



A Transformative Framework to Achieve and Sustain Employment Equity

Report of the **Employment**
equity
Act Review Task Force

Chair, Professor Adelle Blackett, FRSC, Ad E

A Transformative Framework to Achieve and Sustain Employment Equity

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PDF

Cat. No.: Em8-81/1-2023E-PDF

ISSN: 978-0-660-69154-1

Révision de la loi sur
l'équité
en matière d'emploi



Employment
equity
Act Review

The Honourable Seamus O'Regan Jr.
Minister of Labour
Employment and Social Development Canada
Gatineau QC
K1A 0J2

18 April 2023

Dear Minister O'Regan:

Pursuant to my appointment as Chair of the *Employment Equity Act* Review Task Force to advise the Minister of Labour on how to modernize and strengthen the federal employment equity framework, I am honoured to submit to you the following Report.

Respectfully,

Professor Adelle Blackett, FRSC, Ad E
Chair, Employment Equity Act Review Task Force

cc. Deputy Minister of Labour, Sandra Hassan

Table of contents

INTRODUCTION	1
The task force’s mandate	1
The importance of this moment	2
What employment equity symbolizes	4
Why is employment equity proactive?	5
Employment Equity is meant to be transformative	6
Equity means substantive equality	10
Toward a transformative framework	11
Common ground: The commitment to employment equity	14
What has happened along the way?	15
A transformative framework: the three pillars of employment equity	20
Supportive and sustainable approaches to achieving employment equity	22
Our process	23
It takes all of us	28
CHAPTER 1: EQUITABLE INCLUSION IN THE CHANGING WORLD OF WORK: TOWARD SUPPORTIVE & SUSTAINABLE COVERAGE	32
Introduction: Supportive, sustainable coverage	32
Why the focus on employment still matters	32
The workplaces covered by the Employment Equity Act framework	34
Employment equity across Canada	39
The Canadian population and labour market availability	40
Achieving employment equity?	42
Are we truly measuring the changing workforce?	45
Understanding discouraged workers, overqualification and labour market availability	48
CHAPTER 2: DATA JUSTICE	55
The human rights purpose of employment equity data collection	55
A steering committee for the data we need	56
Disaggregation and intersectionality	59
Building a mutually supportive relationship between privacy protections and employment equity	63
Data justice in employment equity implementation and barrier removal	67
Data justice for meaningful consultations	84
Data justice for accountability: Regulatory oversight and public transparency	84

CHAPTER 3: RETHINKING EQUITY GROUPS UNDER THE <i>EMPLOYMENT EQUITY ACT</i> FRAMEWORK	92
Introduction	92
What’s in a name? Terminology matters	93
History matters	94
First Nations, Métis and Inuit: Redefining relationships in the wake of truth and reconciliation	95
Disabled workers and accessibility in the wake of the <i>International Convention on the Rights of Persons with Disabilities</i>	118
A long way to go: Persisting challenges for women workers	128
Black workers in the wake of the International Decade for People of African Descent	137
Emerging from the PURGE – Full inclusion of 2SLGBTQI+ workers	146
Racialized workers beyond “visible minorities”: Disaggregation and group cohesion	159
Inclusion in the <i>Employment Equity Act</i> framework, broadly understood	166
CHAPTER 4: STRENGTHENING IMPLEMENTATION: THE BARRIER REMOVAL PILLAR	189
Understanding proactive approaches: Beyond individual reasonable accommodation	189
Introduction	189
Representation and barriers	190
Beyond individual reasonable accommodation	196
Equity, barrier removal and non-disclosure agreements	230
Barriers that intersect with the workplace	234
Barriers in select federally regulated employers	241
CHAPTER 5: REACTIVATING THE MEANINGFUL CONSULTATIONS PILLAR	270
Introduction – Making consultations meaningful	270
Consultation under the current <i>Employment Equity Act</i> framework	276
Voice models	282
Enhancing employee voice in a modernized <i>Employment Equity Act</i> framework	286
Workplace training: Building communities of learning	292
Incentivizing training through Workplace Opportunities: Removing Barriers to Equity (WORBE)	296
CHAPTER 6: FUNDAMENTALLY RETHINKING THE REGULATORY OVERSIGHT PILLAR	302
Introduction: Regulatory oversight needs fundamental repair	302
Where we are:	303
The one-stop shop: Fundamentally rethinking oversight	314
Institutional architecture	320

Special programs: A role for the Employment Equity Commissioner	328
Harmonizing equity frameworks	330
Oversight through employment equity leadership at the top	347
CHAPTER 7: TECHNICAL REGULATORY IMPLICATIONS OF EMPLOYMENT EQUITY COVERAGE	353
Introduction: Why comprehensive coverage matters	353
Harmonizing LEEP	357
Federally regulated employers' operations abroad	361
Reviving the Federal Contractors Program	362
Supporting equity groups as employers in government procurements and preserving policy space in trade agreements	371
Time to include Parliamentary employees	375
Successorship	376
Other proposals	377
CONCLUSION AND RECOMMENDATIONS	380
It takes all of us	380
Comprehensive list of report recommendations	382
APPENDIX A: TERMS OF REFERENCE - EMPLOYMENT EQUITY ACT REVIEW TASK FORCE	400
APPENDIX B: TASK FORCE MEMBERS	407
APPENDIX C: LIST OF THE EMPLOYMENT EQUITY ACT REVIEW SECRETARIAT STAFF	412
APPENDIX D: INDEX OF ENGAGEMENT SESSION AND MEETING ATTENDEES	413
APPENDIX E: LIST OF ENHANCED ENGAGEMENTS	432
APPENDIX F: INDEX OF WRITTEN SUBMISSIONS	434
APPENDIX G: ENGAGEMENT SESSION ATTENDEES – INDIVIDUAL MEETINGS WITH TASK FORCE CHAIR & VICE CHAIR OR TASK FORCE CHAIR ALONE	438
APPENDIX H: EXPERT CONSULTANCIES COMMISSIONED BY EMPLOYMENT EQUITY ACT REVIEW TASK FORCE	440
APPENDIX I: ILO CONVENTIONS RATIFIED BY AND IN FORCE IN CANADA	441
APPENDIX J: LIST OF OTHER INTERNATIONAL HUMAN RIGHTS TREATIES TO WHICH CANADA IS A PARTY	443

Table of contents

APPENDIX K: COMPARATIVE LAW TABLE OF EMPLOYMENT EQUITY LEGISLATION	444
APPENDIX L: THE 10 HIGHEST-PAYING AND LOWEST-PAYING JOBS IN CANADA	451
APPENDIX M: OCCUPATIONS UNDER THE NATIONAL OCCUPATIONAL CODES THAT EMPLOY 90% OR MORE MEN OR WOMEN	459
APPENDIX N: FEBRUARY 2022 CONSULTATION PAPER: ACHIEVING EQUALITY AT WORK	464

Introduction

Universal and lasting peace can be established only if it is based upon social justice...

Constitution of the International Labour Organization, 1919

[A]ll human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity...

Declaration of Philadelphia, Annex to the Constitution of the International Labour Organization, drafted in Montreal, 1944

We are tied together in the single garment of destiny, caught in an inescapable network of mutuality. And whatever affects one directly affects all indirectly. For some strange reason I can never be what I ought to be until you are what you ought to be.

Rev. Dr. Martin Luther King Jr., 1968

With knowledge comes understanding, with understanding comes wisdom and with wisdom comes justice. And to have justice we must never forget how the world looks to those who are vulnerable. I will never forget the people who taught me to see the world through their eyes.

The Hon. Rosalie Silberman Abella, 2009

The task force's mandate

There is an opportunity to make the *Employment Equity Act* transformative ... as it helps Canada as a whole see itself.

Canadian Race Relations Foundation, Presentation to the EEART, 3 June 2022

Employment equity is a proactive approach to achieving and sustaining substantive equality in the workplace. It takes all of us.

It has been almost decades since the sole commissioner of the Royal Commission on Equality in Employment, then judge, now former Supreme Court of Canada Justice, the Hon. Rosalie Silberman Abella, explained the urgency of her proactive, distinctively Canadian approach.

The *Employment Equity Act* came into force in 1986. It was significantly revised in 1995. The federal *Employment Equity Act* framework is a combination of the *Employment Equity Act* and covered programs:

Introduction

- the Legislated Employment Equity Program
- the Federal Contractors Program, and
- the Workplace Opportunities: Removing Barriers to Equity (WORBE) program

Amendments introducing pay transparency reporting came into force on 1 January 2021.

The federal *Employment Equity Act* framework covers four “designated” groups, referred to in this report as “employment equity” groups:

- women
- Aboriginal peoples
- persons with disabilities, and
- members of visible minorities

In July 2021, the *Employment Equity Act* Review Task Force (EEART) was asked to advise the Minister of Labour on how to modernize and strengthen the federal *Employment Equity Act* framework. The review covers the *Employment Equity Act* and its supporting programs, with a focus on four areas that structure this report:

- Area 1: Equity groups
- Area 2: Supporting equity groups
- Area 3: Improving accountability, compliance and enforcement, and
- Area 4: Improving public reporting

The task force was subject to a stop work order from 16 August 2021 - 14 January 2022.

The *Employment Equity Act* framework has not been reviewed at the regular 5-year intervals foreseen in the *Employment Equity Act*. Aspects have been reviewed and revised on a few occasions over the past 37 years through parliamentary or senate reviews, an internal joint management-board review in the public service, and on visible minorities.

This is the first time since the legislation was adopted that an independent, arms-length task force has been established to offer a comprehensive review of the entire employment equity framework.

The importance of this moment

This statement will surprise no one: we have not yet achieved employment equity.

The statement should concern everyone. It has almost become a given, however, that despite the stated purpose in the *Employment Equity Act* that equality in employment is to be achieved, it remains thought of as merely a lofty ideal.

Our task force heard one message loud and clear: Employment equity is not optional for Canada. For a society that is as deeply diverse as ours to flourish, we must prioritize achieving and sustaining employment equity in the workplace.

A Transformative Framework to Achieve and Sustain Employment Equity

More recent federal equity legislation – the *Accessible Canada Act* and the *Pay Equity Act* – breaks through the inertia with firm commitments and timelines to achieve a barrier-free Canada and achieve and maintain pay equity. This report seeks to do the same, that is, to refocus our attention on what is needed to make achieving and sustaining employment equity a reality.

The moment is particularly significant. As this report was being submitted, unemployment was at record low levels - 5% in January 2023. We cannot afford to leave anyone who wants to work behind: we literally need everyone.

Our task force was established as Canada reckoned with the discovery of thousands of unmarked graves of Indigenous children abused as part of the legacy of colonialism in residential schools. The commitment to truth and reconciliation, and the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, set Canada steadfastly on a necessary path of Indigenous self-determination.

Our task force was formed during the COVID-19 pandemic, as part of a call to think carefully about how we build back. The pandemic forced a profound recognition of human vulnerability and racial disparities in those who predominate in risky, often low waged, yet essential work. Repeatedly, we heard from groups that the pandemic affected the Canadian population unequally, and employment equity groups were particularly hard hit. For example, the Native Women’s Association of Canada’s surveys show that COVID-19 had a “significant impact” on the working lives of Indigenous women, Two Spirit, transgender and gender-diverse people, through job loss, cut hours, and child care responsibilities.¹ Others agreed:

Those hit hardest by the COVID-19 pandemic have been those who were already struggling the most before its arrival. ... In the case of a global pandemic such as COVID-19, this disadvantage has only deepened and has had a disproportionate effect on Indigenous, Black and racialized people, as well as racialized immigrants, newcomers, migrants and people with precarious immigration status – particularly for many women from these groups.

Canadian Labour Congress, Submission to the EEART, 28 April 2022

Our task force was convened as the world emerged from the shadow of the year of racial reckoning with the depth of anti-Black racism in our societies. The #MeToo movement captured a refusal to treat sexual violence – including workplace sexual harassment – as a hidden norm. The Secretary General of the United Nations, acknowledging a pandemic of inequality in the world, has called for a new global social contract as the only way to “build back a more equal and sustainable world.”²

But there has instead been backlash. The depth of the discouragement we heard was cause for real concern.

In this crucial societal moment, this report chooses to focus on a vision that Canada accepted when it signed on to the Constitution of the International Labour Organization in 1919 following the devastating 1914-1918 war, and renewed near the end of another great war, in 1944 through the ILO’s constitutional annex, the Declaration of Philadelphia: that lasting peace can only be achieved through social justice.

Introduction

At a time when it is all too easy to cultivate hate, that message can hardly be more meaningful and urgent.

In Canada, we have an opportunity, indeed a responsibility, to lead by cultivating social justice through equitable inclusion.

We need to move past an exclusionary vision of employment equity. This needs to be heard loud and clear. The vision is one of equitable inclusion. We must stop thinking in terms of “us” and “them” and assuming that some people do not or cannot belong on the basis of one of the protected grounds of discrimination under human rights laws,³ or that our society can simply go on marginalizing people, stereotyping them into certain jobs or out of the labour market altogether.

Equitable inclusion means all of us have a place in Canadian workplaces. Equitable inclusion is about capturing a vision of our country that is greater than any one of us but very much about all of us. Employment equity is about making workplaces better and more inclusive for all.

The task force came away convinced of the importance of this work for our country as a whole - our open economy and our democratic, inclusive society. This report proposes a transformative framework to achieve and sustain employment equity in Canada.

What employment equity symbolizes

In Canada, the *Employment Equity Act* framework has been a symbolic cornerstone of how we have addressed equity in our societies and very specifically in the world of work. It is at some level symbolic because it covers only slightly less than 8% (7.6% in 2020) of the entire Canadian labour force.

Table I.1: Total coverage of the employment equity framework, 2020⁴

Year	Total employment equity framework	Total federal public service	Core public administration	Separate federal agencies	Federally regulated private sector with 100+ employees	Federal Contractors Program (FCP)	Total Canadian labour force as of October 2020 (15 yrs old +)
2020	1,538,406 About 7.6% of the total workforce	300,450* Just under 1.5% of the total workforce	231,176	69,274	735,790 ** 3.6% of total workforce	502,166*** Just under 2.5% of the total workforce	20,327,900****

Our task force was repeatedly told; however, that labour and human rights initiatives in federal law and policy can have an outsized influence, well beyond the actual coverage of the federal *Employment Equity Act* framework, and across Canada.

Employment equity is especially symbolic because it reaches across the workforce that is meant to represent Canadians – its federal public service and many of the core sectors that unite us.

The joint union/ management vision for Canada's public service:

A world-class public service representative of Canada's population, defined by its diverse workforce and welcoming, inclusive and supportive workplace, that aligns with Canada's evolving human rights context and that is committed to innovation and achieving results.

Building a Diverse and Inclusive Public Service: Final Report of the Joint Union/Management Task Force on Equity and Inclusion, 2017

Employment equity at its best is equitable inclusion: the belonging that comes with seeing ourselves – all of us - meaningfully represented in the federal public service, and across federal jurisdiction. It is entering a bank, or a passport office or boarding a flight, or turning on the news and sensing that everyone is welcome, that stereotypes are challenged, that everyone in that workplace has an equal opportunity to thrive.

Why is employment equity proactive?

In one of the consultations held for this report, the chair of the Federal Public Sector Labour Relations and Employment Board and former Canadian Human Rights Commissioner, Edith Bramwell, recalled that the complaints-based process for employment equity related matters in labour and human rights law is the hospital after the crash.

We could not agree more. ***Employment equity was not designed to be the hospital after the crash.*** For the Inuit worker in a remote Northern community, for the racialized disabled worker in a major metropolitan area, for the Filipina trans worker who arrived in Canada two years ago, discrimination may come at them from multiple directions.⁵ They want to enter the labour market and contribute meaningfully. We should all want to do more than just try to help them to survive predictable crashes.

A proactive approach to equality law structures the intersections, ensuring that the rules that apply to all are enforced to prevent crashes and allow all workers in Canada to trust that they can gain equitable inclusion.

We know what we need to redesign to reduce risk; we know that some rules are necessary and must be applied and enforced to prevent harm – with roundabouts, with protected bicycle paths, with wide, accessible sidewalks, with enforced speed limits, and with traffic lights that also speak - to make a range of ways of circulating safe for all of us. Many of these redesigns were made possible because those most concerned were meaningfully consulted on what they needed to make access safe.

So, this report focuses in large measure on removing barriers to access. Barrier removal – like the widened sidewalk that is great for wheelchair users, and those using a guide cane, and those pushing an infant's stroller, and those taking a leisurely lunchtime stroll with co-workers – works to make room for all of us. Employment equity, at its best, brings people into the labour market, at all levels, not just in jobs that they are stereotyped as suited to assume. It makes us stronger.

Introduction

Employment equity law is meant to work like this – it is a proactive approach in that it focuses on removing those barriers to substantive equality that can be reasonably foreseen or have been identified, to make equitable workforce participation a reality for us all.

Finally, employment equity is a meaningfully symbolic reflection of Canada in the world. Canada is one of the world's most racially and ethnically diverse populations. Canada has championed feminist international policies and shown leadership on accessibility. The *Employment Equity Act* framework and the notion of substantive equality that emanates from it, have had an outsized influence on laws and policies around the world. Employment equity aspires no less than to fostering peace through the steadfast cultivation of social justice. This vision should be transformative.

Employment Equity is meant to be transformative

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect.

Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, 1987 SCC 88, at Para. 91 (Chief Justice Brian Dickson's dissenting opinion, subsequently affirmed by the Supreme Court of Canada)

The right to work in dignity is fundamental. Most people spend most of their waking hours at work. Workplace bonds have the potential to strengthen a diverse democracy.

By adopting legislation on employment equity federally, Canada set out to transform our workplaces.

As a country we may have forgotten our history of legal or *de facto* discrimination and segregation in our society that for some employment equity groups extended well into the 1960s.

Yet Canada has long understood historical exclusion and the need for workplace transformation. Consider that the first employment equity program in Canada emerged from recommendations of the Royal Commission on Bilingualism and Biculturalism established by the federal government in 1963.⁶ Its purpose was to remedy exclusion and transform the federal public service: to ensure that francophones would have equitable access to all positions in the federal public service.⁷ Celebrating group-based identities and making sure they are equitably represented is a source of strength, and a solid basis on which to build social justice in the workplace, alongside cohesive, open, democratic societies.

Well before the work of the 1963 Royal Commission and into the 1970 and 1980s, equity seeking and equity deserving⁸ groups realized that anti-discrimination laws were an insufficient response to deep patterns of workplace inequality and exclusion emerging notably from the colonialism faced by Indigenous nations on their own lands, the enslavement and segregation faced by Black people, and histories of exclusion, discrimination, and under-representation experienced notably by women, persons with disabilities, 2SLGBTQI+ communities and racialized people in Canada.⁹ Policies and laws on employment came from listening to their voices.

A Transformative Framework to Achieve and Sustain Employment Equity

The 1984 Royal Commission on Equality in Employment was instructed “to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis.”¹⁰ Commissioner Abella consulted widely, and reported that many people from groups that have faced historical forms of marginalization were being left out, despite their abilities and vast potential contributions. Meaningful workplace inclusion for all was too important to be left to ineffectual, voluntary initiatives. Human rights legislation focused on anti-discrimination and had reactive, complaints-based approaches. But anti-discrimination approaches – the hospitals after the crash - were insufficient to address the complex character of systemic discrimination.

Although there was key U.S. precedent for proactively addressing systemic discrimination, there were also powerful reasons to take distance from the U.S. concept of “affirmative action” that had become tied up in a polemic both around the notion of “reverse discrimination” and a rigid approach to quotas. Let us be clear: the *Employment Equity Act* framework does not impose quotas, and the notion of “reverse discrimination” is not part of Canadian equality law and is likewise not part of the Canadian *Employment Equity Act* framework.

Challenging affirmative action myths: Influential ideas that are not our own

The influence of U.S. ideas about affirmative action on Canadian public understandings of employment equity warrants some attention. We repeat: United States law is not Canadian law. The Supreme Court of Canada has been extremely clear since the *Canadian Charter of Rights and Freedoms* came into being. Canadian equality law generally, and employment equity measures specifically, have developed quite differently from the U.S. and deliberately so. While considerable media attention is often turned to developments in the U.S., and while this report discusses the most relevant developments, it is crucial not to take U.S. law or Court developments as our own. We have worked hard to build a vision of substantive equality through the Canadian Constitution that allows us to reckon with our own history and to build inclusive spaces.

The U.S. idea of “reverse discrimination” has in particular gained a lot of attention. It is used so often in common parlance that many people do not recognize that it is not a part of Canadian substantive equality law. For that matter, it is not part of international human rights law. Even some U.S. academics have shown that the belief that reverse discrimination is a pressing problem does not hold up in practice in the U.S.: as women and racial minorities are included in the workplace in the U.S., “white men’s access to the best jobs increases.”¹¹

Employment equity: A distinctly Canadian contribution

Instead, the Hon. Rosalie Silberman Abella developed the concept of “employment equity” to redress the discriminatory barriers that prevent members of “designated” groups - identified as Aboriginal peoples, women, visible minorities and persons with disabilities - from having the opportunity to put their full potential to work. An approach was needed that could yield proactive, substantive change. She recognized that “laws reflect commitment”:

[Employment equity] is a concept that seeks to identify and remove, barrier by barrier, discriminatory disadvantages. Equality in employment is access to the fullest opportunity to exercise individual potential.

Judge Rosalie Silberman Abella, Commissioner, Equality in Employment: A Royal Commission Report, October 1984 at 3

The Abella Report was trailblazing; the pivotal work framed legislation on employment equity as a distinctly Canadian contribution to understanding systemic discrimination and requiring proactive mechanisms to remove barriers to achieving equality in employment.

The *Employment Equity Act* framework is meant to support employers to attain equitable representation of employees in equity groups, and to sustain employment equity.

In 1981, an organization representing women workers, Action Travail des Femmes, brought a human rights case against one federal employer, Canadian National (CN) Railway, under the *Canadian Human Rights Act*. Six years later, a landmark Supreme Court of Canada decision found that there had been systemic discrimination and established an employment equity plan to remedy it and to transform the workplace; it applied the understanding of substantive equality that emerges from the report of the 1984 Royal Commission on Equality in Employment.¹²

The case established that there was deep-rooted discrimination against women at CN. But employment equity, consistent with the focus on systemic discrimination and achieving substantive equality, moves us past a focus on intent, and past a presumption that everyone has the same employment opportunities. Employment equity seeks to achieve and sustain fair, equitable workplace inclusion.

Chief Justice Dickson for the unanimous Supreme Court of Canada therefore focused on changing the workplace context for the future:

[I]t is essential to look to the past patterns of discrimination and to destroy those patterns in order to prevent the same type of discrimination in the future.

Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) [1987] 1 SCR 1114 at 1145

The Supreme Court of Canada put in place an employment equity plan to get the proportion of women in blue collar jobs to mirror the proportion of women in similar jobs across the country “as soon as possible”.¹³

The **implementation** plan upheld by the Court had two key components:

- the first was to **discontinue certain kinds of practices** that created barriers – including the use of mechanical aptitude tests that the tribunal found had a negative impact on women and were not warranted for the job requirements.

- the second was the **numerical goal** of 13% based on the national average of women in non-traditional occupations across Canada: their approach built in flexibility for employers, but CN was required to hire at least one woman for every four non-traditional positions filled in the future, with due regard to seniority rights.

Crucially, the Supreme Court of Canada also stressed that there was nothing arbitrary about setting the goals and timetables as the Human Rights Tribunal had done, because they corresponded to the national average of women involved in non-traditional occupations.

The plan also included **regulatory oversight**: the Court upheld a quarterly reporting requirement to the Canadian Human Rights Commission.

The Supreme Court of Canada spelled out the foundation for the substantive equality-based approach: employment equity would help to challenge stereotyping, by the very fact of having people thought not able to do the work occupying the jobs.

For the stereotypical attitudes to change, it would not be enough to just have the occasional one or two women hired into the jobs. Too often, the lonely one or two get treated as exceptions or stereotyped themselves as tokens. Either way, could there be a better way to say that a group does not belong in that workplace?

Instead, it was necessary to create a ‘critical mass’ of equity group participation in the under-representative workplace. This required action, both to discontinue the practices that create barriers *and* to introduce numerical goals.

Over the decades, we have largely forgotten how important barrier removal is to employment equity’s successful implementation. That is a pity, because barrier removal is that enlarged sidewalk – it makes space for employment equity groups, and for all of us. This report seeks to reclaim barrier removal’s centrality to the implementation of employment equity.

To create critical mass and challenge stereotypes, it is necessary for employment equity programs to look well beyond hiring to the conditions of employment over the entire workplace lifecycle. The Supreme Court of Canada was very practical about what employment equity should look like. Chief Justice Dickson asked who would evaluate the equity groups coming in with low levels of seniority, who would be more likely to get laid off, who might be scapegoated as if they were stealing other peoples’ jobs?

We think these questions are fundamental. The ‘who’ has in many cases gotten lost. Yet we have known all along: employment equity simply will not happen without meaningful consultations of those most concerned.

And in this day and age, equity groups are pretty clear about that: nothing about us without us. So many people came before our task force and said, we want to be able to bring our authentic selves to our workplaces. How can the *Employment Equity Act* framework get workplace actors talking to each other, in a meaningful, supporting manner, about how best to make space for us all to be our best selves at work and across our work lifecycles?

Equity means substantive equality

Substantive equality offers a remedy for exclusion and a recipe for inclusion.

Justice Rosalie Abella, Fraser v. Canada (Attorney General) 2020 SCC 28 at para. 41

Equity in the context of the Employment Equity Act framework means achieving and sustaining substantive equality. This requires transformation.

Substantive equality is a constitutional principle in Canada, found in Section 15 of the *Canadian Charter of Rights and Freedoms*. Section 15(1) and (2) are to be read as a comprehensive whole:

- 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

The Supreme Court of Canada recognized in its early key decision, *Andrews v. Law Society of British Columbia*¹⁴ that to promote equality, Section 15 like the rest of the Charter is not intended to eliminate all distinctions; otherwise, there would be no place in the Charter for protections of multicultural heritage, the freedom of conscience and religion and Aboriginal rights among others. It also recognizes that to treat everyone the same may “frequently produce serious inequality”, as recognized in Section 15(2). It quoted this passage of the *Action Travail des Femmes* case, which quoted the Abella Report:

Discrimination... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics....

It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

McIntyre J., Andrews v. Law Society of British Columbia, [1989] 1 SCR 143, quoting Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) [1987] 1 SCR 1114 at 1138-1139, quoting Judge Rosalie Silberman Abella, Commissioner, Equality in Employment: A Royal Commission Report, October 1984 at 2

Substantive equality continues to anchor the *Employment Equity Act* framework. The Canadian framework has also been influential in the development of law on proactive measures to remedy inequality internationally.

Employment equity was a significant advance when it was first proposed, even before Section 15 of the *Charter* had entered into force. But we need to stop exceptionalizing employment equity. **Employment equity is substantive equality in action in the workplace. It implements Canada’s international commitments to effectively advance equality¹⁵ and reflects Canadian constitutional and human rights case law.¹⁶**

In 2008, the Supreme Court of Canada took the opportunity to interpret Section 15 of the *Charter* and to address what it really means for “any law, program or activity” to constitute an “amelioration” in Section 15(2).

In *R. v. Kapp*, non-Indigenous fishers argued that they were discriminated against when the federal government created the Aboriginal Fisheries Strategy to enhance Indigenous involvement in commercial fishing. For the Supreme Court of Canada, it is important to make sure that the law, program or activity *actually* includes plausible and predictable ameliorations. Then when a program does make a distinction based on a protected ground and has as its purpose the amelioration of the conditions of a disadvantaged group, it is considered to advance Section 15’s substantive equality guarantee. Under those circumstances, a “claim of discrimination must fail.”¹⁷ In this sense, not all distinctions created by law are discriminatory. It is not enough to show that the law treats someone differently; it is necessary to show that the impact of the law is discriminatory.¹⁸

Similarly, pay equity laws are put in place to redress systemic discrimination; they are the kind of ameliorative programs set out under Section 15(2) of the *Charter*. But in 2018, the majority of the Supreme Court of Canada found that one contained systemic discrimination. It made that determination by assessing whether it met the test for systemic discrimination under Section 15(1). And it found that the challenged provisions were in fact discriminatory.¹⁹ It was necessary to improve the proactive law to respect substantive equality principles.

Toward a transformative framework

Beyond individual accommodation

Employers “must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible.”

McLachlin J. as she then was, in British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3 at para. 68 (Meiorin)

Substantive equality in the context of employment equity is an invitation to rethink the place of individual accommodations in the context of proactive legislation designed for equitable inclusion. The Supreme Court of Canada has also explained the importance of moving beyond individual accommodations in general human rights law, in the *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*²⁰ case, widely referred to as *Meiorin*. The case involved an experienced firefighter who had been successful in her job until a new aerobic test was introduced. The standard in the test was developed based on men’s results. Ms. Meiorin did not pass one aspect of the test and

Introduction

lost her job. The Supreme Court unanimously found that she had faced discrimination, but the key for our purposes in this report is how the Court approached the notion of reasonable accommodations.

Rather than look to see whether Ms. Meiorin could have been individually accommodated, while leaving the new employment standard in place, the Supreme Court of Canada required the employer to scrutinize its standard before applying it. In other words, the Court refused simply to treat the standard as “neutral” and ask the worker to change. The Court asked whether that standard was reasonably necessary in the first place. It stated that employers “must build conceptions of equality into workplace standards.”

The approach in *Meiorin* is transformative.²¹ *Meiorin* is also a jurisprudential high-water mark for understanding the duty to accommodate and its corresponding limit of undue hardship in the workplace context – this is difficult terrain.²² In the context of proactive legislation that centres the removal of barriers, *Meiorin* offers the conceptual clarity needed to guide how we understand the duty to accommodate, barrier removal, and undue hardship for the purposes of achieving and sustaining employment equity. Its consistency with employment equity – and with the importance of taking positive measures to remedy inequality - has long been recognized.²³

Adverse impact discrimination

At the heart of substantive equality is the recognition that identical or facially neutral treatment may frequently produce serious inequality.

Justice Abella for the majority in Fraser v. Canada (Attorney-General), 2020 SCC 28 at para. 47, citing Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at 164

One of the Supreme Court of Canada’s most recent decisions on adverse impact discrimination, *Fraser v. Canada (Attorney-General)*,²⁴ is the pinnacle of a long trajectory of infusing labour law with substantive equality. It is a case of adverse impact discrimination faced by full-time RCMP members who had to sacrifice pension benefits because they job-shared temporarily. Most people enrolled in job sharing were women, and almost all cited childcare responsibilities as the reason why they joined the program. They sought to buy-back their pension credits and were denied even though it was legally possible and even though full-time workers who took unpaid leave were able to buy back pensions. The Supreme Court of Canada majority decided that the disproportionate impact on women perpetuated women’s historical disadvantage. This violated their right to substantive equality under Section 15(1) of the *Charter*.

The approach to adverse impact discrimination is not fault-based; rather it is an effects-based model focused on “critically examin[ing] systems, structures, and their impact on disadvantaged groups.” The fact that something has always been done in a certain way is not a good enough reason to keep doing it that way. The goal of substantive equality is transformation.

Some of the oldest human rights cases affirm the importance of recognizing law’s adverse effects, including in the workplace.²⁵ The Supreme Court of Canada, including in *Fraser*, has repeatedly referred to lessons from *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971):

Griggs v. Duke Power Co., 401 U.S. 424 (1971) was foundational to the 1984 Report of the Royal Commission on Equality in Employment. In that case, the employer required employees to have a high school diploma and pass standardized tests to take on particular forms of work in four of the five departments of the plant. The case does not deny the history of segregation in the company: African Americans worked only in the fifth department, the Labour Department, where the highest paying job paid less than the lowest paying job in the other four departments. Promotions within departments happened by seniority. The Supreme Court of the United States even recognized that the high school requirement and the standardized “aptitude” testing were introduced in 1965, once the explicitly segregationist policy of restricting African Americans from the Labour Department ended. White employees hired prior to the policy change and without high school diplomas continued in their jobs. However, rather than requiring proof of intent to discriminate, the Supreme Court of the United States found that Title VII of the US *Civil Rights Act* of 1964 had as its object to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.

In coming to this point, the Supreme Court of the United States acknowledged the history of inferior education in segregated schools, and its impact on results under the testing requirements. It was necessary to proscribe not only overt discrimination, but also “practices that are fair in form, but discriminatory in operation.” The key was “business necessity”: in other words, “if an employment practice that operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited.” Not only were the high school diploma and the standardized tests not necessary; it was also established that those without a high school diploma who had not taken the tests continued to perform satisfactorily in their jobs. The U.S. Supreme Court considered that whether there was discriminatory intent was not the point; rather the government through enacting Title VII “had placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.” The key was to “measure the person for the job, and not the person in the abstract.”

Fraser is a landmark decision, calling for systems and structures to be examined critically for their impact on disadvantaged groups. The Supreme Court of Canada’s jurisprudence on substantive equality contains much nuance, indeterminacy and at times significant flux.²⁶ For this report, we recognize the solidity of the foundation that substantive equality provides for a transformative approach to employment equity.²⁷

The development of a thick understanding of substantive equality benefits us all. But as discussed below, employment equity into this changing world of work must encompass more if we are to achieve its transformative aims.

Before addressing the need for transformation, our task force wishes to underscore that we are building on considerable common ground in the Canadian commitment to employment equity.

Common ground: The commitment to employment equity

A lot of critique follows in this report.

But no one should lose sight of the core message: there is a widespread commitment to employment equity in Canada, and to making it work.

Throughout the consultations, with employers, with workers, with concerned communities and with consulted governmental representatives, we heard many different views but all of them included a commitment to employment equity.

Stakeholders who came before us were not just framing employment equity as a constraint on business but rather as a competitive advantage, for individual employers, for economic growth, and for Canadian society as a whole.

The comments from the main employers' organization – Federally Regulated Employers – Transportation and Communication Organization (FETCO) – summed it up well. We heard that FETCO members believe in employment equity and that our companies should reflect our country. Again, this does not mean it is all smooth sailing. But FETCO added that employment equity started an important, if at times challenging, conversation in Canada on equity. It has raised awareness.²⁸

This should not be surprising. We are seeing broad acceptance of the value of fostering representation, in terms of political representation, and on corporate boards. Bill C-25 for example provides for corporate diversity disclosure on boards and senior management for the same groups as the *Employment Equity Act*. It requires reporting on any other groups the corporations believe contribute to diverse representation on their boards and senior management teams.²⁹

Indeed, the business case for equitable inclusion in the workplace has been made so frequently, and was so widely acknowledged by those who came before our task force, that this report acknowledges it, but does not dwell on it.

Academics, governmental policy makers, unions and employers, along with civil society generally, have offered thoughtful recommendations over time, focusing on what works and what has not worked under the Canadian framework. While there are increasing calls to modernize our law, we should not lose sight of this important constant: employment equity reflects deeply held Canadian values and our commitment to substantive equality where most people spend much of their lives, at work.

So, there has been movement, and it extends beyond the workplace to the way that Canada sees itself. Moreover, knowing from Census 2021 statistics that 24.3% of all legislators in Canada are First Nations, Métis or Inuit, although separate from the workings of the *Employment Equity Act* framework, sends a hopeful sign about the related emergence of Indigenous self-determination and self-governance.

Does that mean we are fully representative of Canada? Definitely not. And we heard a lot of frustration and understandable impatience.

Thirty-seven years since the *Employment Equity Act* was passed, it is hard to consider that a framework has remained truly proactive if its objectives have not yet been substantially achieved in the workplaces it covers. It was startling to see how unrepresentative some employment remains across Canada.

- Again, from the 2021 census and the national occupation code, we learn that senior managers are 70% men+ while human resources managers are 68.1% women+.³⁰
- We might not need the 2021 census to tell us that 68.3% of taxi drivers are racialized, and that 93.1% are men.

While these occupations essentially fall outside of the jurisdiction of the *Employment Equity Act* framework, these forms of persisting occupational segregation tell us something about where equity groups are finding employment, and by extension, where they are not finding it.

- Why for example, despite coverage under the *Employment Equity Act* since 1986 are airline pilots still 92.5% male+, only 10.5% racialized, with barely 3% First Nations, Métis and Inuit?

Labour market availability is an intricate topic that will be explored in Chapters 1 and 2 of this report. But the bottom-line is clear: at this stage in Canada's trajectory, we should really be sustaining employment equity, not struggling to achieve it. So, what has happened along the way, and what do we need to do to harness employment equity's transformative potential?

What has happened along the way?

Why aren't we implementing? Why are we not thinking about accessibility from the start?

It is important to stop treating people as "special" and focus on barrier elimination.

Federal Public Service Employee, Presentation to the EEART, 14 June 2022

Along the way, something happened. For some, employment equity just got outdated. The terminology did not keep up with the times and was not inclusive enough. The data collection challenges began to weigh down the process with outdated, less than reliable information. Processes became bureaucratized. Boxes got checked, but were things really getting better?

Time and time again we were reminded: the failure to achieve employment equity in Canadian workplaces is a lost opportunity for Canada. We also heard the more positive side: in Canada of 2023, if we are intentional about employment equity, it can be achieved, and it will enrich our workplaces, our society, and our world.

Losing track of individual workers: Beyond a number-crunching exercise

This legislation will only have the capacity to change the culture of workplaces if it is rooted in community-building processes and restorative accountability structures that promote lifelong learning, cultural humility, and transparency.

DisAbled Women's Network, Submission to the EEART, 10 June 2022

Introduction

The *Employment Equity Act* sets out employer obligations in a detailed list. We listened when employers explained how they understood their obligations to us in some of the official presentations: they were often summed up as maintaining records and submitting reports within a prescribed deadline. It is clear that these obligations were experienced in that way by too many workers as well. After decades of implementation of employment equity, it has become bureaucratized. Increasingly it has been reduced to the numbers rather than removing the barriers to substantive equality. Employment equity, in other words, has been reduced to getting to the attainment rate:

Calculating the Employment Equity Attainment Rate. A key employment equity performance measurement is the attainment rate, where the representation of designated groups is compared to their respective labour market availability (LMA). The attainment rate is used to identify gaps between the representation and LMA of a designated group. Where a designated group's representation is below LMA, the attainment rate is less than 100%. Progress is considered to have been made when the gap between a designated group's representation and LMA narrows (that is, the attainment rate approaches 100%) or when a group's representation equals or exceeds LMA (that is, the attainment rate equals or surpasses 100%). A segment of the workforce is considered representative when the representation of a designated group is equal to its LMA.

Labour Program, Employment Equity Act: Annual Report 2021, at page 6

Getting to the employment equity attainment rate is of course an important part of the process. Although it can seem straightforward, it gets complex quickly. The data requirements can be heavy and fastidious, at least until they are systematized. The Labour Program has tried to streamline them and to make reporting straightforward for employers – but that might inadvertently have contributed to the perception of the narrowness of the number-crunching exercise. And it is clear: the exercise itself can take a lot of resources, so much so that it may seem like the main, if not only, requirement. Broader barrier removal may seem at best like a side requirement.

It is not. Far from it.

Perhaps the most significant consequence is that a remedial approach designed to be proactive and systemic lost sight of the people at the centre of the initiatives: the individual workers themselves. By focusing on the aggregate numbers and allowing employment equity to become bureaucratized, it became easy to forget that real people were behind those numbers.

It is absolutely fundamental to pay attention to the quality of peoples' lives at work.

Institutions could at once commit to increasing representation from employment equity groups while failing to support individual workers from those groups and in some cases even pushing them out. The failure to support might happen unconsciously or out of resistance to having the hard conversations. The impact can be to silence those individual employment equity changemakers on whom equitable inclusion depends.

If we are not paying attention to the workplace climate, we are sacrificing talent for a revolving door numbers game.

The exclusive focus on number-crunching has displaced a focus on making equitable inclusion the norm.

Employment equity has been so much about numbers that the actual experiences of human beings have been lost. What we are trying to achieve is substantive equality. This means a fundamental transformation and is more than counting.

Canadian Civil Liberties Association, Presentation to the EEART, 3 June 2022

The task force listened deeply to the many constituents who appeared before us. We engaged at length with employers and union representatives, networks of employees in employment equity groups and those who claim employment equity group status, business representatives and civil society groups, managers within and beyond the federal public service, Labour Program officials responsible for implementation, and enforcement bodies. We were struck by the strength of the conviction that the *Employment Equity Act* framework should not come to be viewed as a pure number-crunching, revolving door, individual reasonable accommodation exercise. Rather, “[a]chieving a truly inclusive society requires constant vigilance”.³¹

Our task force was amazed by the time that some employers and some governmental employees seemed to spend simply to generate the numbers that would be necessary to assess representation. Yet as we tried to understand why certain choices were made in the first place, and how they actually helped to achieve employment equity, too often we came up with very little. We were consistently met with employers and government officials responsible for regulatory oversight who showed that they cared deeply about what they were doing. But they had been doing the same thing, often with limited – indeed decreasing - resources for a long time. Some told us how happy they were that we were asking fundamental questions. The work of our task force seemed to incentivize actors to take their own cold hard look at whether their practices, and the benchmarks used, were really helping us to achieve and sustain employment equity.

Employment equity data on the representation gaps are not the end; they offer evidence-based beginnings for courageous conversations on how to make workplaces truly inclusive.

Achieving and sustaining employment equity requires us to focus on employment systems, policies, and practices to identify barriers to equitable inclusion. Workplaces require a plan to be developed and implemented to remove barriers and correct underrepresentation. Workplaces must refuse to lose sight of the individuals who are in them. Employment equity requires us to pay close attention in particular to retention, promotion and other practices that foster well-being and progress into higher ranks. Building a barrier-free workplace cannot simply be done for workers; it must be done with them, through meaningful consultations. To be transformative, workplace equity, diversity and inclusion initiatives must be rooted in substantive equality and supported by a commitment to democratic participation at work. This work requires supportive and sustainable regulatory oversight.

First Nations, Métis and Inuit workers alongside workers from a wide range of equity groups added that it is necessary to adopt a trauma-informed approach to employment equity – one that recognizes the specificity of their histories of labour market exclusion, and the impact on achieving employment equity. Employment equity should certainly not be allowed to become a source of further trauma.

Introduction

The challenge is at some levels linked to an unnecessary bifurcation of employment equity from broader human rights obligations. Some stakeholders specifically asked the task force to recommend a new section of the *Employment Equity Act*, clarifying that it too is a quasi-constitutional law, like the *Canadian Human Rights Act*. We grew to understand just how important it is for a broad range of stakeholders to see that human rights protection at work is part of a comprehensive, harmonized whole ensuring that all workers are treated fairly.

Why is qualitative data on the experience of workers from employment equity groups not a key performance indicator under the *Employment Equity Act*? The task force was told that employment systems reviews that include climate surveys to measure trust, wellness and workplace integration for all should be woven into the fabric of employment equity accountability.

These issues are addressed throughout the report.

A word of caution is important here: attention to qualitative data is different from a call for “lived experience” writ large; it is of course crucial to know how people are experiencing the workforce, and in our consultations we listened deeply to the richness of the insights that emerged. But the notion must not be allowed to get instrumentalized; no one should be made to feel, like one senior employee shared with the task force, as though they are only there, despite their credentials and expertise, to provide lived experience. Let lived experience – from those who have historically not found a place in our organizations, and all of our lived experiences – help us to approach achieving and sustaining employment equity, with empathy, an awareness of how much we do not know and need to learn about each other in this country. Employment equity will never be implemented by law alone. **We need all of us to approach these crucial societal issues of equitable inclusion with open-mindedness, with empathy, mutuality and care.**

It's time for transformation. **While quantitative targets rightly apply to employment equity groups for whom there is historical underrepresentation, attention to qualitative data should enable proactive workplace barrier removal that is broadly supportive.**

The relationship between the *Employment Equity Act* framework and equity, diversity and inclusion initiatives: Does EDI work?

When organizations create symbolic structures, and those symbolic structures come to be known as ‘best practices’ they acquire an aura of legitimacy that makes it difficult ... to see when actual practices diverge from the formal policies and procedures.

Lauren Edelman, Working Law, University of Chicago Press, 2016 at 15

Something else has happened. An entire industry has developed around largely voluntary equity, diversity and inclusion (EDI) based initiatives. Some EDI techniques and approaches have focused on training within Canadian workplaces to understand and address unconscious workplace bias. They are often considered to be part of the “toolkit” of employment equity.³² But how much has improved because of these mechanisms?

Much of the EDI literature emerges from the United States. The turn to equity, diversity and inclusion in the United States context has followed a jurisprudential turn away from enabling positive measures

to be used to redress general societal discrimination, and toward supporting “diversity” as a justification for some preferences.³³ It is perceived to have rather subtly but decisively supplanted some of the compliance with civil rights law, weakening law’s potential to achieve equity.³⁴ The shaky state of United States Supreme Court decisions on affirmative action has a further, important impact.

It is often said that diversity is a fact, and inclusion is a choice. But in Canada there is more, and it is crucial: equity is the law.

The Canadian legal landscape on systemic discrimination is markedly different from that of the United States, however. As discussed above, employment equity in Canada is rooted in substantive equality, and therefore equity is the law in covered workplaces. So why has there been a turn to EDI in Canada?

The research on the actual effectiveness of some EDI initiatives is surprisingly limited, and the literature that is available leaves some room for concern. Consider that in the United States, the Equal Employment Opportunity Commission’s Select Task Force on the Study of Harassment in the Workplace found that despite 30 years of corporate training, there is little evidence to show whether it is effective in preventing harassment.³⁵ Should what works or does not work simply be left to the marketplace of ideas, especially in a context when individual workplaces may surmise that there are few incentives to disclose their techniques for success, much less their failures?³⁶ What if some of the proliferating symbolic policies or procedures framed as promoting EDI increase arbitrariness and actually run the risk of causing real harm?³⁷

Our task force was told that some large employers, including some universities, might have staffed EDI offices but limited experience conducting environmental scans of policies and processes to identify systemic barriers, and limited experience engaging in meaningful consultations with affected groups.³⁸ Some experts worried that EDI initiatives, detached from a focus on employment equity, run the risk of yielding a “learned helplessness”.³⁹ The troubling related, implicit assumption seems once again to be that employment equity will not actually be achieved – the focus is simply on doing something, or worse, appearing to do something.

EDI initiatives may also lack the procedural rigour that equality rights deserve. It was deeply concerning to read through the many reports on workplace harassment and barriers to employment in some aspects of the federal public service and hear auditor after auditor, reviewer after reviewer call attention to procedural problems, conflicts of interest challenges, breaches of privacy. Unless we are careful about treating equality rights as human rights and according them the seriousness of process that they deserve, we run the risk of doing harm even when we mean to do good.

Some U.S. researchers have even expressed the concern that the proliferation of internal measures, policies and procedures may be used to suggest in court proceeding that due diligence measures are being taken. The possible result could be to limit liability for discrimination or harassment.⁴⁰

Voluntary measures alone will not bring equity to Canadian workplaces. The 1984 Abella report affirmed it. The 2004 Bilson report on pay equity reiterated it.⁴¹ We agree: like voluntary measures, merely symbolic measures will not get us to employment equity. There is a lot of goodwill, but we need to create the conditions that allow reflexive mechanisms to work together to promote substantive equality in the workplace.

Introduction

To recap: there is nothing wrong with having a positive symbolic impact – the turn to EDI could symbolize a willingness to achieve employment equity and measures to help us get there. But EDI language may be taking on a life of its own. Our task force was concerned to ensure that we not let a focus on EDI supplant the firm requirement to achieve and sustain employment equity.⁴²

Employment equity needs to be more than EDI characterized by employers largely acting alone; employment equity needs a commitment to a transformative framework that builds compliance through the combination of proactive barrier removal, meaningful consultations and regulatory oversight.

We need a transformative framework, to ensure that EDI practices support rather than supplant the Employment Equity Act framework.

A transformative framework: the three pillars of employment equity

Full compliance does not equal greater diversity.

FETCO, Submission to the EEART, 28 April 2022

In the Canadian context, if employment equity compliance has come to mean little more than completing reports, rather than actually making reasonable progress within a reasonably predictable amount of time, could it be that we are giving license to symbolic but largely ineffectual measures?

These concerns were repeated by groups who came before our task force. Our task force heard over and over that we need to refocus so that we are assessing continuous improvement – that is, reasonable progress so that we actually can achieve and sustain employment equity.

The *Employment Equity Act* framework is the necessary anchor to secure an evidence-based approach to equitable inclusion in the workplace. The focus is the human rights purpose of achieving and sustaining substantive equality. **The task force was urged, in the midst of the changing global workplace and the ever-present risk of backlash, to offer recommendations to ensure that the anchor of employment equity holds.**

It is beyond the scope of the [Employment Equity] Act to address the full weight of the inequality created by the historical, societal and cultural forces that have shaped Canadian society. However, the Act sets out a strategy for identifying systemic barriers to equality of results in employment ..., and replacing those barriers with practices that are fair to all.

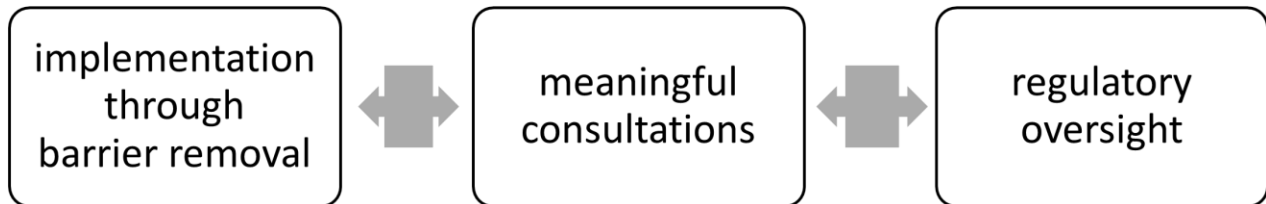
Carol Agócs, Think Piece on Three Topics, Unpublished Paper prepared for the EEART, 30 August 2022

Employment equity was an early model of ‘reflexive regulation’, designed to encourage employers and workplace actors more generally to take a close look at their workplace and identify the practices necessary to transform their workplace. As Sir Bob Hepple, Mary Coussey and Tufyal Choudhury recognized in the recognized in the context of proposing a framework for UK anti-discrimination legislation, it was never assumed that employers could do this alone.⁴³ The conditions necessary to make this reflexive regulation effective must extend beyond employers acting alone.

The *Employment Equity Act* framework must not be allowed to become a check list or a series of forms to fill out.

It is time to be clear about what the framework requires for employment equity to be achieved and sustained. The *Employment Equity Act* framework is best understood as built on three pillars:

Figure I.1: Three pillars of the Employment Equity Act



The three pillars are discussed in greater detail below and throughout this report, but the key take away is that employment equity is not just a list of employer obligations, it requires a framework⁴⁴ for achieving, and sustaining, equality.

The *Employment Equity Act* is crucial legislation, which depends on a strong, supportive institutional framework that encompasses a balanced relationship between all three pillars.

Over time, the implementation was reduced to number-crunching and individual accommodations that put the onus on underrepresented workers to *ask* to be “fit” into the norm, with little attention to meaningful consultations and sparse, narrow regulatory oversight. **The transformative potential got lost.**

It has been easy to lose sight of this structure, by simply listing features of law.

All three pillars in the *Employment Equity Act* framework are required to ensure employment equity’s stability.

- The first pillar is the requirement on workplaces to examine their practices, proactively, to **implement** employment equity, including by **identifying and eliminating workplace barriers**. Representation numbers are a pivotal part of the exercise. Employers **implement through barrier identification and removal** including taking special measures to eliminate underrepresentation, with regular reporting. Although special measures through representation goals have received considerable attention, they are far from the whole exercise. Our decades of experience have shown us that if the focus is not broadened to cover the fundamental work of barrier removal through comprehensive employment systems reviews, improvements will plateau or worse, be lost.
- The second pillar is **meaningful consultations** of employers and workers throughout the process of identifying barriers, eliminating them including through the implementation of special measures, and reporting. Although there is a nod to meaningful consultations in the *Employment Equity Act* framework, it has largely been overlooked. Yet it is crucial. Meaningful participation provides an opportunity both to understand quantitative data more effectively, and to build a richer set of data that incorporates qualitative features. Without this pillar, a heavily bureaucratized employment equity approach that forgets about the workers

themselves can be harmful. Worker voice matters and relationships matter, especially for employment equity groups who have faced disadvantage and trauma. Canada's reckoning with truth and reconciliation underscores that self-determination by First Nations, Métis and Inuit peoples must be part of the human rights-based framework through which equitable inclusion is understood. Employment equity is part of a process of deliberately undoing systemic discrimination, while building respectful relationships within inclusive workplaces. Meaningful participation is grounded in the principle of "nothing about us without us".

- The third pillar is active support for compliance, accountability and enforcement through sustainably resourced **regulatory oversight**. Workplaces should be supported through guidance and oversight by state regulatory actors who understand the workplace context and are sufficiently well resourced to give real-time advice. They should be able to provide independent, transparent external auditing to ensure that equitable representation is both achieved and sustained. Voluntary compliance is not enough. Yet the structures that are in place leave the *Employment Equity Act* framework largely to achieve implementation on its own. Someone needs to be making sure that reasonable progress is actually occurring, with a view to achieving and sustaining employment equity. What our task force has perceived is a regulatory oversight framework that is staffed with motivated and knowledgeable people, but is both under-resourced and sub-optimally structured. We heard a lot of cynicism, and the related concern that this breeds a dangerous disregard for law. Are we, in political economist Leah Vosko's terms, "inadvertently incentivizing non-compliance"?⁴⁵ The federal government has repeated that employment equity is crucial to who we are as Canadians. Employment equity must not be sacrificed to wishful thinking. On regulatory oversight we must put our money where our principles are. The regulatory oversight needs to be rethought.

To get the *Employment Equity Act* framework properly into balance, we need to support and sustain all three pillars.

Supportive and sustainable approaches to achieving employment equity

We need leadership which is willing to acknowledge the situation we are in, rather than paint a rosy picture by manipulating data.

Submission of the Community of Federal Visible Minorities to the EEART, 28 April 2022

We reiterate: it is close to 40 years since Canada has been grappling with where to go on employment equity. Employment equity is meant to be achieved. The focus should now turn to sustaining equitable inclusion at work. We are not quite there yet, and in many cases, for many employment equity groups, we are far from it.

Many people who came before us referred to the Clerk of the Privy Council's Call to Action on Anti-Racism, Equity, and Inclusion in the Public Service. That call starts with these words: "the time to act is now".

Our task force agrees, and we believe that *how* we act is key.

The report's chapters are organized around the transformative framework of the three pillars of implementation through barrier removal; meaningful consultation; and regulatory oversight. The

report offers a detailed discussion of where we are and where we need to go to strengthen each of them, in Chapters 4 – 6.

But before addressing how to strengthen each pillar, the report presents three transversal chapters that guide engagement with the three pillars: equitable inclusion in a changing world of work (Chapter 1), data justice (Chapter 2) and rethinking equity groups (Chapter 3). Chapter 7 returns to the theme of equitable inclusion, to explore some of the more technical regulatory implications of supportive and sustainable employment equity coverage.

On coverage and scope in Chapter 1, the report considers how the Canadian workforce has changed since the *Employment Equity Act* framework was introduced. It takes a hard look at discouraged workers and workers who are overqualified. It asks whether we are effectively covering the Canadian workforce. It also asks whether we might be reproducing stereotypes in our benchmarks.

On data justice in Chapter 2, the report delves into the statistics that support employment equity, with a focus on why we have employment equity: the “why” should affect what we do. We collect data in employment equity to promote and protect the human right to equality. That purpose affects how we approach privacy protections. It affects the decision to disaggregate data. It affects how we approach the issue of self-identification. And it supports moving away from workforce availability in the federal public service toward a benchmark that supports a focus on removing barriers, meaningful consultations and oversight. It also includes strengthening public accountability by democratizing access to employment equity data.

On rethinking equity groups in Chapter 3, we have emphasized the importance of understanding the groups in their context. We invoke specific histories that help us to understand group-based barriers to employment equity and how we should be thinking about employment equity groups in 2023 and into the future. We have emphasized just how important it is to build supportive and sustainable approaches to achieving employment equity for groups who need it. The goal of the *Employment Equity Act* framework is broader still: through proactive barrier removal, meaningful consultations and regulatory oversight, we work to achieve and maintain employment equity: this benefits us all.

On the regulatory implications of supportive and sustainable employment equity coverage in Chapter 7, we look at the public service, the federal private sector employers and the federal contractors program, and recommend changes to ensure that the *Employment Equity Act* framework is truly offering supportive and sustainable coverage.

Throughout the report, we say it, and say it again: we must go beyond the symbolic, to focus on a transformative, three pillar framework that offers supportive and sustainable approaches to achieve employment equity.

Our process

Our task force

We are a 12-person task force, including the chair, Professor Adelle Blackett and the vice-chair, Professor Dionne Pohler. Members emerge not only from academia and from key employers and workers organizations, but also from a broad cross section of society (Appendix B). Collectively we brought a breadth of complementary expertise and lived experience rarely captured in federal task

Introduction

forces in Canada. Members brought a thick range of equity, human rights, statistical, policy, labour relations, and business knowledge that intersected with many of the concerns that are at the centre of the *Employment Equity Act* framework. Members showed commitment and generosity throughout their appointments, which were formally ended for everyone but the Chair with the end of the public consultations in October 2022. The Chair gratefully acknowledges the formidable intellectual companionship and steadfast commitment of Vice Chair Dionne Pohler. The insightful input received from all members of the task force has been invaluable. Members brought grace, each time we met. We have learned immeasurably together and from each other, including what respectful, equitable inclusion looks and feels like.

We made it our priority to listen deeply. Listening deeply meant taking the time to hear what was being said about the *Employment Equity Act* framework. Listening deeply also meant remembering - being alive to the hopes, concerns, enthusiasm and hurt, senses of possibility and frustration of those who felt that what they were saying had also been said, repeatedly, over the past decades. Some people literally came before us and said that despite their own disappointments, they wanted to make the world of work in Canada better for their children, and better for the next generations. We heard a real sense of urgency. Groups and individuals who met with us wanted to know that our report and recommendations would also be listened to deeply, and would lead to meaningful change.

Consultations

Experiences should inform policies.

Consultations were therefore a significant part of our work. Many people and groups wanted to be heard on this matter that affects their livelihood so directly and invited participants came ready to share. To respect the accelerated post-election pace set by the Government of Canada once we were reconvened following the 5-month stop work order during the federal election, our task force held 51 meeting days with over 109 consultations between February – October 2022. There was a total of 337 attendees, including 176 employer and worker organizations, civil society representatives, experts, governmental departments and agencies. These included a number of roundtable discussions with academics from within Canada and across the world. Many were plenary sessions of the task force; others had a representative range of task force members. The paper that we prepared to support the consultations is included in Appendix N.

We are enormously grateful to the many people who made it a point to meet with us. This report could not have been written with the same depth of insight without their contributions. Key insights from some of the people we met are formally referenced throughout the report, but we want to stress just how rich and resonant many of the reflections were – there is a lot that is shared, and as a result a lot of power in the call to move forward.

In addition to these consultations, the task force chair – either jointly with the vice-chair or alone - held a number of discussions with commissioners leading other independent offices or units related to employment equity, notably the Privacy Commissioner, the Chief Commissioner of the Canadian Human Rights Commission, both the outgoing and acting Pay Equity Commissioner, the Accessibility Commissioner and the Auditor General of Canada. These meetings were extremely important to shaping understandings of the institutional structures and the possibilities for rethinking oversight of employment equity in Canada. We renew our gratitude to each.

Most of the task force’s consultations were undertaken virtually, given the pandemic and in keeping with the task force’s mandate. A few of the meetings that took place into Fall 2022 with federal government officials and agencies responsible for implementing or enforcing employment equity or other equity mandates took place in person once it was considered safe to do so. A list of consulted parties is to be found in Appendix D.

This report would not have been the same without them. We are grateful. What was shared, collectively, has become part of the reconstruction of employment equity through an equitably inclusive understanding of substantive equality.

Enhanced engagements

Our mandate included a request to consider changes to reflect current understandings of the relationship between “Indigenous peoples” and the Canadian state, to reconsider the definition of “persons with disabilities”, to consider whether an employment equity group should be added for workers from 2SLGBTQI+ communities and to consider whether Black communities should be considered a distinct employment equity category. For this reason, we undertook enhanced engagements with key organizations from each of these communities on the principle of nothing about us without us. Organizations entered into grants and contributions agreements to produce detailed consultative reports on core issues related to our mandate. They in turn reached out to the broader communities across Canada, in English and in French, and in some cases in Indigenous languages, in American Sign Language and in Quebec Sign Language, through a combination of surveys, focus groups, engagements with a range of stakeholders including employers’ organizations, conducted online surveys, engaged in desk research, and validated results with their own constituencies, often combining forces to reach several hundred members of their communities. Each organization reported to the task force on interim progress and most final reports were received in writing or in a few instances through presentations to the task force between Summer 2022 and Winter 2023. Particularly given the tight timelines for this consultative process, the enhanced engagement process was pivotal to ensuring broad-based input to inform the development of the report and its recommendations.

Written submissions

Our task force issued a call for written submissions that yielded over 400 contributions, listed in Appendix F. Most were received by April 2022 but some specially commissioned reports from employment equity groups, listed in Appendix E, arrived throughout Fall 2022 and a few into Winter 2023.

The launch of the task force appears to have galvanized a number of reviews and reports internal to the federal government. When our task force met with the Treasury Board of Canada Secretariat’s Office of the Chief Human Resources Office (TBS-OCHRO), we were informed that the Treasury Board was conducting a review of the calculation of Workforce Availability for the federal public service, to determine whether it should be retained. TBS-OCHRO indicates that its work on modernizing benchmarks will be reflected in its 2021-22 report.⁴⁶ Its initial completion timeline was Summer 2022, but it commissioned a separate external study on the calculation of workforce availability in Fall 2022, invited the chair and vice-chair to a meeting, and shared a draft report with the task force chair in Winter 2023. From September 2021 – July 2022, the Canadian Human Rights Commission conducted an Employment Equity Employment Systems Review, with results

highlighted in a report released on 8 November 2022. Deputy Minister Champion for Indigenous Federal Employees and Women, Gina Wilson, shared a June 2022 report that she commissioned on self-identification.⁴⁷

Research and data collection

Research was also a pivotal part of the mandate of the task force. Despite the absence of a research director in the secretariat and the pandemic-imposed restrictions on travel, it was crucial for us not to compromise on this dimension of the work. This report has sought to honour the significant, critical research that has been undertaken for decades by many people committed to achieving workplace equality in Canada and beyond. This has required fastidious review. This report has sought to offer a meaningful opportunity to take stock, with a view to enabling Canadian society to move resolutely forward. The key, as we heard over and over from those who came before our task force, is to make change happen.

The task force commissioned a few key research papers from leading experts on core issues related to our mandate. We were highly selective in our choices, to avoid duplicating the significant volume of leading studies related to employment equity. The topics are listed in Appendix H and the papers are referenced in this report.

Given the many concerns expressed about the frequent reliance on outdated data to conduct employment equity, our task force wanted to be sure to draw on as much of the 2021 Census data as possible. Statistics Canada released its labour and language of work data from the 2021 Census of Population on 30 November 2022. The Chief Data Officer for Employment and Social Development Canada (ESDC), Ima Okonny, and her staff along with members of the task force secretariat worked intensively in the first half of December to enable the task force Chair to incorporate some of that crucial newly released data into this report.

We express sincere gratitude for the commitment and dedication of the secretariat and its Executive Director, Eldon Holder. The secretariat provided crucial support notably to schedule intensive consultations and coordinate input from stakeholders from mid-July to early August 2021 until we were fully paused during the elections, and on resumption from February to October 2022, and was largely dismantled by December 2022. However, despite repeated requests in light of the task force's mandate and terms of reference, the task force secretariat was not equipped to provide the expected legal research support, and the Chair was not provided with independent access to legal counsel, unlike Professor Arthurs' Employment Standards Review,⁴⁸ Professor Bilson's Pay Equity Review,⁴⁹ and other recent reviews including the External Review Authority reports cited in this report and conducted notably by the Hon. Marie Deschamps, C.C., Ad. E.,⁵⁰ the Hon. Morris Fish,⁵¹ and the Hon. Louise Arbour.⁵²

With the support of two talented and dedicated student research assistants in law, McGill D.C.L. candidate Leanna Katz (September 2022 – April 2023) and McGill B.C.L. & J.D. candidate Béatrice Rutayisire (May 2022 – April 2023), the Chair conducted an extensive legal and broader literature review using legislation, case law and research papers from across Canada and around the world. We learned how special measures to promote equitable adoption were being used in different parts of the world, from France to India, from Northern Ireland to South Africa, from the United States to Argentina. Our task force report reflects the perspective that experiences from around the world can be instructive, and a source of inspiration. Canada has played a crucial role in contributing to the

development of substantive equality principles and employment equity policies abroad, too. The report contains references to international law, especially when it involves the observations or comments made by international treaty bodies commenting specifically on the situation in Canada. Our task force also met virtually with experts from the International Labour Office in Geneva, who explained that special measures were an important part of post-pandemic recovery.

[Employment equity’s] ambiguity and adaptability are both its strength and its fragility. It is not a fixed formula for governmental action transportable from one country to another, nor is it a precise constitutional or legal arrangement of universal action. Yet it does have a core feature... it involves focused and deliberate governmental intervention that takes account of the reality of [systemic discrimination] to deal with and overcome the problems with [systemic discrimination].

Justice Albie Sachs, Foreword, in Elaine Kennedy-Dubourdien, ed., Race and Inequality: World Perspectives on Affirmative Action (London: Routledge, 2006)

The report contains selective references to comparative law. At this stage when Canada’s system is mature, we want to be especially careful not simply to be “cherry-picking” from elsewhere. Part of the comparative law “method” in this report has been to make explicit much of the distance that has been travelled to come to understandings of these principles that prevail in Canada and that draw inspiration internationally. We have wanted to make sure the use of comparative law and practice is mindful of how legislative approaches are rooted in the societies in which they have emerged. Any changes introduced need to be mindful of context, and alive to the possibility that they might work very differently in one context than in another. It recognizes the potentially emancipatory power of experimentation in law.

This report is in dialogue with what is happening around the world and implicitly builds on many of the contemporary currents, especially on enforcement.

This report focuses not on what might have been done in the abstract, but rather on what can be done concretely and in context to transform employment equity to achieve and sustain substantive equality in Canadian workplaces.

As a result, this report draws on comparative examples with care, and emphasizes taking a good, hard look at some of the assumptions that have surrounded our own system of employment equity to encourage us to take achieving substantive equality seriously. A table of comparative law sources is in Appendix K. We are persuaded this approach takes a model in Canada that has been a source of leadership, quite far.

The recommendations

Finally, throughout the report we issue a total of 187 recommendations that seek to offer comprehensive guidance. They are often reasonably high level, to leave latitude to government in consultations to decide how best to implement them. In some cases, though, the recommendations are more granular, and are meant to complement each other to build a comprehensive whole.

Introduction

Every effort was made within the accelerated timeframe for delivery of our report to provide precise recommendations capable of implementation without further research; this is true of the vast majority of recommendations. Given the breadth of the review, however, a few recommendations are inevitably more directional. All build on each other, and all depend on a shared commitment to achieving and sustaining employment equity.

Our task force is convinced that all-of-government prioritizing of the proposed holistic approach focused on equitable inclusion and strengthening and balancing the three pillars of the *Employment Equity Act* framework is needed to achieve and sustain employment equity.

It takes all of us

Despite the magnitude of the challenge, we came away optimistic about the possibilities in this moment to bring about transformative change.

One particularly memorable, and moving moment was when a union representative described himself as an older white working-class man, in an industry that had tended to be very heavily male and white, and explained some of the union's initiatives to increase the representation of Indigenous workers. He not only affirmed that the task force's work would be crucial to advancing the conditions of working people, and recognized that the voices of workers from employment equity groups needed to be heard. He also offered to add his own voice, in support.

A second takes us back to 1985, as the *Employment Equity Act* framework was being introduced. The Montreal Board of Trade acknowledged an introverted student body president and class valedictorian from one of the most diverse high schools in the city with its Outstanding Student Award. Of course, the award was deeply meaningful. But the main prize - a summer job at what was then the Toronto-Dominion Bank – made all the difference. Summer after summer, that employment supported her through university until her first position in law; it opened worlds of possibility.

A third was the well-educated taxi driver from Congo-Kinshasa who commented that the task force chair was not joking: the suitcase taken to the Monastère des Augustines in Québec to make progress writing this report really was heavy. The suitcase contained more books than clothing. The taxi driver refused to have the bill doubled as an additional tip, and looked the chair straight in the eyes, as if to convey solidarity with this necessary work.

We need to keep raising the level of public debate so that it is fundamentally understood to involve all of us, together building an equitably inclusive Canada.

And we need to get serious about actually achieving and sustaining employment equity, through a transformative framework built on implementation through barrier removal, meaningful consultations and regulatory oversight.

This work is the work that will transform employment equity. And this work requires all of us. It requires us to build Canadian workplaces, with grace.

In this worldwide moment of rising hate, intolerance and exclusion, Canada has a critical choice to make, and an opportunity to show the importance of our ability, literally, to work together to foster equitable inclusion for all.

¹ Native Women’s Association of Canada, Supporting the *Employment Equity Act* Review Task Force: Consolidation of 2021 Labour Market Reports, September 2022.

² United Nations Secretary General António Guterres, “*Tackling Inequality: A New Social Contract for a New Era*” Nelson Mandela Annual Lecture, 2020.

³ Vrinda Narain, Colleen Sheppard & Tamara Thermitus, “*Employment Equity and Inclusion: Through the Lens of Substantive Equality*” (September 2022) Unpublished working paper prepared for the EEART.

⁴ * Source: Treasury Board of Canada Secretariat, “Population of the Federal Public Service” (28 November 2011), online: <<https://www.canada.ca/en/treasury-board-secretariat/services/innovation/human-resources-statistics/population-federal-public-service.html>>. Statistics Canada, “Population estimates, quarterly Table 17-10-0009-01” (22 March 2023), online: <<https://doi.org/10.25318/1710000901-eng>>. Canadian population figures have been updated with the latest Statistics Canada’s figures. ** Source: Statistics Canada, “Labour force characteristics by age group, monthly, seasonally adjusted Table 14-10-0287-02” (10 March 2023), online: <<https://doi.org/10.25318/1410028701-eng>> (individuals 15 years of age and over who during 2020 were employed or unemployed). *** Note: Covering 371 employers as of December 2020. Note, the FCP does not apply to private-sector employers under federal jurisdiction, contracts for the purchase or leasing of real property, or construction or legal service contracts. **** Source: Statistics Canada, “Labour force characteristics by age group, monthly, seasonally adjusted Table 14-10-0287-02” (10 March 2023), online: <<https://doi.org/10.25318/1410028701-eng>>.

⁵ Kimberlé Crenshaw, “*Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique, Feminist Theory and Antiracist Politics*” (1989) U Chi Leg F 139.

⁶ *Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen’s Printer, 8 October 1967). The Commission’s preliminary report was submitted on 1 February 1965. Part IV of the final report focused on the cultural contributions of ethnic groups beyond the official language groups, which led to subsequent developments on multiculturalism. See also *Official Languages Act*, 1970 RSC, Chapter O-2 and the Official Languages Program of 1969.

⁷ See Maryse Potvin & Sophie Latraverse, « Etude comparative de la collecte de données visant à mesurer l’étendue et l’impact de la discrimination dans certains pays : Rapport final Canada » (Commission Européenne DG Emploi et Affaires Sociales, May 2004).

⁸ Wisdom Tettey, “*Inspiring Inclusive Excellence: Professor Wisdom Tettey’s installation address*” Vice-President and Principal, University of Toronto Scarborough, 25 February 2019.

⁹ See e.g. Cecil Foster, “*They Call Me George: The Untold Story of Black Train Porters and the Birth of Modern Canada*” (Windsor: Biblioasis, 2019).

¹⁰ Order in Council PC 1983-1924, (1983) C Gaz I (1947-1997).

¹¹ Kevin Stainback & Donald Tomaskovic-Devey, “*Documenting Desegregation: Racial and Gender Segregation in Private Sector Employment Since the Civil Rights Act*” (New York: Russel Sage Foundation, 2012) at xxii.

¹² *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, also known as “Action Travail des Femmes”.

¹³ *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1127.

¹⁴ [1989] 1 SCR 143, 1989 SCC 2.

¹⁵ See e.g. Committee on the Elimination of Racial Discrimination, General recommendation No. 32: The meaning and scope of special measures in the Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/GC/32, 24 September 2009, at para. 11 & 30 (recalling also the mandatory nature of the obligation to take special measures when warranted); Adelle Blackett, “This is Hallowed Ground: Canada and International Labour Law,” in Oonagh E. Fitzgerald, Valerie Hughes and Mark Jewett, eds., *Reflections on Canada’s Past, Present and Future in International Law* 409 (Centre for International Governance Innovation, 2018).

¹⁶ For an insightful discussion of the case law arguing that “there is a legal matrix of wide-ranging human rights obligations that can be marshalled to support proactive employment equity planning and equality promoting obligations” with a focus on Ontario, see Mary Cornish, Fay Faraday, and Jan Borowy, “*Securing Employment Equity by Enforcing Human Rights Laws*” in Carol Agócs, ed., *Employment Equity in Canada: The Legacy of the Abella Report* 217 at 236-37 (University of Toronto Press, 2014).

¹⁷ *R. v. Kapp* [2008] 2 SCR 483, 2008 SCC 41.

¹⁸ *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143 at 182, 1989 SCC 2.

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- ¹⁹ *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 SCR 464.
- ²⁰ [1999] 3 S.C.R. 3.
- ²¹ Shelagh Day & Gwen Brodsky, “*The Duty to Accommodate: Who Will Benefit?*” (1996) 75 Canadian Bar Review 433; Colleen Sheppard, Of Forest Fires and Systemic Discrimination” (2001) 46 McGill LJ 533.
- ²² A heavily divided decision emerges, for example, in *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 S.C.R. 591.
- ²³ See e.g. *Canadian Human Rights Act* Review Panel, 2000 (chaired by former Supreme Court of Canada Justice, the Hon. Gérard LaForest.) at 10 - 11.
- ²⁴ *Fraser v. Canada (Attorney General)*, 2020 SCC 28.
- ²⁵ *Ontario Human Rights Commission v. Simpsons-Sears* [1985] 2 SCR 536.
- ²⁶ See recently the 5:4 Section 15 analysis in *R. v. Sharma*, 2022 SCC 39 on sentencing law. The majority reasons state that Section 15 does not impose a general positive obligation on the state to remedy social inequalities or enact or retain remedial legislation, reading down the *Alliance* pay equity case that was decided under Section 15(1) in the employment law context. *Sharma* has precipitated criminal law reform.
- ²⁷ Joshua Sealy-Harrington, “*The Alchemy of Equality Rights?*” (2021) 30:2 Constitutional Law Forum 53.
- ²⁸ Federally Regulated Employers – Transportation and Communications (FETCO), Presentation to the Task Force, 7 April 2022.
- ²⁹ Bill C-25, *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act*, 1st Sess, 42nd Parl, 2018, cl 172.1(1) (assented to 1 May 2018).
- ³⁰ Statistics Canada has adopted the category of “men +” to include men and some non-binary people; the category of “women+” includes women as well as some non-binary people.
- ³¹ Human Rights Council, Report of the independent expert on minority issues, Gay McDougall: Mission to Canada, A/HRC/13/23/Add.2, 8 March 2010 at para. 85.
- ³² Carol Agócs, “*Think Piece on Three Topics*,” Unpublished paper prepared for the EEART, 30 August 2022.
- ³³ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *City of Richmond v. JA Croson, Co.*, 488 U.S. 469 (1989); Stacy Hawkins, “*Affirmative Action Law & Policy in the United States: Past, Present, and Future*,” Unpublished paper prepared for the EEART, 31 August 2022.
- ³⁴ Lauren Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* (Chicago: The University of Chicago Press, 2016) at 145 – 149.
- ³⁵ U.S. Equal Employment Opportunity Commission, Select Task Force on the Study of Harassment in the Workplace: Report of Co-chairs Chai R. Feldblum & Victoria A. Lipnic, June 2016.
- ³⁶ See Cynthia Estlund, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy* (Oxford University Press, 2003).
- ³⁷ See Susan Bisom-Rapp, “*The Role of Law and Myth in Creating a Workplace that Looks Like America?*” (2022) 43 Berkeley Journal of Employment and Labor Law 251 at 258; Jesse Singal, “*What if Diversity Training is Doing More Harm Than Good?*” *The New York Times* (17 January 2023), Opinion, online: <www.nytimes.com>.
- ³⁸ Social Sciences and Humanities Research Council, Presentation to the EEART (29 April 2022).
- ³⁹ Malinda Smith, Presentation to the EEART, 24 March 2022; Frances Henry et al., “*The Equity Myth: Racialization and Indigeneity in Canadian Universities?*”
- ⁴⁰ On the U.S. experience see Edelman, *Working Law*, University of Chicago Press, 2016; Susan Bisom Rapp (2022)
- ⁴¹ Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right* (2004) (Chair: Beth Bilson).
- ⁴² Lauren Edelman, *Working Law Working Law: Courts, Corporations, and Symbolic Civil Rights* (Chicago: University of Chicago Press, 2016) at 5, 101, 137 – 140 (U.S. studies suggest that many symbolic structures are not effective at improving the workplace conditions of women and minorities); Marie-Thérèse Chicha & Eric Charest, *Le Québec et les programmes d'accès à l'égalité: Un rendez-vous manqué?* (Montreal: Centre d'études ethniques des universités montréalaises, April 2013).
- ⁴³ Bob Hepple, Mary Coussey & Tufyal Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Oxford: Hart Publishing, 2000).
- ⁴⁴ See also Bob Hepple, “*The Aims and Limits of Equality Laws?*” in Ockert Dupper & Christoph Garbers, eds., *Equality in the Workplace: Reflections from South African and Beyond* (Cape Town: Juta, 2009) at 12.
- ⁴⁵ Leah F. Vosko and the Closing the Enforcement Gap Research Group, *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (Toronto: University of Toronto Press, 2020) at 28, 263.

⁴⁶ Treasury Board of Canada Secretariat, Annual Report: Employment Equity in the Public Service of Canada 2020 – 2021 (2022) at 9.

⁴⁷ That discussion paper erroneously indicates that the EEART is investigating the issue of ethnic fraud, a topic that exceeds the task force's mandate.

⁴⁸ Harry W Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (Gatineau, QC: Government of Canada, 2006).

⁴⁹ Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right* (2004) (Chair: Beth Bilson, Q.C.).

⁵⁰ External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces (27 March 2015) (External Review Authority: the Hon. Marie Deschamps).

⁵¹ Report of the Third Independent Review Authority to the Minister of National Defence (30 April 2021) (External Review Authority: the Hon. Morris J. Fish) at vii & 21

⁵² Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces (20 May 2022) (External Review Authority: the Hon. Louise Arbour) at 18 & 19.

Chapter 1: Equitable inclusion in the changing world of work: Toward supportive & sustainable coverage

Introduction: Supportive, sustainable coverage

Much has changed in the world of work since the *Employment Equity Act* framework was proposed and introduced in the 1980s. This chapter provides an overview of the coverage of the *Employment Equity Act* framework, then discusses some of the changes. It considers the pros and cons to adapting the coverage in light of the changing world of work.

Our task force repeatedly heard that employment equity concerns all workers, and all employers. If employment equity groups are overrepresented in precarious jobs in the federal sector, we should all pay attention. What workplace measures might bring them meaningfully in to the *Employment Equity Act* framework?

Some of these measures require societal shifts: like accessible childcare policies and public transportation. They extend beyond any given workplace. Employment equity is just as concerned about those who want to gain equitable access to employment as it is about those who already have that access and seek to maintain it.

We also repeatedly heard that administrative burdens, a lack of harmonization and a lack of sustained support could get in the way of achieving employment equity. Any expansion of coverage needs to pay serious attention to employers' capacity and workplace capacity more broadly.

Throughout our consultations, we were encouraged to keep our focus on employment equity's "why" – equitable inclusion in Canadian workplaces, which benefits us all. Equitable inclusion matters, and it needs to be supported to be sustainable.

Why the focus on employment still matters

The focus on the "why" – equitable inclusion – leads us to cover some of the thorniest questions in labour and employment law coverage. They all relate to the *Employment Equity Act* framework, but distinctly. Take the following three:

First, **the *Employment Equity Act* framework cannot stand alone.** It needs to be understood as an important part of a broader, comprehensive law of work. Much of Canadian labor and employment law, including the collective bargaining system, and later minimum standard protections and safety and health at work protections sought to "[reduce] the disparity between the rights of the individual as a worker and [their] rights as a citizen."⁵³ Employment equity requires strong surrounding labour and employment laws upholding decent work in the changing workplace. Attempts to reduce the prevalence of precarious work complement attempts to achieve substantive equality at work. In this

regard, employment equity coverage is not quite about broad coverage the way much other labour and human rights law imagines coverage.

In other words, and second, the purpose of the *Employment Equity Act* is to secure social justice through equitable representation of workers, but not just in any jobs. **Employment equity is unabashedly about making sure that all workers have an equal opportunity to be represented in good, stable jobs** – what internationally, including in the UN Sustainable Development Goal No. 8, tends to be referred to as decent work and economic growth. UN Sustainable Development Goal No. 8 entails “promot[ing] sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.” Decent work for all was an animating principle for reforms of Part III of the *Canada Labour Code*, framed by Commissioner Harry W. Arthurs as a “moral imperative to ensure decent working-conditions for the most vulnerable members of the workforce.”⁵⁴

However – for there is always a “however” – some will look at the *Employment Equity Act* framework in light of this discussion and wonder whether those workers currently covered – that is, employees in largely standard employment relationships - are the workers who “are more in need of assistance compared to vulnerable disadvantaged workers in precarious non-standard jobs, or who are in the bottom of the polarized wage distribution or who have lost their job.”⁵⁵ Our task force considered these important views, and found ourselves arriving at a somewhat different conclusion.

Employment equity was never meant to be a complete response, but it can be part of the response, by correcting a distinct set of problems. We agree therefore that historically excluded groups have stood to benefit from employment equity.⁵⁶ Alongside and in relation to the other workplace measures that foster substantive equality, namely pay equity, accessibility, and human rights protection, employment equity creates opportunities for equitable inclusion, including, indeed especially, for those who have been excluded and relegated to precarious, non-standard jobs. There is a focus on achieving and sustaining employment equity through the removal of barriers to equal opportunity for all: equitable inclusion of employment equity groups, as a matter of social justice, into good, stable jobs alongside all other workers.

It follows that third, **we still need to know what is happening around jobs where the conditions are more precarious, and who is occupying precarious jobs if we are going to be able to foster employment equity.** As discussed below, employment equity group members are disproportionately represented in precarious work. They earn disproportionately low wages. They are disproportionately underemployed or unemployed. Despite their education, despite their skills, they are overrepresented in precarious work. Employment equity seeks to correct that inequity. But it is one piece of the puzzle. We repeat: we need a holistic approach to labour and employment law, and an understanding of employment equity’s “why”.

Our first recommendation is to build the “why” more fully into the purpose of the *Employment Equity Act*.

Recommendation 1.1: The purpose of the *Employment Equity Act* should be updated as follows: “The purpose of this Act is to achieve and sustain substantive equality in the workplace through effective employer implementation, meaningful consultations and regulatory oversight of employment equity and, in the fulfilment of that goal, to:

- correct the conditions of disadvantage in employment experienced by employment equity group members
- give effect to the principle that employment equity means more than treating persons in the same way but also requires barrier removal including special measures
- support the implementation of Canada’s international human rights commitments to substantive equality and meaningful consultations in the world of work, including in the United Nations Declaration on the Rights of Indigenous Peoples, and
- foster equitable inclusion and sustainable economic growth, full and productive employment and decent work for all”

The workplaces covered by the Employment Equity Act framework

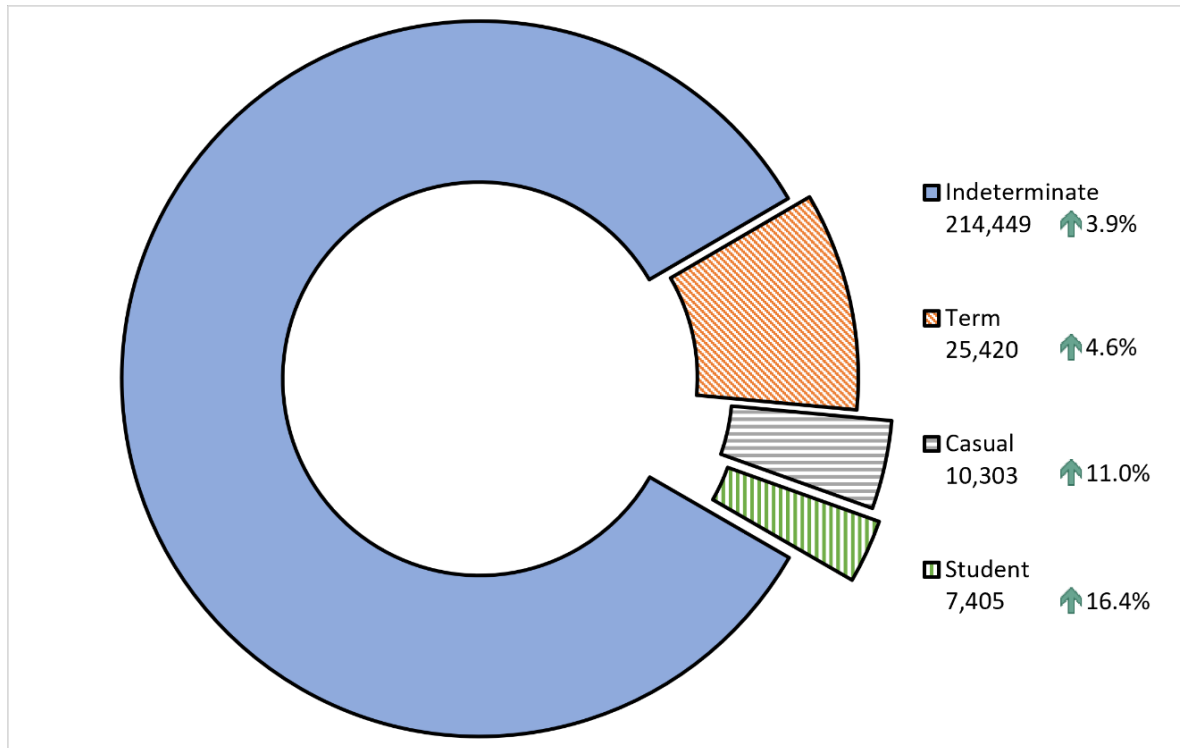
The *Employment Equity Act* framework applies to the core federal public administration without threshold. Of a total of 228,245 employees in the core public administration, 154,177 have identified themselves as belonging to employment equity groups.⁵⁷ It has also been extended to the Canadian Forces and the Royal Canadian Mounted Police. It covers separate federal agencies such as Canada Revenue Agency, where they meet a threshold of 100 or more employees.

The *Employment Equity Act* framework also applies to federally regulated private-sector employers with 100 or more employees. This includes federal Crown corporations such as Canada Post, as well as a range of other federal organizations like the port authorities. The federally regulated private sector includes approximately 19,000 employers and 1,300,000 employees. For federally regulated employers with 100 or more employees, in 2020, 575 employers submitted an employment equity annual report, covering 739,067 employees across Canada or 3.6% of the Canadian workforce.⁵⁸

The *Employment Equity Act* makes the Minister of Labour responsible for administering the Federal Contractors Program (FCP). The FCP applies to those who bid for federal contracts worth \$1 million or more, with 100 or more employees. The task force was informed that a new iteration of the FCP is expected to be launched in 2024-25 to include requirements based both on the *Accessible Canada Act* and the *Pay Equity Act*.

Figure 1.1 shows the breakdown of the entire public service population as of March 2022, comprising 257,577 employees, with a breakdown of the type of contracts that they held:

Figure 1.1: Breakdown of *Public Service Employment Act* population based on tenure as of March 2022⁵⁹



The overwhelming majority of workers were on full time, standard, indeterminate/permanent term contracts.

The composition of the federally regulated private sector is reflected in Figures 1.2 and 1.3 below. They show that full time, standard, indeterminate/permanent term employees remain in the majority in the federally regulated private sector.⁶⁰ It is important to keep in mind that from the perspective of constitutional law, work that is subcontracted can simultaneously fall outside of federal jurisdiction.

Figure 1.2: Composition of the federally regulated private sector for firms with 100 or more employees, 2021⁶¹

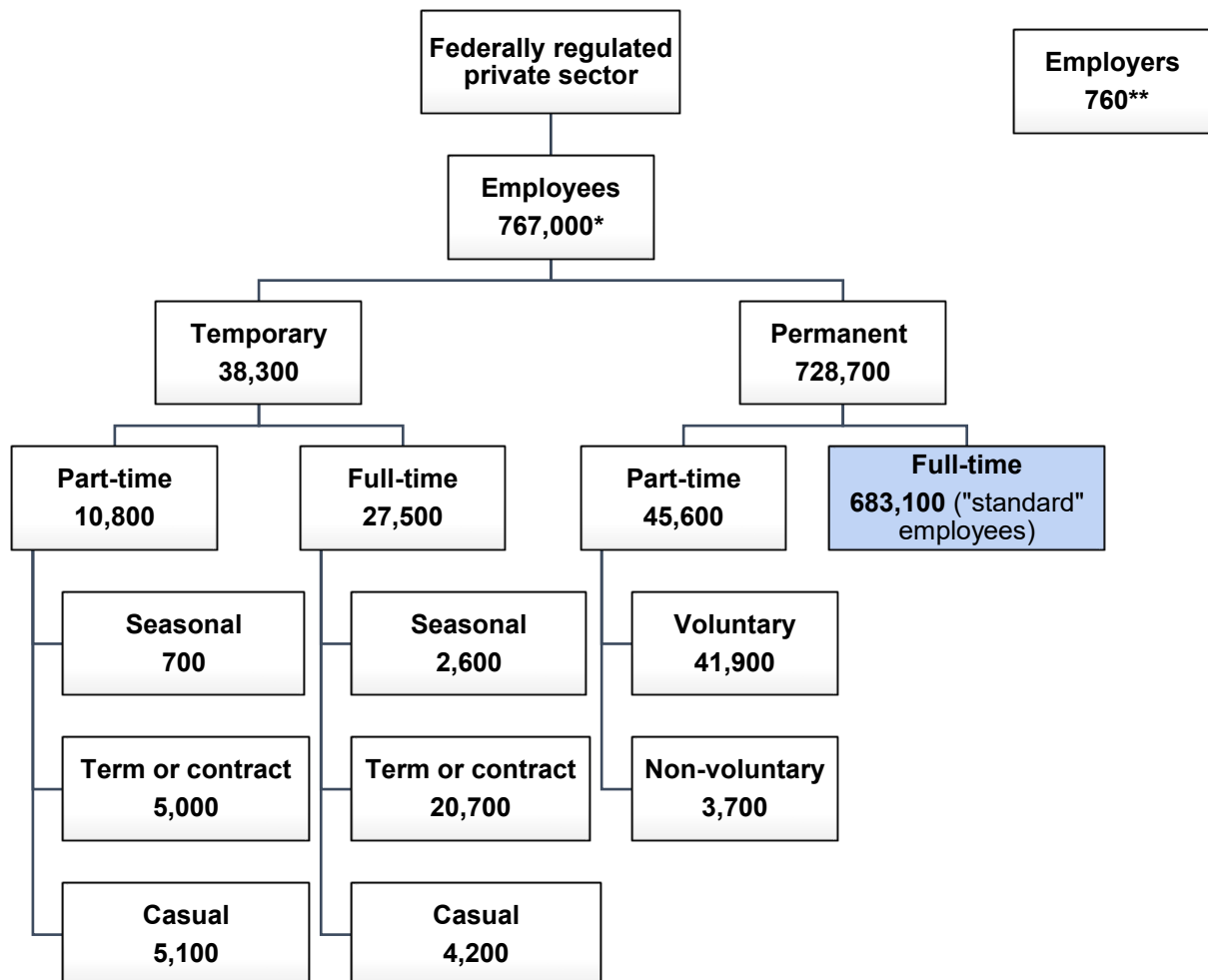
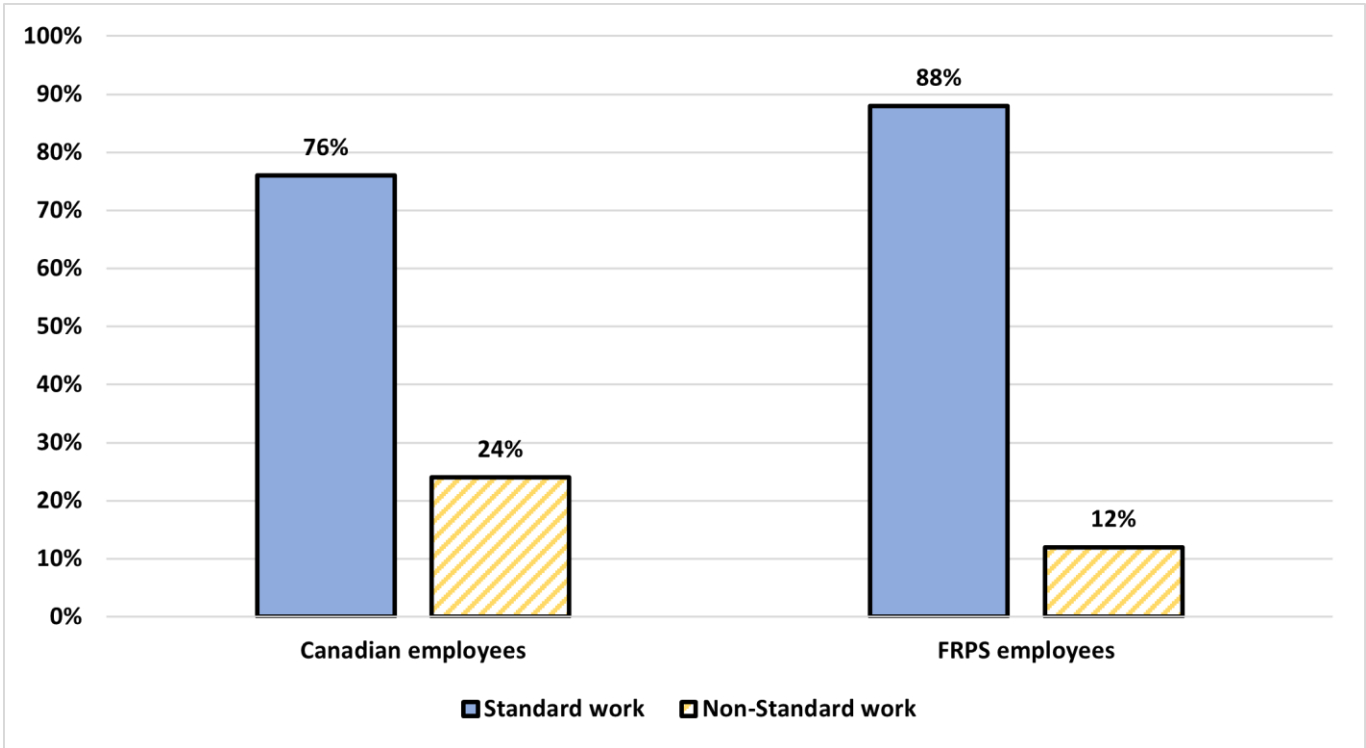


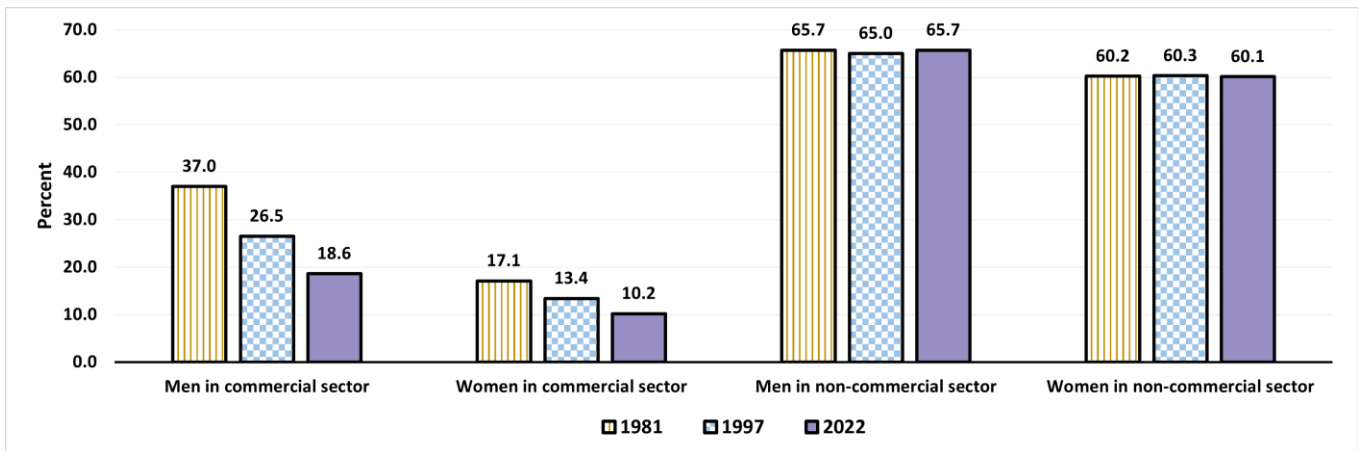
Figure 1.3, Standard and non-standard work in the federally regulated private sector compared to Canada, 2021⁶²



Unionization rates are relatively high in the federal public service. In the federally regulated private sector, two-thirds are not unionized. Unionization in the federally regulated private sector also varies significantly by industry. While unionization has been declining in Canada since the 1980s, Gunderson *et al* note that for women as a group, rates have remained constant. They also note that as concerns employment equity, the decline is essentially in the private sector.⁶³

Figure 1.4 below provides the cross-Canada figures:

Figure 1.4: Percentage of employees who are union members, by sex and sector, 1981 to 2022⁶⁴



Chapter 1: Equitable inclusion in the changing world of work: Toward supportive & sustainable coverage

In the public sector generally, 77.2% were covered by a collective agreement in 2021, an increase from 74.7% in 1997. Public administration coverage rates are at 75.5%. The decreases were in the private sector, where 21.3% were covered in 1997 while 15.3% were covered in 2021. In the federally regulated private sector, in contrast, 34% were covered by a collective bargaining agreement, according to Figure 1.5 below.

Figure 1.5: Unionization rate of employees 15 years and over by private and public sectors, Canada, 1997 to 2021⁶⁵

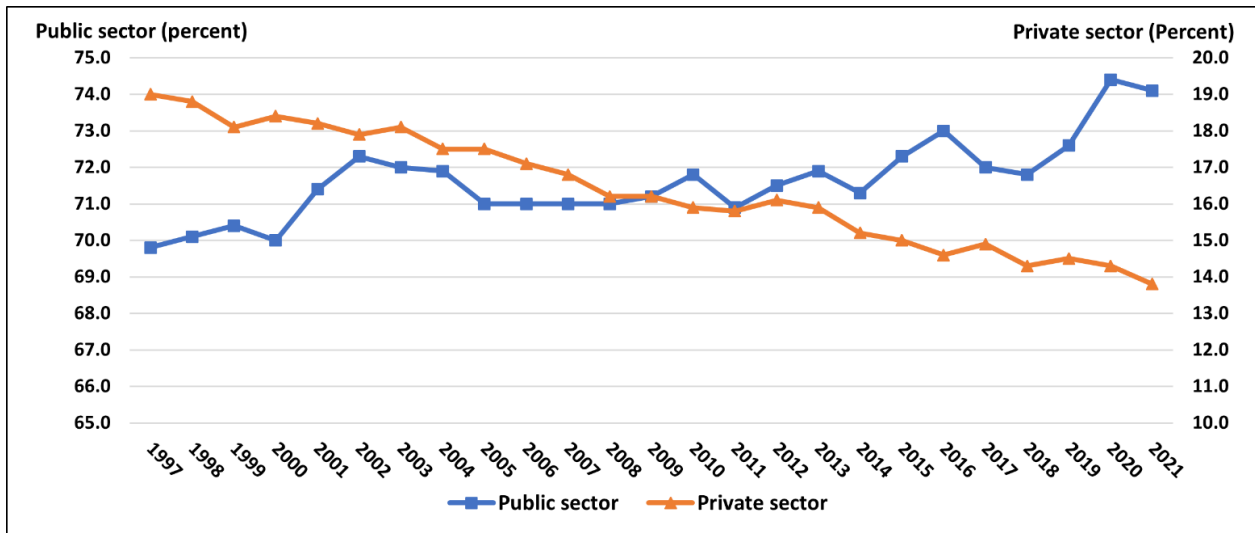
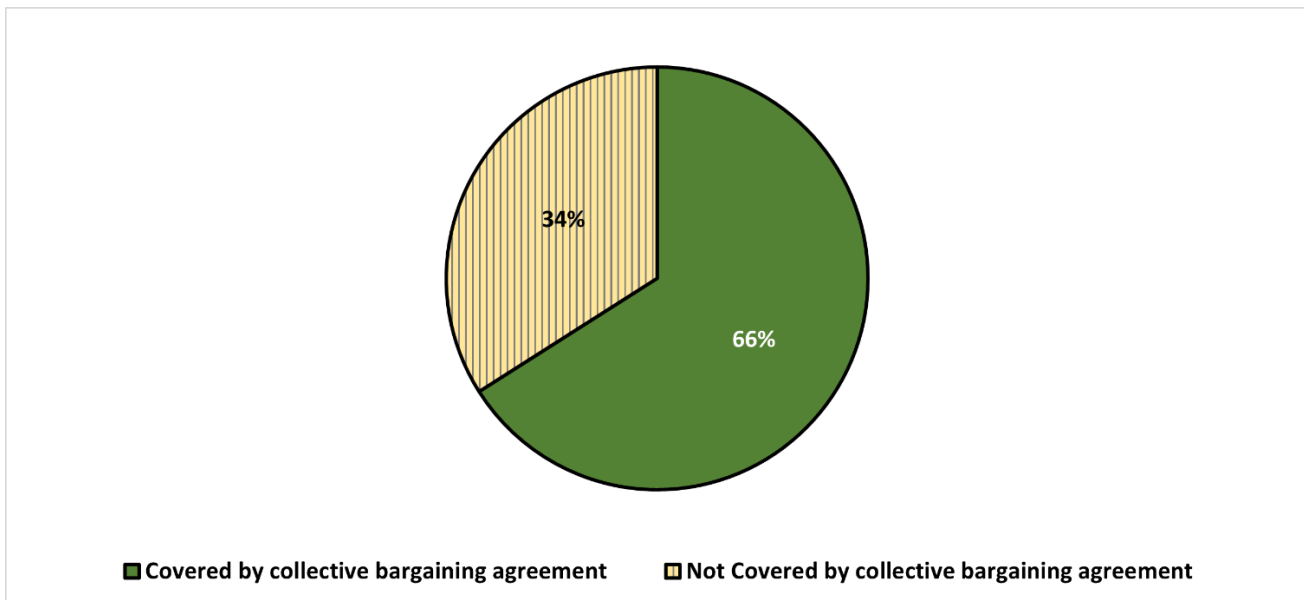


Figure 1.6: Collective bargaining agreement (CBA) coverage in the federally regulated private sector, 2021⁶⁶



Employment equity across Canada

Québec is the only other jurisdiction with a comprehensive legislative approach to employment equity covering the public service and a broad range of public sector institutions including state enterprises and corporations whose board of directors is appointed by the government; universities, colleges (Cégeps) and school boards; municipal employers including transit authorities, public health care institutions, and the Sûreté du Québec.⁶⁷ Québec also has legislation on employment equity in public procurements.

Finally, the Québec *Charter of Human Rights and Freedoms* also permits employment equity programs. They may be either voluntarily proposed by the employer or recommended by the Québec Human Rights and Youth Rights Commission following an investigation. If the Commission's recommendation is not followed, it may seek an order of a tribunal to enforce it. An important example of a tribunal order occurred in the case of *Gaz Métropolitain*.⁶⁸ Québec's significant leadership on proactive measures, including on pay equity, is referenced throughout this report.

Initiatives in the 1990s to extend employment equity to the private sector in Ontario and British Columbia faced significant backlash.⁶⁹ In British Columbia, the *Public Service Act* gives agencies the discretion to develop employment equity programs.⁷⁰

Saskatchewan references employment equity and diversity in its *Public Service Act* (ss. 3(d), 11(2)(c) and 22(e)) of the accompanying regulations. It covers Aboriginal peoples, persons with disabilities and visible minorities. It limits women's coverage to management and non-traditional occupations.⁷¹

The *Nunavut Land Claims Agreement* specifically foresees preferential hiring for Inuit workers. A number of modern treaties and self-government agreements include references to the employment of First Nations, Métis and Inuit workers. Their development offers an important basis for understanding how the *Employment Equity Act* framework can be transformed. They are discussed at greater length in Chapter 3.

Several other jurisdictions across Canada extend employment equity policies, programs and action plans within their public services. For example, the province of Newfoundland and Labrador has an employment equity program specifically for persons with disabilities. Some other jurisdictions specifically focus on Indigenous workers (e.g., Northwest Territories, Ontario). Ontario has also established goals through its anti-racism strategic plan for hiring Black employees. Nova Scotia has employment equity policy guidelines that empower provincial departments to post positions that are restricted to employment equity groups where the position matches an employment equity group, and the union has granted its permission. Its employment equity groups are Aboriginal people, African Nova Scotians and other racially visible persons, persons with disabilities and women. The Yukon's employment equity plan includes women, Indigenous people and persons with disabilities.

Canada seems far away from the harmonization encouraged internationally. But a strengthened federal *Employment Equity Act* framework that considers examples across Canada can help.

The Canadian population and labour market availability

Canada's total population according to the 2021 Census is over 36 million people, with 30 million over the age of 15. Of that number, the national Labour Market Availability (LMA) is calculated at 20.6 million people. LMA is calculated on the basis of Census data and the Canadian Survey on Disability.

For clarity, the LMA benchmarks are derived from estimates of workers, with relevant recent experience. As a result, the Canada wide workforces for women, Aboriginal peoples and members of visible minorities were derived from the non-student population aged 15 and over who worked some time within the 17 months previous to the 2021 Census (worked in 2020 or 2021). Two challenges built into the calculation of LMA are discussed later under discouraged workers and occupational segregation.

Table 1.1. Total population in private household and workforce for women, Aboriginal peoples and members of visible minorities - (2021 Census)⁷²

Population	Total	Men	Women	First Nations, Métis and Inuit peoples	Members of racialized populations
Total population	36,328,475	17,937,165	18,391,315	1,807,250	9,639,200
Percentage of total population	100.0%	49.4%	50.6%	5.0%	26.5%
Population 15 years & over	30,335,915	14,861,245	15,474,675	1,348,040	7,721,915
Percentage of population 15 years & over	100.0%	49.0%	51.0%	4.4%	25.5%
Workforce population	20,630,515	10,690,035	9,940,490	857,775	5,519,790
Labour market availability (LMA)	100.0%	51.8%	48.2%	4.2%	26.8%

Canada's workforce participation rates hover around 65.9% of the total population but hit an all-time low of 59.7% during the pandemic in April 2020.⁷³

The Labour Market Availability above is calculated for men, women, Indigenous persons and racialized groups (visible minorities) based on the Census 2021, released in 2022. Compared to the 2016 Census, the total workforce population increased by 3.4% from 19,956,255 in 2016 to 20,630,520 in 2021. Women, Aboriginal peoples and members of visible minorities increased by 3.4%, 6.8% and 29.5% respectively.

A few features are noteworthy.

- First, the availability of First Nations, Métis and Inuit populations has been growing steadily since 1996, with the largest proportion within the 25 – 34 age group (23.3%). They are the largest growing youth population.
- Second, women made up a slightly higher proportion of the racialized population as a whole (51.7%) than that of the population not belonging to the racialized employment equity group (50.8%). Yet overall, women’s actual labour market availability has remained at 48.2% since 2011.
- Third, the availability of racialized groups continues to grow and grew rapidly between 2016 – 2021, from 21.3% availability to 26.8% labour market availability. Statistics Canada projects that 2 out of 5 people in Canada will be racialized Canadians by 2041.74 Close to 80% of the racialized or visible minority population as a whole was made up of the following five subgroups: South Asian (27.0%), Chinese (18.8%), Black (14.8%), Filipino (10.1%) and Arab (6.6%).

Of the racialized population as a whole, Japanese and Black populations have the highest percentages of third-generation workers (that is, born in Canada to Canadian-born parents) – 31.7% of Japanese workers and 5% of Black workers.⁷⁵

In the labour force, 44.9% of racialized groups held a university certificate, diploma or degree at bachelor level or above, compared to 26.8% not belonging to a population included in the racialized employment equity group. Education levels for racialized populations are high, and often exceed the population average.

Conspicuously absent in Table 1.1 above, based on Census 2021 data, are corresponding data providing the labour market availability of persons with disabilities. New data on disabled workers come available approximately a year after Census data are released. The Canadian Survey on Disability, which comes available every 5 years, uses a more inclusive set of filter questions to identify persons with disabilities than the Census. Over time it has improved coverage of a range of disabilities. The 2022 Canadian Survey on Disability data were collected from May – October 2022, and data are to be available in late 2023. The workforce population for persons with disabilities comprises persons aged 15 to 64 who worked anytime between 1986 and 1991; 1996 and 2001; in 2011 or 2012; and in 2016 or 2017.

The 2022 survey includes questions on barriers to accessibility, in keeping with the approach that emerges from the *Accessible Canada Act*. Below is a table that introduces the most recent information available:

Table 1.2: National labour market availability (percent)⁷⁶

Census cycle	1996	2001	2006	2011	2016	2021
Women	46.4	47.3	47.9	48.2	48.2	48.2
First Nations, Métis and Inuit Peoples	2.1	2.6	3.1	3.5	4	4.2
Members of racialized populations	10.3	12.6	15.3	17.8	21.3	26.8
Persons with disabilities	N/A	5.3	4.9	4.9	9.1	N/A

While the most recent available data on the population of persons with disabilities in Canada dates from 2017, Statistics Canada, through the use of its projection tool, *Demosim*, predicts stability in the population of persons with disabilities.

Table 1.3: Projected share (%) of persons with disabilities among the active population aged 15 and over in Canada, 2016-2024⁷⁷

Persons with disabilities	2016	2018	2020	2022	2024
Canadian citizens and immigrants without Canadian citizenship	15.9	15.9	15.8	15.8	15.7
Canadian citizens only	16.5	16.4	16.4	16.4	16.4

Not surprisingly, the available workforce in Canada is overwhelmingly urban.

Yet employment equity applies not only to fast growing central metropolitan areas and other urban spaces, but also to non-metropolitan areas and rural spaces with populations of less than 10,000 inhabitants. Rural Canada comprised 17.8% of the population in 2021. Although this number is down from 18.7% in 2016, rural populations have grown significantly in some parts of the country, including Nunavut. The pandemic with its work at home mandates has also led workers to move to locations with lower density, including rural communities.

Rural areas are far from monolithic. And urban spaces may or may not be remote. Consider that most of Canada's population (88.0%) live in the municipalities that make up only 6.1% of Canada's landmass. Consider too that half of the people living within municipalities identified as Indigenous communities live in remote areas of Canada.⁷⁸ Targeted internal mobility and immigration are occurring into rural communities in specific industries and include temporary migration into agriculture. These phenomena extend far beyond that familiar image, however, and can be the site of creativity, initiative and stimulus for inclusion.⁷⁹

The demography matters. Equitable workplace inclusion is important throughout Canada, and opportunities for innovation will vary. They warrant our ongoing attention as the *Employment Equity Act* framework is rethought.

Achieving employment equity?

More granular data for each employment equity group – current or as proposed – will be presented in Chapter 3. We have presented enough data to provide a sense of some key features of the general labour market.

As discussed in the introduction, the federal workplace is a small percentage of the whole. From the information currently available, how have federal employers – within the public service and private sector - fared? Are they making reasonable progress on their goals to represent workers at the level at which they are available in the relevant labour market (attainment rates)? Are they achieving and sustaining employment equity?

Federal public service

In the 2020-2021 annual report released on 13 July 2022, the core public administration through the Treasury Board secretariat reported that it had met its targets for women and visible minorities as composite groups in all but the executive hiring level. The share of hires and promotions from Indigenous peoples and persons with disabilities is below their representation within the core public administration. Moreover, they acknowledged that “some subgroups of visible minorities do not have the same experience as others in the recruitment processes,”⁸⁰ offering based on the Public Service Commission’s 2021 audit that “of all visible minority groups, Black candidates experienced the greatest decrease in representation between the job application and appointment stages (from 10.3% to 6.6%).”⁸¹

The Treasury Board Secretariat currently relies on a benchmark prepared specifically for its needs, workforce availability (WFA).

WFA is a subset of the labour market availability figures used by private sector employers. It is used to assess the representation or attainment rates in the federal public service. To determine WFA, additional criteria are applied to the labour market availability (LMA) population. They include education levels specific to the public service, and for a long time included a citizenship criterion. The WFA factors have significantly narrowed the availability of workers primarily in the racialized populations group, at times making it look like this group was overrepresented in the core administration of the federal public service when the measure used by most other employers would have told a different story. Some of this gap has recently been reduced, because the *Public Service Employment Act* was changed to include permanent residents on June 29, 2021. With that change, the rationale for calculating a separate WFA for the public service may also have been significantly reduced. The differences between workforce availability and labour market availability for most other employment equity groups, including First Nations, Métis and Inuit workers, and workers with disabilities are so low, and the representation challenges so persistent, that our task force was left to wonder whether energies might not be better spent, elsewhere – notably by focusing on barrier removal.

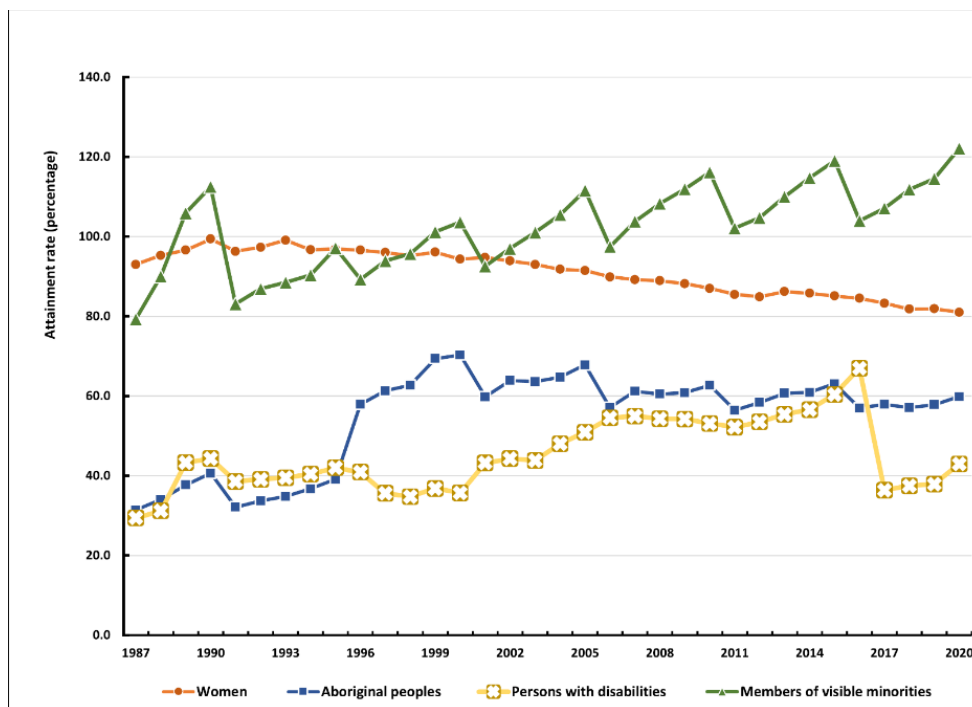
Private sector employers – both those that are federally regulated (the Legislated Employment Equity Program, LEEP) and those that are included in the framework through the Federal Contractors Program (FCP) – establish plans to set their own “short term” goals to redress representation gaps. The Labour Program reports that overall, for the 562 federally regulated private sector employers that reported data for all four designated groups in 2020, the attainment rate has been declining for women workers since it reached its highest point in 1990 at 99.4% - in 2020 it was at the lowest rate, 81.0%. The remaining 13 employers in 2020 were reporting for the first time, and so are not included in these trends.⁸²

For Indigenous workers, while from 1987 – 2000 there has been an upward trend, some of that was due to the way in which the Labour Market Availability was calculated. However, since 2001, the attainment rate has remained largely the same, and it is only at 59.9% in 2020.

For workers with disabilities, changes to the calculation of the Labour Market Availability also affected the attainment rates. While there was an observed increase of 29.4% in 1987 to 67.0% in 2016, with the new LMA the attainment rate was re-calculated at 36.4% in 2017 and sits at 43% in 2020.

Finally, for members of racialized groups, the attainment rate has been above 100%, sitting at 122.1% for 2020. Yet the report does not disaggregate so those members of different sub-groups within the visible minorities category that are underrepresented remain unknown under this manner of reporting. Moreover, the report is based on Census information that is now dated; recall that racialized groups' availability grew by over 5% in the period between the 2016 and 2021 Census.

Figure 1.7: Designated group attainment rate (Canadian LMA*) from 1987 to 2020 (by percentage)⁸³



These results varied by sector. The largest percentage of both employers (67%) and employees (41%) is found in the transportation sector. The banking and financial services sector accounts for over a third of all employees (34.7%) albeit 7.7% of the employer population. The communications sector is the third largest sector with 10.9% of employers and 16.2% of employees. The *Employment Equity Act Annual Report, 2021* also showed variation by salaries, disaggregated by gender.

There was no discussion of other barriers. However, the Labour Program has in other information highlighted the importance of barrier removal:

Representation rates are an indicator of compliance, but the purpose of the EEA is to remove barriers and correct under-representation. When the Labour Program notices that there has been non-compliance and that goals have not been met, it opens a dialogue with the employer on the measures put into place and to identify whether there are circumstances beyond the employer's control. The Labour Program therefore follows up and monitors the efforts of the employer in setting up new targets. The Labour Program tends to adopt a collaborative approach with employers, based on an open and frank dialogue.

Labour Program, July 2021

Finally, the Labour Program's *Employment Equity Act Annual Report, 2021* contained a brief discussion of the Federal Contractors Program (FCP) and the Workplace Opportunities: Removing Barriers to Equity (WORBE) grants and contributions initiative designed to support private-sector employers to improve representation.

Are we truly measuring the changing workforce?

“As our economy increasingly relies on precarious, low-wage, contract-based work, higher numbers of workers and jobs will not be covered by employment equity legislation, a consideration that must be taken into account and addressed in the Act's modernization. ... A strengthened *Employment Equity Act* that considers and addresses the current realities of Canada's workforce and the labour market is a critical tool needed to overcome the barriers to decent work for those belonging to communities that have been marginalized and who continue to face unstable, often dangerous work for low pay.”

Canadian Labour Congress, Submission to the EEART, April 2022

Employment equity challenges exclusionary barriers to workplace access. Some may consider it as a rather technical, even niche topic. But a clear message came through our broad consultations, study of the law, statistics and expert reports: employment equity is central to labour law in Canada and a crucial component of what makes work fair.

In employment equity, we might have gotten so caught up in looking at where we want workers from employment equity groups to be able to work that we lose sight of them even when they are working in the same workplaces but under different contractual forms. The workforce in Canada has changed dramatically since the 1980s when employment equity was conceived and introduced into law. Non-standard or precarious work became a pronounced feature of Canadian workplaces around the time that the *Employment Equity Act* was first adopted in 1986. Are we capturing the workplaces we need to capture?

Much has been written about these changes. They can be summarized in the broad strokes that follow, but one point needs to be recognized: workers in employment equity groups have tended to be overrepresented in non-standard, precarious work. Most of the implications of the broad strokes canvassed below are addressed in Chapter 7, alongside technical recommendations for comprehensive coverage.

Offshoring and Canada in the world

The risk of employment moving elsewhere has been a core concerns about globalization. Canada has committed to open trade relationships with the world. Increasingly this commitment is recognized to include respect for fundamental principles and rights at work – including equality – and the effective enforcement of labour laws.⁸⁴

Offshoring work to other countries affects a broad range of industries. In federal jurisdiction, it may be epitomized in the public imaginary by telecommunications customer services provided by call-center workers abroad.

Researchers acknowledge that multinationals can have a complex impact on social policy. Some research shows that beyond country of origin of the multinational enterprise, unions are a strong predictor of compliance across foreign multinational enterprises in Canada, with a focus on Ontario.⁸⁵ Sometimes social policy initiatives become more important in an increasingly integrated world and the basis of competition. This is not necessarily negative: state provided healthcare may for example be considered a comparative advantage for businesses to settle in Canada. Studies focused specifically on employment equity are limited, however. So far, researchers have not identified a clear convergence or divergence between the *Employment Equity Act* framework and offshoring of work to the United States, although they have called for more evidence.⁸⁶ The uncertainty may relate to the shifting legal landscape on affirmative action and the rise of voluntary EDI in the United States.⁸⁷ Enforcement of employment equity in Canada has also been characterized as weak.⁸⁸ The results of our task force's consultations seem relevant too: there is broad acceptance of employment equity as an important feature of a diverse Canadian society, economy and workforce. We may come to understand this broad acceptance, coupled with a supportive framework to achieve and sustain employment equity, as a source of Canada's competitive advantage in a plural world.

From large to small employers

There has been a general societal move from large to small employers. The features of the move are important. David Weil vividly calls the changing workplace the fissured workplace:

Fissured workplaces:

Like rocks split by elements, employment has been fissured away from ... market leaders and transferred to a complicated network of smaller business units.

David Weil, Enforcing Labour Standards in Fissured Workplaces (2011) 22:2 The Economic and Labour Relations Review 33 at 36

Subcontracting, contracting out or outsourcing, the use of employment agencies, franchising and self-employment are all important parts of this picture. The Canadian Labour Congress considered that outsourcing was a matter of concern for the viability of the *Employment Equity Act* framework.⁸⁹

The variations are multiple, and so is the degree of dependency between a traditional, standard employment relationship and a fully independent contractor. The following was observed as early as 2002 for employers under the Federal Contractors Program (FCP):

Changes in the context in which FCP operates have major implications and present challenges for the administration and implementation of the program. For example, the declining size of Canadian private sector companies over the past decade means that fewer companies meet the FCP's 100+ employee threshold and therefore fewer firms are covered. Also, as a result of mergers and acquisitions, the definition of the contracting organization may become less clear. For example, a small company may own 5 subsidiaries with a workforce of 500 employees, but not appear to be covered by FCP if the parent company has only 79 employees. Some of Canada's most prominent corporations, which were previously covered by FCP, were found in this research to be classed as having under 100 employees, because of outsourcing, and were therefore no longer covered by the program.⁹⁰

Our task force observed that fissuring workplaces pose a challenge to coverage under the *Employment Equity Act* framework, not only for employers under the FCP but also for some public service agencies and federally regulated private sector workplaces where the size of the workplace is near the threshold.

There is one further important observation: fissured workplaces are reported to concentrate a high degree of labour violations in low wage work, where employment equity groups tend to be overrepresented.⁹¹

Precarious workers

Not only has labour and employment law long excluded many precarious workers.⁹² The workers it has tended to exclude are overwhelmingly workers from employment equity groups. Employment equity group members have tended to be overrepresented in precarious work, that is, “forms of work for remuneration characterized by labour market insecurities such as degree of certainty of continuing employment, low income, lack of control over the labour process, and limited access to regulatory protection.”⁹³

Temporary employees are one example of precarious workers. As explained in Chapter 7, they are to some extent already covered under the *Employment Equity Act* framework. They may, however, be recruited by temporary agencies. Temporary employees may be considered to be the employees of the temporary agencies that recruited them under some labour, employment or social security laws, and the employees of the federally regulated public service or federally regulated private sector employer under others.

More generally, there is a tendency to assume that precarious workers are in low wage work that is often considered to be low skilled. Yet precarious workers may also be professional workers. Precarious professional workers are those working full time in positions without pension plans or sick days, or with unpredictable incomes or work schedules, and correlated with relatively low professional earnings. They are not necessarily younger or less experienced than professionals in more secure positions. They are primarily women.⁹⁴

Demographic factors also intersect; researchers underscore the extent to which racialized immigrant workers, alongside racialized workers more generally, regardless of their place of birth, tend to have lower earnings than the population at large.⁹⁵ The 2017 Aboriginal People’s Survey conducted by Statistics Canada, which focused on participation in the economy by First Nations people living off reserve, Métis and Inuit, reported that for nearly a third (31%) of First Nations people working part time, part time work was not a choice.

Approximately 30% of precarious workers are in the public service.⁹⁶ In its 2020-21 report on hiring, the Public Service Commission noted that hiring of indeterminate workers had decreased by 27.4%, while term employment was up by 14.9%. Overall, hiring activity was down by 15.5%, with casual employment down by 18.5% and student employment down by 32.1%.⁹⁷ We were told that the pandemic explained some of this practice.

The Canadian Association of University Teachers (CAUT) noticed that based on their own workforce surveys, equity groups tend to be under-represented in tenured or tenure-track, full-time employment yet starkly overrepresented in precarious, term-limited, part-time or contract academic job

categories.⁹⁸ Some of the workforce covered by CAUT falls under the federal *Employment Equity Act* framework through the Federal Contractors Program.

Precarious workers become a specific concern for employment equity when employment equity groups are overrepresented in precarious work. If a covered employer has a lot of diversity in precarious work and not so much in senior management, we should have that full portrait for the purposes of the federal *Employment Equity Act* framework.

Who tends not to be covered?

The key question ought to be “to whom should labour law apply” not “is that person an employee?”

Judy Fudge, Eric Tucker & Leah Vosko, The Legal Concept of Employment: Marginalizing Workers, Report for the Law Commission of Canada, 2002, at 122.

In precarious work, it might be challenging to identify who is the employer, as workers may be self-employed or autonomous workers.

When workers are in fact employees but have been mischaracterized, this problem should be acknowledged and addressed. The importance of accurate classification is recognized internationally in the ILO’s *Employment Relationship Recommendation, 2006 (No. 198)* and in Canadian case law – including under the *Income Tax Act* and increasingly in relation to recent forms of work organization typified by “uberization.”⁹⁹

Broader, more inclusive coverage for workers has extended beyond narrowly defined employment contracts, notably under the *Canadian Human Rights Act* and through the coverage of dependent contractors in Part I of the *Canada Labour Code*.

For employment equity, the issues present themselves somewhat distinctly. That is because the goal is equitable inclusion. Equitable inclusion is a challenge to the overrepresentation of employment equity groups in precarious work. We must therefore go back to first principles and ask: what categories of employment should be covered under an *Employment Equity Act* framework to ensure that employment equity group members are equitably included in the workplace?

Understanding discouraged workers, overqualification and labour market availability

One of the challenges that our task force wanted to address was the need to obtain a strong portrait of what it means to be a discouraged worker. Our related concern was to identify whether overqualified workers were potentially structurally mis-identified in employment equity benchmarks.

In the Canada-wide Labour Market Availability benchmark, employment equity data concerns itself with the following criteria: labour market participation, unemployment, income and ultimately, occupational segregation.

A Transformative Framework to Achieve and Sustain Employment Equity

As concerns discouraged workers, we know that the benchmark does not include workers who have been absent from the labour market for 18 months or more. Some of those workers are discouraged workers, who are taken out of the labour market not because they do not want to find work, but because they do not think they can find suitable work.

As concerns overqualified workers, the benchmark calculates availability in relation to one of the 14 occupational groups identified in the *Employment Equity Regulations*:

- senior managers
- middle and other managers
- professionals
- semi-professionals and technicians
- supervisors
- supervisors: crafts and trades
- administrative and senior clerical personnel
- skilled sales and service personnel
- skilled crafts and trades workers
- clerical personnel
- intermediate sales and service personnel
- semi-skilled manual workers
- other sales and service personnel, and
- other manual workers

We were concerned that the benchmarks that we are using may prevent us from seeing those who have taken themselves out of the labour market, due to discouragement.

We were also concerned about something that experts and representatives of employment equity groups have been telling us for some time: might employment equity data collection lead us to take their overrepresentation in occupations below their qualification level for granted, treating it as if it is the ‘natural’ state of affairs and overlooking the inequity?¹⁰⁰

Consider for example that the Filipino population has similarly high educational levels to other racialized populations, but they are underrepresented in occupations that require a bachelor’s degree or higher. They are even overrepresented in occupations below their qualification level relative to other members of racialized groups who earned foreign degrees.¹⁰¹

Something else is happening. We need to recognize that a significant number of Filipino women came to Canada under various versions of the Caregiver Program, which recruits workers without permanent resident status and with degrees such as registered nurse. Those workers take care of families in Canada, then face hurdles to have their degrees recognized and to exercise their profession if and when they receive permanent residency in Canada. Without reducing this to a single story, it is important to recognize that there have also been intergenerational challenges for those who are subsequently able to bring their families to Canada.¹⁰² This phenomenon has been widely discussed in the social science literature, both as it relates to members of the Filipino community in Canada, and to members of Black communities in Canada who faced similar trajectories in immigration from the Caribbean since 1955.¹⁰³ According to the 2021 Census, nurses aides, orderlies or patient service

Chapter 1: Equitable inclusion in the changing world of work: Toward supportive & sustainable coverage

attendants in the health care sector are 14.6% composed of Filipino workers and 15.6% composed of Black workers.

From the perspective of employment equity, the combination of overrepresentation and occupational segregation raises a foundational challenge: it reflects a problem for how labour market availability is actually calculated. The problem is commonly captured by the doctor driving a taxicab. That problem gets complicated by the range of qualifying requirements that lead a newcomer to Canada who must put food on the table for the family to accept the job that does not do justice to the qualifications. When, as we will see in Chapter 4, it is possible to identify whole occupational categories that embed overqualification and treat persons with higher qualifications as available only for the lower qualification, we are building a measure of availability on the basis of pre-existing structural barriers, rather than removing the barriers.

In sum: the length of time it takes to meet licensing requirements could be a barrier. The policy objective may be entirely legitimate: ensuring public safety. But the adverse impact on racialized groups may well warrant us to address the root problem, as a society, and the calculation of labour market availability needs to support that work.

Take a look at the data made available through new data visualization tools by Statistics Canada on 29 March 2023. It shows racialized populations' degree of "overqualification" – defined as people with a bachelor's degree or above (at bachelor's level or above) who, during the current year or the year prior to the census, held a position usually requiring a high school diploma or equivalency certificate or less.

- The "visible minority" population as it is currently defined was 22% overqualified.
 - Filipino workers (44.9%)
 - South Asian workers (23.9%)
 - Black workers (23%)
 - Latin Americans (21.3), and
 - the multiple visible minority workers (21.1%) had the highest overqualification rates.
- These percentages compared with 10.8% of the population that is not visible minority.
- Even when one controls for those admitted to Canada more than 10 years ago, the rates remain disproportionately high,
 - at 17.8% for visible minorities as a whole
 - with Filipino workers (31.5%)
 - South Asian workers (21.2%)
 - Latin American workers (18.5%)
 - Japanese workers (17.7%), and
 - Black workers (16.9%) having the highest overqualification rates
- These percentages compared with 9.6% for the population that is not visible minority¹⁰⁴

Barrier removal is not just an employer responsibility. It is also a societal responsibility. And barrier removal is a feature of the chosen benchmark, which enables employers to achieve and maintain the representation numbers required under the *Employment Equity Act*. How we calculate this will be discussed in Chapter 2 on data justice.

There is occupational segregation: It is horizontal segregation, for example where women and men are concentrated in different jobs, as well as vertical segregation, where women occupy lower positions

in the same occupations than men.¹⁰⁵ We are increasingly able to identify the extent that these patterns affect a range of equity groups.

Have a look too at the distribution of the lowest and highest paid occupations in Canada – full year, full time – under the 2021 Census, presented in full in Appendix L.

- Based on the most recent available statistics, the lowest paid occupations, we find hairstylists, bartenders, taxi and limousine drivers and chauffeurs and home childcare providers. Hairstylists are 82.6% women; taxi and limousine drivers and chauffeurs are overwhelmingly racialized men (93.5% men; 57.3% racialized).
- Among the highest paid occupations, we find judges, senior managers in both the public and private sectors, petroleum engineers, and specialists in surgery. There are a total of 1370 men+ judges (53.1%) and 1205 women+ (46.7%); of those totals, only 80 judges are Indigenous, and 155 judges are racialized including only 30 Black judges. In the ten other categories, the underrepresentation of women, Indigenous and visible minorities is significant.

The takeaway is clear: of the 10 lowest paid occupations using the National Occupational Classification, either women or racialized populations predominate.

As we discuss throughout this report, we are deeply concerned about the unavailability of detailed information for persons with disabilities. Our task force was repeatedly informed that discouragement is a phenomenon that is particularly important for persons with disabilities.

We discuss these findings in greater detail in Chapter 3. But it is important to state this clearly at the outset: **the persistence of occupational segregation faced by employment equity group members is disarming.**

We therefore need to know what is happening to discourage and to overqualified workers for more reasons than might immediately be recognized.

If workers with doctorates who drive taxis are simply being captured as taxi drivers, we have a problem.

Employment equity – for all its number crunching – will miss these workers. We need the data that allow us to capture this overrepresentation and to remove the barriers that prevent those workers from getting the job opportunities for which they are qualified.

We need to rethink the data collection, to foster data justice.

Recommendation 1.2: Employment equity data collection and benchmarks should be systematically rethought to eliminate barriers and foster data justice.

⁵³ *Canadian Industrial Relations: The Report of Task Force on Labour Relations* (Chair H.D. Woods) (Privy Council Office, 31 December 1968) at 97, para. 300.

⁵⁴ *Fairness at Work: Federal Labour Standards for the 21st Century* (Commissioner Harry W. Arthurs) (Gatineau QC: Government of Canada, 2006) 28-31.

⁵⁵ Morley Gunderson, *Revisiting the Abella Report: Final Report to ESDC* (Ottawa: Employment and Social Development Canada, September 2018) at 3, 18.

⁵⁶ Morley Gunderson, *Revisiting the Abella Report: Final Report to ESDC*, ESDC (Ottawa: Employment and Social Development Canada, September 2018) at 19.

⁵⁷ Treasury Board of Canada Secretariat, *Annual Report: Employment Equity in the Public Service of Canada 2020 – 2021* (Ottawa: Treasury Board of Canada Secretariat, 2022) at 3.

⁵⁸ This was a drop of 4.9% from 776 997 employees reported in 2019. See Employment and Social Development Canada, *Employment Equity Act Annual Report 2021* (Ottawa: Employment and Social Development Canada, 2021) at 7.

⁵⁹ Source: Public Service Commission of Canada, *Annual Report 2021–22: Building tomorrow’s public service today* (Ottawa: Public Service Commission of Canada, 2022).

⁶⁰ Employment and Social Development Canada, *2015 Federal Jurisdiction Workplace Survey; 2015* (Dataset), (Ottawa: Statistics Canada, 30 November 2016) and Statistics Canada, *2021 Survey of Employment, Payroll, and Hours*, (Ottawa: Statistics Canada, 2021); Statistics Canada, *2021 Labour Force Survey*. Research and Innovation Division, Labour Program calculations. *Federal Crown and Shared Governance corporations are included in the employee counts. Excluded are employees in Indigenous Governments on First Nations reserves, of which there were approximately 60,000 in 2021.

⁶¹ Source: 2015 Federal Jurisdiction Workplace Survey; 2015 and 2021 Survey of Employment, Payroll, and Hours; 2021 Labour Force Survey. Research and Innovation Division, Labour Program calculations. *Federal Crown and Shared Governance corporations are included in the employee counts. Excluded are employees in Indigenous Governments on First Nations reserves. **The figure for employers given (760) is directly from the 2015 Federal Jurisdiction Workplace Survey (FJWS). It is higher than the number of employers reporting under the Legislated Employment Equity Program (LEEP) for the 2020 calendar year (575). There could be various reasons for the difference. One example is a difference in how employers are counted: under LEEP, two or more employers who jointly operate related businesses may be authorized to file a consolidated report and would therefore count as one employer, while the FJWS would count each of these employers separately. A second example is a difference in which employees are counted to determine the 100-employee threshold: LEEP does not include all employees receiving a T4 in its count (the *Employment Equity Regulations* exclude persons employed on a temporary or casual basis for fewer than 12 weeks in a calendar year from that determination), whereas the FJWS does. These examples could lead to the FJWS giving a higher count of federally regulated private-sector employers with 100 or more employees than LEEP.

⁶² Source: 2015 Federal Jurisdiction Workplace Survey; 2015 and 2021 Survey of Employment, Payroll, and Hours; 2021 Labour Force Survey. Research and Innovation Division, Labour Program calculations.

⁶³ Dwayne Benjamin, Morley Gunderson, Thomas Lemieux & Craig Riddell, *Labour Market Economics: Theory, Evidence and Policy in Canada*, 8th ed (Toronto: McGraw-Hill, 2018) at 406.

⁶⁴ Sources: Statistics Canada, *Survey of Work History*, 1981; *Labour Force Survey*, May 1997 and May 2022. Note: Main job held in May by employees aged 17 to 64. The commercial sector includes all industries except educational services, health care and social assistance, and public administration.

⁶⁵ Note: Due to rounding, estimates and percentages may differ slightly between different Statistics Canada products, such as analytical documents and data tables. Source: Statistics Canada, *Labour Force Survey*, custom tabulation

⁶⁶ Source: Federal Jurisdiction Workplace Survey, 2008 and 2015; Federal Mediation and Conciliation Service’s Industrial Relations Information System, 2022. Research and Innovation Division, Labour Program calculations.

⁶⁷ *Act respecting equal access to employment in public bodies*; L.Q. Ch. A-2.01. Note the Cree Nation Government and the Kativik Regional Government are expressly excluded from the scope of the Act (Section 2(2)).

⁶⁸ *Gaz métropolitain inc. c. Commission des droits de la personne et des droits de la jeunesse*, 2011 QCCA 1201.

⁶⁹ Abigail B Bakan & Audrey Kobayashi, “Employment Equity Legislation in Ontario: A Case Study in the Politics of Backlash” in *Workplace Equality: International Perspectives on Legislation Policy and Practice* (The Hague, New York: Kluwer Law International, 2002); Abigail B Bakan & Audrey Kobayashi, “Backlash Against Employment Equity: The British Columbia Experience” (2004) 29:1 *Atlantis* 61.

⁷⁰ *Public Service Act*, RSBC 1996, c 385, s 8(3)(a).

⁷¹ RRS c P-42.1 Reg 1; Government of Saskatchewan, “Section-1000-Employment Equity” (28 February 1994) online: *Taskroom* <taskroom.sp.saskatchewan.ca/how-do-i/access-the-human-resource-manual/section-1000-employment-equity>.

⁷² Source: Statistics Canada, *Census 2021*

⁷³ Statistics Canada, 1976 – 2023, *Monthly*.

⁷⁴ Statistics Canada, *Canada in 2041: A larger, more diverse population with greater differences between regions*, Catalogue No 11-001-X (Ottawa: Statistics Canada, 2022), *The Daily*, 8 September 2022 based on projections data from the 2016 Census.

⁷⁵ Statistics Canada, *A Portrait of Educational Attainment and Occupational Incomes among Racialized Populations in 2021*, Ottawa: Statistics Canada, 2023) at 4.

⁷⁶ Source: Census (1996, 2001, 2006, 2016, 2021), National Household Survey (2011) and Canada Participation and Activity Limitations Survey (2001, 2006) and Canadian Survey on Disability (2012, 2017).

⁷⁷ Source: Demosim 2021, using a variant of the scenario Medium growth for the Indigenous populations from “Projections of the Indigenous populations and households in Canada, 2016 to 2041: Overview of data sources, methods, assumptions and scenarios”, with participation rates continuing the 1995-2019 trends and 2016-2020 counts of births, deaths, immigrants and emigrants adjusted to match the most recently available estimates. Demosim’s disability rate calculation is based on the 2017 Canadian Survey on Disability (CSD), Statistics Canada’s main source of data on disability for the non-Indigenous population, alongside modelling using the 2017 Aboriginal Peoples Survey (APS), the main source of information on disability for Indigenous people. Statistics Canada, “Projecting Disability with Demosim” (undated document provided to the task force).

⁷⁸ Statistics Canada, *Population Growth in Canada’s Urban Areas, 2016 to 2021* (Ottawa: Statistics Canada, 2022).

⁷⁹ See generally Clark Banack and Dionne Pohler, eds., *Building Inclusive Communities in Rural Canada* (Edmonton: University of Alberta Press, 2023).

⁸⁰ Treasury Board of Canada Secretariat, *Annual Report: Employment Equity in the Public Service of Canada 2020 – 2021* (Ottawa: Treasury Board of Canada Secretariat, 2022) at 4.

⁸¹ Treasury Board of Canada Secretariat, *Annual Report: Employment Equity in the Public Service of Canada 2020 – 2021* Ottawa: Treasury Board of Canada Secretariat, 2022) at 23.

⁸² Employment and Social Development Canada, *Labour Program, Employment Equity Act Annual Report 2021*, Catalogue No Em5-2E-PDF, ISSN: 1929-5426 (Ottawa: Employment and Social Development Canada, 2021) at 9.

⁸³ Sources: Statistics Canada, 1986 to 2016 Census; 1986 and 1991 Health and Activity Limitation Survey; 2001 and 2006 Participation and Activity Limitation Survey; 2011 National Household Survey; and 2012 and 2017 Canadian Survey on Disability, Reproduced from Employment and Social Development Canada, Labour Program, *Employment Equity Act Annual Report 2021*, (Ottawa: Employment and Social Development Canada, 2021) at 10.

⁸⁴ See e.g. Chapter 23, Canada-United States-Mexico Agreement, 30 November 2018, as amended by Protocol of 10 December 2019.

⁸⁵ Dionne Pohler & Chris Riddell, “Multinationals’ Compliance with Employment Law: An Empirical Assessment Using Administrative Data from Ontario, 2004-2015 (2019) 72:3 ILR Review 606 at 627.

⁸⁶ Rafael Gomez and Morley Gunderson, “Does Economic Integration Lead to Social Policy Convergence? An Analysis of North American Linkages and Social Policy,” In *Social and Labour Market Aspects of North American Linkages*. Edited by Rick Harris and Thomas Lemieux. (Calgary: University of Calgary Press, 2005) 309 at 315, 340, 348.

⁸⁷ Stacy Hawkins, “Affirmative Action Law & Policy in the United States: Past, Present, and Future,” Unpublished Paper prepared for the EEART, 31 August 2022.

⁸⁸ Rafael Gomez and Morley Gunderson, “Does Economic Integration Lead to Social Policy Convergence? An Analysis of North American Linkages and Social Policy,” In *Social and Labour Market Aspects of North American Linkages*. Edited by Rick Harris and Thomas Lemieux. (Calgary: University of Calgary Press, 2005) 309 at 340.

⁸⁹ Canadian Labour Conference, Presentation to the EEART, 29 March 2022.

⁹⁰ Evaluation and Data Development Strategic Policy, Human Resources Development Canada, *Evaluation of the Federal Contractors Program: Final Report* (Ottawa: Human Resources Department Canada, 2002) at 5.

⁹¹ See David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, (Cambridge, Massachusetts; London, England: Harvard University Press, 2014) at X; Judy Fudge, Eric Tucker & Leah Vosko, *The Legal Concept of Employment: Marginalizing Workers*, Report for the Law Commission of Canada, (Ottawa, ON: Law Commission of Canada, 2002) at 30-33.

⁹² Jean Bernier, Guylaine Vallée & Carol Jobin, *Les besoins de protection sociale des personnes en situation de travail non traditionnelle : Rapport final*, Québec, 2003.

⁹³ Leah F. Vosko and the Closing the Enforcement Gap Research Group, *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (Toronto: University of Toronto Press, 2020) at 15, 19 – 21.

⁹⁴ Trish Hennessy & Ricardo Tranjan, *No Safe Harbour: Precarious Work and Economic Insecurity Among Skilled Professionals in Canada*, (Ottawa: Canadian Centre for Policy Alternatives, 2018) at 14; Leah F. Vosko and the Closing the Enforcement

Chapter 1: Equitable inclusion in the changing world of work: Toward supportive & sustainable coverage

Gap Research Group, *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (Toronto: University of Toronto Press, 2020) at 15.

⁹⁵ Leah F. Vosko and the Closing the Enforcement Gap Research Group, *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (Toronto: University of Toronto Press, 2020) at 21 – 22.

⁹⁶ Trish Hennessy & Ricardo Tranjan, *No Safe Harbour: Precarious Work and Economic Insecurity Among Skilled Professionals in Canada*, (Ottawa: Canadian Centre for Policy Alternatives, 2018) at 14.

⁹⁷ Public Service Commission of Canada, *Annual Report 2020-21: Building tomorrow's public service today*, Catalogue No SC1E-PDF, ISSN 1912-0842, (Ottawa: Public Service Commission of Canada, 2021) at 7.

⁹⁸ Canadian Association of University Teachers, EEART Consultations, 31 March 2022, Report to the EEART, 28 April 2022.

⁹⁹ 1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue), 2013 FCA 85; Uber Technologies Inc. v. Heller, 2020 SCC 16, [2020] 2 S.C.R. 118.

¹⁰⁰ Marie-Thérèse Chicha, *Discrimination systémique – fondement et méthodologie des programmes d'accès à l'égalité en emploi*, Les éditions Yvon Blais inc., 1989 at 41ff; Québec, Ministère de l'Immigration et des Communautés culturelles, *Un emploi correspondant à ses compétences? Les travailleurs sélectionnés et l'accès à un emploi qualifié au Québec* by Jean Renaud and Tristan Cayn (Montréal: Ministère de l'Immigration et des Communautés culturelles, 2006) at 10; Steven Wald & Tony Fang, « Overeducated Immigrants in the Canadian Labour Market: Evidence from the Workplace and Employee Survey » (2008) 34 :4 Canadian Public Policy – Analyse de politiques 457.

¹⁰¹ Statistics Canada, A portrait of educational attainment and occupational outcomes among racialized populations in 2021 (Ottawa: Statistics Canada, 2023) at 7.

¹⁰² Statistics Canada, A portrait of educational attainment and occupational outcomes among racialized populations in 2021 (Ottawa: Statistics Canada, 2023) at 7; see generally Roland Sintos Coloma et al., *Filipinos in Canada: Disturbing Invisibility* (University of Toronto Press, 2012).

¹⁰³ Canada, Department of Foreign and International Trade, Admission of Domestic from the British West Indies, Memorandum from Minister of Citizenship and Immigration and Minister of Labour to Cabinet, Ottawa, 7 June 1955, Cabinet Doc. No. 131-55, Documents on Canadian External Relations; Agnes Calliste, “Canadian Immigration Policy and Domestic from the Caribbean : The Second Domestic Scheme” in Jesse Vorst, ed., *Race, Class, Gender: Bonds and Barriers* 133 (Toronto: Garamond Press, 1991).

¹⁰⁴ Statistics Canada, The Daily: Social Inclusion for Canada's ethnocultural groups: New Products, 29 March 2023; Statistics Canada, [Table 43-10-0071-01 Overqualification rate, by groups designated as visible minorities and selected sociodemographic characteristics for the employed labour force population aged 15 years and over in private households, 2011 and 2016](#).

¹⁰⁵ Tessa Wright, *Gender and Sexuality in Male-Dominated Occupations: Women Working in Construction and Transport* (Palgrave-MacMillan, 2016) at 18.

Chapter 2: Data justice

The human rights purpose of employment equity data collection

Justice for systemically oppressed communities does not simply arise in documenting inequalities through disaggregated data and taking urgent action based on what the data shows (although this is important), but also in reimagining and rebuilding how research is done in order to address ongoing social harm that has taken place through standard research practices in the province.

British Columbia Office of the Human Rights Commissioner, 2020

Data justice facilitates the identification of barriers to equitable inclusion at work. It enables workplace actors to work together to ensure that employment equity is implemented. It provides accountability, ensuring that reasonable progress can be made and monitored, so that employment equity will be achieved and sustained. Data justice is the backbone of substantive equality.

With this in mind, we understand that data collection is not an end in itself. If it is not understood to be done in alignment with its human rights purpose, it can cause harm.

Data and qualitative research on the nature and extent of labour inequalities, including its underlying causes, are crucial to determine the nature, extent and causes of discrimination, design and implement a relevant and effective national equality policy ... and monitor and evaluate its results.

ILO Committee of Experts on the Application of Conventions and Recommendations, General Observation on Discrimination based on Race, Colour and National Extraction, 108th Session, 2019 at 4

This report has drawn on the **grandmother principle**, articulated by the British Columbia Office of the Human Rights Commissioner, built out of a concern for meaningful community engagement and the development of respectful relationships. The grandmother principle calls for the data collection to be relevant, to be collected through data stewardship and respect for Indigenous data sovereignty that shows responsibility and reciprocity with communities, and to illustrate reflexivity – that is, a deep, continual examination of barriers and biases. The overall focus is to ensure that the data collection meets the overall human rights purpose. Systems are changed when the quality of relationships is changed.¹⁰⁶

The task force is informed by emerging data governance frameworks. The First Nations data sovereignty framework (First Nations Principles of ownership, control, access and possession or OCAP) is addressed in Chapter 3. OCAP provides crucial insights for thinking about respectful relationships in data collection on employment equity. Emerging frameworks include the EGAP (engagement, governance, access, protection), developed in the health care context out of a concern that data currently collected are not being used to improve Black people's lives. It calls for genuine, cyclical and accessible consultations with communities on data collection, management, analysis and use; governance that involves community decision making; the right of access by communities to their

collective data; and the safeguarding of individual rights and types of data.¹⁰⁷ A key takeaway for the purposes of employment equity is that it is crucial to take the time necessary to ensure that consultations are appropriately structured with representative community organizations, who can be meaningfully engaged to arrive at data justice solutions that help us all to achieve employment equity.

A steering committee for the data we need

The task force received numerous submissions calling for timely access to data to determine population demographics and labour market availability in order to assess attainment rates.

Our task force heard that there is a strong desire, within government, for greater collaboration with Statistics Canada to make evidence supported decisions more readily available. The task force heard from stakeholders that they were concerned that Statistics Canada collects little data on employment equity in its monthly Labour Force Survey. The Census collects more data but there is a lag in making that data available. We received concrete recommendations, including from the federal Anti-Racism Secretariat, in favour of strengthened collaboration with Statistics Canada. Support to data disaggregation was one of the key themes.¹⁰⁸

Repeatedly we heard that there is a need to work with Statistics Canada to collect and release more useful, timely and informative labour-wide employment and equity data.

The discussion paper that we commissioned from Professor Louis-Philippe Morin focused on the prospects of combining existing datasets to be able to gain the kinds of understanding of what is happening in Canadian workplaces that we need. Professor Morin offered a number of suggestions that could be considered to enhance employment equity data collection, including by selectively linking datasets such as the Census, the National Household Survey, the Labour Force Survey, the Canadian Employer-Employee Dynamics Database (CEEDD), the Canadian Community Health Survey and the Canadian Survey on Disability (CSD).¹⁰⁹ The data should be simplified to enable widespread use by analysts and other end users. The data should be readily downloadable.

Our task force chair and vice-chair gratefully witnessed how valuable data could be made available in an impressively short timeframe once the 30 November 2022 Census data were released, thanks to coordination and prioritization at a high level. We were told that the process reminded some long-serving public service employees of the past collaborations that were made possible at the outset of the *Employment Equity Act* framework.

It can be done.

It takes resources, it takes commitment, and it takes a deliberately structured institutional framework to ensure that it supports the transformative employment equity framework consistently over time.

Reviewing the significant but singular decision of the Canadian Human Rights Tribunal, *National Capitol Alliance on Race Relations v. Minister of National Health*¹¹⁰ was a further reminder. To be able to identify barriers with specificity to implement employment equity and ensure appropriate oversight and accountability, we need to have the appropriate high-level institutions in place. Only then will the right data be collected, and for the right reasons.

Data on statistical disparities alongside **information about employment equity group members' situation**, when available and presented together, complement and strengthen our understanding of the barriers to equity. The focus is on remedying the effects of discrimination, and on fostering equitable inclusion in the workplace through substantive equality.¹¹¹

What we also know is that there is tremendous, understandable fatigue with superficial data collection.

Stakeholders wanted to know what the real challenges were with representation, and how to fix them. They called for sophisticated data collection alive to demographic trends that could support employers to locate emerging pools of talent.

Employers stressed that the data collection system is broken. The data lags and lack of follow up undermine their ability to achieve employment equity. They asked for helpful, timely, easily-understandable feedback to make good on their commitment to inclusion.¹¹²

There is also a broad recognition that while the numbers really matter, data justice must take us beyond numbers. How peoples' life experiences are represented really matters.

Statistics Canada's recent consultative work with communities was a source of encouragement for understanding data. How can the *Employment Equity Act* framework, so rooted in workers' contextualized experiences, support ensuring that complex stories about the world of work are meaningfully told? This has been a key theme running through the task force report.

One starting point is clear and forms the substance of our first data justice recommendation: we need to re-create an institutional structure that is continuously able to update how employment equity data is collected, analyzed, used and made available.

That consultative structure should be able to address requests like the following, to rethink how sector-level data are calculated:

Better data is needed for universities and colleges to meet equity goals. CAUT has called for an expansion of Statistics Canada's University and College Academic Staff System survey (UCASS) to include equity data of academic staff beyond gender, and to collect information on contract academic staff and college faculty.

Canadian Association of University Teachers, Submissions to the EEART, April 2022

For example, Census data now tell us the "Location of Study," but treat those degrees obtained "Outside of Canada" as the same. We know that location of study does have an impact on the valuation of degrees or diplomas. One study showed that there is significant variation when degrees are earned in countries such as U.S., U.K., Australia, New Zealand and South Africa, or countries in continental Europe, as compared with most other countries in Asia, the Middle East, Africa, the Caribbean, and Latin America.¹¹³ The proposed Employment Equity Data Steering Committee could play a useful role in deciding whether it would be useful and feasible to disaggregate the "Outside of Canada" variable to capture the countries or regions in the world where study has taken place. There are many other examples. They are best handled in a deliberative forum that represents the technical specialists and the communities concerned.

Recommendation 2.1: An Employment Equity Data Steering Committee should be established under the *Employment Equity Act* to support implementation, meaningful consultations, and regulatory oversight to achieve and sustain employment equity.

Recommendation 2.2: The Employment Equity Data Steering Committee should have as a clear mandate to adopt a human rights-based, data justice approach.

Recommendation 2.3: The Employment Equity Data Steering Committee should comprise high level representation that includes as titular members Statistics Canada, the Employment Equity Commissioner, ESDC's Chief Data Officer, the Canadian Human Rights Commission, the Labour Program, the Public Service Commission and TBS-OCHRO.

Recommendation 2.4: The Employment Equity Data Steering Committee should include sub-committees with appropriate technical specialists within the federal government that are meaningfully representative of employment equity group members.

Recommendation 2.5: The mandate of the Employment Equity Data Steering Committee should include:

- recommending appropriate expansions or merging of databases, sources and surveys that affect the ability of federally regulated employers and employers subject to the Federal Contractors Program to report on the representation of employment equity groups and subgroups
- prioritizing the identification and removal of barriers in data benchmarks that affect discouraged and overqualified workers, and
- undertaking research in collaboration with academics and broader communities that are meaningfully representative of employment equity groups

Recommendation 2.6: Labour market surveys conducted by Statistics Canada should include a question, developed in consultation with the Employment Equity Data Steering Committee, asking how long workers looked for employment in their field of study.

Recommendation 2.7: The Employment Equity Data Steering Committee should be considered part of the *Employment Equity Act* framework.

Disaggregation and intersectionality

Concepts and practices

We live intersectional lives.

Enchanté Network, presentation to the EEART, 10 June 2022

Powerful statements are made possible by disaggregated data.

By making systemic inequalities in our society visible, data can lead to positive change. The same data, used or collected poorly, can reinforce stigmatization of communities, leading to individual and community harm.

British Columbia's Office of the Human Rights Commissioner, Disaggregated demographic data collection in British Columbia: The grandmother perspective, September 2020 at 8

The task force heard strong and consistent support for the employment equity groups of workers to be referred to in a distinctions-based and intersectional manner. From the Public Service Commission of Canada to unions, employee networks, private sector employers, and civil society, alongside international experts and representatives from the International Labour Office in Geneva, we heard that it was particularly important to be able to see how sub-groups are affected. Aggregate data collected to reflect the four current employment equity groups prevented us from seeing what was happening to sub-groups in the workplaces. By failing to collect disaggregated data, employment equity has masked and at times perpetuated systemic inequality in the workplace.

A distinctions-based approach focuses on addressing equity groups with due attention to their specific histories and identities. This is particularly significant for Indigenous peoples. They are nations, who have treaty rights and Indigenous rights recognized in the Canadian constitution and at international law. As is discussed in Chapter 3, their inclusion in employment equity legislation needs to be rethought to reflect the specificity of their experience and honour and respect nation-to-nation/government-to-government relationships.¹¹⁴

An intersectional and distinctions-based approach shares much with the Canadian government's championing of a Gender-Based Analysis Plus (GBA+) framework. GBA+ was broadly recognized as providing space for nuanced analyses, recognizing that people at once have multiple identities that interact; they cannot either be reduced to those identities. We heard from stakeholders, though, that they worried that the framework as characterized might inadvertently give the impression that it sought to subsume all other equity groups into the "plus" – meant to include identities such as race, ethnicity, religion, age and disability. This approach was considered to be a problem, potentially creating a hierarchy between gender and all the rest. As one person put it, groups do not want to be reduced to a "plus". The Government of Canada should seriously consider renaming its framework so that its substantive equality framework for inclusion is evident in a name that all equity groups want to embrace.

Data disaggregation is widely accepted, including by the Public Service Commission of Canada itself. In a 2021 employment equity audit of representation in recruitment it found different experiences

amongst external applicants to advertised positions and stressed “the importance of examining visible minority sub-group data.”¹¹⁵

Data disaggregation supports the distinctions-based approach. Instead of limiting employment equity data only to the composite group, for example “Indigenous peoples”, it turns attention to First Nations, Métis and Inuit workers. It is apparent that with time and with due regard to the considerations to be raised below, employment equity programs will need to be especially attentive to understanding the representation of specific nations and the precise barriers that may apply. Data disaggregation is recognized as one tool among others – including qualitative data - to be used in the context of the *Employment Equity Act* framework to achieve equality in the workplace.

[T]he [Employment] Equity Act will not be able to address intersectional barriers faced by women with disabilities if it does not require employers to collect disaggregated data on their workforce in order to determine the degree of underrepresentation of persons from multiple designated groups, including the experiences of those living at the intersection of one or more group.

DisAbled Women’s Network of Canada, Brief submitted to the EEART, 10 June 2022

A related concept is intersectionality.

The notion of intersectionality emerges in law from the work of Professor Kimberlé Crenshaw and in sociology from the work of Professor Patricia Hill Collins. Its profound roots should not be forgotten: they are embodied the life of the formerly enslaved African American woman, Harriet Tubman, who after freeing herself from slavery, kept going back at great risk, to bring others to freedom. She was not alone.¹¹⁶ Intersectionality offers a way to understand and challenge systemic inequality. Keeping the focus on this point is crucial. Intersectionality is not an abstract adding of identities. Nor is it subdivision separated from social context into impossibly smaller and smaller subgroups.

Rather, the traffic intersection analogy used by Crenshaw in her leading 1989 law review article focused on employment discrimination law helps to explain the focus on grounds of discrimination as lived by actual people, in context:

Consider an analogy for traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happened in an intersection, it can be caused by cars travelling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.¹¹⁷

Intersectionality must focus on the actual people who seek to move from societal margins to the centre of policy change. In other words, intersectionality must remain centred on its critical “why”. Its “why” is to gain deep insight into how systemic discrimination is experienced by people who have been historically marginalized and continue to face exclusion. Its “why” is to ensure that context matters, in all its complexity. Its “why” is to bring lived experiences to the centre of policy and action for substantive equality.

Just as data disaggregation is increasingly used in data reporting, intersectionality is increasingly recognized in legislation: Section 3.1 of the *Canadian Human Rights Act* acknowledges that “a discriminatory practice includes one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds”.

Some further clarifications are useful. **Data disaggregation does not necessarily require intersectionality.** For example, disaggregation of the racialized workers could mean reporting separately on the data collected specifically for Japanese workers and Filipino workers.

[The] Filipino Public Servants Network recently put together some stats showing the employment gaps for Filipinos in the public service at all levels. These types of realities would be difficult to notice if data about Filipinos is lumped in together with data about other Asian ethnicities under an "Asian" category.

Federal Public Servant

Intersectionality does however require disaggregation, both within and across equity groups. For example, intersectionally disaggregated data allow us to report on all racialized men and all racialized women, or Inuit women with a disability and Inuit men with a disability, therefore within and across the equity groups constituted as visible minority, women and disabled workers.

Intersectionality also allows us to identify and remove barriers, based on qualitative systems reviews, for equity groups across multiple grounds of discrimination identified in the *Canadian Human Rights Act*. The task force heard from youth representatives, who called for an intersectional approach to young people, who are present in each of the employment equity groups.¹¹⁸ The theme of intersectional barrier removal beyond the employment equity groups will be explored further in Chapters 3 and 4.

Finally, an intersectional and disaggregated approach makes space to address so-called “mixed-race” identities. Accurate Census data make accurate analysis possible. The key, throughout, will remain the purpose. For the *Employment Equity Act* framework, that purpose remains to achieve substantive equality, and equality is achieved by removing barriers to equitable employment across equity groups and for all.

A strong statistical base supports a deepened understanding of systemic discrimination – and in particular adverse impact discrimination. While the law on systemic discrimination has been clarified to confirm that statistics are not always required in court cases to establish adverse impact discrimination, for policy makers trying to make key decisions on representation in their workplaces, a thick, nuanced statistical base provides tools necessary to redress systemic discrimination.¹¹⁹ This requires a true change in perspective, for “[m]ore than just extending the conventional use of legal sanctions to discriminatory acts, indirect discrimination requires the examination of all of the apparently neutral procedures and practices, and, above all, the active promotion of equality.”¹²⁰

Collecting disaggregated data: The grandmother perspective

Rather than monitoring the lives of our citizens, collecting and using disaggregated data is about caring for our communities by informing law, policy and institutional practice that is in service of – and developed in collaboration with – those who are systemically discriminated against.

Kasari Govender, BC Human Rights Commissioner, 2020

The grandmother principle applied by the BC Office of the Human Rights Commissioner, and referenced earlier in the chapter, underscores the need to align purpose, process and tool, in the context of the *Anti-Racism Data Act* that was subsequently adopted. In building this principle, the BC Human Rights Commissioner acknowledged notably that demographic data collected on Indigenous households by what was then known as the Department of Indian and Northern Affairs Canada supported the establishment and operation of so-called residential “schools”.¹²¹ This history of trauma explains why it is so important to be extremely attentive to how disaggregated data are collected and used. The BC Office of the Human Rights Commissioner adds that “[i]n addition to the significant danger of disaggregated data leading to further stigma and discrimination, over-researching social inequalities with little follow-up action has also harmed communities In these cases, research is not grounded in respectful relationship.”¹²²

Adapted to the employment equity context, the Grandmother principle yields the following:

- The purpose is achieving substantive equality in the workplace through employment equity. The purpose of disaggregated data is not individual or group stigmatization, or reinforcing deficit narratives. Rather, the focus is on redressing systemic workplace exclusion.
- The process must foster respectful relationship toward members of equity groups in the workplace context. Employers, unions and other workplace actors are integral to the process of achieving employment equity.
- An important tool to achieve this purpose is data collection, and in particular disaggregated data collection.

Emerging out of the COVID-19 pandemic, jurisdictions including British Columbia started collecting race-based and other disaggregated data to understand and address systemic discrimination. The human rights commissioner alongside the privacy commissioner urged the “grandmother perspective” be adopted in the collection of disaggregated data. Drawing on that important work, British Columbia’s 2022 *Anti-Racism Data Act*, co-developed with Indigenous peoples and racialized communities, is a significant example of leadership on dismantling systemic discrimination. With a focus on building trust with Indigenous Peoples and racialized communities, it retains the principle of voluntary self-reporting, safe collection, use and disclosure of demographic data. It builds in a committee-based structure for ongoing, robust and culturally safe consultations to establish a plan, and ensure implementation.

Finally, collecting disaggregated data is consistent with Canada’s international human rights treaty obligations. Most recently, the UN Committee on the Rights of Persons with Disabilities observed that “it is essential to monitor the barriers to employment for persons with disabilities on an equal basis with others”, adding that by appropriately disaggregating the data, it will be possible to identify who is working in the informal economy and what barriers may relate to self-employment and

entrepreneurship.¹²³ The ILO's Committee of Experts on the Applications of Conventions and Recommendations has also encouraged governments, in cooperation with workers' and employers' organizations and other interested bodies, to gather disaggregated data in a manner that is respectful of privacy through informed consent and voluntary self-identification, to take into account multiple forms of discrimination.¹²⁴

Building a mutually supportive relationship between privacy protections and employment equity

Despite the benefits of disaggregated data to determine the experiences and needs of 2SLGBTQI+ people, participants acknowledged that highly specified data collection can feel intrusive and lead to concerns about data being used for the wrong purposes...

The Enchanté Network, The Employment Equity Act and 2SLGBTQI+ Communities, Extended Engagement Report to the EEART, August 2022 at 8

Privacy rights... underpi[n] the fundamental values of personal autonomy, identity, dignity and integrity. These same values are inherent in the core objectives ... that the Employment Equity framework seeks to achieve: a workplace characterized by respect, dignity and fairness, and one that reflects the diversity of Canada. Ultimately privacy law and the Employment Equity framework both seek to protect and advance fundamental human rights and values.

Office of the Privacy Commissioner of Canada, Submission to the Employment Equity Act Review Task Force, 14 September 2022

Listening to equity groups generally, and members of 2SLGBTQI+ communities in particular, drove home how critical it is for data collection to be conducted in full respect of privacy rights as a human right. Members of this community lived through the Purge of employees, a sustained campaign of discrimination, harassment and removal of employees based on sexual orientation, sexual identity and expression, and sex characteristics (SOGIESC) within the federal government, discussed in detail in Chapter 3.

The concerns about data collection extend across all three pillars of the employment equity process, from the implementation pillar, which includes the identification of barriers, self-identification and data collection on representation including data disaggregation, through to the meaningful consultation process, and into the processes of regulatory oversight.

In our consultations with concerned communities, with Statistics Canada, and in the submission of the Office of the Privacy Commissioner, it was also clear that challenges could emerge if disaggregation were to lead to re-identification when the number of individuals is small.

Courts recognize and safeguard the privacy and confidentiality of individual employees under the *Employment Equity Act*, and seek to enable employees to have a reasonable opportunity to verify and as appropriate contradict the statistical information prepared on the basis of the voluntary self-identification.¹²⁵

The responses to these concerns have tended to result in a brake on disaggregation. The Labour Program, in particular, told the task force that it does not have the legal authority to collect disaggregated data on visible minority subgroups, although Statistics Canada does collect data on those same subgroups and makes them public.¹²⁶ The Canadian Human Rights Commission approached its own reports and audits without disaggregating.

The Quebec Commission des droits de la personne et des droits de la jeunesse informed us that they consider that an employer who collects sub-group data that are not required by an employment equity program is acting contrary to the Quebec *Charter of Human Rights and Freedoms*.¹²⁷ The Quebec *Charter of Human Rights and Freedoms* permits employers to enter voluntarily into an employment equity program that is in conformity with it. Notably, it must have as its object to remedy the situation of persons belonging to groups discriminated against in employment.¹²⁸

We note, as well, that some of the federal annual reports, including that of the Public Service Commission of Canada, included subgroup data.¹²⁹ For example, for persons with disabilities, the Public Service Commission identified subgroups such as coordination or dexterity, deaf or hard of hearing, mobility, speech impairment and other disability.¹³⁰

In addition, voluntary initiatives have started to proliferate, and employers have initiated employment equity for a range of groups, including Black workers and 2SLGBTQI+ workers. This practice is consistent with the *Canadian Human Rights Act*'s authorization of special programs.

The *Employment Equity Act* is of course human rights legislation designed to achieve substantive equality. But to avoid confusion, it will be important for a revised *Employment Equity Act* to clarify that an employer should collect subgroup data to provide a clear portrait of the representation of employment equity group and sub-group members. Sub-group data that builds on intersections with grounds of discrimination identified in the *Canadian Human Rights Act* for the purpose of achieving employment equity will not be considered discriminatory. The grounds of discrimination are the following:

3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

Canadian Human Rights Act

Principles of substantive equality apply within and across employment equity groups. The key, following the Supreme Court of Canada's decision in *Kapp* canvassed in the introduction, will be for the program to have an ameliorative purpose and to target a disadvantaged group under the protected grounds (enumerated or analogous).

Recommendation 2.8: The *Employment Equity Act* should specify that the collection of distinctions-based, disaggregated and intersectional data is authorized to meet the purpose of achieving and sustaining substantive equality for members of employment equity groups.

Recommendation 2.9: Distinctions-based, disaggregated and intersectional data should be collected whenever reasonably possible and with due regard to privacy protections, with the purpose of ameliorating the conditions of all equity groups and with special attention to members of the most underrepresented employment equity groups.

One related concern must be addressed. Representatives of consulted communities expressed concern about an all too familiar challenge: employment practice may be to fill positions with members of employment equity groups who are already relatively well represented in the enterprise, while neglecting the other employment equity groups. Much of the reporting indicates that the category is likely to be “women”, understood to mean women who are not disabled, and women who are not First Nations, Métis or Inuit, and women who are not Black or racialized. This is not hard to understand; achieving employment equity may require moving out of old habits and rethinking workplaces to foster inclusion. “Do what you think you can do most readily” might be the approach that under the circumstances is adopted. Barrier removal is a way to move beyond this approach, and is addressed in Chapter 4.

Disaggregated data can help us to start a more purposeful process.

By paying attention to disaggregated and intersectional data, disadvantage across and within equity groups can become easier to identify. With the capacity to disaggregate, the focus should be placed on redressing persisting forms of disadvantage. Disaggregation allows us to focus on entrenched underrepresentation within and across equity groups.

There cannot be an easy or fixed formula for doing this, and it will be important to enable some latitude. However, the *Employment Equity Act* framework can include guidelines on how to prioritize those groups and subgroups that are the most underrepresented in the workplace, while retaining responsibility for equitable inclusion for all employment equity groups. Meaningful consultations will be important to identifying how best to prioritize across sectors and in the workplace.

Recommendation 2.10: The *Employment Equity Regulations* or guidelines prepared under them should offer sustainable support to workplaces on how to prioritize employment equity initiatives on those employment equity groups and subgroups that are the most underrepresented in the workplace, while retaining responsibility for achieving employment equity for all employment equity groups.

Remembering the “Why” of Data Collection

Each of the practices canvassed above reminds us of how important it is to keep the human rights purpose of the data collection firmly in mind, by adopting a data justice perspective.

Unfortunately, there is a common perception that the *Privacy Act* is functioning as a sword and shield, preventing the effective implementation, meaningful consultation and regulatory oversight required to achieve employment equity. Privacy protections were perceived as invoked to prevent progress on equity. Our task force was told this repeatedly and we considered it unfortunate and unnecessary.

Privacy protections are at the heart of employment equity – the *Privacy Act* applies to the personal information held by federal government institutions, and the *Personal Information Protection and Electronic Documents Act (PIPEDA)* applies to the federal private sector organizations that collect, use or disclose

personal information about its employees or job applicants, in connection with the operation of federal works, undertakings or businesses.¹³¹

This way of framing privacy may be such a reflex that we overlook how it misreads the substantive equality context.

Privacy needs to be understood for its ability to enable groups of individuals to meet societal goals.¹³² Privacy rights are part of the proactive character of employment equity law. In other words, our *Employment Equity Act* framework provides an opportunity to understand the relationship between substantive equality and privacy protection, in context, as mutually reaffirming. Privacy rights in the context of employment equity were not designed to become mere abstractions. More specifically, privacy protection is critical to resolving the self-identification conundrum. When understood contextually, the interdependency of privacy and employment equity becomes clear: together, they offer crucial support to achieving and sustaining employment equity.

Building trust

Critically, our task force was repeatedly told by a number of stakeholders from different constituencies that trust is not high.

Whether to disclose membership in a group that has faced historical marginalization may remain one of the most critical challenges that workers face. They might fear stigmatization or social isolation; they might risk harassment, career derailment or even job loss.¹³³ We heard workers have real fears about how information collected by individual employers can be used. This profoundly affects self-identification.

In its submission to the task force, the Office of the Privacy Commissioner emphasized that both employment equity legislation and privacy legislation trace their origins to the *Canadian Charter of Rights and Freedoms*, and to federal legislation. And under the *Charter*, as well as the *Canadian Human Rights Act*, everyone is entitled to exercise fundamental rights under conditions of equality and non-discrimination.

The 10 PIPEDA privacy principles are:

- accountability
- identifying purposes
- consent
- limiting collection
- limiting use, disclosure, and retention
- accuracy
- safeguards
- openness
- individual access, and
- challenging compliance

The Office of the Privacy Commissioner added that it recognizes that effective compliance with the requirements of the *Employment Equity Act* framework depends on the collection, analysis and reporting of employees' personal information. Not only do privacy protections support data collection in fulfilment of the purposes of employment equity. Privacy protections can engender trust, through

transparency and a high standard for safeguarding personal information. The Office of the Privacy Commissioner added that workers must:

- have confidence in their employers in order to accept to self-identify voluntarily
- trust that their personal information will lead to decision-making and implementation that achieves employment equity
- trust that their sensitive self-disclosed information will not be used for non-employment equity purposes, or improperly accessed or disclosed and used against them.

We would add that centering the purpose – substantive equality at work – and ensuring that the meaningful consultations pillar is strengthened, as discussed in Chapter 5, are crucial to engendering the trust necessary for the balancing of rights.

We must remember the ‘why’ of employment equity data collection. We urge a human rights, purpose-driven, trust-building approach to data collection – including disaggregated data collection –under the *Employment Equity Act* framework, with a view to achieving substantive equality.

In light of this focus, we make the following recommendation in keeping with our mandate to support equity groups, improve accountability and improve public reporting:

Recommendation 2.11: The *Employment Equity Act* should specifically clarify that the purpose of data collection is to support achieving and sustaining employment equity in the workplace, by building trust in support of implementation, meaningful consultations and regulatory oversight.

Recommendation 2.12: The *Privacy Act* and PIPEDA should be reviewed and as appropriate amended to clarify expressly that the data collection frameworks are to be interpreted to support the human rights purpose of the *Employment Equity Act*, including in implementation, meaningful consultations and regulatory oversight.

With that focus securely in mind, it is possible also to address data justice across all three pillars of the *Employment Equity Act* framework: implementation through barrier removal, meaningful consultations, and regulatory oversight.

Data justice in employment equity implementation and barrier removal

This section addresses two dimensions of data justice in implementation that are crucial to employment equity – the self-identification conundrum and the appropriate metrics for data collection to inform our understanding of the data gaps. The broader question of data collected to identify the wide range of barriers in the workplace is addressed in Chapter 3.

The self-identification conundrum

Self-identification is the only permissible basis through which an employer may identify employees as members of one or more employment equity group for the purpose of implementing employment equity, according to Section 9(2) of the *Employment Equity Act*. Section 9(3) establishes strict rules governing the confidentiality of information and its designated use, in keeping with privacy legislation.

The 1986 *Employment Equity Regulations* even included self-identification as part of the definition of the employment equity groups.

Although the definition includes persons who have been accommodated in their current job or workplace, Section 18(4) on self-identification states that only those who identify themselves to their employer or agree to be identified by their employer as a member of an employment equity group may be counted for the purposes of the report.

For strong employment equity data to become available, it is crucial that workers in employment equity groups trust that their participation, through self-identification and the various participatory methods stressed in this report, is a meaningful part of the process. Some employment equity groups have witnessed data collection and self-identification used against them – sources of disadvantage and stereotyping rather than proactive equality. It was disturbing to see that decades after the employment equity legislation has been in place, workers who can “pass” notably as white, or cisgender, or who may keep their disabilities hidden, may feel they are better off doing so.

While self-identification has problems, it is important not to overstate them. Some federally regulated employers report high rates of self-identification. For example, the Bank of Canada reports that 88% of employees participate in the self-identification program.¹³⁴ CBC/Radio Canada reports approximately 90% self-identification, and is working to improve the participation.¹³⁵

It is also important to keep in mind that the problems with self-identification do not necessarily relate to all equity groups in the same manner.

Distinct challenges to self-identification for First Nations, Métis and Inuit peoples that emerge from taking nation to nation or government to government relationships seriously are addressed separately and in detail in Chapter 3.

Members of the Community of Federal Visible Minorities in the federal public service indicated that their members tend to self-identify.¹³⁶ In contrast, the Public Services Commission of Canada reported in 2014 that only one quarter of persons with disabilities report them within the first two years of public service; most report over the course of their careers in the federal public service.¹³⁷ Our task force recognizes that self-identification may be a particular challenge for persons with psychosocial or intellectual disabilities.

Special concerns were shared with our task force about the risks of declaring sexual identity or social expression:

In relation to Positive Space, the Act should address the risks LGBTQ2+ employees currently face when self-declaring (e.g., the risk of their manager being homophobic). It should also address the various social stigmas surrounding different groups (e.g., feminine-presenting employees may not be as readily seen as leaders; employees whose membership in the LGBTQ2+ community is more visible (by the way they present themselves, dress, speak, etc.) may be discriminated against and “othered” consciously or subconsciously).

Subgroup, Public Service Commission Departmental Consultation answers, received 1 September 2022

The task force heard that for members of 2SLGBTQI+ communities, the risk of unintended consequences of gaining access to datasets collected for other reasons could be dire. People may not self-identify precisely because they do not want to be “discovered”. Indeed, researchers have reported that more than half (53%) of 2SLGBTQI+ workers may conceal their identity. They add that inclusive workplace environments can help: supportive policies are linked with an increased willingness to “come out” within the workplace context. Supportive workplace policies can foster inclusion for all workers.¹³⁸

It will be important to anticipate that with the recommended inclusion of 2SLGBTQI+ communities as an employment equity group, additional self-identification questions will arise. Researchers from Toronto Metropolitan University’s Diversity Institute pointed out that some members might resist self-identification if it requires them to share information about their sex lives and they consider this to be “inappropriate or blatantly unfair.”¹³⁹

The acknowledged challenges in establishing trust seem built into the regulations, in particular on employment equity in the Canadian Armed Forces. Section 16(1) directs that when exercising their oversight powers, agencies including the Canadian Human Rights Commission should take into account “the fact that Canadian Forces members who may be members of one or more of the employment equity groups of Aboriginal peoples, persons with disabilities and members of visible minorities, may choose not to identify themselves as such or not to agree to be identified as such.”¹⁴⁰ But the provision itself may indicate how deeply climate-related barriers persist, and that much more work needs to be done.

Public service self-identification modernization project

“In September 2020, the Treasury Board of Canada Secretariat launched the Self-Identification Modernization Project to increase the accuracy of data and reduce the perception of the risk associated with voluntary self-identification. With this project, there is hope for collecting more comprehensive data for persons with disabilities and for other equity seeking groups. For example, the Canadian Survey on Disability conducted by Statistics Canada in 2017 revealed that 15.6% of the Canadian workforce are persons with disabilities. However, in the 2017–18 fiscal year, only 5.3% of public service employees self-identified as persons with disabilities, and only 2.9% self-identified as persons with disabilities when applying for a position. Therefore, a new questionnaire is being designed to capture more relevant data.”

Treasury Board of Canada Secretariat, Annual Report: Employment Equity in the Public Service of Canada 2020-2021, at 7

Finally, the Treasury Board Secretariat has issued a *Directive on Employment Equity, Diversity and Inclusion* effective as of 1 April 2020. It sets out mandatory procedures for self-identification:

When conducting a workforce self-identification survey, the senior official designated by the deputy head must:

- A.2.2.1.1 Respect the requirements of the *Employment Equity Regulations* in developing and administering workforce self-identification questionnaires
- A.2.2.1.2 Consult with bargaining agents and other employee representatives throughout the process and on the results
- A.2.2.1.3 Communicate to all employees the purpose and importance of self-identification
- A.2.2.1.4 Disseminate self-identification questionnaires in accessible formats to all employees
- A.2.2.1.5 Request that all employees return a completed form, whether or not they identify themselves as members of one or more employment equity designated groups
- A.2.2.1.6 Develop and implement an effective strategy to assess the outcome of the workforce self-identification questionnaire, and
- A.2.2.1.7 Ensure that information gathered for the purposes of self-identification is kept confidential and safeguarded appropriately, in accordance with the *Employment Equity Regulations*

Treasury Board Secretariat, Directive on Employment Equity, Diversity and Inclusion, 2020

We listened closely to the challenges of self-identification experienced both by workers who are members of employment equity groups and by covered employers. It is important to acknowledge right from the start that in the context of a nation reckoning with the need for truth and reconciliation in dealing with the impact of settler colonial laws and policies, Indigenous self-identification is laden and requires specific and particularly careful treatment. These issues are addressed with attention to their specificity and their complexity in Chapter 3.

Ultimately, one of the most promising ways out of the conundrum seems to be something that the Supreme Court of Canada recognized decades ago: achieving critical mass. When equity group members are well represented in workplaces that also include champions, allies, and others who actively support people from underrepresented groups, the workplace environment starts to change, too.¹⁴¹

Taking into account the various considerations, our task force considers that the *Employment Equity Act* framework should move toward making completion of the survey mandatory for all employees covered by the legislation, but self-identification should remain voluntary. In other words, the self-identification form should include the possibility to answer questions – indeed each question – with something like, “prefer not to state”. Currently, Section 3(7) of the *Employment Equity Regulations* permits this practice but does not require it. The forms should clearly indicate that self-identification itself is voluntary. This practice is already in place in some federal workplaces, including the Canadian Armed Forces.¹⁴² For others, this would entail modifying the current self-identification form in the federal public service, both to include the third option AND to clarify that self-identification is voluntary.¹⁴³

Within the federal public service, self-identification survey data should be centralized, so that employees do not need to complete the surveys each time that they change departments. A consultant

engaged by the Treasury Board Secretariat also provisionally recommended in February 2023 that self-identification data should be centralized, noting that Treasury Board already maintains a central data bank of self-identification to facilitate transfers between departments. Centralization would reduce the time required to reconcile data collected locally, to avoid multiple counting of employees who might have been transferred. We recommend making the Treasury Board Secretariat the central record recipient and recorder of self-identification to support harmonization, improve efficiency and speed, with due regard for preserving privacy protections.

Recommendation 2.13: Self-identification should remain voluntary under the *Employment Equity Act* framework.

Recommendation 2.14: Employers should be required under the *Employment Equity Act* framework to ask all workers to complete a self-identification survey on initial hiring, on an annual basis, and on separation from the employer.

Recommendation 2.15: Completing the self-identification survey should be mandatory, but the survey should include the option not to self-identify under each question related to membership in an employment equity group or sub-group.

Recommendation 2.16: The self-identification survey should be available in accessible formats, include all of the employment equity groups and disaggregated sub-groups, and clarify that a worker may self-identify as being a member of as many of the employment equity groups and disaggregated sub-groups as apply.

Recommendation 2.17: Within the federal public service, self-declaration on appointment should be streamlined with self-identification for the purposes of the *Employment Equity Act*.

Recommendation 2.18: Within the federal public service, self-identification survey data should be centralized and streamlined, making the Treasury Board Secretariat the central record recipient and recorder to facilitate appropriate employment equity data sharing between units.

Recommendation 2.19: The self-identification survey should be available for workers to update at any moment in their work lifecycle and resubmitted to employees on an annual basis for any updates.

Self-identification and data on accommodations

Requesting a reasonable accommodation is not considered by the Labour Program to be self-identification for the purposes of the *Employment Equity Act*.

Some employers have specifically sought to be permitted to use the data on accommodation requests in their reports on the number of persons with disabilities in their workplaces to determine representation under the *Employment Equity Act* framework. After all, both concern human rights frameworks, and both require self-identification to the same employer.

The task force considered this proposal closely.

It is worth noting right from the start that this request by employers was raised only in the context of persons with disabilities. A person may request an accommodation on the basis of a disability without actually meeting the definition of “persons with disabilities” under the *Employment Equity Act* framework. We address definitional issues and offer recommendations for change in Chapter 3.

Our reflection focused on the privacy law dimensions. The task force noted that Section 8(2)(a) of the *Privacy Act* applicable in the public sector enables personal information to be compiled for a use that is consistent with the purpose for which it was collected. In addition to the 10 fair information principles that form the ground rules for the *Personal Information Protection and Electronic Documents Act (PIPEDA)* privacy framework in the private sector, would a reasonable employee not consider the use and disclosure appropriate in the circumstances?

The position of the Office of the Privacy Commissioner was that clear legal authority under Section 4 of the *Privacy Act* is needed. A recommendation would require a specific *Employment Equity Act* amendment that contained the necessary limitations. Schedule 1 of *PIPEDA* requires that personal information collected must be limited to what is necessary to the purposes identified by the organization. A new purpose must be required by law; if not, the consent of the individual is required before the information can be used for that purpose.

The Office of the Privacy Commissioner recommended that institutions collect personal information directly from workers, and that the purpose for the collection be made clear at the point of collection. Similarly, in our consultations drawing on experiences in other jurisdictions, the Quebec *Commission des droits de la personne et des droits de la jeunesse* confirmed that in the face of workers who are reluctant to self-identify, the Commission encourages greater sensitivity-training but considers that the exclusive responsibility for self-identification should rest with the person concerned.

We also received a powerful argument in favour of responding to this objection by being explicit about the multiple purposes of the data collection, including in the context of inter-departmental sharing of information out of which the submission below emerged:

While we understand that under the *Privacy Act*, data can only be used for the purpose it is collected, perhaps we should change the basis on which we collect data by explicitly stating all the purposes for which it could be used. Privacy is an important stewardship requirement, but stewardship in data also means collect it once and use it effectively. Every time we collect and store the data over again for another purpose we create further possibilities of data breaches. We should be aware of that and of the difficulty of harmonizing all of these processes.

Natural Resources Canada, Written Submission to the EEART

We considered this suggestion closely. It raises concerns about the climate of trust in the workplace. We realized that disclosure is not an all or nothing proposition, but rather a continuum from full disclosure to non-disclosure.¹⁴⁴ Disclosure is linked to its purposes. Data on accommodation requests might be quite detailed because of the purpose, and the datasets might contain particularly intrusive and sensitive material. The risk of having that information more broadly available than necessary seemed to outweigh the benefits, as self-identification data are necessarily quite limited. We did not want to create a situation that could potentially serve as a break on workers coming forward to request accommodations when they need them.

We also wondered whether we might be overlooking something obvious. An employee who came forward to request an accommodation would have already disclosed at least the relevant part of their identity, and likely in greater detail than an employment equity self-identification form could legitimately require. It is possible that the extent of the contexts in which employment equity information could be used – including across the worker’s lifecycle in matters of promotion and leadership training and other aspects of their file – might well give rise to concerns. It was equally plausible that the matter was one of bureaucratic miscommunication, since self-identification has tended primarily to happen only once, when an employee is hired. Over the course of their working life with the employer, the worker might have acquired a disability and sought an accommodation but not thought to update self-identification data. We address the timing of self-identification later in this chapter.

In working through the options, the task force considered whether a method might be devised that would allow the worker to choose whether their accommodation data could be used for self-identification. But given the distinct data banks in which the information is required to be held, at least under the *Privacy Act*, the risks and complications outweigh the advantages. The Office of the Privacy Commissioner stressed that accommodation files may contain quite detailed and sensitive health or medical information that would not be required for self-identification purposes; indeed, its use could be inconsistent with federal privacy legislation.

In addition, if choice could be given on an individual basis, the risk that it could leave workers feeling compelled to self-identify for employment equity purposes in order to receive the accommodation would be a significant potential unexpected consequence. Given the need for trust for employment equity legislation to be effective, this seemed counter-productive.

Considering the depth of the concern expressed by employment equity groups and the importance of retaining strong privacy protections, our task force considered, instead, that a “soft” approach in this context would be most advisable. We consider that the approach most consistent with the spirit of both employment equity legislation and privacy legislation is to continue to encourage self-identification, but not to require it.

To be abundantly clear, this would under no circumstances permit the distinct datasets to be linked. Instead, an employer who receives a request for an accommodation should be permitted to ask the employee to complete a *separate, confidential, and voluntary* self-identification form for the purpose of employment equity, *after* the accommodation request has been addressed. The self-identification form should provide the option under each listed employment equity group to declare not only whether the worker is a member or is not a member, but whether the worker would prefer not to self-identify for the purposes of employment equity. The self-identification form would be kept separate from the accommodation request and remain confidential.

We are sensitive to the risk that some workers who have not already self-identified could feel implicit pressure to self-identify, even though the form would clearly indicate the option not to self-identify. However, we also heard that workers are in many cases self-identifying for the purpose of requesting some types of accommodations. The issue, in other words, is to ensure that distinct datasets are maintained. This recommendation would therefore ensure that the datasets remain distinct. The information in the employment equity dataset would therefore remain separate and strictly limited to the information necessary for the purposes of employment equity. It would only be requested once the accommodation process has been completed. In light of all of these considerations, we think the

recommendation is fair and balanced, supporting the purpose of employment equity data collection and access to accommodations.

Recommendation 2.20: Employers should be permitted to remind workers to complete the separate, confidential and voluntary self-identification survey at the end of the accommodation process, so long as self-identification for the purpose of employment equity is understood to remain voluntary, confidentiality can be assured, and the datasets are understood to remain separate.

Data collection and disaggregation

The Act should stipulate that progress must be monitored by the employer ... on an annual basis for the 10 ethno-cultural communities that are being tracked by Statistics Canada, and timely actions are taken when its employment equity plan is not on track.

Submission of the Community of Federal Visible Minorities to the EEART, 28 April 2022

It is important to share granular and nuanced information to achieving employment equity goals. This allows employment equity to be implemented in a sustained, supportive manner that is alive to those most in need of employment equity measures. It enables meaningful consultations and accountability.

It is also important to make sure that data used – and any datasets linked – sufficiently de-personalize individuals. This might be a particular challenge in relatively small workplaces.

For the Office of the Privacy Commissioners, even if this might limit the number of linkages that can be made or even prevent some datasets from being linked, the key is to be “as transparent as possible” about the reasons for the data collection, and to identify cut offs.¹⁴⁵

The Office of Public Service Accessibility pointed out that it is not always possible to analyze disability by subtype, proposing instead that disaggregated data collection remain optional. A second option is to follow the Office of the Privacy Commissioner’s recommendation that if there are fewer than 10 employees in any given group or sub-group, reporting on those categories or sub-categories should be suppressed.¹⁴⁶ Moreover, we acknowledge that this could lead to challenges if sub-group data are systematically suppressed. A third option would be to aggregate subgroups, and in some cases employment equity groups, where necessary to permit granular reporting without sacrificing privacy. The advantage of the third option is that it reduces the risk of systematic data suppression in some of the smaller employment equity groups.

Given the importance of data disaggregation and the complementary concern for privacy protection, we are inclined to ensure that there is a requirement to disaggregate, but latitude to move between the second or third option. Those options should be exercised on the basis of meaningful consultations as discussed in Chapter 5.

We also agree with the Office of Public Service Accountability that future *Employment Equity Act* regulations should provide detailed guidance to organizations on how to collect and report on disaggregated data. We consider that this should include promising practices on how to enable a meaningful composite to emerge from the data available. Recent approaches adopted by Statistics Canada to ensure that consultations are undertaken with concerned communities are promising

practices that should be further developed and shared. Promising practices should also be shared on how to avoid potentially misleading reporting when the same person is counted multiple times across a number of disaggregated or intersecting groups. Those promising practices exist: consider for example tables prepared by McMaster University to meet employment equity obligations under the Federal Contractors Program. The tables present employment equity groups and their overall composition in the initial columns, then add columns clearly identified to provide a portrait of each group's intersectionality within the employment equity groups.¹⁴⁷

Recommendation 2.21: The *Employment Equity Act* should expressly clarify that data collection and reporting on sub-group members are permitted, and permit special measures to be taken to improve the hiring, promotion and retention of those sub-group members that are relatively less well represented in the employer's workplace.

Recommendation 2.22: The *Employment Equity Regulations* or guidelines prepared under them should provide detailed guidance on how to collect disaggregated data and report it in a meaningful manner to understand underrepresentation and where to prioritize.

Recommendation 2.23: The *Employment Equity Regulations* or guidelines prepared under them should provide directives to avoid misleading reporting if persons are counted multiple times across a number of disaggregated or intersecting groups.

Keeping it simple: Moving beyond workforce availability toward labour market availability and comprehensive barrier removal

FETCO members also feel that the dogged focus on Labour Market Availability (which is based on lagging Census figures that are often not detailed enough) is not working. Focusing on specific numbers can take away from successes. Could the focus be on ranges, or some other measure?

FETCO, Written Submission to the EEART, 28 April 2022

Our task force has looked closely at the available data in the ever changing, contemporary post-pandemic Canadian workplace. One message seems clear: we need to simplify.

We did not sense much love for Labour Market Availability and heard a rather fundamental rejection of Workforce Availability.

Section 5(b)(i) of the *Employment Equity Act* and Section 6(1)(b) of the *Employment Equity Regulations* set out the process for establishing the benchmark by which representativeness is to be established. It takes as a starting point the availability of each employment equity group in each occupational group, either in “the Canadian workforce as a whole,” or in “those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography, and from which the employer may reasonably be expected to draw employees”.

This offers a fair amount of latitude, which in theory is helpful to setting the short-term goals (1 – 3 years) that the law requires. It can also get complicated quickly.

But our consultations and research confirm: we need to focus on three clear, simple things:

Chapter 2: Data justice

- We need to be able to rely on a more fluid set of data, including projections-data
- We need to ensure that the benchmarks we choose do not embed the barriers we are trying to remove,
- We need to move ourselves away from excessively complicated calculations and toward a focus on removing barriers to reasonable progress that are sustained over time, so that employment equity is actually achieved

Getting the data we need when we need it: Prospects and limits of data projections

The most relevant data sources have been the Census and the Canadian Survey of Disability, which are undertaken every 5 years. The data are significantly out of date with a fast-growing workplace. For some groups, and in particular visible minorities/ racialized workers, they lead to a systemic underestimation of availability.

In our meetings with Statistics Canada, the Labour Program, and the federal Treasury Board Secretariat, parties acknowledged the data lags and their impact on employment equity implementation.

For example, Statistics Canada indicated that data on employment equity groups comes from self-identification to employers or in StatsCan censuses or surveys. There is a lag of between 12 – 18 months in data provided by employers. This leads to reports that are produced 16 to 18 months after the reference period.¹⁴⁸

Following the January 2021 Clerk of the Privy Council Office ‘s Call to Action on anti-racism, equity and inclusion in the federal public service, the Secretary of the Treasury Board of Canada asked the Chief Statistician to help them to establish realistic, timely targets.

We canvassed sources that might help make data on the rapidly changing Canadian workplace available more readily. There are some promising possibilities, including new projection tools. These should be operationalized. The recommended Employment Equity Data Steering Committee should be tasked to prioritize this rethink.

This does not require legislative change. This requires swift, dedicated policy action.

Statistics Canada told our task force that it proposes to use as benchmarks the results of detailed population projections specific to a given year, rather than relying on the last available census or survey data.¹⁴⁹

The Demosim model projects the Canadian population according to various characteristics. It has been in use since the 2001 Census, for women, and was launched in 2004 with Canadian Heritage to provide projections of visible minority groups. Indigenous populations were added in the 2006 version, and persons with disabilities were added in the 2016 version. Our task force was informed that scenarios and projections based on gender diversity are under development. In its assessment of the previous census data, its projections have accurately predicted short term population demographics. It takes into account behaviour differentials between population subgroups, including migration differentials, and is able to offer detailed geographic information across provinces and territories, large urban centres and regions located outside of them, and custom set regions. Its

demographic predictions have been used in the Department of Finance for transfer payments (*péréquation*).

Task force members were impressed by the potential to provide population diversity projections on the basis of some of the current and recommended categories in the *Employment Equity Act*. Statistics Canada affirmed that it can provide LMA benchmarks for women, visible minorities, Indigenous peoples, and persons with disabilities. The key is that they could be produced annually.

We were also alive to some of the limits. Statistics Canada was clear: **Demosim is not an economic projection model. It focuses on sociodemographic factors.** Demosim therefore cannot make projections of future incomes. **Its LMA and WFA calculations cannot be relied upon, as occupation cannot be modelled in Demosim. There are too many macroeconomic factors that make it hard to predict.**

Statistics Canada also clarified that Demosim’s results are simulation-based and provide projections rather than observed values. Yet the very purpose of employment equity is to be a dynamic process: the data guide the establishment of goals and allow an assessment of how one is faring in relation to those goals.

Demosim may provide short-term or interim projections and facilitate long-term testing of assumptions. It is a tool that can be adjusted on a continuous basis to integrate the most recent demographic information, including from survey sources beyond the Census. In this regard, Statistics Canada confirmed that results are expected to be closer to future Census estimates than the current benchmarks relied upon for LMA.

Our recommendation therefore calls for the Employment Equity Data Steering Committee to evaluate emerging projections capabilities to see how it can help to redress the LMA time lag, taking into account its limits as well as its possibilities.

Recommendation 2.24: The Employment Equity Data Steering Committee should be mandated to consider how best to draw on existing and emerging projections capabilities to redress the time lag in the calculation of LMA.

Digging deeper: Benchmarks embedding discrimination

But we felt obligated to dig deeper. The problem is not just one of getting the data faster, although that will help. The problem is one of accuracy, of built-in assumptions.

The Canadian Association of Counsel for Employers cautioned that “statistics can be interpreted in many ways and that such an exercise does not necessarily promote fairness for members of the groups covered by the legislation.”¹⁵⁰ We agree.

The statistical measures that we are currently relying upon to calculate availability may themselves embed systemic discrimination. Our discussion in Chapter 1 of discouraged workers is a prime example of this problem. If our measures of labour market availability code doctoral degree holders who have to work as taxi drivers to make a living, as taxi drivers, we are reinforcing a vicious cycle. This does not help to root out systemic discrimination; it may well embed it.

Moving away from workforce availability in the federal public service

Workforce Availability in the Federal Public Service has exceeded its shelf life.

Introduced by the federal public service to take into account the specific requirements under the *Public Service Employment Act* in determining availability, WFA has become a primary example of how a measurement tool can embed the exclusionary practices that employment equity seeks to uproot. We heard repeatedly that the Canadian federal public service, of all employers in Canada, should have reached sufficient maturity to be able to use the same metric that is used by most federally regulated employers in Canada.

Below is the Treasury Board's lay description of how workforce availability is calculated:

Workforce availability (WFA) calculation in the Public Service of Canada:

Workforce availability (WFA) estimates are used as a benchmark to assess the representativeness of employment equity designated groups within the CPA (organizations listed in Schedule I and IV of the *Financial Administration Act*) in accordance with the *Employment Equity Act*. Indeed, the dynamics of hiring depend on the availability of designated group members for public service employment. The WFA varies geographically (national or by province or territory) or by the specific qualifications that organizations have to fill. Four filters are taken into account:

1. **citizenship:** this filter was applied because the *Public Service Employment Act* gives preference to the hiring of Canadian citizens (section 39.1.c); this preference was extended to permanent residents as of June 29, 2021
2. **classification:** this filter narrows consideration to occupations that the government deems relevant to the public service
3. **education:** this filter is used for some classifications to include only persons who have an educational degree for scientific and professional occupations, taking into account the public service qualification standards for jobs (educational requirements)
4. **geography:** this filter assumes that most organizational hiring will be done locally for most occupational groups, rather than from wider geographic areas

WFA estimates are derived from the Labour Market Availability, which is derived from the Census and the Canadian Survey on Disability, which is performed every five years. The WFA [has in the past included] Canadian citizens who have been in the labour market for at least 15 years based on their presumed ability to work in occupations comparable to those in the public service.

Treasury Board of Canada Secretariat, Annual Report: Employment Equity in the Public Service of Canada 2020 – 2021 at 28-29

Among many others, the Public Service Alliance of Canada considered WFA not to reflect the population in Canada and to be outdated. Repeatedly, our task force heard from employers, workers, equity groups, and experts that WFA does not reflect the population in Canada. We heard that it is outdated. We heard that the challenge is less the available pool than the policies and practices on hiring, promotion and retention.¹⁵¹

The most significant problems with WFA can be observed vividly in relation to the visible minority/racialized workers category:

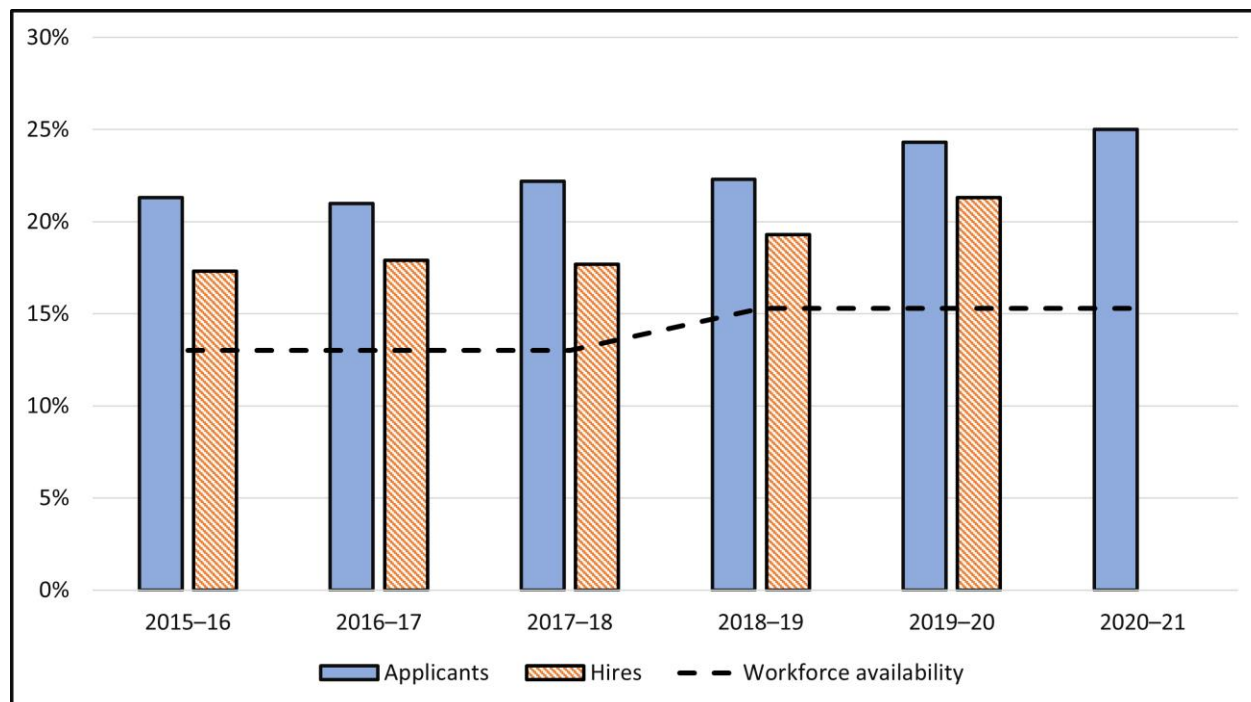
The manner TBS calculates WFA is the most significant systemic barrier and discriminates all Visible Minorities. According to the TBS report for 2020-21, Visible Minorities representation in the Federal Public Service is 18.9%, which appears favourable when compared with the VM's WFA of 15.3%. However, it is worth noting that it is still less than the population of visible minorities which was 19.6% in 2011, their current Labour Market Availability is 21.3% and their population is 22.3%, based on 2016 census. Therefore, the reality is that the VMs representation is 2.4 points lower than their LMA (even though six years outdated), and 3.4 points lower than their representation in the Canadian population in 2016. For EX classification, VM representation is 12.4%, which is 1.8 points higher than their WFA but 9.9 points lower than their representation in the population of Canada. Keeping the benchmark for EX so low in fact institutionalises the assumption that visible minorities are less qualified to be public service executives. ... It is also worth noting that the flawed benchmark used by TBS is based on census 2016, and used as a benchmark even in 2022, six years out of date. ... instead of being a leader, the Federal Public [service] is a laggard, and is lagging behind the [federal] private sector.

Submission of the Community of Federal Visible Minorities to the EEART, 28 April 2022

As early as 2000, the task force report on the participation of visible minorities, *Embracing Change in the Federal Public Service* recommended that WFA be jettisoned. The Community of Federal Visible Minorities made the same recommendation.

Frankly, it was difficult to review a graph like the one submitted by the Public Service Commission, which clearly showed that applications from members of visible minorities significantly exceeded the WFA numbers, often by 10%, and hiring also tended to exceed WFA by between 4 – 6%, knowing the extent to which it underestimates racialized populations in Canada.

Figure 2.1: Members of visible minorities applicants to advertised processes and hires compared to workforce availability¹⁵²



It is understood, too, that now that the *Public Service Employment Act* has been amended on 29 June 2021 and citizenship is no longer a requirement for employment, the biggest difference in WFA rates is likely to be experienced in the visible minority group. Permanent residents will be included in the availability rates. This was, however, one of the most important justifications for undertaking all the work of establishing a separate benchmark for the federal public service. **That justification is gone.**

The remaining differences – in particular, excluding temporary migrant workers and foreign students from LMA – may not justify the time and effort required to produce a separate standard for government. Although the rules are different, we should keep in mind that private sector employers cannot simply hire without regard to immigration status either. No matter, if LMA and WFA are substantially similar with the removal of the permanent residency restriction in the federal government, it is entirely reasonable to anticipate that the federal government will be able to base itself on LMA as characterizing the workforce from which it may reasonably be expected to draw. This would represent a more fluid approach and send the right signal to employers at large.

Some stakeholders went further, pointing to the significant disparity between WFA and population-based information. The outgoing Deputy Minister of Public Service Accessibility and Champion for Federal Employees with Disabilities, Yazmine Laroche, shared findings from consultations. The significant difference between WFA, situated at 9% for disabled workers, and actual population-based availability at 22% based on the 2017 Canadian Survey on Disability, was cited as a stark example of the representation challenge.¹⁵³

It is important to note that 64% of employees surveyed on the draft Public Service Accessibility Strategy rated replacing the concept of workforce availability in setting employment targets for persons with disabilities with a concept that accounts for work potential as defined in the 2017 Canadian

Survey on Disability to be either very important or somewhat important.¹⁵⁴ We acknowledge that work potential will change when there are fewer barriers. We also recognize the importance of supporting equitable inclusion for persons with disabilities within the workplace with basic income support measures at the societal level, as discussed in Chapter 4.

With the growing potential of remote work, some considered that the federal government should set an example by not relying on a benchmark that incorporates a geography filter to assume that hiring will necessarily be local.

The main argument against shelving WFA in the federal public service was the potential that departments and agencies might feel discouraged if they feel the targets are unrealistic. When we looked closely at the data and the significant differences in actual attainment rates between some governmental departments and agencies, we were told the key difference is that some were **intentional** about removing barriers and fostering equitable inclusion. Expending extensive resources to get a more precise WFA will not fix this cardinal difference. WFA has been a source of discouragement for too many employment equity groups. We were persuaded that our federal government, assuming its dual responsibility as a symbolically important federal employer as well as regulator, can do better.

The production of WFA is now understood to be a distraction, taking time and energy away from the fundamental work of barrier removal. Government should be the site for experimentation and creativity for sustainable change. It should be at the vanguard, not the rear guard.

To use WFA in 2023 was likened by one public service employee to trying to follow social media with a flip phone. We must do better.

During its consultations with the task force in Spring 2022, TBS-OCHRO informed the task force that it would be commissioning its own study of WFA. The Treasury Board's president is a member of Cabinet and Treasury Board is a government employer. The Treasury Board exercised its capacity to seek recommendations for legislative change through a separate process, while the task force was ongoing. A consulting firm was hired in Fall 2022, and a draft report was shared with the task force Chair in February 2023. The consultant provisionally recommended retaining the use of WFA.

The consultant's recommendation referred to a criterion that currently exists in the *Employment Equity Regulations*, that is the workforce from which the core public service may "reasonably be expected to draw" employees. The legislated standard itself – reasonableness – seems not to have been the one applied in the consultancy report. Instead, a different, higher standard - "accuracy" - was substituted.

Although the consultant's report notes the benchmark lags up to seven years, the report seems not to have turned attention to the serious issue of the time and complexity involved in preparing a separate WFA. The task force learned that some departments faced with challenges in the WFA that limit the ability to measure representation when government priorities change and recruitment requires different NOC codes to be used, calculated their own WFA using Treasury Board's methodologies. And the process is hardly transparent; calculation building blocks are not published or even well known, and interpretations may vary.¹⁵⁵

The excessive focus on developing separate WFA benchmarks, potentially on an annual basis relying on Demosim despite real feasibility challenges discussed above, risks simply

exaggerating the attention placed on representation numbers, to the detriment of actually achieving employment equity. This must stop.

Rather than building on Demosim while keeping WFA, our task force has recommended mandating the Employment Equity Data Steering Committee to consider how best to draw on existing and emerging projections capabilities, to redress the time lag in the calculation of LMA alone. We further recommend shelving WFA altogether.

Recommendation 2.25: The federal public service should cease producing and relying on workforce availability to meet its responsibilities under the *Employment Equity Act* framework.

Toward a fluid approach to representation and goal setting

Use representation by population rather than convoluted formula that [replicate] patterns of systemic discrimination.

Natural Resources Canada, Written Submission to the EEART

So, what do we need to be able to represent our society the way it would be in the absence of systemic discrimination? How do we get there?

We heard loud and clear: the federal government should be aspiring to be the face of Canada.

Labour market availability is a good start for federally regulated workplaces. But our aspiration should be that our workplaces reflect our populations. **A barrier-removal focus is best placed to get us there.** This will require proactive initiatives by our government to address the barriers that intersect with the workplace discussed in Chapter 4. This cannot and should not be borne by employer action alone. It is an ongoing, interactive process and requires an all of society approach. It should be integrated into the Canadian government's adherence to the United Nations' Sustainable Development Goals, including on gender equality and decent work, and tackled holistically.

We cannot help noting, as well, that to calculate “availability” in the context of a tight labour market might in itself beg the question. We need everyone and the tight labour market reminds us of how important it is to be finding ways to draw people in and not just moving people around.

Because of the current restrictions on litigating employment equity, we may also have lost sight of the fact that in the two leading federal cases on employment equity, both the Supreme Court of Canada and the Canadian Human Rights Tribunal set targets that were **above** availability. The reason was clear: underrepresentation was a reflection of the discrimination experienced by employment equity groups historically. To wait a generation or two until they become “available” is to allow the effects of the past discrimination to persist.¹⁵⁶ Employment equity sought to correct the underrepresentation in a steadfast and sustainable manner.

Within the federal public service, the Canadian Human Rights Commission already advises public service employers that it is a good practice to exceed the employment equity attainment rates under workforce availability, knowing that the benchmarks are based on data from previous years.

The task force paid special attention when employers in both the public and private sector referenced basic Census or Canadian Survey on Disability workforce numbers, and rather than complicating the

analysis, turned their focus on how they could remove barriers and transform their workplaces. Some other members of employment equity groups or subgroups have also called for representation numbers to be set on the basis of the general population, in particular the Black Class Action Secretariat.

Turning the efforts toward barrier removal made more sense than applying more and more complex analyses of the availability data. We discuss this in detail in Chapter 4.

For the federally regulated private sector and employers covered by the Federal Contractors Program, in addition to the federal public service, this means promoting a more fluid approach to representation.

A more fluid approach will help with some of the concerns raised by some private sector employers who have reported that NOC codes do not even fit their industries.¹⁵⁷

For all, this means that the focus on Labour Market Availability, while important, should not become a death grip that locks workplaces into outdated data and sterile exercises that tell us little about what is actually happening to achieve and sustain substantive equality.

We have the labour market availability benchmark, of course, because the goals need to be realistic, and should not be arbitrary. And we want to foster reasonable progress over time to achieve and sustain employment equity.

Ultimately, labour market availability should be thought of as a floor, with a broad societal aspiration for population-based representation rates that show that it is possible to achieve and sustain substantive equality in a barrier-free workplace for all. Because it is 2023.

Our workplaces should increasingly look like Canada. The benchmarks help us to get there. They should not be hindrances. They should not get in the way of the real work of equity.

In our globalized, integrated societies, workplaces are able to recruit widely, and workers are increasingly mobile. Technology and our pandemic-era work-from-home experience have made this more apparent for many employers. Where there are labour market shortages, we are increasingly recruiting internationally. We are in a moment where we have shown creativity and experimentation on work-life issues. The creativity and experimentation should purposefully be used to foster greater accessibility and bring more people into the workforce. We should avoid artificial limits on employers' ability to look for talent across the Canadian workforce, and to do so while fostering equitable inclusion. This is said with care, because we acknowledge the immense challenge of representation across a country as vast as Canada, with remote and rural communities alongside major metropolitan areas.¹⁵⁸

So long as representation is lower than Census population levels, employers should be permitted to continue to work to correct underrepresentation.

We recommend that the “Canadian workforce” should be the default. Requests for derogations should be addressed to the Employment Equity Commissioner and assessed on a case-by-case basis for a time-limited period.

We also heard the frustration faced by employment equity groups whose labour market availability is consistently low and attainment rates rarely received.

Here, especially, we should take pressure off the narrow calculation and place efforts resolutely on fostering inclusion.

Recommendation 2.26: The “Canadian workforce” under Section 5(b)(i) of the *Employment Equity Act* should be the default benchmark in the *Employment Equity Regulations*.

Recommendation 2.27: Requests for derogations from the default benchmark should be addressed to the Employment Equity Commissioner on a case-by-case basis for a defined time period.

Recommendation 2.28: So long as representation is lower than Census population levels appropriate to the geographic context, employers should be permitted to continue to work to correct underrepresentation of employment equity groups, focusing on obtaining critical mass.

Data justice for meaningful consultations

In Chapter 5 we address the significance of data justice for meaningful consultations. We offer precise recommendations to strengthen and structure the meaningful consultations pillar. Here, we sum up the importance in two points:

- First, meaningful consultations require meaningful access to workplace employment equity data.
- Second, meaningful consultations are a crucial source for meaningful workplace employment equity data.

The relationship between the two is dynamic. The relationship must be supported and sustained.

Data justice for accountability: Regulatory oversight and public transparency

Keeping it simple: Reducing the reporting obligation

We were also wisely urged to keep reporting simple.¹⁵⁹ In Chapter 3, we recommend adding two employment equity groups. Challenges associated with certain subgroups require attention, so we enable and encourage data disaggregation. It is clear that the smaller the sub-group, the greater the risk of data suppression. We need to allow fluidity on assessing and calculating representation rates and attainment. We take up this suggestion with a specific recommendation to reduce the frequency of reporting by all employers in Chapter 4. We also offer recommendations on streamlining reporting in Chapter 6.

Public transparency: Democratizing access to data

The logic of the *Employment Equity Act* is that the Act's effectiveness depends on scrutiny of employers' results by the public as well as by government compliance authorities.

Carol Agócs, "Think Piece on Three Issues," Unpublished paper prepared for the EEART, 30 August 2022

One of the reasons we have not advanced on employment equity is that the public has been required to rely on the symbolic as proxies for action on equity, rather than on the data. Workplace equity in a universe of EDI has tended to be measured by statements and communications strategies that have come to symbolize diversity.¹⁶⁰ But do they work? For example, do we have the information necessary to ensure that these workplaces have been promoting members of employment equity groups into managerial positions? How do we know whether they have revolving doors? How do we know whether sexual harassment claims are through the roof?

To meet our international human rights obligations, Canada has been encouraged to publish comprehensive, disaggregated data for the public service, for "[a]ll contractors to public service agencies", and for private employers by the UN Committee on the Elimination of Racial Discrimination.¹⁶¹

Federal employers have themselves been calling for learning to be shared:

Suggest government share widely any learnings with the entire stakeholder community (perhaps look at best practices). Employers could then, for example, use this relevant information to improve their own EDI initiatives.

FETCO, Submission to EEART, 28 April 2022

Data justice also includes democratizing access to data through greater disclosure obligations, to enable the public at large to understand whether employment equity is being achieved.

We were reminded that employers see a business case to equity, and that they want to be able to tell their positive narratives about success. They do not just want to be reporting their numbers outward like an academic exercise; they want a process of better data collection that allows them to have successes, and share them as promising practices.¹⁶² If this is the ground we are rebuilding employment equity upon, it is pretty solid.

Currently, reports submitted on an annual basis to Parliament comprise the main approach to public disclosure by public oversight agencies.

Audits conducted by the Canadian Human Rights Commission of the federal public administration are not made public; they are not even shared with the Labour Program. They were redacted even in the case of review by the task force chair.

Employment equity results should not be hidden. Nor should the goal be public shaming. Rather, employment equity results should be the basis of deep learning. Success in achieving

and sustaining representative workforces should become a sign of pride that we can all celebrate.

Currently the *Employment Equity Act* provides for reports to be made available, including from private sector employers:

Availability of reports of private sector employers

19 (1) Subject to subsection (2), every report filed under subsection 18(1) shall be available for public inspection at such places as may be designated, and in such form as may be determined, by the Minister, and any person may, on payment of a prescribed fee, not to exceed the costs of furnishing a copy, obtain from the Minister a copy of any of the reports.

Withholding of report

(2) The Minister may, on the application of an employer, withhold the employer's report from public inspection for a period not exceeding one year if, in the opinion of the Minister, special circumstances warrant the withholding.

The practical experience with this requirement leaves much to be desired. Consolidated versions of the report are included in the Annual Report to Parliament pursuant to Section 20 of the *Employment Equity Act*. Treasury Board also submits an annual report to Parliament. Although the Labour Program's website normally allows reports to be searched, the search function was rendered inoperative at a critical period in the report drafting phase and the task force chair was not otherwise able to obtain access to the reports. **The Labour Program must do better.**

The Canadian Bar Association made the following comprehensive suggestions for rendering information publicly available, noting that none requires legislative change:

- (a) **Release of Narrative Reports:** Narrative Reports by employers engaged in the Legislated Employment Equity Program (LEEP) should be released to the public. At present employers are required to create a narrative report (for instance Individual Employer Data Page that is inaccessible online). Granting access to narrative reports would allow the public to review the subjective actions taken by companies relating to Employment Equity and promote innovative ways to increase employment equity.
- (b) **Release of RCI scores or similar scores:** The LEEP ranks employers by a Report Compliance Index (RCI) score, which indicates compliance with the Employment Equity Regulations converted into a five-mark index. For instance, a company may receive a 3/5 score. These scores should be released so compliance of LEEP employers can be viewed publicly.
- (c) **Increased Searchability of Data:** The data shared online should be easily searchable in a dashboard with editable parameters. For instance, the WEIMS system should allow searches to find companies that employ, for instance, zero women or zero visible minorities by searching all companies for these flags. To find this information now one would have to physically view all of the forms for individual employers from the WEIMS link.

- (d) **Increased Disclosure Relating to Employment Equity Champion Awards:** There should be more transparency on the criteria used to determine Employment Equity Champion awards, and the process should allow for public feedback prior to awarding these designations. Government of Canada recognitions such as these, are perceived as endorsement of these companies. Independent criteria and an arms' length determination process would ensure the decisions are not politically motivated.
- (e) **Access to Full Dataset for Searches:** There should be an easy way to allow requests for, and to give a copy of all data from the annual Employment Equity Report to researchers interested in the information. For instance, this could be provided through a data output of Microsoft Access or using a dashboard with editable parameters.
- (f) **Options to search Individual Employer Data by Common Name instead of Legal Name:** Many companies in the individual employer dataset are numbered companies. It is difficult for the public to find commonly used company names. We recommend displaying both.
- (g) **Public List of Companies:** The website or dashboard should include a list of companies and access to their employment equity data, making it easy to search and find, rather than listing companies as part of a pull-down menu from WEIMS. Listing all companies in the text of the website will increase accessibility and make reports easier to find because users don't always know about the 'individual reports' section of the ESDC website, where this data is currently available.⁷ We recommend posting these on the List of federally regulated industries and workplaces page.

Canadian Bar Association, Submission to the EEART, 10 May 2022

We agree. In practice, though, and in the task force's own experience, the provisions in the *Employment Equity Act* on the availability of reports have not been interpreted to foster readily accessible, reasonable public access.

A range of stakeholders has called for reports to be made readily available and searchable online to ensure easy access to information. The DisAbled Women's Network of Canada (DAWN) considered that having to proceed through an access to information request to obtain an employer request, with the associated fee, to be a barrier.¹⁶³ Several have also called for compliance and audit reports to be made publicly available.¹⁶⁴

Reports filed by all those covered by the federal *Employment Equity Act* framework - including the federal public service, the federally regulated private sector, and FCP employers - should be accessible, both in location and format. They should be easy to find, and easy to read. They should respect current accessibility standards.

Summaries of audits, using promising practices on data sharing for comparability, should similarly be made available to the general public.

The task force was provided with a first glance of initiatives underway to render pay transparency data readily available to the public through the Workplace Equity Program of the Labour Department. With due regard to privacy protections, we would encourage the proposed Employment Equity

Commissioner to develop tools that foster appropriate public sharing of employer reports. Protocols should be developed to ensure that proprietary information can be excepted from the information that is shared.

Guidelines should be put in place by the proposed Employment Equity Commissioner, who is encouraged to build an accessible, clear electronic form that can be completed with the expected data and that can then be made readily available and accessible online in a centralized and searchable site by the Commissioner.

A complementary initiative would be to create an open government site for employment equity reports, and make all reports filed under the employment equity framework available through that accessible, searchable database.

Recommendation 2.29: The Employment Equity Commissioner should develop tools that foster appropriate, accessible public sharing of employer reports. Protocols should be developed to ensure that proprietary information can be excepted from the information that is shared consistent with the *Employment Equity Act* and privacy laws.

Recommendation 2.30: An open government site for employment equity reports should be created to make all reports filed under the *Employment Equity Act* framework available through the accessible, searchable database.

Data centralization in the federal public service

The task force heard loud and clear that data on compliance with the *Employment Equity Act* should be made available in a ready, accessible manner. There was frustration with how data from the federal public service was made available, when it was made available:

It would be great if all the data with regards to EE were clearly accessible to the public if you visit the page of any department (for example a quick graphic under the About Us Tab with a breakdown of just how diverse departments/regions are) If that information is available, it should be easy to find on the webpage and not buried in some long report somewhere that would be challenging to find.

Subcommittee, Public Service Commission Departmental Consultation Answers for the EEART, Received 1 September 2022

Part of making the data publicly available and enabling regulatory oversight is to make sure that data are available in an accessible and organized format.

The task force was informed by the Public Service Commission that the slow release of data can be a problem. The current requirement dictates that a gap needs to be identified before action can be taken; this slows down proactive measures. Our task force also heard that in the public service, the collection, processing, reconciliation and quality control takes approximately 7 – 8 months. Since reports to Parliament are aligned with fiscal years, they are tabled by March 31. In light of this, the data are published on a yearly basis – a 12-month basis, even though they may be ready well in advance. Some entities wanted the data to be made available between the time that employment equity data is

calculated and the time that it is tabled in Parliament. The Office of Public Service Accessibility put it this way:

Public service employees are often inhibited from accessing employment equity data for months after EE reports have been generated. This is a consequence of EE data having restricted access prior to being tabled in Parliament. Despite the understanding that using and integrating EE data in public service initiatives drives forward progress, accessing EE data during this ‘restricted’ phase puts analysts at risk of being in contempt of parliament. Delaying internal communication of EE data reduces accountability and strays from the spirit of the EEA: equitable access and pushing for improvements in the workplace for minority groups.

Office of Public Service Accessibility, Submission to the EEART

Some inspiration for the federal public service might be found from the United Kingdom. Since 2011, the United Kingdom’s *Equality Act, 2010*¹⁶⁵ has included a duty on public bodies to publish information annually that shows compliance with a duty to avoid discrimination, advances in equality of opportunity, as well as equality objectives, in addition to longstanding provisions permitting “positive action”. Regulatory oversight lies with the Equality and Human Rights Commission.

Of course, the recommendations in this Chapter move us toward greater access to data as well as streamlining and simplification of reporting. Further recommendations are formulated in Chapter 6. But we take the point that someone should have an eye to this specific problem.

Recommendation 2.31: the Employment Equity Commissioner should be provided with all reasonable latitude to ensure that employment equity data are made available for employment equity implementation and oversight as soon as possible after it is prepared.

¹⁰⁶ British Columbia, Office of the Human Rights Commissioner, *Disaggregated demographic data collection in British Columbia: The grandmother perspective*, (Vancouver: British Columbia’s Office of the Human Rights Commissioner, 2020) at 51.

¹⁰⁷ Black Health Equity Working Group, Engagement, Governance, Access and Protection (EGAP), *A Data Governance Framework for Health Data Collected from Black Communities in Ontario* (2021) online (pdf).

¹⁰⁸ Federal Anti-Racism Secretariat, presentation to the EEART, 6 May 2022.

¹⁰⁹ Louis-Philippe Morin, “Investigating Potential New Datasets to Foster our Understanding of the Labour Market Barriers Faced by the EEA Designated Groups and Other Disadvantaged Groups” Report to the EEART, 29 August 2022.

¹¹⁰ 1997 CHRT 1433, T.D. 3/97

¹¹¹ *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paras. 56 – 63.

¹¹² See e.g. FETCO, Consultations with the EEART, 7 April 2022.

¹¹³ Lucia Lo *et al.*, “Are Degrees/Diplomas from Inside and Outside of Canada Valued Differently in the Labour Market,” *Toronto Immigrant Employment Data Initiative (TIEDI) Analytical Report 14*, December 2010 at 7-8 (also noting associated earning disparities).

¹¹⁴ This report uses “nation-to-nation” and “government-to-government” interchangeably.

¹¹⁵ Public Service Commission of Canada, “Audit of Employment Equity Representation in Recruitment” (2021) at 19.

¹¹⁶ See R.J.M. Blackett, *Making Freedom: The Underground Railroad and the Politics of Slavery* (Chapel Hill: University of North Carolina Press, 2013) at 74.

¹¹⁷ Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) 8 University of Chicago Legal Forum 139 at 149.

¹¹⁸ Students Commission of Canada, Presentation to the EEART, 3 June 2022.

¹¹⁹ *Fraser v. Canada (Attorney General)*, (2020) SCC 28; Commission Européenne, Étude comparative de la collecte de données visant à mesurer l’étendue et l’impact de la discrimination dans certains pays : Rapport final Canada by Maryse Potvin & Sophie Latraverse, (Lyon, France : Commission Européenne, Mai 2004) at 25.

¹²⁰ European Commission, Directorate-General for Employment and Social Affairs, Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great-Britain and the Netherlands, (Luxembourg: Office for Official Publications of the European Communities, 2004) at 6.

¹²¹ Government of Canada, 2020, cited in British Columbia’s Office of the Human Rights Commissioner, *Disaggregated demographic data collection in British Columbia: The grandmother perspective*, September 2020 at 26.

¹²² British Columbia, Office of the Human Rights Commissioner, *Disaggregated demographic data collection in British Columbia: The grandmother perspective*, (Vancouver: British Columbia’s Office of the Human Rights Commissioner, 2020) at 40.

¹²³ Committee on the Rights of Persons with Disabilities, General Comment No. 8 on the right of persons with disabilities to work and employment, 2022, CRPD/C/GC/8 at para 79.

¹²⁴ ILO Committee of Experts on the Application of Conventions and Recommendations, General Observation on Discrimination based on Race, Colour and National Extraction, 108th Session, 2019, at 7.

¹²⁵ See e.g. *Pereira v. Canada*, 2000 FC 16339, T-608-92.

¹²⁶ Task Force Consultations, 22 July 2021.

¹²⁷ Task Force Consultations with the Quebec Commission des droits de la personne et des droits de la jeunesse, 17 February 2022.

¹²⁸ Quebec *Charter of Human Rights and Freedoms*, L.Q. c. C-12, Section 86.

¹²⁹ Public Service Commission of Canada, *Annual Report 2020-21: Building tomorrow’s public service today* (Ottawa: Public Service Commission of Canada, 2021).

¹³⁰ Considering that “other disability” constituted 65.4% of the total, the subgroup classifications might require refinement.

¹³¹ *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s 4(1).

¹³² See Jane Bailey, Toward an Equality-Enhancing Conception of Privacy (2008) 31:2 Dalhousie Law Journal 267.

¹³³ Belle Rose Ragins, Romila Singh & John M. Cornwell, “Making the Invisible Visible: Fear and Disclosure of Sexual Orientation at Work” (2007) 92:4 Journal of Applied Psychology 1103 at 1105.

¹³⁴ Bank of Canada, Bringing our values to life: Equity, Diversity, and Inclusion Strategy, 2022-24, (Ottawa: Bank of Canada, 2022) at 7.

¹³⁵ Canadian Broadcasting Corporation/ Radio Canada, *Employment Equity Annual Report 2020*, (Ottawa: CBC/Radio-Canada, 2020) at 11.

¹³⁶ Submission of the Community of Federal Visible Minorities to the EEART, 28 April 2022.

¹³⁷ Public Service Commission of Canada, Members of Employment Equity Groups: Perceptions of Merit and Fairness in Staffing Activities, A Statistical Study, March 2014 at 4.

¹³⁸ Eddy S. Ng & Nick Rumens, “Diversity and inclusion for LGBT workers: Current issues and new horizons for research” (2017) 34 Canadian Journal of Administrative Sciences 109 at 112 – 113.

¹³⁹ Analytical Summaries: Early Release of [Toronto Metropolitan] University Information to Help Guide the Task Force in its Assessment of Existing Research, December 2021.

¹⁴⁰ Section 16(2)(a), *Canadian Forces Employment Equity Regulations*, SOR/2002-421.

¹⁴¹ *CN v. Canada (Canadian Human Rights Commission)*, 1987 SCC 109, [1987] 1 SCR 1114 at 1114; See also Belle Rose Ragins, Romila Singh & John M. Cornwell, “Making the Invisible Visible: Fear and Disclosure of Sexual Orientation at Work” (2007) 92 Journal of Applied Psychology 1103 at 1105; Abigail J. Stewart & Danielle LaVaquer-Manty, “Achieving Critical Mass: The Future of Gender and Higher Education in the United States” in David L Featherman, Martin Hall, & Marvin Krislov, eds, *The Next Twenty-five Years: Affirmative Action in Higher Education in the United States and South Africa* (Ann Arbor, MI: University of Michigan Press, 2009) 309.

¹⁴² Canadian Armed Forces, *Employment Equity Plan 2021-2026*, (Ottawa: Canadian Armed Forces, 2021).

- ¹⁴³ Government of Canada, “Employee Self-Identification Form” (18 November 2002), online: <https://www.canada.ca/en/government/publicservice/wellness-inclusion-diversity-public-service/diversity-inclusion-public-service/self-identification/employee-self-identification-form.html>.
- ¹⁴⁴ Belle Rose Ragins, Romila Singh & John M. Cornwell, “Making the Invisible Visible: Fear and Disclosure of Sexual Orientation at Work” (2007) 92:4 *Journal of Applied Psychology* 1103 at 1105.
- ¹⁴⁵ Office of the Privacy Commissioner of Canada, Written Submission to the EEART, 14 September 2022.
- ¹⁴⁶ Office of the Privacy Commissioner of Canada, Written Submission to the EEART, 14 September 2022.
- ¹⁴⁷ McMaster University, *2021 Employment Equity Census Report* (Human Resources Services, 2022) at 70. Available online.
- ¹⁴⁸ Statistics Canada, Presentation to the EEART, 25 May 2022.
- ¹⁴⁹ Statistics Canada, Presentation to the EEART, 25 May 2022.
- ¹⁵⁰ Canadian Association of Counsel for Employers, Submission to the EEART, 28 April 2022.
- ¹⁵¹ Public Service Alliance of Canada, Presentation to the EEART, 29 March 2022; Diversity Institute, Toronto Metropolitan University, Presentation to the *Employment Equity Act* Review Task Force, 23 February 2022.
- ¹⁵² Source: Public Service of Canada, Presentation to the EEART, 18 March 2022.
- ¹⁵³ Presentation to the EEART, 14 June 2022.
- ¹⁵⁴ Treasury Board of Canada Secretariat, “Appendix H: What We Heard: Second Survey on the Draft Public Service Accessibility Strategy” in *Accessibility Strategy for the Public Service of Canada* (07 May 2020), online.
- ¹⁵⁵ Hara Associates, “Employment Equity Benchmarking Policy Options, Draft Report to the Treasury Board Secretariat: Centre for Diversity and Inclusion” received February 2023 at 23 [unpublished].
- ¹⁵⁶ *CN v Canada* (Canadian Human Rights Commission), [1987] 1 SCR 1114, 1987 CanLII 109 (SCC); *National Capital Alliance on Race Relations v Canada* (Department of Health & Welfare), 1997 CanLII 1433 (CHRT), T.D.3/97; See also J Helen Beck, Jeffrey G Reitz & Nan Weiner, “Addressing Systemic Racial Discrimination in Employment: The Health Canada Case and Implications of Legislative Change” (2002) 28:3 *Canadian Public Policy* 373 at 385.
- ¹⁵⁷ Human Resources Development Canada, *Evaluation of the Federal Contractors Program: Final Report* / [by] Evaluation and Data Development, (Ottawa: Human Resources Development Canada, 2002) at 22.
- ¹⁵⁸ See generally Clark Banack & Dionne Pohler, eds., *Building Inclusive Communities in Rural Canada*, (Edmonton: University of Alberta Press, 2023).
- ¹⁵⁹ Carol Agócs, Think Piece on Three Issues, Unpublished Paper commissioned by the EEART, 30 August 2022.
- ¹⁶⁰ Lauren B Edelman, *Working Law: courts, corporations, and symbolic civil rights* (Chicago; London: University of Chicago Press, 2016) at 3.
- ¹⁶¹ UN Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, UN Doc CERD/C/CA/CO/21-23 (2017) at para 32(d).
- ¹⁶² FETCO, Submission to EEART, 28 April 2022; FETCO, Submission to EEART, 28 April 2022; Conseil du patronat du Québec, « Commentaires du CPQ dans le cadre d’une table ronde avec le Groupe de travail sur la révision de la Loi sur l’équité en matière d’emploi (fédérale) April 2022.
- ¹⁶³ DisAbled Women’s Network of Canada, *Brief Submitted to the EEART*, 10 June 2022 at 3.
- ¹⁶⁴ Canadian Bar Association, Submission to the EEART, 10 May 2022; Canadian Labour Congress, Submission to the EEART, 28 April 2022; Canadian Union of Public Employees, Submissions to the EEART, 28 April 2022.
- ¹⁶⁵ (UK), 2010, c. 15, section 159.

Chapter 3: Rethinking equity groups under the *Employment Equity Act* framework

Introduction

[T]he underlying causes of discrimination and de facto inequalities, resulting from deeply entrenched discrimination and long-standing social exclusion, cannot effectively be addressed without proactive measures.

ILO Committee of Experts on the Application of Conventions and Recommendations, General Observation on Discrimination based on Race, Colour and National Extraction, 2019

The task force was asked to consider what changes should be made, not only to the names and definitions of the current *Employment Equity Act* “designated groups,” but also to the understanding of “employment equity groups.”

Names matter and virtually everyone who came before our task force agreed that much of the terminology in the *Employment Equity Act* needed to be modernized. Employer associations, unions, community groups and researchers, alongside international treaty bodies, have urged the government to modernize the language in the *Employment Equity Act* framework to ensure that it aligns with careful, intersectional, contemporary understandings and concerns of First Nations, Métis and Inuit workers, workers with disabilities, Black and racialized workers, and 2SLGBTQI+ workers.

Our first recommendation is in that spirit. In keeping with our focus on the purpose of achieving and sustaining substantive equality, is that they should be referred to as “employment equity groups”:

Recommendation 3.1: The term “designated groups” in the *Employment Equity Act* should be replaced by the term “employment equity groups”.

The challenge extends beyond naming and defining. Equitable inclusion matters too. It was heartening to hear employers, governmental actors, workers and a range of concerned communities make the case for broad *Employment Equity Act* inclusion.

Similarly, umbrella categories used in the current legislation - “women”, “Aboriginal Peoples”, “persons with disabilities” and “visible minorities” - can inadvertently lead us to miss the fact that disadvantage is historically rooted. They can also obscure significant differences in experiences and the specific barriers faced by each equity group, as well as by sub-group members. Finally, they run the risk of masking the barriers created at the intersections of grounds of discrimination such as race, gender and disability.

Our task force was reminded by the outgoing United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Professor Tendayi

Achieme, that barriers tend to reflect historical injustice; international human rights law requires discriminatory practices to be combatted at a structural level so they cease to be barriers for equity groups; for anti-racism, this requires race-conscious remedies that undo discrimination, rather than so-called “colorblind” approaches.¹⁶⁶

What’s in a name? Terminology matters

In proposing to rename the categories, this report takes an additional step: we have deliberately chosen to identify members of each employment equity group as workers. The notion of work and workers is discussed in broad, non-technical terms, in the report’s spirit of inclusion. Through the broad notion, the report also discusses the changes to the scope of the *Employment Equity Act* that require attention.

The term worker is used in a deliberately non-technical manner. The language is meant to include. Those who wish to work, even if they have become discouraged from entering or re-entering the Canadian labour market, are considered workers. Those who undertake unpaid childcare work at home and have difficulty entering the workforce as fully as they might like are considered workers. Those whose paid employment is to care for another person in that person’s home, yet earn far less than they might if they were hired according to their formal professional educational level as a nurse, are considered workers. Those who are self-employed yet earn far less than they might if they were hired according to their formal educational level as an engineer are considered workers. Those who have occupied a range of immigration statuses upon arrival in Canada are considered workers. Those who have been misclassified through the use of contractual arrangements that disguise their true legal status as employees are covered in our discussions with the language of workers. Employment equity is about identifying and removing barriers. The language we choose should convey this inclusive approach.

This inclusive approach is guided by the ILO’s non-binding *Employment Relationship Recommendation, 2006 (No. 198)*, which encourages ILO members like Canada to review their laws to ensure that they “guarantee effective protection for workers who perform work in the context of an employment relationship.”¹⁶⁷ Our approach shares some similarities with the broad, non-technical definition of work for statistical purposes in the ILO *Resolution concerning statistics of work, employment and labour underutilization, 2013* which allows a range of forms of work, including the own-use production work, employment work, unpaid trainee work, volunteer work, and other work activities to be considered for the purposes of understanding the barriers that may affect workplace participation.¹⁶⁸

The task force’s report also draws inspiration from the ILO’s Violence and Harassment Convention, 2019 (No. 190), Article 2, which is designed to provide broad coverage and protec[t] workers and other persons in the world of work, including employees as defined by national law and practice, as well as persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer” as well as appl[y] to all sectors, whether private or public, both in the formal and informal economy, and whether in urban or rural areas.

Recommendation 3.2: Employment equity group members should be referred to as “workers” in the *Employment Equity Act* framework.

History matters

In response to the first concern, this report is anchored in the specific histories of all employment equity groups. The historical discussion is particularly pronounced for three:

- **First Nations, Métis and Inuit peoples** because of the significant change in understanding of Canada’s nation-to-nation or government-to-government relationship with Indigenous peoples and the responsibility for truth and reconciliation
- **Black workers** because of the specific request in our mandate to consider whether this sub-group of the current ‘visible minority’ category should be considered a separate employment equity group, and
- **2SLGBTQI+ workers**, because of the specific request in our mandate to consider whether to include them within the *Employment Equity Act* framework

Engagement sessions were filled with reminders of the importance of taking the time to understand group members’ lived realities. The inequitable workplace practices experienced by members of employment equity groups are far from abstract. Consistent with its focus on substantive rather than formal equality, employment equity should move us away from a hypothetical, abstract approach to the workplace, and toward a grounded approach that takes history seriously. History offers a way to ground in the actual, lived experiences of unfair practices that serve as barriers to equitable representation in the workplace.

A caution is necessary, however. By looking closely at historical disadvantage, this report does not suggest that historical disadvantage is required to establish that discrimination has occurred under Canadian law; it is not, and international treaty bodies have similarly reaffirmed this point.

History can be helpful to the exercise of identifying employment equity groups because it informs how group members understand themselves and their shared experience of disadvantage, which has often occurred over time and through specific forms of exclusion. The shared experiences help to shape the coherence of the groups proposed to be covered by the law, and shape how each group is identified.

Yet “[r]elations across group-based diversities must be relations of equality.

Colleen Sheppard, Inclusive Equality (McGill-Queen’s University Press, 2010) at 114

Attention to history helps us to acknowledge that while each of the employment equity groups is in one way or another a composite of many subgroups, sometimes the composition of the groups may prevent us from fully appreciating the persistence of forms of exclusions faced by some members of the group.

This message was compellingly communicated by Black workers about their inclusion in the already widely criticized category termed “visible minorities”. In redefining and including equity groups, it was important to pay attention to whether inclusion in the same group could perpetuate rather than assist in removing workplace barriers.

For all workers, and in particular for First Nations, Métis and Inuit workers, it was important to take into account the magnitude of the change in relations – in this case, nation-to-nation relations or government-to-government relations – terms that we use interchangeably - and the impact of the change on the kind of framework we build into our common future.

First Nations, Métis and Inuit: Redefining relationships in the wake of truth and reconciliation

Introduction

Reconciliation is about forging and maintaining respectful relationships. There are no shortcuts.

Senator Murray Sinclair, Truth and Reconciliation Commission

The review of the EEA is an opportunity to build better relationships with Indigenous people and to work towards reconciliation. Engagement and consultation with Indigenous people are key to work towards reconciliation.

Federal Employee, member of the Federal Indigenous Employees Network, 10 May 2022

Our task force concludes that it is time to rethink the manner in which First Nations, Métis and Inuit peoples are included in the *Employment Equity Act* framework. Transformative change includes but extends beyond terminology and self-identification practices. It includes rethinking the framework to support First Nations, Métis and Inuit economic self-determination.

Framing Indigenous peoples as one equity group alongside others misses the nature of the relationship between Indigenous peoples and the Canadian state. Indigenous peoples in Canada are nations. They include approximately 634 First Nations, in addition to Inuit and Métis governments, and stand 1.8 million people strong. The foundations of the relationship have also been powerfully, and importantly, called into question. Volume 2 of the report of the *Royal Commission on Aboriginal Peoples* states it plainly:

We know ... that this country was not terra nullius at the time of contact and that the newcomers did not 'discover' it in any meaningful sense. We know also that the peoples who lived here had their own systems of law and governance, their own customs, languages and cultures.¹⁶⁹

We must reckon with the challenge of this starting point. It literally changes the landscape. It is central to imagining alternatives that are resolutely built on Indigenous rights and recognition. The reckoning is happening in Canada, through the *United Nations Declaration on the Rights of Indigenous Peoples*, which has been incorporated into Canadian law through the *United Nations Declaration on the Rights of Indigenous Peoples Act*,¹⁷⁰ and in international organizations such as the Organisation for Economic Co-operation and Development (OECD).¹⁷¹

Affirming nation-to-nation or government-to-government relationships is pivotal to rethinking employment equity as it concerns First Nations, Métis and Inuit peoples going forward. Métis constitutional law scholar Josh Nichols and Anishinaabe chair of Indigenous constitutionalism and philosophy, Aaron Mills argue the following:

When Canadians chose to constitutionally recognize the inherent rights of Indigenous peoples in s. 35 of the Constitution Act, 1982 they repudiated the prejudices of the colonial past and affirmed that Indigenous peoples are equal to all other peoples and, like other peoples, they have a right to self-government.¹⁷²

Canada's colonial past is increasingly acknowledged and set out in detail in key reports, including the Reports of the Royal Commission on Aboriginal Peoples, *the Report of the Truth and Reconciliation Commission of Canada*, and *the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*.¹⁷³ It is also the subject of international attention:

Addressing violence against women is not sufficient unless the underlying factors of discrimination that originate and exacerbate the violence are also comprehensively addressed. The IACHR [Inter-American Commission on Human Rights] stresses the importance of applying a comprehensive holistic approach to violence against indigenous women. This means addressing the past and present institutional and structural inequalities confronted by indigenous women in Canada. This includes the dispossession of indigenous lands, as well as historical laws and policies that negatively affected indigenous people, the consequences of which continue to prevent their full enjoyment of their civil, political, economic, social and cultural rights. This in turn entails addressing the persistence of longstanding social and economic marginalization through effective measures to combat poverty, improve education and employment, guarantee adequate housing and address the disproportionate application of criminal law against indigenous people. These measures must incorporate the provision of information and assistance to ensure that indigenous women have effective access to legal remedies in relation to custody matters.

Inter-American Commission on Human Rights, Missing and Murdered Indigenous Women in British Columbia, Canada, 21 December 2014, OEA/Ser.L/V/II. Doc. 30/14, at para. 306

It bears recalling: the majority of First Nations adults have either attended or have at least one member of their family who attended an Indian Residential School.¹⁷⁴ Court cases are also increasingly offering comprehensive discussions of the colonial history including the long life of federal Indigenous assimilation policies.¹⁷⁵ Holistic responses are critical.

Canadian courts increasingly acknowledge the historical right to self-government that flows from Indigenous peoples' original sovereign rights over their land, and that is now enshrined in Section 35 of the *Constitution Act, 1982*. The Auditor General of Canada, in an audit of programs for First Nations on reserves, considered that "First Nations members generally face far greater challenges than those confronting Canadian society as a whole, whether they live on or off reserves," including higher unemployment.¹⁷⁶ The First Nations Information Governance Centre reports that emotional well-being was higher among those who were working, as compared with those who were not. First Nations who were working also reported having relatively higher levels of social support compared with those who were not working.¹⁷⁷

These reports also contain key teachings about the power and responsibility of relationships for ending violence and fostering transformation. They are grounded in the foundational right of self-determination that emerges through the *United Nations Declaration on the Rights of Indigenous Peoples*.

The International Labour Organization’s Indigenous and Tribal Peoples Convention, (No. 169), which Canada has not yet ratified, and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which Canada has ratified, are often addressed together with the United Nations *Declaration on the Rights of Indigenous Peoples* by the ILO to reinforce Indigenous peoples’ rights in relation to land and employment. The ILO urges ratification of Convention No. 169 as a way to abide by Convention No. 111. For the ILO, not only do states have an obligation to recognize Indigenous peoples’ rights to land, territories and resources; failure to do so can undermine Indigenous peoples’ “right to engage without discrimination in traditional occupations and livelihoods”.¹⁷⁸ The ILO has called on members to reinforce their efforts to redress discrimination and promote equality of opportunity and treatment in employment and occupation for Indigenous peoples.¹⁷⁹

The teachings in the extensive reports that have helped to shift the narrative on Indigenous rights in Canada should root how we approach transforming the *Employment Equity Act* framework.

The Truth and Reconciliation Commission of Canada, in order to redress the legacy of residential schools and advance Canadian reconciliation, has specifically issued a call to action for the corporate sector in Canada:

Truth and Reconciliation Commission Call to Action no. 92:

We call upon the corporate sector in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:

- i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.
- ii. Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.
- iii. Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

This call to action, and its invocation of the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework to be applied, structures the focus of our task force’s work on employment equity. It is a basis for how the *Employment Equity Act* framework might be reimaged, based on meaningful consultations with First Nations, Métis and Inuit peoples.

Terminology and the *Employment Equity Act*

The *Employment Equity Act* uses the term “Aboriginal peoples”, defined as “Indians, Inuit or Métis”. This is the language used and defined under Section 35(2) of the *Constitution Act, 1982*. In addition, the Supreme Court of Canada has clarified that the reference to the word “Indian” or “Indians” in Section 91(24) of the *Constitution Act, 1867* in its historical, philosophical and linguistic contexts “includes all Aboriginal peoples, including non-status Indians and Métis.”¹⁸⁰ The Supreme Court of Canada has also recognized that the term “Indians” was “created by European settlers and applied to Canada’s Aboriginal peoples without making any distinctions between them.”¹⁸¹ There is an obligation to remedy the harms of “internal colonization”, a term used to include the Truth and Reconciliation Commission’s concept of “cultural genocide”, to recognize that the practices occur within Canadian jurisdiction.¹⁸² The obligation applies to all Indigenous peoples and individuals, including individuals “who may no longer be accepted by their communities because they were separated from them” for example through government policies like residential schools.¹⁸³

The entry into force of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (UNDRIPA) puts the question of Indigenous self-determination squarely on the table, consistent with Article 33(1) and (2) of the *United Nations Declaration on the Rights of Indigenous Peoples, 2007* (UNDRIP).

It is important to update the language in the *Employment Equity Act*, and the task force recommends that the language of “Indigenous peoples” be adopted with a distinctions-based approach, in other words, one that specifically identifies First Nations, Métis and Inuit peoples. The language as updated should be clearly understood to be consistent with the Canadian constitutional coverage of all Aboriginal peoples of Canada. A specific reference to Section 35 of the *Constitution Act, 1982* and Section 91(24) of the *Constitution Act, 1867* would be advisable.

Recommendation 3.3: The *Employment Equity Act* framework should adopt the term “Indigenous workers” with a distinctions-based approach to First Nations, Métis and Inuit peoples.

Recommendation 3.4: The *Employment Equity Act* should clarify that its use of “Indigenous workers” with a distinctions-based approach to First Nations, Métis and Inuit peoples is intended to be consistent with Section 35 of the *Constitution Act, 1982* and Section 91(24) of the *Constitution Act, 1867*.

A note about statistics on First Nations, Métis and Inuit

“The quality and reliability of data related to the Indigenous population is generally high in Canada compared to other OECD countries with Indigenous populations and draws on consistent and therefore comparable definitions of Indigenous groups. Reliance on the national census and specific population-based surveys has been a detriment, however, to a fuller understanding of the state of Indigenous businesses and communities.”

National Indigenous Economic Strategy, June 2022 at 49

Accurate data are crucial for addressing employment equity for First Nations, Inuit and Métis peoples. In 2019, the OECD urged that Indigenous communities and institutions should be involved in decision-making about ongoing data collection. For data sovereignty reasons linked to First Nations

Principles of ownership, control, access and possession (OCAP), Canada labour force surveys are not collected on reserves.

There are initiatives underway that move us toward consultative approaches to data governance and data justice. They include the recent British Columbia *Anti-Racism Data Act*, discussed in Chapter 2, which rightly puts consultations and collaboration with First Nations and Métis communities at the forefront.

OCAP asserts that First Nations alone have control over data collection processes in their communities, and that they own and control how this information can be stored, interpreted, used, or shared.

Ownership refers to the relationship of First Nations to their cultural knowledge, data, and information. This principle states that a community or group owns information collectively in the same way that an individual owns his or her personal information.

Control affirms that First Nations, their communities, and representative bodies are within their rights to seek control over all aspects of research and information management processes that impact them. First Nations control of research can include all stages of a particular research project—from start to finish. The principle extends to the control of resources and review processes, the planning process, management of the information and so on.

Access refers to the fact that First Nations must have access to information and data about themselves and their communities regardless of where it is held. The principle of access also refers to the right of First Nations' communities and organizations to manage and make decisions regarding access to their collective information. This may be achieved, in practice, through standardized, formal protocols.

Possession While ownership identifies the relationship between a people and their information in principle, possession or stewardship is more concrete: it refers to the physical control of data. Possession is the mechanism by which ownership can be asserted and protected.

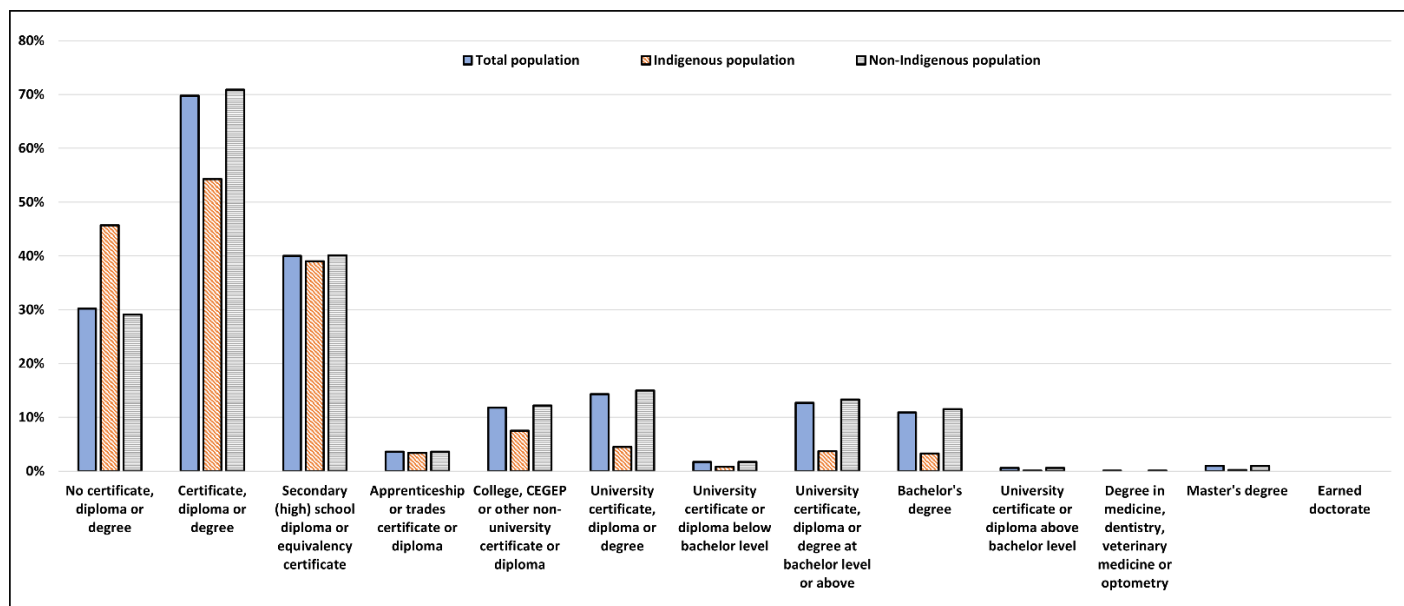
First Nations Information Governance Centre

We heard that the data gap gives the appearance of workforce shortages, which could then be used to justify relying on migrant workers. The task force urges the federal government to prioritize government to government, meaningful consultations with Indigenous peoples over the data gap in labour market information, notably on reserves, which arises as a result of unresolved data sovereignty issues.

Recommendation 3.5: The federal government should prioritize meaningful consultations consistent with First Nations, Métis and Inuit peoples' right to self-determination to seek to resolve data sovereignty issues and redress data gaps in labour market information on reserves.

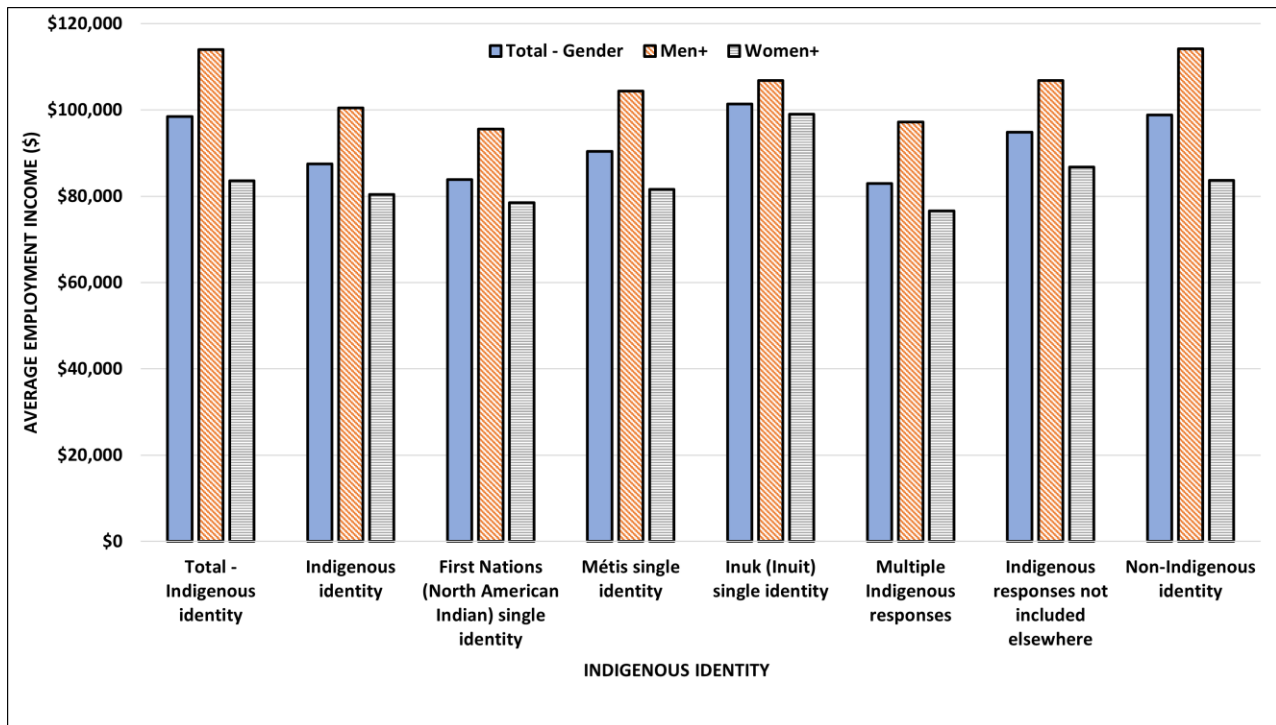
Census 2021 data confirm that First Nations, Métis and Inuit youth are the fastest growing youth population. Below is the most recent population data from Census 2021, which shows the percentage of the total First Nations, Métis and Inuit population compared to the population at large in Canada with corresponding educational levels:

Figure 3.1: Percentage of the total Canadian population, Indigenous and non-Indigenous populations, aged 15 to 34, by highest certificate, diploma or degree¹⁸⁴



The 2021 Census indicates that the average full-time, full year employment income of First Nations, Inuit and Métis peoples with a university bachelor's degree or above was 11.4% lower than that of the non-Indigenous population. The difference was significant across all age groups. While the average income of non-Indigenous populations in the same demographic was \$98,800, for First Nations, the income was 15% lower, at \$83,900; and 8.5% lower for Métis, at \$90,400. For Inuk/Inuit people, the income was slightly higher at 2.6% or \$101,400.

Figure 3.2: Average employment income by Indigenous Identity for the population 15 years and over of Canada who worked full year, full time with a university certificate, diploma or degree at bachelor level or above¹⁸⁵



The First Nations Information Governance Centre, drawing on a holistic lifelong learning model, prepared a cross-sectional survey that measures early childhood development, education, and employment among First Nations children, youth and adults living in First Nations reserves and Northern communities. The rooted model values sources and domains of knowledge that include a world of people, including the self, family, ancestors, clan and community, and represents the coexistence of Indigenous knowledges with Western knowledges. The model recognizes lifelong learning as a journey across life stages that includes home, community, school, land as well as workplace. It encompasses four dimensions of personal development, that include the spiritual, emotional, physical and mental through which learning is experienced. And the model encompasses community well-being, focusing on the social, economic, spiritual and political conditions that influence and are influenced by the learning process.¹⁸⁶

The employment results of the First Nations Information Governance Centre were contextualized, and often included seasonal work in rural or isolated First Nations communities. The results did not include traditional work that contributes to the local economy but is unpaid, such as hunting, fishing or caring for children and Elders. Based on these parameters, the survey found that

- close to half of First Nations adults were working at the time of the survey (men, 44.9%; women 44.5%), with close to two-thirds of those between the ages of 40 – 49 working.
- First Nations governments and organizations were a major employer of First Nations adults (and youth) in First Nations communities.
- The main sectors of employed First Nations adults included
 - First Nations government or organizations (40.5%)
 - educational services (9.8%)

Chapter 3: Rethinking equity groups under the Employment Equity Act framework

- agriculture, forestry, fishing and hunting; mining, quarrying and oil and gas extraction as well as utilities (8.1%)
- health care and social assistance as well as public administration (7.7%), and
- construction (7.5%)
- From an occupational perspective,
 - 22.6% assumed jobs as labourers
 - 19.3% were in professional or technical occupations, and
 - 17.1% were managers and administrators or more senior staff
 - Personal and protective service staff accounted for 14.8%, while
 - clerical or secretarial staff were 10.4%
- While most worked full-time, a significant proportion worked less than 30 hours per week in their main jobs, one third due to a lack of suitable opportunities, and in other cases to care for others.
- The survey found that 22.1% of those who were working had a main job located outside of a First Nation. Reasons ranged, with some high sampling variability, from
 - a lack of jobs in community (51.7%)
 - higher wages (38.7%)
 - job security (6.2%), or
 - advantages and services such as on-site day care or proximity to children’s schools or pension plans (3.4%)
- Importantly, the survey also identified main reasons why First Nations adults chose to work within a First Nations community, including
 - to be close to family (29.4%)
 - to give back to community (22.9%)
 - for financial reasons (17.6%)
 - to build capacity in community (14.8%)
 - to stay connected to their culture, language and traditions (8.7%)
 - to create opportunities for others (3.7%)
 - alongside other reasons (2.9%).¹⁸⁷

The report recognized the importance of First Nations governments and organizations as public-sector employers, but lamented among other features the lack of job opportunities for First Nations communities and the impact on out-migration. It called for policy makers to pay close attention to the barriers to employment within and outside of First Nations communities, and improvements in the investment climate to foster employment opportunities.¹⁸⁸

The report provided nuance on the relationship between work experiences and wellness, adding that work environments in which First Nations cultures are not understood and respected can lead to a lack of trust and resentment among First Nations employees, undermining wellness. The report called for the “positive association” between language, culture, and traditions in communities and the well-being of First Nations and potential employment.¹⁸⁹

According to the 2021 Census, there were 70,545 Inuit people living in Canada, with 69% living in Inuit Nunangat. Based on the 2016 Census, the 2017 Aboriginal Peoples Survey released in 2019 found that more than half (52%) of Inuit aged 15 or over were employed (53% for Inuit women and 51% for Inuit men). Of that number, 79% held permanent employment, while 21% worked part-time. The Aboriginal Peoples Survey paid particular attention to the land-based economy, which included reporting on contributions beyond the wage economy. The “livelihoods” approach to the mixed economy in Inuit

Nunangat is important and should not be dichotomized into work and non-work. It included questions focused on whether respondents participated in activities such as hunting, fishing, trapping, gathering of wild plants, and making clothing, footwear, jewelry, carvings, drawings or more, as well as the reasons for participating in these activities. The survey results show that 85% of Inuit living in Inuit Nunangat participate in at least one of these activities, and when they do, they do so often. They do so for many reasons, including for 29% to supplement income.

It is important to underscore the youth dimension of these statistics. Indigenous youth are significant labour market entrants, including in rural communities. This has effects both in rural and urban communities, with due regard to the plural character of rural Canada discussed in Chapter 1. The nature and quality of employment options available to First Nations, Métis and Inuit youth should be a number one policy priority.¹⁹⁰

The Imperative of meaningful, good faith consultations

[A]ny new and revised legislation must be supported by robust yet collaborative mechanisms with Indigenous governments, organizations, and peoples to take into account jurisdictional scenarios and operational realities. This includes questions and decisions around how the federal government will work closely with Indigenous people in order to build, support and implement any new changes in applicable legislation.

Native Women's Association of Canada, Project Reporting to the EEART, 19 October 2022

Decisions of the Supreme Court of Canada recognize that the Canadian government has a context-specific duty to consult and accommodate (that is, adapt, harmonize, reconcile) the interests of First Nations, Métis and Inuit peoples when Aboriginal rights are at issue; the duty will vary based on the circumstances.¹⁹¹ While the Supreme Court of Canada has developed principles ranging from meaningful, good faith consultation with the intention of substantially addressing the concerns of Indigenous peoples whose lands are at issue, to informed consent in the case of established rights, these principles emerge from the specific context of proving the existence of Aboriginal rights through lengthy litigation, so may not be well suited to supporting “the negotiated construction of a constitutional order” for Indigenous self-determination.¹⁹² They hold potential, however, for rethinking relationships beyond the existing *Employment Equity Act* framework.

In particular, Indigenous peoples have the right to participate in decision-making in matters that would affect their rights. This right is to be exercised “through representatives chosen by themselves in accordance with their own procedures”. They also have the right to “maintain and develop their own indigenous decision-making institutions.”¹⁹³

Free, prior and informed consent “before adopting and implementing legislative or administrative measures that may affect them” is the hallmark right of Indigenous peoples, defined in Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples*. It requires Canada to undertake good faith consultation and cooperation with Indigenous peoples through their own representative institutions to obtain that free, prior and informed consent.

The UN Human Rights Committee, while reaffirming Supreme Court of Canada decisions, recommended that Canada “should consult indigenous people to ... seek their free, prior and informed consent whenever legislation and actions impact on their lands and rights.”¹⁹⁴

This rights-based approach to meaningful consultations frames how our task force has engaged with transformative approaches to the *Employment Equity Act* framework.

A discussion of self-identification in the *Employment Equity Act* framework

The question of the sufficiency of self-identification under the EEA is, without question, a key barrier that needs to be addressed. ... [W]hile many Indigenous people today allow that self-identification is necessary, few accept that it’s sufficient.

Joshua Nichols and Aaron Mills, “Rethinking the Relationship between Indigenous Rights and Employment Equity”, Unpublished Paper submitted to the EEART, 31 August 2022

Indigenous identity is not a one-size fits all approach; instead, it should more accurately reflect the fluidity of the changing Indigenous-settler relationship and landscape, including the changing nature of First Nation, Inuit, and Métis inter-relations. Each of the Indigenous distinctions-based groups interprets identity quite differently.

Carolyn Laude, Strategic Communications Advisor, Knowledge Circle for Indigenous Inclusion, Being our Indigenous Selves: Redressing Indigenous Identity and Self-Identification in Colonial Spaces: Discussion Paper on Self-Identification and Indigenous Identity prepared for Deputy Minister Wilson, 3 June 2022, at 18

The *Employment Equity Act* has been built on the premise of self-identification. Yet increasingly, there is a call to step back.¹⁹⁵ What are the legacies of colonialism and the *Indian Act* that make reliance on the self-identification process alone particularly fraught? What are the implications for self-identification of an approach to Indigenous identity that is at once relational and “actively lived as resurgence”, that is “constructed, shaped and lived”?¹⁹⁶ And once that work has been done, can the *Employment Equity Act* framework contribute to building better processes that “honour Indigenous self-determination, practices, and approaches”¹⁹⁷ into the future?

It needs to be stated clearly from the outset: the issue of Indigenous self-identification can only be determined through meaningful consultations with First Nations, Métis and Inuit peoples.

For the task force, it was obvious that our role cannot be to resolve a matter that is rightfully the subject of meaningful consultations and free, prior and informed consent of First Nations, Métis and Inuit peoples. Our goal is to raise important questions that affect how Section 9(2) of the *Employment Equity Act* on employee self-identification and Section 18(4) on employer reporting on those who have self-identified should be applied.

Our task force was informed that the Government of Canada has specifically committed to close consultations, in particular on the issue of “community acceptance,” given the complexity of self-identification.¹⁹⁸

The report offers a discussion of some of the key issues that have been raised through our consultations, with special attention to Canada's obligations under the *UNDRIP Act*. The discussion benefits from the outstanding discussion paper prepared by Mohawk strategic communications advisor Carolyn Laude for Deputy Minister Wilson, and the incisive analysis provided by Josh Nichols and Aaron Mills. Through the *Employment Equity Act* Review task force secretariat, our task force also undertook extended engagements and commissioned reports from leading First Nations, Métis and Inuit organizations to inform its reflections.

We were told that for First Nations, Métis and Inuit peoples, addressing the issue of self-identification could hardly be more urgent; it is also painful and fraught. The question of self-identification is profoundly connected to the legacies of colonialism. And the question of identity fraud has come to be understood as a particularly problematic exercise of privilege in the face of persistent underrepresentation of Indigenous peoples in most federally regulated workplaces across Canada.

It is hurtful to First Nations, Métis and Inuit to have to contend with non-Indigenous individuals claiming Indigenous status.

Those who misrepresent themselves as Indigenous may ironically be favoured because they can readily “fit in” or “adapt” to a *status quo* that is already familiar to them, while First Nations, Métis and Inuit continue to face systemic inequality including barriers within the workplace. That so many public institutions, including universities, appear to have been relying on self-identification alone has been increasingly criticized and has led to some significant reviews of current practices.¹⁹⁹ Whatever the reasons, leading Kanien'kehá:ka anthropologist Audra Simpson states the challenge forcefully:²⁰⁰

Indigenous people are quite literally being replaced by non-Indigenous people in these cases. The fallout of that is profound. The perspective that is supposed to be sought is not being acquired. Indigenous peoples are not being represented. In fact, white people are basically hiring themselves. Until there is a proper verification process that involves First Nations and Métis and Inuit Peoples, this is going to continue. It is a farse, it's a ruse, it's a farse. And it will continue. There is no reason for them not to. Clearly there are serious ethical and moral lapses that are baked into the self-identification process. Unless there is verification, unless Indigenous peoples are understood to be political communities that govern themselves and can understand and communicate their membership to others, these folks will continue to tick boxes, take up space and speak over and for us.

Professor Audra Simpson, CBC Newsroom, Indigenous Ancestry Claims, 27 November 2022

We were also told, notably by the Métis National Council in its consultations with our task force, that the right of Indigenous governments to determine for themselves who their citizens are, without the federal government infringing on that, is tightly tied with Indigenous self-government, consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*. The Métis National Council pointed to their own registry, and expressed cautions about approaches from the federal government that make self-identification a Crown responsibility. They also acknowledged the concern to avoid discrimination against Indigenous peoples during the hiring process, considering that self-identification itself should be on a need-to-know basis.²⁰¹

Self-identification in the federal public service

Internal reconciliation with Indigenous employees cannot occur if anti-racism policies are also not part of the equation... In order to better promote and support reconciliation across the country and throughout society, there is a need to start within our own house within the public service.

Gina Wilson, Deputy Minister of Women and Gender Equality and Youth & Deputy Minister Champion for Indigenous Federal Employees and Women, Presentation to the EEART, 14 June 2022

The task force's largest engagement session was with Indigenous federal public service employees. They stressed the complexity and challenge of self-identification. In this consultation and in others, the task force was told that the painful paradox is real: it takes courage to self-identify.²⁰² Many Indigenous workers expressed concerns to us about self-identifying as First Nations, Métis or Inuit for the purpose of employment equity. They know the weight of stereotyping and discrimination, so took their decisions carefully. One former federal employee was reluctant to self-identify as First Nations because their university rendered them ineligible for financial aid on the false assumption, a stereotype, that their First Nation would finance their education. Because of that experience, the employee was afraid to self-identify in the federal workplace.

These reflections echoed some of the statistical data prepared in the report of the Interdepartmental Circles on Indigenous Representation, which in 2017 noted based on their analysis of science-based occupational groups and senior levels of economics and social science services, that Indigenous employees were promoted at a lower rate (19.9%) than those not self-identifying as Indigenous (25.4%), although they had a slightly higher rate of lateral transfers (25.2%) than employees who did not self-identify as Indigenous (24.7%).²⁰³

"I completed all the hoops I was told I must get through but then you hit the Indigenous ceiling and get pushed back. There is a point at which being labelled as an Indigenous employee becomes a barrier".

Dialogue Circle Participant, Many Voices one Mind: A Pathway to Reconciliation: Welcome, Respect, Support and Act to fully Include Indigenous Peoples in the Federal Public Service. Final Report of the Interdepartmental Circles on Indigenous Representation, 4 December 2017 at 13

So, we witness in this day and age the combination of instances of identity fraud by non-Indigenous individuals who claim preferential treatment, alongside First Nations, Métis or Inuit workers who hesitate to self-identify for fear of facing further discrimination.

While there is an urgent need to address the self-identification issue, solutions are far from simple. They involve dealing seriously with the legacies of colonialism.

The Office of the Privacy Commissioner offered some reflections on verification regimes in the public service context. Verification could support the accuracy of personal information, but its reasonableness would depend on the context. It added that verification of employment equity self-identification could not involve collecting more personal information than is necessary for the purpose for which it is

collected. It called for great thought and consideration in devising any systematic verification scheme. They considered that the need and responsibility for establishing the scheme should be contained in the *Employment Equity Act* itself.²⁰⁴ The Office of the Privacy Commissioner urged consultation with Indigenous communities, noting that some wish to be custodians of Indigenous personal information.

The federal government requires an Affirmation of Indigenous Identity Form (effective 1 November 2022, replacing the Aboriginal Affiliation Form) to be completed by a candidate who has self-declared as an Indigenous person, and where one of the following conditions applies:

- the area of selection is limited to Indigenous peoples
- an organizational need is used to increase the representation of Indigenous peoples
- an inventory of Indigenous candidates or a student employment program approved by the Treasury Board of Canada Secretariat is used to increase the representation of Indigenous peoples

According to the Government-wide approach to the Affirmation of Indigenous Identity Form, if one of the circumstances applies, then the form is a condition of employment. The Government of Canada affirms that the form was originally developed following concerns raised by Indigenous groups and in consultation with them. Managers and human resources professionals are informed that they are not to ask applicants to substantiate their Indigenous ancestry, but if they have doubts they are to consult the Public Service of Canada's investigations directorate for advice.

Dangers abound. A study commissioned by the Deputy Minister Champion for Indigenous Federal Employees and Women, Gina Wilson, identifies significant concerns with a process that emphasizes collecting accurate and complete self-identification data as a basis to see whether policies and programs are being effectively implemented, but does not consider how systemic racism continues to operate.²⁰⁵

Deputy Minister Wilson herself stated poignantly how systemic racism operates:

[W]ithout a rigorous EE legislative and policy framework supported by disaggregated data sets to engage managers in distinctions-based staffing measures and deliberate strategies to reduce EE gaps that include a sound understanding of Indigenous Peoples, self-identification based on self-perception can inadvertently reinforce flawed assumptions about what it means to 'be Indigenous' and create the perception of identity and culture theft and act as a form of colonialism. It also pushes us to think about how best to breathe life into Indigenous ways of belonging as part of the *Employment Equity Act* review and how to support the good work of Indigenous Nations in (re)strengthening their citizenship and self-determination efforts in line with the United Nations Declaration on the Rights of Indigenous Peoples. An anti-racist approach of this nature can help us to take stock of and change federal EE policies and legislation to ensure they are not contributing to racist outcomes in the Public Service.

Gina Wilson, Deputy Minister of Women and Gender Equality and Youth & Deputy Minister Champion for Indigenous Federal Employees and Women, Letter to the EEART chair and vice chair, 14 June 2022

Chapter 3: Rethinking equity groups under the Employment Equity Act framework

Representatives of 2 Spirits in Motion also stressed how important it is to avoid data underrepresentation, and capture gender identity accurately within Indigenous communities, noting that conversations are ongoing.²⁰⁶ Representatives of Canadian Roots Exchange wanted to ensure that barriers affecting Indigenous youth – the fastest growing population in Canada - would be better researched in the future.²⁰⁷ Attention to urban-rural differences remains crucial, experiences of self-identification by Black-Indigenous, or members of 2SLGBGQI+ communities similarly require attention.

An intersectional, rights-based approach is required to acknowledge the diversity of Indigenous peoples' lived experiences, and meaningfully address the intersectional barriers urban Indigenous people continue to face.

National Association of Friendship Centres, Enhanced Engagement Report to the EEART, October 2022 at 11

Consider for example that Statistics Canada has included a new question in the 2017 Aboriginal Peoples Survey after consultation with Métis organizations. It asks respondents whether they “have a card or certificate issued by a Métis organization that identifies you as Métis”. Statistics Canada reported that 45% of those who self-identified as Métis responded that they had a card or certificate issued by a Métis organization.

Members of Indigenous federal government employee networks expressed a range of views on the experience of being subjected to what is perceived as a dual process of self-identification. An issues paper shared by Deputy Minister Wilson sought to capture the complexity of self-identification in part through the lens of the different understandings of Indigeneity:

“Divergent understandings of Indigeneity can make the development of a self-identification tab difficult. For some employees, Indigeneity can mean beading or partaking in cultural activities; others live by the Elders teachings and ceremonies; “Indians of convenience” (idea coined by Arthur Manuel) adhere strongly to Eurocentric values and beliefs, but claim Indigeneity when it will benefit them; some employees are only beginning to awaken to their Indigeneity; and lastly, others are “pretendians” who claim Indigeneity based on a distant Indigenous ancestor and they have no connection to community or kinship or culture. This can add to the complexity of Indigenous identity formation in relation to self-identification.”

Carolyn Laude, Strategic Communications Advisor, Knowledge Circle for Indigenous Inclusion, Discussion Paper, Self-Identification and Indigenous Identity, Prepared for Deputy Minister Gina Wilson, 3 June 2022 at 9, fn 10

Self-identification and dismantling internal colonization

Self-identification under the *Employment Equity Act* needs to be understood in the context of the Government of Canada's responsibility for dismantling internal colonization through an evolving process of reconciliation that includes removing sex-based discrimination from the *Indian Act*.²⁰⁸ Section 67 of the *Canadian Human Rights Act (CHRA)*²⁰⁹ shielded decisions or actions taken in relation to the *Indian Act* from 1977 to 2008, when the provision was repealed. When it was repealed, an interpretive provision was adopted to make it clear that if a complaint is brought under the *Canadian*

Human Rights Act against a First Nation government for how it administered the Indian Act, the CHRA must be “interpreted and applied” to give “due regard” to First Nations legal traditions and customary laws. The provision specifically mentioned balancing individual rights and interests with collective ones, “to the extent that they are consistent with the principle of gender equality.”²¹⁰

Article 17(1) of the *United Nations Declaration on the Rights of Indigenous Peoples* applies both to Indigenous individuals and peoples. It provides that both “have the right to enjoy fully all rights established under applicable international and domestic labour law”. Article 17(3) of the *United Nations Declaration on the Rights of Indigenous Peoples* is one of the provisions that applies specifically to Indigenous individuals. It provides that “Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.”

First Nations, Métis and Inuit nations do not only comprise an employment equity group for the purpose of the *Employment Equity Act* framework. They have collective rights under Section 35 of the *Constitution Act, 1982*. The Crown has obligations to both collectives and individuals under Section 91(24) of the *Constitution Act, 1867*.

For Nichols and Mills, self-identification provisions in the *Employment Equity Act* are not in tension with either the concept of a collective right of self-determination in the *United Nations Declaration on the Rights of Indigenous Peoples Act* or Aboriginal and treaty rights under Section 35 of the *Constitution Act, 1982*. They consider that the *United Nations Declaration on the Rights of Indigenous Peoples Act* recognizes the right of Indigenous peoples to determine their own membership and identity within their institutions, as a collective right. Moreover, they argue that the collective right cannot determine the relationship between Indigenous individuals and the state.²¹¹ Their concern is clear: they want to make sure the federal government recognizes and is held accountable for its responsibility toward those Indigenous people who for reasons that are inseparable from internal colonization such as residential schools, are non-status, may not have ties to a specific nation anymore, but do have the right to employment opportunities. In the midst of the extremely problematic and thorny crisis caused by fraudulent claims to Indigenous status, Nichols and Mills call for rigorous attention by policy makers to Crown responsibilities toward all Indigenous people.

A comparable approach was adopted by the Canadian Human Rights Tribunal in its application of Jordan’s Principle to First Nations children entitled to receive services and supports. It considered that there is a “significant difference” between determining who is a citizen of a First Nation vs determining who is entitled to receive services under Jordan’s Principle. Yet the Tribunal acknowledged that “First Nations parties are concerned and strongly view the two questions as intertwined.” The Panel considered the concerns, and used the terminology “eligibility criteria under Jordan’s Principle.” By using that terminology, the Panel was actively seeking to avoid any misunderstanding; that is, it was decidedly not attempting to define who is a First Nations child for any purpose beyond the eligibility to access Jordan’s Principle services.²¹² **Is a comparable distinction conceivable for the purpose of self-identification under the *Employment Equity Act*?**

Article 33, United Nations Declaration on the Rights of Indigenous Peoples:

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 9, United Nations Declaration on the Rights of Indigenous Peoples:

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Nichols and Mills offer that beyond “self-identification” as a starting point, there are three far from simple potential conditions. They include two that are traditionally relied upon and have been applied in case law in some cases, lineal descent and community recognition or acceptance. Nichols and Mills add an alternative to membership, which is Indigenous kinship networks, focused more on relatedness than lineal descent and understanding indigenous law from the inside and in its complexity across nations. In preferring this approach to community acceptance given its potential to deny rights to non-status Indigenous individuals, Nichols and Mills argue that “it is difficult to contemplate a serious effort at reconciliation which does not advert to the imperative role of indigenous law”.²¹³

Honouring Elders by practicing law in a relational context can help us address issues of Indigenous voice and appropriation in ways which advance Indigenous Peoples’ own laws.

John Borrows, Voicing Identity: Cultural Appropriation and Indigenous Issues (University of Toronto Press, 2022) at 4

There are challenges with each approach, but there is also an optimism that surrounds the insistence on reimagining self-identification through processes that rebuild with intention, taking Indigenous legal orders and legal traditions particularly seriously.²¹⁴

It is with humility that we reiterate that it is not the role of the task force to purport to resolve the choices. For the purposes of this report, the goal has simply been to posit that the status quo is not sufficient.

A word of caution on self-identification in the federally regulated private sector and under the Federal Contractors Program

In that same spirit of humility, we also offer one employment relations word of caution: the determination of the self-identification for the purpose of employment equity as it relates to First Nations, Métis and Indigenous peoples should grapple with how to mitigate the power that might devolve to individual employers if they ultimately assume a role as arbiters of how Indigenous identity is to be determined. Much of the literature anticipates that it will be the federal government, or major Crown corporations that will assume these roles, with the prospect of a meaningful nation-to-nation

relationship (federal government as both the responsible interlocutor for treaty and Indigenous rights as well as the employer in the context of the *Employment Equity Act* framework).

Increasingly scandals at the university level have broadened the perspective on who the potential employers (and service providers) will be, and the nature of their responsibility. Queen's University and the University of Saskatchewan have in particular provided alternative models adapted to their institution's context and based on extensive consultations. Both recent reports on addressing fraudulent self-identification in universities have recommended a role for the Indigenous nations on whose unceded land they are situated, and have built in the notion of consultative bodies.

The scope of the *Employment Equity Act* framework, including with the proposed enlargement to cover more workplaces with smaller size and lowered federal contractors program coverage, creates the risk of a multiplicity of employers having the ability to make determinations on Indigenous inclusion. Under the *Employment Equity Act* framework, where self-identification disclosure is limited to protect employees, would a broad mandate for each covered employer to build consultative committees be suitably responsive? The potential for First Nations, Métis and Inuit employees to be subjected to targeted internal scrutiny by institutions concerned about potential reputational harm or human rights complaints is not theoretical.

It is increasingly urgent for meaningful consultations of First Nations, Métis and Inuit organizations to work through what the arrangements might look like in resolving these matters at a nation-to-nation or government-to-government level. It is possible that recognition agreements or minimum criteria and processes for membership determination that can simply be implemented by individual employers may become necessary. Processes that ensure control, oversight and verification by First Nations, Métis and Inuit organizations warrant careful consideration.

Whatever the approach, we must not repeat the colonial harms of the past. We urge a rigorous, decolonial approach to build a transformative Employment Equity Act framework.

This is a first principle.

To determine the most appropriate approach to avoid fraudulent claims and address Indigenous status under the *Employment Equity Act* framework, there is no circumventing meaningful consultations with a view to securing the free, prior and informed consent of First Nations, Métis and Inuit peoples.

Recommendation 3.6: The issue of Indigenous self-identification for the purposes of the *Employment Equity Act* framework should be made the subject of an urgent process of meaningful consultation within the meaning of the Canadian constitution and the *United Nations Declaration on the Rights of Indigenous Peoples Act*.

Beyond employee preferences to Indigenous self-determination

“Indigenous Nations have increasingly asserted their inherent jurisdiction and rights in respect to major project development decisions within their traditional territories. This assertion has been driven by the demand for the recognition of the right of free, prior, and informed consent (FPIC) and important Supreme Court decisions that have paved the way for a renewed relationship...”

National Indigenous Economic Strategy for Canada, 2022 at 88

Indigenous self-determination, recognized in Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples*, is at the heart of national Indigenous economic strategies in Canada. Self-government requires a significant economic base.²¹⁵

An Indigenous Economic Strategy for Canada was developed collaboratively by Indigenous organizations following a recommendation of the Organisation for Economic Co-operation and Development (OECD) to the Government of Canada.²¹⁶ The Strategy identifies significant barriers to Indigenous economic development both on and off reserve, from the *Indian Act* itself and its effects on the use of land and land tenure, to access to capital, financial exclusion and discouraged borrowers as well as innovative Indigenous-led approaches to addressing them. It also highlights some notable examples of economic development corporations that are together responsible for over 12,000 jobs. Half of the after-tax revenues earned by 61% of the economic development corporations studied was invested back into Indigenous communities. The strategy underscores the role of Indigenous women in several of the projects.²¹⁷

Some of the strategic statements that are most relevant to this task force’s work are as follows:

Table 3.1: Selected Strategic Statements and Calls to Economic Prosperity from the National Indigenous Economic Strategy for Canada, 2022

Strategic statement	Call to economic prosperity
Labour force: highly skilled, competitive, and world class Indigenous labour force for Canadian and global markets	22. Strengthen support for organizations that focus on Indigenous skills, employment, and business training.
Social capital: proactive and meaningful approaches to eradicate systemic racism	29. Encourage all entities in Canada to establish Reconciliation Action Plans that are measurable and communicated publicly.
Workplace: Inclusive workplace strategies for Canadian employers that harness the human resource potential of all employees	30. Engage Indigenous Advisors to help Indigenous and non-Indigenous organizations evaluate workplace practices and strategies, measure and monitor workplace inclusion strategies, provide inclusive workplace training, and undertake systems review of strategies. 31. All public and private employers adopt the Truth and Reconciliation Calls to Action No. 57 (educate public servants on Indigenous history) and No. 92 (corporate sector adoption of the United Nations Declaration on the Rights of Indigenous Peoples).

These strategic statements on “people” (comprising Indigenous entrepreneurs, leadership and governance, labour force/ labour market, social capital and workplace) are part of a comprehensive whole that is structured as a circle, around three other strategic pathways, including lands (land sovereignty, land management, and environmental stewardship), infrastructure (physical and institutional infrastructure as well as financial resources); and finance (revenue sources, stimulus funds, procurement and trade).

The strategy generally identifies inclusivity goals that resonate with the purpose of employment equity. Calls to incorporate proactive workforce strategies at all levels of the organization that include establishing retention strategies, setting measurement criteria and establishing pathways for training, advancement and promotion of Indigenous employees, echo the *Employment Equity Act*'s barrier removal process discussed in Chapter 4.²¹⁸

Moreover, there is a call for agreements with enterprises to be co-developed in good faith with Indigenous peoples. Government is encouraged to stimulate the economy and build capacity through employment and training of Indigenous Peoples and businesses. And overall, there is a call to be “innovative and creative.”²¹⁹

These calls resonate with the Organisation for Economic Co-operation and Development (OECD)'s recommendation that the Federal Government's Procurement Strategy for Aboriginal Business established in 1996 to redress the underrepresentation of Indigenous businesses in federal procurement should be strengthened, among other matters to establish binding procurement targets and set asides for federal government procurements. The OECD notes that presently, departments that procure more than \$1 million worth of goods and services (including construction) each year must set their own performance targets. In land claims agreements, the targets are already binding. While multi-national firms in mining or energy projects tend to adopt benefits-sharing agreements, the OECD's evidence suggests that most of the benefits flow in terms of direct employment.²²⁰

The prospect of using procurements to achieve national industrial policy objectives has been well understood.²²¹ Indigenous economic empowerment has been framed by Canada as a priority, including through clauses in trade agreements that allow for preferential treatment of Indigenous participation in economic transactions.²²² Drawing on the *United Nations Declaration on the Rights of Indigenous Peoples*' requirements in Article 23 and 32, Professor Panezi argues that beyond free, prior informed consent on economic empowerment plans, Canada should “periodically engage in robust review of the Indigenous procurement regime through consultations with Indigenous participants, beneficiaries and leaders.”²²³ Noting that the Nunavummi Nangminiqagtunik Ikajuuti (NNI) Policy in relation to the Nunavut Land Claims Agreement offers one of the “most elaborate Indigenous procurement systems in Canada” and is an indication of the kind of focus that a comprehensive social procurement regime could take to promote economic empowerment.²²⁴

Members of First Nations, Inuit and Métis peoples who came before our task force at once affirmed the importance of employment equity but also underscored how remote the issues can at times seem from the many pressing concerns faced in a context of truth and reconciliation.

Part of the concern was how to engage some of the issues, unpacking the starting points that put such distance between Indigenous ways of knowing, and engaging with land and peoples. Barriers upon barriers need to be removed.

Some federal research funding agencies, including the Social Sciences and Humanities Research Council (SSHRC), noted a shift in framework, with Indigenous partners moving beyond the employment equity group self-understanding toward nation-to-nation relationships; SSHRC has therefore developed a distinct Indigenous Research Strategy to govern its relationship with Indigenous partners, with a focus on supporting the research priorities of Indigenous peoples and a revised merit review criteria to ensure that researchers are accountable to Indigenous communities and that First Nations, Métis and Inuit knowledge systems are recognized and contribute to excellence in scientific and scholarly pursuits. It includes data management protocols.²²⁵

It was important for our task force to pause and acknowledge that it takes a lot just to hold constant the prospect that employment equity as it is currently understood is a broad enough institutional framework to cover crucial Indigenous concerns carefully.

But then we were told, if banks were to hire senior First Nations, Inuit and Métis representatives at the senior management level, we might begin to see positive steps toward addressing some of the problems of access to financial services faced by First Nations, Inuit and Métis people. Of course, better representation at senior levels in telecommunications services might yield greater sensitivity to the needs of First Nations, Inuit and Métis individuals and enterprises that depend on and seek access to the sector. Of course, meaningful representation of First Nations, Inuit and Métis people in the federal government at the highest levels could help foster a move to transformations in relationships between the Crown and Indigenous peoples instead of multiple levels of marginalization. These are all extremely serious concerns. They are part of the rationale for the kind of meaningful and sustained representation that is at the core of the employment equity framework.

But for Crown relations with First Nations, Métis and Inuit peoples as we look forward, the framework is far from enough.

Section 7 of the current *Employment Equity Act* offers a limited understanding of the relationship between First Nations, Métis and Inuit peoples, and their lands. It permits a specific “preference in employment”:

Section 7, *Employment Equity Act*:

Notwithstanding any other provision of this Act, where a private sector employer is engaged primarily in promoting or serving the interests of Aboriginal peoples, the employer may give preference in employment to Aboriginal peoples or employ only Aboriginal peoples, unless that preference or employment would constitute a discriminatory practice under the Canadian Human Rights Act.

It was and remains an important, if limited, provision. However, it seems barely to scratch the surface of what it means to be taking inherent rights, treaty rights, the Truth and Reconciliation Commission’s calls to action and UNDRIP seriously. At best, Section 7 of the *Employment Equity Act* is a place holder for a process of meaningful nation-to-nation or government-to-government consultations to build a transformative approach that fosters Indigenous self-government.

A more powerful vision is found in UNDRIP, Articles 20 & 21:

United Nations Declaration on the Rights of Indigenous Peoples

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

The distinct opportunity of Impact Benefit Agreements

Territories where First Nations, Métis or Inuit peoples' constitutionally protected Aboriginal and treaty rights have been recognized, comprehensive land claims agreements (modern treaty holders) have been negotiated and signed, where land claims are outstanding, or where Indigenous workers predominate, notably in the territories, may also be resource rich and the subject of significant mining and forestry interests.

Impact Benefit Agreements (IBA) are bilateral agreements negotiated between mining companies and Indigenous peoples. With 335 IBAs signed by 2015 for over 198 mining projects since 1974 covering exploration through reclamation, they constitute a significant part of a landscape that includes investment in resource-based, typically mining, projects.²²⁶ The federal government estimates investments of \$650 million by 2024, with many of the projects occurring on or near Indigenous lands.²²⁷

While the terms of most IBA are confidential, they tend to include a range of purposes, including provisions on employment to enable members of the relevant First Nation, Métis or Inuit community to benefit from employment and training opportunities on a preferential basis.²²⁸ The IBA toolkit proposes the following on preferential hiring:

- There are provisions with measurable targets and milestones that require hiring community members.
- There are provisions with measurable targets and milestones that support advancement of community members into higher skilled and higher paying positions.

Chapter 3: Rethinking equity groups under the *Employment Equity Act* framework

- There are provisions with measurable targets and milestones that support retention of community members in the project workforce.²²⁹

Increasingly, IBA include a more direct focus on broader economic benefits including royalties and direct payments.²³⁰ In some contexts, for example diamond mines in the Northwest Territories, Indigenous employment levels “have been high by national standards, although still below Aboriginal availability within the NWT population, while approximating the target employment levels in the [socio-economic agreements].”²³¹ The study added that Indigenous workers were disproportionately found among the unskilled or semi-skilled workers, and were rarely found amongst managerial and even professional positions. IBA implementation seemed not to have focused on redressing education and training challenges.²³²

IBAs also emerge out of comprehensive land claims agreement signed by the Crown with First Nations and Inuit Nations. In other words, the modern treaties may require proponents of a major project to sign an IBA with the relevant First Nation.²³³

IBAs came up in a number of our task force’s consultations with First Nations, Inuit and Métis representatives. We learned that there are examples of First Nations that apply a cascading approach to preferential hiring, starting with members of their First Nation, followed by First Nations people broadly, and finally with all Indigenous people. We also learned that there is a drive for full Inuit employment in some Inuit communities.

In particular, our task force met with representatives of a number of Modern Treaty Holders. They explained the importance of preferential hiring practices to ensure high levels of staffing by First Nations and Inuit peoples. We heard of the importance attached to nations’ goals to provide their citizens with the skills and trainings they need to succeed. Nations also worked to reduce the impact of barriers that include Western hiring norms that fail to value Indigenous ways of knowing or recognize lived experience.

Tr’ondëk Hwëch’in Government representatives emphasized the importance of incorporating First Nations values in human resources policies and cited a case where they were able to promote an employee with limited formal education but a wealth of cultural knowledge and expertise.²³⁴

Representatives of the Kativik Regional Government – emerging from the James Bay and Northern Québec Agreement in 1978 - observed that signatories to IBAs were considerably more likely to hire Inuit workers than non-signatories, and had lower turnover rates. We were told that Kativik Regional Government helps to provide Inuit language training and intercultural training to employers.²³⁵

The federal government refers to modern treaties as “reconciliation in action”, recognizing that they must be implemented in a manner that upholds the honour of the Crown and in full respect of Aboriginal and treaty rights as recognized and affirmed in Section 35(1) of the *Constitution Act, 1982*. A whole-of-government approach to implementation is required. This should apply to how the *Employment Equity Act* framework is approached and transformed.

Teslin Tlingit Council employs Aboriginal and non-Aboriginal employees. TTC's hiring priority provides opportunity for well-trained Teslin Tlingit Council Citizens to work and remain in their community. As a result, preference wherever possible, will be given to TTC Citizens who apply for positions with the required skills. Other First Nations applicants will also receive preference. Non-Aboriginal applicants who have the required skill sets are encouraged to apply for advertised positions.

Employment Opportunities, Teslin Tlingit Council, Modern Treaty/ Self-Government Agreement Holder, 2022

The task force heard several important examples of modern treaties that grapple with employment equity issues, very specifically with ensuring the goals of ensuring broad workforce participation by citizens of Indigenous nations – including members of other equity groups such as Indigenous women, Indigenous persons with disabilities, Indigenous two-spirit / 2SLGBTQI+ members - and providing the skills and training needed for success.

For example, the *Nisga'a Lisims Government's Final Agreement* from 2000, the first modern treaty in British Columbia, includes a reference to improving employability or creating new employment opportunities; the Nisga'a Lisims Government experiences difficulty recruiting and retaining employees during the COVID-19 pandemic, and developing capacity for Nisga'a citizens on its own land is a priority. Migration into the territory by people who are not Nisga'a citizens increases pressures on resources, including limited housing.

Can the *Employment Equity Act* framework support employment promotion through IBAs and in particular redress some of the capacity challenges that reportedly affect the ability of some First Nations to take full advantage of IBA-related provisions?²³⁶ Some researchers consider that there is an opportunity to consider publicly regulated requirements in selected industries to ensure a level of Indigenous employment and socio-economic entitlements in the face of major business investment.²³⁷

Our task force thinks it is about time for the Employment Equity Act framework to be drawn upon to support this more transformative thinking about changing the relationships.

We reiterate that meaningful, good faith consultations with Indigenous peoples are paramount. The task force understands its limited role: to bring some of the issues to the forefront and offer suggestions that might begin to frame an exploratory exchange.

What is clear is that Section 7 of the current *Employment Equity Act* does not come close to capturing the implications of the embrace, in Section 35 (1) of the *Constitution Act, 1982* of a government-to-government constitutional relationship. Our global recommendation is the following:

Recommendation 3.7: Section 7 of the *Employment Equity Act* should be supplemented by a framework fostering Indigenous self-determination that is co-constructed through meaningful consultations with a view to free, prior and informed consent with Section 35 of the *Constitution Act, 1982* and Articles 18 -21 and 26-32 of the *United Nations Declaration on the Rights of Indigenous Peoples*.

Recommendation 3.8: The transformative framework should include special measures that ensure continuing improvement of First Nations, Métis and Inuit peoples' economic and social conditions.

Disabled workers and accessibility in the wake of the *International Convention on the Rights of Persons with Disabilities*

Introduction

Disability inclusion is more than adding persons with disabilities to the work force. It's a cultural shift that prioritizes creating an environment where every employee can flourish to their highest potential. And it is a mindset that actually values the rich contribution of those with a diversity of lived experience.

Yasmine Laroche, former Deputy Minister, Public Service Accessibility, Globe and Mail, 12 June 2022

One of the priority areas of People First of Canada (PFC) is work and employment. PFC also follows Article 27 of the *United Nations Convention on the Rights of Persons with Disabilities*. This article states that that people with disabilities have the same right to work as other people. This also means that they have the right to earn a living from work they choose in an environment that is open and accessible to all people.

People First of Canada, Overcoming Barriers to Employment: A Review of the Employment Equity Act in Plain Language, Written Submission to the EEART, 15 June 2022 at 4

Canada has internationally recognized the “right of persons with disabilities to work, on an equal basis with others” in the Convention on the Rights of Persons with Disabilities.” Canada has committed to taking “all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise”.²³⁸

The UN Sustainable Development Goal 8.5 sets a target for states, by 2030, to “achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value.” The UN Committee on the Rights of Persons with Disabilities (CRPD) has called on Canada to ensure that employment equity programs are implemented, and that they include the “allocation of targeted funding to promote the employment of persons with disabilities in the public and private sectors.”²³⁹

The available data on the underrepresentation of disability speak forcefully, and the story they tell is that much needs to be done.

Our task force concludes that the employment equity group for persons with disabilities needs to be redefined. Progress is long overdue. We need concerted barrier removal to achieve and sustain employment equity for disabled workers.

One in five (22%) people in Canada aged 15 or older had at least one disability in 2017. That is approximately 6.2 million individuals. A greater percentage (24%) were women rather than men (20%). Twenty percent of working age adults aged 25 – 64 had a disability. Among those aged 25 to 64 years, persons with disabilities were less likely to be employed (59%) than those with disabilities (80%). Within Indigenous nations, disability rates exceed 30%.

This information is based on the 2017 Canadian Survey on Disability (CSD), which according to Statistics Canada has since 2012 adopted a social model of disabilities. We await the release of data from the 2022 CSD, which includes new questions on barriers to accessibility.

What we do know is that the prevalence of disability increases with age, and that disabilities among youth aged 15 to 24 were primarily linked to mental health.

We also know that 76% of the working aged population between 25 – 64 years of age who were neither employed nor in school and who had mild disabilities were employed, compared with only 31% of those characterized as having very severe disabilities. Critically, among those with disabilities generally, 39% or 645,000 were ready and willing to work, but were not currently working.²⁴⁰

In essence, persons with disabilities were significantly less likely to be employed (59%) than persons without disabilities (80%).

The impact of the pandemic on disabled workers remains to be fully understood, but existing studies underscore the significant negative impact. Early in the pandemic, in August 2020, Statistics Canada reported that over one third of the survey participants with a long-term condition or disability who were employed prior to the pandemic reported that they experienced temporary or permanent job loss or reduced hours during the pandemic.²⁴¹

A big part of the challenge of achieving employment equity lies in transforming how we understand disability.

“In Canada, there are all the conditions to fully implement the Government’s obligations under the Convention on the Rights of Persons with Disabilities,” concluded The UN Special Rapporteur on the rights of persons with disabilities during her 2019 visit to Canada, but, “more must be done to complete the transition from a care and medical approach to a human rights-based approach.”²⁴² This calls for, as the UN Special Rapporteur recommended, “remov[ing] barriers that impede the effective and full participation of persons with disability on an equal basis with others.”²⁴³

This powerful statement resonates with the many submissions provided throughout our engagements with disabled workers and their civil society organizations: substantive equality is in reach, but it requires transformation including to the way we understand, implement, consult on and enforce the employment equity framework.

The importance of getting the definition of disability right

When persons with disabilities were included in the *Employment Equity Act* in 1986, the term was defined in the accompanying Regulations as follows:

persons with disabilities are considered to be persons who

- (i) Have any persistent physical, mental, psychiatric, sensory or learning impairment
- (ii) Consider themselves to be, or believe that an employer or a potential employer would be likely to consider them to be disadvantaged in employment by reason of an impairment referred to in subparagraph (i), and
- (iii) For the purposes of section 6 of the Act, identify themselves to an employer, or agree to be identified by an employer, as persons with disabilities

Despite significant advances in societal understandings of disability since then, the current definition is only slightly updated since 1986, now found in the text of the *Employment Equity Act*:

persons with disabilities means persons who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who

- (a) consider themselves to be disadvantaged in employment by reason of that impairment, or
- (b) believe that a employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment,

and includes persons whose functional limitations owing to their impairment have been accommodated in their current job or workplace;

The definition of persons with disabilities is distinct in that it references those who have been accommodated in their current job or workplace.

The complexity of the definitional choice is clear. We were reminded by accessibility organizations to step back, and to focus on how ableism structures ideas about the norm. We were encouraged to rethink the norm, to think about how the environment – including the working environment – is literally built. For example, why are stairs the norm in our society, rather than ramps?

The task force heard consistently that the existing definition of persons with disabilities needs to be updated. It is a medical model, which looks at disability as impairment, and does not link disability to societal barriers. It also constructs disability as a rigid binary, rather than in a more nuanced, contextual manner. Instead, we were strongly urged to follow the emerging societal model, that is, a human rights vision of disability.

Language shapes our thoughts and is central to the way we experience the world. When the public, the government and employers talk about disability, accessibility, or barriers, do we have shared understanding, building upon the same concepts?

Canadian Council on Rehabilitation and Work, Report: Review of accessibility-related legislation, regulations, and standards on employment in Canada, July 2021

Several constituents emphasized that the *Employment Equity Act* needs to move away from a medical model of disability, toward a model that takes into account the social context. In a medical model,

disability is treated as an impairment – the definition focuses on the person alone. In a social model, disability is understood to interact with barriers. It focuses on the role society plays in creating disability.²⁴⁴ Focusing on barriers puts attention to how much work can be done to make society, and workplaces, accessible. It is therefore a human rights model of disability.

It is important to recognize, though, that while the current definition in the *Employment Equity Act* diverges from the social model of disability, it does offer something characterized by the Canadian Council on Rehabilitation and Work as unique: it focuses on self-definition. The self-definition aspect has been considered by some as an “enhancement”, leaving the agency in the hands of the persons themselves.

We agree that self-definition is important. The challenge is that the self-definition concerns whether the worker considers themselves to be “disadvantaged in employment by reason of that impairment” or whether they believe an employer will consider them to be disadvantaged. We heard repeatedly that these were the wrong questions.

Instead, self-definition should be based on a definition that persons with disabilities recognize as affirming them, in the terms of the Committee on the Rights of Persons with Disabilities (CRPD), as “a valued aspect of human diversity and dignity”.

On this framing, it must not be construed as a legitimate ground to deny or restrict human rights. Laws and policies are expected to take into account the diversity of persons with disabilities.²⁴⁵

It is in that same spirit that this report alternates between a person-first language of “persons with disabilities” that is internationally recognized, and the contemporary, identity-based approach of “disabled workers,” which was strongly encouraged by some of the concerned communities who met with us and task force members with relevant lived experience. We were challenged to “say the word disability”, embrace it, and normalize it.²⁴⁶

The *Americans with Disabilities Act of 1990*²⁴⁷ in the United States had the effect of introducing reasonable accommodations requirements for people with disabilities in employment. The law was amended under President Barack Obama’s Administration through the *Americans with Disabilities Act Amendments Act of 2008*²⁴⁸ to reject jurisprudence that narrowed the scope and explicitly provide expansive coverage. While the basic impairment focused definition of disability was not changed, implementing regulations were adopted by the Equal Employment Opportunity Commission (EEOC) that provided interpretive tools.²⁴⁹ They adopted a functional approach to disability, which underscored that disability may not be immutable, may not necessarily be visible, and should be addressed in a manner that respects the self-advocacy of disability-rights movements. It similarly shifted responsibility from the individual with a disability to the institution with a responsibility for accommodations.²⁵⁰ Yet our task force heard from Harvard disability scholar and advocate Michael Stein that of all the areas covered by the *Americans with Disabilities Act*, the legislative framework has been least effective in fostering equality in employment.²⁵¹

The human rights model is endorsed internationally, including by the UN Committee on the Rights of Persons with Disabilities (CRPD). The CRPD identifies high unemployment rates, low wages, instability, hiring challenges and inaccessible work environments, and acknowledges the prospect for newer barriers through artificial intelligence and new technologies. The CRPD considers especially that ableism can get in the way of States like Canada’s responsibility to “eliminat[e] persistent barriers, particularly disability stereotypes and stigmas”:

Meaningful work and employment are essential to a person's economic security, physical and mental health, personal well-being and sense of identity. However, the Committee is aware that a value system known as ableism adversely affects the opportunities for many persons with disabilities to have meaningful work and employment. Ableism and its impacts have been described as “a value system that considers certain typical characteristics of body and mind as essential for living a life of value. Based on strict standards of appearance, functioning and behaviour, ableist ways of thinking consider the disability experience as a misfortune that leads to suffering and disadvantage and invariably devalues human life.”¹ Ableism is the foundation of the medical and charity models of disability that leads to social prejudice, inequality and discrimination against persons with disabilities, as it underpins legislation, policies and practices ... that prevent persons with disabilities from being able to work on an equal basis with others.

Committee on the Rights of Persons with Disabilities, General Comment 8 (2022) on the Rights of Persons with Disabilities to Work and Employment, CRPD/C/GC/8, 9 September 2022, at para. 3 & 7

The definition in the *Accessible Canada Act* was inspired by the *Convention on the Rights of Persons with Disabilities*:

The definitions of ‘barrier’ and ‘disability’ put forth in Bill C-81 draw upon the UN Convention on the Rights of Persons with Disabilities. They are broad and inclusive, supporting the greatest number of Canadians. The bill is meant to inspire and drive a deep cultural transformation. Part of that transformation is changing the way we talk about accessibility and disability. It is also about changing existing government structures and systems and creating new ones. It is about putting these aspirations into action.

Minister Carla Qualtrough, Minister of Public Services and Procurement and Accessibility, Lib., Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, 2 October 2018, quoted in Laverne Jacobs et al., The Annotated Accessible Canada Act, 2021 CanLIIDocs 987

The definition was built on the basis of significant, recent consultations with members of the accessibility communities. The *Accessible Canada Act*'s definition of disability adopts a social model:

any impairment, including a physical, mental, intellectual, cognitive, learning, communication or sensory impairment — or a functional limitation — whether permanent, temporary or episodic in nature, or evident or not, that, in interaction with a barrier, hinders a person's full and equal participation in society.

Section 2, Accessible Canada Act, S.C. 2019, c. 10

A Transformative Framework to Achieve and Sustain Employment Equity

The *Accessible Canada Act* is also one of the only federal human rights texts to define the term “barriers”:

barrier means anything — including anything physical, architectural, technological or attitudinal, anything that is based on information or communications or anything that is the result of a policy or a practice — that hinders the full and equal participation in society of persons with an impairment, including a physical, mental, intellectual, cognitive, learning, communication or sensory impairment or a functional limitation.

Section 2, Accessible Canada Act, S.C. 2019, c. 10

The broad and inclusive definitions in the *Accessible Canada Act* dovetail with the Section 15 equality provision of the *Canadian Charter of Rights and Freedoms*, which includes both “mental and physical disabilities.” It reflects Supreme Court of Canada jurisprudence on disability that defines it broadly, including in the workplace context.²⁵² The 2019 Onley review of the *Accessibility for Ontarians with Disabilities Act, 2005* also recommended that Ontario should adopt the *Accessible Canada Act* definition, both as a “positive gesture” promoting harmonization across federal and provincial lines, and to harmonize with the international approach.

Harmonization is one of the aspirations sought in this review of the *Employment Equity Act* framework as well. In light of the recent extensive consultations on the definition under the *Accessible Canada Act*, its embrace of a social model of disabilities, its important focus on barrier removal that is consistent with the focus of the *Employment Equity Act* framework, our task force recommends that the *Accessible Canada Act* definition of disability be adopted in the *Employment Equity Act*, replacing the current definition.

Recommendation 3.9: The definition of disability in the *Accessible Canada Act* should replace the current definition of persons with disabilities in the *Employment Equity Act*.

The importance of intersectional approaches to disability

Thriving would mean not always being so careful about making a mistake. For black disabled people you have to be over careful at all times and you are not allowed to make any mistakes.

Survey Respondent quoted in Dr. Harvi Millar, Reimagining the Employment Equity Act: Making it Work for Black Canadian Employees, Enhanced Engagement Report for the EEART, 20 July 2022 at 77

As discussed in Chapter 2, and as is the case for all employment equity groups, an intersectional approach to disabilities is crucial. Our consultations revealed that constituents are alive to the importance of an intersectional approach. Yet the data lag. This was true on disability when the Abella report was written. We noted the extent and consistency of the data available on persons with disabilities, including workers with disabilities, published by the United States Bureau of Labor Statistics of the Department of Labor.²⁵³ The monthly data on disability status produced through the U.S. Office of Disability Employment Policy (ODEP) since 2008 – when new questions to assess the employment status of persons with disability were added to the monthly Current Population Survey (CPS) following research and testing - are disaggregated by race and ethnicity as well as gender. As ODEP affirms on its website, “[c]redible, consistent data is critical to creating change.”²⁵⁴

In Canada, some advances have been made. However, the Labour Force Survey does not contain the Disability Screening Questions (DSQ) modules or other disability identification questions. More disaggregated and intersectional data on disability are needed. This should be attentive to the specificity of data necessary to persons with disabilities. They may include assessing whether persons had lifelong or long-term disabilities prior to their current employment, or whether they acquired those disabilities while employed or during the course of employment. As discussed in Chapter 4, these specificities affect distinct aspects of the work life cycle and call for distinct barrier removal strategies.

Our task force calls for sustained attention to quantitative and qualitative data on persons with disabilities that are disaggregated and intersectional, in meaningful consultation with representative organizations of disabled workers. The Employment Equity Data Steering Committee should prioritize this question.

Recommendation 3.10: The Employment Equity Data Steering Committee should prioritize developing quantitative and qualitative data on persons with disabilities that are disaggregated and intersectional, including through commissioned research, and in meaningful consultation with employers’ and workers’ representatives and representative organizations of disabled workers.

Avoiding a one size fits all approach – psychosocial or intellectual Disabilities

“Intellectual disabilities are the unseen and unheard.”

People First Member, People First of Canada, Overcoming Barriers to Employment: A Review of the Employment Equity Act in Plain Language, Written Submission to the EEART, 15 June 2022 at 8

In my experience in sort of mainstream equity, diversity, inclusion spaces, disability tends to refer to physical impairments of various kinds and also mental health. But there is really, really no consideration for folks with developmental disabilities.

Family member testimony in Presentation to the EEART from Inclusion Canada, 28 April 2022

We heard that workers with psychosocial or intellectual disabilities have so far not really been able to count on the *Employment Equity Act* framework to secure representation in employment in federally regulated workplaces. Tellingly, People First of Canada conducted extensive focus groups and asked whether anyone had heard of the *Employment Equity Act*. Of 101 participants, only 7 said “yes”.²⁵⁵

Task force members were urged to avoid a one-size-fits-all approach to disabilities. We were encouraged to adopt a disaggregated approach to addressing disabilities. The Office of Public Service Accessibility helpfully recommended that the subgroups should align with those contained in Statistics Canada’s Canadian Survey on Disability.²⁵⁶

We were reminded that both intellectual disability and developmental disability had bio-medical origins, and were thought of as “deviations” from a “norm” of development or learning stages. Participants in of our extended engagements used the language of psychosocial or invisible disabilities, as well as developmental or intellectual disabilities. A more social model understands disabilities through societal barriers:

“For people with developmental or intellectual disabilities, the barriers usually lie more in inaccessible language, lack of time to process information, and disrespect they experience when others perceive them through negative stereotypes – whether in social settings, services, education, workplaces, health care, the justice system or other situations.”

People First of Canada, Overcoming Barriers to Employment: A Review of the Employment Equity Act, 15 June 2022 at 13

The challenge of self-identification was addressed in Chapter 2. Some of the specific workplace barriers include the ways in which jobs are posted and interviews are conducted and are addressed in Chapter 4. There is also misinformation; outdated ideas may prevent the inclusion of workers with intellectual disabilities, including on hiring committees and in human resources teams.

We note that the term psychosocial disabilities is increasingly used internationally, including by the UN Committee on the Rights of Persons with Disabilities, to capture the social model of disability. It characterizes psychosocial disability as a condition arising from interactions with barriers that hinder persons with psychosocial disabilities from full and equal participation in society on an equal basis with others.

“Ultimately, ableism is the network of beliefs, processes and practices that assign values to certain ranges of abilities. One range of abilities is constructed as perfect and ideal, another as disabled but worthy of protection and support, and another range of abilities as defective and less worthy of help and perhaps even subject to blame and sanction. This book adopts the position. All else equal, where attitudes about disability cause one impairment group to suffer disadvantage relative to others, then in that situation an impairment hierarchy is created.”

Paul David Harpur, Ableism at Work: Disablement and Hierarchies of Impairment (Cambridge University Press, 2019) at 14

People First of Canada called for a distinctions-based approach to ensure that people with intellectual or developmental disabilities would be understood to be included in the definition of persons with disabilities.²⁵⁷ Inclusion Canada was clear: they are not seeking a separate process; rather they want barriers removed. Inclusion Canada called for this process to be proactively offered, expressing concern that accommodations must systematically be requested.²⁵⁸ The relationship between accommodations and barrier removal is addressed in greater detail in Chapter 4.

Repeatedly we were told that culture change needs to accompany any legislative change for inclusion to happen. For one, the perception kept coming up, that disabled workers continue to face stigma, and some employers continue to doubt that people with disabilities can do the job.²⁵⁹

Consider what we are learning about “neurodiversity” - the term developed by Australian sociologist Judy Singer to capture the insights of the social model of disability - and the “myth of normal”.²⁶⁰ Wolfgang Amadeus Mozart and Greta Thunberg help us to shift the narrative about what is normal, and to understand the range of contributions that can be embraced when a shift is made to include neurodiversity in Canadian workplaces.

Inclusion Canada also advocated against wage subsidies to employers to hire disabled workers, calling them short-term strategies that do not support disabled workers over time. This important issue requires further, specific consultations and research into the specific programs and is not the subject of a recommendation by the task force. However, the call made by accessibility organizations for us to focus on ensuring that long term, sustainable employment is available to neurodiverse persons is very much the direction of our recommendations.

Recommendation 3.11: Psychosocial or intellectual disabilities should be considered from a disaggregated and intersectional manner to ensure that the implementation, meaningful consultation and regulatory oversight in employment equity effectively responds to the specific needs of those with invisible disabilities.

Recommendation 3.12: The *Employment Equity Act* framework should draw inspiration from the *Accessible Canada Act* and the *Canadian Survey on Disability* to identify appropriate subgroups.

Addressing disability in the federal public service

The culture is one of nothing for us without us... [I]t is critical to make sure that people with disabilities are at the front end of the decisions that affect them.

*Federal Public Service Employee, Presentation to the EEART with the Deputy Minister
Champion for Federal Employees with Disabilities, 14 June 2022*

According to the most recent *Employment Equity in the Public Service of Canada Report, 2020-2021*, 5.6% of employees in the core public administration identify themselves as having a disability. Of those employees, 55.5% are women, 9% are Indigenous, and 14.6% are members of racialized minorities. Their workforce availability (WFA) – the benchmark calculated specifically for the federal public service – is 9%. We should also remember that according to the most recent Canadian Survey on Disability from 2017, 15.6% of the workforce in Canada aged 25 to 64 comprises persons with a disability.

In the federal public service, persons with disabilities were underrepresented both in hiring (4.3%) and in promotions. (4.7%), yet their departures were above their representation at 6.8%. They were overrepresented in the two lowest salary levels and under-represented in the two highest salary levels. The overall portrait is disturbing.

That is not the whole story. There is tremendous variation across departments and agencies. Why at the Canadian Human Rights Commission are persons with disabilities 16.5% of the organization, while only 3.8% of the Privy Council Office?²⁶¹ We were reminded of the importance of being intentional, paying attention to the workplace climate, and otherwise adopting proactive barrier removal approaches to employment equity implementation, as discussed in Chapter 4.

In one of its first consultations, the task force heard from the Treasury Board of Canada Secretariat's Office of Public Service Accessibility (OPSA), led by then Deputy Minister Yazmine Laroche and represented at our meeting by Assistant Deputy Minister Alfred MacLeod, who presented *Nothing without Us: An Accessibility Strategy for the Public Service of Canada* alongside the Centralized Workplace fund (CEWF) to invest in research, tools and innovation to improve workplace accommodation practices and remove barriers that create a need for accommodation. These initiatives are in keeping with the

2019 *Accessible Canada Act* framework designed to create a barrier-free Canada for persons with disabilities by 1 January 2040.

Accessibility in the workplace focuses on removing and preventing barriers for all employees, and in particular, employees with disabilities who often face systemic barriers in the workplace.

*Treasury Board of Canada Secretariat's Office of Public Service Accessibility,
Task Force Consultations, 11 March 2022*

In its consultations on the Accessibility Strategy for the Public Service, the Treasury Board Secretariat heard that for 39% of survey respondents, employment was the most important area in which to improve accessibility. The Government of Canada was urged to lead by example, by having more persons with disabilities within the federal public service.

It is important that the federal public service has committed to hiring 5,000 persons with disabilities by 2025. However, the task force was told that progress toward meeting the 5K goal has been slower than expected.²⁶²

We heard considerable concern about the slow progress from accessibility groups.

There are various proactive measures that show important experimentation. These include the Centralized Enabling Workplace Fund, and the Workplace Accessibility Passport. These are important. And no one came before our task force claiming that they are enough. There are workplaces in the federal public service that have demonstrated to the task force that they have been intentional in proactively removing barriers that enable them to build workplaces that are equitably inclusive of disabled workers.

The UN Committee on the Rights of Persons with Disabilities (CRPD) has called on states like Canada, in their role as public service employer, to be particularly rigorous on inclusion. Objective standards for hiring and promoting persons with disabilities, quotas or targets designed to increasing the number of employees with disabilities, alongside public procurement measures, targeted funding, and annual reporting on compliance. They specify that to be consistent with the Convention, the measures should involve:

- (a) Ensuring that employers do not restrict persons with disabilities to certain occupations, reserved jobs or specific employment units
- (b) Ensuring that employers do not restrict persons with disabilities from opportunities for promotion and career growth
- (c) Taking steps to ensure that work promoted under these measures does not constitute “fake” employment, whereby persons with disabilities are engaged by employers but do not perform work or do not have meaningful employment on an equal basis with others, and
- (d) Incorporating a disability, gender and age perspective across the organization²⁶³

The CRPD is also careful to stress the need to take measures to “mitigate the possibility of unintended negative consequences” when employment equity measures are adopted, to avoid reinforcing rather than challenging stereotypes. Throughout the general comment, there is a consistent concern to avoid segregated work for persons with disabilities.²⁶⁴

Recommendation 3.13: The Treasury Board of Canada and the Public Service Commission should work closely and on a priority basis with the Employment Equity Commissioner to establish targeted hiring initiatives for persons with disabilities to achieve and sustain the established 2025 hiring goal in the federal public service.

Moving to disability confidence

The Canadian Council on Rehabilitation and Work added that it was necessary to ensure that large organizations are “disability confident” – that is, they need to be able to look closely at their culture in the workplace, and ensure that the groundwork is in place to include disabled workers meaningfully. There is a need to address fears head on, rather than avoiding matters that may make all the difference for inclusion.²⁶⁵

Large organizations also need to make consequential decisions: Disability organizations gave the example of a large employer stating it is keen to hire persons with disabilities, but then unable to afford screen readers – i.e. software programs that enable blind or visually impaired readers to read text displayed on a computer screen with speech technology.²⁶⁶

There needs to be a shift in mindset, the task force was told, to focus on barrier removal that meets and supports the culture change necessary to ensure that the stated hiring goals can actually be achieved. With the widespread use of computer-based technology, accessibility organizations argue that it is easier than before to remove barriers and make necessary accommodations.²⁶⁷

Our task force emphasizes the need to work steadfastly on barrier removal to create the kind of climate that enables disabled workers to be retained, and to flourish. Strengthening all three pillars: implementation through proactive barrier removal, meaningful consultation and regulatory oversight, will be pivotal to achieve employment equity for people with disabilities. We address these in chapters 4 – 6, with particular attention to ensuring a better harmonization between the *Accessible Canada Act* and a modernized *Employment Equity Act* framework.

A long way to go: Persisting challenges for women workers

From the data

There is an opportunity to modernize the Act. Women should continue to be one of the equity groups and it is critical to understand their lived experiences and be aware of their intersectionality.

*Canadian Federation of Business and Professional Women,
Presentation to the EEART, 31 May 2022*

Gender Equality is UN Global Sustainable Development Goal 5, which Canada has committed to attaining by 2030.²⁶⁸ Yet the task force was repeatedly reminded of the persisting challenges and adverse workplace impacts faced by women workers. The challenges are intersectional, and require close attention to providing disaggregated data.

Our task force concludes that there are ample reasons why women workers should remain an employment equity group in Canada, and why we should intensify efforts to achieve substantive equality for all women.

It is important to clarify from the outset that this report uses the notion of gender as defined by Statistics Canada since its 2021 Census:

Gender

Gender refers to an individual's personal and social identity as a man, woman or non-binary person (a person who is not exclusively a man or a woman).

Gender includes the following concepts:

- gender identity, which refers to the gender that a person feels internally and individually;
- gender expression, which refers to the way a person presents their gender, regardless of their gender identity, through body language, aesthetic choices or accessories (e.g., clothes, hairstyle and makeup), which may have traditionally been associated with a specific gender.

A person's gender may differ from their sex at birth, and from what is indicated on their current identification or legal documents such as their birth certificate, passport or driver's licence. A person's gender may change over time.

Some people may not identify with a specific gender.

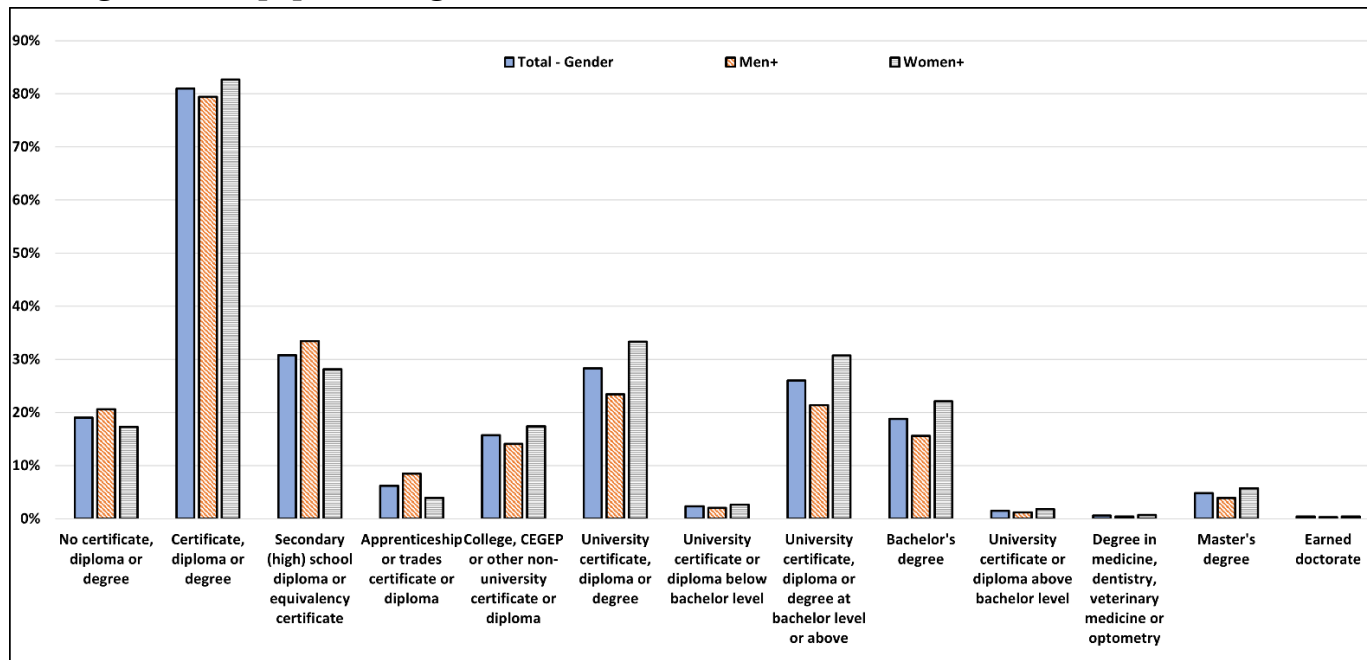
Given that the non-binary population is small, data aggregation to a two-category gender variable is sometimes necessary to protect the confidentiality of responses provided. In these cases, individuals in the category “non-binary persons” are distributed into the other two gender categories and are denoted by the “+” symbol.

Statistics Canada, Census 2021

Our task force acknowledges Statistics Canada’s use of women+ and men+ when providing Census 2021 data.

Statistics Canada reports that women in Canada are amongst the most educated in the OECD. In 2020, two thirds (66%) of women aged 25 to 64 had a college or university qualification, compared to an average of 43% across the OECD. For young women aged 15 - 34, according to the 2021 Census data, the percentage of highly educated women is even higher:

Figure 3.3: Percentage of the individual gender categories by highest certificate, diploma or degree for the population aged 15-34 in Canada²⁶⁹



Despite progress in women’s employment over the past decade, women remain less likely than men to be employed.

The 2021 Census data speak volumes on persisting occupational segregation.

There are 516 “unit groups” of jobs in the 2021 National Occupational Codes of Canada. Almost one fifth – for a total of 98 occupations - remain, in 2021, over 90% men+.

We present all 98 occupations that remain over 90% men+ in Appendix M. Below are just a few examples. Several of them are significantly within federal jurisdiction or otherwise potentially covered by the *Employment Equity Act* framework:

- drillers and blasters in surface mining, quarrying and construction (99.25% men+)
- industrial electricians (98.06% men+)
- railway carmen/ women (97.06% men+)
- transport truck drivers (95.50% men+)
- railway conductors and brakemen/ women (94.52% men+)
- air pilots, flight engineers and flying instructors (92.53% men+)

In contrast, there are far fewer (18 of the 516 occupations) that remain overwhelmingly (90% or more) women+. They include:

- elementary and secondary school teacher assistants (90.48% women+)
- registered nurses and registered psychiatric nurses (90.50% women+)
- occupational therapists (91.31% women+)
- dietitians and nutritionists (95.61% women+)
- early childhood educators and assistants (96.15% women+)
- dental hygienists and dental therapists (96.85% women+)

These data reinforce the disaggregated data presented in Chapter 1. Together, these portraits show us that while there is some movement, there is a long way to go to achieve employment equity for women in Canada.

The gender wage gap remains particularly pronounced for Indigenous women, who in 2018 earned on average 80 cents for every dollar earned by all men in Canada, and immigrant women, who earned 69 cents for every dollar earned by all men in Canada.

Classic economic theories are insufficient to explain the broader range of variables linked to occupational segregation on the basis of grounds of discrimination, including why gender segregation persists despite demonstrated, overlapping abilities.²⁷⁰ Researchers increasingly combine insights from a range of disciplines, and not just economics, to understand occupational segregation on equity grounds. This is particularly important for employment equity, when researchers try to measure employment equity’s impact. Tools are increasingly sophisticated, but they run the real risk of leading us astray and back into misunderstanding occupational segregation as primarily a matter of personal choice. We need to work hard to understand the many factors that constrain life choices faced by employment equity groups.

Over the years we have learned a lot about the perceptions of women’s skills and their impact on occupational segregation. Some of the perceptions, discussed in a 1997 study, remain stubbornly constant in the occupations.

Table 3.2: Perceptions regarding women’s skills and the impact on occupational segregation

Stereotyped characteristics of women	Effect on occupational segregation	Examples of occupations associated with certain skills
Concern for others (perceived positive trait)	Greater demand in occupations where one takes care of others: children, patients, seniors	Nurse, doctor, midwife, social worker, child care provider, teacher
Lesser physical strength (perceived negative trait)	Lesser demand in occupations requiring substantial physical effort	Construction worker, miner
Lack of aptitude in mathematics and sciences (perceived negative trait)	Lesser demand in scientific occupations	Physicist, engineer, statistician

Statistics Canada data also confirm the widely acknowledged effect of becoming a parent: the decision continues to have an important impact on women’s employment rates, but not on men’s employment rates.

Figure 3.4: Employment rates of women aged 25 to 54 by age of youngest child in the household, Canada, 1976 to 2015²⁷¹

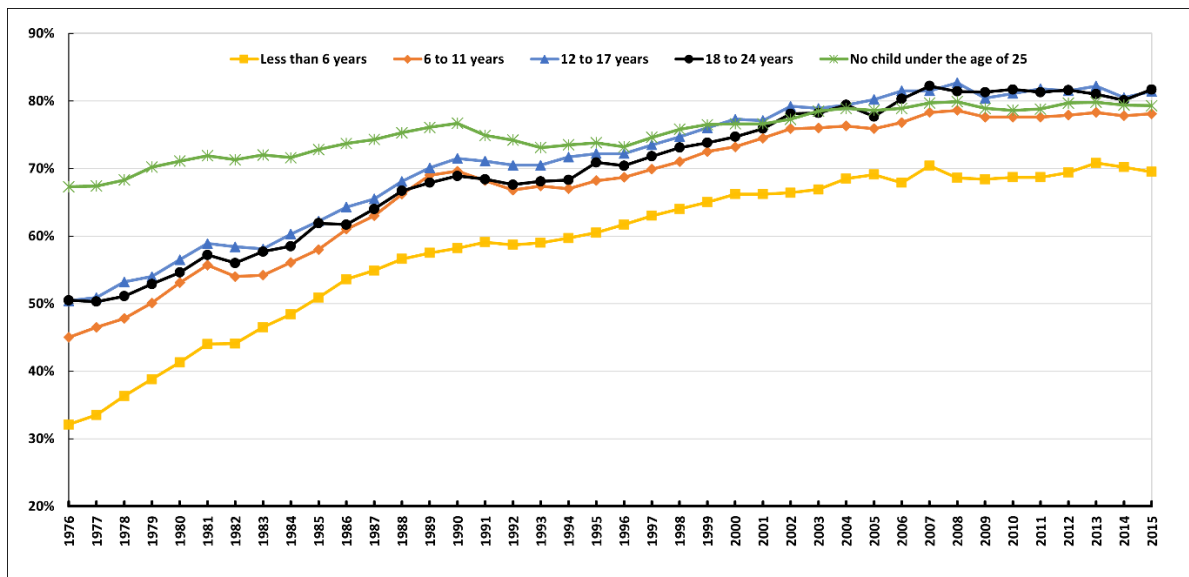
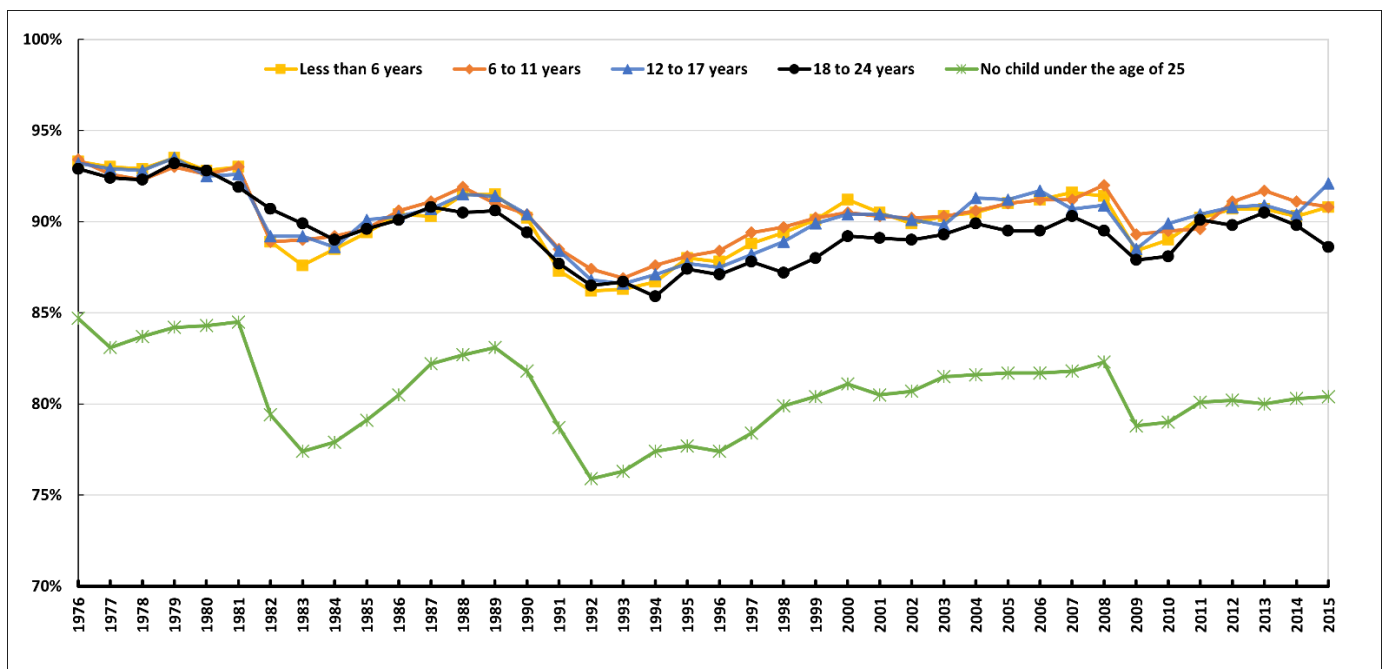


Figure 3.5: Employment rates of men aged 25 to 54 by age of youngest child in the household, Canada, 1976 to 2015²⁷²



The graphs below tells us about the hours spent per day on paid and unpaid work. Women spend a disproportionately high average number of hours on unpaid work, relative to men, a subject that is monitored every 5 years through a time use survey.

Figure 3.6: Average number of hours per day spent on paid and unpaid work (total work burden) as primary activities, women and men aged 25 to 54, Canada, 2015²⁷³

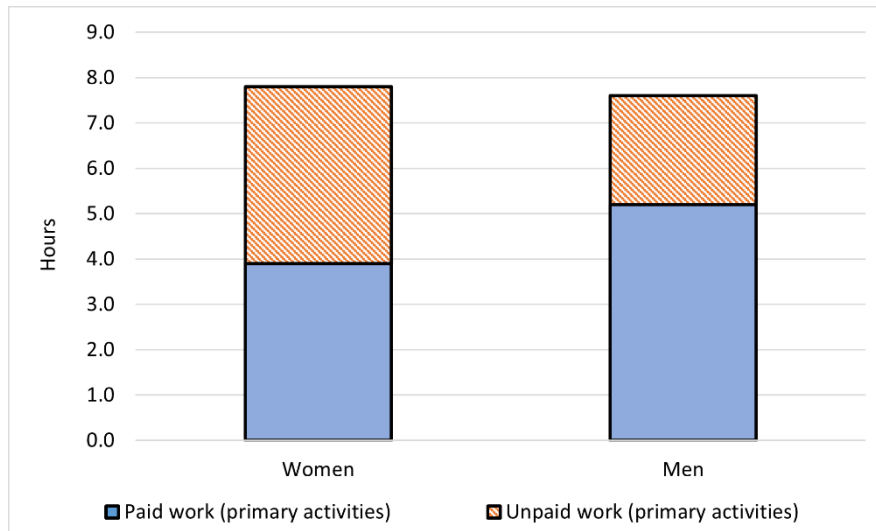
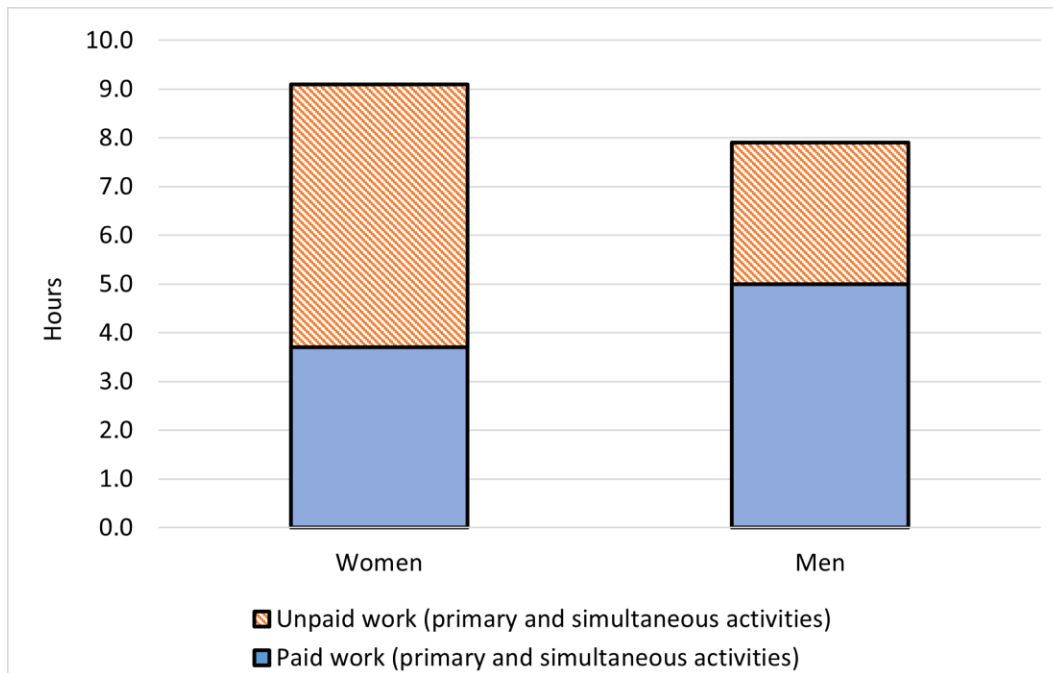


Figure 3.7: Average number of hours per day spent on paid and unpaid work (total work burden) as primary and simultaneous activities, women and men aged 25 to 54, Canada, 2010²⁷⁴

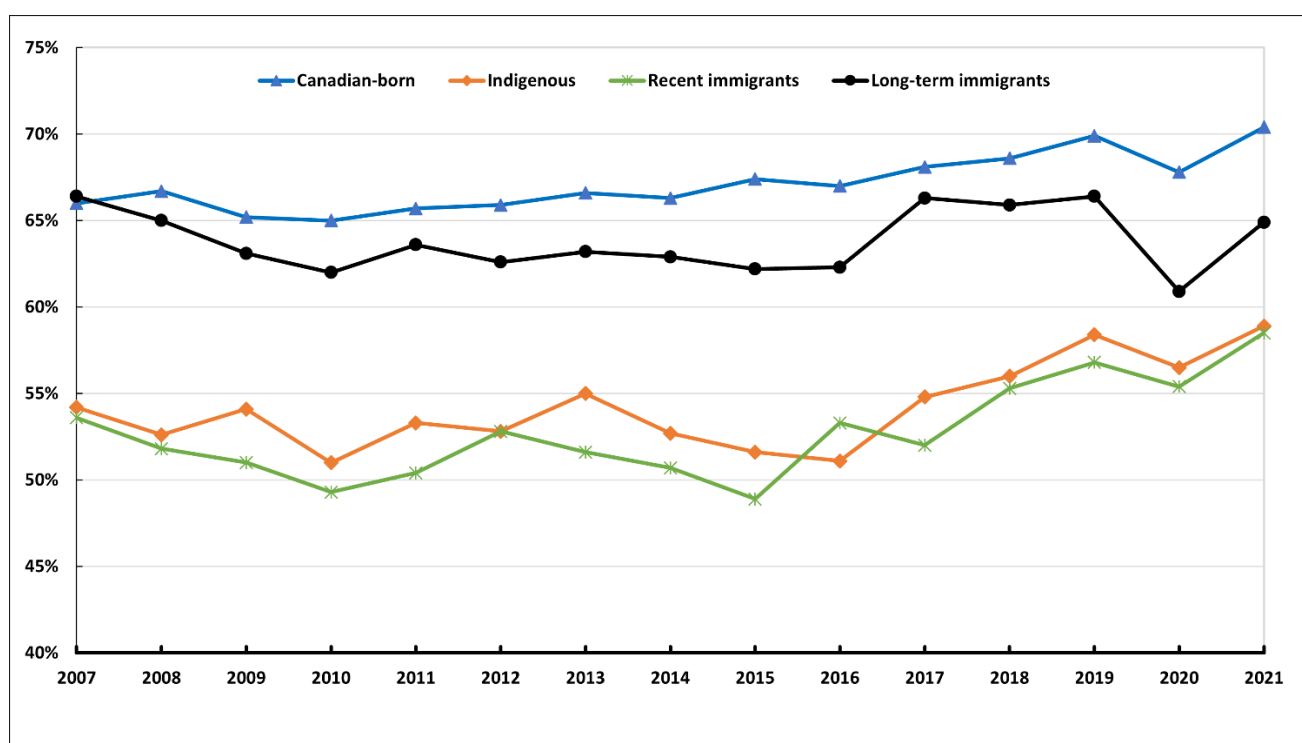


The number of employees earning low pay (that is, less than 2/3 of the median hourly earnings before tax and other deductions, at their main job in each year) has increased in Canada between 2020 and 2021, by 316,000 or 10.7%. Men’s median hourly wage was \$28.00 whereas women’s was \$24.40 in 2021. Most of the increase in low pay was concentrated among young people aged 15 to 24%. Statistics Canada reports that the main characteristics of low-paid workers has not changed much, despite the widely acknowledged impact of the COVID-19 pandemic on the Canadian labour market. In fact, low-paid employment rebounded from 2020 to 2021, with an increase in the low-pay rate to 20.1%.²⁷⁵

The task force was informed by Statistics Canada that women accounted for over half (50.9%) of those who earned less than \$12 per hour, and only 42.3% of those who earned \$30 or more per hour. In 2021, women accounted for over half (53.9%) of the people aged 25 – 54% working in temporary employment; in 2022 that number rose to 56.4%.²⁷⁶

Among workers aged 25 to 54 years, women accounted for the majority (71.1%) of those working part-time in 2021.²⁷⁷ Responsibility for care is the main reason cited by 24.8% of women aged 25 to 54 in 2021, and 27.7% of women in the same age range in 2022.²⁷⁸ Statistics Canada reports that in 2021, 68% of women aged 20 to 54 were employed full time, with disaggregated data since 2007 for women who are Indigenous, recent immigrants and long-term immigrants:

Figure 3.8: Proportion of women employed full time in their main job, by population group, 2007-2021²⁷⁹



The main takeaway from an associated Statistics Canada research paper is that data disaggregation is necessary if we are to obtain a complete picture.²⁸⁰

Intersectional analysis is required

It is essential that beyond a gender-based analysis or GBA+, an anti-racism, anti-oppression lens be applied to the LEEP and the FCP. This may appear to be a complex prospect, but the status quo will not show results.

Canadian Council of Muslim Women, Written Submission to the EEART, 24 June 2022

Early employment equity implementation has tended to focus on including women as a category without paying sufficient attention to diversity within the category of women. Aggregate data on women tell an incomplete story about substantive equality in employment on the basis of gender. The need to

approach the category women in a disaggregated and intersectional manner was stated poignantly by many of the stakeholders who appeared before our task force.

An intersectional approach to gender is consistent with Canada's international obligations and has been underscored by several UN Committees. In 2016, the Committee on the Elimination of Discrimination against Women (CEDAW) noted the "limited access" to the labour market faced by Indigenous (First Nations, Inuit and Métis), Afro-Canadian, migrant, refugee and asylum-seeking women, as well as women with disabilities. CEDAW was concerned that occupational segregation persists: "horizontal and vertical occupational segregation and the concentration of women in part-time and low-paid jobs, which is often due to their parallel traditional child raising and caretaking responsibilities".

CEDAW noted that this occupational segregation also reflects women's low representation in managerial positions. In addition to endorsing a national childcare framework providing "sufficient and adequate childcare facilities", CEDAW has quite specifically called for special measures to be put in place to achieve substantive equality of women and men in the labour market and to eliminate occupational segregation in both public and private sectors, considering that quotas would enhance the representation of women in managerial positions in companies. It called for a specific and integrated plan with effective and proactive measures to address Indigenous women's particular socioeconomic conditions.²⁸¹

The Committee on the Rights of Persons with Disabilities (CRPD)'s General Comment No. 8 (2022) offers an important reminder that

Women with disabilities (art. 6) experience multiple and intersectional discrimination in work, employment and throughout the employment cycle resulting in barriers to equal participation in the workplace. These barriers include sexual harassment, unequal pay for work of equal value, fewer career options, less prestigious career paths in order to be able to obtain employment, lack of access to redress because of discriminatory attitudes that result in dismissal of their claims, and physical, information and communication barriers. Further, women with disabilities are at great risk of exploitation in the informal economy and in unpaid work, which in turn exacerbates inequalities in areas such as remuneration, health and safety, rest, leisure and paid leave including maternity leave.²⁸²

In addition, management scholar Barnini Bhattacharyya and sociologist Jennifer L. Berdahl have published a rigorous recent study of 65 in-depth narratives, on the complexity of women's experiences of intersectional invisibility in the workplace. They demonstrate how Indigenous, Black and racialized women face the following four prevalent forms of marginalization at work:

- erasure (that is, left out of interactions or ignored in their work environment)
- homogenization (that is, treated as interchangeable with other racialized women, in some cases literally called by the wrong name or sent the wrong email)
- exoticization (that is, objectified by being reduced to "foreign objects of fascination and fetishization"), and
- whitening (that is, "having their similarities to white people complimented and their non-white racial/ ethnic identities and cultural backgrounds discounted or ignored")²⁸³

These challenges are discussed in greater detail in Chapter 4, as they are examples of the kind of barrier removal that is necessary to ensure that workplaces are welcoming to all women.

Women in the federal public service

In the federal public service, while women constitute 55.6% of the core public administration according to the data from 2020-2021, Indigenous women workers (5.9%) and disabled women workers (5.6%) are underrepresented according to the workforce availability (WFA) benchmark. Women's overall promotion into executive positions, while higher than WFA, is challenged by the high degree employees who separate from the public service in the executive rank, which is 4.6% above what it should be and acknowledged to be in need of attention.²⁸⁴

Resetting normal on gender justice

The composite picture for women in Canada is that inclusion as an employment equity group remains crucial. Substantive equality has not been achieved. The gains that have been made over time, moreover, have been shown to be all too fragile during the pandemic, as noted by organizations as varied as the United Nations, the Canadian Human Rights Commission and the Canadian Women's Foundation.²⁸⁵ We agree with the Canadian Women's Foundation:

“It's ‘normal’ to view equality as ‘nice to have’ but not an essential feature of a healthy society. ... It's time to reset normal. ... Inequality is harmful to our collective health.”

Canadian Women's Foundation & Diane Hill, Resetting Normal: Lessons from the Pandemic: Building intersectional gender justice in post-pandemic Canada, September 2021

We discuss each employment equity group with attention to gender. We recommend that women should remain an employment equity category. We call for enhanced attention to disaggregation and an intersectional approach.

Recommendation 3.14: Women should remain an employment equity group.

Recommendation 3.15: Employment equity implementation, meaningful consultation, and regulatory oversight should be approached in a disaggregated and intersectional manner.

Black workers in the wake of the International Decade for People of African Descent

Introduction

We want to be treated equally – Black Canadians want their humanity to be valued: a work environment that is supportive, that is respectful of diversity. Our education, experience, and skills should be recognized as valid. We want an equal opportunity to grow professionally and not to be held back because of skin colour.

Survey Respondent quoted in Dr. Harvi Millar, Reimagining the Employment Equity Act: Making it Work for Black Canadian Employees, Enhanced Engagement Report for the EEART, 20 July 2022 at 65

This section addresses the specific request for workers of African descent to be removed from the existing employment equity group of ‘visible minorities’ or ‘racialized groups’ and constituted into a separate employment equity group. It therefore offers a detailed discussion of the specific history of Black communities in Canada, as well as a statistical portrait, to assess the justification for a special category.

Our task force concludes that it is appropriate and timely to constitute a special employment equity group for Black workers in Canada.

The pandemic revealed for Canadian society a portrait of Black workers that was rarely portrayed in the media, and that countered anti-Black stereotypes – Black health care workers, cleaning personnel, grocery store workers, bus drivers and other workers who made immense personal sacrifices through the depth of the pandemic to enable the majority of the population to shelter in place.²⁸⁶ The portrait cemented the importance of statistical data on the differential impact of COVID-19 on Black populations. The overrepresentation of Black workers in jobs that literally put their lives and health at risk was a palpable reminder of what employment inequity can look like.

This is contrasted with recent data provided about Black representation in the federal public service. In rarely released sub-group data published on the occasion of an audit by the Public Service Commission of Canada, it was found that Black applicants, who formed the largest sub-group, experienced the overall largest drop in representation of all visible minority sub-groups. That is, their representation between the period of job application, through automated screening, through organizational screening, assessment and ultimately appointment fell from 10.3% down to 6.6%. In the Public Service Commission of Canada’s audit sample, out of 1 570 applications, 30 Black candidates were appointed.²⁸⁷

The United Nations Decade on People of African Descent

The United Nations Decade on People of African Descent began in 2014 and was formally recognized by the Government of Canada in 2018. The United Nation’s Committee on the Elimination of Racial Discrimination had formulated a set of recommendations that recognize “that millions of people of African descent are living in societies in which racial discrimination places them in the lowest positions in social hierarchies.”²⁸⁸ Among them, they call for special measures to be adopted as part of a comprehensive national strategy and with the participation of people of African descent, to eliminate discrimination including in employment.²⁸⁹

But in the wake of George Floyd’s unspeakable murder, the extent of “racism and structural discrimination against people of African descent, rooted in the infamous regime of slavery”²⁹⁰ became globally recognized. We have witnessed global mobilizing of people calling for racial justice and a recent reckoning with the extent of anti-Black racism and the institutional causes. The UN’s transformative agenda calls for States to “examine the extent and impact of systemic racism and adopt effective legal, policy and institutional measures that address racism *beyond* a summation of individualized acts.”²⁹¹

In the wake of these global developments, representatives from a broad range of Canadian society have joined with Black communities to support establishing a separate employment equity group for Black workers. This included government, employers and unions, experts in Canada and internationally. It centres Black workers, themselves.

The fact that employers can meet compliance standards without ever having to employ Black Canadians is problematic.

Dr. Harvi Millar, Reimagining the Employment Equity Act: Making it Work for Black Canadian Employees, Enhanced Engagement Report for the EEART, 20 July 2022 at 21

Our task force heard from representatives of workers of African descent and representatives of Black communities within the public service and private sector, including representatives from the Black Class Action secretariat that has brought a civil suit on systemic discrimination in the *Employment Equity Act* framework. A repeated concern was that they experience ‘invisibilization’ and anti-Black racism within the visible minority category. They pointed to statistical data on representation, through which an employer could be considered to have attainment rates that meet or exceed labour market availability, without ever hiring a Black person. While the disaggregation of data through intersectional analyses illustrated the challenge, it did not remedy it. They pointed to persistent barriers that illustrated the nature and persistence of anti-Black racism. Separate categorization, grounded in the specific legacies of enslavement whose afterlives manifest themselves through the statistical data, become an important basis for this rethinking.

The task force was repeatedly reminded that workers of African descent belong to many communities; Black communities are diverse in histories, origins, and geography. They are represented in all employment equity groups. They are urban and rural, and these differences matter. Some identify more readily with specific geographies, particularly those who have recent links to specific states in the African continent. For many others, the history is inextricably tied to transatlantic slavery, as they are the descendants of Africans who were enslaved throughout the Americas, including the Caribbean, Central America, South America and North America. This history, in other words, includes Canada.

The long history of Black people in Canada

Many Canadians may only recently have learned that slavery existed in Canada. The case for a distinct *Employment Equity Act* category specifically for people of African descent is rooted in part in the legacy of slavery, both in Canada from the 16th century until its abolition in 1834, and as a global institution. Both Indigenous peoples and Black people were enslaved, from the Maritimes to Upper and Lower Canada, prior to Confederation in 1867.²⁹² In some provinces, like Prince Edward Island, legislation was adopted to codify the legality of slavery. In some other jurisdictions, there are questions about the applicability of legislation authorizing the enslavement of people of African descent, like the French *Code Noir* in what is now Québec. Moreover, the enslavement of people was only one way in

which Canada participated in the global and profitable institution of slavery – the impact of the production and sale of salted cod fish from Eastern Canada and the United States to feed the enslaved is another little-known dimension.

There has rightly been special attention given to the experience of the African Nova Scotian population, including by the courts. The Nova Scotia Court of Appeal found that “African Nova Scotians have a distinct history reflected in how they arrived here and their experience over the past 400 years. This history is rooted in systemic and institutionalized racism and injustice.”²⁹³

R. v. Anderson, Nova Scotia Court of Appeal, 2021 NSCA 62 at 97:

“An examination of the history and experience of African Nova Scotians reveals the nature and extent of their oppression:

- enslavement and the legal status as property of White men.
- re-enslavement of freed slaves by profiteers and slave marketers.
- forced migration as the chattels of American loyalists after the Revolutionary War.
- servitude to Loyalists households even for freed slaves.
- lawful segregation following the formal abolition of slavery in the British colonies. Examples of legally sanctioned racial segregation existed for military service, schooling, and, as the 1946 case of Viola Desmond highlighted, even in cinemas.
- the denial of ownership of real property. Black settlers were given tickets of location or licenses of occupation rather than legal title to their land. Denied clear title, Black settlers could not sell or mortgage their property, or legally pass it down to their descendants on death.
- exclusion under the *1864 Juries Act* as a consequence of not holding a freehold estate.”

Slavery left legacies that profoundly affect African Canadian communities’ participation in the labour market. The history of segregation – in service provision, housing, schooling and employment – is not well known in Canada, despite the fact that segregation was legally upheld by our Supreme Court of Canada in 1939.²⁹⁴ But slavery as a global institution is at the root of stereotypes of Black peoples’ proper place in the labour market – in menial jobs, poorly paid, expected to be subservient. As Bridglal Pachai argues,

[t]he social and racial climate during the war years had brought no improvements in race relations. Blacks in Nova Scotia continued to stand at the end of the long line seeking employment opportunities. It did not matter whether one was educated, skilled, semi-skilled or unskilled, the result was the same: Blacks were employed if and when other candidates were unavailable or unwilling.²⁹⁵

Historically African Nova Scotians sought to rely on self-help, community economic development in the midst of significant constraints, community organizing, and of course mobility. However, Black communities such as the African Nova Scotian community of Africville, north of Halifax, were forcibly destroyed. Since 2017 following key litigation, a land titles initiative has been put in place to resolve

claims and provide clear title to residents of the communities of East Preston, North Preston, Cherry Brook/Lake Loon, Lincolnville and Sunnyville.

Animated by the question of why we do not “know more about the struggle of Black men and women who fought Jim Crow-style laws and political policies so they could be recognized, not only as humans, but as full citizens of Canada,” historian Cecil Foster posits that Canada became an officially multicultural state “because of the ... work of the railway porters... if they were men, and in-home domestics if they were women.”²⁹⁶

It is well known that railways – an iconic symbol of Canadian unification from coast to coast - were built on the basis of a racialized division of labour.²⁹⁷ That segregation – which left Black men recruited from the Maritimes, the United States and the Caribbean working gruelling hours, struggling to stay awake, always at the service of the passengers in search of “porters as good housekeepers”²⁹⁸ yet barely paid a living wage²⁹⁹ - was formalized by law. It is telling that the first Black Chief Justice, the Hon. Julius Isaac of the Federal Court of Canada, worked as a sleeping car porter in a segregated railway industry.³⁰⁰ The first African Nova Scotian judge and first Black woman in Canada to become a judge, the Hon. Corrine Sparks, attended segregated schools in Halifax.³⁰¹

Segregated workplaces in Canada have also been the basis of recent human rights cases, including Centre Maraicher Eugène Guignois, where Black permanent residents and citizens working in precarious jobs as “day labourers” on a farm outside of Montreal were required to use separate bathrooms and kitchens from white workers.³⁰² In Canada. In 2001.

The specific history of anti-Black racism in Canada was stressed by the UN Working Group on People of African Descent, when it visited Canada in 2017.³⁰³ Anti-Black racism has also been acknowledged by the Supreme Court of Canada that “racial prejudice and its effects are as invasive and illusive as they are corrosive”:

For some people, anti-black biases rest on unstated and unchallenged assumptions learned over a lifetime. Those assumptions shape the daily behaviour of individuals, often without any conscious reference to them.

R. v. Williams [1998] 1 SCR 1128, 1998 SCC 782 at para. 21 quoting *R. v. Parks*, 1993 ONCA 3383 at p. 371

In *R. v. Parks*, Justice Doherty added that our institutions “reflect and perpetuate those negative stereotypes.” In 2021, the Ontario Court of Appeal affirmed that “[i]t is beyond doubt that anti-Black racism, including both overt and systemic anti-Black racism, has been, and continues to be, a reality in Canadian society.”³⁰⁴ Also in 2021, the Nova Scotia Court of Appeal acknowledged that “[t]he experience of racism and segregation inflicted deep transgenerational wounds.”³⁰⁵ In 2022, the Supreme Court of British Columbia took “judicial notice of the fact that anti-Black racism exists in the Lower Mainland of British Columbia, as it does throughout Canada, and that anti-Black racism can have a profound and insidious impact.”³⁰⁶

[Translation] To live in the skin of a black person is to experience humiliation, rejection, mistrust, disapproval, disqualification, prohibition, indifference, systemic discrimination, veiled by politically correct speeches at all times but without concretization. Evaluate reality, people of black colors live in rejection, the outrage of a day and forever.

Federal Public Servant

Consulted community organizations understood employment equity as a fundamental question of fairness, of ensuring economic justice for people of African descent and promoting intersectional Black flourishing in an inclusive Canadian society. The extended engagement report that canvassed over 500 members of Black communities across Canada revealed disturbing experiences including being passed over for promotions, a lack of mentorship and limited professional development opportunities, not having academic credentials respected and being told they are unqualified, experiencing a race-based pay gap, and being told to stop playing the “race card”.³⁰⁷

A diverse group of People of African Descent: The statistics

This history should not mask just how diverse a population of people of African descent we have in Canada.

For the purposes of the Census, the category “Black” was added in 1986 as part of an important initiative to improve data collection and reporting, in support of *Employment Equity Act* implementation.³⁰⁸ 2021 Census data indicate that close to 91% of those born outside of Canada were from the Caribbean or the African continent.

There is a logical, built-in assumption that certain geographical regions – notably much of the African continent - have predominantly Black populations. The assumption has its limits. It should also be noted that members of the Black diaspora from other parts of the world, such as Central and South America, might be undercounted because of assumptions embedded in the constitution of the visible minority category. Historically Brazil, for example, received the largest number of enslaved Africans in the world. Over 97 million people or 50.7% of Brazil’s population have African ancestry.³⁰⁹ Blackness in Latin America has been historically undercounted, but there is growing attention to the existence of people of African descent in the region.³¹⁰ We note that Statistics Canada includes data from Guyana in some of its calculations, noting that the Black population “has many sociocultural commonalities with Black populations in the Caribbean.”³¹¹ Of course, Guyana is both in South America and a member state of the Caribbean Community. The historical trajectory of Black people in North Africa and current experiences of anti-Black racism can be understood in a similar manner.³¹²

The basic take away is that statistics on the Black population in Canada focus largely on race while statistics on other racialized populations focus largely on geography.

It is important to acknowledge that the category “Black” cannot be rooted in only one geographical region reflects the history of slavery as a global institution. The notion of African descent draws particular significance from this historical reality.

There is also emerging if limited research on the “multiple visible minority” category used in the Census. Some research from the United States suggests that even when someone identifies as a member of

more than one visible minority, but one of those identities is Black, being Black is experienced as an identity that is not a choice and that affects their life options.³¹³ Britain has developed a standalone ‘mixed’ ethnic designation that includes sub-groups allowing greater specificity – e.g. “white and Black Caribbean” – to be identified.³¹⁴

The challenging issue of arriving at a more representative characterization of the Black population in Canada, in all of its diversity, is an important issue for data collection going forward in support of employment equity implementation, meaningful consultations, and oversight.

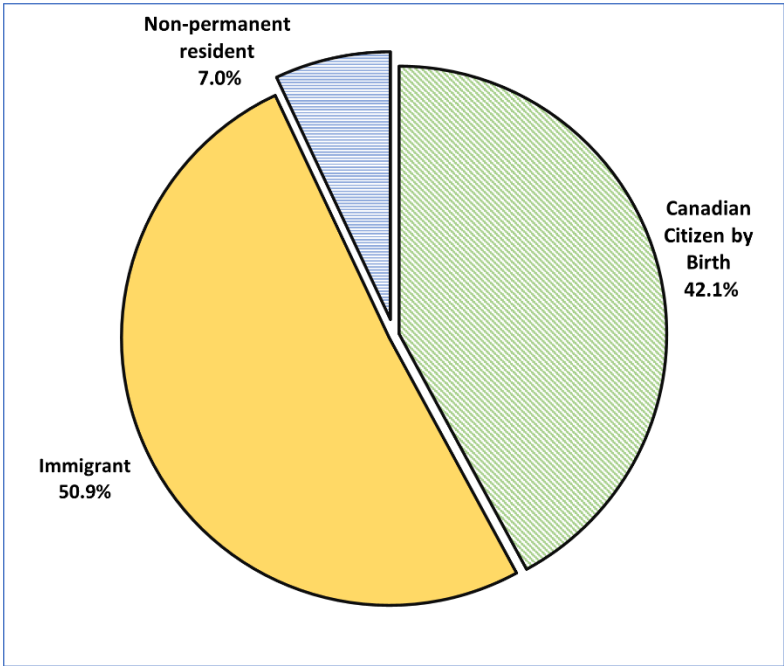
Recommendation 3.16: The Employment Equity Data Steering Committee should study how best to obtain a suitably representative, disaggregated, and intersectional characterization of the Black population in Canada, in meaningful consultation with representative organizations of people of African descent.

Despite these concerns, our task force notes that the 2021 Census data reveal almost a three-fold increase in the size of the Black population in Canada since 2016, with close to 1.5 million people identified as Black. Black people constitute 4.3% of Canada’s total population, and 16.1% or the third largest group of the population defined as visible minorities. A young population, Black people are projected to reach 3.0 million by 2041.

The demography of the Black population has changed dramatically over time, with various waves of immigration from the post-war period through to the present. Currently, according to the 2021 Census data, approximately 42.1% of the Black population were Canadian citizens by birth, while 50.9 % were immigrants, and 7.9% were non-permanent residents.

In 2021, approximately 897,000 members of the Black population were immigrants or non-permanent residents, with 42% of them coming to Canada in the previous decade.

Figure 3.9: Immigrant status for the Black population, Canada, 2021³¹⁵



The most recent statistical information confirms that there are significant differences in the employment and earnings of Black people relative to the rest of the adult population in Canada, and these differences have grown over time—despite gains in the educational attainment of Black people. The 2021 Census data indicate that the average employment income of the Black population was 78% that of the total population, while the employment income of Black women+ was 72% of the total population. According to the 2016 Census data, unemployment rates were 2 ½ times higher for Black men than for the rest of the population and frequently two percent higher for both Black women and Black men in most major cities in Canada. One in 5 Black adults live in a low-income situation.

Statistics Canada has underlined the following features showing labour market challenges both at the top and at the bottom emerging from the 2021 Census data. First, at 15.8%, the percentage of the third-generation-or-more Black population with a bachelor's degree or higher is lower than that of Black populations that immigrated either from the African continent or from the Caribbean, and lower than second generation members of the Black population. Approximately 49.8% of the Black population have postsecondary credentials.

Second, the Black population faces a significant challenge of overqualification. An important feature needs to be stressed: unlike most other racialized groups, the overqualification is not mainly associated with foreign credential recognition.

Fully 16.0% of Black workers with a bachelor's degree or higher from a Canadian institution work in occupations that required a high school diploma or less.

This is the highest overqualification rate of any Canadian-educated racialized group. The average for the Canadian-educated population was 11.1%.

It is particularly striking that the rate is similar across generations: first-generation Black workers were overqualified at 15.8%, second-generation were overqualified at 16.6% and third-generation-or-more were overqualified at 15.7%. According to Statistics Canada, “[t]his is consistent with other data relating to challenges faced by Black workers; they were more likely than other workers to report facing discrimination or unfair treatment in the workplace.”³¹⁶

From 2001 to 2016, for example, the employment rate of Black women aged 25 to 59 remained at 71%, but increased from 72% to 75% among other women in the same age group. Similarly, the gap in median annual wages increased between Black people and the rest of the working age population, largely because the wages of Black workers did not grow as quickly as those of other workers.

From the labour market portrait of Black workers issued during the pandemic, Statistics Canada reported that in January 2021, Black workers in the core-aged group of 25 to 54-year-olds were more likely to hold a bachelor's degree or higher (42.8%) than Canadians in the same age group who were not a visible minority (33.6%). However, Black Canadians with a university degree had a lower employment rate (86.1%) than their non-visible minority counterparts (91.1%). While Black and non-visible minority men were found in equal proportions in the trades and sciences, for example, but at the management table, Black men were 40% less likely to work in management positions than non-visible minority men. Employed Black women were also underrepresented in management occupations compared to non-visible minority women.

Considering both the distinct history of slavery and segregation in Canada, and the statistical data showing persisting differential treatment and underrepresentation, Black workers have a strong claim for inclusion under Employment Equity Act framework as a separate category. The proposal received significant specific support from a number of stakeholders who appeared before us from a broad range of constituencies, including Black communities themselves.³¹⁷

The collective comments and recommendations show a very strong level of consensus that the EEA is woefully inadequate in creating the conditions for Black flourishing in the workplace. The consensus view from the data is that Black Canadians cannot locate themselves in the equity agenda proposed under the EEA.

Dr. Harvi Millar, Reimagining the Employment Equity Act: Making it Work for Black Canadian Employees, Enhanced Engagement Report for the EEART, 20 July 2022 at 34

A specific employment equity group

Calls for a specific employment equity group have been made both within Canada and before the United Nations. Beginning with a critique of the terminology of ‘visible minority’, workers of African descent have argued that it leads their specific identities and situations to be neglected.³¹⁸

Employers are using this category that is very broad to say they are doing their part but in actuality they aren’t picking black workers.

A federal public servant

The task force was informed that a majority of participants to the consultations undertaken by TBS-OCHRO in the federal public service agreed that workers of African descent should be an employment equity group, both in light of the historical context of enslavement and the commitment of Canada to focus on issues that address Black communities and improve data, research and policies, including in light of the International Decade for People of African Descent.³¹⁹

We have deliberately used the language of Black workers and workers of African descent interchangeably in this report, out of respect for the ways in which Black communities in Canada have self-identified and organized. We are also cognizant of the powerful forward momentum derived from the International Decade for People of African Descent and the United Nations Permanent Forum of People of African Descent. A United Nations Declaration on the promotion and full respect of the human rights of people of African descent is currently under development. It seemed fitting to acknowledge and embrace the international language in our report and recommendations.

The Federal Black Employees Caucus (FBEC) considered that recognition of Black workers in a separate category would help with understanding the legacy and impacts of colonialism, and the importance of understanding Black Canadians’ lived experience through the lens of anti-Black racism. Stakeholders that presented to the task force and expressed an opinion tended to be supportive of establishing a distinct category for Black workers, noting the specificity of the history and employment outcomes. The task force also heard from the Black Class Action Secretariat, a not-for-profit organization representing unionized and non-unionized Black federal public servants that has launched a lawsuit against the Government of Canada. They claim the following:

A Transformative Framework to Achieve and Sustain Employment Equity

[p]resent employment equity laws and efforts have failed to recognize and address the unique history and experience of Black workers and have perpetuated prejudices, stereotypes and Black employee exclusion in a way that has eroded the confidence of Black workers in employment equity laws, in employer and societal commitments to these laws, and in the ability to enforce recognized goals, objectives and inclusion of Black workers at all levels of the workplace, particularly at the upper echelons.³²⁰

They submitted to the task force that undisclosed sub-group data in the *Employment Equity Promotion Rate Study* covering 2005 – 2018 indicated a negative relative promotion rate for Black employees of -4.80% relative to employees who are non-Black.³²¹ The overall visible minority rate of promotion was positive, at +0.6%, although at the executive rank it too was negative at -0.5%.³²²

The Public Service of Canada stressed that departments wanted to take initiatives to focus their hiring on Black candidates or Black students. They were restricted from acting on behalf of the sub-group, because the employment equity group was visible minorities as a whole.

The solution to this emerging need may be the expansion of the designated groups.

Gaveen Cadotte, Vice-President (Policy and Communications) Public Service Commission of Canada, Letter to the Employment Equity Act Review Task Force, 2 June 2022

Several unions have also expressed public support and solidarity for federal Black public service employees, recognizing the prevalence of anti-Black racism, affirming the importance for the federal public service in particular to lead by example.

The UN Committee on the Elimination of Racial Discrimination has issued a general recommendation, including a call for states to “develop and implement special measures aimed at promoting the employment of people of African descent in both the public and private sectors.”³²³

Black Flourishing: This term which appears in the Scarborough Charter [on Anti-Black Racism and Black Inclusion in Canadian Higher Education: Principles, Actions and Accountabilities] has profound relevance for Black Canadians in the world of work.

Dr. Harvi Millar, Reimagining the Employment Equity Act: Making it Work for Black Canadian Employees, Enhanced Engagement Report for the EEART, 20 July 2022 at 34

It was also important to the task force to note that different sectors in Canadian society increasingly recognize the need to redress the underrepresentation of Black workers. Voluntary initiatives such as the 2021 *Scarborough Charter on Anti-Black Racism and Black Inclusion in Canadian Higher Education* have helped to frame and support initiatives in universities and colleges to redress the underrepresentation of Black professors, staff and students.³²⁴ The Black North Initiative was launched in 2020 and signed by 481 companies; however, a 2022 independent report raised serious questions about the extent of the progress on equitable inclusion.³²⁵

We already know this: voluntary measures will not achieve employment equity.

Recommendation 3.17: Black workers should constitute a separate employment equity group for the purposes of the *Employment Equity Act* framework.

Emerging from the PURGE – Full inclusion of 2SLGBTQI+ workers

Introduction

Our community is a collection of many communities, bound together through our histories, oppressions, and dreams of futures where gender and sexual diversity are celebrated and affirmed.

The Enchanté Network, The Employment Equity Act and 2SLGBTQI+ Communities, Extended Engagement Report to the EEART, August 2022 at 12

The International Convention on Economic, Cultural and Social Rights specifically requires states, as a minimum core obligation, to “[g]uarantee through law the exercise of the right [to work] without discrimination of any kind as to ... sexual orientation, gender identity, intersex status.”³²⁶

Our task force closely considered the history and available evidence of systemic workplace discrimination faced by members of 2SLGBTQI+ communities in Canada. We listened carefully to the many stakeholders who came before us, from the communities themselves and across employer and worker groups. We studied what has already been done, in Canada and in other countries. And we asked what would be necessary to advance knowledge on the employment situation of 2SLGBTQI+ communities’ employment experiences.

Taken together, we conclude that there is a strong basis to recommend inclusion of 2SLGBTQI+ people as an employment equity group in the Employment Equity Act framework and recommend inclusion.

2SLGBTQI+ communities by the available data

The lack of data and research attention created a chicken-egg problem. ... With the recent publication of Canadian research using a variety of methods, and the availability of new data on gender diversity from the 2021 Census, in part due to advocacy by the research, policy and [2SLGBTQI+] communities, there is an opportunity to move forward on this issue.

Carol Agócs, Think Piece on Three Issues, Unpublished Paper Prepared for the EEART, 14 December 2022

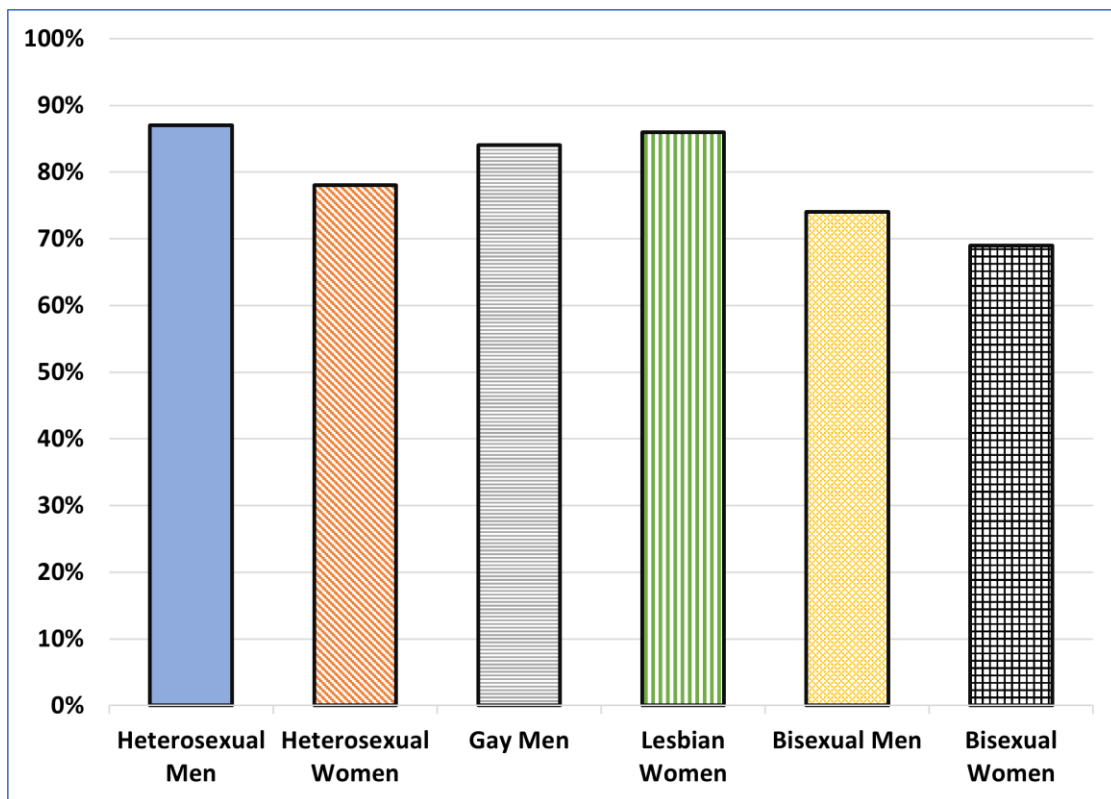
According to the most recent data released by Statistics Canada, an estimated 1 million people are part of the 2SLGBTQI+ communities in Canada, representing 4% of the overall Canadian population aged 15 years and older.³²⁷ Within 2SLGBTQI+ communities, 52% are women, 42% are men, and 3% are non-binary. Based on the same 2018 survey data, 2SLGBTQI+ people constitute a young population, with 58.4% aged 34 or younger compared to 30.5% of the general population, and 7.3% of the population aged 65 or older, compared with 20.6% in the general population. Employment income for 40.5% of the population is less than \$20,000 per year. Average personal incomes were significantly lower (\$39,000) than those for non-2SLGBTQI+ community members (\$54,000).³²⁸

While our task force was convening, Canada became the first country to provide census data on transgender and non-binary people. Statistics Canada now distinguishes in the Census questionnaire between sex “at birth” and asking a question on gender.³²⁹ Statistics Canada reports that 0.2% of the population aged 18 and older was transgender in 2021. Close to two-thirds (62%) were younger than 35. Over half of the non-binary people aged 15 or older (52.7%) lived in one of Canada’s six largest urban centres.

Separate Government of Canada data collected through an online non-randomized survey in 2021 for the 2SLGBTQI+ Action Plan, found that of 25,636 respondents, 37% self-identified as gay, 23% as bisexual, 20% as queer, 19% as lesbian, 13% as pansexual and 6% as asexual.³³⁰ On employment, approximately half were employed full-time, 11% part time, 14% were students, 7% were unemployed and seeking work, 6% were self-employed and 5% were retired. Discrimination, harassment and exclusion were found to be prevalent, and barriers at hiring were substantial. 30% of transgender women and 22% of transgender men reported that they had been denied employment due to their gender identity compared with 7% of cisgender women and 4% of cisgender men. Two-Spirit respondents were most likely to report that they had experienced harassment based on their sexual orientation (42%) or gender identity (38%) over the past 5 years.

Despite this progress, getting accurate data on employment has been a significant challenge: it is therefore not yet possible to understand the employment context for 2SLGBTQI+ members, in the absence of large data sets.³³¹ Statistics Canada shared with the task force the following information on employment rates:

Figure 3.10: Proportion of employed population aged 25 to 59, by sexual orientation and gender, 2007 to 2017³³²

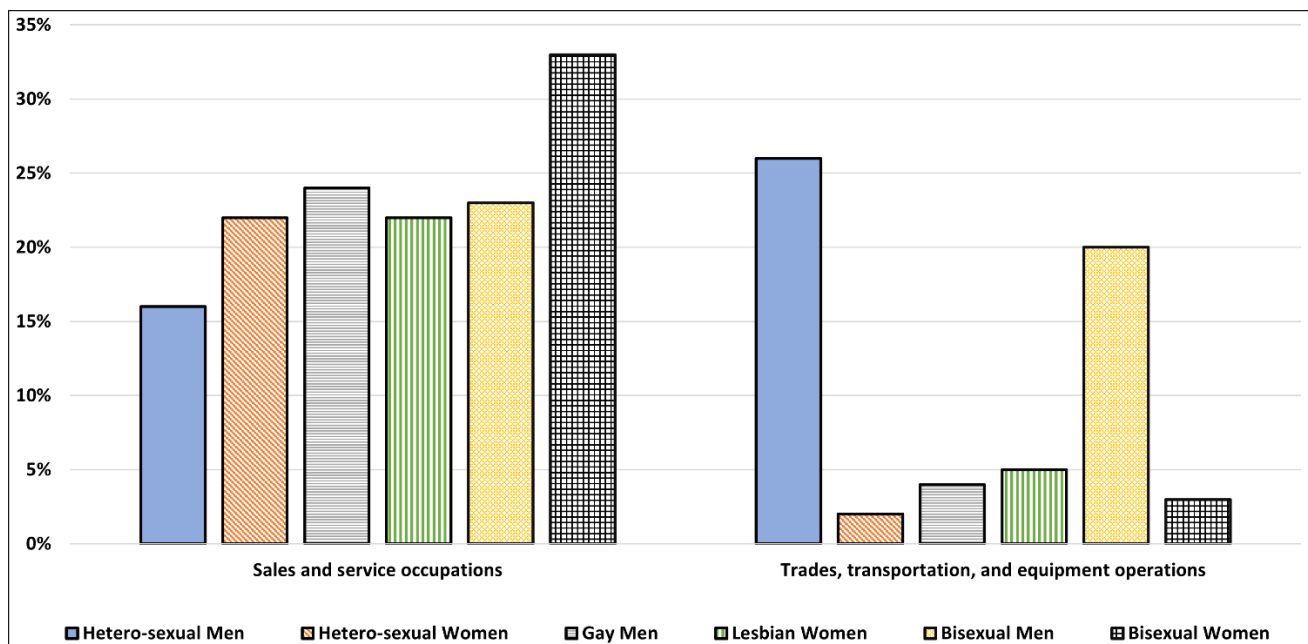


Their presentation was based on ten cycles of the Canadian Community Health Survey from 2007 - 2017, which includes a direct question on sexual orientation, large sample sizes as well as income and employment measures. Drawing on this source, a team of researchers has been able to provide important, granular data.

For example, they found that gay men have median incomes that are lower than heterosexual men but higher than heterosexual and lesbian women. They are less likely to work in trades, transportation and equipment operations than heterosexual men, and are more likely to work in sales and service occupations. Lesbians' median incomes are greater than heterosexual women, but less than gay or heterosexual men. They are more likely to work in trades, transportation and equipment operations than heterosexual women.

Their novel data for bisexual people show that bisexual men (\$38,733) and women (32,601) have considerably lower median incomes than heterosexual women (41,611) and men (59,313), gay men (52,013) and lesbians (47,552). Bisexual men are more likely to be immigrants or visible minorities than both gay men and heterosexual men, and bisexual women are more likely to identify as Indigenous than heterosexual or lesbian women. Bisexual men have a relatively large representation in trades, transportation and equipment operation occupations. They are underrepresented relative both to heterosexual and gay men in management and business, finance and administrative occupations. Bisexual women are overrepresented across the board in sales and service occupations as well as in the retail trade industries. Moreover, bisexual men and women are significantly less likely to be employed or work full-time than their respective comparators, heterosexual men and women. They also faced “large and robust wage penalties”, relative to heterosexual men. Lesbians are more likely to be employed and working full time compared to heterosexual women, although their tables do not appear to provide data on lesbian women relative to heterosexual men or for the population as a whole. While the authors acknowledge inevitable limits to their data, they conclude their study with the hope that it will be a catalyst for additional research and data on LGB employment.³³³

Figure 3.11: Select occupational groups by sexual orientation and gender, aged 25 to 59, 2007 to 2017³³⁴



The importance of community-informed data was stressed in the enhanced engagements, and the dearth of data in particular regarding intersex people was identified as a matter to be remedied going forward.³³⁵

Trans PULSE Canada, a national community-based research survey of the health and well-being of trans and non-binary people in Canada, has collected non-randomized data over a 10-week period in Summer 2019, in English and French, online, on paper or by telephone with or without language interpreters). They reached 2873 respondents aged 14 or over living in Canada and identifying as a gender other than the one assigned at birth. Of this total, 9% identified as Indigenous, 14 % identified as racialized, 3% were new immigrants, and 88% were born in Canada. Trans Canada reported on a number of disability-related identities, and noted that 19% identified as disabled. 75% of the total under age 35 and approximately 50% of surveyed people had a college or university degree. They found that 43% were employed on a permanent, full-time basis, while 35% were employed but did not have permanent, full-time status and 16% were on leave and not employed. Despite high levels of education, average incomes for those aged 25 or up was less than \$30,000 per year; fully 40% of trans and non-binary people were living in low-income households.

A study relying on the 2017 Public Service Employee Survey (PSES) conducted by Statistics Canada on employment experiences in the federal public service found that there is “compelling evidence that gender diverse federal public service employees experience significantly higher rates of employment discrimination and harassment, relative to cisgender men and cisgender women.”³³⁶

History matters

Many stakeholders focused on aspects of the history of exclusion and the slow but decided movement toward removing legal barriers to full representation of 2SLGBTQI+ communities in Canadian society.

A community born from oppression: Many queer and trans folks recognize that LGBTQ2+ culture has been created out of necessity as a result of historical and contemporary oppression.

Public Sector Pride Network, Presentation to the EEART, 17 March 2022

It is a disturbingly contemporary history. The 2022 Federal 2SLGBTQI+ Action Plan takes the time to list the movement toward rights recognition for 2SLGBTQI+ community members over the past 50 years:

1969 – Decriminalization of gross indecency and buggery for consenting adults 21 years and older (Canada’s first Criminal Code (1892) included offences prohibiting gross indecency and buggery [anal intercourse])

1977 – *Immigration Act* amended, removing “homosexuals” from list of “inadmissible classes”

1992 – End of Canadian Armed Forces restrictions regarding the service of “homosexuals”

1995 – Supreme Court rules that “equality” Charter rights extend to sexual orientation

1996 – *Canadian Human Rights Act* amended to include sexual orientation

2000 – *Benefits and Obligations Act* extended to same-sex couples

2005 – Legalization of same-sex marriage under *Civil Marriages Act*

In 2016, the Prime Minister appointed a Special Advisor on LGBTQ2 issues, and shortly thereafter, created what is now called the 2SLGBTQI+ Secretariat with the mandate to provide the federal government with pathways to address historical and ongoing injustices experienced by 2SLGBTQI+ people in Canada. Since then, the Government of Canada has taken further steps toward building a safer and more inclusive country:

2017 – *Canadian Human Rights Act* protects gender identity and gender expression

2017 – Prime Minister’s apology to LGBT Purge survivors and 2SLGBTQI+ communities

2018 – Federal Court approved Final LGBT Purge Class Action Settlement Agreement

2018 – *Expungement of Historically Unjust Convictions Act* for eligible offences involving consensual same-sex sexual activity

Source: Federal 2SLGBTQI+ Action Plan 2022

It becomes clear that some of the starkest barriers have only just been acknowledged and removed. To echo Professors Brenda Cossman and Ido Katri when legislation was passed in 2017 to protect gender identity and gender expression, including trans rights, “the work of real equality has only just begun”.³³⁷ Quoting them, Professor Samuel Singer adds that social justice movements are aware of the limits of anti-discrimination laws and seek substantive transformation.³³⁸

Emerging from the Purge

“The history of systemic discrimination towards LGBTQI2S people in Canada’s federal workplaces is deeply troubling. Since the LGBT Purge, we have come a long way towards building inclusive federal workplaces, but it will take coordinated, deliberate, and effective efforts to promote sustainable culture change and foster truly inclusive workplaces across the Government of Canada. Emerging from the Purge is the roadmap for change.”

Michelle Douglas, Executive Director of the LGBT Purge Fund, comment on the Emerging from the Purge report

A significant part of the roadmap for emerging from the purge is on equitable workplaces.

The task force heard in particular from federal workers and unions, who spoke about “the Purge” and its devastating impact on their lives and community. The Government of Canada has acknowledged that throughout the Cold War Era, from the 1950s through to the early 1990s in Canada, federal government employees faced a systematic campaign literally to purge them from the federal public service.

The history, and the need for redress, is chronicled in the Prime Minister of Canada’s historic 2017 apology, delivered in the House of Commons.³³⁹ It is important to identify what the Government of Canada has recognized and committed to redressing:

Mr. Speaker, today we acknowledge an often-overlooked part of Canada’s history. Today, we finally talk about Canada’s role in the systemic oppression, criminalization, and violence against the lesbian, gay, bisexual, transgender, queer, and two-spirit communities. ... Since arriving on these shores, settlers to this land brought with them foreign standards of right and wrong – of acceptable and unacceptable behaviour. Suitable and unsuitable partnerships. They brought rigid gender norms – norms that manifested in homophobia and transphobia. Norms that saw the near-destruction of Indigenous LGBTQ and two-spirit identities. People who were once revered for their identities found themselves shamed for who they were. They were rejected and left vulnerable to violence. And discrimination against LGBTQ2 communities was quickly codified in criminal offences like “buggery”, “gross indecency”, and bawdy house provisions. Bathhouses were raided, people were entrapped by police. Our laws bolstered and emboldened those who wanted to attack non-conforming sexual desire. ... Lives were destroyed. And tragically, lives were lost. ...

Over our history, laws and policies enacted by the government led to the legitimization of much more than inequality – they legitimized hatred and violence, and brought shame to those targeted. ...

Mr. Speaker, a Purge that lasted decades will forever remain a tragic act of discrimination suffered by Canadian citizens at the hands of their own government. From the 1950s to the early 1990s, the Government of Canada exercised its authority in a cruel and unjust manner, undertaking a campaign of oppression against members, and suspected members, of the LGBTQ2 communities. The goal was to identify these workers throughout the public service, including the foreign service, the military, and the RCMP, and persecute them. ... And sadly, what resulted was nothing short of a witch-hunt. The public service, the military, and the RCMP spied on their own people, inside and outside of the workplaces. Canadians were monitored for anything that could be construed as homosexual behaviour, with community groups, bars, parks, and even people’s homes constantly under watch. During this time, the federal government even dedicated funding to an absurd device known as the Fruit Machine – a failed technology that was supposed to measure homosexual attraction. This project was funded with the intention of using it against Canadians. When the government felt that enough evidence had accumulated, some suspects were taken to secret locations in the dark of night to be interrogated. They were asked invasive questions about their relationships and sexual preferences. Hooked up to polygraph machines, these law-abiding public servants had the most intimate details of their lives cut open. Women and men were abused by their superiors, and asked demeaning, probing questions about their sex lives. Some were sexually assaulted.

Those who admitted they were gay were fired, discharged, or intimidated into resignation. They lost dignity, lost careers, and had their dreams – and indeed, their lives – shattered. Many were blackmailed to report their peers, forced to turn against their friends and colleagues. Some swore they would end their relationships if they could keep their jobs. Pushed deeper into the closet, they lost partners, friends, and dignity. Those who did not lose their jobs were demoted, had security clearances revoked, and were passed over for promotions.

Under the harsh glare of the spotlight, people were forced to make an impossible choice between career and identity. The very thing Canadian officials feared – blackmail of LGBTQ2 employees – was happening. But it wasn't at the hands of our adversaries; it was at the hands of our own government. Mr. Speaker, the number one job of any government is to keep its citizens safe. And on this, we have failed LGBTQ2 people, time and time again. It is with shame and sorrow and deep regret for the things we have done that I stand here today and say: We were wrong. We apologize. I am sorry. We are sorry. For state-sponsored, systemic oppression and rejection, we are sorry. For suppressing two-spirit Indigenous values and beliefs, we are sorry.

For abusing the power of the law, and making criminals of citizens, we are sorry. For government censorship, and constant attempts to undermine your community-building; For denying you equality, and forcing you to constantly fight for this equality, often at great cost; For forcing you to live closeted lives, for rendering you invisible, and for making you feel ashamed – We are deeply sorry. We were so very wrong.

To all the LGBTQ2 people across this country who we have harmed in countless ways, we are sorry.

... We were wrong. Indeed, all Canadians missed out on the important contributions you could have made to our society. ... You served your country with integrity, and veterans you are. You are professionals. You are patriots. And above all, you are innocent. And for all your suffering, you deserve justice, and you deserve peace. It is our collective shame that you were so mistreated. And it is our collective shame that this apology took so long ... We also thank members of the We Demand an Apology Network, our LGBTQ2 Apology Advisory Council, the Just Society Committee for Egale, as well as the individuals who have long advocated for this overdue apology. Through them, we've understood that we can't simply paint over this part of our history. To erase this dark chapter would be a disservice to the community, and to all Canadians. ... Mr. Speaker, it is my hope that we will look back on today as a turning point. But there is still much work to do.

Discrimination against LGBTQ2 communities is not a moment in time, but an ongoing, centuries-old campaign.... And Canada will stand tall on the international stage as we proudly advocate for equal rights for LGBTQ2 communities around the world. ...

Why legislative inclusion matters

What remains, is fear. Consider that Statistics Canada has reported that members of 2SLGBTQI+ communities were “more likely to report being violently victimized in their lifetime and to have experienced inappropriate behaviours in person and online than non-sexual”³⁴⁰ minorities in Canada. Researchers have chronicled the extent of the backlash faced over the recognition of trans human rights protections, and the importance of legal recognition to building an inclusive climate.³⁴¹ The Positive Space training offered within the federal public service, while important, was considered to be uneven and insufficient:

Without legislation and support, fear will remain.

Public Service Pride Network, Presentation to the EEART, 17 March 2022

This community has faced historic patterns of discrimination and exclusion in what is often referred to as “The Purge”. Census 2021 data will be released about LGBTQ2+ communities in 2022 including trans and non-binary populations. The Public Service Employee Survey shows that members of this community experience harassment and discrimination because of their identity. Including LGBTQ2+ as a designated group is an important step towards addressing systemic barriers for this community.

Canadian Association of Professional Employees, Submission to the EEART, 28 April 2022

There are important comparative examples

Canada has been a leader on a number of initiatives on 2SLGBTQI+ inclusion, but not on employment equity inclusion.

Legislation in several jurisdictions, including the United States, South Africa and India (Karnataka state) include measures for members of some or all members of 2SLGBTQI+ communities.

Argentina is one of the most prominent recent examples of international leadership. It has established strong anti-discrimination protections at work specifically for trans persons, defined in Law 26.743 of 9 May 2012 on Gender Identity as all those whose self-perception of their gender identity does not correspond with their sex assigned at birth. In 2020, it adopted Decree No. 721/20, providing that the national public sector should comprise no fewer than 1% of the population by trans persons. It followed in 2021 with Law No. 27.636 and accompanying Decree 659/2021 that expanded the scope to include public ministries, decentralized or autonomous bodies, non-state public entities and Crown corporations. The law specified that criminal antecedents that are irrelevant for the job are not to constitute a barrier to employment given the specific ‘situation of vulnerability’ of this equity group. Temporary fiscal incentives and access to credit for employers, including micro, small and medium sized employers, are built into the law. A single voluntary registry is created across government, of trans persons who wish to seek employment in the national public sector, through the Ministry of Women, Gender and Diversity. Decree 721/20 is notable in its recognition of the discrimination and stigmatization that trans folks have experienced since childhood and in education, and the need for the state to offer repair through positive action measures. The measures include specific support for job applicants to complete some of the necessary educational requirements on the job. They also include

measures to facilitate the participation of civil society groups with competency in the matter, in the implementation of the decree. Finally, Argentina has established an inter-ministerial coordination unit with high level representation to establish the implementation plan and ensure the necessary coordination mechanisms and procedures for effective realization of the decree, while ensuring that the educational and capacity-building spaces are available for trans people.³⁴²

The Argentinian special measures are inspired by the international and regional (Inter-American Court and Commission of Human Rights) recognition of human rights on the basis of sexual orientation and sexual expression. In March 2022, the undersecretary of diversity in the Ministry of Women, Gender and Diversity who was pivotal to the adoption of the Decree, Alba Rueda, was appointed as the Argentinian Special Representative on sexual orientation and gender identity. The notice of her appointment mentioned that she is the first trans woman to occupy this role in Argentina and in the world; it also mentions that four other persons occupy similar roles worldwide – the United States, United Kingdom, Italy and Germany. Rueda’s role reports to the Minister of Foreign Relations, and is part of a foreign policy designed to promote 2SLGBTQI+ rights in the region and beyond.³⁴³

On language

The task force was constantly reminded of how important it is for those most concerned to be able to decide how they will be named:

2S at the outset, recognizes Two-Spirit First Nations, Métis and Inuit people as the first 2SLGBTQI+ communities.

L – Lesbian

G – Gay

B – Bisexual

T – Transgender

Q – Queer

I – Intersex, considers sex characteristics beyond sexual orientation, gender identity and gender expression.

+ is meant to be inclusive of people who identify as part of sexual and gender diverse communities, who use additional terminologies.

Source: Federal 2SLGBTQI+ Action Plan 2022

Based on the extended engagement conducted by the Enchanté Network, the language of 2SLGBTQI+ was recommended as the preferred term by members of the concerned community. The Federal Government in its Action Plan has adopted this language in consultation with the community. We note that Statistics Canada, in order to reflect a “broad scope of gender and sexual identities”³⁴⁴ has decided to use LGBTQ2+, adding that terminology may vary over time and depend on the context. It has acknowledged that gender is “experienced in different ways”, adding that an over two-third majority of

people who used the write-in option in the 2021 census question on gender used the term “non-binary”, while others used the term “fluid” (7.3%), “agender” (5.1%), “queer” (4.1%), “gender neutral” (2.9%) and Two-Spirit (2.2%).

The task force was alive to the challenge of identifying communities with a plus, and members tend to prefer choices that explicitly reference each member of the community concerned. This is particularly important for employers as they implement employment equity and seek to ensure that their initiatives are comprehensive and effectively defined. We encourage fluidity and want best to reflect it. We acknowledge that language evolves over time, within communities, and that the commitment to ensuring fulsome representation may mean that the language in the legislation should evolve with it. Our commitment is less to the choice of terminology as to the respect for community self-identification. It is for this reason, as well, that the disadvantaged group is recommended in its composite, inclusive identity while we stress the need to pay careful attention to the specific forms of disadvantage experienced in particular by transgender workers. What matters, in this moment, is the communities’ self-identification as part of 2SLGBTQI+ and the importance for the employment equity group status to reflect that self-identification.

Recommendation 3.18: 2SLGBTQI+ workers should comprise a new employment equity group under the *Employment Equity Act* framework.

Recommendation 3.19: The *Employment Equity Act* and accompanying regulations should provide for the language of 2SLGBTQI+ to be updated as appropriate, in meaningful consultation with 2SLGBTQI+ communities concerned.

Support for data collection

The significance of self-identification issues for 2SLGBTQI+ members is addressed in Chapter 2. Members of 2SLGBTQI+ communities also stressed how important recognition as an equity group is to support data collection.

Good data are pivotal for effective policy implementation. We have witnessed what happens when data are not available: groups get ignored. Qualitative analyses will also remain crucial, notably to understand some of the barriers and biases that may affect the ability to achieve employment equity. The *Emerging from the Purge Inclusion Report* similarly stresses that when appropriately collected data are invaluable for improving employment equity initiatives and barrier removal.³⁴⁵

Our task force was repeatedly reminded of the lack of official statistical data on the workforce profile of members of 2SLGBTQI+ communities.³⁴⁶ Statistics Canada made history when its 2021 Census included a discrete question on gender at birth.

The new federal Action Plan commits to “Strengthen 2SLGBTQI+ data and evidence-based policy making by improving data collection, analysis, research, and knowledge on 2SLGBTQI+ communities and the barriers they face in Canada”.³⁴⁷

Recommendation 3.20: In consultation with the Employment Equity Data Steering Committee and concerned representatives of 2SLGBTQI+ workers, Statistics Canada should develop appropriate questions for the Census or other suitable surveys to support the implementation of an employment equity group for 2SLGBTQI+ workers.

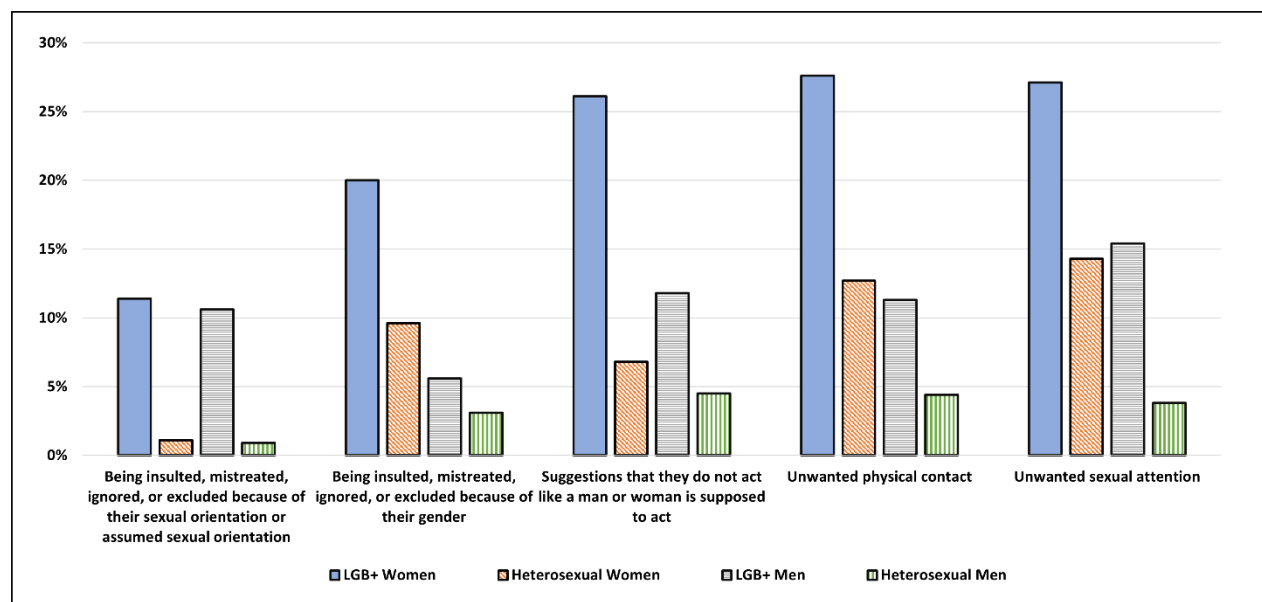
There is an immediacy to the work, moreover. Given the limited available census data to determine precise labour market availability, our task force recommends that covered employers initially be required to carry out an employment systems review and prepare an action plan to remove systemic barriers and provide special measures to support 2SLGBTQI+ inclusion. While they may collect self-identification data and set targets based on available general population numbers, reporting on attainment rates would be progressively implemented as the available Labour Market Availability data becomes available.

Recommendation 3.21: Transitional measures should be adopted under the *Employment Equity Act* or accompanying regulations to ensure that employers can commence coverage of 2SLGBTQI+ employment equity group members by conducting employment systems reviews and preparing action plans drawing on general population data before Labour Market Availability benchmarks become available.

Removing barriers now

2SLGBTQI+ workers face significant barriers at work, including disproportionate levels of discrimination and unwanted sexual behaviours at work:

Figure 3.12: Select experiences of discrimination and unwanted behaviours at work, employed people aged 15 and over, by sexual orientation and gender, 2018³⁴⁸



One study of trans workers from Switzerland documented managers wanting their workers to transition quickly. It found that “[s]lower transitions, allowing the person time to take things at their own pace, as physical changes occurred – as a result of hormone therapy, for instance – or allowing for medical and administrative procedures, seemed to have been problematic for managers.”³⁴⁹ The article noted that even when things seem to be going fine when the transition is announced, difficulties may appear during the course of the transition. Interestingly, one study suggests that trans men post-transition reported getting more recognition for their work even though their skills remain the same.³⁵⁰ However, the data on income tell a story of persisting economic disadvantage.

Initiatives are already underway

As with Black Canadians, it is revelatory that employers across Canada have already started to implement employment equity and broader EDI initiatives to promote the hiring, retention and flourishing of 2SLGBTQI+workers. The Public Service of Canada specifically mentioned focused hiring initiatives for 2SLGBTQI+ candidates that could be facilitated by expanding employment equity groups.³⁵¹ Banks are among the federal private sector employers that have taken a lead on voluntary EDI programming and support for PRIDE events for 2SLGBTQI+ workers. However, the results confirm the challenge with voluntary initiatives:

Across the government today, there is an alarming lack of coordination or clear strategy surrounding LGBTQI2S EDI initiatives, which is inhibiting progress towards LGBTQI2S inclusion. Without an overarching strategy with measurable outcomes, efforts lack consistency and resources and there is little attention paid to their effectiveness.

LGBT Purge Fund, Emerging from the Purge Inclusion Report, 2021, at 65

The task force was reminded that the Government of Canada also includes optional self-identification for 2SLGBTQI+ individuals in applications for judicial appointments, signaling that “it seeks to achieve gender balance and fully reflect the diversity of Canadian society on the superior courts.”³⁵²

Meaningful participation through collective bargaining processes has been a catalyst to legislative change:

The fact that provisions prohibiting discrimination on the basis of sexual orientation began to appear in collective agreements at a relatively early period in the gay and lesbian rights movement lent support to the fight to get similar provisions in broader human rights legislation.³⁵³

Indeed, there is a crucial role that collective bargaining can continue to assume in unionized workplaces on benefits coverage. The LGBT Purge Fund has also praised ESDC for the quality of its Guide for Transitioning Employees, their Co-workers and Managers, and urged it to update other guides.³⁵⁴

Inclusion will enable employers to deepen the adoption of proactive initiatives that identify recruitment and retention strategies and allow results to be monitored and improved. One example is drawn from the federally funded Canada Research Chairs program, as follows:

The Addendum to the Canada Research Chairs program in Canadian institutions of higher education provides that:

17. The Program shall, using the data collected, monitor the nomination rates and level of representation of the LGBTQ+ community within the Program, gather and implement sound approaches to increase representation by LGBTQ+ chairholders in the Program, and require institutional initiatives to implement such approaches (e.g., within their Equity, Diversity, and Inclusion Action Plans (“EDI Action Plans”)).
18. The Program shall revise its Best Practices Guide to include measures encouraging the nomination and retention of LGBTQ+ nominees and chairholders.

A concern raised sparingly in the literature is a familiar one: self-declaration about identity may be difficult to verify.³⁵⁵ This risk, sadly, is not new. Declarations of this nature in the employment context would constitute dishonesty in the employment relationship and although the threshold for dismissal on that basis is high, contextual factors to assessing the appropriate sanction would rationally include any preferential treatment received on the basis of the false statement.³⁵⁶

On an intersectional, distinctions-based approach:

There is disproportionate disadvantage within any umbrella term. We have to break up a category even though it is difficult and look specifically for areas where we know statistically and empirically that people are being disadvantaged. We have to find a way to add protection and be explicit in naming it. I think about racialized queer folks, non-binary folks, persons with disabilities, and people who carry many identities. Trans people experience difficulty in the workplace, and beyond. While their colleagues are getting a lot better in terms of standing up as allies actively and seeing, respecting and learning about them, there is a lot more that needs to be done.

Michelle Douglas, Executive Director, LGBT Purge Fund, Presentation to the EEART, 31 August 2022

Consulted groups often stressed to our task force that 2SLGBTQI+ workers are members of other equity groups too. We wanted also to turn attention inward, to the challenges of the ‘umbrella’ group.

Will there be challenges to implementation? Certainly. Each employment equity group faces distinct barriers to equity as well as histories of exclusion.

They are also familiar challenges. Our task force reflected on the parallels between the 1984 introduction of the “visible minorities” employment equity group and the proposed introduction of the 2SLGBTQI+ employment equity group. What has been a source of hope in both contexts is the ways in which sub-group members have understood and built upon the shared understanding of historic disadvantage, and the importance of intra-group solidarity for inclusion. However, there is a critical need to avoid generalizations about the community and sub-groups within the equity group. It will be important to keep an eye on the representation of those within the equity group. It is our expectation that by clearly focusing on disaggregated data and targeting the least advantaged within the groups, disparities can be redressed more attentively.

Participants shared fears that federally regulated employers may focus on or solely address barriers related to sexual orientation, and not consider those related to gender identity.

The Enchanté Network, The Employment Equity Act and 2SLGBTQI+ Communities, Extended Engagement Report to the EEART, August 2022 at 14

Trans workers have been identified in much of the existing literature as particularly likely to face discrimination in a number of contexts, including healthcare, bathroom use and dress codes.³⁵⁷ The barriers might be particularly prevalent when trans folks are transitioning. Supportive workplace policies will be crucial.

The *Emerging from the Purge Transition Report* recommended a “[m]ove away from a universalist approach to EDI and anti-discrimination initiatives to explicitly identify the marginalized groups of focus and articulate specific actions that seek to meet the needs of those groups.”³⁵⁸ An intersectional approach that is attentive to specific Indigenous worldviews was stressed by Professor Tuma Young, Q.C.. Professor Wesley Crichlow stressed the importance of naming the intersectional specificity of anti-Black racism.

This seems a fitting way to conclude this section. Our task force endorses intersectional specificity. It is consistent with our approach for all employment equity groups under the *Employment Equity Act* framework. It captures just how important it is to ensure that 2SLGBTQI+ workers are equitably included.

Racialized workers beyond “visible minorities”: Disaggregation and group cohesion

Introduction: A composite category

The courts have acknowledged that racial prejudice against visible minorities is so notorious and indisputable that its existence will be admitted without any need of evidence. Judges have simply taken ‘judicial notice’ of racial prejudice as a social fact not capable of reasonable dispute.

R. v. Spence, 2005 SCC 71 at para. 5

When the category “visible minorities” was introduced into the new *Employment Equity Act*, it was thought to be progress. It is a composite group, which has comprised the following 11 sub-groups:

- Black
- Chinese
- Filipino
- Japanese
- Korean
- South Asian-East Indian (including Indian from India; Bangladeshi; Pakistani; East Indian from Guyana, Trinidad, East Africa; etc.)
- Southeast Asian (including Burmese; Cambodian; Laotian; Thai; Vietnamese; etc.)
- non-white West Asian, North African or Arab (including Egyptian; Libyan; Lebanese; etc.)
- non-white Latin American (including indigenous persons from Central and South America, etc.)
- person of mixed origin (with one parent in one of the visible minority groups listed above), and
- other visible minority group

Difficulties with defining and constituting the category were to some degree already anticipated in the Abella Report. Those difficulties persist to this day.

The definition of “visible minorities” in the 1986 *Employment Equity Regulations*:

Persons, other than aboriginal peoples, who are, because of their race or colour, in a visible minority in Canada are considered to be persons who are non-Caucasian in race or non-white in colour and who, for the purposes of section 6 of the Act, identify themselves to an employer, or agree to be identified by an employer, as non-Caucasian in race or non-white in colour.

One submission stated plainly that the term “visible minority” reflects a Eurocentric world view, and recommended that each subgroup should have a separate category.

Our task force’s recommended approach is to focus on disaggregating sub-groups. It offers a practical way to acknowledge the concerns, while ensuring that employment equity remains feasible for employers to implement.

We conclude, however, that the term visible minority should be replaced with the term racialized workers.

It is widely understood that “race” does not exist as a biological concept to distinguish between human beings, but that social processes of racialization are inherently linked to major forms of historical, social, economic and cultural oppression, including slavery and colonialism. People from around the world were not simply artificially categorized and discriminated against by “race”, they underwent processes of racialization that created and sustained hierarchies.

Not surprisingly then, ‘race’ existed in pre-Confederation censuses through 1941. In the post-war context, in 1951, the language of race was replaced by ‘ethnicity’ and with the introduction in 1996 of a question focused on measuring ‘visible minorities’, the approach to ethnicity largely remained despite the addition of certain specific categories such as “Black”. The collection of data by race emerged as a transnational norm, encouraged by the International Committee responsible for monitoring implementation of the United Nations Convention on the Elimination of All Forms of Discrimination (UNCERD), alongside specialized UN agencies such as UNESCO and the International Labour Organization, regional bodies including the Council of Europe, and a broader international endorsement through the United Nations Statistical Commission of the use of racial statistics obtained through self-declaration.³⁵⁹

In Canada, an interdepartmental employment equity working group comprising representatives from the Departments of Immigration and Citizenship, Statistics Canada, Human Resources and Development, the Public Service Commission, the Canadian Human Rights Commission and the Treasury Board secretariat, reportedly favoured including an explicit question on race in the 1991 Census. Testing results were positive, but ultimately a question on “population group” was not introduced until 1996.³⁶⁰ The Chief Statistician at the time, Dr. Ivan Fellegi, offered an explanation that remains relevant today:

[E]mployment equity legislation has been the law of the land since 1986 and the census is the only possible source of the objective information which is needed to administer the act and to evaluate its impact. It is in everyone’s interest that the debate on issues related to employment equity, and the many other issues illuminated by census data on the composition and characteristics of our population, be supported by objective, impartial and reliable data, rather than by impressions, unfounded opinion or stereotypes.³⁶¹

With the pandemic and the 2020 moment of racial reckoning, there have been increased calls within Canada and internationally to improve the quality of data collection on race.

Members of this employment equity group want to be acknowledged for their past and ongoing contributions to Canadian society. For example, the task force was reminded that the Chinese Canadian community is predominantly an immigrant community for a reason – in the 70th anniversary of the repeal of the *Chinese Exclusion Act*, Canadian demography is not neutral; it partly reflects a history of legal exclusion of Chinese people.³⁶² The Canadian Race Relations Foundations reminded our task force that it was created as a Crown Corporation in 1996 as part of the Japanese Canadian Redress Agreement for the internment by Canada of Japanese Canadians during the Second World War.³⁶³ Racialized groups were concerned to dispel misperceptions, and in particular called attention to the myth that racialized groups are newcomers to Canada.

Racialized groups’ contributions to Canada are longstanding, and have helped to make Canada the deeply cosmopolitan, pluralist society that it is today.

Beyond “visible minorities” to racialized groups

We are also too mature a society to still be stuck with the terminology we have. The language of “visible minority” has been almost universally criticized, and the task force received substantial requests to have it changed.

The United Nations Committee on the Elimination of Racial Discrimination has regularly criticized the use of the term “visible minority”, considering that “it renders invisible the differences in the lived experiences of diverse communities.”³⁶⁴ In 2010, the Independent Expert, Gay McDougall recalled that “[w]hile the category called ‘visible minority’ in the *Employment Equity Act* was at one time a positive step to acknowledge minority communities, it is now too broad to give a realistic picture of the achievements of or problems faced by distinct communities.”³⁶⁵

Not only does the purpose of the EEA need to be revised, but the language needs to be changed as well [...] making sure that the language you use does not always focus on whiteness as the norm.

Public Service Employee accompanied by Deputy Minister Champion for Visible Minorities for the Federal Public Service, 14 June 2022

Much of the federal government, including Statistics Canada, has already adopted the language of “racialized” as the omnibus-term. This language has gained widespread acceptance internationally. Some seek to be more precise by using the language of “racial subordination” or “racial marginalization”, but the language works less well when the focus is to characterize the groups in a multi-dimensional manner. The task force received a few other suggestions on terminology, such as ethno-cultural communities, which could introduce confusion given that another jurisdiction, Quebec, defines “ethnic minorities” for the purposes of an Act respecting equal access to employment in public bodies as “persons whose mother tongue is neither French nor English and who belong to a group other than the aboriginal peoples group or the visible minorities group.”³⁶⁶

The language of racialization is important because it is active language. It captures something fundamental: the notion of race is constructed, historically and through ongoing practices that recreate

historical forms of social stratification. And in this, Canadian employment and immigration policy continues to play a less than subtle role.

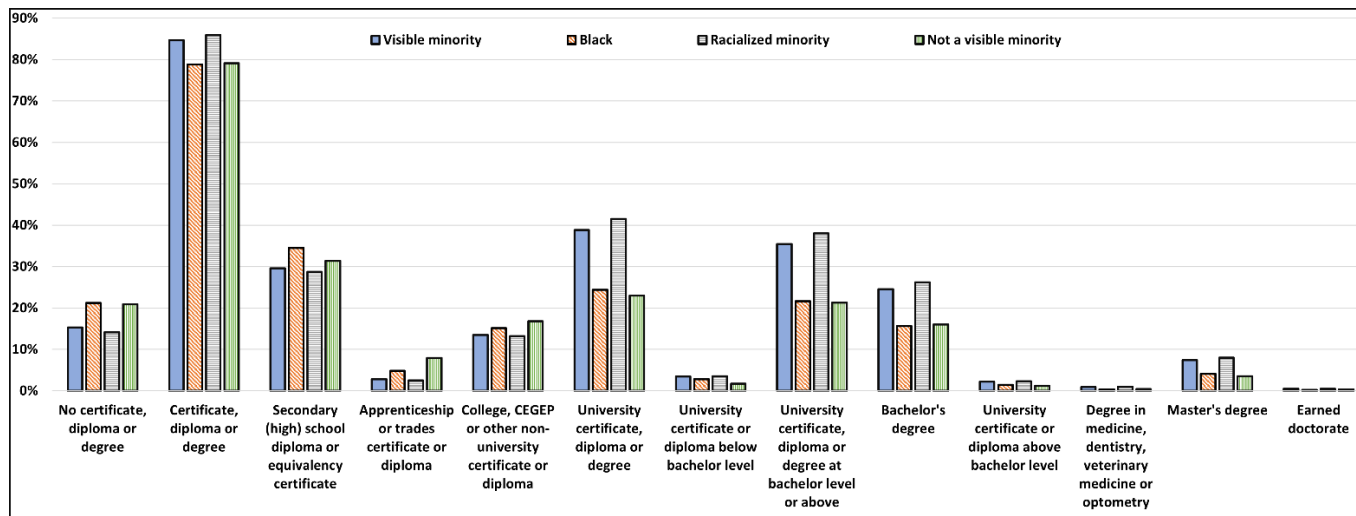
Recommendation 3.22: The term “visible minority” in the *Employment Equity Act* framework should be replaced by the term “racialized workers”.

Persisting challenges: by the data

There are factors that remind us that despite signs of progress, the category of racialized workers continues to require coverage under the *Employment Equity Act* framework.

Educational levels are high for Black and racialized populations, often at or exceeding the population averages:

Figure 3.13: Percentage of visible minority (Black and racialized populations combined), Black population, racialized population and not a visible minority by highest certificate, diploma or degree for the Canadian population aged 15 to 25 in Canada, 2021³⁶⁷



Consider, moreover, that unemployment rates of visible minorities who earned a degree within Canada or abroad were significantly higher than non-visible minorities.

Table 3.3: Unemployment rates by location of degree for those with a university certificate, diploma or degree at bachelor level or above³⁶⁸

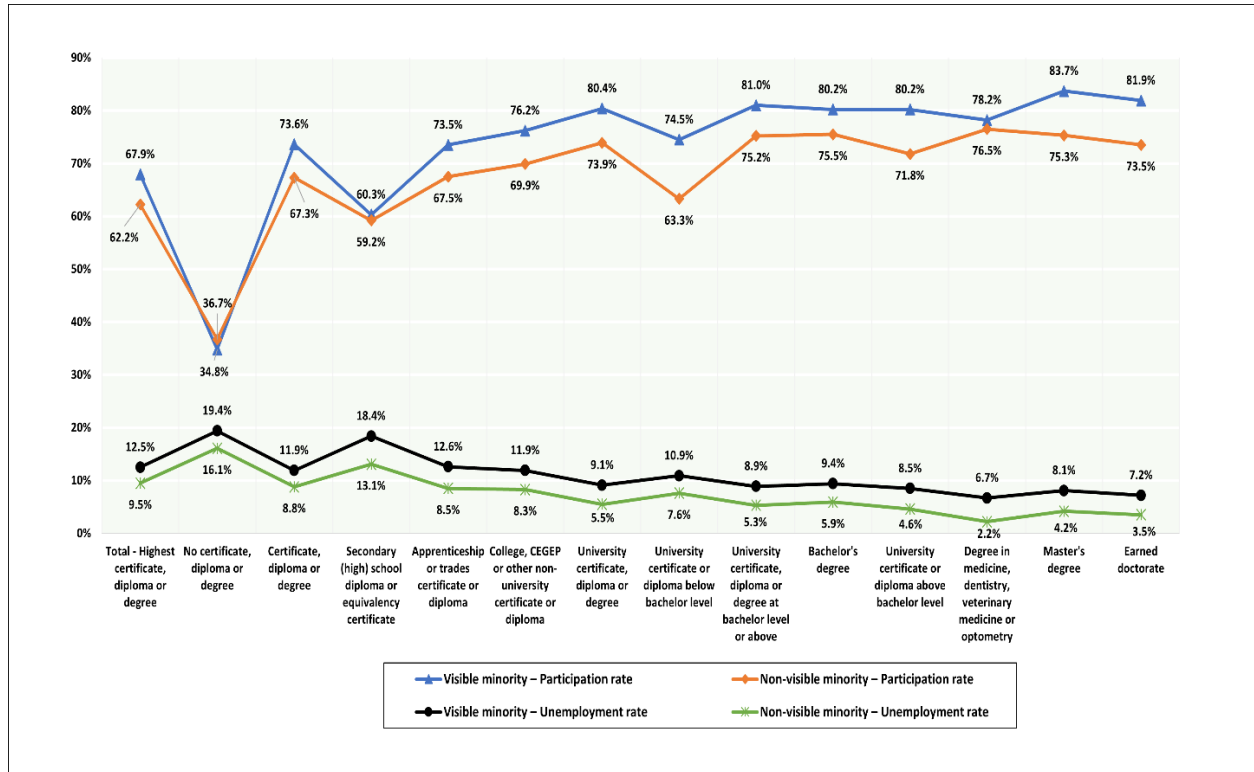
Population	Degree earned within Canada	Degree earned abroad
Visible minorities	8.1%	9.6%
Non-visible minorities	5.1%	6.7%

The average, full time, full year employment income of members of racialized populations with a university, certificate, diploma or degree at the bachelor level or above was 22% less than that of the population that is not part of an employment equity group. The corresponding average employment

income was \$83,100 compared to \$106,600. For men who are not members of the employment equity group for racialized populations, the average employment income was \$127,000 compared with \$92,100 for racialized men, \$88,500 for women who are not part of the employment equity group for racialized populations, and \$72,800 for racialized women.

Despite having generally higher labour market participation rates than non-racialized workers across most educational levels, racialized workers have consistently higher unemployment rates across all levels of education.

Figure 3.14 : Participation rate and education of racialized workers³⁶⁹



From the 2021 Census, we learn that as far as employment income is concerned, Filipino and Black workers earned the lowest incomes of all sub-groups, while Japanese and Chinese workers earned the highest incomes. But no subgroup earned averages as high as the full time, full year employment income of non-visible minorities.

These findings are consistent with what key researchers told us: according to Professor Grace Edward-Galabuzzi, there is a racialization of unemployment.³⁷⁰

A further crucial consideration was whether the challenges raised could be addressed through close attention to adopting a disaggregated, distinctions-based approach to the existing employment equity groups. Some researchers have stressed that labour force prospects for immigrants and visible minorities have actually decreased over time, with a particularly dramatic and steady deterioration for racialized immigrant women over the entire 15-year period analyzed.³⁷¹ Analyzing census data over four cycles, Pendakur and Pendakur found a “very strong pattern of increasing earnings disparity” that encompassed immigrants and Canadian-born visible minorities, across genders.

Group cohesion through disaggregation

There are important differences in employment equity results for subgroups of racialized workers. In her 1984 *Report on Equality in Employment*, Justice Abella had already anticipated part of the problem:

Some non-whites face more serious employment barriers than others. Although it is unquestionably true that many non-whites face employment discrimination, the degree to which different minorities suffer employment and economic disadvantages varies significantly by group and by region. To combine all non-whites together as visible minorities for the purpose of devising systems to improve their equitable participation, without making distinctions to assist those groups in particular need, may deflect attention from where the problems are greatest.³⁷²

For example, according to the 2021 Census data, while labour market participation rates of those who identified as members of racialized groups were higher than those who did not identify as members of racialized groups, at 62.2%, there was one exception: Chinese workers' participation was slightly lower, at 59.2%.

And there were the differences (positive gaps) between racialized sub-groups, and those populations that are not part of the racialized employment equity group: they ranged from 0.3% (Japanese) to 14.3% (Filipino). While unemployment rates of those who identified as racialized were higher in all sub-groups than populations that are not identified as part of the racialized employment equity group, Filipino workers had lower unemployment levels (8.4%).

We acknowledge that there are limits to what can be gleaned from unemployment rates, as our discussion of labour force participation rates, discouraged workers and overqualified workers in Chapter 1 attests. Together with the discussion in Chapter 1, the differences presented call out for further analysis of the reasons for the differences.

Our consultations similarly confirmed that perceptions about the progress of some racialized subgroups can contribute to mythmaking and stereotyping. For example, Act2End Racism noted that there are some trailblazers amongst Asian communities that have broken through barriers, but the overall underrepresentation of Asians has not been encouraging and underrepresentation persists including at the executive levels.³⁷³ We need to be careful – for example in the pandemic era climate of a rise of anti-Asian hate³⁷⁴ – not to stoke fires of division.

But another feature should be obvious: the similarities are more significant than the differences. Sub-groups share a lot in common; a racialized workers employment equity group makes a lot of sense, conceptually and practically.

If the notion of “visible minority” is a misrepresentation of who comprises our communities, our task force was reminded that the strategic solidarity across the label – racialized workers - should not be ignored but rather reinforced.³⁷⁵ Members of this equity group have been able to move forward critical sets of issues affecting representation that foster equitable inclusion.

The case for a separate category for Black workers was made with great care. The history of transatlantic slavery and the broader international law context alongside the powerful data on persisting disadvantage and the specificity of anti-Black racism together led to our task force's recommendation.

We also heard representations about the many aspects of racialized groups' lives that may lead to labour market exclusion. It is important to acknowledge them. Many of them are discussed in the next section, since they have led to calls for new employment equity groups covering intersecting factors like immigration status or religion.

Significant statistical work has already been done to get better portraits. As discussed in Chapter 2, more will be required to make employment equity data justice a reality. Disaggregated, distinctions-based record-keeping and reporting accompanied by a focus on barrier-removal is the remaining piece of the puzzle. It is crucial.

We recommend keeping the *Employment Equity Act* framework resolutely focused on racialized workers.

Recommendation 3.23: The *Employment Equity Act* framework should continue to cover racialized workers.

The federal public service

1. The federal public service does not reflect the diversity of the public it serves. Visible minorities remain under-represented while demographic trends indicate their number will grow in the Canadian population. Faster progress in changing the face of the public service is vital; at stake is the integrity of services and the respect the federal government needs to govern.
2. As an employer, the federal government is not harnessing and nurturing talent as it should to compete in a new global environment. It must invest in human resources innovatively and be competitive with the private sector as an employer of choice in all its staffing activities, from outreach and recruitment to training and development and career advancement.
3. The federal government has not achieved its legislated employment equity objectives and goals for visible minorities. With few exceptions, departments have not achieved an equitable workforce representation (i.e., representation is short of labour market availability). For visible minorities already in the public service, advancement to management and executive levels has virtually stalled.
4. The slow progress has engendered frustration, discontent and cynicism about the future. Further delay -- or worse, inaction -- could result in complaints of discrimination and grievances that could revisit the lengthy and acrimonious arena of tribunal investigations and directives.
5. A lack of government-wide commitment and leadership, and consequently, accountability at the top, has hampered progress. Commitment from deputy heads would motivate managers and others responsible for hiring and managing people to achieve the objective of modernizing the face of government as a whole.
6. Changing the corporate culture so that it is hospitable to diversity is as essential as getting the numbers up. Both must move in concert. Diversity training must be available to all employees and translated into expected behaviour and attitudes in the workplace. Increasing the number of visible minorities in the workplace can create a "critical mass" to effect and sustain

cultural change; the experience of francophones and women demonstrated this.

7. The government has an opportunity in its recruitment drives to change the face of the public service. Downsizing has given way to recruitment to renew and rejuvenate an ageing public service. In recruiting from an increasingly diverse talent pool, the federal government cannot afford to lose more ground to the private sector.
8. The time has come to focus on results. The federal government should establish a benchmark that, if achieved, would help make up ground in the representation of visible minorities. The purpose of setting a benchmark is to seize the opportunity to make progress over a short period. In proposing this approach, the task force does not seek quotas for visible minorities, nor does it wish to see them become entrenched as an employment equity group. The driving principle must be that what an individual can do on the job must matter more than his or her race or colour.

Embracing Change, 2000

There are many challenges in the federal public service; addressed in each chapter of this report. Few of them are new. Consider the conclusions of a 2000 task force report on the Participation of Visible Minorities in the Federal Public Service, entitled *Embracing Change*, which called for an action plan to be implemented within 3 – 5 years.

Too many of the 2000 *Embracing Change* task force's conclusions continue to resonate today, and its proposed benchmark of 1 out of 5 in the federal public service – which they sought to have attained by 2003 - continues to be advocated for by members of the current visible minority network, the Community of Federal Visible Minorities. The 2000 task force's expectation was that this target would have a particular impact for visible minorities in the executive feeder groups and in executive level positions.³⁷⁶

By strengthening all three pillars of the *Employment Equity Act* framework – implementation that includes comprehensive barrier removal, meaningful consultations and regulatory oversight – we anticipate that many of the known challenges – and some emerging challenges – facing racialized groups will be addressed. We do not have a choice if we are going to strengthen our cosmopolitan, pluralist societies through equitably inclusive workplaces.

Inclusion in the *Employment Equity Act* framework, broadly understood

Introduction: Relationship between the *Canadian Human Rights Act* and the *Employment Equity Act*

Focusing on visible minority groups through employment equity programs does not relieve society of the responsibility to eradicate discrimination for all minority groups.

Abella Report, page 47

We cannot lose sight of the goal: substantive equality in employment.

A Transformative Framework to Achieve and Sustain Employment Equity

Several constituents appeared before the task force, seeking recognition either within existing categories or as distinct employment equity groups. These included representatives of younger workers, older workers, new immigrants,³⁷⁷ refugees or workers with precarious immigration status, workers with care responsibilities, and members of religious groups or religious minorities.

A few stakeholders suggested that all categories under the *Canadian Human Rights Act* should be included under the *Employment Equity Act*.

Employment equity groups relate to but are distinct from the 13 grounds of discrimination identified under Section 3(1) of the *Canadian Human Rights Act*. Section 15 of the *Canadian Charter of Rights and Freedoms* is inclusive and allows for analogous grounds of discrimination and by extension to Section 15(2), analogous groups, while specifically referencing “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

But we understood where the ask was coming from. As we listened, we heard sheer frustration. Individual complaints-based models under the *Canadian Human Rights Act* or individual grievances were the hospital after the collision. Equity seeking and equity deserving groups wanted preventative care. We canvass some of the challenges in Chapter 6. There is an evidence-based case for strong, well-financed human rights mechanisms, which have the confidence of all equity seeking and equity deserving groups.

We have a comprehensive legal framework. Although both the *Canadian Human Rights Act* and the *Employment Equity Act* share the same commitment to substantive equality, they are not the same. Nor should they be the same.

The *Employment Equity Act* should not be called upon to replace the *Canadian Human Rights Act*. Hospitals are necessary. But the case for inclusion as a separate employment equity group was different.

Employment equity’s focus is to correct barriers to equitable inclusion in the labour market. It remedies underrepresentation. It is therefore important to establish which of the groups – e.g. women workers rather than sex or gender identity or expression; Black workers and racialized workers rather than race, national or ethnic origin or colour.

We also heard from several stakeholders who worried that adding many more groups would render employment equity too complicated to be meaningfully enforced.

Bluntly stated, if virtually everyone is included in employment equity groups for the purpose of representation targets, no one is really included. Employment equity will be reduced to the broadly aspirational, and utterly unenforceable.

The risk with a non-specific approach to who the Act covers, is that the Act is the basis for compliance and without specificity, there may be too much latitude or potential that accountability will decrease.

Subcommittee response, Public Service of Canada Departmental Consultation Results, Submitted to the EEART, received 1 September 2022

Chapter 3: Rethinking equity groups under the *Employment Equity Act* framework

Our task force therefore has taken great care in defining the scope of employment equity. We want our justifications for inclusion to be robust, and our approach to the future to be fluid. We want employment equity to be supportive and sustainable.

However, barrier removal does not carry the same limits. Barriers are often common across equity groups, and across protected grounds of discrimination under the *Canadian Human Rights Act*.

Barrier removal recognizes that someday, any one of us might find ourselves in a workplace needing it to be as inclusive as possible, and that we are all better off in a workplace that allows us to be our authentic selves at work. It strives for belonging.

We discuss this in detail in Chapter 4. But the key is that barrier removal across human rights categories is the consolidation of what employment equity does for all of us: it brings everyone in. It is the inclusion that equity seeks to achieve.

A transformative approach to employment equity fosters equitable inclusion.

There is further potential.

Section 16(1) of the *Canadian Human Rights Act* already contains the permission needed for workplaces to carry out special programs, plans or arrangements “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 based on or related to the prohibited grounds of discrimination.” The special programs “improv[e] opportunities,” including in employment.

Our focus, developed in greater detail in Chapter 6, is to provide latitude to an Employment Equity Commissioner, working carefully with and through the Employment Equity Data Steering Committee, to be able to draw on a similar provision, that we recommend should be added to the *Employment Equity Act*, and that would enable the Employment Equity Commissioner to recommend special measures that are supportive and sustainable.

This approach has guided the following requests for inclusion under the *Employment Equity Act* framework:

New immigrants

We continue to see that newcomers’ rate of labour market participation is lower than Canadian-born even with higher levels of education. That said, the overall economic integration story is positive within 10 years of landing; wherein newcomer earnings come close to the national average.

Manger of the Federal Internships for Newcomers Program, Immigration, Refugees & Citizenship Canada, 2022

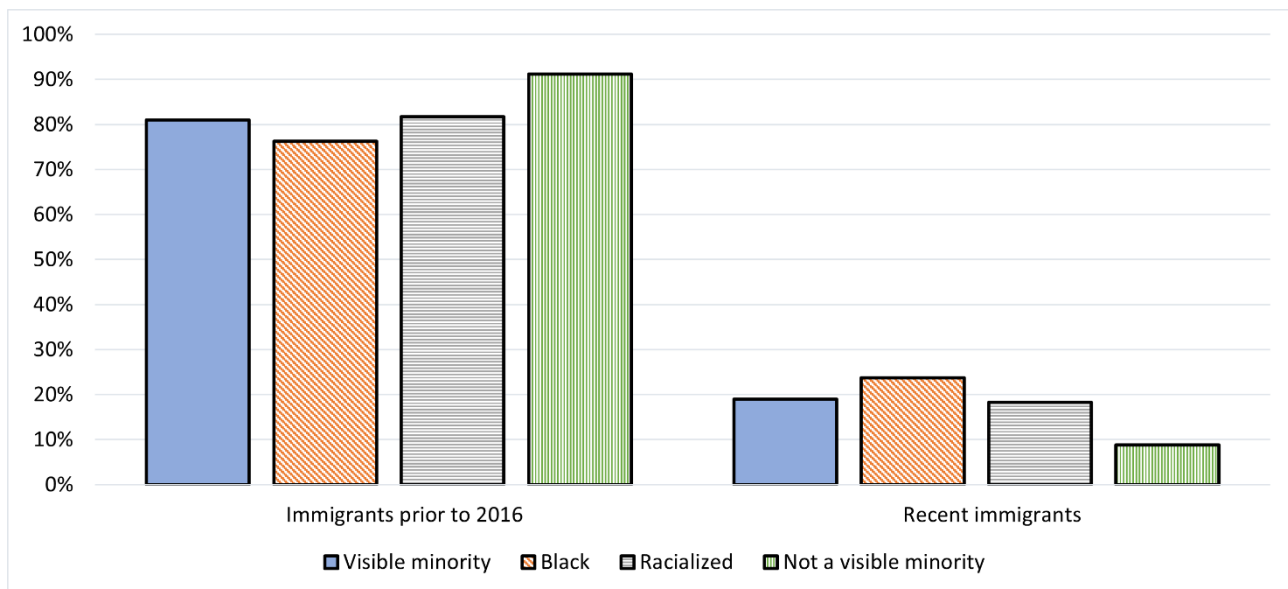
Some groups that appeared before the task force called for immigrants to be considered an employment equity group, citing in particular the disparities faced by new immigrants with less than 5 years. The literature troublingly shows that newcomers continue to fare worse in the labour market than Canadian born counterparts, and that their situation might be worsening over time.³⁷⁸ New research suggests that COVID-19 has also had a disproportionate adverse effect on the employment of recent immigrants

relative to Canadian-born workers, especially in low-skilled occupations and in industries that were hard hit by the pandemic.³⁷⁹

Canada has one of the most highly educated populations in the world based on credentials from colleges and universities, in large measure thanks to an influx of highly educated immigrants.

More than 1.3 million new immigrants settled in Canada permanently since the last census in 2016 and the newly released 2021 census. This is the highest number ever in a Canadian census. And as Statistics Canada has added, Canada is “leaving talent on the table” by failing to recognize the training and qualifications of workers educated abroad. Statistics Canada has underscored the “mismatch” between their training and qualifications and the employment that they currently occupy.

Figure 3.15: Percentage of immigrants prior to 2016 and recent immigrants by visible minority (Black and racialized populations combined), Black, racialized and not a visible minority³⁸⁰



We were heartened that some degree of success seems to emerge from programs that focus on providing opportunities to newcomers while also training employers, including on understanding foreign credentials. These initiatives should be encouraged, and their results rigorously studied and shared.

Census 2021 data confirm something important: being Black or racialized still makes a lot of difference for new immigrants.

The unemployment rate of recent immigrants who were not members of Black or racialized employment equity groups and who arrived in either in 2016-20 (10.1%) or 2021 (11.6%) was significantly lower than that of immigrants who are Black or racialized and who arrived during the same reference periods.

The unemployment rate of immigrant women who are either Black or racialized (13.4%) was significantly higher than that of immigrant men who are either Black or racialized (10.4%), and higher than the unemployment rates of both immigrant men who are not part of the Black or racialized equity groups (8.6%) and immigrant women who are not part of the Black or racialized equity groups (10.5%).

Chapter 3: Rethinking equity groups under the Employment Equity Act framework

The constant is clear: Being a Black worker or being a racialized worker is what makes the difference. Based on this data, our task force considers it appropriate to retain the proposed employment equity groups of Black and racialized workers.

There is one recommendation that stands to make a positive difference for all recent immigrants: moving forward on the recognition of qualifications in higher education. There is international movement on this matter. Our task force urges our government to engage.

Recommendation 3.24: The federal government should consider ratifying the Global Convention on the Recognition of Qualifications concerning Higher Education.

Refugees

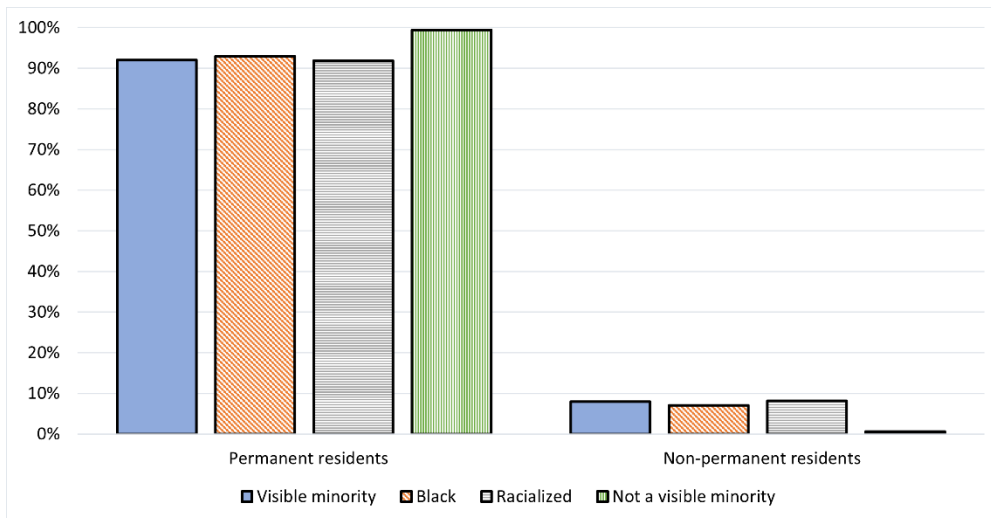
Our task force also received an expert submission supporting a targeted employment equity initiative for refugees who come to Canada and settle in small communities.³⁸¹ The case recognizes that refugees have been forced to flee their homeland in the face of war or persecution. There is often but not always an intersection with grounds of discrimination, including race, ethnicity, religion and gender. They have not been admitted to Canada as economic immigrants, but rather through humanitarian grounds. The literature is clear: they face challenges to settlement in Canada, including in employment. They also tend to fare well in small cities, towns and rural communities that may simultaneously benefit from the influx of people but can benefit from financial support for settlement. There is a possibility to support the social needs of refugees, and rural communities have been shown to be particularly supportive of retention of newcomers.

This kind of proposal is interesting, and would have to be developed on a case-by-case basis with governmental incentives. Consultations and oversight by the Employment Equity Commissioner would be appropriate to consider approving an ad hoc special program. They fall squarely within the regulatory oversight role anticipated in Chapter 6.

Temporary foreign workers

Temporary migrants are overwhelmingly Black or racialized workers:

Figure 3.16: Percentage of visible minority (Black and racialized populations combined), Black, racialized and not a visible minority by permanent resident and non-permanent resident status³⁸²



Our task force was concerned about how the treatment of temporary migrant workers, sometimes alongside other racialized workers with permanent immigrant status but limited job options, could reinforce barriers, by cementing the perception that it was simply normal that racialized, temporary migrant workers would occupy low paid, precarious, if essential jobs.

We have already observed some of this stereotyping in human rights cases: from segregated facilities³⁸³ to pervasive sexual harassment.³⁸⁴ The actual hiring practices that disproportionately concentrate racialized workers in low paid jobs are at the heart an employment equity concern.

Our task force made sure to hear from Immigration, Refugees and Citizenship Canada (IRCC) as well as ESDC to gain insight into the temporary foreign worker program.

The temporary foreign worker program is framed as enabling employers to respond to shortages in labour and skills on the Canadian market with workers who are brought to Canada on a temporary basis. The Temporary Foreign Worker Program has four streams: agriculture (59%), low wage, (22%), high wage (16%) and global talent (4%). While ESDC leads the temporary foreign worker program and Services Canada processes labour market impact assessments, as well as administers the employer compliance program, Immigration, Refugees and Citizenship Canada determines eligibility for work permits. Canada Border Services Agency assesses admissibility at ports of entry and issues work permits. The Temporary Foreign Worker program comprises 0.5% of the labour force and 11% of all temporary residents with work permits as the latter category also includes foreign students, refugee claimants and the International Mobility Program.

We know working and living conditions are a source of concern: troubling reports from the Office of the Auditor General of Canada about the conditions of temporary foreign workers,³⁸⁵ including the poor quality of inspections and accommodations affecting the health and safety of temporary foreign workers during the pandemic.³⁸⁶

What is often overlooked is how labour market stratification results.

The temporary foreign worker program and its precursors have not simply been a significant source of labour for Canada's agricultural sector since 1966. They have also been a key basis through which labourers from the Caribbean, Mexico and increasingly Guatemala have become associated with low wage work in agriculture in Canada.

Temporary foreign worker programs also contribute to a pervasive misperception that racialized workers are recent arrivals to Canada. Yet the presence of racialized peoples in Canada dates as far back as the arrival of the first European settlers.

Another example is the foreign domestic workers movement. Primarily Black women from the Caribbean came to Canada as domestic workers in the 1950s through the 1970s.

Initially they came with permanent resident status as it was assumed in the text of a 1955 Memorandum they would not leave the role that stereotypically associated them to of domestic work.³⁸⁷ Over time, as they consistently moved on in search other forms of employment, the schemes changed. Permanent residency stopped being delivered on landing, and workers from the Philippines began to predominate. Over time, the educational requirements became so high that the women who came tended to be trained nurses or teachers.³⁸⁸

The caregiver program has changed significantly over time to become one of the temporary foreign worker programs, while the range of sectors and industries covered by temporary foreign workers has multiplied. They require ESDC and IRCC to determine that there is a labour 'shortage' and issue employer-specific or open work permits. There is also important literature showing the inter-generational effects of the various domestic worker programs in Canada on some members Black and Filipino communities, as discussed earlier. The combination of poor labour conditions and the racialization of employment³⁸⁹ in low wage work – anyone who has taken care of children knows that it is far from low skilled work – matters for employment equity.

It matters because we risk reinforcing stereotypes: it is assumed that precarious work is the work that some Black or racialized groups are 'naturally' meant to do. The occupational segregation stops being recognized.

If these workers fill labour market shortages and are needed, we should be rethinking their immigration status as the advocacy groups who defend their rights have urged.

Religious minorities

We considered each of these requests, which came as our task force consultations progressed.

It was apparent from the presentations from within government that not all religious minorities were concerned that members of their group were underrepresented in employment. All were concerned, albeit to varying degrees, about the way in which discrimination against religious groups could create workplace barriers.

Anti-Semitism and Islamophobia

Our task force was especially concerned by the reported rise in anti-Semitism and Islamophobia in Canadian society, alongside a torrent of anti-Asian hate that has especially surfaced during the COVID-19 pandemic.

Statistics Canada reports that hate crimes in Canada continue to rise, of a total of 3,360 in 2021, 1,723 targeted people on the basis of race or ethnicity into which Statistics Canada includes Indigenous peoples, a 27% increase over the 2,646 incidents in 2020. Hate crimes targeting religious minorities were reported at 881 incidents and sexual orientation at 423 incidents. These numbers too are high and are rising. Here are some of the numbers for 2021:

Table 3.4: Hate Crimes in 2021³⁹⁰

Population	Incidents per 100,000	Total number of incidents
Total population	8.8	3,360
First Nations, Métis & Inuit	4	77
Jewish	145	487
Black	41	642
Sexual Orientation	N/A	423
Arabs and West Asian	17	184
Muslim	8	144
Catholic	1	155

All of these currents are a part of Canada's past and present, and task force members listened to stakeholder after stakeholder express growing concerns. In Canada, the tragedies of the Quebec City Mosque shooting and the murder of the Afzaal family in London Ontario were especially on our hearts. They affect all of Canada, and are global problems.

That these most serious forms of societal exclusion, which have been acknowledged by the federal government, should affect the workplace is a disturbing but sound assumption. Individuals and groups came before us with examples of Islamophobic comments in the federal workplace and experiences of exclusion, which the Muslim Federal Employees Network (MFEN) considered to be characterized by racism, stereotypes, prejudices, fear and hatred in a context in which Muslims have been stigmatized as security threats.

While data are limited and groups did not necessarily establish underrepresentation in the workplace, they were concerned that discriminatory practices prevented them from being able to bring their authentic selves to the workplace. It is not surprising that many raised the question of how best to

include religious minorities into the employment equity framework. It was clear that inclusion needed to be considered in consultation with affected communities.

We agree: it is imperative that the Employment Equity Act be able to address labour market exclusion that religious minorities experience. It should do so in a careful, targeted manner. It should underscore the recognition, both in Canada and internationally, that these forms of exclusion constitute racism.³⁹¹

Muslim women

[I]n the context of Islamophobia and the elision of race with religion, discrimination against Muslim women in the workplace must be recognized as racism.

Vrinda Narain, Colleen Sheppard and Tamara Thermitus, "Employment Equity and Inclusion: Through the Lens of Substantive Equality," Working Paper Prepared for the Employment Equity Act Review Task Force, September 2022

A biological understanding of race has been discredited. Race is socially constructed, and racism is a persisting lived experience across many groups in Canada. Islamophobia is a specific example. It is a fear and hostility that is projected onto cultural stereotypes of difference. Difference – like wearing a hijab - is perceived to be a threat to state neutrality or liberal democracy and can translate into exclusion in the labour market.³⁹² A federal public service employee referred to this as “gendered racism”.³⁹³

Although official data sources limit the ability to gain a full portrait, stakeholders explained the kind of barriers faced in particular by Muslim women workers:

Canadian Muslim women have provided us with some insights into the reasons behind their high rates of underemployment and unemployment. Systemic barriers throughout the employment life cycle, from entry to exit, prevent them from securing a job and progressing in their careers. Some of these barriers include:

- stereotypes and assumptions about Muslim women
- discrimination throughout the employment life cycle
- racism and Islamophobia resulting in hostile work environments
- harassment in the workplace
- undervaluing of international qualifications
- burdensome and expensive licensing requirements and processes in regulated occupations
- lack of accessible and affordable childcare
- requirement for Canadian experience
- lack of networks, mentors, and developmental opportunities that could support them in finding a job in the first place and then achieving career success

Unfortunately, instead of these barriers being removed they have become all the more entrenched based on both quantitative and qualitative data and analyses.

Canadian Council of Muslim Women, Written Submission to the EEART, 24 June 2022

Some stakeholders also expressed concern that legislative developments in other jurisdictions, including the use of notwithstanding clauses to insulate Bill 21 in Québec from certain forms of court scrutiny, could affect Muslim women's rights in the federal public service and federally regulated sectors. Constitutional litigation is ongoing on Bill 21, and some of the juridical arguments include considering whether the measures may be considered a form of discrimination on the basis of sex/ gender. The federal government has announced its intention to intervene with respect to the use of notwithstanding clauses.

Internationally, in the face of measures from Belgium and France prohibiting the wearing of symbols of belief in schools and employment, the Committee on the Elimination of Racial Discrimination recommended that State parties “ensure that any policies regarding the wearing of symbols of belief in schools and in employment do not in practice lead to discrimination on the basis of ethnicity or national origin.”³⁹⁴

This is therefore an area in considerable flux, and the court outcomes will have an impact on access to employment.

Members of Sikh communities

Members of Sikh communities within and beyond the federal public service similarly pointed to limits in the current understanding of individually sought reasonable accommodation. It was all too easy to jump to the conclusion that there was undue hardship. This point was emphasized by Unifor, which called for accommodations to be supported with appropriate workplace accommodations.³⁹⁵

We were provided with concrete examples of accommodations: one example was negotiated accommodations by dock workers in British Columbia. Inclusive standards for protective equipment were agreed upon.³⁹⁶

We were also told about the United Kingdom approach: turban-wearing Sikhs are exempted from the requirement to wear head protection in the workplace, including on construction sites. An exception is made for some particularly dangerous and hazardous tasks. The exemption includes both an employer responsibility to take necessary action to avoid injury through safety and health measures at work, and a limited liability of the duty-holder should an incident occur.³⁹⁷

Proactive barrier removal was shown to be a supportive and sustainable way to ensure that the standard itself was built to be inclusive. In other cases, the *Singh Thattha* technique for donning respirator masks in COVID-19 patient care,³⁹⁸ available technology was considered to play a potential role in facilitating accommodations.

Members of the recently established Sikh Public Service Network shared their concern about anti-Sikh sentiment within the federal public service. They also shared intersectional experiences of racism and sexism at work.

Sikh Public Service Network members expressed frustration as “visible minorities” who are too often overqualified yet underemployed.

Members sought a strengthened *Employment Equity Act*, and wanted to be meaningfully included either as part of the existing employment equity group of “visible minorities” or racialized workers, or through separate protection for religious minorities as a new, distinct employment equity group.

Chapter 3: Rethinking equity groups under the Employment Equity Act framework

Finally, task force members were mindful of “proxy” discrimination, where people draw upon proxy factors to guess someone’s racial identity, as this has regrettably been reported as a factor affecting some communities who have faced Islamophobia, notably members of the Sikh community.

Insights from comparative law

We also looked at comparative law initiatives to include religious minorities in preferential schemes in other jurisdictions, although the differences in context lead to caution. Northern Ireland is an example deeply rooted in its history and following significant investigations that showed considerable underrepresentation of Catholics in employment in both the public and private sectors. Northern Ireland embraced the notion of systemic discrimination following visits to Ottawa over several years and a visit by Justice Abella to Belfast.³⁹⁹ In Northern Ireland, since 1989, the affirmative action program, applicable to Catholics and Protestants, has entailed five key duties for employers. They include:

- for all employers with 11 or more employees,
 - registering with the Equality Commission,
 - monitoring the religious composition (and gender) of the workplace and applicants to the post, with annual reporting to the Equality Commission,
- in addition, for all employers with 250 or more employees,
 - reviewing employment practices to ensure “fair participation” of both Catholic and Protestant communities in employment and report every three years;
- taking “affirmative action” in the event of an underrepresentation; and
- setting both goals and timetables to evaluate progress toward achieving fair participation.⁴⁰⁰

Perhaps because it was effectively rooted in Northern Ireland’s historical context, “despite initial misgivings that religious monitoring would cause some difficulties, this aspect of the legislation proved to be uncontroversial.”⁴⁰¹

The experience in the United States offers a different reminder: although religion is a category for affirmative action measures, the freedom of religion has been interpreted to take precedence over anti-discrimination protections.⁴⁰²

Where do we go from here?

Our mandate from the Minister of Labour clearly asked us to consider whether 2SLGBTQI+ workers should be added as an employment equity group and whether Black workers should be added as a separate employment equity group. In light of that mandate and following our request to support extended community consultations, our task force was able to provide targeted funding to community representative organizations as well as ensure that the broad public at large could express their views. The recommendations for inclusion that we have made draw heavily on these meaningful consultations.

In contrast, despite our extensive consultations, we did not receive representations from many of the concerned groups in the broad population beyond the federal public service who wanted us to consider adding religious minorities as an employment equity group. *Those dedicated consultations would be required to be able to make a firm recommendation.* Our task force wishes to be true to our commitment to ensure that the meaningful consultations necessary to address affected communities has truly been supported.

It is particularly noteworthy that there is already significant if imperfect coverage of those members of religious minorities – and in particular Muslim women and members of the Sikh community – who presented to the task force.

Nine out of ten (87%) of Canadian Muslim women identify themselves as visible minorities.... we know that there is a disproportionate impact of racism and Islamophobia on Muslim women, especially those who are Black and Brown.

Canadian Council of Muslim Women, Written Submission to the EEART, 24 June 2022

We note as well that the Anti-Racism Secretariat includes religious minorities in its anti-racism consultations.

The significant overlap between these communities with racialized workers in particular means that targeted measures that are distinctions based and disaggregated can contribute significantly to increasing and sustaining representation for many religious minorities.

But it is important to stress that the overlap, while significant, is not perfect. Moreover, it may leave those who face labour market discrimination feeling unrecognized and therefore unprotected on the basis of their identity.

The point is that there are markers of racialization, not just the flawed notion of skin colour. They can include clothing that tends to be associated with particular racialized sub-groups, whether or not they present or identify as “non-white”. They can include associations made on the basis of a person’s name, or where they completed their education.

By focusing on comprehensive barrier removal, we help to remove discrimination faced by racialized workers, and by many other workers including a broad range of religious minorities.

This report’s focus on barrier-removal seeks to recognize precisely those barriers that prevent racialized minorities, or women, or other employment equity groups from feeling like they can bring their full selves to the workplace.

An important consideration is the state of the available statistical data. In the absence of workplace data, the reasons offered by those who made presentations before us tended to track the generalized climate of discrimination and rising concerns over hate crimes.

We take note of the recommendation of the Canadian Council of Muslim Women that Census data retain the use of the question on religion in each census, and not every 10 years as is currently the case, to avoid lags in information.⁴⁰³

Finally, we suffered from a lack of experimentation or voluntary initiatives on employment equity for religious minorities in Canada. We were able to point to initiatives for Black Canadians and 2SLGBTQI+.

In the case of Canada, given

- the grounding of employment equity in substantive equality, and the timing of the evolution of cases before the courts,

Chapter 3: Rethinking equity groups under the *Employment Equity Act* framework

- the fact that all Muslim women are women, and the vast majority (estimated at 90% +) are also Black or racialized workers, and both of these groups are already employment equity groups,
- the call for a commitment to an intersectional, disaggregated approach to employment equity groups, and
- the focus on taking barrier removal seriously, including along grounds of discrimination under the *Canadian Human Rights Act*,

we consider that concerns can and should be addressed substantively through the proposals made in this report.

Our task force has therefore decided not to recommend the creation of a separate category for some or all religious minorities at this time. We do encourage this situation to continue to be studied, and offer the following four recommendations:

Recommendation 3.25: A principled approach to the issues of exclusion should come from a comprehensive, proactive approach to barrier removal across protected grounds under the *Canadian Human Rights Act*.

Recommendation 3.26: The Employment Equity Commissioner should have the ability to investigate and recommend special employment equity programs (special temporary measures) for defined equity groups based on evidence of disadvantage that has resulted in underrepresentation in employment.

Recommendation 3.27: The Employment Equity Data Steering Committee should be mandated to advise on whether a question on religion should be present in each Census rather than every 10 years.

Recommendation 3.28: The inclusion of religious minorities under the *Employment Equity Act* should be considered for comprehensive study by the newly re-established Law Commission of Canada.

¹⁶⁶ Professor Tendayi Achiume, UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Presentation to the EEART, 25 March 2022.

¹⁶⁷ Section 1.

¹⁶⁸ The basic unit in that resolution, however, is “persons” rather than workers.

¹⁶⁹ Report of the Royal Commission on Aboriginal Peoples: Restructuring Relationships, volume 2(Ottawa: Canada Communication Group Publishing, 1996).

¹⁷⁰ SC 2021, c 14.

¹⁷¹ OECD, Centre for Entrepreneurship, SMEs, Regions and Cities, *Linking Indigenous Communities with Regional Development in Canada*, OECD Rural Policy Reviews (Paris: OECD, 2020), Chapter 3.

¹⁷² Joshua Nichols & Aaron Mills, “Rethinking the Relationship between Indigenous Rights and Employment Equity”, Unpublished Paper submitted to the EEART, 31 August 2022.

¹⁷³ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, vol 1a & 1b) & Supplementary report: Quebec, vol 2 (3 June 2019).

¹⁷⁴ First Nations Information Governance Centre, Now is the Time: Our Data, Our Stories, Our Future: The National Report of the First Nations Regional Early Childhood, Education, and Employment Survey (Ottawa: 2016) at 61.

¹⁷⁵ See most recently Reference to the Court of Appeal of Quebec in relation with the *Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185.

¹⁷⁶ Office of the Auditor General of Canada, Status Report of the Auditor General of Canada to the House of Commons - Chapter 4 Programs for First Nations on Reserves (Ottawa: Office of the Auditor General of Canada, 2011) at 9.

¹⁷⁷ First Nations Information Governance Centre, Now is the Time: Our Data, Our Stories, Our Future: The National Report of the First Nations Regional Early Childhood, Education, and Employment Survey (Ottawa: 2016) at 62 - 63.

¹⁷⁸ See e.g. ILO Committee of Experts on the Application of Conventions and Recommendations, “Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Australia, Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC.107/III(A)(Geneva: ILO, 2018) 340.

¹⁷⁹ E.g. Committee of Experts on the Application of Conventions and Recommendations, “Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Australia, Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC.107/III(A)(Geneva: ILO, 2018)341.

¹⁸⁰ Daniels v. Canada (Indian Affairs and Northern Development), [2016] 1 SCR 99, 2016 SCC 12 at para. 19.

¹⁸¹ Daniels v. Canada (Indian Affairs and Northern Development), [2016] 1 SCR 99, 2016 SCC 12 at para. 23.

¹⁸² See Joshua Nichols & Aaron Mills, “Rethinking the Relationship between Indigenous Rights and Employment Equity”, Unpublished Paper submitted to the EEART, 31 August 2022.

¹⁸³ *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99, 2016 SCC 12 at para. 49; Joshua Nichols & Aaron Mills, “Rethinking the Relationship between Indigenous Rights and Employment Equity”, Unpublished paper submitted to the EEART, 31 August 2022.

¹⁸⁴ Source: Employment and Social Development Canada, Chief Data Officer, Census 2021, LAB 68-69.

¹⁸⁵ Source: Employment and Social Development Canada, Chief Data Officer, Census 2021, LAB 120.

¹⁸⁶ First Nations Information Governance Centre, Now is the Time: Our Data, Our Stories, Our Future: The National Report of the First Nations Regional Early Childhood, Education, and Employment Survey (Ottawa: 2016) at 9-12.

¹⁸⁷ First Nations Information Governance Centre, Now is the Time: Our Data, Our Stories, Our Future: The National Report of the First Nations Regional Early Childhood, Education, and Employment Survey (Ottawa: 2016) at 67, 60, 79, 87, 81-83.

¹⁸⁸ First Nations Information Governance Centre, Now is the Time: Our Data, Our Stories, Our Future: The National Report of the First Nations Regional Early Childhood, Education, and Employment Survey (Ottawa: 2016) at 92-96.

¹⁸⁹ First Nations Information Governance Centre, Now is the Time: Our Data, Our Stories, Our Future: The National Report of the First Nations Regional Early Childhood, Education, and Employment Survey (Ottawa: 2016) at 69–70.

¹⁹⁰ See Ray D. Bollman, “The Demographic Context of Rural Canada: The Size of the Indigenous and Visible Minority Populations” in Clark Bannak & Dionne Pohler, eds., *Building Inclusive Communities in Rural Canada* (Edmonton: University of Alberta Press, 2023) 3 at 22.

¹⁹¹ *Delgamuokw v. British Columbia*, [1997] 3 S.C.R. 1010, 1997 SCC 302; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207.

¹⁹² See Joshua Nichols & Robert Hamilton, “The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult (2019) 56:3 Alberta Law Review 729.

¹⁹³ United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295, Article 18.

¹⁹⁴ Human Rights Committee, *International Covenant on Civil and Political Rights, Concluding observations on the sixth periodic report of Canada*, CCPR/C/CAN/CO/6, 13 August 2015 at para 16. See also Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Canada, International Covenant on Economic, Social and Cultural Rights*, E/C.12/CAN/CO/6, 23 March 2016 at para 14.

¹⁹⁵ Carolyn Laude, Strategic Communications Advisor, Knowledge Circle for Indigenous Inclusion, Being our Indigenous Selves: Redressing Indigenous Identity and Self-Identification in Colonial Spaces: Discussion Paper on Self-Identification and Indigenous Identity prepared for Deputy Minister Wilson, 3 June 2022, at 3.

¹⁹⁶ Taiaiake Alfred & Jeff Corntassel, “Being Indigenous: Resurgences against Contemporary Colonialism” (2005) 40 Government and Opposition 597 at 609, 612, 597.

¹⁹⁷ Queen’s University Chancellor Hon. Murray Sinclair, “Statement on Indigenous Identity” (28 June 2021), adding that the approaches may differ from community to community and from nation to nation.

¹⁹⁸ Carolyn Laude, Strategic Communications Advisor, Knowledge Circle for Indigenous Inclusion, Discussion Paper: Self-Identification and Indigenous Identity, Prepared for Deputy Minister Wilson, 3 June 2022 at p. 14.

- ¹⁹⁹ First Nations University of Canada & National Indigenous University Senior Leaders' Association, "Indigenous Voices on Indigenous Identity: What Was Heard Report" (June 2022); First Peoples Group, "Gii-Ikidonaaniwan: 'It has been said': Queen's University Indigenous Identity Project Final Report" (Ottawa: First Peoples Group, 7 July 2022); Jean Teillet, "Indigenous Identity Fraud: A Report for the University of Saskatchewan" (17 October 2022).
- ²⁰⁰ Audra Simpson, "Indigenous identity theft must stop", *Boston Globe* (17 November 2022); see also Independent Senator Mary Jane McCallum, "Can we stop with the Indigenous identity fraud?", *The Hill Times* (28 November 2022).
- ²⁰¹ Métis National Council, Consultations with the EEART, 25 May 2022.
- ²⁰² Indigenous Federal Employee Network, Presentation to the EEART, 10 May 2022.
- ²⁰³ Many Voices one Mind: A Pathway to Reconciliation: Welcome, Respect, Support and Act to fully Include Indigenous Peoples in the Federal Public Service. Final Report of the Interdepartmental Circles on Indigenous Representation, 4 December 2017 at 16.
- ²⁰⁴ Office of the Privacy Commissioner of Canada, Written Submission to the EEART, 14 September 2022.
- ²⁰⁵ Carolyn Laude, Strategic Communications Advisor, "Knowledge Circle for Indigenous Inclusion, Being our Indigenous Selves: Redressing Indigenous Identity and Self-Identification in Colonial Spaces: Discussion Paper on Self-Identification and Indigenous Identity prepared for Deputy Minister Wilson" (3 June 2022) at 31.
- ²⁰⁶ 2 Spirits in Motion Society, Presentation to the EEART, 24 May 2022.
- ²⁰⁷ Canadian Roots Exchange, Presentation to the EEART, 2 June 2022.
- ²⁰⁸ Joshua Nichols & Aaron Mills, "Rethinking the Relationship between Indigenous Rights and Employment Equity", Unpublished Paper submitted to the EEART, 31 August 2022.
- ²⁰⁹ "Nothing in this Act affects any provision of the [Indian Act](#) or any provision made under or pursuant to that Act."
- ²¹⁰ CHRA Section 1.2.
- ²¹¹ Joshua Nichols & Aaron Mills, "Rethinking the Relationship between Indigenous Rights and Employment Equity", Unpublished Paper submitted to the EEART, 31 August 2022.
- ²¹² First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2020 CHRT 20 at paras 84, 129.
- ²¹³ Joshua Nichols & Aaron Mills, "Rethinking the Relationship between Indigenous Rights and Employment Equity", Unpublished Paper submitted to the EEART, 31 August 2022.
- ²¹⁴ Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing A Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015) 1:1 Lakehead Law Journal 17.
- ²¹⁵ Report of the Royal Commission on Aboriginal Peoples: Restructuring Relationships, vol 2 (Ottawa: Canada Communication Group - Publishing, 1996) at 775.
- ²¹⁶ OECD, Centre for Entrepreneurship, SMEs, Regions and Cities, *Linking Indigenous Communities with Regional Development in Canada*, OECD Rural Policy Reviews (Paris: OECD, 2020) Recommendation 4 (Improving governance and policies for place-based Indigenous economic development).
- ²¹⁷ National Indigenous Economic Strategy for Canada: Pathways to Socioeconomic Parity for Indigenous Peoples (June 2022).
- ²¹⁸ National Indigenous Economic Strategy for Canada: Pathways to Socioeconomic Parity for Indigenous Peoples (June 2022) at 35.
- ²¹⁹ National Indigenous Economic Strategy for Canada: Pathways to Socioeconomic Parity for Indigenous Peoples (June 2022) at 38.
- ²²⁰ OECD, Centre for Entrepreneurship, SMEs, Regions and Cities, *Linking Indigenous Communities with Regional Development in Canada*, OECD Rural Policy Reviews (Paris: OECD, 2020), Chapter 3 (Enabling rural Indigenous entrepreneurship).
- ²²¹ See Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford University Press, 2007).
- ²²² See Maria Panezi, "The Complex Landscape of Indigenous Procurement" in John Borrows & Risa Schwartz, *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements* (Cambridge University Press, 2020) 217 at 222.
- ²²³ Maria Panezi, "The Complex Landscape of Indigenous Procurement" in John Borrows & Risa Schwartz, *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements* (Cambridge University Press, 2020) 217 at 222.

- ²²⁴ Maria Panezi, “The Complex Landscape of Indigenous Procurement” in John Borrows & Risa Schwartz, *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements* (Cambridge University Press, 2020) 217 at 238–239.
- ²²⁵ Social Sciences and Humanities Research Council, Presentation to the EEART, 29 April 2022; Government of Canada, “Setting new directions to support Indigenous research and research training in Canada 2019-2022” (December 2019).
- ²²⁶ Norah Kielland, Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements (Ottawa: Library of Parliament in Brief, 5 May 2015) at 2.
- ²²⁷ Norah Kielland, Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements (Ottawa: Library of Parliament in Brief, 5 May 2015) at 1.
- ²²⁸ Norah Kielland, Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements (Ottawa: Library of Parliament in Brief, 5 May 2015) at 3.
- ²²⁹ Cameron Gunton et al., *Impact Benefit Agreement Guidebook* (Canadian International Resources and Development Institute & Simon Fraser University, March 2020), Appendix A.
- ²³⁰ Norah Kielland, Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements (Ottawa: Library of Parliament in Brief, 5 May 2015) at 3-5.
- ²³¹ Michael Lynk, “Employment Equity and Canada’s Aboriginal Peoples” in Carol Agócs, ed., *Employment Equity in Canada: The Legacy of the Abella Report* (University of Toronto Press, 2014) 99 at 121.
- ²³² Michael Lynk, “Employment Equity and Canada’s Aboriginal Peoples” in Carol Agócs, ed., *Employment Equity in Canada: The Legacy of the Abella Report* (University of Toronto Press, 2014) 99 at 121.
- ²³³ E.g. Art. 26 of the Nunavut Land Claims Agreement pertains to IBAs, in which “Inuit training at all levels”, “Inuit preferential hiring”, “employment rotations reflecting Inuit needs and preferences”, “scholarships” and “labour relations” in addition to “business opportunities for Inuit” are considered to be matters that are “appropriate” for Inuit Benefits under Schedule 26.1. See *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*, 25 May 1991, online: <https://www.gov.nu.ca/sites/default/files/Nunavut_Land_Claims_Agreement.pdf>.
- ²³⁴ Tr’ondëk Hwëch’in Government, Presentation to EEART, 22 April 2022.
- ²³⁵ Kativik Regional Government, Presentation to the EEART, 22 April 2022.
- ²³⁶ It is important to underscore that this reflection is meant to be distinct from “transparency” measures surrounding own-source revenues, formulated as part of the *Extractive Sector Transparency Measures Act*.
- ²³⁷ See Michael Lynk, “Employment Equity and Canada’s Aboriginal Peoples” in Carol Agócs, ed., *Employment Equity in Canada: The Legacy of the Abella Report*, University of Toronto Press, 2014, 99 at 118.
- ²³⁸ Articles 27(1) & 4(e), *Convention on the Rights of Persons with Disabilities* (CRPD), A/RES/61/106, 13 December 2006. Canada ratified the Convention in 2010.
- ²³⁹ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Canada, Convention on the Rights of Persons with Disabilities, CRPD/C/CAN/CO/1, 8 May 2017, at para. 48(c).
- ²⁴⁰ “Work potential is a concept “used to describe persons with disabilities not currently working who might be likely to enter paid employment under the best-case scenario, [which is] an inclusive labour market without discrimination, with full accessibility and accommodation. [Work potential] is not an attempt to measure one’s internal capacity, ability to work, or even likelihood of finding employment under current conditions. It is rather a way to examine how the labour market might change under more inclusive conditions.” (Source: Statistics Canada, *Canadian Survey on Disability Reports: A Demographic, Employment and Income Profile of Canadians with Disabilities Aged 15 Years and Over*, 2017); See also People First of Canada, *Overcoming Barriers to Employment: A Review of the Employment Equity Act*, 15 June 2022 at 6.
- ²⁴¹ Statistics Canada, “Impacts of COVID-19 on persons with disabilities” (27 August 2020) online: The Daily <<https://www150.statcan.gc.ca/n1/daily-quotidien/200827/dq200827c-eng.htm>>.
- ²⁴² United Nations Human Rights Council, Report of the Special Rapporteur on the rights of persons with disabilities, Catalina Devandas-Aguilar, Visit to Canada, A/HRC/43/41/Add.2, 19 December 2019 at para. 87.
- ²⁴³ United Nations Human Rights Council, Report of the Special Rapporteur on the rights of persons with disabilities, Catalina Devandas-Aguilar, Visit to Canada, A/HRC/43/41/Add.2, 19 December 2019 at para 29 and Recommendation 91.
- ²⁴⁴ Paul David Harpur, *Ableism at Work: Disablement and Hierarchies of Impairment* (Cambridge University Press, 2019) at 5.
- ²⁴⁵ Committee on the Rights of Persons with Disabilities, General Comment 8 (2022) on the Rights of Persons with Disabilities to Work and Employment, CRPD/C/GC/8, 9 September 2022, at para. 8.

- ²⁴⁶ Anjali Forber-Pratt, “Say the Word”, Public Health Post, 19 February 2020.
- ²⁴⁷ 42 U.S.C. § 12101
- ²⁴⁸ 122 Stat. 3553
- ²⁴⁹ Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 FR 16977.
- ²⁵⁰ Ruth O’Brien, “What a Difference Thirty Years – 1978 to 2008 – Makes in the Transformation of Disability Law (2015) 50 Tulsa Law Review 367 at 370.
- ²⁵¹ Professor Michael Stein, Harvard Law School, presentation to the EEART, 17 June 2022.
- ²⁵² Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), [2000] 1 SCR 665, 2000 SCC 27; Nova Scotia (Workers’ Compensation Board) v. Martin; Nova Scotia (Workers’ Compensation Board) v. Laseur, [2003] 2 S.C.R. 504, 2003 SCC 54.
- ²⁵³ Bureau of Labor Statistics, U.S. Department of Labor, Persons with a Disability: Labor Force Characteristics - 2022, USDL-23-0351, released 23 February 2023.
- ²⁵⁴ Office of Disability Employment Policy, *Disability Employment Statistics*, available online: <https://www.dol.gov/agencies/odep/research-evaluation/statistics>.
- ²⁵⁵ People First of Canada, Consultations with the EEART, 28 April 2022; People First of Canada,
- ²⁵⁶ Office of Public Service Accessibility, Written Submission to the EEART, 25 April 2022.
- ²⁵⁷ People First of Canada, Consultations with the EEART, 9 June 2022.
- ²⁵⁸ Inclusion Canada, Presentation to the EEART, 28 April 2022.
- ²⁵⁹ See also Paul David Harpur, *Ableism at Work: Disablement and Hierarchies of Impairment* (Cambridge University Press, 2019) at 10-11.
- ²⁶⁰ CBC Ideas, *Two part Series*, aired 29 April & 9 May 2022; Judy Singer, “‘Why can’t you be normal for once in your life?’ From a ‘problem with no name’ to the emergence of a new category of disability” in Mairian Corker and Sally French, eds., *Disability Discourse* (Open University Press, 1999) 59.
- ²⁶¹ Treasury Board of Canada Secretariat, *Employment Equity in the Public Service of Canada 2020-2021* (2022), Table 1 at page 31. The Public Service of Canada (PSC) representatives suggested that some places are known to allow employees to feel comfortable, offering the example of the CHRC that has a long history of identifying barriers. The PSC suggested this might help in attracting employees with disabilities.
- ²⁶² Office of Public Service Accessibility, Task Force Consultation, 11 March 2022.
- ²⁶³ Committee on the Rights of Persons with Disabilities, *General Comment 8 (2022) on the Rights of Persons with Disabilities to Work and Employment*, CRPD/C/GC/8, 9 September 2022, at para. 42.
- ²⁶⁴ Committee on the Rights of Persons with Disabilities, *General Comment 8 (2022) on the Rights of Persons with Disabilities to Work and Employment*, CRPD/C/GC/8, 9 September 2022, at para. 81(p).
- ²⁶⁵ Canadian Council on Rehabilitation and Work, presentation to the EEART, 28 April 2022
- ²⁶⁶ Neil Squire Society, presentation to the EEART, 28 April 2022
- ²⁶⁷ National Educational Association of Disabled Students, presentation to the EEART, 28 April 2022.
- ²⁶⁸ See Statistics Canada’s data hub for Goal 5 – Gender Equality (2021) online: <https://www144.statcan.gc.ca/sdg-odd/goal-objectif05-eng.htm>.
- ²⁶⁹ Source: Employment and Social Development Canada, Chief Data Officer, Census 2021
- ²⁷⁰ Richard Anker, “Theories of Occupational Segregation by Sex: An Overview” (1997) 136 International Labour Review 315; Judy Fudge & Guy Mundlak, “Law and Gendered Labour Market Segmentation” (2022) 161 International Labour Review 657.
- ²⁷¹ Source: Statistics Canada, Labour Force Survey, custom tabulations. The employment rate of mothers generally rises with the age of the youngest child in the household. E.g.: the employment rate of women with a child under the age of 6 was 69.5% in 2015 vs 79.3% for women without a child under the age of 25
- ²⁷² Source: Statistics Canada, Labour Force Survey, custom tabulations. For father, there is limited variability in the employment rate of men related to the age of the youngest child in the household. E.g.: in both 1976 and 2015, the lowest employment rate was for men with no children under the age of 25
- ²⁷³ Source: Statistics Canada, General Social Survey, 2015.

- ²⁷⁴ Source: Statistics Canada, General Social Survey, 2010
- ²⁷⁵ Statistics Canada, Quality of Employment in Canada, Employees with low pay, 1998 – 2021 (release 30 May 2022).
- ²⁷⁶ Statistics Canada, Table 14-10-0072-01 Job Permanency (Permanent and Temporary) by Industry, annual (x 1,000) (released 6 January 2023).
- ²⁷⁷ Statistics Canada, Presentation to the EEART, 17 May 2022.
- ²⁷⁸ Statistics Canada, Part-time employment by reason, annual (x 1,000), Table 14-10-0029=01 (released 6 January 2023).
- ²⁷⁹ Source: Statistics Canada, Labour Force Survey, March and September monthly files, 2007 to 2021
- ²⁸⁰ Marie Drolet, “Insights on Canadian Society: Unmasking differences in women’s full-time employment,” Statistics Canada, 26 September 2022.
- ²⁸¹ Committee on the Elimination of Discrimination against Women, Concluding observations on the combined eighth and ninth periodic reports of Canada, Convention on the Elimination of All Forms of Discrimination against Women, 25 November 2016, CEDAW/C/CAN/CO/8-9, paras 38, 39 & 29. It also urged Canada to ratify the ILO’s Indigenous and Tribal Peoples Convention, 1989 (No. 169) and the ILO’s Domestic Workers Convention, 2011 (No. 189).
- ²⁸² Committee on the Rights of Persons with Disabilities, General Comment No. 8 (2022) at para. 66.
- ²⁸³ Barnini Bhattacharyya & Jennifer L. Berdahl, “Do You See Me? An Inductive Examination of Differences Between Women of Color’s Experiences of and Responses to Invisibility at Work” (2023, advance online publication) *Journal of Applied Psychology*.
- ²⁸⁴ Treasury Board of Canada Secretariat, Employment Equity in the Public Service of Canada for Fiscal Year 2020 to 2021 (2022).
- ²⁸⁵ Canadian Women’s Foundation, *Resetting Normal Reports*, (May 2020 – September 2021).
- ²⁸⁶ See e.g. Janet Kemei et al., “Impact of the COVID-19 Pandemic on Black Communities in Canada” (2023) 20:2 *International Journal of Environmental Research and Public Health* 1580.
- ²⁸⁷ Public Service of Canada, Audit of Employment Equity Representation in Recruitment, 2021.
- ²⁸⁸ United Nations Committee on the Elimination of Racial Discrimination, *General recommendation No. 34 adopted by the Committee: Racial discrimination against people of African descent*, International Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/GC/34, 3 October 2011, at para. 2.
- ²⁸⁹ United Nations Committee on the Elimination of Racial Discrimination, General recommendation No. 34 adopted by the Committee: Racial discrimination against people of African descent, International Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/GC/34, 3 October 2011, at paras 18-21.
- ²⁹⁰ United Nations Committee on the Elimination of Racial Discrimination, General recommendation No. 34 adopted by the Committee: Racial discrimination against people of African descent, International Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/GC/34, 3 October 2011 at para. 6.
- ²⁹¹ UN General Assembly, Resolution adopted by the General Assembly on 15 December 2022: A global call for concrete action for the elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action, A/RES/77/205, 3 January 2023 (emphasis added),
- ²⁹² Afua Cooper, *The Hanging of Angélique: The Untold Story of Canadian Slavery and the Burning of Old Montréal* (Harper Collins, 2006); Barrington Walker, ed., *African Canadian Legal Odyssey: Historical Essays* (Toronto: The Osgoode Society and the University of Toronto Press, 2012); Harvey Amani Whitfield, *North to Bondage: Loyalist Slavery in the Maritimes* (University of British Columbia Press, 2016).
- ²⁹³ *R. v. Anderson*, 2021 NSCA 62 at 94.
- ²⁹⁴ *Christie v. York*, (1939), [1940] S.C.R. 139.
- ²⁹⁵ Bridlal Pachai, *The Nova Scotia Black Experience Through the Centuries* (Halifax: Nimus Publishing, 2007) at 166.
- ²⁹⁶ Cecil Foster, *They Call Me George: The Untold Stories of the Black Train Porters* (Windsor, ON: Biblioasis, 2019) at 14.
- ²⁹⁷ Cecil Foster, *They Call Me George: The Untold Stories of the Black Train Porters* (Windsor, ON: Biblioasis, 2019) at 20.
- ²⁹⁸ Cecil Foster, *They Call Me George: The Untold Stories of the Black Train Porters* (Windsor, ON: Biblioasis, 2019) at 55. See also James W. St.G. Walker, *Racial Discrimination in Canada: The Black Experience* (Ottawa: Canadian Historical Association, 1985); Constance Backhouse, *Colour- Coded: A Legal History of Racism in Canada* (Toronto: University of Toronto Press, 1999);

Barrington Walker, ed, *The History of Immigration and Racism in Canada: Essential Readings* (Toronto: Canadian Scholars' Press, 2008).

²⁹⁹ See Proceedings of the Canadian Railway Board of Adjustment No. 1, Case No. 29 – The Canadian Pacific Railway Company and its Sleeping Car Porters (June 1919), *The Labour Gazette* vol XIX 679.

³⁰⁰ Cecil Foster, *They Call Me George: The Untold Stories of the Black Train Porters* (Windsor, ON: Biblioasis, 2019) at 78.

³⁰¹ Constance Backhouse, *Reckoning with Racism: Police, Judges and the RDS Case* (UBC Press, 2022) at 33–34; Rekeash Walters, "Against Amnesia: African Nova Scotia Women's Generational Leadership in Civil Rights Organizing, 1950-79" (2020) 32:2 *Can J Women & L* 383.

³⁰² Commission des droits de la personne et des droits de la jeunesse (Lumène et autres) c Centre maraîcher Eugène Guinois Jr inc., 2005 CanLII 11754 (QC TDP), <<https://canlii.ca/t/1k5k6>>.

³⁰³ UN Human Rights Council, Report of the Working Group of Experts on People of African Descent on its mission to Canada, 16 August 2017, A/HRC/36/60/Add.1 at para 33.

³⁰⁴ *R. v. Morris*, 2021 ONCA 680, at para. 1.

³⁰⁵ *R. v. Anderson*, 2021 NSCA 62 at para. 99.

³⁰⁶ *R. v Peart*, 2022 BCSC 680, at para. 35.

³⁰⁷ Dr. Harvi Millar, *Reimagining the Employment Equity Act: Making it Work for Black Canadian Employees*, Enhanced Engagement Report for the EEART, 20 July 2022 at 92.

³⁰⁸ Karen Kelly, *Collecting Census Data on Canada's Visible Minority Population: A Historical Perspective*, Employment Equity Data Program, (Minister responsible for Statistics Canada, Minister of Industry, Science and Technology, 1995) at 7–23, 26, 35–37.

³⁰⁹ Brazil, 2010 Census. The most recent, 2022 population data was collected up to 25 December 2022.

³¹⁰ Tanya Katerí Hernández, *Racial Subordination in Latin America: The Role of the State, Customary Law, and the New Civil Rights Response*, Cambridge University Press, 2012.

³¹¹ Statistics Canada, "A portrait of educational attainment and occupational outcomes among racialized populations in 2021" (18 January 2023) at fn 24.

³¹² Statistics Canada, "A portrait of educational attainment and occupational outcomes among racialized populations in 2021" (18 January 2023).

³¹³ Research is limited, but in the United States context consider that "[w]hereas Asian-white and Latino-white multiracials exhibited a great deal of fluidity in their choice of identification, black-white multiracials experienced the most constraint... , black multiracials of any ethnoracial combination feel limited in their identity options; for them, black is neither a choice nor a category from which they can easily exit." Jennifer Lee & Frank D. Bean, *The Diversity Paradox: Immigration and the color line in twenty-first century America*, New York, Russell Sage Foundation, 2010, at 181.

³¹⁴ Debra Thompson, *The Schematic State: Race, Transnationalism, and the Politics of the Census* (Cambridge University Press, 2016) at 212.

³¹⁵ Source: Census 2021.

³¹⁶ Statistics Canada, "A portrait of educational attainment and occupational outcomes among racialized populations in 2021" (18 January 2023).

³¹⁷ E.g. Canadian Association of University Teachers, Presentation to the EEART, 31 March 2022

³¹⁸ See Human Rights Council, Report of the independent expert on minority issues, Gay McDougall: Mission to Canada, A/HRC/13/23/Add.2, 8 March 2010 at para. 92.

³¹⁹ Chief Human Rights Officer of TBS, Presentation to the EEART, 26 May 2022.

³²⁰ Black Class Action Secretariat and its Representatives, *Employment Equity Act* Review Submissions, 14 April 2022

³²¹ Black Class Action Secretariat and its Representatives, *Employment Equity Act* Review Submissions, 14 April 2022.

³²² Public Service Commission of Canada, *Employment Equity Promotion Rate Study*, modified 28 November 2022.

³²³ United Nations Committee on the Elimination of Racial Discrimination, General recommendation No. 34 adopted by the Committee: Racial discrimination against people of African descent, International Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/GC/34, 3 October 2011 at para. 21.

³²⁴ Karen Kelly, *Collecting Census Data on Canada's Visible Minority Population: A Historical Perspective*, Employment Equity Data Program, (Minister responsible for Statistics Canada, Minister of Industry, Science and Technology, 1995) at 9-23, 26, 35-37.

³²⁵ Vanmala Subramaniam et al., “Two years after signing BlackNorth Initiative, majority of companies have failed to make substantial progress on diversity, survey shows,” *The Globe and Mail* (30 July 2022), online: <<https://www.theglobeandmail.com/business/article-hire-black-employees-corporate-canada/>>.

³²⁶ UN Committee on Economic, Social and Cultural Rights, General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights, 2016 (E/C.12/GC/23), , at para 65(a); and UN Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 2006 (E/C.12/GC/18), para 12(b)(i); United Nations Human Rights Office of the High Commissioner, *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law*, 2nd ed, (New York & Geneva: UN Human Rights Office of the High Commissioner, 2019) at 63—64.

³²⁷ These numbers may be low; task force members were told that 2SLGBTQI+ communities consider that representation may be closer to 10 – 15%, noting the tendency of younger people to self-declare compared with older people.

³²⁸ Statistics Canada, “A statistical portrait of Canada’s diverse LGBTQ2+ communities” (15 June 2021), online: *The Daily* <www150.statcan.gc.ca/n1/daily-quotidien/210615/dq210615a-eng.htm>; Statistics Canada, “Canada at a Glance 2022: LGBTQ2+ people” (1 December 2022), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/12-581-x/2022001/sec6-eng.htm>, citing Statistics Canada, *Experiences of violent victimization and unwanted sexual behaviours among gay, lesbian, bisexual and other sexual minority people, and the transgender population, in Canada, 2018* (Juristat article) by Brianna Jaffray, (Ottawa: Statistics Canada, 2020).

³²⁹ Statistics Canada, “Canada is the first country to provide census data on transgender and non-binary people” (27 April 2022), online: *The Daily* <www150.statcan.gc.ca/n1/daily-quotidien/220427/dq220427b-eng.htm>. They sought to preserve historical continuity in information on sex by proceeding in this manner. The task force appreciated Statistics Canada’s openness to members’ questions about some of the limits of the “sex at birth” approach, including on how gender identities of bisexual Canadians might be captured.

³³⁰ The Government of Canada adds that “results are representative of those that responded to the survey and cannot be used to make generalizations about the entire population of 2SLGBTQI+ people living in Canada.” Government of Canada, Federal 2SLGBTQI+ Action Plan Survey, conducted 27 Nov 2020 – 28 Feb 2021.

³³¹ Carol Agócs, Think Piece on Three Topics, Unpublished paper prepared for the EEART, 30 August 2022.

³³² Employment rates vary by sexual orientation and gender. Between 2007 and 2017, heterosexual men showed similar employment rates as gay men (87% vs. 84%). In contrast, lesbian and gay women had a higher employment rate than heterosexual women (86% vs. 78%). Among lesbian and gay people, men and women had similar employment rates (84% vs. 86%). Overall, bisexual men (74%) and women (69%) showed the lowest employment rates of all groups. Source: Waite, Sean. Pajovic, Vesna, and Nicole Denier. (2020). “Lesbian, gay and bisexual earnings in the Canadian labor market: New evidence from the Canadian Community Health Survey.” *Research in Social Stratification and Mobility*

³³³ Sean Waite, Vesna Pajovic & Nicole Denier, “Lesbian, gay and bisexual earnings in the Canadian labor market: New evidence from the Canadian Community Health Survey, (2020) 67 *Research in Social Stratification and Mobility* 100484.

³³⁴ LGB people are more likely to work in sales and services. Between 2007 and 2017, higher proportions of LGB individuals than heterosexual people worked in sales and service jobs, which are among the lowest paid occupations in Canada. Bisexual women (33%) in particular were overrepresented in sales and service occupations. Compared with heterosexual men (26%), gay men (4%) were less likely to be working in trades, transportation and equipment operations. Higher proportion of lesbian and gay women (5%) than heterosexual women (2%) worked in trades, transportation and equipment operations. Source: Waite, Sean. Pajovic, Vesna, and Nicole Denier. (2020). “Lesbian, gay and bisexual earnings in the Canadian labor market: New evidence from the Canadian Community Health Survey.” *Research in Social Stratification and Mobility*.

³³⁵ The Enchanté Network, *The Employment Equity Act and 2SLGBTQI+ Communities*, Extended Engagement Report to the EEART, August 2022 at 7.

³³⁶ Sean Waite, “Should I Stay or Should I Go? Employment Discrimination and Workplace Harassment against Transgender and Other Minority Employees in Canada’s Federal Public Service” (2021) 68 *Journal of Homosexuality* 1833 at 1853.

³³⁷ Brenda Cossman and Ido Katri, “Today, Trans Canadian Canadians Celebrate Bill C-16. Tomorrow, the Work Begins for us all,” (15 June 2017), online: *The Globe and Mail* <www.theglobeandmail.com/opinion/today-trans-canadians-celebrate-bill-c-16-tomorrow-the-work-begins-for-us-all/article35324961>.

³³⁸ Samuel Singer, Trans Rights Are Not Just Human Rights: Legal Strategies for Trans Justice” (2020) 35 *Canadian Journal of Law and Society* 293 at 299.

³³⁹ Prime Minister Justin Trudeau, “Remarks by Prime Minister Justin Trudeau to Apologize to LGBTQ2 Canadians,” (28 November 2017) online: *Prime Minister of Canada* <pm.gc.ca/en/news/speeches/2017/11/28/remarks-prime-minister-justin-trudeau-apologize-lgbtq2-canadians>.

³⁴⁰ Statistics Canada, “A statistical portrait of Canada’s diverse LGBTQ2+ communities” (15 June 2021), online: *The Daily* <www150.statcan.gc.ca/n1/daily-quotidien/210615/dq210615a-eng.htm>; drawing on the 2018 Survey on Safety in Public and Private Spaces and focusing on lesbian, gay, bisexual and Canadians whose sexual orientation is not heterosexual.

³⁴¹ See e.g. Samuel Singer, “Trans Rights are not just Human Rights: Legal Strategies for Trans Justice” (2020) 35 *Canadian Journal of Law and Society* 293.

³⁴² The language used in the law and decrees is “travestis, transsexuales y transgénero”. Decreto 659/2021, *Promoción del acceso al empleo formal para personas travestis, transexuales y transgénero*; Diana Sacayán - Lobana Berkíns, 27 de septiembre de 2021; Ley No 27.636 de *Promoción del acceso al empleo formal para personas travestis, transexuales y transgénero*; Diana Sacayán - Lobana Berkíns; Decreto 721/2020, *Sector público nacional*, 3 de septiembre de 2020 (Argentina).

³⁴³ News Release, “Cafiero designará a la referente del movimiento LGBTI+ Alba Rueda como Representante Especial sobre Orientación Sexual e Identidad de Género”, (4 March 2022), online: *Zona Norte* <www.zonanortediario.com.ar/04/03/2022/cafiero-designara-a-la-referente-del-movimiento-lgbt-alba-rueda-como-representante-especial-sobre-orientacion-sexual-e-identidad-de-genero/>.

³⁴⁴ Statistics Canada, “A statistical portrait of Canada’s diverse LGBTQ2+ communities” (15 June 2021), online: *The Daily* <www150.statcan.gc.ca/n1/daily-quotidien/210615/dq210615a-eng.htm>.

³⁴⁵ LGBT Purge Fund et al., *Emerging from the Purge: Reviewing the State of LGBTQI2S Inclusion in Canada’s Federal Workplaces*, (Ottawa: LGBT Purge Fund, 2021) at 54.

³⁴⁶ The task force notes that this parallels the observation of then Judge Rosalie Silberman Abella in her 1984 for “visible minorities”.

³⁴⁷ Government of Canada, “Federal 2SLGBTQI+ Action Plan 2022” (9 September 2022), online: *Canada.ca* <women-gender-equality.canada.ca/en/free-to-be-me/federal-2slgbtqi-plus-action-plan/federal-2slgbtqi-plus-action-plan-2022.html>.

³⁴⁸ Observations: In 2018, LGB+ workers were more likely than heterosexual workers to report having experienced discrimination or unwanted sexual behaviours at work (44% vs 22%) – a similar difference was observed between transgender/non-binary and cisgender workers (69% vs. 23%). Among workers, fewer LGBTQ2+ people than non-LGBTQ2+ people agreed that every person in their workplace has equal advancement opportunities regardless of their sexual orientation (78% vs. 86%) or because they are transgender (69% vs. 79%). Between 2007 and 2017, higher proportions of LGB individuals than heterosexual people worked in sales and service jobs, which are among the lowest paid occupations in Canada. Source: Statistics Canada, *Survey of Safety in Public and Private Spaces*, 2018.

³⁴⁹ Lorena Parini, *Doing and undoing gender at work: The workplace experiences of trans people in Switzerland* (2022) 161 *International Labour Review* 395 at 405.

³⁵⁰ Kristen Schilt, “Just one of the guys?: How Transmen make gender visible at work” (2006) 20 *Gender & Society* 465-490.

³⁵¹ Gaveen Cadotte, Vice-President (Policy and Communications) Public Service Commission of Canada, Letter to the *Employment Equity Act* Review Task Force, 2 June 2022.

³⁵² Office of the Commissioner for Federal Judicial Affairs Canada, “Questionnaire for Federal Judicial Appointments,” (26 September 2022), online: *Federal Judicial Affairs Canada* <www.fja.gc.ca/appointments-nominations/forms-formulaires/cq-qc/index-eng.html>.

³⁵³ Gerald Hunt & Jonathan Eaton, “We are Family: Labour Responds to Gay, Lesbian, Bisexual, and Transgender Workers” in David Rayside & Gerald Hunt, eds. *Equity, diversity, and Canadian labour* (University of Toronto Press, 2007) at 137.

³⁵⁴ LGBT Purge Fund et al., *Emerging from the Purge: Reviewing the State of LGBTQI2S Inclusion in Canada’s Federal Workplaces*, (Ottawa: LGBT Purge Fund, 2021) at 102.

³⁵⁵ Morley Gunderson, “Revisiting the Abella Report: Final Report to ESDC”, September 2018 [unpublished].

³⁵⁶ *McKinley v. B.C. Tel*, 2001 SCC 38, [2001] 2 SCR 161.

³⁵⁷ Diversity Institute, *Between the corporation and the closet: ethically researching LGBTQ+ identities in the workplace*, Toronto Metropolitan University, 2018.

³⁵⁸ LGBT Purge Fund et al., *Emerging from the Purge: Reviewing the State of LGBTQI2S Inclusion in Canada’s Federal Workplaces*, 2021 at 21.

³⁵⁹ See Debra Thompson, *The Schematic State: Race, Transnationalism, and the Politics of the Census* (Cambridge University Press, 2016) at 4, 151-152.

³⁶⁰ See Debra Thompson, *The Schematic State: Race, Transnationalism, and the Politics of the Census* (Cambridge University Press, 2016) at 157 - 164. Thompson reports that there was “considerable confusion” on the term ‘visible minorities’ under previous testing.

³⁶¹ Ivan P. Fellegi, “Chief Statistician: Why the Census is Counting Visible Minorities” *Globe and Mail* (26 April 1996) A21. See also Patrick Simon & Victor Piché, eds, “Accounting for Ethnic and Racial Diversity: The Challenge of Enumeration” (2012) 35:8 *Ethnic and Racial Studies* 1357 at 1360, affirming that “Measuring the extent and nature of the diverse forms of discrimination is essential to the formulation, monitoring and evaluation of anti-discrimination policies, be they national, regional or global.” See also Statistics Canada, “Ivan Fellegi: A statistician who made his mark” (3 December 2018), online: *The Daily*, <www150.statcan.gc.ca/n1/daily-quotidien/181203/dq181203g-eng.htm>.

³⁶² Chinese Canadian National Council for Social Justice, EEART Consultations, 19 May 2022.

³⁶³ Canadian Race Relations Foundation, EEART Consultations, .3 June 2022

³⁶⁴ UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada, International Convention on the Elimination of All Forms of Racial Discrimination, 2017, CERD/C/CAN/CO/21-23 at paras 5 - 6, based on its previous recommendation in Consideration of reports submitted by States parties under article 9 of the convention : concluding observations of the Committee on the Elimination of Racial Discrimination : Canada, 2012, CERD/C/CAN/CO/19-20 at para 8.

³⁶⁵ See UN Human Rights Council, Report of the independent expert on minority issues, Gay McDougall: Mission to Canada, 2010, A/HRC/13/23/Add.2 at para 92.

³⁶⁶ Act respecting equal access to employment in public bodies, CQLR. ch. A-2.01, s 1.

³⁶⁷ Source: Employment and Social Development Canada, Chief Data Officer, Census 2021, LAB 68-69.

³⁶⁸ Source: Employment and Social Development Canada, Chief Data Officer, Census 2021.

³⁶⁹ Source: Labour Program - 2021 Census based on 30 Nov. 2022 data release.

³⁷⁰ Presentation to the EEART, March 2022. See also Sheila Block & Grace-Edward Galabuzi, “Persistent Inequality: Ontario’s Colour-Coded Labour Market” (Toronto: Canadian Centre for Policy Alternatives, 2018) at 4.

³⁷¹ Krishna Pendakur & Ravi Pendakur, “The Colour of Money Redux: Immigrant/Ethnic Earnings Disparity in Canada, 1991 – 2006” in Carlos Teixeira & Li Wei, eds, *The housing and economic experiences of immigrants in US and Canadian cities*, (Toronto: University of Toronto Press, 2014) 227 at 240-- (noting that “for visible minority immigrant women, relative earnings disparities more than doubled from 1990 to 2005.”)

³⁷² Human Resources and Skills Development Canada, *Report of the Commission on Equality in Employment*, by Judge Rosalie Silberman Abella Commissioner (Ottawa: Human Resources and Skills Development Canada, 1984 at 46.

³⁷³ Act2End Racism, Consultations with the EEART, 6 May 2023.

³⁷⁴ Statistics Canada, “Police-reported hate crime, 2021” (22 March 2023), online: *The Daily* <www150.statcan.gc.ca/n1/daily-quotidien/230322/dq230322a-eng.htm> at Table 6: Characteristics of Hate Crime Victims, by Detailed Motivation, Canada 2018 – 2021.

³⁷⁵ Dr. Audrey Kobayashi, EEART Expert Panel, 22 March 2023.

³⁷⁶ Treasury Board of Canada Secretariat, *Embracing change in the federal public service / [issued by the] Task Force on the Participation of Visible Minorities in the Federal Public Service*, (Ottawa: Treasury Board of Canada Secretariat, 2000) at 44—45.

³⁷⁷ See e.g. Ravi Pendakur, “Settlement and labour force outcomes for Afghan immigrants and their children in Canada” (2021) 47:21 *Journal of Ethnic and Migration Studies* 4893; Krishna Pendakur & Ravi Pendakur, “The Colour of Money Redux: Immigrant/Ethnic Earnings Disparity in Canada, 1991 – 2006” in Carlos Teixeira & Li Wei, eds, *The housing and economic experiences of immigrants in US and Canadian cities*, (Toronto: University of Toronto Press, 2014) 227 at 228 (finding that “minority and immigrant based earnings disparity has increased substantially over the 15 year period. In contrast, European-origin minorities born in Canada do not face earnings gaps.”)

³⁷⁸ Eddy S. Ng & Suzanne Gagnon, “Employment Gaps and Underemployment for Racialized Groups and Immigrants in Canada: Current Findings and Future Directions,” January 2020, SkillsNext 2020.

³⁷⁹ Tony Fang, Morley Gunderson & Viet Ha, “The Short-term Effects of COVID-19 on Labour Market Outcomes of Recent Immigrants to Canada” [Unpublished Paper]

³⁸⁰ Source: Employment and Social Development Canada, Chief Data Officer, Census 2021.

³⁸¹ See Carol Agócs, “Think Piece on Three Topics,” Unpublished Paper prepared for the EEART, 30 August 2022.

³⁸² Source: Employment and Social Development Canada, Chief Data Officer, Census 2021.

³⁸³ *Commission des droits de la personne et droits de la jeunesse (Cupidon Lumène) c Centre Maraîcher Eugène Guinois Jr inc.*, [2005] RJQ 1315, 2005 CanLII 11754 (QC TDP); See Adelle Blackett, “Situated Reflections on International Labour Law, Capabilities, and Decent Work: The Case of Centre Maraîcher Eugène Guinois” (2007) *Revue québécoise de droit international* 223.

³⁸⁴ O.P.T. v Presteve Foods Ltd., 2015 HRTO 675 (CanLII).

³⁸⁵ Auditor General of Canada, “Report 5--Temporary Foreign Worker Program, - Employment and Social Development Canada” (16 May 2017) online: *Office of the Auditor General of Canada* <www.oag-bvg.gc.ca/internet/English/att_e_42263.html>.

³⁸⁶ Auditor General of Canada, “Report 13: Health and Safety of Agricultural Temporary Foreign Workers in Canada During the Pandemic” (9 December 2021) online: *Office of the Auditor General of Canada* <www.oag-bvg.gc.ca/internet/English/att_e_43972.html>.

³⁸⁷ Canada, Department of Foreign and International Trade, Admission of Domestic from the British West Indies, Memorandum from Minister of Citizenship and Immigration and Minister of Labour to Cabinet, Ottawa, 7 June 1955, Cabinet Doc. No. 131-55, Documents on Canadian External Relations.

³⁸⁸ Abigail B Bakan & Daiva K Stasiulis, *Not one of the family: foreign domestic workers in Canada* (Toronto: University of Toronto Press, 1997); Adelle Blackett, *Everyday Transgressions: domestic workers’ transnational challenge to international labor law* (Ithaca, NY: Cornell University Press, 2019) at 59.

³⁸⁹ IDRC commissioned a recent literature review. See Policy Research, Research and Evaluation Branch, Immigration, Refugees and Citizenship Canada, *Racism, Discrimination and Migrant Workers in Canada: Evidence from the Literature / Nalinie Mooten* (Ottawa: Immigration Refugees and Citizenship Canada, 2021), online: *Government of Canada* <publications.gc.ca/site/eng/9.909420/publication.html>.

³⁹⁰ Source: Statistics Canada, Census 2021.

³⁹¹ See e.g. *Anti-Racism Act, 2017*, SO 2017, c 15; Government of Ontario, “Data Standards for the Identification and Monitoring of Systemic Racism: Collection of Race-Related Personal Information, Standard 16, Collecting Personal Information about Religion” (13 April 2022), online: *Ontario.ca* <www.ontario.ca/document/data-standards-identification-and-monitoring-systemic-racism/collection-personal-information#section-8>. – collected to identify and monitor systemic racism and racial disparities that people may experience on the basis of religion.

³⁹² Vrinda Narain, Colleen Sheppard & Tamara Thermitus, “Employment Equity and Inclusion: Through the Lens of Substantive Equality,” (2022) Working Paper Prepared for the *Employment Equity Act* Review Task Force, September 2022.

³⁹³ Federal Public Service Employee, Presentation to the EEART with the Deputy Minister Champion for Visible Minorities for the Federal Public Service, 14 June 2022.

³⁹⁴ Report of the Committee on the Elimination of Racial Discrimination, UNGAOR, 69thSess, Supp No 18, UN DocA/69/18 (2014) at para 11.

³⁹⁵ Unifor, *Strengthening the Federal Employment Equity Act: Unifor’s Submission to the Federal Employment Equity Task Force*, April 2022 at 9-10.

³⁹⁶ World Sikh Organization, Written Submission to the EEART, May 19 2022.

³⁹⁷ *Employment Act 1989*, (UK) 1989 c 38, ss 11 & 12, as amended by the *Deregulation Act 2015*, (UK) 2015 c 20, s 6.

³⁹⁸ R. Singh, *et al*, “Under-mask beard cover (*Singh Thattha* technique) for donning respirator masks in COVID-19 patient care” (2020) 106:4 *Journal of Hospital Infection* 782.

³⁹⁹ Carol Agócs & Bob Osborne, “Comparing Equity Policies in Canada and Northern Ireland: Policy Learning in Two Directions?” (2009) 35:2 *Canadian Public Policy/ Analyse de Politiques* 237.

⁴⁰⁰ *Fair Employment (North Ireland) Act 1976* (UK), and *Fair Employment (North Ireland) Act 1989* (UK); *Fair Employment and Treatment (Northern Ireland) Order 1998* (NI), SI 1998/3162 NI; *Fair Employment and Treatment Order (Amendment) Regulations (NI) 2003*, SI 2003/520; Christopher McCrudden *et al*, “Affirmative Action without Quotas in Northern Ireland” (2009) 4 *Equal Rights Review* 7; Carol Agócs & Bob Osborne, “Comparing Equity Policies in Canada and Northern Ireland: Policy Learning in Two Directions?” (2009) 35:2 *Canadian Public Policy/ Analyse de Politiques* 237.

⁴⁰¹ Carol Agócs & Bob Osborne, “Comparing Equity Policies in Canada and Northern Ireland: Policy Learning in Two Directions?” (2009) 35:2 *Canadian Public Policy/ Analyse de Politiques* 237 at 243.

⁴⁰² Stacy Hawkins, unpublished report prepared for the EEART, 31 August 2022.

⁴⁰³ Canadian Council of Muslim Women, Written Submission to the EEART, 24 June 2022.

Chapter 4: Strengthening implementation: The barrier removal pillar

Understanding proactive approaches: Beyond individual reasonable accommodation

Barrier removal is about running processes that are equitable from beginning to end.

An HR practitioner

Introduction

We often hear that employment equity is proactive. But what does that really mean?

Our task force engagement sessions revealed that the *Employment Equity Act* framework was being implemented with an unduly limited understanding of “proactive” measures. This has not helped employment equity’s image.

Who wants their inclusion to be reduced to a pure numbers-counting, revolving door, individual reasonable accommodation exercise? The narrow approach to implementation has prevented proactive measures from taking the central place that they should in fostering equitable employment opportunities for all.

This chapter seeks to clarify the proactive character of employment equity legislation in Canada. It offers recommendations not only to streamline the legislation but also to ensure that the proactive character of employment equity is respected.

Section 5 of the *Employment Equity Act* sets out employers’ duty to “implement employment equity.” This includes barrier removal, the focus of this chapter. But nothing in Section 5 requires an employer to demonstrate that they have implemented their plans, or at least that they have made reasonable progress on plan implementation. Our consultations suggest that the French version of the law, which is equally authoritative, does not contain the words “if implemented”, and specifies that “*l’employeur est tenu de veiller à ce que la mise en œuvre de son plan d’équité en matière d’emploi se traduise par des progrès raisonnables*” (“the employer is required to ensure that reasonable progress is made in implementing its employment equity plan”) has not guided the interpretation. Instead, those responsible for regulatory oversight stressed that the law does not clarify that reasonable progress actually needs to be made.

This is understandably exasperating. Many stakeholders – employers themselves, government actors responsible for oversight, and of course workers and unions - argued that this needs to change, or employment equity will not be achieved. We could not agree more.

Chapter 4: Strengthening implementation: The barrier removal pillar

Employers and their workplaces should be supported to achieve this reasonable progress, and this report turns attention to the nature and quality of support – including, crucially, financial support.

A related conclusion in this chapter is that equity, diversity and inclusion (EDI) insights can help, but the requirements of the *Employment Equity Act* framework must not become diluted. As discussed in the introduction to this report, tailored initiatives may keep workplaces busy, but may do little to remove barriers. We must be especially careful to ensure that less than rigorous EDI practices not undermine confidence in the ability of employment equity to be achieved and sustained.

We need, instead, to focus on **reasonable progress** to proactive implementation of employment equity, so it can be both achieved and sustained. This conclusion was widely shared, including by the outgoing president of the Public Service Commission of Canada, whose candor our task force greatly appreciated.⁴⁰⁴

Recommendation 4.1: The *Employment Equity Act* should be clarified to ensure that employers are understood to have an obligation to make reasonable progress to achieve employment equity, and to sustain employment equity once it has been achieved.

Representation and barriers

Workplace culture change is essential to employment equity and addressing barriers, and we agree with the Canadian Labour Congress that this “modernization process must support a move toward truly equitable and inclusive workplaces and go beyond the simple representation of members of equity-seeking groups by examining the workplace experience as a whole. This means examining the kinds of positions held by members of the designated groups, their compensation, as well as the opportunities they have for promotion, advancement and professional development.” We would add that examining the workplace experience as a whole should include examining the general culture of the workplace.

Canadian Women’s Foundation, Submission to the EEART, June 2022; Canadian Labour Congress, Submission to the EEART, 28 April 2022

What’s in a barrier?

The word ‘barrier’ is often used, but without much consistency. It is helpful to return to the process of building proactive workplace practices and policies at the organizational level. The key is to remove factors that can lead to discriminatory effects. There are better ways to achieve substantive equality than waiting for individual requests for reasonable accommodation, or for complaints before human rights tribunals or grievance arbitrators.

Barrier removal is the redesign of the roads we travel, the holistic approach to care rather than the hospital after an avoidable accident.

Barrier removal to foster truly inclusive workplaces starts a different kind of process – a process of awareness, mutual learning, and change. Undertaken in a collaborative manner, through meaningful consultations to produce workplace environmental scans and action plans, it draws workplace actors into making the workplace better for all of us.

Some requests for individual accommodation will always be a necessary part of sustaining workplace equality. Barrier removal can even support the individual accommodation process, by removing excessive delays or duplication and streamlining responses so that similar requests are handled in an expeditious and equitable manner.

The key is that a proactive approach to barrier removal means individual workers may not need to seek individual accommodations for those structural barriers that workplaces can identify and remove in advance. We're even willing to suggest that acting proactively holds the potential to be more efficient if you factor in the economic and social costs of related absenteeism, separation, litigation, and stress at work.

Mostly, though, working to remove barriers conveys a commitment to equitable inclusion for all.

Barriers include anything that prevents people from fully and equally participating in Canadian societies. Some barriers are very visible, like a building without an access ramp, other barriers are less visible, like instructions written in complex language.

Treasury Board of Canada Secretariat, Office of Public Service Accessibility, Task Force Consultations, 11 March 2022

Barrier removal has been embraced in the *Accessible Canada Act*. Its implications for all members of society need to be better recognized.

Recentring barrier removal

The *Employment Equity Act* framework has long been understood as focusing on numerical underrepresentation as a barrier, and redressing that. And it is no small task. The goal-setting exercise is undertaken with care to prevent arbitrariness (this is how quotas are defined and prohibited in Section 33(2) of the *Employment Equity Act*). The regulatory oversight should be ensuring that progress toward implementing these numerical goals is reasonable. We address these features in Chapter 6.

This is not the only focus of the *Employment Equity Act*. As we have discussed in Chapter 1, employers are required in Section 5 to implement employment equity by “identifying and eliminating employment barriers” as well as “instituting positive policies and practices and making the reasonable accommodations that will ensure” that persons in employment equity groups achieve equitable representation.

Section 9 of the *Employment Equity Act* further clarifies that in addition to determining the degree of underrepresentation, employers must also “conduct a review of the employer’s employment systems, policies and practices, in accordance with the regulations, in order to identify employment barriers against persons in designated groups that result from those systems, policies and practices.”

Our task force realized through its consultations with employers, workers’ representatives and networks, government bodies charged with ensuring compliance and accountability, and a range of experts that much has been lost in the interpretation and implementation of the *Employment Equity Act* framework.

The task force heard loud and clear: we need to recentre barrier removal in employment equity, and to do so comprehensively.

The overemphasis on the numbers has taken us away from the focus on removing workplace systemic discrimination. Yet it is recognized that we cannot ensure the equitable workplace inclusion the *Employment Equity Act* framework requires unless employment barriers are eliminated and unless positive policies and practices and reasonable accommodations are implemented.

In other words, what is sometimes overlooked is that employment equity must focus, at the workplace level, on the social and administrative structures that “create or perpetuate a position of relative disadvantage” for equity groups, while privileging others.⁴⁰⁵ As Carol Agócs explains, employment equity-based employment system reviews are designed to identify workplace barriers with a view to redress.⁴⁰⁶ Numerical underrepresentation, in other words, is not the only barrier. Moreover, numerical representation levels are deeply related to a range of societal inequalities that create barriers for equity group members to enter the labour force or to appear at the appropriate levels.

Within the workplace, then, barriers may also be found in organizational structures and organizational culture. Organizational structures include job classification, recruitment, remuneration and other working conditions, retention, training and promotion policies, and termination of employment policies. Organizational culture relates to the range of formal and informal norms and practices surrounding the workplace, and include management approaches, communications, and social interaction.

Defining barriers?

There has been a tendency not to define the notion of barriers, even in the *Accessible Canada Act* that is built around the notion.⁴⁰⁷

Basically, if a practice is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.⁴⁰⁸

Barriers are assessed in context. There is no pre-defined list. Barrier identification and elimination requires a careful process of assessing workplace practices through the analysis required by Section 5 of the *Employment Equity Act*.

Concrete indicative examples of barriers may include requiring Canadian experience for a job when it is not necessary to successfully fulfilling the job. Other barriers may include informal, “word of mouth” based recruiting that draws on networks that exclude racialized workers or workers with disabilities. Selection committees might include only senior-level employees, excluding women or Indigenous workers who are underrepresented in senior levels. Some consulted groups offered a range of concrete examples. For example, the Public Service Pride Network affirmed that members of 2SLGBTQI+ communities face specific forms of barriers:

Harassment & discrimination

- LGBTQ2+ members have been targets of discriminatory behaviours (e.g. homophobia, transphobia, etc.)

Systemic inequalities

- Health benefits [Insurance companies]

Lack of safe/inclusive spaces

- Socio-environmental factors and family pressure (e.g. being your authentic self at work, lack of gender inclusive facilities, etc.)

Violence in the workplace (verbal & physical)

- Macroaggressions: Death threats at the office
- Microaggressions: Assuming heteronormative relationships, misgendering

Isolation and alienation

- Lack of coordination to leverage existing resources available to LGBTQ2+ community members (e.g. coming out, transitioning, gender fluidity, etc.)

Impacts on career advancement

- Stagnate upward mobility (e.g. visibility of LGBTQ2+ executives, mentorship and coaching)

Regional context affecting lived experiences (or regional disparities)

- Regional/cultural differences when it comes to tolerance and acceptance
- Access to services and information may not be as readily available

These barriers are compounded when members are part of another equity group

Public Service Pride Network, Presentation to the EEART, 17 March 2022

And the world is changing; sometimes unexpected changes may lead to barriers being removed. For example, we heard from some disability advocates that in the COVID-19 pandemic when people worked remotely, some buildings with physical barriers were no longer being used and some disabled workers were able to work from their accessible homes. With returns to work, there may be the ability to rethink, and purposefully choose workspaces that are accessible.

It is important to add that Section 5(a) of the *Employment Equity Act* contains its own limit on the breadth of the notion of employment barriers, because it refers to the employer's employment

Chapter 4: Strengthening implementation: The barrier removal pillar

systems, policies and practices “that are not authorized by law”. An example is Section 8(1), which deems that employee seniority rights are not employment barriers within the meaning of the *Employment Equity Act* when they concern layoff or recall. In other cases, under Section 8(2), only if the seniority rights are found to constitute a discriminatory practice under the *Canadian Human Rights Act* are they to be considered barriers. This gives meaning to the limit in Section 5. We discuss Section 8 in detail in Chapter 5 on meaningful consultations.

We also find guidance from constitutional law and human rights law on substantive equality, with a focus on adverse impact discrimination. Both recent Supreme Court of Canada decisions mentioned in this report’s introduction, *Fraser* and *Sharma*, focus on the application of laws to assess their constitutionality under Section 15(1) of the *Canadian Charter of Rights and Freedoms*. *Fraser* was cited affirmatively in *Sharma*⁴⁰⁹ although *Sharma*’s majority offers a narrowed interpretation of the standard and how disproportionate impact may be proven for the purposes of constitutional litigation.

Relevant for us is how *Fraser*, drawing in part on human rights and labour law cases focused on employer practices, understands disproportionately negative impacts, or barriers, in the workplace context:

- Ideally one would have both evidence about the circumstances of the group and about the results produced by the barrier but neither is required - it is important to be flexible
- The group facing barriers does not need to establish why there is a statistical imbalance
- Proof of the employer’s discriminatory intent is irrelevant, and
- It is not necessary to show that all members of the group have the same experience, a principle that is particularly important for claims involving multiple or intersecting grounds of discrimination

Throughout the process of identifying barriers, care must be taken to address the discrimination that can result from “continuing to do things ‘the way they have always been done’”.⁴¹⁰

Stimulating barrier removal through employment systems review

We need to reclaim the full meaning of “proactive” in the *Employment Equity Act* framework. But this is hard work and we need to be thinking hard about how to promote it.

Many organizations are not set up to prompt critical assessment of day-to-day performance. Employees operate within organizational routines, which limit their perception of problems. ... Public agencies also face considerable obstacles in developing common performance metrics that will simultaneously prompt local experimentation and provide accountability.

Susan P. Sturm, “The Architecture of Inclusion: Advancing Workplace Equity in Higher Education” (2006) 29 Harvard Journal of Law & Gender at 268-269

Barrier identification and elimination is the first step required in Section 5 of the *Employment Equity Act*. It is not just the numbers. But we need the incentive to refocus, and that will come through strengthening the two other pillars, meaningful consultations and regulatory oversight.

One of the most recent, thorough examples of what barrier identification looks like emerges from the 2022 *Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces* (the Arbour Report). It is not a surprise that the close look came from outside. The report is discussed in greater detail later in this chapter, in our focus on the federal public service. It offers a careful identification of the barriers to women's recruitment and promotion, in the context of widely documented sexual harassment and abuse. The report addresses the representation statistics, as a basis to understand where the problems lie and what is required to address them. It considers the organizational culture, the recruitment, promotion and retention barriers, the problems with education and training requirements, the procedures, and the leadership context, in addition to the access to remedies.⁴¹¹ The key is that one emerges with a close and careful assessment of the systemic challenges that prevent employment equity from being achieved.

Under the *Employment Equity Act* framework, both organizational structures and organizational culture should receive careful employment systems reviews. This extends to policies and practices across the employment lifecycle, to include recruitment, evaluation, promotion, retention, discipline and termination, exit policies and retirement.

Although the *Employment Equity Act* requires the workplace employment equity plan to address hiring, training, promotion and retention across the employment lifecycle in Sections 5 and 9, we would urge greater clarity, specificity and support to ensure comprehensive implementation and reporting.

Recommendation 4.2: The *Employment Equity Act* should:

- define barriers as practices that affect equity groups in a disproportionately negative way
- specify that barrier removal applies across each stage of the employment lifecycle, and
- provide for the *Employment Equity Regulations* or guidelines prepared under them to support comprehensive barrier removal and reporting

Barrier removal recognizes that to achieve employment equity in Canadian workforces, the entire employment lifecycle matters. Employment equity is not only about recruitment. It is about the ability to bring workers' authentic selves to their jobs throughout their time in their workplace, with retention and promotion as part of the mix.

The practice can be transformative because it requires systemic barriers that may be unconscious and unintended to be recognized. To do that, deliberate, dedicated and determined efforts must be undertaken. This takes time and training. Training is addressed in Chapter 5.

Reducing the regularity of reporting

The regularity of the reporting under the *Employment Equity Act* framework has some advantages. However, it has created a mountain of work, largely focused on the numerical representation, to the detriment of addressing the qualitative challenge posed by the very barriers that employment equity seeks to remove. Small private sector employers have in particular expressed concern about the weight of the reporting responsibility. This dovetails with their concern that the Census-related Labour Market Availability is insufficient to meet their needs.

We received a number of submissions from stakeholders and from academics, urging the frequency of reporting to be reduced, alongside increasing the focus on barrier removal.⁴¹² We agree. Reporting

Chapter 4: Strengthening implementation: The barrier removal pillar

every three years is also the norm in the Federal Contractors Program. We would extend this requirement to all workplaces covered under the *Employment Equity Act* framework.

Recommendation 4.3: Reporting by employers, including employment systems reviews, should be required by all covered employers on a 3-year reporting cycle.

Recommendation 4.4: A transitional process should be implemented to ensure that report submission dates by employers are staggered.

Recommendation 4.5: The *Employment Equity Regulations* should contain schedules to support employers in preparing an employment equity plan.

Recommendation 4.6: Guidelines should be developed that include promising practices for identifying and eliminating barriers in the workplace, including how to conduct employment systems reviews that identify and eliminate barriers across the work lifecycle and incorporate climate surveys.

Beyond individual reasonable accommodation

They do very little to change themselves to accommodate to you. The basic assumption is one of assimilation, and that it is Inuit who need to change and adapt, not the Government of Canada or its policies.

Many Voices one Mind: A Pathway to Reconciliation: Welcome, Respect, Support and Act to fully Include Indigenous Peoples in the Federal Public Service. Final Report of the Interdepartmental Circles on Indigenous Representation, 4 December 2017 at 24

Traditionally, people with disabilities need to prove that they have a disability and justify the required accommodations following a medical model. We need to move away from that. The *Accessible Canada Act* has recognized that it is the responsibility of society to create an environment, where everyone can function and live at their full potential.

Federal Public Service Employee, Presentation to the EEART, 14 June 2022

It is necessary to move beyond specific, individualized accommodation toward addressing and understanding the structural and institutional nature of discrimination.

Professor Vrinda Narain, EEART Consultations, 22 March 2022

The *Employment Equity Act* in Section 5 refers to reasonable accommodations, and Section 6 introduces the undue hardship limit. Is this what the *Employment Equity Act* framework is about?

Reasonable accommodations are a crucial part of our human rights law

Individual reasonable accommodations are recognized both internationally and in Canadian human rights law as necessary to ensure the equal enjoyment of the right to work and employment.⁴¹³ Individual accommodation is an employer responsibility under human rights legislation, and it can contribute to making workplaces welcoming for all.

The right to request an individual accommodation plan is a pivotal part of proactive schemes on disability, including under the *Canadian Human Rights Act*. While the first set of regulations under the Accessible Canada Act came into force in 2021 establishing rules to publish accessibility plans, feedback processes and progress reports, individual accommodations are featured in some detail in Ontario's *AODA Integrated Accessibility Standards Regulation* that dates from 2011:

Documented Individual Accommodation Plans under the AODA Integrated Regulations:

28. (1) Employers, other than employers that are small organizations, shall develop and have in place a written process for the development of documented individual accommodation plans for employees with disabilities.

(2) The process for the development of documented individual accommodation plans shall include the following elements:

1. The manner in which an employee requesting accommodation can participate in the development of the individual accommodation plan.
2. The means by which the employee is assessed on an individual basis.
3. The manner in which the employer can request an evaluation by an outside medical or other expert, at the employer's expense, to assist the employer in determining if accommodation can be achieved and, if so, how accommodation can be achieved.
4. The manner in which the employee can request the participation of a representative from their bargaining agent, where the employee is represented by a bargaining agent, or other representative from the workplace, where the employee is not represented by a bargaining agent, in the development of the accommodation plan.
5. The steps taken to protect the privacy of the employee's personal information.
6. The frequency with which the individual accommodation plan will be reviewed and updated and the manner in which it will be done.
7. If an individual accommodation plan is denied, the manner in which the reasons for the denial will be provided to the employee.
8. The means of providing the individual accommodation plan in a format that takes into account the employee's accessibility needs due to disability.

(3) Individual accommodation plans shall,

- (a) if requested, include any information regarding accessible formats and communications supports provided, as described in section 26;

- (b) if required, include individualized workplace emergency response information, as described in section 27; and
- (c) identify any other accommodation that is to be provided.

Accessibility for Ontarians with Disabilities Act, Integrated Accessibility Standards Regulation, 2011

Individual accommodations may take on particular importance at different stages of a person's work lifecycle.

Stakeholders also shared initiatives to centralize accommodation processes and help reduce wait times for accommodations. Compared to one-off individual requests for individual accommodations, these initiatives are positive.

But the *Employment Equity Act* framework must be understood to go beyond leaving the onus on individual employees to request accommodations, with workplaces responding to individual employees' accommodation requests one at a time, over and over throughout the employee's working life cycle, to redress barriers.

Are individual reasonable accommodations provided equitably?

The task force was repeatedly told by experts on disability law that it is in the realm of employment protections that accessibility frameworks are the weakest.⁴¹⁴ And as we met with more and more workplaces throughout our consultations, we got a picture of the extent to which the relationship between individual accommodations and proactive barrier removal remained ambiguous at best, and perhaps in need of attention from the point of view of transparency or requesters' hypervisibility. Where was the incentive to undertake meaningful change?

Ambiguity: An example

One written example of this ambiguous relationship is the generally helpful, user-friendly published Labour Program guidance to LEEP employers. A template of human resources policies and practices lists organizations' formal and informal human resources policies and practices under a range of familiar headings. While features such as general human resource policies, training and development, and promotion are identified in broad and general terms, the section on "accommodation" is particularly detailed and seems to encompass many of the features that should be the subject of proactive barrier-removal. The list ranges from "accessibility" to "childcare services" to "maternity/paternity/parental leave" to "telework". By listing these elements of working life under "accommodation", it is taken for granted that there is a different 'norm' and everything else is simply accommodated.⁴¹⁵

Employment equity barrier removal leads to necessary changes to the norm. The norm becomes one that is equitably inclusive.

Transparency: Emerging research

Some emerging, small sample research led us to wonder about the transparency of individual reasonable accommodation requests. We were not so much thinking of the ones that are denied, where

complaints might be brought before the Canadian Human Rights Commission or grievances. We were thinking a little more about the cases that are approved.

We tend to have very little information about whether workers with similar accommodation needs receive similar accommodations. Early qualitative research about actual human resource managers' practices is starting to shed light on the ways in which accommodations are granted in workplaces on the ground. Some of the accommodations may exceed what is legally required under human rights law, when an employer wants to work creatively to maintain relationships with desired employees. Researchers also found that the accommodations may expressly be kept off the books, that is, they may not be documented. Why create precedent that could lead to other comparable requests?⁴¹⁶

In other words, do we know whether accommodations – offered by pragmatic workplace human resources specialists to solve problems while maintaining valued relationships – are carried out equitably for all similarly situated workers needing accommodations? More data and research are needed.

Who gets accommodated?

The accommodation framework is widely understood to apply in the context of disability, but applies across grounds of discrimination and in the *Employment Equity Act*, to all employment equity groups. Religious accommodation in the workplace has long been an important area for human rights law, but it has not always been well understood. Members of religious minorities requesting individual accommodations have to establish that their request is reasonable, but may face a standard of reasonableness that treats their religious beliefs as the subjective standard against which the objective workplace norm is measured.

Substantive equality specialists Vrinda Narain, Colleen Sheppard and Tamara Thermitus caution against allowing individual reasonable accommodations to “normaliz[e] structural inequality” by validating rather than carefully analyzing existing workplace norms.⁴¹⁷

What model?

Finally, our task force was told that reliance on individual accommodations when comprehensive barrier removal is possible is not only cumbersome, but also potentially costly. Individual accommodations have been criticized because they keep us focused on making changes after the fact on a piecemeal basis to enable a worker to “fit in”. They reinforce the medical model of disability. They are not so transparent. We need to know more about them, and we recommend specific reporting on them for barrier removal.

Recommendation 4.7: The *Employment Equity Regulations* or guidelines prepared under them should provide for reporting on individual reasonable accommodations requested and provided in the workplace to be included in employment systems reviews.

But achieving employment equity means more than individual reasonable accommodations.

Chapter 4: Strengthening implementation: The barrier removal pillar

Shifting the norm: Closing the gap between reasonable accommodation and barrier removal

Most cases aimed at policies and practices that affect many individuals in the workplace can be described as systemic to the extent that they identify and remove barriers based on outmoded assumptions and stereotypes in the workplace.

Canadian Human Rights Act Review Panel, Promoting Equality: A New Vision. (Ottawa: Department of Justice, 2000), at 18

Employment equity’s transformative potential is to build accessibility into the workplace’s design, or redesign. Employment equity shifts the norm.

Our extensive consultations led us to worry that the notion of “reasonable accommodations” – a concept drawn from general human rights law found in human rights legislation across the country – has in some cases become the default under employment equity as well, so much so that the proactive work of achieving employment equity has been reduced to individual accommodations.

Our task force urges a recalibration, one that accentuates what is distinctive about the *Employment Equity Act* framework. In other words, reasonable accommodation in the *Employment Equity Act* framework needs to be understood as it is by the Supreme Court of Canada in the *Meiorin* decision discussed in the introduction. The barriers are built into the very measures meant to offer objective evaluations.⁴¹⁸ The point is to focus attention on removing discriminatory norms, rather than making exceptions to the norms to fit the individual worker into them. Sometimes, it is the norm that is the barrier and that is what needs to be changed. In international human rights law, this is sometimes referred to as the “duty to ensure accessibility,” through barrier removal.⁴¹⁹

The *Employment Equity Act* framework emphasizes this proactive character. The employment systems review is necessary to identify and eliminate the barriers:

An [Employment Systems Review] ESR is an in-depth analysis of the organization’s employment systems, policies and practices — both formal and informal. An ESR investigates attitudes, behaviors and corporate culture and should always involve direct consultation with members of the under-represented designated groups. The ESR should focus on each significant representation gap identified in the workforce analysis. A thorough ESR is key to building an effective and legislatively compliant employment equity plan.

Canadian Human Rights Commission, Horizontal Audit in the Communications Sector: Improving Representation for People with Disabilities, 2022 at 13

And we have some publicly available examples of this work happening in the federally regulated private sector.

Consider the Canadian Broadcasting Corporation/ Radio Canada’s 2020 Annual Report. It offered quite specific across-the-board workplace adaptations for accessibility. CBC/Radio Canada mentioned introducing adaptable furniture and installing height adjustable workstations, creating universal washrooms that are both gender neutral and accessible and installing automatic door openers to allow easier reach for all users. This kind of specificity on accessibility and its impact on other equity groups

is important, especially for a federal employer that has as part of its mandate under the *Broadcasting Act* to strive to be of equivalent quality in English and French, contribute to shared national consciousness and identity and reflect the multicultural and multiracial nature of Canada.

Unfortunately, very few similar examples showed up in the audits shared with the task force chair, a subject that we address under regulatory oversight in Chapter 6.

Undue hardship

There is a limit consistent with Canadian human rights law on the duty to accommodate, in Section 6(a) of the *Employment Equity Act* – undue hardship to the employer. International human rights law also recognizes the limit of an undue burden. In Canadian case law, undue hardship is part of how we assess whether a measure is a *bona fide* occupational requirement (BFOR). The Supreme Court of Canada has recognized that the very notion of “undue” implies that some hardship is to be expected to meet the purpose.⁴²⁰ The purpose is substantive equality. As an accommodation is to be reasonably necessary, the employer must establish that it would be “impossible” to accommodate the worker without “undue hardship”.

Over time, we have noticed that it is easy when cases are litigated for courts to apply such a broad notion of undue hardship that the duty to accommodate may be reduced to a matter of cost or dismissed because there is a countervailing health and safety consideration. Both are important factors. But courts may be reluctant to substitute their assessment for that of employers.

As the *Employment Equity Act* is currently drafted, the limit appears to apply to all measures to implement employment equity. We must keep in mind that proactive barrier removal in the *Employment Equity Act* is different from individual reasonable accommodations.

Proactive barrier removal under the *Employment Equity Act* framework sets a process in motion within the workplace and between the parties, through meaningful consultations. The measures to eliminate barriers are meant to be implemented. To allow proactive barrier removal to be undermined by a broad notion of undue hardship would defeat the purpose of the *Employment Equity Act* framework. With nimble regulatory oversight and support, discussed in Chapter 6, there is an important opportunity to ensure that undue hardship is a robust standard.

Canadian substantive equality experts have urged our task force to recommend that undue hardship be defined strictly in the *Employment Equity Act* framework.⁴²¹ We agree with their advice.

Recommendation 4.8: The notion of “undue hardship” in Section 6(a) of the *Employment Equity Act* should be defined to mean that it would be impossible to take the reasonably necessary measure without “undue hardship”.

Identifying barriers across the workplace lifecycle

Getting the guidance workplaces need

Barrier removal is central to proactive approaches to substantive equality and should take place across the employment lifecycle. Yet report after report has underscored the challenges employers have faced in identifying the barriers that lead to under-representation.⁴²²

Chapter 4: Strengthening implementation: The barrier removal pillar

The self-reflexive process requires support. It requires enough input from concerned workers to be able to see and name the problem. Workplaces require more guidance and support to make this a realistic ask. We need to recalibrate. Chapters 5 & 6 address this challenge, including the guidance needed.

The point of this Chapter is simple: barrier removal should happen across the entire employment lifecycle. Workplaces require nimble, context-specific guidance to do that.

We read audit reports that merely called on employers to review their staffing framework and practices to ensure that appointment, promotions, and retention processes are barrier-free for employment equity groups, including subgroups of visible minorities. **That is an ask, but it is not guidance.** As discussed in Chapter 6, Labour Program officials do not even know what is in the audits. It should not take 37 years and an independent review to fix this patent problem.

Even the recently adopted Government of Canada Directive on Employment Equity, Diversity and Inclusion repeats the language of barrier removal through “proactively reviewing systems, policies, programs, processes and practices as they are developed and implemented to ensure that they will not create barriers to employment equity designated groups” (4.1.5) but does not provide any guidance on how to conduct those reviews and seems to identify that process as distinct from meeting the *Employment Equity Act* obligations (4.1.3).

Learning from the Pay Equity Act framework

In contrast, the *Pay Equity Act* is extremely specific. Pay equity calculations are complicated; this is acknowledged in the technical, careful way that legislative requirements are set out and explained. The responsibilities and powers of the Pay Equity Commissioner are framed in a precise manner through each step of the process of establishing the relevant committees, how to calculate compensation, as well as the detailed contents of a pay equity plan (Section 51(a) – (m)) and, given the nature of the exercise, a requirement to correct the pay gap by making the required pay increases that become payable the day after the plan is duly posted, subject to a 90 day implementation period (Section 96).

Beyond the purpose of the legislation to achieve pay equity through the proactive means described, there is also a responsibility to maintain pay equity through proactive means (Section 2), with a pay equity maintenance review that includes updated plans (Section 64 ff).

Section 95 of the *Pay Equity Act* also puts in place an important principle: the plan prevails to the extent of an inconsistency, over a collective agreement, incorporating into the collective agreement any increase in compensation that is payable by an employer to employees under the Act.

We also learned from consultations that much has depended on the ability of the Pay Equity Commissioner to garner the trust and confidence of employers and employees in the workplace context. We’ll come back to that in Chapter 6 on regulatory oversight.

There are limits to what can be gleaned from a statute that focuses on one aspect of one equity group’s disadvantage. But what we take from the *Pay Equity Act* framework for this first pillar – implementation – is that a modernized *Employment Equity Act* needs to strive for greater clarity about employers’ responsibility to achieve and sustain employment equity.

Recommendation 4.9: The *Employment Equity Act* should be amended to clarify that once employment equity has been achieved for any employment equity group, employers have an ongoing responsibility to sustain employment equity.

Where to start? Essential qualifications and the need to look deeply at merit

Rhetorically, I ask who defines the characteristic of being a good lawyer.

The Hon. Corrine Sparks, Women of Colour in the Legal Profession, Appendix 10 to the Report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, August 1993

In her 1993 report to the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, the Honourable Corinne Sparks, the first African Nova Scotian judge in Canada, listened to Asian Canadian women lawyers who found themselves closeted in research-related jobs. Those lawyers talked about one of the stereotypes they faced in the profession: that they were somehow not aggressive enough to litigate. Judge Sparks understood that the stereotype went deep: to the very definition of what constitutes a good lawyer. The model was built around another image, the image that predominated in the profession for centuries. Left unchallenged, that model would continue to exclude a lot of talented, committed lawyers from equity groups. Judge Sparks added that too many women who had succeeded had to accept norms established by male lawyers, at the cost of great personal sacrifice.

Judge Sparks' reflection sadly continues to resonate 30 years later.

- How do we frame essential qualifications inclusively?
- How do we learn to let go of norms that have been built up around the profession, not because they are essential qualifications because they are deeply linked to characteristics attributed to those who predominated in the work in the past?
- How do we prevent generations of equity group members from either being excluded or from having to distort their authentic selves to fit a workplace norm?

If we fail to address these hard questions and shift dynamics, we will keep losing talent.

[S]ome people choose not to self-identify in order to ensure the perception of hiring based on merit rather than being a statistic to help with representation.

Participant in consultations undertaken by TBS-OCHRO, presentation to the EEART, 26 May 2022

According to Section 6(b) of the *Employment Equity Act*, an employer is not required “to hire or promote persons who do not meet the essential qualifications for the work to be performed”. Section 6(d) clarifies that an employer is not required to create new positions in the workplace to implement the *Employment Equity Act*. These provisions apply to all federally regulated workplaces in Canada covered by the *Employment Equity Act*.

Section 6(c) also addresses the issue of “merit” specifically for public service employees: no employer is required to hire or promote persons without basing the hiring or promotion on merit in cases where

Chapter 4: Strengthening implementation: The barrier removal pillar

the *Public Service Employment Act* requires that hiring or promotion be based on merit. While the discussion below has particular importance, therefore, for the federal public service, it is clear that the questioning extends well beyond and is relevant for all those concerned about equitable workplace inclusion.

Let's turn back to the provisions. We need to acknowledge at the outset that there is redundancy. **Section 6(c) of the *Employment Equity Act* could simply state that merit under the *Public Service Employment Act* is consistent with employment equity.** Section 6(b) already speaks to essential qualifications of the work.

But we heard repeatedly that the way the *Employment Equity Act* communicates messages has unnecessarily left a number of public service employees feeling like there is an assumption in the law that they are not deserving.

The Deputy Minister for Crown-Indigenous Relations and Northern Affairs Canada, and Deputy Minister Champion for Visible Minorities for the federal public service, Daniel Quan-Watson, focused his comments on the *Employment Equity Act's* reference to “merit” in the federal public service. In his presentation to the task force, he traced the history – the transition from a period in law before the *Canadian Human Rights Act* and the *Employment Equity Act* were adopted. That transition he argued, like the transition from imperial to metric, understates all the work that was necessary to move from a place of blatantly discriminatory hiring practices to one in which hiring is to happen on the basis of merit. Recalling that most senior management remains unrepresentative, he concluded, poignantly:

The framework retains the assumption and its manner of implementation leads most of us to feel that we are not meritorious.

Deputy Minister Champion for Visible Minorities for the Federal Public Service, Daniel Quan-Watson, presentation to the EEART, 14 June 2022

Understanding merit

It is true that merit is often invoked but rarely defined. This is a mistake. Employment equity has been criticized for its perceived narrow focus on redistributing representation, that is, the numbers. It has led to the mistaken and invariably offensive perception that employment equity means promoting people who are not qualified. This perception is harmful to equity deserving groups, as has been repeatedly expressed., including in the federal public service:

Participants expressed a feeling of being “tokenized” and the task of constantly defending or explaining Indigenous histories and cultures to non-Indigenous colleagues. Participants shared that senior leaders seek them out for photo opportunities but when it really matters, such as designing a policy or program intended for Indigenous communities and people, Indigenous employees did not feel they were called upon to share their Indigenous experience and knowledge.

Many Voices one Mind: A Pathway to Reconciliation: Welcome, Respect, Support and Act to fully Include Indigenous Peoples in the Federal Public Service. Final Report of the Interdepartmental Circles on Indigenous Representation, 4 December 2017 at 12

This must change.

Deputy Minister Champion Quan-Watson made a poignant plea for a deepened understanding, which is consistent with the task force's focus on transformation, and an understanding of how important it is to humanize how any of us learn and benefit from support, mentoring, guidance and many would add, grace extended to us in workplace contexts in order to be able to succeed.

This task force has stressed that employment equity has at its heart the removal of barriers to substantive equality. It is about affirming our equal worth and ensuring equitable inclusion for all of us. There is a problem if we do not have proper representation. Equitable inclusion is the response. Employment equity calls for us to look closely at the barriers to achieving that equitable inclusion. It is important, in other words, to stop labelling those who face barriers to inclusion as unmeritorious.

The undervaluing of Indigenous women and 2SLGBTQQAI+ employees can make them feel they need to go above and beyond to receive equal treatment from employers.

Native Women's Association of Canada, Supporting the Employment Equity Act Review Task Force: Consolidation of 2021 Labour Market Reports, September 2022

Similarly, they should not be made to feel that they have to work twice as hard to receive respect in the workplace.

Instead, this review offers a crucial opportunity to redefine underlying norms, to make workplaces equitable for all.

Part of what is happening with discussions about employment equity and redressing underrepresentation is that we are moving beyond deficit thinking to identifying and cultivating talent.

If, as we learned, major universities have been able to set goals to hire clusters of people from groups where there are employment equity gaps, and to work to close those gaps in some of their most prestigious hiring, and they are seeking some of the most highly educated people around the world, most workplaces in Canada should be able to do a better job of rethinking how they understand talent acquisition, too.

Merit is double-edged and needs to be addressed with nuance. And merit is so important that it needs to be understood in a smarter, more supportive, and more sustainable way.

The submission of the Community of Federal Visible Minorities is particularly insightful on this point: loosely defined EDI initiatives might be undermining meaningful and effective employment equity initiatives:

TBS and PSC have more or less eliminated programs that had positive impact on Visible Minorities, such as non-imperative staffing, and targeted, government-wide selection processes but instead resorted to cherry-picking processes such as “best fit”, “mentorship plus” and “sponsorship”, which legitimizes and normalizes nepotism, compromises the principles of merit, fairness and transparency, and punishes employees for independent thinking and speaking up. These short-term approaches hide the real and legitimate issues of discrimination and favouritism in

the public service, which prevent qualified and competent Visible Minorities to be hired, selected for training, including language training, and acting assignments, and to advance their career based on their abilities to do the job and contribute to serving Canadians with excellence.

Because the federal public service totally overlooks seniority, it also overlooks the fact that the vast majority of highly qualified visible minorities spend their entire careers in the same group and level in which they were hired.

Submission of the Community of Federal Visible Minorities to the EEEART, 28 April 2022

That non-advertised positions make up 59.7% of appointments in the core public administration is noteworthy. Bargaining agents have expressed concern about this practice.

We heard that the practice enables candidates who have already gone through competitive processes and who have qualified when assessed against select criteria but were not appointed to the post to remain a part of a qualified pool for a limited time period. But we also heard that there is a glaring lack of transparency to the process surrounding non-advertised positions. The process essentially allows managers to pick from a pool of qualified candidates, without actually advertising the position. Other qualified candidates in the pool might not know that there is a position available for which they, too, have qualified. Despite the stated objective of fostering inclusion, the practice concentrates significant power in the hands of individual managers to make decisions that might well be arbitrary. They might well lead to one member of employment equity groups being hired or promoted, but leave many others feeling that they have not been given a fair opportunity to compete for the position.

Perhaps most importantly, the separate non-advertised position process leaves the terms of competitions unchanged. Troublingly, we learned that competitions could be called to circumvent the pool of qualified candidates. We need to pay greater attention to the selection processes, including the composition of hiring committees, a matter that meaningful consultations can help workplaces to address, as discussed in Chapter 5. There also needs to be clear responsibility for those responsible for hiring to achieve employment equity, as discussed in Chapter 6.

Consider the Public Service Commission of Canada's own 2014 study, which was conclusive: "employment equity status has an impact on the perceptions of merit and fairness in staffing".⁴²³

- The results suggest that Aboriginal men, men with disabilities or men who are members of visible minorities have less favourable perceptions of merit than men who do not belong to an EE group.
- The perceptions of merit of Aboriginal women and women with disabilities are comparable to those of women who do not belong to another EE group.
- Women who are members of visible minorities have less favourable perceptions of merit than women who do not belong to another EE group.
- Perceptions of merit do not differ between women who do not belong to another EE group and men who do not belong to an EE group.

Public Service Commission of Canada, Perceptions of Merit and Fairness in Staffing Activities, A Statistical Study (Ottawa: 2014) at 10

Its study also identified factors that affected the perceptions of merit during selection processes. Here are a few:

- “assessment tools used during the staffing activities also affected perceptions of merit. Candidates assessed through written knowledge tests, structured interviews or reference checks have more favourable perceptions of merit than those who were not assessed using such tools”
- candidates with three or more years of experience in their position tended to express less favourable opinions of merit.
- Lengthy staffing processes tended to undermine perceptions of merit.⁴²⁴

The Public Service Commission of Canada separately identified factors that affected the perception of “fairness”, where a key difference appears to be that “candidates who participate in an informal discussion are less likely to express a favourable opinion about the fairness of the staffing activity.”⁴²⁵

Repeated studies, including the 2021 Staffing and Non-Partisanship Survey, underscored that 53% of employees believe that appointments depend on ‘who you know’.

Despite this, the Public Service Commission concluded that employees’ views on merit, fairness and transparency had improved over time even though differences persist. But the conclusions were vague: the call for more in-depth analysis belies the need for proactive responses. The recommendations from the employment equity promotion rate survey were similarly vague despite negative promotion rates reported in some cases for all equity groups.

When we asked about how to achieve progress, our task force received a candid response from the Commission: we need clear accountability, regular monitoring and rigorous oversight.⁴²⁶

Our task force could not agree more: external regulatory oversight is essential to ensure that there is reasonable progress.

We address this issue comprehensively in Chapter 6. But there is an opportunity to return to employment equity in a proactive and creative manner, in light of the legislative latitude within Section 34(1) of the *Public Service Employment Act*:

34 (1) For purposes of eligibility in any appointment process, other than an incumbent-based process, the Commission may determine an area of selection by establishing geographic, organizational or occupational criteria or by establishing, as a criterion, belonging to any of the designated groups within the meaning of section 3 of the *Employment Equity Act*.

In light of the stark underrepresentation in executive level positions in the core public administration, the task force recommends that the latitude in Section 34(1) be used to support targeted hiring competitions to redress the underrepresentation of employment equity groups in a proactive and equitable manner.

Recommendation 4.10: Section 34(1) of the *Public Service Employment Act* should be drawn upon proactively to support targeted hiring competitions to redress the underrepresentation of employment equity groups in a proactive and equitable manner.

Chapter 4: Strengthening implementation: The barrier removal pillar

Merit requires rethinking what jobs actually require

The ideal of merit has merit. It seeks to reduce arbitrariness and to ensure that work is distributed based on individuals' abilities, rather than personal preferences of the employer, or excluded on the basis of stereotypes. It is therefore not a surprise that the Public Service Commission of Canada would take the position that merit and equity hiring are entirely compatible. Its definition of merit, however, is not what many people might think. We'll come back to that later in this chapter.

We can learn a lot from the Honourable Michel Bastarache's report on the RCMP. He both articulated this critique of those who would "ignore merit" but then also called for merit to be understood seriously:

Ignoring merit and the ability to do the job has, at times, resulted in a worsening of harassment and discrimination. ... However, it cannot be assumed that "merit" is a neutral and objective matter. The definition of "merit" needs to be carefully scrutinized, as part of the process of removing systemic barriers. That a candidate brings diversity to the RCMP can be a factor enhancing his or her merit. The question must be asked: what is actually necessary to do "the job"? Further, what is "the job"? ... Finally, it cannot be assumed that determining which candidates are meritorious is a neutral and objective process; it may be highly subjective.

The Hon. Michel Bastarache, Broken Dreams, Broken Lives: The Devastating Effects of Sexual Harassment on Women in the RCMP: Final Report on the Implementation of the Merlo Davidson Settlement Agreement, November 2020 at 64

After comparing requirements internationally, he found that the work of an RCMP officer required higher qualifications, not lower qualifications. In other words, part of the problem of harassment in the workplace was precisely that workers – all workers – should have more specific and demanding qualifications, rather than assuming that every RCMP member should be a generalist able to fulfil every possible role.

This close scrutiny into merit, into making sure we are really understanding and valuing everyone is how employment equity starts to change the workplace for the better, and for everyone, including for our society as a whole and for Canada in the world.

The close scrutiny must start with how we understand the "essential qualifications" of the job and extends across the entire employment lifecycle.

Essential qualifications and the federal public service

So, what is the definition of merit in the federal public service? It surrounds a highly discretionary notion, "right fit".

Right fit

‘right fit is often used to exclude better qualified candidates belonging to marginalized communities, rather than its original purpose of increasing representation. The Statement of Merit Criteria (SoMC) is adapted to narrow the field and favour a preferred candidate. Areas of Selection have no real relevance; they often bear little relation to the actual posted requirements, which are adapted to the narrow sector or branch.

Professional Institute of the Public Service of Canada, Submission to the Employment Equity Act Review Task Force, 22 September 2021

There is an abundant literature in organizational behaviour that workplace environments with highly discretionary personnel practices can leave members of employment equity groups susceptible to bias. Discretion is an important part of workplace life, and cannot be treated as “the problem” in isolation. But in the face of legislation that is itself ambiguous, organizations retain a lot of latitude to set for themselves what the compliance will look like, on some of the most fundamental societal issues.

Merit is a defined term in the *Public Service Employment Act*, which requires appointments to be made on the basis of merit and free from political interference. According to Section 30(2), on the meaning of merit:

- (2) An appointment is made on the basis of merit when
- (a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and
 - (b) the Commission has regard to
 - (i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,
 - (ii) any current or future operational requirements of the organization that may be identified by the deputy head, and
 - (iii) any current or future needs of the organization that may be identified by the deputy head.

We heard from a range of stakeholders, including employee networks and unions that there were serious problems with how the notion was applied.

The issue is a challenging one. We are aware that “right fit” had been understood by some as a solution to addressing underrepresentation, even introduced to enable a more flexible approach to assessing merit than a narrow points-based system that was not attentive to the range of potential that employment equity group members could bring. This report as a whole encourages thinking broadly about qualifications as well as how one assesses candidates’ range of expertise and experiences.

Recourse to the notion of ‘right fit’ is part of a broader discussion of the importance of managerial discretion to make hiring decisions in workplaces that are precisely not subject to a narrowly defined set of tasks.

Chapter 4: Strengthening implementation: The barrier removal pillar

And we have observed this challenge in labour and employment relations before.

If many people with a broad range of skillsets can meet the criteria and do the work, and when the differences between candidates lie more in the training, mentoring and career path opportunities they might have received along the path, the issue starts to look more familiar – that is, how might one ensure that workers in the workplace have appropriate access to training and advancement that respects the quality of their ongoing, evaluated satisfactory service and their potential? How do we ensure that hiring committees have a broad enough vision and training to be able to assess candidates fairly to foster equitable inclusion?

The risk that bias – conscious or unconscious – and other barriers will affect the selections and perpetuate the status quo is one that was repeatedly shared with the task force, with considerable frustration.

And let’s be clear: the language of “right fit” sends exactly the wrong message to members of groups that are underrepresented. The point is not to “fit” into a norm that has excluded diverse talent. The point is to foster equitable inclusion for all. That means challenging barriers to inclusion.

In other types of workplaces, there have been concerns that seniority may prevent decisions based on equity although there is much to suggest that seniority increases perceptions of fairness through which historically excluded groups, once hired, can progress. What we are witnessing in the federal public service without seniority, is the bottlenecking of members of employment equity groups in feeder positions, but an absence of promotion into management. Right fit, rather than providing the incentive and latitude to choose those workers from equity groups that are underrepresented, may embed the latitude to overlook many of them, and of course their years of service. This challenge will become more acute as disaggregated data focus attention on the extent of underrepresentation of some employment equity groups or sub-group members.

This concern is far from new.

Solutions need to emerge through consultations with workplace actors. There are however promising practices and policies that can be fostered for equity.

- One is to identify the equity groups – and disaggregated members of those equity groups - that are the most severely underrepresented and prioritize their hiring and promotion. In the *Royal Commission Report on Equality in Employment*, Justice Abella argued that “[i]n devising ameliorative programs ... the emphasis should be on concentrating efforts on those minorities in those regions where the need has been demonstrated.”⁴²⁷
- Another is to ensure that hiring committees are themselves equitably inclusive, well trained to consider a range of expertise and experience and to understand the essential qualifications of the position.
- Yet another, discussed below, is to pay attention to the qualification standards.

Qualification standards

The task force received submissions encouraging the use of the Treasury Board Secretariat’s qualification standards for the core public administration by occupational group or class, developed

and maintained by the Office of the Chief Human Resources Officer pursuant to Section 31(1) of the *Public Service Employment Act*. Section 31(2) clarifies that they are the standards that must be met or exceeded under Section 30(2). They are, in other words, at least the essential qualifications. The qualification standards are meant to apply to all appointments, as well as to all intra-group and inter-group deployments from separate agencies with some notable exceptions for student employment programs, acting appointments of less than 4 months, casual employment and part time workers (less than 12.5 hours per week).

Qualifications standards are expected to be applied in relation to the Appointment Policy.

The qualification standards were acknowledged by stakeholders to limit the discretion of hiring managers. However, they were considered to hold the potential to reduce other systemic barriers. For example:

- They might address foreign credential recognition with a process enabling candidates to provide proof of Canadian equivalency when applying for a job in the federal public service
- They might support a process of identifying a number of employer-approved alternatives to formal educational credentials, and
- They might support ways to sustain equitable inclusion in situations of workforce adjustment

Crucially, Section 31(3) of the *Public Service Employment Act* as recently revised calls for biases and barriers to be identified when the qualification standards are being established or reviewed. If a bias or barrier is identified, the employer “shall make reasonable efforts to remove it or to mitigate its impact on those persons.” We heard little about how barriers were being identified across employment systems within the federal public service but this dimension is crucial to rethinking appointment processes.

Let’s be clear: qualification standards are not a panacea. The expectation is that they will help to curtail wide discretion.

A caveat is required, moreover: This is not about levelling down.

The goal is to foster workplace flourishing of all, including members of employment equity groups. By creating conditions that are equitably inclusive, we help workers to learn and thrive in a supportive and sustainable workplace.

Our task force was informed that discretionary appointments are based on the interpretation in Section 30(4) of the *Public Service Employment Act* to the effect that “[t]he Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.” We were concerned that the interpretation of merit in Section 30(4) of the *Public Service Employment Act* should be tightened. While no one should be interviewed simply to “accompany” the person who is to be selected, the word “consider” suggests the appointment could be made with no competition whatsoever. We recommend tightening this language to ensure that appointments based on merit occur through competitions with equity resolutely built into those competitions.

Recommendation 4.11: Section 31(1) of the *Public Service Employment Act* should be changed from permissive to a requirement.

Recommendation 4.12: The qualification standards should be established through meaningful consultations with the Joint Employment Equity Committee.

Recommendation 4.13: The interpretation of merit in Section 30(4) of the *Public Service Employment Act* should be tightened, notably through attentive use of the Public Service Commission’s general regulatory powers in Section 22(1), to ensure that appointments based on merit occur through competitions assessed by committees composed in consultation with the relevant Joint Employment Equity Committee(s).

Recommendation 4.14: The language of “right fit” should be abandoned in the Public Service of Canada in favour of a concept that communicates an equitably inclusive approach to appointments.

Features of the work lifecycle

What allows us to identify the conditions that enable workers to thrive across the employment lifecycle? We are told of the negative case: could employment equity policies set members of equity groups up to fail? A literature has developed that frames these concerns in terms of the abilities of group members, and the stress imposed on them to succeed. Failure, it is argued, will simply reinforce negative stereotypes.⁴²⁸

What tends to be missed is what it means to walk into a workplace knowing that as a member of communities that have been underrepresented, you bear the onus of proving that you belong and that you are worthy, over and over, sometimes under unequal conditions.

Paradoxically, moreover, for employment equity group members, to be perceived as confidently qualified can actually be threatening to others who may hold conscious or unconscious biases about members of the group. A team of scholars led by award-winning psychology professor, Dr. Kecia Thomas, has surveyed Black women in the United States, and found that early in their careers they might benefit from mentoring support from those already in the workplace, often white men. However, as they became more confident and competent, the attitudes of their mentors changed and they even experienced hostility. They went, in Dr. Thomas’ words, from “pet to threat”.⁴²⁹ This research has been widely recognized as identifying a significant barrier to promotion and retention. It is revelatory because it shows what a wide range of organizational reactions there might be to the success experienced by members of employment equity groups.

Success by historically underrepresented groups may destabilize deeply held perceptions that are also exclusionary ideas about merit.

Rather than earn greater acceptance and inclusion, employment equity group members may face fear, resentment and exclusion.

Finally, researchers caution that there is much we still do not yet know.

Some call in particular for more research into how 2SLGBTQI+ inclusion is understood and experienced in the workplace context. Pointing to the notion of “gay-friendly” organizations, for example, they ask whether the existing research sufficiently considers employment practices that affect transgender workers.⁴³⁰ An intersectional and distinctions-based approach is necessary within this category as well.

Employment equity’s important task is not to reinforce this narrative, but rather to change it.

Employment equity is meant to turn our gaze instead to the quality of the receiving environment. This is not a matter of blame or intent. It is rather about proactively building supportive and sustainable workplace environments.

Recommendation 4.15: Section 6(c) of the *Employment Equity Act* should be abrogated.

Barrier removal in job classification

There is an extensive literature on the origins of workplace job requirements and classifications, evaluations and related human resource management practices. Consider how job profiles were developed. The profiles themselves were created prior to the Second World War, enabling managers to explain and compare job hierarchies and pay on an objective basis. The models were those that predominated at the time. It is now broadly accepted that they reflect the norms that were prevalent with the emergence of an early to mid-20th century modern employment workplace. Those norms were overwhelmingly male. They excluded many workers who comprise employment equity groups.⁴³¹ Human rights legislation and complaints procedures were necessary to begin to challenge the norm, but those challenges happened after the fact – the hospital scenario.⁴³²

In workplaces like factories that were organized with vertical reporting and promotion hierarchies, job classifications, evaluations and related human resource management practices explained and justified increases in pay and hierarchy based on assessments of the basic requirements and skill required to perform the job. Even under the traditional models, it was understood that workers were largely evaluated based on features like punctuality and dependability – the “good worker” - alongside criteria most directly related to productivity.

Being recognized as a good worker, awarded merit increases and having a record carry forward – often through seniority-based systems – for promotions, is an important part of the assessment of a “meritorious” or to use a related term, “fair” employment process. For many, educational requirements prior to the job would be minimal and training and learning on the job could be expected.

In contrast, job classifications for positions were typically held by women or associated with women, have been criticized for failing to recognize and adequately value work done by women, or how women might execute those jobs differently, but also well. Recent cases in Ontario on midwives show the failure to value work that is overwhelmingly performed by women and other employment equity group members.⁴³³

Similarly, employers’ search for “soft skills” in job applicants can make comparison difficult. Depending on how they are assessed, they can have a disproportionate effect on members of equity groups. For example, the Canadian Human Rights Tribunal in the *National Capital Alliance on Race Relations* employment equity case found that public service managers in Health Canada were assuming that certain soft skills were found in some “cultures” rather than in others, and deciding on that basis that some visible minorities were less well qualified to be managers.⁴³⁴ Moreover, some researchers have worried that the non-discriminatory hiring practices that were emerging when employment equity was first introduced might actually become less prevalent or replaced in the face of an emphasis on “soft skills”.⁴³⁵

Chapter 4: Strengthening implementation: The barrier removal pillar

Some employment equity groups, and in particular the Community of Federal Visible Minorities, recommended that government should work with bargaining units to ensure that jobs are appropriately classified in a manner that does not embed disadvantage. This proposal is a reminder of the importance of strengthening the meaningful consultations pillar.

Finally, the task force was warned against the perils of creeping credentialism – if the bar is continuously raised when pools of candidates are being diversified, employers may wind up excluding a diversity of candidates who are perfectly able to perform the requirements of the job on entry or on promotion.

Barrier removal in the recruitment and onboarding processes

On several occasions when our task force asked about barrier removal in the application process, we were met with examples of individual reasonable accommodation. Yet the assessment and appointment stages are moments of significant vulnerability for applicants.

It is not hard to imagine that an applicant might request minimal accommodations, if at all.

Ideally, the workplace would already have identified the most common barriers and eliminated them. For example, the employer might already have ensured that job advertisements were available in accessible formats and posted on accessible websites. The employer might have thought to announce that they have a fragrance-free work environment rather than wait for an applicant with environmental sensitivities to have to ask.

The Government of Canada's *Directive on the Duty to Accommodate* took effect on 1 April 2020. It reaffirms the right to accommodation that applies to all protected groups under the *Canadian Human Rights Act*, and that appropriately frames individual accommodations as occurring “when barriers cannot be removed”.⁴³⁶ That policy sets out a series of mandatory procedures that apply to candidates seeking employment.

The Public Service Commission notes that accommodation services requests decreased in 2020-21 and mentions receiving 621 requests compared to 3160 in 2019-20.⁴³⁷ It would be useful to know how many of those who *requested* accommodations were actually hired. While the percentage of public service appointments of persons with disabilities exceeds the percentage of applicants, this seems attributable to persons with disabilities hired into non-advertised positions and regrettably the reporting leaves it unclear how many of these appointments are temporary.⁴³⁸ If the number of people who requested accommodations and were hired into permanent jobs is high, it could instill greater confidence in applicants. If the number is low, it could be a signal to review policies.

The Public Service Commission's 2020-2021 report informs the public that although 4.4% of applicants for jobs in the federal public service were persons with disabilities and after the automatic screening, 4.7% of the applicants remained persons with disabilities, by the assessment stage the percentage was down to 3.6% and only 2.4% of the hired employees were persons with disabilities. The 2021 Public Service Commission's audit recognized the need to “better understand accommodation services for assessment” and called for further examination.⁴³⁹ In the annual report, the Public Services Commission acknowledged that biases and barriers need to be identified and removed.

That persons with disabilities fared better on automated screening and organizational screening than at the assessment stage and that the already small numbers of appointments were halved rather than increasing for women with disabilities suggests that “much needs to be done to ensure that barriers and biases are identified and eliminated.”⁴⁴⁰

It is especially challenging but necessary and required by the accommodation policy to identify systemic factors that could be revised proactively, so that the burden is not systematically placed on individual applicants to seek adaptations at the assessment and appointment stage. For example, the Office of Public Service Accessibility recommended that right from the start, employers should ensure that software used in application processes is itself accessible rather than wait for a potential applicant to request accessible software. The recruitment processes themselves need to be inclusive.⁴⁴¹

Similarly, we received submissions that pointed to the importance of ensuring that there is universal washroom access to ensure that non-binary, and gender-non-conforming applicants and workers do not have to seek individualized accommodations in the face of a barrier that affects their health and safety in the workplace, and basic human dignity.⁴⁴²

Other kinds of barriers include “proxy” discrimination. Applicants may be screened out based on their home address in their curriculum vitae, or an accent detected by an interviewer over the phone.⁴⁴³ A study undertaken by the Québec *Commission des droits de la personne* in 2012 established a statistically significant difference in discrimination based on the name of the applicants. Noting the significant unemployment rate of Québec-born racialized groups, it sought to understand whether racial discrimination at the stage of applications for employment occurred. It adopted a deceptively simple methodology: it sent substantially similar curriculum vitae to employers in the greater Montreal area across a range of sectors and in highly skilled and low skilled occupations, essentially varying only the applicant’s name to reflect names that would suggest African, Arab or Latin American applicants. Someone with the last name Tremblay might be 1.54 to 1.80 times more likely to be called back for an interview than someone with the last name Traoré.⁴⁴⁴

In our extended engagements, similar concerns were raised about the application prospects of workers from the 2SLGBTQI+ communities:

There needs to be a real understanding of how homophobia and transphobia can look like on someone's resume or job application, and understanding what employment barriers 2SLGBTQI+ folks face. These challenges can be addressed by not seeing gaps in employment history or shorter term employment periods as a negative and providing more mentorship to these candidates.

*The Enchanté Network, The Employment Equity Act and 2SLGBTQI+ Communities,
Extended Engagement Report to the EEART, August 2022 at 10*

Psychometric or behavioural tests may be used in some workplaces. They not only assess aptitude. They can also be used to try to get around problems of under-representation. In other words, and according to the Diversity Institute, these forms of testing might be drawn upon to assess aptitude for the job where members of employment equity groups in the place of requiring certain degrees or even certain kinds of experience.⁴⁴⁵ This research was in early stages, and we were not able to gain a sense of whether this was highly experimental or more broadly used. A concern would be to avoid the situation in which the testing became an additional hurdle rather than an alternative.⁴⁴⁶ Reliability of

Chapter 4: Strengthening implementation: The barrier removal pillar

the testing would also need to be questioned. This comes down to the familiar: to identify, remove and indeed avoid adding new barriers, workplaces need to pay attention to identifying and sticking close to the essential criteria for the job.

Finally, as was alluded to in Chapter 1, care should be taken to evaluate the impact of executive recruitment firms. We know that one of the stickiest representation challenges for employment equity groups is at the top: making sure that the work of executive recruiters fosters equity – rather than reinforces hierarchy – should be one of the features of an employment systems review.

Barrier removal on the job: Workplace harassment and gender based violence

Anti-harassment policies should address three broad actions to address harassment in the workplace: prevent, respond, support.

Unifor, Strengthening the Federal Employment Equity Act: Unifor's Submission to the Federal Employment Equity Task Force, April 2022 at 10

Workplace harassment on the basis of grounds of discrimination, including sexual harassment and other forms of gender-based violence and unwanted sexual behaviour constitute a readily recognized example of workplace barriers. The effects are broadly-based, and affect all genders, if differently, but the severity is extremely clear:

While men (56%) were slightly more likely than women (53%) to witness inappropriate sexual behaviour in their workplaces, the opposite was true when it came to personally experiencing this type of behaviour. Three in ten (29%) women were targeted by inappropriate sexual behaviour in a work-related setting compared with 17% of men.

Furthermore, the prevalence of experiencing inappropriate sexual behaviour in the workplace was highest among women who stated that they worked in a male-dominated environment (i.e., their co-workers were all or mostly male). Four in ten (39%) women working in a male-dominated environment were personally targeted by unwanted sexual behaviour, compared with 27% of women working in a female-dominated environment and 28% working in an environment that was about evenly distributed. For men, the prevalence of inappropriate sexual behaviour was highest among those who worked in a female-dominated environment (24%), and was similar for men working in a male-dominated environment (16%) or a workplace that was evenly divided (15%).

[I]hose who were physically or sexually assaulted in any setting were asked details about the most serious incident, including whether or not it occurred at their place of work. The proportion of victims who stated that the most serious incident they experienced had occurred in their workplace ranged from 18% of women and 21% of men who were sexually assaulted, to 26% of men and 29% of women who were physically assaulted.

Adam Cotter and Laura Savage, Gender-based violence and unwanted sexual behaviour in Canada, 2018: Initial findings from the Survey of Safety in Public and Private Spaces, Statistics Canada, 5 December 2019, at 3, 13-14. This study includes some data by age and SOGIESC

Harassment and violence at work is understood to exclude, that is “to intimidate, discourage, and keep women out of traditionally male fields of employment.”⁴⁴⁷

This is true too in the federal public service: in 2020 more than 1 in 10 employees (11%) in the federal public service indicated that they had been the victim of on-the-job harassment, in almost 2/3 of the cases (62%) the source was an individual of authority. Yet only 8% filed a grievance or formal complaint and 27% took no action.⁴⁴⁸ What happened to the remaining 65% who apparently took some action, but did not formally complain or grieve?

The 2015 *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces* undertaken by the Honourable Marie Deschamps and discussed in greater detail below acknowledges the major disincentive for complainants to come forward if harassment complaints are addressed at the lowest level without escalation. Focusing on early settlement and restoring workplace harmony might have been thought of by managers as a “laudable goal”. But for the workers who complained, they might have felt intimidated into not pursuing their legitimate concerns.⁴⁴⁹

In the wake of the ILO *Violence and Harassment Convention, 2019* (No. 190), which Canada has ratified early in 2023, necessary attention is being turned to the relationship between one or more unacceptable behaviours and practices or threats that aim at or result in physical, psychological, sexual or economic harm, and that include violence and harassment directed at or disproportionately affecting persons because of their sex or gender. These are interrelated with the world of work, and Canadian labour, employment and human rights law is increasingly recognizing amongst other features, the need to prohibit violence and harassment, adopt a comprehensive strategy to prevent it, including mitigating the impact of domestic violence on the world of work. Barrier removal through employment equity has an important role to play in this comprehensive approach.

The framing of protection against violence and harassment at work situates them within the context of workplace health and safety obligations. Employers have the duty to protect their employees’ mental and psychological health at work.

Recommendation 4.16: The *Employment Equity Regulations* or guidelines prepared under them should ensure that employers report on workplace harassment and violence policies and their preventative actions.

Barriers throughout the work lifecycle: Facades of conformity, mental health, and authenticity

Our task force heard over and over that employment equity group members want to be able to bring their authentic selves to the workplace.

Studies on authenticity are reminding us that the people who have been well represented in the workplace are the people that the workplace norms are built around. Logically, then, there is more room for them to be their authentic selves at work than members of some of the employment equity groups. In other words, while some already have the privilege to be themselves in the workplace, members of employment equity groups may struggle to fit in.⁴⁵⁰ This affects all aspects of the workplace lifecycle. We need to encourage processes of change that ensure that barriers to bringing authentic selves to work are removed.⁴⁵¹

There are many ways that workers from employment equity groups can be made to feel like they fall outside of workplace norms and must conform to fit in and survive. They may range from matters as basic as consistent overtime, which might interfere with significant family-related commitments,⁴⁵² and given the data presented in Chapter 2, have a disproportionate effect on women workers with care responsibilities. Widely held workplace norms that consider natural Black hairstyles to be unprofessional can be barriers to recruitment and promotion, despite growing evidence that chemical hair straighteners are linked to uterine cancer.⁴⁵³ Workplace pressure for women to dye greying hair is another example. Our task force was reminded that not all accents are treated equally in the workplace. Pressure – including perceived pressure - to adopt a name or an accent that sounds “Canadian” may be part of a similar pattern of performing to a norm that may stand in the way of workplace authenticity. These may be types of “inauthentic self-preservation” in the workplace.⁴⁵⁴ They reinforce stereotypes and can stand in the way of meaningful workplace inclusion.

We want to be black and to be queer without being subjected to micro and macro aggressions, without necessarily having a burden to lead equity, diversity, inclusion work in the workplace. We don't want to stand out as an oddity or a special case, or even a celebrated case, because of the bravery or courage, or challenge of their lives. Individuals want to be their authentic selves in the workplace...

Survey Respondent quoted in Dr. Harvi Millar, Reimagining the Employment Equity Act: Making it Work for Black Canadian Employees, Enhanced Engagement Report for the EEART, 20 July 2022 at 76

The studies on “facades of conformity” are evolving. They are beginning to tell us that when people want to but cannot bring their authentic selves to work, when there is a “conflict between their expressed and felt values,” when they are concerned that being authentic will affect their career progression, they may experience psychological and emotional distress.⁴⁵⁵ This does not mean that disclosure leads to positive outcomes, though. In an unsupportive workplace, revealing the information may also lead to psychological and emotional distress.⁴⁵⁶ As so many of the people who appeared before the task force told us, there may well be good reasons to be cautious. But even in the bad news, there is hope for change: one study suggested that those who disclosed and lost a job were more fearful of disclosing, but also more likely to disclose.⁴⁵⁷

Equity group members may decide that resistance to exclusionary norms and insistence on authentic inclusion is necessary. Can employment equity help to lessen the cost, by enabling workplaces to be more supportive of workers bringing their authentic selves to work?

Authenticity is associated in the research with general well-being. Authenticity and work engagement are also related: workers may feel they can draw fully on their personal energy and strengths in the workplace context. Their intersectional identities as Indigenous workers, women workers, racialized workers, 2SLGBTQI+ workers, disabled workers are not devalued. They do not feel like they have to hide dimensions of who they are to try fit in or “pass”. When workers can behave authentically, they tend to perform well.⁴⁵⁸

Reducing barriers supports workers’ ability to bring their authentic selves at work, and this can benefit us all.

Barrier removal on the job: Performance evaluation, access to training and career progression

The EEA is implemented at the hiring level, but not to the life cycle of employment, which prevents Indigenous peoples' access to positions in senior management.

Public Service Employee, Member of the Federal Indigenous Employees Network, 10 May 2022

Repeatedly we were told of the unequal distribution of leadership opportunities for members of employment equity groups, and within subgroups. The concerns expressed matched the numbers.

In the core administration of the federal public service, as of March 2021, there were 6,717 executive positions.

- Only 297 of those positions, or 4.4%, were held by First Nations, Métis or Inuit employees.
- Only 128 or 1.9% of those positions were held by Black employees.
- The total number of racialized employees holding those positions was 830, or 12.4% the total number of executives.
- Disabled persons, at 377 employees represented 5.6% of the total.
- Women as a group were in a majority position (52.3% or 3, 513).

While the Office of the Auditor General reports that racialized minorities are represented beyond their workforce availability, they are “significantly underrepresented” in the highest salary bands and the number of senior managers was suppressed to preserve confidentiality because it was too small. The numbers were also suppressed for Indigenous persons (2.5% overall) and persons with disabilities (4.9% overall). This is in a key governmental workplace, the Office of the Auditor General, which alone has 791 employees.

We heard a lot of concern about access to executive (EX)-level employment in the federal public service. Some unions conceded that there was potential for employees to gain valuable learning experiences through temporary appointments. But most acknowledged that temporary appointments could be a source of concern given the wide discretion available to employers. The Public Service Alliance of Canada called for greater equity oversight.⁴⁵⁹

Our task force was provided with numerous examples of how equity groups might face “unconscious demotion”, that is what Suzanne Wertheim refers to as the patterned, often stereotypical assumptions that lead to a failure to recognize a person at their correct occupational status. Assuming a Chinese woman judge is a court stenographer, assuming a Black male doctor is an orderly, assuming an Indigenous two-spirit professor is a student: these are examples of how unconscious bias works. The individual “mistakes” can reflect systemic problems that prevent employment equity group members from progressing at an equitable pace in their workplaces. They can lead members of equity groups to repeatedly feel they need to prove their value, and to avoid certain events that may be career enhancing because of the psychological toll.⁴⁶⁰

The conclusion that action is widely needed on promotions, access to training and retention is inescapable. The 1997 *National Capital Alliance on Race Relations v. Canada (Department of Health & Welfare)* employment equity case before the Canadian Human Rights Tribunal is an important example of how specific barriers were identified and measures were proposed to remove the barriers

Chapter 4: Strengthening implementation: The barrier removal pillar

throughout the employment lifecycle. The decision took a close look at training, career development and promotion.⁴⁶¹

Moreover, if the low skill jobs in which women predominate are not only less well remunerated than men's but also offer fewer opportunities for on-the-job training that gives workers greater access to internal job mobility, broader barriers to promotion and movement will persist in the labour market. Professor Marie-Josée Legault's study is one of the rare inquiries into the potential for employment equity to remove barriers to progress in employment for low wage women with lesser educational levels. She urges policymakers to pay attention to the barriers affecting low wage women.⁴⁶² This concern, when approached intersectionally, helps to turn attention as well to the underemployment of women who might, for example, be new immigrants or racialized.

Barrier removal on the job and for retention: Inclusive benefits packages

The inclusiveness of benefits packages should be part of the employment systems review process. Our task force heard that coverage for sick leave and leave to care for dependents, employee assistance programs and long-term disability are matters of concern for workers generally, and may have a disproportionate impact on members of employment equity groups.

Recommendation 4.17: The *Employment Equity Regulations* or guidelines prepared under them should provide for workplace benefit packages to be considered in the employment systems review process.

The importance of collective bargaining processes and agreements to securing this important feature of equitable inclusion is internationally recognized, borne out in Canada, and addressed by our task force in Chapter 5.

Barriers to retention and career progression in the federal public service: Official language training

There is a perception that racialized people do not have linguistic competency in both languages. Racialized people perceive that they have less access to official languages testing and learning opportunities that should be evaluated as a barrier to employment and promotion. Despite specific policy provisions allowing prioritization of racialized employees, access is limited by management discretion. Specific programs should be developed to ensure adequate access.

Natural Resources Canada, Written Submission to the EEART

We noted with concern that “official language requirements” were repeatedly framed as barriers in the federal public service.⁴⁶³ Yet official language requirements reflect a significant government commitment to a bilingual Canada.

This was discouraging, as there is much that can be done in a public service to facilitate active bilingualism in the public service workplace, which benefits all Canadians. Official language requirements reflect an important government priority, reaffirmed in the most recent 2023 federal budget. It is imperative to put the means behind language training to ensure that inequitable access to training does not have an adverse impact on employment equity group members.

The Interdepartmental Circles on Indigenous Representation in its 2017 report focused precisely on access to language training.⁴⁶⁴ For some groups this included language training for newly recruited employees who may require early support to help to close the gaps, or those who are in regions.

We were also troubled by the suggestion in several submissions and consultations that official language training requirements might be approached unevenly through the exercise of managerial discretion. We heard that providing official language training is a significant financial commitment within government, as the training can require 18 months of salary.

One written submission suggested that for disabled workers with profound hearing impairments, accommodations might be needed to the requirement to become proficient in both official languages. Like so much of the work on equity, this requires asking whether the barrier is the way in which the disability is understood: might the official recognition of Quebec Sign Language (LSQ) and American Sign Language (ASL), not enhance our understanding of bilingualism and help to foster inclusion? Context matters. And so too does carefully framing of the barrier matter, so that it can be eliminated.

Equitable access to official language training by employment equity groups has emerged as an issue that warrants close policy attention. There should be meaningful consultations with bargaining agents to ensure that language training is actually available to members of employment equity groups in a manner that does not impose other barriers due to work overload or scheduling.

The task force was also concerned to ensure that there is support for a deeply related objective, that is ensuring a supportive approach that ensures that meaningful consultations be undertaken with First Nations, Métis and Inuit peoples to ensure that Indigenous languages are valorized in the workplace.⁴⁶⁵ According to the 2021 Census, of 1.8 million Indigenous people in Canada, only 237,420 can speak an Indigenous language well enough to conduct a conversation. A 2016 national survey conducted by the First Nations Data Centre found that although proficiency in a First Nations language was low amongst youth, of those who had some knowledge of a First Nations language nearly half could understand and speak a few words (48.2%), while one quarter were fluent or had intermediate proficiency (23.8%).⁴⁶⁶ For First Nations adults, close to 75% reported the perceived importance of understanding and speaking a First Nations language.⁴⁶⁷

Should we not at this stage in our country's trajectory be able to embrace ways to honour, promote and value Indigenous languages?

Some Indigenous employees in the public service expressed their choice to work to preserve and strengthen their Indigenous languages, to be able to transmit their language to their children and communities. The task force was told that those who delivered services in their Indigenous languages, notably in the North, should have that skillset valued and remunerated, rather than taken for granted.

Some Indigenous partners who presented to the task force also expressed concern that the *Indigenous Languages Act* does not render Indigenous languages official languages in Canada. The legislative framework states that it facilitates the effective exercise of the rights of Indigenous peoples that relate to Indigenous languages, including cooperative measures and agreements, while acknowledging and preserving a range of rights.⁴⁶⁸

Chapter 4: Strengthening implementation: The barrier removal pillar

For our purposes in this Report, the Interdepartmental Circles on Indigenous Representation had a concrete and fitting ask that would be part of a broader package of transformative change: compensating Indigenous language users in positions where Indigenous language use is required or an asset.⁴⁶⁹

Recommendation 4.18: Urgent policy attention should be devoted to assessing the distribution of official language training opportunities to ensure that they are made available to employment equity group members in the federal public service, without discrimination.

Recommendation 4.19: Meaningful consultations should be undertaken between the federal government and First Nations, Métis and Inuit peoples with a view to establishing a national Indigenous languages allowance within the federal public service to acknowledge and compensate Indigenous language users in positions where Indigenous language capacity is required, recommended or relied upon.

Barrier removal for retention – Understanding separation

Exit interviews are an important EDI tool for understanding the reasons for departure. In the federal public service, although hiring falls under the Public Service Commission while the TBS-OCHRO has responsibility for terminations, the ability to speak across the divides and learn from the reasons why public servants from equity groups are leaving seems to warrant attention.

Important as these exit interviews are, they come at the end of the work relationship.

Part of the accountability is to those who leave. Exit interviews should be conducted so that they ensure senior level accountability. But we cannot afford to be naïve and forget that sometimes, the reason why members of employment equity groups are leaving may be well known. The key is accountability. And accountability must be balanced with ensuring that the departing workers feel able to tell their story.

The Interdepartmental Circles on Indigenous Representation have called for exit interviews for Indigenous workers to be conducted with an Indigenous person who is not immediately linked to their work environment.⁴⁷⁰ The exit interview could be conducted by one or more member(s) of the joint employment equity committee proposed in Chapter 5. There is an opportunity to vest this responsibility in a new but important vehicle for transformative change – the recommended deputy employment equity commissioners or ombudspersons discussed in Chapter 6. The departing employee might be permitted to be accompanied by a representative of their choosing. Ultimately the takeaway at this point is that exit interviews are a crucial feature enabling workplaces to identify and address workplace barriers.

Some of the workplace assumptions that prevailed in 1986 when the first *Employment Equity Act* was adopted have of course shifted. There have been shifts in the understanding of the employment relationship and whether workers plan to build a career in one workplace, although it is important not to overstate them. Substantive equality in the workplace requires us to pay attention when underrepresented group members leave. Maybe they were very happy but found better opportunities

elsewhere. But maybe they were not. Disparity in separation is something that employment equity data collection allows us to track.

But when you have small numbers, that exercise will be imperfect. What can be done?

When you have small numbers, each loss, each hire, and each promotion matters.

Katie Wullert, Shannon Gilmartin & Caroline Simard, "The Mistake Companies Make When They Use Data to Plan Diversity Efforts," Harvard Business Review, 16 April 2019

More precisely, what can be done with small sample sizes? Does it mean that factors cannot be identified?

Important research on equity practices suggests otherwise. How employers use quantitative data to identify and remove barriers has also become the basis of scrutiny. It makes sense to be cautious of small numbers. But a 2019 Harvard Business Review article, drawing on an example from the separation/ retention stage, urges employers to be more specific about the kind of claims that can be made, based on the small numbers:

When an organization has data on their full population, however, small samples are not an issue for identifying patterns. Understanding descriptively what's going on with your employees doesn't require inference from a sample to a population. Say, for instance, that of the 40 Black women in a hypothetical organization in 2017, 15% or 6 people, left the company by 2018. This is enough information to see that you might need to pay more attention to retaining black women.

Now say that the attrition rate for women *on average* in the organization is 6%. If the company just focuses on the aggregate, the difference in attrition rates among smaller groups gets obscured. The interpretation goes from "the turnover of black women is alarming" to "our company has a low attrition rate for women." This can harm future retention efforts.

When you have small numbers, each loss, each hire, and each promotion matters.⁴⁷¹

In other words, the small sample size means that the full story cannot be captured by statistical data alone.

With small numbers, it is necessary to analyze and understand what is happening, and what can be done to change patterns, including by considering the effect on those who remain. Interviews – including exit interviews – are one important tool to identify and remedy the barriers.

Some stakeholders asked for greater attention to be paid to ensuring that members of equity groups, especially those who are new immigrants, be given attentive onboarding, alive to the fact that their work experience in Canada is limited and that some expectations might need to be explained explicitly. We received various versions of this comment across employment equity groups: that fostering equitable inclusion requires a degree of flexibility, mutuality and even, grace, in order to welcome workers with diverse lived experiences in their full humanity and foster their flourishing. This,

fundamentally, seems the kind of transformation that is in line with how Canadians want to see ourselves in the world, including the world of work.

The potential barrier of artificial intelligence

Workplaces are increasingly moving to incorporate new technological innovations, in some cases automating tasks and altering skills required in some employment.⁴⁷²

The ability of artificial intelligence to embed structural disadvantages precisely by relying on and even amplifying existing social inequalities is the reason why a substantive equality approach is necessary.⁴⁷³

The key take away is that technology is not neutral. In workplaces covered under the *Employment Equity Act* framework, we should be careful to ensure that artificial intelligence-based solutions do not simply mask persisting or deepening bias. There is nothing inevitable about this outcome. A barrier-removal approach grounded in substantive equality remains an important method for achieving and maintaining employment equity.

Unifor recommended that an Employment Equity Commissioner should be responsible for developing standards notably for online job boards and recruitment and hiring agencies. Their concern was to ensure that employment equity objectives are strengthened rather than hindered.⁴⁷⁴

Our task force agrees that the ability to develop nimble, context sensitive guidance over time is the way to approach these issues. We recommend that the use of artificial intelligence in recruitment or other forms of worker evaluation or assessment should be monitored for potential biases and reported upon in employment systems reviews, with suitable guidance.

Recommendation 4.20: The *Employment Equity Regulations* should provide for the use of artificial intelligence in recruitment or other forms of worker evaluation or assessment to be reported upon in employers' employment systems reviews.

Recommendation 4.21: Guidelines and training should be developed and updated by the Employment Equity Commissioner, including on artificial intelligence use across the employment lifecycle with particular attention to recruitment and hiring.

Promising practices on eliminating barriers to employment

There is a lot of busy work around Equity, Diversity and Inclusion. Task force members heard a lot about it. We also heard from employment equity groups that some of the initiatives were yielding skepticism and downright discouragement when they were not accompanied by actual change in representation. It may be great to commemorate Black history month or women's history month or attend a Pride parade. But concrete barrier removal within the workplace has to be prioritized.

We cannot jump to the solutions if we do not really understand the problems. Too many of the EDI-based activities offer solutions without analyses of the problems. And after 37 years, if we are not doing better on representation, we have not really understood the problem.

That is why this chapter spends so much time framing the barriers. **But the point is not to recommend specific practices or approaches.** Barrier removal is context specific. Its goal is to help

employment equity's numerical goals to be realized. To prevent the revolving door, where separation rates are higher than recruitment and promotion rates.

The following promising practices are therefore offered not as a checklist, nor as one-size-fits-all solutions, but as examples of how some actors in some sectors – within and beyond Canada – are trying to root out some systemic barriers through proactive means.

- The task force heard of proactive measures to remove bias from recruitment practices such as resumes that remove demographically identifying data.
- We learned of the success of auditions by musicians that were conducted behind a screen, so examiners could evaluate the performers only based on what they heard.⁴⁷⁵
- The Diversity Institute mentioned scholarship programs in the underrepresented aviation sector offered to Indigenous students through Indspire to enable them to become pilots.
- We learned of a pre-employment training initiative, Pilimmaksaivik, which recruits Inuit workers for professional placements in federal departments and agencies in Nunavut. It includes a 2020 working group co-chaired by OCHRO and Pilimmaksaivik that is working on the incentivization of the use of Inuktitut and whether that could enhance Inuit representation in the federal public service.⁴⁷⁶ It notes that in negotiating a joint committee on Indigenous languages with the Treasury Board, the Public Service Alliance of Canada (PSAC) affirmed that it “expects that the results of this joint review will support our standing demand for an Indigenous languages allowance, consistent with the Truth and Reconciliation Commission’s Call to Action.”⁴⁷⁷ Some of these promising practices address hiring in relation to the Nunavut Land Claims Act, and focus on finding ways to enable Inuit workers to be hired through a focus on the ability to do the job, and not necessarily on the ability to meet qualifications on paper.⁴⁷⁸
- The Interdepartmental Circles on Indigenous Representation have called for anti-racism, anti-discrimination, anti-harassment and bias free expectations of conduct to be integrated into the competency profiles for all public servants, and for them to become a part of ongoing performance expectations.
- Australia has introduced a “guaranteed interview” approach. The idea of the “guaranteed interview” requires a commitment from employers to guarantee to include in its short list for interviews one or more applicants with disabilities who meet the inherent requirements for the job vacancy. This promising practice avoids charges of tokenism because short listed applicants meet the inherent job requirements. It has been instituted in a number of search processes for the range of equity groups in different employment sectors. It offers a proactive means to challenge unconscious bias, ensuring that selection committees look more closely at applicants from equity groups. It is also a practice that can be the basis of reporting to monitor compliance.
- Requests might entail requiring extra time to complete a test, or permitting a text to be taken orally, or having a reader or a scribe. But imagine if some of the norms about test taking were simply rethought – imagine if, with due regard to essential job components as well as to technological advances, tests were routinely made available in formats that allowed the test taker to decide whether to read or have a computer read the test to them, possibly through increased reliance on e-recruitment as is the case in New Zealand.⁴⁷⁹ With technological advances, the possibilities may increase.
- Across the employment lifecycle, the federal public service has introduced workplace accessibility passports. The passports enable an employee to share information once. The

information then travels with the employee across government. With due regard to privacy protections, this initiative can foster inclusion and reduce the requirement to repeat certain kinds of accommodations on a perpetual basis.

- To create accessible workplaces in the federal public service, the task force was informed of the Centralized Enabling Workplace Fund, described as follows in the Accessibility Strategy for the Public Service of Canada:

What we are doing

Through the Centralized Enabling Workplace Fund, develop a government-wide approach to address workplace adjustments

As part of the Government of Canada’s accessibility agenda, \$10 million over five years (from the 2019 to 2020 fiscal year to the 2023 to 2024 fiscal year) has been allocated for the Centralized Enabling Workplace Fund.

The fund was created based on recommendations made by the Persons with Disabilities Chairs and Champions Committee. It will be managed by OPSA and will:

- develop and implement an employee passport that:
 - documents needs
 - facilitates conversations with managers and corporate services
 - tracks actions
- “travels” with employees when they change positions
- research and assess best practices from public and private sector jurisdictions, and experiment with innovative approaches to workplace adjustment
- create a centralized “library” of adaptive devices and services to provide quick access to assistive devices to new employees (student, casual and term employees)
- implement training and tools to support culture change within the public service, and
- implement other initiatives such as pilot projects to examine whether they have the potential to be applied government-wide

Treasury Board of Canada Secretariat, “Goal 1: Employment – Improve recruitment, retention, and promotion of persons with disabilities” in Accessibility Strategy for the Public Service of Canada (07 May 2020)

- Some submissions stressed that the pandemic has brought new understandings of the potential to do things differently. Working at home is one example. Lessons may be learned about whether working at home may increase accessibility for some persons with disability, or reconcile some First Nations, Métis and Inuit workers’ preference to stay close to their land. Some reports conducted during the pandemic suggest that workers who have faced discrimination in the workplace may prefer to work from home.⁴⁸⁰ Lessons should be evidence-based, and will depend on a range of contextual factors across distinct sectors and

industries. We heard from some stakeholders that internet access remained a barrier for many in remote Northern communities. Submissions mentioned the mental health concerns that may arise from social isolation for some who work at home.

- The task force was also interested in an emerging standard practice for executive-level recruitments: reliance on external firms. The talent recruited by executive recruitment firms typically become employees of the organization, often at the highest levels. But for employment equity, it is crucial to be able to assess the impact on the workplace of both. Do they facilitate employment equity or constitute barriers?
 - Some take responsibility for identifying and even pre-selecting candidates. Some specialize in finding candidates from equity groups. Some market their ability to draw in diversity as part of their strength. But we know very little about these practices.
 - In its horizontal audit on Indigenous employment in the banking and financial sector, the Canadian Human Rights Commission reported that executive recruitment was a promising practice:

A related positive/promising practice for external hiring is the use of a recruitment services agreement that requires contracted recruiting agencies to respect an organization's commitment to EE by seeking out applicants from under-represented designated groups. An organization provides the contracted agency with the EE targets by designated group and occupational group, updating the information at least annually, and the agency strives to include qualified designated group members in its slate of proposed candidates. If, in any one-year period, the agency fails to supply suitable designated group candidates, it must submit a written justification stating the reasons for its lack of success. These contracts can be used for senior managers as well as for other professional or technical openings. They can also be linked to a company policy requiring a certain number or percentage of designated group candidates for positions with significant representation gaps before interviewing can begin.

Canadian Human Rights Commission, Horizontal audit on Indigenous employment in the banking and financial sector, 2019 at 16

- Our task force considers that these practices are an important part of the employment equity process and warrant ongoing close attention through the employment systems review process.
- The Interdepartmental Circles on Indigenous Representation considered developing a mid-career employment opportunity program to encourage lateral hiring of Indigenous peoples into the public service to be an immediate opportunity for transformative change within the federal public service.

As promising practices were shared with us, through the consultations, the written reports and research, our task force repeatedly heard the concern that employers needed the capacity to meet their responsibility to provide safe and inclusive environments for all workers, including those from employment equity groups.⁴⁸¹

Basically, people who appeared before us wanted us to consider, especially in tight labour markets, the prospect that accessible workplaces “can open up a new labour market”⁴⁸² – this is a key argument for

Chapter 4: Strengthening implementation: The barrier removal pillar

removing barriers proactively, so that accommodations do not need to be the framework that workers with disabilities need to fit in order even to apply for work.

We turned our thoughts to this too as we analyzed how to reach workers who are “discouraged” from a statistical perspective and considered to be out of the labour market, in Chapter 1.

This message resonates as well for those who might face exclusion on other grounds of discrimination covered under the *Canadian Human Rights Act*. Proactive barrier removal, like the roundabouts or the widened sidewalk, can support broadly inclusive policies that benefit workers generally.

Far too often, we think of employment equity as distributing a small and shrinking pie. Under a barrier removal approach to employment equity, we are bringing people in, we are baking a bigger, better pie that is ready to be shared more equitably.

Barrier removal beyond equity groups

The overview provided should give a fulsome indication of the kind of work that comprehensive employment systems reviews can provide. They will move us to a deepened understanding of the kind of 360-degree work required to remove barriers to equitable inclusion from the workplace.

What is hopefully also clear is that barrier removal is broadly beneficial and holds the potential to foster equitable workplace inclusion. The effects extend beyond the employment equity groups and create a climate that can enable workplaces to be more receptive to the needs of a broad range of constituents. For example, representatives of youth reminded the task force that they are present in all equity groups, endorsing an intersectional approach. Unifor pointed out that millennial and Gen Z workers onboarded during the pandemic may face particular difficulties integrating into workplaces, alongside familiar tropes and stereotypes that do a disservice to them.⁴⁸³ Youth organizations welcomed support for initiatives that could allow employers to address workplace barriers, like the misperception that it is acceptable to yell at young people at work. Preventing workplace harassment would be part of the response. So too will taking issues like age into consideration when employment systems reviews are conducted, as Unifor recommends. Addressing barrier removal and accessibility concerns will also assist youth.⁴⁸⁴

Barrier removal can of course be supported through legislative reform. The task force was dismayed, for example, that access to leave for religious minorities whose holidays were other than traditionally celebrated holidays that correspond with some Christian calendars was, at this stage in life in Canada, still a challenge.

In his review of federal labour standards, Commissioner Harry Arthurs considered labour rights, including minimum labour standards, to be human rights. He made a plea for greater flexibility on hours of work, which included leaves for care responsibilities. His review also suggested that “Canada’s labour standards are neither more costly nor less flexible than those of international comparators.”⁴⁸⁵ On leave for religious holidays, he recommended the following:

Part III should allow the employer, on the written request of an individual employee, to substitute one or more cultural or religious holidays for any general holiday under Part III. The Labour Program, in cooperation with the Canadian Human Rights Commission, should remind employers of their legal obligation to accommodate such requests.

Federal Labour Standards Review, Fairness at Work: Federal Labour Standards for the 21st Century, Professor Harry Arthurs, Commissioner (Human Resources and Skills Development Canada, 2006) at 166

The recommendation shows important recognition of the significance of accommodating religious holidays.

There have since been significant reforms to Part III of the *Canada Labour Code's* leave provisions. The approach has been to acknowledge that there are a range of reasons why people might need flexibility in their working lives. Workplaces and society as a whole benefit by ensuring that flexibility is available when it is needed. The types of leave range under Part III of the *Canada Labour Code* from parental leave on the birth or adoption of a child to leave for end-of-life caregiving responsibilities, from critical illness, compassionate care and bereavement leaves to leaves in the event of family violence, from personal leave broadly defined to leave for “traditional aboriginal practices”. The approach reinforces the principle that substantive equality is not a sameness standard. Substantive equality is an equitable inclusion standard.

We would encourage the federal government to enter into consultations with employers’ and workers’ representatives and concerned communities, to consider an amendment to Part III of the *Canada Labour Code* to provide one or more days per year that can be taken on religious high holidays, with appropriate modalities to account for the needs of specific industries or emergencies.

Recommendation 4.22: The federal government should enter into consultations with employers’ and workers’ representatives and concerned communities with a view to amending the *Canada Labour Code* to enable religious minorities to avail themselves of one or more annual paid leave days reasonably available to them to observe religious high holidays.

The key takeaway remains the task force’s observations on the over-use of an accommodation model when proactive measures are required should guide this process.

The point is not to bring everything to the macro-level and require law to fix the problem. Rather, the legislation in this context enables broad parameters to be set, and allows workplaces to act in a nimble, fluid manner to remove barriers.

This requires us to take care to identify and eliminate barriers. The need for specificity is recognized at the highest governmental levels, judging from the Clerk of the Privy Council’s 2021 *Call to Action on Anti-Racism, Equity, and Inclusion in the Federal Public Service*.

This task force underscores the importance of undertaking this work with joint management-employee committees, and with the safeguards necessary to prevent reprisals for those who take this kind of proactive work seriously.

Equity, barrier removal and non-disclosure agreements

Introduction

One workplace practice that has received significant recent attention in the wake of #MeToo and growing public consciousness of the harms of sexual harassment and violence in the workplace is the use of non-disclosure agreements in dispute settlement. Some frame this development as a managerial rather than legal issue; in other words, letting a matter escalate to the point of becoming an external complaint is perceived to be a sign of “poor management”.⁴⁸⁶ This might well promote less adversarial employment relationships. But there are dangers: when a serious human rights matter is not redressed, the dispute might go away but the discrimination might simply be hidden from view. This can prevent barrier removal, and leave systemic discrimination in place contrary to the purposes of employment equity.

The task force heard poignant representations from co-founders of Can’t Buy My Silence, law professor Julie MacFarlane and Zelda Perkins who maintain that legally enforceable non-disclosure agreements (NDAs) – also known as confidentiality agreements - mask abuse and discrimination, and cause harm. These legal instruments were initially privacy tools to protect trade secrets, but their use in settling employment disputes has become ubiquitous. They pointed to the prevalence of non-disclosure agreements, in both the federal public service and the private sector. They noted that confidentiality agreements are used even in employment agreements as a condition of employment, or at the investigation stage of harassment claims.⁴⁸⁷

The use of confidentiality agreements in the employment context extends beyond the purview of the *Employment Equity Act* framework, and warrants careful and comprehensive treatment. It has been the basis of significant reviews internationally and in Canada, linked in large measure to the transnational advocacy of Can’t Buy My Silence.

Wherever these settlement patterns hold true, they will echo back into the entire system of protective labour and equality laws: if a settlement with an NDA is the best that law and legal process normally offer those who invoke these rights at work, it appears fully rational on that basis alone for complainants to give up early on trying to do something, let alone once additional pressures towards silence are factored in.

Lizzie Barmes, “Silencing at Work: Sexual Harassment, Workplace Misconduct and NDAs” (2023) 52 Industrial Law Journal 68 at 76

To the extent that they run the risk of entrenching rather than removing barriers to achieving substantive equality at work, the indiscriminate use of non-disclosure agreements and confidentiality agreements to investigate or settle harassment and discrimination cases in the workplace is a matter that also warrants our attention in the employment equity review.

NDAs in comparative law and across Canada

There has been growing attention across Canada and internationally on NDAs as they relate to sexual harassment claims in the workplace. The following three broad features emerge from a review of the studies undertaken in Australia, Ireland and the United Kingdom on the use of NDAs in harassment and discrimination claims, with a focus on sexual harassment.

First, NDAs may be perceived to have some benefits, including confidentiality for complainants as some would rather settle a dispute and avoid litigation.⁴⁸⁸ Others want confidentiality to avoid being cast as difficult or facing personal reputational damage in their sector of work.⁴⁸⁹ Some suggest that without NDAs, employers could instead use their resources to show that they have taken reasonable measures to address discrimination in the workplace and leave defendants to seek independent legal advice, or alternatively to dissuade or repress complainants altogether.⁴⁹⁰ We do not yet know. And none of these arguments means that NDAs should be used indiscriminately. Exceptions to the use of NDAs may be difficult for most people to understand, including sometimes the experts.⁴⁹¹ It is important to ask whether they actually protect the complainant from reputational damage.

Second, parties may experience harm by virtue of having signed NDAs. They may not have a real choice as to whether to sign an NDA due to the power imbalance with their employer.⁴⁹² Some might not have had access to independent legal advice;⁴⁹³ even then, the limited sociolegal research questions whether independent legal advice is enough.⁴⁹⁴ Complainants may experience isolation, as signing the NDAs prevents them from confiding in friends and family or finding support.⁴⁹⁵ NDAs may also limit opportunities for complainants to find new employment if they cannot explain why they left their jobs.⁴⁹⁶

Third, if NDAs merely cover up credible accusations of abuse rather than having perpetrators in the workplace appear before appropriate disciplinary committees and face sanctions, they perpetuate harassment in the workplace and prevent patterns of harassment from being identified and addressed. Perpetrators may be able to move easily between employers without their behaviours being stopped.⁴⁹⁷ There is an inherent challenge to gathering information about the prevalence of NDAs due to their secrecy requirements.⁴⁹⁸ In this sense, they contribute to a culture of silence.⁴⁹⁹

In Canada, Prince Edward Island's *Non-Disclosure Agreements Act* came into force on 17 May 2022, making PEI the first jurisdiction in Canada to pass legislation prohibiting NDAs where a complainant alleges or has experienced harassment or discrimination.⁵⁰⁰ Similar bills have been introduced in Nova Scotia,⁵⁰¹ at first reading, and Manitoba, where the private members' bill did not proceed after second reading but the matter is being studied by the Manitoba Law Reform Commission.⁵⁰² British Columbia is also reportedly considering introducing legislation.⁵⁰³

In February 2023, the Canadian Bar Association overwhelmingly endorsed a resolution both to “promote the fair and proper use of NDAs as a method to protect intellectual property and discourage their use to silence victims and whistleblowers who report experiences of abuse, discrimination and harassment in Canada” and to “advocate and lobby the federal, provincial and territorial governments to enact changes to legislation and policies to ensure NDAs are not misused for the purpose of silencing victims and whistleblowers.”⁵⁰⁴

There are currently no laws in place yet in Australia, Ireland or the United Kingdom, but Ireland is considering a private members bill, and the UK has committed in principle to consider legislation to limit their scope. Australia proposed a practice note and model confidentiality clause, to promote best practices with plain language expectations while ensuring that whistleblower protections are maintained.

A number of U.S. states have also acted either to restrict or to prohibit the use of NDAs between employers and employees, although generally without proscribing contractual clauses in mandatory arbitration agreements in standard employment contracts.⁵⁰⁵ California and Washington broadly

Chapter 4: Strengthening implementation: The barrier removal pillar

prohibit NDAs or render them void in cases of discrimination or harassment and cover independent contractors.⁵⁰⁶ New York is one of the U.S. states that has built in procedural protections, by providing a 21-day period for the claimant to consider the NDA and seven days to revoke the agreement.⁵⁰⁷ Other states such as Vermont require employees to be notified of their rights. In particular the settlement agreements state that the NDA does not prevent the claimant from lodging a complaint, testifying or otherwise assisting with an investigation, or complying with a discovery request.⁵⁰⁸

Of particular interest for the *Employment Equity Act* framework, Maryland introduced a reporting requirement for employers with 50+ employees. The covered employers must report to the state civil rights commission the number of:

- settlements entered after an employee alleges sexual harassment
- payments to the same employee to resolve an allegation of sexual harassment in the last 10 years, and
- confidentiality requirements in settlement agreements⁵⁰⁹

What can we do now?

It is, however, critical not to assume that all change is in the direction of less silencing.

Lizzie Barmes, "Silencing at Work: Sexual Harassment, Workplace Misconduct and NDAs" (2023) 52 Industrial Law Journal 68 at 101-102

It is clear that there is an important moving landscape seeking to understand and redress the abuse of confidentiality agreements. There is enough information about the potential for misuse for this task force to recommend that the federal government consider changes to human rights and labour laws to ensure that NDAs are not misused for the purpose of silencing human rights complainants or whistleblowers. And we must be alive to unintended consequences of law reform.

Workplace harassment is a broad concept under the *Canada Labour Code*, and several Canadian jurisdictions have specific psychological harassment laws. We heard concern not only that employment equity groups facing intersectional discrimination are more likely to face workplace harassment; psychological or similarly broad harassment claims might disproportionately target senior-level and at times Black, Indigenous or racialized women when they exercise authority and seek to work within organizational structures and policies to push for change.⁵¹⁰ Could stereotypes such as the “angry Black or Indigenous woman” leave some managers more susceptible to having organizations turn on them, leaving them more susceptible to psychological or related harassment complaints for behaviours that in male managers would be treated as normal? The caution is a reminder that sexual violence and harassment are exercises of power. They intersect with exercises of power in relation notably to race, sexual orientation, sexual identity and expression, and sex characteristics, and accessibility, the very dynamics that are so central to the lived experiences of the employment equity groups that they need also to be taken into account.

The *Employment Equity Act* framework already features reporting requirements on proactive measures taken in the workplace. It provides the opportunity to learn about a practice that has been shrouded in secrecy. As the requirement will be forward looking, federally regulated employers will be required

to conduct themselves in their private agreements in a manner that enables them to respect this reporting requirement. Our task force considers that it can be generative for federally regulated employers to be required to report on the extent and nature of the use of NDAs and confidentiality agreements.

A focus on reporting what can be reported will enhance the ability of the Employment Equity Act framework to enable us to identify and remove barriers.

Our task force therefore recommends that workplaces be required to report on the number of harassment and discrimination complaints, identified by category, by whether complainants or respondents or perpetrators are members of one or more employment equity groups and if so which ones, and by the number of NDAs that were concluded by the workplace as part of the mandated workplace climate scan. The list must be anonymized. We acknowledge that some data suppression may be required based on the size of the employment equity groups or subgroups in question, in keeping with privacy principles discussed in Chapter 2.

Finally, the task force considers that it is timely and appropriate for a study to be undertaken on the issue of the apparently widespread use of NDAs to resolve employment matters and its impact on human rights and equity in the workplace and beyond. The proposed study could usefully consider a range of practices that might affect the unequal bargaining power of parties at different stages of the employment relationships but that affect the conditions of termination. Moreover, it could encompass the use of restrictive covenants including non-competition clauses in often low wage employees' contracts, considering that the Federal Trade Commission in the United States has just proposed a new rule in the Code of Federal Regulations that would ban employers from imposing non-competition clauses on workers, a practice that they refer to as exploitative.⁵¹¹

Recommendation 4.23: The federal government should, in consultations with concerned groups, consider amending the *Canadian Human Rights Act* and the *Canada Labour Code* to ensure that NDAs are not misused for the purpose of silencing human rights complainants or whistleblowers.

Recommendation 4.24: The *Employment Equity Regulations* should be amended to require employers to report on the number of NDAs signed with categories regarding the broad subject matter and potential barriers that they covered. The reporting should include non-nominative information about the designated employment equity group(s) to which the complainant(s) and the alleged perpetrator(s) may belong.

Recommendation 4.25: A study should be undertaken of the use of NDAs to resolve employment matters within federal jurisdiction and its impact on respecting human rights and achieving employment equity in the workplace.

Barriers that intersect with the workplace

Without investments in early predictors of employment success, such as youth employment, the *Employment Equity Act* will face an uphill battle...

Inclusion Canada, Presentation to the EEART, 9 June 2022

[I]t is important to mainstream the promotion of equality of opportunity and treatment in employment and occupation in relevant national policies, such as education and training policies, employment policies, poverty reduction strategies, rural or local development programmes, women's economic empowerment programmes, and climate mitigation and adaptation strategies.

ILO Committee of Experts on the Application of Conventions and Recommendations, General Observation on Discrimination based on Race, Colour and National Extraction, 2019

Introduction

Markets are interdependent.⁵¹² The labour market is no exception. There is a growing awareness that without the work of social reproduction, labour markets could not function. Yet affordable childcare remains a persisting barrier to substantive equality in employment. Moreover, it is telling that both the Woods commission of 1968 and the Abella commission of 1984 found it disturbing that domestic workers were excluded from labour and human rights law.⁵¹³ This remains a concern. Canadian leadership through ratification and implementation of the ILO's Domestic Workers Convention, 2011 (No. 189) is warranted. A related concern is to think about how the programs we support – like childcare programs – may enable equitable inclusion.

Recommendation 4.26: The Government of Canada is encouraged to ratify the ILO Domestic Workers Convention, 2011 (No. 189).

There is no magic line between barriers within and barriers beyond the workplace.

But we want to highlight the role that public policies for work play in supporting workplaces – employers and workers alike – and supporting our broader societal substantive equality goals. The barriers discussed – in care responsibilities, in education, and in transportation and housing, are not the only barriers, but they are the ones that were brought to our attention repeatedly by constituents who came before us.

The takeaway is that as a society, we need to think broadly and creatively about some of the most basic aspects of our social system – early childhood care, education, transportation and housing, and prospects for basic income.

Care responsibilities

The differential weight of care responsibilities across employment equity groups was a recurring theme in our task force's consultations. The data confirm this. International law, including the ILO's *Workers with Family Responsibilities Convention, 1981 (No. 156)* supports addressing these issues with dedicated

policies. Canadian human rights law is slowly developing to recognize family status as a ground of discrimination that needs to be accommodated at work.⁵¹⁴

While this report affirms that the disproportionate burden borne by women as a group is well known and often commented upon, differential impacts were also experienced, by First Nations, Métis and Inuit workers, by disabled workers,⁵¹⁵ by Black and racialized workers and by 2SLGBTQI+ workers. Below we stress the literature on First Nations, Métis and Inuit peoples and emphasize that the data are intersectional including across disability, and across gender.

Post-pandemic build-back-better initiatives like transformative 2021 Early Learning and Child-Care Agreements are extremely important for fostering workplace access. Other measures might also be needed, however, to address some of the root concerns over care responsibilities raised by First Nations, Métis and Inuit peoples.

The 2017 Aboriginal People's Survey conducted by Statistics Canada reported that of working age First Nations women who worked part time, one fifth (19%) did so to care for children.⁵¹⁶ Among core working age First Nations women who wanted to work but were not considered to be in the labour force, 21% did not look for work because of childcare responsibilities. Access to childcare was considered particularly important for First Nations and Inuit women who planned to look for work within 12 months. It is significant, also that 72% of off-reserve First Nations people, and an equivalent percentage of Inuit people, reported "helping out their community" on at least once per month; many of the activities involved forms of care including eldercare.

We were also influenced by the 2016 report of the First Nations Data Centre, offering a rooted perspective on childcare and school programs:

Although formal childcare and school programs are highly significant in directly supporting children and families, these programs should not be seen as adequate in and of themselves. Rather, multi-pronged and inclusive strategies designed to respect diversity should be the foundation upon which to develop programs, policies, and activities that specifically address the collective and the individual elements of health and well-being.

In other words, supporting families and communities to be culturally, spiritually, economically, and socially whole and healthy is a key element in supporting the healthy development of First Nations children. This broader, holistic approach to early childhood development and learning is resonant with an Indigenous world view that recognizes the interconnection of all things and the integral role of language, culture, and Indigenous knowledge in the health and well-being of Indigenous individuals, families, communities, and broader collectives.⁵¹⁷

A further point about "care" is vital: while much attention has rightly been placed on the importance of affordable childcare, some employment equity groups – notably First Nations, Métis and Inuit workers – face the persisting legacies of having their children disproportionately placed in the child welfare system, a point that was underscored in March 2023 by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Mr. José Francisco Calí-Tzay in his End of Mission Statement to Canada.⁵¹⁸ Canada is only beginning to grapple with the legacies of residential schools and the 60s scoop for Indigenous children, families and nations.

Chapter 4: Strengthening implementation: The barrier removal pillar

What our task force heard during our consultations also mirrored what has been reported, including the unsatisfactory result reported in the Auditor General's 2011 Status Report on Programs for First Nations on Reserves requiring government, in consultation with First Nations, to develop immediately and implement a comprehensive strategy and action plan, with targets, to close the education gap and report to Parliament in a timely basis.⁵¹⁹

Primary and secondary education

Decisions about life options happen early, whether one knows about the options or not. Education is meant to equalize, to prepare children for a range of life and workplace options, but educational disparities remain stark. In other words, gender segregation starts early.⁵²⁰ So do other forms of differential life options based on grounds of discrimination. Research considering why women are so underrepresented in some sectors, including the transportation and construction sectors, worldwide, turns attention to how STEM subjects are taught. These factors intersect with others, including the impact of employment requiring long hours on expectations that women will bear primary responsible for care at home.⁵²¹

The comments echoed UN Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya's reminder in his report on his visit to Canada in 2014 that while there have been several "laudable government education programs":

At every level of education, indigenous people overall continue to lag far behind the general population. Government representatives have attributed the gap in educational achievement in large measure to high levels of poverty, the historical context of residential schools, and systemic racism.⁵²²

He noted that "numerous First Nations leaders have alleged that federal funding for primary, secondary and post-secondary education is inadequate."⁵²³ The Committee on the Rights of Persons with Disabilities (CRPD), in its periodic review of Canada, expressed particular concern that Indigenous women with disabilities should have access to education programs.⁵²⁴

In his 10 March 2023 end of mission statement, the current UN Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Cali Tzay, called attention to the "appalling legacy" of residential schools:

In every place I visited, I heard about how Indian Residential Schools, more appropriately termed 'institutions,' fractured familial and community ties. For over 100 years, successive generations of children, many from the same communities and families, were sent to these institutions and never returned in numbers that may never be fully known. This experience was largely hidden from Canada's history until the 2021 discovery of 215 unmarked graves at Kamloops residential school captured the world's attention.⁵²⁵

The task force listened carefully to the depth of the educational barriers facing First Nations, Métis and Inuit peoples in light of Canada's colonial legacy. The 2016 First Nations Data Centre report emphasized the importance of learning in community, including from elders, First Nations community members, as well as from and about the Land. One of the most significant findings of this report on education is that of those who leave school as youth, nearly three quarters eventually return with

parental and family support.⁵²⁶ The impact of parental and family support flows through the report as a whole, and there is an important reminder that it is impossible to assess negative socio-economic statistics for First Nations youth without taking into account the intergenerational trauma that is rooted in the legacy of residential schools and colonization more broadly. The report considered it fundamental to First Nation thriving in future employment for First Nations cultures and languages to be acknowledged and incorporated into formal education.⁵²⁷

The education gap between adults living in First Nations communities and those living off-reserve is notable and should be of concern. It is imperative that efforts be made to improve educational outcomes for those living on reserve and in northern First Nations communities.

First Nations Information Governance Centre, Now is the Time: Our Data, our stories, our future: The National Report of the First Nations Regional Early Childhood, Education, and Employment Survey, 2016 at 67

The 2017 Aboriginal Peoples Survey, looked closely at the educational barriers for First Nations women and men living off reserve. Crucially, it reported that over the past year, over a third (36%) of First Nations people living off reserve took courses, workshops, seminars or training to develop their job skills, and a further 28% wanted to do so.

In the Federal Public Service, the Interdepartmental Circles on Indigenous Representation reported that most participants seemed to have entered the federal government through participation in a student program or through public service work fairs.⁵²⁸ The importance of these initiatives to break down barriers should not be understated.

Post-secondary education, training programs and internships

Increased recruitment in certain groups depends heavily on information and awareness. This is not only the responsibility of employers, but also the promotion of training programs and the involvement of educational institutions, especially government programs that encourage people to enter unfamiliar or unknown occupations.

Canadian Association of Counsel to Employers, Submission to the EEART, 28 April 2022

The relationship between education, training and employment equity could not be more important. We heard this over and over. Employers who want to hire call for support to address problems of the pool. There is an important role for proactive policies from government, from employers, and from historically underrepresented communities to encourage inclusion. The importance of mentorship should also not be overlooked. CEDAW has recommended that Canada:

Continue to develop and provide targeted training and mentoring programmes on leadership and negotiation skills for potential women candidates and potential female leaders in the public sector, including those who are underrepresented, such as migrant, indigenous and Afro-Canadian women, as well as women belonging to other minorities and women with disabilities.

Committee on the Elimination of Discrimination against Women, Concluding Observations on the combined 8th and 9th periodic reports of Canada, 2016, CEDAW/C/CAN/CO/8-9 at para 35(d)

Chapter 4: Strengthening implementation: The barrier removal pillar

The OECD, reviewing Canada's Indigenous Skills and Employment Training (ISET) Program, delivered through 82 agreement holder organizations across Canada and two national organizations raised concerns about whether rural dwellers are adequately served.⁵²⁹

The nature and quality of training programs also matters. The 2022 report by the Honourable Louise Arbour provides a crucial analysis of the systemic issues linked to training for the military. The report concludes that “military colleges appear as institutions from a different era, with an outdated and problematic leadership model” that runs a “real risk” of perpetuating discrimination.⁵³⁰ Despite acknowledging that the military colleges are viewed by many in the CAF as “untouchable institutions”, she recommends the elimination of the Cadet Wing responsibility and authority command structure (Recommendation #28) and that other significant alternatives be studied and considered to the current education of cadets at military colleges:

I do not dispute the fact that the military college system has produced many bright young Canadians, who have become excellent career officers and successful civilians after their release. However, the overwhelming majority of them were white men. Canadian society has changed. The persistent structural, cultural, and ethical issues inherent in the military college system require Canada to ask whether there is another, potentially much better, way to educate its future military leaders.

The Hon. Louise Arbour, Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces, 20 May 2022, at page 233

The Committee on the Rights of Persons with Disabilities (CRPD) also made recommendations to remove barriers linked to the freedom of expression and opinion and access to information, which are rights under Article 21 of the *Convention on the Rights of Persons with Disabilities*, ratified by Canada in 2010. They called for Quebec Sign Language (*Langue des signes Québécoises*) and American Sign Language as official languages to be used in schools, and the promotion and use of easy-read and other accessible formats in communications technology and ensuring access to that technology.⁵³¹ The Committee on the Rights of Persons with Disabilities called for inclusive educational strategies.

The Committee on the Elimination on All Forms of Discrimination against Women (CEDAW) has also expressed concern about difficulties in gaining access to high quality education, including “significant barriers, including a lack of grants and fragmented funding of educational programs”⁵³² faced by women and girls with disabilities or who are Indigenous, Afro-Canadian or migrants. CEDAW recommended increasing grants and removing the funding cap on the Post-Secondary Student Support Program to ensure that Indigenous women and girls have access to funding for post-secondary education, as well as a broader approach to addressing structural barriers for all girls including those who are disadvantaged or marginalized.

The Supreme Court of Canada in *R. v. Gladue* [1999] 1 SCR 688 has recognized the “excessive” imprisonment of Indigenous people in the criminal justice system and the challenge of systemic discrimination. The link to Canada's colonial history has been repeatedly made by task forces and research studies and was named powerfully in the Report on Truth and Reconciliation Commission and the National Inquiry into Missing and Murdered Indigenous Women and Girls.

The Correctional Investigator, Ivan Zinger, has regularly reported on rampant racial discrimination in Canadian prisons, identifying systemic overrepresentation of Indigenous prisoners as well as Black

prisoners.⁵³³ The Canadian Human Rights Commission has expressed concern about the additional challenges faced by Indigenous and Black inmates, including their over-representation in maximum security and segregation. It has taken the position that “the use of segregation to manage inmates with mental disabilities is inappropriate and should never be permitted.” They call attention to the limited mental health services and alternatives to segregation.⁵³⁴ The 2022 Report of the Miscarriage of Justice Commission led by the Hon. Harry LaForme and the Hon. Juanita Westmoreland-Traoré reported that the current system has failed to provide remedies for women, Indigenous or Black people in the same proportion as they are represented in prisons in Canada, and called for an independent, proactive, systemic and adequately funded commission.

The United Nations Committee on the Elimination of Racial Discrimination also expressed concern that African-Canadian students are “reportedly disciplined more harshly than other students, which forces them out of learning and contributes to the ‘school-to-prison pipeline’.”⁵³⁵ In a General Recommendation, CERD has called on member states to “[a]ct with determination to eliminate any discrimination against students of African descent.”⁵³⁶ We heard from groups who were concerned that the overincarceration of Indigenous people and Black people in Canada has a disproportionate effect on labour market access due to criminal records.

Although unequal access to education can be a barrier, it would be a mistake to assume that simply obtaining an education will pave the path. As was discussed in Chapters 1 and 3, higher educational levels do not necessarily lead to commensurate jobs for Black and racialized workers. Representatives of immigrant workers have long expressed particular frustration at being encouraged to migrate to Canada in part because of their high educational qualifications. Yet they are unable to have their qualifications recognized in a reasonable time and are forced to resort to low wage work to survive. As then Independent Expert on Minority Issues, Gay McDougall stated, “[i]t must be recognized that discrimination plays a role in this equation. A disconnect between education and employment must be tackled by Government as an important issue of concern requiring policy implementation.”⁵³⁷ She called for solutions to be found to the “doctors driving taxi cabs” cliché that troublingly resonated with too many racialized workers. CERD has similarly recognized the potential barriers linked to professional certification, calling on the organizations – which are essentially within provincial jurisdiction – to review their policies to see whether there are discriminatory barriers to certification of foreign degree holders.⁵³⁸

There are aspects of the underemployment of equity groups that have traditionally required care to understand. That immigrant doctor driving a cab may not only be trying to keep a roof over the head of a family in Canada, but also given global income inequality, may be sending remittances to support parents and other family members abroad.

There is an abundance of literature on the need to adopt an “identity conscious” set of strategies to close the opportunity gap for educational success of students from historically marginalized communities.⁵³⁹ Quite specifically, Pendakur seeks to focus attention on removing barriers – that is, on looking at “institutional responsibility to address policy, systems and environmental factors that contribute to student achievement or failure.”⁵⁴⁰

Transportation and housing

Barriers can be anywhere. Getting to your workplace can be a challenge. We can look at systemic barriers from an ACA perspective and work together to find a solution where we can identify those to create a barrier-free society.

Federal Public Service Employee, Presentation to the EEART, 14 June 2022

Transportation is the lifeline that connects persons with disabilities with the community, facilitating greater opportunities for work, social inclusion and overall independence.

Laverne Jacobs, “The Universality of the Human Condition: Theorizing Transportation Inequality Claims by Persons with Disabilities in Canada, 1976-2016” (2018) 7:1 Canadian Journal of Human Rights 35

Transportation, housing and access to information and communications technologies were raised by several representatives of employment equity groups who appeared before the task force. The concern is echoed notably by the UN Special Rapporteur on the rights of persons with disabilities who visited Canada in 2019 and recommended equitable access.⁵⁴¹ Professor Laverne Jacobs, who became a member of the Committee on the Rights of Persons with Disabilities in 2022, has conducted a comprehensive review of case law and focused on those claims brought by applicants who sought to modify transportation systems that extend beyond individually accommodating that applicant’s specific disability needs. Those “transportation restructuring” cases were met with narrow legal interpretations inconsistent with Canada’s international obligations under the *Convention on the Rights of Persons with Disabilities* and at odds with transformative approaches.⁵⁴²

Indigenous Peoples are more likely to live in substandard, overcrowded, and culturally inadequate housing than the rest of the Canadian population. This situation constitutes a barrier to securing stable employment, education, and access to social services.

End of Mission Statement, Special Rapporteur on the rights of indigenous peoples, Visit to Canada, 10 March 2023 at 7

Some consulted groups considered that remote access to employment – with suitable internet access – could enhance employment equity.⁵⁴³ Certainly, the possibilities of flexible workplaces have become clearer since the pandemic.⁵⁴⁴

It is important to experiment with targeted measures. Adequate housing has been decried as a consistent feature preventing reconciliation with First Nations, Métis and Inuit people; it is also an employment barrier for Indigenous workers. Promising practices on housing allowances and travel allowances, for example, may be necessary to foster equitable workplace inclusion for Indigenous workers in remote locations.⁵⁴⁵

Specific educational requirements can be barriers for new immigrants⁵⁴⁶ in ways that may mirror barriers faced by racialized workers irrespective of their place of birth.⁵⁴⁷

The specific challenge of discouraged workers is in many ways a data justice issue, addressed in Chapter 2. But there is a recognition that potential gaps exist between the legislative obligation to correct underrepresentation and the way that availability is calculated. For example, a visible minority worker with a computer degree who works as a security agent because of employment barriers may not be taken into account in the calculation of labour market availability when the focus is on sector and professional categories, rather than by education level or type.⁵⁴⁸

Basic income

Finally, some accessibility organizations called for programs that provide income benefits to be structured to avoid clawbacks that may discourage disabled workers from taking labour market risks.⁵⁴⁹ The relationship between basic income support and labour market access warrants closer attention than this report can provide. Innovative calls for decent jobs at decent pay to all jobseekers are intimately linked to equitable inclusion.⁵⁵⁰ However, task force members considered that it was fundamental to break the cycle of disadvantage by providing the basis upon which workers can make life-enhancing choices. Like much in this section, it extends beyond the *Employment Equity Act* framework, but it could not be more important to equity seeking and equity deserving groups.

Recommendation 4.27: Studies of the feasibility of basic income policies should be encouraged. They should pay particular attention to the effect of basic income strategies on redressing barriers to equitable workplace inclusion faced by employment equity groups.

Barriers in select federally regulated employers

The Federal Public Service is ripe for transformation.

Many Voices one Mind: A Pathway to Reconciliation: Welcome, Respect, Support and Act to fully Include Indigenous Peoples in the Federal Public Service. Final Report of the Interdepartmental Circles on Indigenous Representation, 4 December 2017, at 4

Culture evolves, and cannot change by mere decree. Despite slow progress towards women moving into positions of influence, authority and power, and into fields of professional work historically not open to them, we continue to see resistance, particularly in historically male-dominated organizations with “boys’ club” mentalities, such as the CAF.

But thankfully, there is now a palpable change in the air. The question before us is not whether or when, but how.

The Hon. Louise Arbour, C.C., G.O.Q., Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces, 20 May 2022

There is considerable variation across the federal public service on employment equity and related EDI initiatives. There is also tremendous variation across federally regulated private sector employers.

Reporting is extremely uneven, even in the federal public service. It was explained that this authority is delegated to Departments and Agencies, and that the oversight is limited to asking whether the

Chapter 4: Strengthening implementation: The barrier removal pillar

plans have been prepared. Understandably, the Office of the Auditor General, which is not subject to TBS OCHRO, prepares its own Employment Equity reports, which include their employment equity plan. But mechanisms seem to be lacking for the plans to be analyzed to ensure that they meet the criteria prescribed in the *Employment Equity Act*. The Canadian Labour Congress expressed concern about the delegation of responsibility to departments.⁵⁵¹

LGBTQI2S EDI efforts are highly dependent on the individual agency's structures, staff, and role within the government. Given the distinct missions and mandates of each federal entity, there are often very different structures in place for supporting EDI at the organizational level, with no formalized means for coordinating efforts across the federal government (by a central agency, for example).

LGBT Purge Fund, Emerging from the Purge: The State of LGBTQI2S Inclusion in the Federal Workplace and Recommendations for Improvement, 17 May 2021

Throughout this task force report, we share reflections from and about the federal public service and federally regulated private sector employers. This section focuses on a few key agencies whose equity practices have given rise to a lot of public attention. It also focuses on a few sectors that seem to be struggling.

We want to be sure that our recommendations are grounded and helpful.

The Canadian Armed Forces

Introduction

We are, after all, an employer just like all employers and need to be held accountable in areas where modifications need to be made in order to better support our employment equity and diversity and inclusion programs/ initiatives.

Canadian Armed Forces, Submission to the EEART, 16 May 2022

The Canadian Armed Forces (CAF) recognizes itself to be the largest federal employer subject to the *Employment Equity Act*, and proclaims that it is “fully committed to Employment Equity (EE) throughout the organization.”⁵⁵² The importance of its representation is hard to overstate. For a country that has adopted a Feminist International Assistance Policy and that is present in United Nations peace keeping around the world, the ability to reflect a CAF that reflects Canada seems pivotal. Moreover, there are data from the United Nations suggesting how important it is, for example in the case of sexual violence, for survivors to be able to report to women in a representative CAF.⁵⁵³

The *Employment Equity Act* was applied to National Defence in two stages – in 1986 for civilian employees in the Department of National Defence, and in 2002 for CAF members – including both officers and non-commissioned members. Members of the ‘special forces’ are excluded but task force members were told that the numbers are minimal and representation is not tracked when they are temporarily members of special forces. The CAF is subject to special regulations.⁵⁵⁴ In its written submission to our task force, the CAF recalled that in the absence of a union, its members do not have a collective voice to advocate on their behalf. The Hon. Morris Fish, former Justice of the

A Transformative Framework to Achieve and Sustain Employment Equity

Supreme Court of Canada who conducted the third independent review of the *National Defence Act*, characterized their situation in the following terms:

Members of the Canadian Armed Forces (“CAF”) have fewer means of redress than civilians in other organizations. They are not permitted to unionize or otherwise collectively negotiate their working conditions. They do not have employment contracts. And when they believe they have been aggrieved by any decision, act or omission of the CAF, they do not have recourse to an independent tribunal.⁵⁵⁵

He described their main recourse – that is, to file an individual grievance within their chain of command - as a broken system, plagued with “unacceptable” delays and as did previous external review authorities, recommended grievance system enhancements.⁵⁵⁶

An exclusionary record – Violence, harassment and racism at work

[S]ignificant responsibility is given to CAF leaders both to ensure that members are treated with dignity, and to maintain a standard of professional conduct that respects the dignity of all persons... there is a significant disjunction between the aspiration of the CAF to embody a professional military ethos which embraces the principle of respect for the dignity of all persons, and the reality experienced by many CAF members day-to-day.

External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces (March 27, 2015) (External review authority: Marie Deschamps, C.C. Ad.E) at 12

The Canadian Armed Forces has faced numerous extremely serious reports on sexual misconduct and harassment within its ranks. Most of them have been reviewed for this task force report.

The 2015 External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces by former Supreme Court Justice, the Hon. Marie Deschamps, C.C., Ad. E., captured the magnitude of the challenge, the ways in which CAF members become inured to the culture of harassment as they move up the ranks, the code of silence, and perception that the behaviour is either condoned or ignored. Justice Deschamps noted under-reporting or a lack of reporting. Even if a case is taken seriously and found to be substantiated, the sanctions tended to be perceived as slaps on the wrist. Justice Deschamps called for both policy change and culture change. Her recommendations included close attention to reporting options, allowing support services to be requested without necessarily triggering a formal complaint and an independent centre for accountability and the possibility to transfer complaints to civilian authorities.

A 2016 Statistics Canada Report followed up with a survey of over 43,000 responses on sexual misconduct, covering active members of the CAF. They showed the disturbing prevalence of sexual misconduct.

On 1 June 2021, former Supreme Court Justice, the Hon. Morris Fish, submitted the Third Independent Review containing 107 recommendations under a broad mandate to cover the military justice system. It confirmed the factual findings of the Hon. Marie Deschamps and considered them to be “as rampant and as destructive in 2021 as they were in 2015.”⁵⁵⁷ He included 10 survivor-centred recommendations on sexual misconduct. In particular, he recommended that the Sexual Misconduct

Chapter 4: Strengthening implementation: The barrier removal pillar

Response Centre (SMRC) introduced in 2015 should be reviewed independently to ensure that it is afforded an appropriate level of independence from both CAF and the Department of National Defence (DND). He called for civilian authorities to investigate sexual assaults.

He referenced the 2018 report of the Auditor General of Canada to the Parliament of Canada covering the regular and reserve force members of the CAF, which described the launching of Operation HONOUR in 2015 as a “top down, institution-wide military operation to eliminate inappropriate sexual behaviour.” Operation HONOUR was credited with increasing awareness, but reported that “some members still did not feel safe and supported,” and that “many victims also did not understand or have confidence in the complaint system.”⁵⁵⁸ The Auditor General reported that “[i]n 21 of the 53 cases, the file showed that the victim experienced fear, distress, discomfort, a lack of support, reprisal, or blame, including from the victim’s commanding officer, senior leaders, instructors, and colleagues.”⁵⁵⁹

Former Supreme Court Justice, the Hon. Justice Louise Arbour’s Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces followed, and included both an interim assessment concluded on 20 October 2021 and a final report on 20 May 2022. The Hon. Louise Arbour was mandated to examine how misconduct cases were handled by the military justice system. She examined “the institutional shortcomings and structural impediments” that have led to a status quo despite so many reports and recommendations. Justice Arbour reiterated that a trust deficit persists in the area of addressing sexual abuse and sexual harassment, adding that “[t]his trust deficit is a liability for the CAF. Rather than improving ‘efficiency, discipline and morale,’ jurisdiction over the investigation and prosecution of sexual offences has undermined confidence in the chain of command while doing little to eradicate the proscribed conduct.” Beyond recommending that language be harmonized with the *Criminal Code* (sexual assault) and *Canada Labour Code* (sexual harassment), she offered a close assessment of the CHRC process, noting that the CAF has often taken “a tough stance” when complaints have come forward to the CHRC.⁵⁶⁰ She provided tables indicating the number of complaints brought forward against the CAF to the CHRC, which have been updated by the CHRC for this report:

Table 4.1: Complaints against the Canadian Armed Forces by ground of discrimination, 2015 - 2021⁵⁶¹

Grounds of discrimination	Number of complaints
Disability	108
Sex	43
National or ethnic origin	39
Race	38
Colour	26
Family status	26

Age	24
Religion	23
Other grounds (marital status, sexual orientation, gender identity or expression, retaliations, pardoned conviction, genetic characteristics)	27

Table 4.2: Complaints against the Canadian Armed Forces by discriminatory practice, 2015 to 2021⁵⁶²

Discriminatory practice	Number of complaints
Denial of service	10
Employment-related	176
Discriminatory policy or practice	74
Harassment	40

She noted the existence of reprisal protections under the *Canadian Human Rights Act*, and the Canadian Human Rights Commission’s competency to deal with complaints. The Canadian Human Rights Commission assured her that they could deal with the cases expeditiously “if they were provided with adequate resources to deal with an influx of cases from the CAF”. In light of that, she called for the Canadian Armed Forces not to object to the Canadian Human Rights Commission’s jurisdiction under Section 41(1)(a) of the *Canadian Human Rights Act*. She added that the *Canadian Human Rights Act* should be revised to permit the award of legal costs and increase the potential damage awards.⁵⁶³

Overall, Justice Arbour called for corrective measures that would create “an even and safe playing field for women” adding that the measure would “benefit the other marginalized members of the CAF.”⁵⁶⁴ Her findings were frank and her recommendations proposed “to empower survivors, as they will be less at the mercy of a chain of command in which they have largely lost confidence.”⁵⁶⁵

As discussed in Chapter 3, a culture of harassment is a particularly pernicious barrier affecting the recruitment of equity groups, including women, and including Indigenous women. The task force considers it important for this barrier to employment, retention and promotion be systematically reported on by CAF and that this reporting be undertaken in an intersectional manner.

In our consultations with members of the Canadian Armed Forces, the Culture Change Directorate members readily acknowledged the exclusionary past – including the “undeniably abusive and traumatizing” treatment referred to as the LGBT Purge. They also acknowledged the areas in which they remain unrepresentative and were open to barrier removal.⁵⁶⁶ And they have shown their commitment to going beyond the parameters of the existing *Employment Equity Act*, by voluntarily recognizing 2SLGBTQI+ as an employment equity group.⁵⁶⁷

Chapter 4: Strengthening implementation: The barrier removal pillar

How unique an employer is the CAF?

I do not think that the low representation of women in the CAF is due to a lack of interest on their part in wearing the uniform and serving Canada. It is evident to me that, despite legislation mandating equality, life for women in the CAF is anything but equal. Many women experience harassment and discrimination on a daily basis with one stakeholder noting, “a man can be seen as stoic and forceful and a woman is a bitch. I was told early in my career that I had three choices: to be a slut, bitch or dyke.” This uneven treatment of women, coupled with other forms of systemic discrimination and widespread sexual misconduct, feeds into poor recruitment and retention, as well as underrepresentation at all ranks.

The Hon. Louise Arbour, Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces, 2022, at 34

Members of the CAF’s Culture Change Directorate pointed out key specificities of the CAF, including:

1. Entry-level hiring requiring working up the ranks in a hierarchical structure
2. Universality of Service requirements, and
3. The concept of “unlimited liability” within the military context, where members of CAF accept and understand that they are subject to being lawfully ordered into harm’s way under conditions that could lead to the loss of their lives

They translate into the following Policy Direction on the Principle of Universality of Service in the Canadian Armed Forces:

2.1 The mission of the DND and the CAF is to defend Canada, its interests and its values, while contributing to international peace and security.

2.2 To execute this mission the CAF must be given broad authority and latitude in utilizing CAF members and their skills. The statutory basis for this authority is section 33 of the National Defence Act. The fundamental importance of this authority that impacts the functioning and effectiveness of the CAF is recognized in subsection 15(9) of the Canadian Human Rights Act, which provides that the duty to accommodate under subsection 15(2) of that Act is subject to the principle of universality of service. Under this principle, CAF members are at all times liable to perform any lawful duty.

2.3 Effective performance of the broad range of defence and security tasks assigned to the CAF requires that CAF members be capable of performing a similarly broad range of general military, common defence and security duties, in addition to the more particular duties of their military occupation or occupational specification. The open-ended nature of military service is one of the features that distinguish it from the civilian notion of employment governed by a contract, which obliges employees to perform only those duties specified in their job description or contract.

Policy Direction on the Principle of Universality of Service in the CAF, DAOD 5023-0

Task force members were told that it can take 30 years for an entry level recruit to become a general; career progression for women needs to be studied, including what happens to their progression when they take a maternity leave. We were also told about a level of self-reflection that is going into rethinking selection processes; if 25 people are being promoted yet the first woman is 27th, they recognize based on an actual past experience that it might be necessary to re-evaluate to see whether the process has been affected by bias. Unfortunately, we were told, this kind of review has not yet become systematic. We were told that new processes are coming into effect that are less traditional and more focused on competencies.⁵⁶⁸

Implementing employment equity in the CAF

Representation rates

The dearth of female recruits, particularly in the male-dominated occupations, is not a result of poor effort on the part of recruitment centres. Quite the contrary. The centres strive to redirect women applicants to the occupations where they are most needed. We were told by several women recruits that they were advised to choose infantry or armour, as it was a sure-fire way to get accepted. Unfortunately, one senior officer said that even if the CFRG [Canadian Forces Recruiting Group] could recruit 25% women for combat arms occupations, the resistance of the combat arms community to those women recruits would make it difficult for that many women to be included in its ranks.

Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces (20 May 2022) (Reviewer: The Hon. Louise Arbour) at 202

The *Canadian Forces Employment Equity Regulations* require the records to include the promotion history of each Canadian Forces members alongside other detailed aspects of the workforce analysis and employment systems review.

Section 9 of the *Canadian Forces Employment Equity Regulations* clarifies that for the purposes of Section 33 of the *National Defence Act*, the Canadian Human Rights Commission and ultimately the Employment Equity Review Tribunal limit the ability of the Chief of the Defence Staff of the Canadian Armed Forces to “enrol, re-engage or promote” persons. Frankly, at this stage the limit seems altogether hypothetical given that the Employment Equity Review Tribunal has never decided a case on its merits. This is discussed in Chapter 6.

The Canadian Armed Forces does report that it was audited in 2011, affirming that it “achieved compliance” with the *Employment Equity Act* at that time. Consider the data in relation to the 2022 figures:

Table 4.3: Representation of employment equity groups in the Regular Forces and Primary Reserves, 2011 & 2022⁵⁶⁹

Regular Force & Primary Reserves	2011	1 April 2022
Women	14.8%	16.3%
Aboriginal people	2.1%	2.7%
Visible minorities	4.6%	10.1%
Persons with disabilities	1.2%	1.1%

Consider also that while the CAF is required to collect workforce information, determine underrepresentation through workforce analysis, and establish an equity plan for persons with disabilities, Indigenous persons and visible minorities, the CAF has taken the position that it is not required to set a representation goal for persons with disabilities.⁵⁷⁰ As noted in Table 4.3, disabled workers represent only 1.1% of CAF, a slight decrease since 2011.

The CAF considers itself a “unique” employer in that close to half of its workforce comprises occupations that are unique to the military. Arguing that external labour market direct comparison is not possible, it has agreed with the Labour Program, the Canadian Human Rights Commission, and the Treasury Board of Canada to rely only on two National Occupational Classification codes to estimate labour market availability – officers and non-commissioned members (NCMs).⁵⁷¹ The choice has faced strong critique:

This arrangement permits the CAF to set conservative and outdated goals. Aside from census data being as much as five years out of date, the NOC standard is based on the current representation of designated group members in the military, not in the labour market – a benchmark that is clearly inadequate and must be surpassed if there is to be progress on employment equity in the CAF.

Carol Agócs, Canadian Dilemma: Is There a Path from Systemic Racism Toward Employment Equity for Indigenous People in the Canadian Forces? (2018) 19:2 Journal of Military and Strategic Studies 273 at 281

Interestingly, though, the Arbour Report recalled that the CAF is in “close competition with civilian employers who are vying for the same personnel.”⁵⁷²

It is important to keep in mind that the Auditor General of Canada has conducted compliance audits of National Defence’s Recruitment and Retention of Military Personnel, in 2002, 2006 and 2016. This auditing included the Canadian Armed Forces *Employment Equity Act* responsibilities to identify and eliminate barriers and ensure that women and other employment equity groups are appropriately represented. However, the 2016 audit reported on women, but not on the other employment equity groups.

Not only did the Auditor General find that women represented only 14% of the Regular Force; it also found that women were concentrated in six occupations: resource management support clerks, supply technicians, logistics officers, medical technicians, nursing officers, and cooks. The Auditor General noted that the Canadian Armed Forces had not established targets for each occupation. The Auditor

General's report indicates that this was agreed, and there was an extensive follow up report with specific recommendations to report on progress on representation of women, visible minorities and Indigenous peoples by the Standing Committee on Public Accounts in 2017.

However, the CAF's Employment Equity Plan for 2021-2026 does not appear to retain that approach. It is unclear whether the agreement with the Labour Program, the Canadian Human Rights Commission, and the Treasury Board of Canada to rely only on two National Occupational Classification codes to estimate labour market availability – officers and NCMs – is part of the reason.

The important take away is that the CAF recognizes this is the *minimum* level of representation. CAF agrees that it has the latitude to set higher goals.

Setting minima and then establishing higher targets is important for other employers covered by the Employment Equity Act framework. But the floors themselves must not become sticky, holding equality back. Employment equity must come to mean making reasonable progress over time, with barrier removal within and beyond the workplace bringing us closer and closer to population-level representation.

And in this, data really matter. Goals matter too.

Canadian Armed Forces Employment Equity Regulations already allow the CAF to rely on “any other statistically-reliable information that is available to the public and that the Minister of Labour determines relevant”.⁵⁷³

It might allow for the calculation of goals to be based on different statistical sources, but to fail to calculate goals, in 2023, seems impermissible. This must change.

Recommendation 4.28: The Canadian Armed Forces should be required to calculate availability and set goals for all employment equity groups covered under the *Employment Equity Act*.

Barrier removal

Several female CAF members disclosed how they must adopt male traits such as assertiveness otherwise they are seen as being [weak] however if they are too assertive unlike their male counterpart who would simply be seen as ‘crusty’, a female would be seen that way because of her gender and being a terrible person. Furthermore, female soldiers reported having to work twice as hard as their male counterparts to be accepted in their work environment by having to prove their professional competencies...

*Major Christina Eastwood, “Equity in the Canadian Armed Forces – Why It Matters”
Minister of National Defence, 2019*

CAF has probably had a stronger opportunity than many federal workplaces to understand what barrier identification really looks like, given the many high-level reviews. Inclusion in the *Employment Equity Act* framework should make the barrier identification and barrier removal an ongoing, reflexive internal process.

This means barrier removal in CAF must be more than one line item among many anticipated features of an action plan. It needs to be central to the employment systems review and yield specific actions.

In the case of CAF, more attention may need to be placed on whether initial assessment requirements – for example fitness tests – are built on a model that disproportionately excludes women or other equity groups.

For example, the Arbour Report identifies some potential barriers, and in particular questions whether the physical fitness standard is required and remains appropriate, underscoring the “many occupations that do not require the same level of fitness as one would require and expect to maintain in a deployment”.⁵⁷⁴ It offered a portrait of recruitment that yields a vicious circle, where the CAF can only recruit as many people as it can train, but limited trainers leads to a bogged down process. The Hon. Louise Arbour found that the future of recruitment of women in CAF is “not encouraging” and was told that there is “little or no” chance that CAF will reach its target of 25% women in 2026. She added that women tend to be recruited in support roles, where they already have some representation. Among others, she cited human resources administrators, medical or dental officers, nursing officers, financial services administrators and cooks, occupations that have traditionally tended to feature women. Women were also found in limited number in some Air Force occupations such as aerospace engineers and aerospace control officers.⁵⁷⁵ She recommended that recruitment be simplified and restructured.⁵⁷⁶ Her specific recommendation #22 that the “CAF should put new processes in place to ensure that problematic attitudes on culture and gender-based issues are both assessed and appropriately dealt with at an early stage, either pre- or post-recruitment” is one that the task force endorses and would encourage the CAF extend to include all employment equity groups.

Studies so far have shown that women are more likely to have doubts about their abilities to meet the standards.⁵⁷⁷ That needs to be considered along with the erroneous perception that physical standards were lowered to enable women to pass the FORCE standardized tests to meet the Universality of Service principle.⁵⁷⁸ It is also important not to assume that some matters will be barriers – consider that women who enrolled in the CAF did so because they were attracted by the job security, travel opportunity and desire to serve, alongside educational subsidies and desire for a life change, and these were considered as pretty universal reasons for enrolling while the choice of primary reserve had added features that might allow relative control over family- work life balance issues.⁵⁷⁹ Taking all of this into account, what more can be done to support those members with family responsibilities?

It is not the role of the task force to identify the barriers specific to each workplace. This discussion is an opportunity to recall that this workplace in particular has a solid basis on which the work of barrier identification and removal can be continued.

Employment equity generates reflexive processes within the workplace. In chapters 5 & 6 we propose the kind of meaningful consultations and regulatory oversight to help to stimulate and support this ongoing work. The key take away is that barrier removal must be centred and ongoing if employment equity is going to be achieved.

Meaningful consultations in the CAF

The Deschamps report identified the fear of negative repercussions as the first and foremost reason expressed by members of the CAF to explain why they did not report incidents of sexual harassment

or assault, with the lack of confidentiality and lack of trust in the chain of command constituting other important reason given. Fears of being judged, disbelieved or stigmatized were also reported by CAF members. The Deschamps report recalled consistently that although these concerns mirror the society at large, “the context of an organizational culture that values strength and power, and that can appear unsympathetic to any perceived manifestations of fragility or weakness” could compound these fears in the CAF. The actual experience of how reported sexual assault was addressed – leading to re-victimization of the complainant with few repercussions for the aggressor - was potentially one of the most serious deterrents to others. The Deschamps report called for an independent centre for accountability to be created, outside of the CAF, to which sexual harassment and sexual assault could be reported.⁵⁸⁰

Currently, in what it refers to as the absence of bargaining agents, the CAF seeks to meet its consultation requirement through Defence Advisory Groups (DAGs) – Defence Aboriginal Advisory Group; Defence Advisory Group for Persons with Disabilities; Defence Team Pride Network, Defence Visible Minority Advisory Group, and Defence Women’s Advisory Organization - that are open to all CAF members, including members of employment equity groups, and five corresponding champions are nominated. There are also networks, including the Defence Team Black Employee Network.

The Arbour Report said DAGs and informal networks are “essential agents of change.” They are on the ground. They regularly engage with communities.⁵⁸¹ But researchers have questioned how safe advisory groups they are for participants. For example, a 2016 Defence Aboriginal Advisory Group (DAAG), reported on systemic racism in the CAF and received media coverage, but participation in the survey yielded a low response rate response: only 16 people reporting on 40 incidents. The DAAG report called for an independent investigation.⁵⁸² The Public Service Alliance of Canada (PSAC) and the Union of National Defence Employees (UNDE) play an active role with the civilian workforce in the DND. They question the contracting out of some employees in cleaning and facilities maintenance.⁵⁸³

CAF reports that some changes have been made to ensure that there is meaningful representation within the DAG structure. But the structure for meaningful consultations in the CAF remains weak. ***We see no reason to develop a separate approach for CAF; the recommendations in Chapter 5 on structures for meaningful consultations apply to CAF.***

Beyond exceptionalism

As this discussion should show, there are some distinctive challenges in the CAF. There are also tools necessary to begin to address them. Specific recommendations have been offered in this section. However, based on the information available to us, we conclude that most of the task force’s recommendations can readily apply to the Canadian Armed Forces, with little adjustment but with lots of support. That is the core recommendation.

Recommendation 4.29: Dedicated assistance should be provided to the CAF by the Employment Equity Commissioner to support and enable it to sustain reasonable progress to achieve employment equity for all employment equity groups.

The Royal Canadian Mounted Police (RCMP)

Like other federal employers, the RCMP has a statutory responsibility under employment equity legislation and other human rights legislation to provide a workplace that is free of prohibited discrimination. Its responsibility applies across its employee base, from regular RCMP members to civilian members to public servants. Yet the task force observed that confidence in the RCMP's ability to achieve employment equity is not high.

The RCMP has not been accountable to the marginalized employees within the organization.... Since the RCMP did not have a union until recently, there was no one to report this inaction to.

A Member of the RCMP

The RCMP is a very insular organization. Most members join at entry level, train at Depot and advance through the ranks. Few senior officials are not police officers. This has led to a strong culture and sense of pride, valuable in many regards, but which may lead to resistance to change.

Former Auditor General Sheila Fraser, Review of four cases of civil litigation against the RCMP on Workplace Harassment, March 2017 at 1

[A] fundamental restructuring may be necessary to resolve entrenched issues of misogyny, racism and homophobia but will require an in-depth review which is beyond my mandate. In my view however, it is time to discuss the need to make fundamental changes to the RCMP and federal policing. I am of the view that cultural change is highly unlikely to come from within the RCMP.

Independent Assessor, Former Supreme Court of Canada Justice, the Honorable Michel Bastarache, Broken Lives, Broken Dreams: The Devastating Effects of Sexual Harassment on Women in the RCMP, 11 November 2020

Allegations of widespread sexual harassment in the RCMP for over 30 years, alongside recent class action lawsuits by Constable Janet Merlo and Inspector Linda Gillis Davidson were reported by the Canadian Human Rights Commission to the United Nations' CEDAW during Canada's 8th and 9th periodic review.⁵⁸⁴ The reviews are numerous and long-standing, and include reviews on workplace barriers to retention and promotion.⁵⁸⁵ Former Auditor General Sheila Fraser conducted a review of four other allegations in March 2017, and called for an "independent harassment investigation process" to be established, under the direction of a central authority at National Headquarters, to be led by and consist mainly of "people with expertise in dealing with these issues, not members of the RCMP."⁵⁸⁶ The RCMP's Civilian Review Complaints Commission also issued a report in May 2017, considering that harassment charges had become a catchall that covered a broader range of concerns over a "culture of dysfunction" and an inability to implement reform to redress the problems including recommendations made by the Civilian Review Complaints Commission in 2013. Moreover, it found that 2014 reforms to harassment procedures have only exacerbated employees' lack of confidence in the RCMP. It issued ten recommendations but concluded that "the RCMP lacks both the will and the capacity to make the changes necessary to address the problems that afflict its workplaces. Responsibility now lies with the federal government."⁵⁸⁷

The Government of Canada recognized that discrimination and harassment were systemic in the RCMP and agreed to compensate thousands of women, in a settlement agreement approved in May 2017.

Following the settlement, and as part of its implementation, former Supreme Court Justice Michel Bastarache issued *Broken Dreams, Broken Lives: The Devastating Effects of Sexual Harassment on Women in the RCMP*, Final Report on the Implementation of the Merlo Davidson Settlement Agreement that found the persistence of systemic barriers that prevented women from succeeding in the RCMP, calling for a review of policies and procedures. The barriers were found in recruitment practices that set qualifications that were far less stringent than those in many other countries and that failed to screen candidates for misogyny, homophobia or racism; in on-boarding and the approach to and locations of training both at the initial probationary period and ongoing once in postings; in some of the postings in remote locations; in human resources practices; in access to maternity and parental leave and failures to replace them during their leave leading them to feel pressure to return early; perceptions of bias and unfairness in the dispute resolution mechanisms including a lack of confidentiality, fear of retaliation, alongside a lack of meaningful consequences; promotions derisively described as the “friends and family” plan and incidents of refusals by some junior men to follow the direction of a woman of superior rank disregarded or tacitly approved by senior men.

While my mandate was limited to assessing cases of sexual harassment and gender and sexual orientation-based discrimination, what I heard from the women undermined my belief in the ability of the RCMP to change its culture which, I have concluded, stems from a fundamental lack of respect for anyone that does not fit the profile of the “ideal” Mountie whether due to gender, size, sexual orientation or race.

Independent Assessor, Former Supreme Court of Canada Justice, the Honorable Michel Bastarache, Broken Lives, Broken Dreams: The Devastating Effects of Sexual Harassment on Women in the RCMP, 11 November 2020, at 56

The Hon. Michel Bastarache had the following to offer on the mental health effects of the discrimination and harassment:

Claimants told us that they were prepared for the horrific things that they witnessed as part of their duties as police officers. However, many believed that the constant stress of having to watch their backs or being subjected to harassment and discrimination undermined their natural resilience and left them more susceptible to psychological injuries. This was documented in several psychological assessments provided to us. In my view, based on the medical reports submitted to us, many of the claimants we spoke to would not have suffered as much from the psychological injuries that they did if they had not faced such a hostile workplace.⁵⁸⁸

The report’s specific recommendations included some quite specific features on recruitment that are akin to an employment equity review:

- Perform a careful analysis of what will constitute “merit” in the recruitment of RCMP members, considering the need to remove systemic barriers and to allow for specialized roles and functions.

Chapter 4: Strengthening implementation: The barrier removal pillar

- Require a minimum level of 2 years of post-secondary education or training to apply to the RCMP. I recommend that the RCMP study the recent changes to recruitment recently adopted in the UK which give options for varying ways to meet this requirement.
- Encourage applications from diverse groups including women, LGTQ2S+ people and racialized communities and implement programs to assist them in meeting the entry requirements where necessary.
- Conduct effective and detailed background checks on applicants' views on diversity and women. Eliminate those who are not able to function with women, Indigenous people, racialized minorities or LGTQ2S+ persons and are unwilling to accept the principles of equality and equal opportunity for all. Screening must consider all incidents of harassment and domestic violence.⁵⁸⁹

The report stressed the importance of leadership, and concluded in the following stark manner:

I have concluded, based on everything I was told over the past 3 years, that the culture of the RCMP is toxic and tolerates misogyny and homophobia at all ranks and in all provinces and territories. This culture does not reflect the stated values of the RCMP, and it is found throughout the organization. RCMP members and officers are forced to accept that they must function in the context of this culture to succeed. RCMP employees appear to blame the “bad apples” without recognizing the systemic and internal origins of this conduct.

Comprehensive cultural change is required. For the last 30 years issues of workplace and sexual harassment and discrimination have been brought to the attention of the Government of Canada and the RCMP through internal reports, external reports and litigation before the Courts. The measures taken in response have not, in my view, succeeded in addressing the underlying issues arising from the RCMP's toxic culture. Indeed, based on my review of former reports and litigation and conversations with 644 women, I am not convinced that positive cultural change can occur without external pressure. As such, I conclude that the time has come for an in depth, external and independent review of the organization and future of the RCMP as a federal policing organization.⁵⁹⁰

The RCMP responded as follows, committing to an RCMP “free of violence, harassment and discrimination”:

The RCMP response acknowledges the recommendations, which cross four key areas, many of which are already underway as part of a long-term approach to a healthy and inclusive workplace:

- Harassment prevention and resolution: e.g., a new Independent Centre for Harassment Resolution [ICHR], a civilian-staffed harassment prevention and resolution regime, outside the chain of command and reporting to the Chief Administrative Officer. This will ensure employees have access to a trusted, consistent process that is accessible, timely and accountable.
 - The launch of ICHR was in June 2021, and today there are 29 external investigators.
 - The ICHR is on track to be fully staffed and fully operational by July 2022.
 - In addition to addressing individual cases, analysis of external investigation findings will provide important information to help the RCMP prevent workplace harassment and violence to improve the workplace.
 - The ICHR is part of the panel involved in conduct review discussions.
- Addressing systemic barriers: e.g., identifying, preventing and removing barriers from our policies, programs and operations through Gender-based Analysis+ and a new RCMP Equity, Diversity and Inclusion Strategy.
- Recruitment and onboarding: e.g., recruitment modernization plan, examining large-scale changes to Depot and continuing to review the Cadet Training Program.
- Leadership development and training: e.g., integration of Character Leadership in recruitment, training and promotion processes.⁵⁹¹

An Independent Centre for Harassment Resolution (ICHR) was established on 30 June 2021. Its mandate is to facilitate the resolution for RCMP employees of workplace incidents of harassment and violence. It is staffed by public servants. It is to accomplish its mandate independently, and understands that to mean “outside the chain of command, and free of bias or conflict of interest.”⁵⁹²

ICHR reports that 159 notices of occurrence were filed even prior to its creation, with a total of 615 notices – spanning abuse of authority, discrimination, interpersonal deportation and sexual harassment - filed as of 30 June 2022. An operational challenge in its first year was simply meeting the high demand for investigations.⁵⁹³

The ICHR has worked to gain increased access to qualified external investigators under the recent *Canada Labour Code Work Place Harassment and Violence Prevention Regulations*.⁵⁹⁴ The executive directors acknowledge, however, that the ultimate goal cannot be to address harassment after the fact, but rather to address root causes. They also acknowledge the need for restorative practices following harassment and violence, also to prevent reoccurrences. This leads their investigators to issue recommendations to the local health and safety committee for joint determination, whether or not an allegation meets the definition of workplace harassment and violence.

Chapter 4: Strengthening implementation: The barrier removal pillar

We note the findings of former Auditor General Sheila Fraser in 2017, who found that the RCMP “as an entity has difficulty formally acknowledging that some of its workplace units are dysfunctional. I am of the view that there is a tendency to downplay the transgressions in order to protect the reputation of the organization.”⁵⁹⁵ Former Supreme Court of Canada justice, the Hon. Michel Bastarache, found the following:

fixing the RCMP and addressing the negative culture that has taken root in it will take an immense effort and will require the good will of its leaders and members. Most of these individuals are invested in the status quo and will not likely want to make the necessary changes to eradicate this toxic culture.⁵⁹⁶

On 9 May 2022, a report was issued to the Hon. Marco Mendicino, Minister of Public Safety, by the Canadian Feminist Alliance for International Action (FAFIA) entitled *The Toxic Culture of the RCMP: Misogyny, Racism and Violence against Women in Canada’s National Police Force*. Its findings are consistent with those in the Bastarache report and extends the reflection on the impact of the hard questions raised about the RCMP’s treatment of women it employs to the “women it polices”.

In our consultations the RCMP lamented that the employment equity exercise seemed to be a numbers game, and urged a more comprehensive approach.⁵⁹⁷ Yet there was no engagement with the rather comprehensive barrier assessment that emerges from external, independent reviews.

The RCMP’s 2021-22 annual report on equity, diversity and inclusion, submitted by the RCMP’s Chief Human Resources Officer & EDI Champion, Gail Johnson, indicates that the RCMP spent 2020-21 developing an Equity, Diversity, and Inclusion Strategy to meet needs identified in previous comprehensive workforce and employment systems analyses. But the focus in the Report is on *Employment Equity Act* diversity statistics.

We read that:

- Workforce representation for Indigenous peoples continued to decline in 2020-2021, to 6.2% from 6.3% in 2019-2020 in the general workforce, and to 7% in 2020-2021 from 7.2% in 2019-2020 for Regular Members
- The representation of women increased slightly from 39.4% in 2019-2020 to 39.6% in 2020-2021, with only 21.8% women in the Regular Member cadre
- Visible minorities increased from 12.8% in 2019-2020 to 13.2% in 2020-2021
- Persons with disabilities declined by 15 individuals, despite the already low rates of representation of people with disabilities among regular members (1.4% in 2020-2021, unchanged since 2019-2020) and no new hires in that category for 2020-2021 either. They are underrepresented among senior officer ranks.

Disabled workers face the most significant employment equity gap for the RCMP.

The plan lists other features, including new employee networks being created, communications on the value of equity, diversity and inclusion, notes that performance indicators for senior leaders to measure progress on EDI were created with bargaining unit consultations, and a number of “impact driven” programs. Like many reports, the plan contains pictures of smiling employees representing equity groups and present a positive face. What’s missing, is how actual barriers are being tackled. We are told that “the RCMP’s data collection practices are being strengthened to enable the organization to

evaluate the effectiveness of EDI-related programs and services, and their impact on their targeted demographic.”⁵⁹⁸

The disconnect between the EDI plan and the most serious reviews was frankly disconcerting.

While the task force was told that the RCMP’s leadership is now gender diverse and somewhat racially diverse, we were not told very much about the culture change and barrier removal that would be necessary to achieve employment equity. We were told that not all longstanding issues can be addressed in the short term; systemic remedies seemed to be equated with long term change.

Yet the essence of employment equity is to take proactive measures to address substantive inequality in a determined, accelerated manner to prevent inequity from persisting and start a more equitable process.

Recommendation 4.30: The call in the Bastarache report for an independent external review and genuinely independent and adequately resourced oversight body for the RCMP should be implemented.

It is not surprising that one would at once have a fundamental critique of merit and also have calls for the principle of merit to be held onto steadfastly. Both arguments are flip sides of the same coin. They seek to root out arbitrariness and arrive at a precise, transparent, fair approach to achieving substantive equality.

These findings support an approach to employment equity that is rooted in substantive equality supports ensuring:

- clear and transparent job criteria, application processes and selection processes that ensure that candidates for hiring and promotion processes and evaluated workers are treated with respect and dignity, and
- processes that are exempt of barriers and that foster inclusive practices

In this kind of workplace, representation numbers can actually be achieved and employment equity can focus on maintaining equity, because the conditions are in place to make employment equity work for all.

Federally regulated private employers – A focus on transportation

There is considerable variety within the federally regulated private sector. The sector includes several key industries in the transportation sector. The transportation sector is strategically and symbolically significant, not least because the 1987 decision of the Supreme Court of Canada discussed earlier in this report, *C.N. v. Canada (Canadian Human Rights Commission)* was about stubborn representation challenges in the railway industry. Following that decision, and the decision in the public service, *National Capital Alliance v Health and Welfare Canada*, the ability to bring statistical representation employment equity complaints was essentially removed from the *Canadian Human Rights Act*.

In 2023, stubborn representation challenges across the transportation sector persist.

Chapter 4: Strengthening implementation: The barrier removal pillar

Consider the aviation industry. Air pilots, flight engineers and flying instructors are 92.53% men+. Lack of representation is a global challenge. The problems are not specific to any one employer.

Within this challenged industry, Air Canada is rated one of Canada's best diversity employers. Like others in the sector, it was hard hit by the pandemic. We know from its own employment equity report for 2020, its entire workforce had decreased by 55%; it is therefore important to be cautious about overall numbers. But with women's overall representation at 38% with 40% of them leaving Air Canada, visible minorities at 20% with 22% departures, Indigenous representation at 1.2% of the entire workforce and a 1.3% departure rate; or disabled workers at 1.1% representation with 1.4% departure, it is clear that there are some significant persisting challenges to equitable representation.

What support has there been to Air Canada through the *Employment Equity Act* LEEP participation, to improve these numbers?

The narrative reports were among the most comprehensive reviewed for the report in detail and scope. Initiatives range from showcasing EDI events or external communications type initiatives – pledges, joining voluntary initiatives, recording videos, supporting scholarship and bursary programs, participating in Pride events. They also include revising accommodation policies and providing a range of training.

Let us be clear. What is listed is positive, and may well affect climate and more. But we cannot tell that from the report.

Moreover, the focus on identifying and removing barriers is at best diffuse. The relationship to the quantitative data is to be intuited but is not established. There are commitments to groups that would be disaggregated (Black North Initiative, for example, or Pride events) but they are not linked back to employment equity measures. And, in a workplace that has 86% of its workplace covered by collective bargaining agreements (down from 90% in 2015),⁵⁹⁹ the narrative report was strikingly silent on this feature of *Employment Equity Act* implementation.

The takeaway is this: some employers are putting a lot of effort into doing diversity work and even reporting on it. But they need support to tailor their employment equity initiatives in a manner that actually helps to achieve and sustain results.

Transportation by rail is not faring much better. Have a look at Appendix M. To take one example from the NOC codes, railway carmen/women – Canada wide - are 97.07% male.

Via Rail reported having representation of 8% in 2022 for “visible minorities” in its executive positions, with an overall total of 16% visible minorities.⁶⁰⁰ It informed the task force that 2% of its entire workforce is Indigenous, and 2% comprise persons with disabilities, without specifying what percentage of either employment equity group is in executive ranks.⁶⁰¹ Their efforts to promote gender equality seem to have been where most of the movement has happened, with 46% of women managers; the overall representation of women in Via Rail is at 37%.

Via Rail's narrative report indicated that a robust Diversity & Inclusion Strategic Plan was developed, to reflect its aspiration to “move away from compliance to the creation of a culture of inclusion and belonging.” The report provided a list of bullet points with relatively vague statements on areas from governance and leadership to a planned review of HR practices and policies and the implementation of flexible work-life and accommodation practices.

Again, the practices are laudable so far as they go. But they provide little to no idea of how these initiatives are being linked to enabling Via Rail to achieve employment equity. That workplace reports are so vague says something about the expectation of the receiving entity. We need to turn the attention back to assessing what training and what support are being provided to ensure that the focus remains on identifying and eliminating barriers to employment equity.

To put it bluntly: employment equity is not busy work. We need to be doing the analysis, and preparing the reports with purpose. The purpose is to achieve and then sustain employment equity.

Where are these annual reports going, and why is more not being done with them, to support employers to achieve and sustain employment equity?

Our consultations were fruitful. We did not face federally regulated private sector employers who were in denial. Rather, we were faced with industry representatives who were candid about the need to attract and retain diverse talent. They acknowledged that they are depriving themselves of a huge part of the potential workforce. The Air Transport Association of Canada added that the shortage in pilots was compounded by labour shortages in many other aviation professions. Our task force was told that the carrier with the highest percentage of female pilots was regional. Why? Perhaps because they could enable employees to be back home at night.⁶⁰²

The available research on barriers faced by transportation sector workers confirms the impact of work patterns, in particular long shift hours. The ability to address these barriers in a systematic manner may seem limited.

But this is not the whole answer to the problem.

As we saw with other male dominated professions, part of the answer is the way that accommodations are treated. If the accommodation for women workers with childcare responsibilities who seek to work fewer hours is to offer them precarious contracts, then we are just compounding the problem. That is not how you build a supportive and sustainable solution to the challenge of recruiting women with childcare responsibilities. In contexts with little proven flexibility, it is not unlikely that rather than request accommodations, workers will instead adopt a strategy of emulating the dominant norm, or simply leave the sector. The power of dominant workplace gender norms across sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) factors, is something the research is also beginning to observe.⁶⁰³

That said, our task force was surprised to see that at this stage in the life of the Employment Equity Act framework we were still raising these concerns about longstanding problems. 37 years into employment equity, we should have covered more mileage.

We need to strengthen the barrier removal pillar to have more rigorous and clear diagnoses of the problems and to know what to do to eliminate barriers.

We need to activate meaningful consultation.

And we need to recalibrate regulatory oversight.

Chapter 4: Strengthening implementation: The barrier removal pillar

- ⁴⁰⁴ Outgoing president of the Public Service Commission of Canada, Patrick Borbey, Task Force Consultations, 18 March 2022.
- ⁴⁰⁵ Carol Agócs, “Systemic Discrimination in Employment: Mapping the Issue and the Policy Responses” in Carol Agócs (ed) *Workplace Equality: International Perspectives on Legislation, Policy and Practice* (The Hague: Kluwer Law International, 2002) at 2.
- ⁴⁰⁶ Carol Agócs, “Think Piece on Three Topics,” Unpublished Paper prepared for the EEART, 30 August 2022.
- ⁴⁰⁷ See Laverne Jacobs *et al.*, *The Annotated Accessible Canada Act, 2021*, University of Windsor, Faculty of Law, 2021 CanLiiDocs 987, calling for a definition of barriers under the *Accessible Canada Act*.
- ⁴⁰⁸ *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 1987 CanLII 109 (SCC).
- ⁴⁰⁹ *R v. Sharma*, 2022 SCC 39 at para. 41, 55.
- ⁴¹⁰ Fay Faraday, “One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada” (2020) 94 SCLR (2d) 301 at 310.
- ⁴¹¹ Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces (20 May 2022) (Reviewer: The Hon. Louise Arbour).
- ⁴¹² See also Carol Agócs, “A Think Piece on Three Issues,” Unpublished paper submitted to the EEART, 30 August 2023.
- ⁴¹³ See e.g. Committee on the Rights of Persons with Disabilities, General Comment 8 (2022) on the Rights of Persons with Disabilities to Work and Employment, CRPD/C/GC/8, 9 September 2022, at para. 19.
- ⁴¹⁴ Michael Stein, EEART Consultations, June 2022; David Lepofsky, EEART Consultations, 2022.
- ⁴¹⁵ See Government of Canada, “Employment Equity Tasks, Legislated Employment Equity Program,” (12 April 2023), online: [Canada.ca < equity.esdc.gc.ca/sgiemt-weims/emp/WeimsEET.jsp >](http://Canada.ca/equity.esdc.gc.ca/sgiemt-weims/emp/WeimsEET.jsp).
- ⁴¹⁶ See Isabelle Letourneau, et al., “Human Resources Professionals Supporting Work-Life Balance: A Qualitative Study”, Presentation to the Work Family Research Network Conference, New York, 24 June 2022 [unpublished] & Professor Isabelle Letourneau, Expert consultations with the Task Force Chair and Vice Chair, 7 July 2022.
- ⁴¹⁷ Vrinda Narain, Colleen Sheppard & Tamara Thermitus, “Employment Equity and Inclusion: Through the Lens of Substantive Equality,” Unpublished Working Paper prepared for the EEART, September 2022.
- ⁴¹⁸ Pay Equity: A New Approach to a Fundamental Right, Pay Equity Task Force Final Report (Bilson Report), (Ottawa: Department of Justice, 2004) at 27.
- ⁴¹⁹ See UN Committee on the Rights of Persons with Disabilities, *General Comment 8 (2022) on the Rights of Persons with Disabilities to Work and Employment*, CRPD/C/GC/8, 9 September 2022.
- ⁴²⁰ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652 (SCC) at para 62.
- ⁴²¹ Vrinda Narain, Colleen Sheppard and Tamara Thermitus, “Employment Equity and Inclusion: Through the Lens of Substantive Equality” Unpublished Working Paper Prepared for the EEART, September 2022 at 33.
- ⁴²² Canadian Human Rights Tribunal, *Annual Report 1999*, (Ottawa: Minister of Public Works and Government Services Canada, 1999); *Canadian Human Rights Act* Review Panel, *Promoting Equality: A New Vision*. (Ottawa: Department of Justice, 2000) at 20.
- ⁴²³ Public Service Commission of Canada, *Members of Employment Equity Groups: Perceptions of Merit and Fairness in Staffing Activities, A Statistical Study*, (Ottawa: Public Service Commission, 2014) at 3.
- ⁴²⁴ Public Service Commission of Canada, *Perceptions of Merit and Fairness in Staffing Activities, A Statistical Study*, (Ottawa: Public Service Commission, 2014) at 11.
- ⁴²⁵ Public Service Commission of Canada, *Perceptions of Merit and Fairness in Staffing Activities, A Statistical Study*, (Ottawa: Public Service Commission, 2014) at 12.
- ⁴²⁶ President of the Public Service Commission of Canada, Patrick Borbey, Task Force Consultation, 18 March 2022.
- ⁴²⁷ *Report of the Commission on Equality in Employment* by Judge Rosalie Silberman Abella, Commissioner (Ottawa: Human Resources and Skills Development Canada, 1984) at 46.
- ⁴²⁸ For a discussion, see Morley Gunderson, “Revisiting the Abella Report: Final Report to ESDC” (September 2018) [unpublished] at 10.
- ⁴²⁹ Kecia Thomas *et al.*, “Moving from Pet to Threat: Narratives of Professional Black Women” In Lillian Comas-Diaz & Beverly Green, eds, *Psychological Health of Women of Color: Intersections, Challenges, and Opportunities* (Santa Barbara, CA: Praeger,

2013) 275. This research has been widely discussed. See e.g. Kevin Donoghue et al, “The Infuriating Journey from Pet to Threat: How Bias Undermines Black Women At Work” *Forbes EQ*, (29 June 2021), online: <www.forbes.com/sites/forbeseq/2021/06/29/the-infuriating-journey-from-pet-to-threat-how-bias-undermines-black-women-at-work/?sh=7ecbb8496490>.

⁴³⁰ Eddy S. Ng & Nick Rumens, “Diversity and inclusion for LGBT workers: Current issues and new horizons for research” (2017) 34 *Canadian Journal of Administrative Sciences* 109 at 115.

⁴³¹ Leah F Vosko, *Managing the Margins: gender, citizenship, and the international regulation of precarious employment* (Oxford, Oxford University Press, 2010).

⁴³² For an early historical case, see Karen Flynn, “Hotel Refuses Negro Nurse’: Gloria Clarke Baylis and the Queen Elizabeth Hotel” (2018) 35:2 *Canadian Bulletin of Medical History* 278.

⁴³³ The most recent decision is *Ontario (Health) v. Association of Ontario Midwives*, 2022 ONCA 458.

⁴³⁴ *National Capitol Alliance on Race Relations v Canada* (Department of Health & Welfare), 1997 CanLII 1433 (CHRT), T.D. 3/97.

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Chapter 4: Strengthening implementation: The barrier removal pillar

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- ⁵⁵⁵ Report of the Third Independent Review Authority to the Minister of National Defence (30 April 2021)(Chair: The Hon. Morris Fish) at para 622.
- ⁵⁵⁶ Report of the Third Independent Review Authority to the Minister of National Defence (30 April 2021)(Chair: The Hon. Morris Fish) at para 633.
- ⁵⁵⁷ Report of the Third Independent Review Authority to the Minister of National Defence (30 April 2021)(Chair: The Hon. Morris Fish) at vi.
- ⁵⁵⁸ Report of the Third Independent Review Authority to the Minister of National Defence (30 April 2021)(Chair: The Hon. Morris Fish) at 138 - 139, citing 2018 Fall Reports of the Auditor General of Canada to the Parliament of Canada, Report 5 – Inappropriate Sexual Behaviour – Canadian Armed Forces at para. 5.5, 5.17 & 5.19.
- ⁵⁵⁹ 2018 Fall Reports of the Auditor General of Canada to the Parliament of Canada, Report 5 – Inappropriate Sexual Behaviour – Canadian Armed Forces at para. 5.61.
- ⁵⁶⁰ Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces (20 May 2022) (Reviewer: The Hon. Louise Arbour) at 8, 86 & 135.
- ⁵⁶¹ Source: Canadian Human Rights Commission.
- ⁵⁶² Source: Canadian Human Rights Commission.
- ⁵⁶³ Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces (20 May 2022) (Reviewer: The Hon. Louise Arbour) at 136.
- ⁵⁶⁴ *Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces* (20 May 2022) (Reviewer: The Hon. Louise Arbour) at 14, 23 (specifically mentioning interviews with members of 2SLGBTQI+ communities as well as members of visible minorities).
- ⁵⁶⁵ Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces (20 May 2022) (Reviewer: The Hon. Louise Arbour) at 31.
- ⁵⁶⁶ Canadian Armed Forces, Presentation to the EEART, 14 April 2022 & Written Submission to the EEART, 16 May 2022.
- ⁵⁶⁷ National Defence & Canadian Armed Forces, Canadian Armed Forces, Employment Equity Plan 2021-2026.
- ⁵⁶⁸ Canadian Armed Forces, Presentation to the EEART, 14 April 2022.
- ⁵⁶⁹ Sources: Canadian Armed Forces. (2011). Employment Equity Report, 2010-2011, https://publications.gc.ca/collections/collection_2014/mdn-dnd/D3-31-2011-eng.pdf; Canadian Armed Forces, Written Submission to the *Employment Equity Act* Review Task Force, 16 May 2022.
- ⁵⁷⁰ Canadian Armed Forces, Written Submission to the EEART, 16 May 2022.
- ⁵⁷¹ National Defence & Canadian Armed Forces, Canadian Armed Forces, Employment Equity Plan 2021-2026.
- ⁵⁷² Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces (20 May 2022) (Reviewer: The Hon. Louise Arbour) at 205.

- ⁵⁷³ Canadian Forces Employment Equity Regulations, SOR 2002-421, Section 15(2)(b).
- ⁵⁷⁴ Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces (20 May 2022) (Reviewer: The Hon. Louise Arbour) at 203.
- ⁵⁷⁵ Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces (20 May 2022) (Reviewer: The Hon. Louise Arbour) at 201-202.
- ⁵⁷⁶ Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces (20 May 2022) (Reviewer: The Hon. Louise Arbour) at 205, recommendation #20.
- ⁵⁷⁷ Barbara T. Waruszynski et al., “Desire to serve: Insights from Canadian defence studies on the factors that influence women to pursue a military career” (2022) 8:1 Journal of Military, Veteran and Family Health 75.
- ⁵⁷⁸ Barbara T. Waruszynski et al., “Women Serving in the Canadian Armed Forces: Strengthening Military Capabilities and Operational Effectiveness” (2019) 19 Canadian Military Journal 24 at 31.
- ⁵⁷⁹ Barbara T. Waruszynski & Kate H. MacEachern, “Women’s Lived Experiences of Serving in the Canadian Armed Forces Primary Reserve” (2021) 21 Canadian Military Journal 47 at 49.
- ⁵⁸⁰ *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces* (March 27, 2015) (External review authority: Marie Deschamps, C.C. Ad.E) at 29 – 36 & Recommendation 3.
- ⁵⁸¹ Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces (20 May 2022) (Reviewer: The Hon. Louise Arbour) at 190.
- ⁵⁸² Carol Agócs, “Canadian Dilemma: Is There a Path from Systemic Racism Toward Employment Equity for Indigenous People in the Canadian Forces?” (2018) 19:2 Journal of Military and Strategic Studies 273 at 297.
- ⁵⁸³ Union of National Defence Employees & Public Service Alliance of Canada, In the interest of safety and security: The case for ending the privatization of Department of National Defence services, (October 2020).
- ⁵⁸⁴ Canadian Human Rights Commission, Submission to the Committee on the Elimination of Discrimination against Women in advance of its consideration of Canada’s 8th and 9th Periodic Reports (September 2016).
- ⁵⁸⁵ Broken Dreams, Broken Lives: The Devastating Effects of Sexual Harassment on Women in the RCMP, Final Report on the Implementation of the Merlo Davidson Settlement Agreement (11 November 2020)(Independent Assessor: The Hon. Michel Bastarache) at 38; Civilian Review and Complaints Commission for the RCMP, Report into Workplace Harassment in the RCMP, May 2017 at 13.
- ⁵⁸⁶ Sheila Fraser, Review of four cases of civil litigation against the RCMP on Workplace Harassment, Report to the Minister of Public Safety and Emergency Preparedness (March 2017).
- ⁵⁸⁷ Civilian Review and Complaints Commission for the RCMP, *Report into Workplace Harassment in the RCMP*, May 2017.
- ⁵⁸⁸ Broken Dreams, Broken Lives: The Devastating Effects of Sexual Harassment on Women in the RCMP, Final Report on the Implementation of the Merlo Davidson Settlement Agreement (11 November 2020)(Independent Assessor: The Hon. Michel Bastarache) at 38; Civilian Review and Complaints Commission for the RCMP, Report into Workplace Harassment in the RCMP, May 2017 at 25.
- ⁵⁸⁹ Broken Dreams, Broken Lives: The Devastating Effects of Sexual Harassment on Women in the RCMP, Final Report on the Implementation of the Merlo Davidson Settlement Agreement (11 November 2020)(Independent Assessor: The Hon. Michel Bastarache) at 65.
- ⁵⁹⁰ Broken Dreams, Broken Lives: The Devastating Effects of Sexual Harassment on Women in the RCMP, Final Report on the Implementation of the Merlo Davidson Settlement Agreement (11 November 2020)(Independent Assessor: The Hon. Michel Bastarache) at II & III.
- ⁵⁹¹ Royal Canadian Mounted Police, RCMP response to the report of the Independent Assessors regarding the claims made under the Merlo Davidson Settlement Agreement, 5 May 2022.
- ⁵⁹² Independent Centre for Harassment Resolution, Annual Report 2021-2022, at 5 (Message from the Executive Directors).
- ⁵⁹³ Independent Centre for Harassment Resolution, Annual Report 2021-2022, at 12, 15.
- ⁵⁹⁴ SOR/2020-130.
- ⁵⁹⁵ Sheila Fraser, Review of four cases of civil litigation against the RCMP on Workplace Harassment, Report to the Minister of Public Safety and Emergency Preparedness (March 2017).
- ⁵⁹⁶ Broken Dreams, Broken Lives: The Devastating Effects of Sexual Harassment on Women in the RCMP, Final Report on the Implementation of the Merlo Davidson Settlement Agreement (11 November 2020)(Independent Assessor: The Hon. Michel Bastarache) at 58.

⁵⁹⁷ RCMP, Presentation to the EEART, 17 May 2022.

⁵⁹⁸ RCMP, From Strategy to Implementation: Addressing Systemic Racism and Discrimination: Annual EDI Report 2021-2022 at 33.

⁵⁹⁹ Air Canada, 2021 *Corporate Social Responsibility Report*, 89 see102-41. GRI Content Index 2021.

⁶⁰⁰ Via Rail, Submission on Diversity and Inclusion to the EEART, at 4.

⁶⁰¹ Via Rail, Submission on Diversity and Inclusion to the EEART, at 5-6.

⁶⁰² Air Transport Association of Canada, Consultations with the EEART, 7 April 2022.

⁶⁰³ Drawn from the ethnographic study and analysis of the transportation and construction sectors primarily in the United Kingdom by Tessa Wright, *Gender and Sexuality in Male-Dominated Occupations: Women Working in Construction and Transport* (Palgrave Macmillan, 2016) at 203 – 218.

Chapter 5: Reactivating the meaningful consultations pillar

Introduction – Making consultations meaningful

Consultations should not be about informing unions and workers, but involving these actors in the processes... The consultation should result in a profound dialogue.

Canadian Union of Professional Employees, Presentation to the EEART, 10 May 2022

Meaningful consultations have, in practice, been the weak pillar in the process of sustaining employment equity in workplaces in Canada. This must change. The active, structured participation of those most concerned with the outcomes need to be part of workplace transformations. Otherwise, we can expect no transformation.

[The] *Employment Equity Act* needs to deal with a delicate balance: you do not want to tell employers how to run their business but, on the other hand, you want them to incorporate into their businesses collective values and create an opportunity to do well.

Canadian Race Relations Foundation, Presentation to the EEART, 3 June 2022

Throughout our engagements, task force members heard two things that might seem contradictory.

- First, we heard that workers and employment equity groups felt a certain survey and interview fatigue.
- Second, we heard that workers and equity groups should be consulted more.

The focus, of course, was on the nature of the consultations: consultations needed to be meaningful, with a view to enabling change. We heard that formal consultations with workers, including concerned equity groups, are foundational.⁶⁰⁴

At some level, this seems to be broadly understood. It is repeated. The Canadian Human Rights Commission (CHRC) calls engagement with a variety of stakeholders a central priority, especially those who the policy will affect the most. The CHRC even anticipates that if no members of the employment equity group are in the organization, or if they are not willing to participate, the employer will need to engage with individuals and groups beyond the organization.⁶⁰⁵

Bargaining agents need to be part of the movement.

Yasmine Laroche, former Deputy Minister Champion for Federal Employees with Disabilities, Presentation to the EEART, 14 June 2022

Not a top-down exercise

Employment equity should not be thought of as a top-down form of workplace control. Not only are top-down workplace governance models increasingly considered to be outdated; employment equity is premised on fostering workplace inclusion for equity groups. It recognizes and seeks to respect a key feature of trauma-informed approaches: that collaboration with historically excluded groups constitutes a crucial way to avoid re-traumatization.⁶⁰⁶ Meaningful consultations also strengthen the attempt to correct a reliance on purely quantitative data. Workers' participation is necessary to be able to identify and remove barriers. Studies also underscore the importance of unions to promoting and fostering compliance with employment law, including by multinational enterprises located in Canada.⁶⁰⁷ Mechanisms that enable meaningful consultations should therefore be at the heart of employment equity.

The *Employment Equity Act* contains several key provisions requiring consultations. But as we discuss in this chapter, in many workplaces, those consultations seem minimal at best, and the provisions to ensure compliance seem not to be audited systematically.

Hiring is a management responsibility, and the *Employment Equity Act* framework respects the delicate balance. And as we have stressed throughout this report, employment equity is not only about hiring, and it is certainly not only about the numbers.

Procedures and processes that ensure fairness can and have been implemented in Canadian workplaces, and the federally regulated workplaces covered by the *Employment Equity Act* already have experience that can guide ongoing implementation.

Making employment equity consultations meaningful is part of the crucial recalibration for achieving employment equity.

Participation is at the heart of substantive equality and the processes that secure it.⁶⁰⁸ For all workers to be able to bring their authentic selves to the workplace, much needs to be done to move beyond the poles of disaffected disengagement and heavily litigious individual complaints of discrimination. Mechanisms that give workers a voice in the workplace are not a panacea, but they can help.

In the meantime, the notion of meaningful consultation has developed both in international law and in Canadian law. This is particularly true in relation to Indigenous rights. It is also the case in labour law. These insights should help to move the employment equity framework beyond loose calls for “diverse voices” to be heard, toward more carefully structured consultation rights that benefit all.

Meaningful consultations are especially important because they encourage the kind of supportive and sustainable environment we need to make employment equity a reality in Canadian workplaces.

Workers who speak out or become active in equity work may find themselves *exposed to reprisals* rather than thanked for their investment in making their workplace more equitable. Taking meaningful consultations seriously in the *Employment Equity Act* framework can help to create structures where workers who invest their time and energy are better recognized, remunerated and protected against reprisals.

To have the necessary “courageous conversations” requires *structured processes with reliable information* and meaningful protections against retaliations.

Many constituents from a broad range of equity groups, unions and employers recommended that consultations should be formalized through joint employment equity committees. The Canadian Human Rights Commission made a similar recommendation to the task force, and has provided the following guidance:

When developing a special program or special measure, engagement with those affected is crucial. Many organizations incorporate “consultation” into their policy-development process, generally by inviting comments on a policy or program that has been developed. Engagement is different because it involves the impacted group for the duration of the project, from initial brainstorming to drafting to implementation and beyond, in whatever capacity they are comfortable. This ongoing process allows the organization to develop lasting and meaningful relationships with the individuals who are most impacted by the initiative.

Canadian Human Rights Commission, Levelling the Field: Developing a Special Program or Special Measure under the Canadian Human Rights Act or the Employment Equity Act, January 2022

In this chapter, our task force recommends that joint employment equity committees be mandated. They should be built on existing models for pay equity and occupational safety and health.

We were rightly cautioned that the committees should not simply be established as talk shops; their mandate should be clearly defined and play a key role in reporting obligations and ensuring accountability.⁶⁰⁹

Our task force was fortunate, too, to have a number of unions and employers explain how the collective bargaining process allows them to arrive at agreements that foster equitable inclusion.

We came away with a clear insight: employment equity will not be achieved unless we pay attention to supporting and sustaining the quality of the workplace relationships. Equity groups need to be heard through fair and equitably inclusive processes. Nothing about us, without us.

The EEA task force should consider an enhanced ‘employee voice’ proposal as part of its review of the Federal *Employment Equity Act* framework... EEA objectives and goals can only be fruitfully realized by allowing all workers – especially those historically marginalised and disadvantaged – to bring their lived experiences and knowledge to the table.

Rafael Gomez, Ensuring Compliance and Progress with the Employment Equity Act: A Review of Worker Voice Mechanisms in the Federally Regulated Private Sector, unpublished paper prepared for the EEART, 31 October 2022

Canada's international commitments to meaningful consultations

Meaningful consultations are an important part of Canada's international commitments. In Chapter 3 we explained the significance of Canada's commitments under the *United Nations Declaration on the Rights of Indigenous Peoples*, alongside Canadian cases on Aboriginal and treaty rights.

Canada's commitment to meaningful consultations encompasses the freedom of association and equality.⁶¹⁰ The ILO's Committee of Experts on the Application of Conventions and Recommendations has stressed the importance of meaningful consultations in proactive measures to achieve equality:

The Committee also wishes to stress the importance of consulting with the social partners and the interested groups on the design, monitoring, implementation and evaluation of the measures and plans adopted with a view to ensuring their relevance, raising awareness about their existence, promoting their wider acceptance and ownership and enhancing their effectiveness.

The Committee recalls the important role that employers' and workers' organizations play in promoting understanding, acceptance and realization of the principles of the Convention which set out broad requirements of active cooperation with employers' and workers' organizations with respect to the effective implementation of the national equality policy required under the Convention. The Committee also underlines the importance of collective agreements in applying the national equality policy and advancing equality of opportunity and treatment for all workers, irrespective of race, colour or national extraction.

ILO Committee of Experts on the Application of Conventions and Recommendations, General Observation on Discrimination based on Race, Colour and National Extraction, 2019

Meaningful consultations on employment equity need to include representatives of employment equity groups, a principle that several UN treaty bodies have reaffirmed.⁶¹¹ The UN Guiding Principle 31 on Business and Human Rights includes engagement and dialogue with the stakeholder groups for whose use the mechanisms are intended. The engagement and dialogue cover the design of the mechanisms, their performance, and how to address and solve grievances.

Meaningful consultations in Canadian labour law

Meaningful consultations have also been at the heart of collective labour relations law in Canada. The Supreme Court of Canada has increasingly defined the importance of a meaningful labour relations process through cases on the freedom of association and collective bargaining rights, and therefore outside of the context of the specific labour relations scheme.⁶¹² There is a constitutional duty under Section 2(d) of the *Canadian Charter of Rights and Freedoms* to consult with trade unions, in good faith. This "meaningful dialogue" is to be understood in context, and entails "engaging in meaningful dialogue where positions are explained and each party reads, listens to, and considers representations made by the other. Parties' positions must not be inflexible and intransigent, and parties must honestly strive to find a middle ground."⁶¹³

Although employment standards covering non-unionized workers have traditionally been recognized as the arena of direct state enforcement, with a growing enforcement gap we are seeing increased experimentation with ways to ensure that mechanisms can provide worker voice.

Employment equity spans both contexts where collective bargaining agreements are in place and workplaces without union representation. It focuses on groups that have been historically excluded, so much needs to be learned about barriers to equitable inclusion. Meaningful consultations are crucial both to learning what is needed, and ensuring that employment equity groups feel heard.

For employment equity to be transformative in result, it must be transformative in process. It must draw bargaining agents and employment equity groups in to arrive at the change we need.

Canadian case law already recognizes that both employers and unions have a duty to accommodate to the point of undue hardship, and the provisions of a collective agreement cannot absolve them of this duty.⁶¹⁴

It is settled law that unions can be held legally responsible for causing or contributing to discriminatory effects in the workplace, and that unions as well as employers bear a duty to accommodate if the union is a party to the discrimination.⁶¹⁵ A union may be a party to discrimination in one of two ways, and the application varies depending on how it arose, namely by:

1. “participating in the formulation of the work rule that has the discriminatory effect,” which might be in the collective agreement, and
2. failing to accommodate even if it did not participate in formulating the discriminatory rule or practice – that is, by impeding reasonable employer efforts to accommodate: “if reasonable accommodation is only possible with the union’s cooperation and the union blocks the efforts to remove or alleviate the discriminatory effect, it becomes a party to the discrimination.”⁶¹⁶

The Supreme Court of Canada added that “[a]ny significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect”. It also underscored that while “well-grounded concerns that [other employees’] rights will be affected must be considered ... objections based on attitudes inconsistent with human rights are an irrelevant consideration.”⁶¹⁷

With the recommendation of complaints procedures under the *Employment Equity Act*, we should expect similar careful parsing of responsibilities to be undertaken. However, the basic principle remains and is consistent with existing jurisprudence: discrimination in the workplace is everybody’s business.⁶¹⁸

There have also been some particularly interesting processes made possible through collective bargaining, such as the following on Indigenous languages. It is the Joint Committee on the Use of Indigenous Languages in the Public Service, which is co-chaired by OCHRO and the Public Service Alliance of Canada. This initiative emerged out of a collective bargaining agreement:

Collective Bargaining and Indigenous languages:

Given that:

- the Government of Canada has passed an *Indigenous Languages Act* (Bill C-91) and has recognized the importance of preserving and promoting the use of Indigenous languages, and
- The public service in certain areas of the country provides services to Canadians in Indigenous languages

The parties agree to establish a joint committee, co-chaired by a representative from each party, to review the use of Indigenous languages in the public service, examine Indigenous language skills in the performance of employee duties and consider the advantages that Indigenous language speakers bring to the public service.

Agreement between the Treasury Board and Public Service Alliance of Canada, Program and Administrative Services, Appendix P, Expiry 20 June 2021

We keep in mind Professor Lizzie Barmes' research from the UK context. It finds that there is more potential to accommodate equality rights and build on them in workplaces that are embedded with trade unionism and employee participation than in workplaces where employers deal with employees one by one, even when those employees are able to present concerns as a group claim.⁶¹⁹ This finding was echoed by many of the experts on employment equity who engaged with our task force.

In other words, unionization is not a prerequisite for meaningful consultations. However, unionization helps. In the federal public service and the federally regulated private sector as presented in Chapter 1, coverage is relatively high. The federal public sector, with its strong unionization rates and large organizational structures, has tremendous potential to lead by example on meaningful consultations on equity generally, and employment equity in particular.

Some bargaining units also wanted us to clarify that the *Employment Equity Act* framework encourages rather than restricts collective bargaining more generally:

The *Employment Equity Act* should represent the minimum for employment equity initiatives. Currently Bargaining Agents cannot negotiate staffing or classification of their members under the current legislative framework. This should be eliminated as the Employer's unilateral ability to determine the policies regarding staffing, and limited classification grievance rights have contributed to a lack of progress on Employment Equity.

Canadian Union of Public Employees, Submission to the EEART, 28 April 2022

While the task force does not consider this to be a necessary interpretation of the *Employment Equity Act* framework, we acknowledge that it is how the framework has been presented to workplace actors in some circumstances. We should be clear: the *Employment Equity Act* framework is not meant as a limit to collective bargaining that deepens equitable inclusion. Consistent with Canada's international and constitutional obligations, the *Employment Equity Act* framework should be drawn upon to encourage collective bargaining to promote equitable inclusion in federally regulated workplaces.

Given the room for confusion in interpretation, it would be important to ensure that the *Employment Equity Act* clarifies its relationship to and effects on collective agreements.

Recommendation 5.1: The *Employment Equity Act* should clarify that the obligation to make reasonable progress to achieve employment equity, and to sustain employment equity once it has been achieved:

- is incorporated into collective agreements governing employees of covered employers, and
- encourages, rather than limits, collective bargaining that deepens equitable inclusion, notably on staffing or classification

Consultation under the current *Employment Equity Act* framework

The task force was told that the consultation provisions in the *Employment Equity Act* left too much room for ambiguity over the nature of the consultations. Unions and employees were left with little to rely upon. The practice has tended to be that workers are left out of employment equity processes of identifying and eliminating barriers, or setting employment equity plans.⁶²⁰

The *Employment Equity Act* framework refers to consultations between the employer and its employees' representatives in several respects. In none of these respects does it specify that the consultations need to be with members of equity groups themselves.

The main provision is Section 15 of the *Employment Equity Act*, which provides for consultation:

Section 15(1) Every employer shall consult with its employees' representatives by inviting the representatives to provide their views concerning

- (a) the assistance that the representatives could provide to the employer to facilitate the implementation of employment equity in its workplace and the communication to its employees of matters relating to employment equity; and
- (b) the preparation, implementation and revision of the employer's employment equity plan.

Where employees represented by bargaining agents

(2) Where employees are represented by a bargaining agent, the bargaining agent shall participate in a consultation under subsection (1).

Collaboration

(3) Every employer and its employees' representatives shall collaborate in the preparation, implementation and revision of the employer's employment equity plan.

Rule of interpretation

(4) Consultation under subsection (1) and collaboration under subsection (3) are not forms of co-management.

According to Section 22(1) of the *Employment Equity Act*, the Canadian Human Rights Commission has a specific responsibility to enforce employers' consultation requirement in its compliance audits.

We heard many calls by employment equity groups and subgroups for “more seats at the decision-making table” through a meaningful approach to consultation under Section 15.⁶²¹

Meaningful consultations and seniority

“There are various models of blended approaches which balance the need to recognize workers' service to the organization and the need to remove barriers for equity-seeking groups. The Act should support employers and workers in developing promising practices and focus on complementarity between bargaining processes and measures to advance employment equity.”

Canadian Labour Congress, Submission to the EEART, April 2022

Consultations are also specifically foreseen in respect of the particularly sensitive issue of employee seniority rights. Seniority rights are carefully framed in Section 8(1) as not constituting employment barriers in respect to a layoff or recall under a collective agreement or established employer practice. Section 8(2) addresses other seniority rights and considers them similarly not to be employment barriers unless they are found to constitute a discriminatory practice under the *Canadian Human Rights Act*. However, Section 8(3) clarifies that seniority practices are not exempted from analysis and review pursuant to Section 9(1)(b) of the *Employment Equity Act*. That provision requires an employer to “conduct a review of the employer's employment systems, policies and practices, in accordance with the regulations, in order to identify employment barriers against persons in employment equity groups that result from those systems, policies and practices.”

According to Section 8(3),

Notwithstanding subsections (1) and (2), where, after a review under paragraph 9(1)(b), it appears that a right referred to in either of those subsections that is provided for under a collective agreement may have an adverse impact on the employment opportunities of persons in designated groups, **the employer and its employees' representatives shall consult with each other concerning measures that may be taken to minimize the adverse impact.**⁶²²

Both employers and bargaining units sought greater latitude to engage in meaningful consultations in the context of employment equity. One might have imagined this would entail sustained critique of seniority. But we received very little, and considered an individual example brought to our attention could have benefitted precisely from the ability for parties to seek advice from the Employment Equity Commissioner, and support on collective bargaining practice. Our task force received very few representations on seniority rights. The Canadian Labour Congress expressly called for the provisions to be left as is.⁶²³ On seniority, we think it is reasonable to say that the Canadian employment equity landscape has largely settled on the balance established under the current *Employment Equity Act* framework.

One employer did call for reflection on the relationship between seniority and the *United Nations Declaration on the Rights of Indigenous Peoples*, including the latitude for employers to act unilaterally and

bypass seniority if parties are unable to come to agreement.⁶²⁴ The impact of the *United Nations Declaration on the Rights of Indigenous Peoples* has permeated the entire reflection on the *Employment Equity Act* framework. We have considered how to rethink the relationship toward one that supports self-determination and nation-to-nation relationships. Our approach to meaningful consultations is meant to underscore the need for Indigenous peoples and nations to be at the forefront on matters that affect them.

The Canadian model respects the balance established internationally. Article 7(c) of the International Covenant on Economic, Social and Cultural Rights, ratified by Canada since 1976, provides an equal opportunity for everyone to be promoted in their employment. It is understood that employment equity might be required to accelerate achieving equality. **This right is subject only to seniority and competence, and workers' right to be promoted should be protected against reprisals for trade union or political activity.**⁶²⁵

The task force agrees that the *Employment Equity Act's* provisions on seniority, encompassed as they are in an approach focused on meaningful consultations, strike the right balance. The provisions respect the importance of recognizing and valuing workers' service, while ensuring that barriers can be addressed. There is a strong focus on ensuring that the balance is struck through meaningful consultations.

Reporting on consultations and consultations on reporting

Where the provisions need work is in reporting on consultations. They also need work on how to consult on reporting. Our recommendations work to address these challenges.

The federal public service is specifically required to report on its consultations. Under Section 21(2)(c) of the *Employment Equity Act*, the Treasury Board's report is required to contain "a description of the consultations between the Treasury Board and its employees' representatives during the reporting period concerning the implementation of employment equity".

Interpretation, Policy and Guideline (IPG) 115 under the *Employment Equity Regulations* on Communication, Consultation, Collaboration seems to translate the employer responsibility into largely an "information" requirement. Employers are also informed that they must invite employee representatives and bargaining units to "provide their views" on how employment equity can be implemented and in communicating to employees, while requiring collaboration on the "preparation, implementation and revision" of the plan.

A Transformative Framework to Achieve and Sustain Employment Equity

Employers must inform their employees about:

- the purpose of employment equity
- the measures undertaken or planned to implement employment equity
- the progress made in implementing employment equity

Employers must invite employees' representatives, including bargaining agents where applicable, to provide their views on:

- the assistance that the representatives can provide in implementing employment equity and in communicating to employees on related matters
- the preparation, implementation and revision of the employment equity plan

Employers and employees' representatives must collaborate in the preparation, implementation and revision of the employment equity plan.

Employers must establish and maintain records of the activities undertaken to inform employees and the information provided to them.

Interpretation, Policy and Guideline (IPG) 115 under the Employment Equity Regulations

The specific nature of “consultation” is rather diffuse in this framing:

Employers should communicate, consult and collaborate frequently with employees and their representatives when they are conducting their employment equity activities (see recommended activities related in the Employment Equity Task - Meet your Communication, Consultation, and Recordkeeping Requirements). Otherwise, employers should do so at least once per year.

Employers should ensure to take the views of members of designated groups into account in the consultations.

Employers should invite bargaining agents to participate in the consultations and encourage their collaboration, or designate someone to participate on their behalf. Consultation and collaboration are not forms of co-management.

When employees' representatives or bargaining agents do not collaborate, employers should record their attempts to engage them and reasons given for non-participation.

Interpretation, Policy and Guideline (IPG) 115 under the Employment Equity Regulations

In linked online explanatory information to LEEP employers, communication, consultation and record-keeping requirements are framed as an “ongoing task”.

The least one can say is that the guidance almost anticipates a minimalist role and leans toward direct voice mechanisms rather than sustained collaboration. Regrettably, it anticipates non-participation by unions rather than measures to ensure their meaningful participation.

The meaningful consultations pillar is weak, and so are the results.

Meaningful consultations in the federal public service:

In the federal public service, however, there is a joint employment equity committee that is actively involved in “co-development” of directives and policies:

The **Joint Employment Equity Committee (JEEC)**, an ongoing advisory national forum within the National Joint Council (NJC). The NJC’s process is one of “co-development of directives and policies.” The JEEC is the vehicle through which employment equity, diversity and inclusion policies and programs are discussed. It includes the Treasury Board Secretariat (TBS), the Public Service Commission (PSC), bargaining agents and departmental representatives. It may invite others to collaborate with it. Its mandate is to:

- Undertaking timely and relevant analysis/review from an Employment Equity and diversity lens. Analysis from an Employment Equity and diversity lens is understood as:
 - Considering the Employment Equity impacts and implications of policy and practice modifications on the designated groups;
 - Ensuring that intersections among designated groups—including gender identity and sexual orientation related issues are considered when impacts and implications are assessed.
- Periodically undertaking system wide reviews and analysis on Employment Equity and diversity related issues.

To achieve its mandate, the JEEC relies on:

- Transparent and timely sharing of Employment Equity and diversity related information among all Committee members (including Employment Equity data summaries gathered through various employer-controlled systems);
- A consistent approach to referring issues to JEEC for consultation, collaboration, input and analysis; and,
- Engagement with the NJC Executive with regard to emerging priorities.

However, we found it surprising that the JEEC was barely referenced in consultations with our task force.

Our task force was told that unions were consulted throughout the co-development of TBS OCHRO’s strategy and its implementation. JEEC was mentioned in the 2019-20 annual report of the Treasury Board Secretariat as participating in discussions about harassment and violence prevention, as well as recruitment and staffing.⁶²⁶ Its meetings were mentioned in some prior reports as well, including the 2009-10, 2011-12, and 2015-16 annual reports. However, there are no references to JEEC in the 2020-

2021 or 2021-2022 annual reports. We were left to wonder about the systematic follow through of planned initiatives.

The Directive on Employment Equity, Diversity and Inclusion of 1 April 2020 requires “engaging, consulting and collaborating” with employees who are members of designated groups under the *Employment Equity Act*, in addition to “consulting and collaborating with employee representatives, including bargaining agents,” to conduct amongst other things the employment systems review and the identification and elimination of barriers. It does not appear to have been a product of the JEEC process.

Unions responded to the Government of Canada’s expressed willingness to address gaps in staffing, working collaboratively with Treasury Board officials on the Joint Union/ Management Task Force on Diversity and Inclusion. The final report, *Building a Diverse and Inclusive Public Service*, contains 44 recommendations that have been important to this task force’s work, including Recommendation 36:

Joint Union-Management Task Force on Diversity and Inclusion, Building a Diverse and Inclusive Public Service: Final Report, 2017’s Recommendation 36:

“each department establish a joint union-management consultation committee on employment equity, diversity and inclusion that is co-led by unions and management, with agendas and minutes published on departmental intranet sites.”

It became painfully clear from our own task force consultations that the powers and enforcement responsibilities for meaningful consultations under the *Employment Equity Act* were not used as much as might have been expected.

One example speaks volumes. Task force members were told by Treasury Board’s deputy minister that public sector workers were deeply distressed by the limited timeframe for the consultations undertaken by the Treasury Board. While this frustration was framed as a critique of the government-mandated accelerated time frame for the task force’s review, we began to realize that the advent of the task force was not really an opportunity to consolidate feedback from years of past and ongoing meaningful consultations with employee representatives including the networks. Instead, employees seemed to perceive it as an all too rare opportunity to share their views with their employer. Their employer had a rare glimpse into the insight that can be gleaned when meaningful consultations are in fact undertaken in a comprehensive, collaborative manner.

TBS-OCHRO ultimately reported to the task force on feedback from employee networks that many provided through Deputy Minister champions or through the networks directly, rather than providing recommendations on the directions that employment equity accountability should take. We thought TBS-OCHRO might share their own experience as a joint employer alongside the Public Service Commission. It is our sincere hope that the task force process provided not only a fresh look at the work on employment equity but also the momentum to recognize just how deeply workplace actors want and are able to contribute meaningfully to achieving employment equity when given the chance.

Our task force is hopeful that the experience will rekindle support for a deepened and systematic approach to consultations, like Recommendation 36 formulated by unions and management in the 2017 joint report and quoted above. It is entirely consistent with our own task force recommendation.

There is a real opportunity to make co-development a reality throughout the employment equity process, both within and beyond the federal public service. This would entail not only reporting on consultations, but ensuring that reports are prepared through consultative processes.

Voice models

Meaningful consultations with workers benefits both employers and workers. There are two types of workplace models that enable worker voice to be heard: direct and representative.

Direct voice models

Direct voice models tend to be management led, and may include surveys, town hall meetings, even the occasional, often ad hoc, informal convening of meetings and working groups. Versions of these direct voice models have been adopted in a panoply of EDI strategies. For example, town halls can allow employers to share information and hear some questions. However, they are not really designed as a forum through which workers can provide sustained feedback, and certainly not over time.

Below is a table of the different direct voice models, with some of their generalized advantages and disadvantages:

Table 5.1: Direct Voice Models⁶²⁷

Employee voice model	Advantages	Disadvantages
Employee surveys - designed to gauge employees' experiences and views of aspects of work.	<ul style="list-style-type: none"> • Can provide some good data and information on workplace issues • Easy to set-up and manage. Less administratively burdensome for employers than more formalized representative models (e.g., joint management/staff committees) 	<ul style="list-style-type: none"> • Challenge of getting staff to complete surveys and garnering representative sample. • More passive engagement of staff than representative models. • Doesn't produce broader HR benefits inherent in more representative approaches
Suggestion schemes - under which employees (as individuals or as part of self-managed teams) put ideas to management, who then reward those whose ideas are implemented.	<ul style="list-style-type: none"> • Can encourage creative thinking and generate innovative ideas. • Easy to set-up and manage. Less administratively burdensome for employers than more formalized representative models (e.g., joint management/staff committees) 	<ul style="list-style-type: none"> • Challenge of motivating staff to participate in these schemes. • More passive engagement of staff than representative models. • Doesn't produce broader HR benefits inherent in more representative approaches
Digital media - seeking and discussing questions or ideas via electronic means. Increasingly, social media is being used in this way through enterprise social networks (ESNs).	<ul style="list-style-type: none"> • Younger tech savvy workers more likely to engage through these platforms • Accommodates staff working from home or at different sites. 	<ul style="list-style-type: none"> • May not be suitable engagement approach for all workplaces. More suited to office type work than blue collar. • Requires enhanced IT infrastructure/programming costs

<p>Working groups and self-managed teams - employees brought together on a regular or ad hoc basis to discuss specific organisational issues. No formalized structure or terms of reference for these groups.</p>	<ul style="list-style-type: none"> • Engages staff more directly with management. • Relatively easy to organize and establish • Can provide some good data and information on workplace issues 	<ul style="list-style-type: none"> • Lack of formalized mandate and structure could impact ability to achieve concrete results • Challenge of getting staff to volunteer to participate in these groups.
<p>One-on-one meetings with staff - face-to-face discussions between managers and staff for whom they have responsibility, for example, through regular meetings every few weeks.</p>	<ul style="list-style-type: none"> • Builds on existing structures, no need to create new system • Easy to garner input directly from staff through this approach. 	<ul style="list-style-type: none"> • Challenge of getting staff and management to discuss specific EE issues through this process • Need for monitoring and reporting mechanisms • Could be seen as additional HR burden for management, along with performance evaluation etc. reporting.

An example: The Canadian Human Rights Commission’s own consultations

The current requirements in the *Employment Equity Act* are mandatory.

The Canadian Human Rights Commission (CHRC)’s report on its own workplace provides insight into how the body that audits others including on their meaningful consultations understands the consultation requirement outlined in the *Employment Equity Act*.

While the CHRC showed that some consultation had taken place, they noted that “voluntary” consultations yielded participation by 15% of the total workforce through a direct voice mechanism.

Some of those consulted expressed concern that they really did not have a choice but to participate, and called for greater sensitivity in the approach to consultations by the CHRC as well as meaningful time or compensation to carry out the activities in a workforce already characterized as having an “unrelenting pace”.

The process did not exclusively adopt a direct voice approach. The representative voice structure, through an Employment Equity Advisory Group convened through the CHRC’s Decolonization and Anti-Racism Consultation Committee (DACC), includes union representation.⁶²⁸ A separate consultation also took place with union representatives. What participants said about the process is telling:

“[e]mployees are disaffected, they feel they have been endlessly interviewed but nothing has changed. They don’t see real change, but that is what they need.”

Public Service Alliance of Canada (PSAC), Canadian Association of Professional Employees (CAPE) and Association of Justice Counsel (AJC), comments to the Canadian Human Rights Commission, Final Report – Employment Equity: Employment Systems Review, 8 November 2022

Are interview and feedback fatigue a necessary result of meaningful consultations?

These direct voice models have apparently been used a lot but their one-way focus is insufficient and possibly counter-productive, as the quote above suggests. In other words, “[o]ne-way communications in the form of employee surveys, suggestion boxes or town halls (with no opportunity for two-way dialogue) are not considered forms of meaningful consultation or voice.”⁶²⁹ How can we bring workers more fully into meaningful consultations under the *Employment Equity Act* framework?

Representative voice models

The second kind of voice model is a representative voice model. Below are three broad types:

Table 5.2: Representative voice models⁶³⁰

Employee voice model	Advantages	Disadvantages
Formalized Partnership - employee representatives and employers emphasize mutual gains and tackling issues in a spirit of co-operation, rather than through adversarial relationships. This includes a commitment to information sharing and joint decision-making on certain matters	<ul style="list-style-type: none"> • Ensures high-degree of buy-in and participation from both staff and management. • Produces broader HR benefits for organization in terms of productivity and employee well-being. • Creates platform for addressing issues/concerns on proactive basis. 	<ul style="list-style-type: none"> • Not viable for many workplaces, especially non-union, without a tradition or culture of joint decision-making. • Increased training requirements for staff participating in partnerships • Greater time and resource requirements than more direct approaches of engagement.
Joint consultation committees - to consider issues that are deemed to be of common interest or of key importance to the parties, at non-union as well as unionized workplaces.	<ul style="list-style-type: none"> • Ensures high-degree of buy-in and participation from both staff and management. • Well-recognized and established structure with a positive track record of success (Joint-Health and Safety committees) • Creates platform for addressing issues/concerns on proactive basis 	<ul style="list-style-type: none"> • Additional administrative burden in the organizing of and reporting on committee work. • Increased training requirements for staff participating in committees
Employee forums/Citizen Assemblies – Larger groups of non-union or mixed groups of union/non-union employees meeting on a periodic basis with management for consultation and information sharing. Can take place in a convention or congress type setting, either virtual or in-person and/or combining elements of both.	<ul style="list-style-type: none"> • Potentially a good method of engagement for sectors where work is not routinely conducted in “one location” – (e.g., commercial or passenger transportation sectors like trucking, bus, rail, maritime and air travel, arts, film, television). • Well-recognized and established structure with a positive track record of success outside of labour relations context (e.g., citizen assemblies) 	<ul style="list-style-type: none"> • Would present logistical and organizational challenges such as convening and facilitating. • Not typically an approach for used for on-going engagement with employees.

On equity matters in the workplace, representative models tend to be preferred. This is the model in our *Pay Equity Act* framework. It is also the model in the *Canada Labour Code* for occupational health and safety committees.

The more our task force listened and the more we researched, the more we came to appreciate that employment equity will not be supportive and sustainable if it is a purely top-down exercise. Employment equity calls for some workplace norms to be changed to foster equitable inclusion. This work takes all of us.

Representative voice models require leadership within the workplace, that is an active commitment from the top. They also require meaningful worker involvement, systematic and regular two-way communication, and trust in the quality and nature of the commitment to address equity proactively and collaboratively.⁶³¹ For unions seeking to enhance workplace democracy, the opportunity presented for active participation in achieving and sustaining employment equity could hardly be clearer.⁶³²

Past representative voice proposals

In 2000, the *Canadian Human Rights Act* Review Panel recommended that “[a] process be established to ensure that community groups have a way of giving input into the Commission’s implementation of its responsibilities under the EEA.”⁶³³ The panel noted that input could be sought even without amending the *Canadian Human Rights Act*, such as publishing a list of employers that are due for audits and inviting input from interested organizations that they might consider as they conduct the audit. They could list the audits that are completed, and publish limited information in public form, notably undertakings or directions.⁶³⁴

The Labour Program in consultation with the Canadian Human Rights Commission issued a guideline on Consultation and Collaboration for compliance with the *Employment Equity Act*. It suggested that joint labour management employment equity committees could usefully be established voluntarily, and in 2000 recommended to the *Canadian Human Rights Act* Review Panel that they be legislatively required.⁶³⁵ The *Canadian Human Rights Act* Review Panel acknowledged that a committee dedicated broadly to human rights issues in the workplace – including policy, training and complaint resolution – could provide an important focal point, supporting a systemic approach to addressing the issues. It received examples from a range of employers and unions on the contributions of joint committees in select federal workplaces.

At the time, the Review Panel reported that some employers might see this as an additional burden, but considered that “the cost of creating and operating the internal responsibility mechanism should be offset by the cost of the litigation it could avoid and the benefits of greater workplace harmony.”⁶³⁶ On balance, they considered that employers would be better off with an internal responsibility mechanism and recommended that a joint committee structure be mandated by law. In 2000, the Review Panel needed to address the employer concern that jumping from no internal responsibility on equity to a legislated one at the time might be challenging.

With the introduction of pay equity committees, and with accessibility issues addressed as part of the Occupational Safety and Health Committee mandate, internal responsibility on equity has been embraced. The key now, in 2023, is harmonization. Issues of harmonization are addressed in detail in Chapter 6.

Chapter 5: Reactivating the meaningful consultations pillar

As mentioned above, in 2017 the Joint Union/Management Task Force on Diversity and Inclusion in the Public Service recommended department-level joint employment equity committees. They were concerned that when oversight got focused on system-wide problems within the federal public service, oversight within departments was reduced. They wanted to ensure that greater information would be available about the reasonable progress being achieved within departments to ensure equitable inclusion.

Past studies show that calls for consultation were also made regarding the Federal Contractors Program.⁶³⁷ Some of these requests were repeated in consultations before our task force, especially in sectors where the FCP was shown to have made a major difference, like universities and colleges:

It is critical that staff associations and unions be part of the contractor's implementation of the program and that Joint Employment Equity Committees be properly resourced and trained. Academic staff associations should be involved in all aspects of implementation, including: questionnaire design, setting short- and long-term goals, evaluation and revision of the employment equity plan; and should have access to the relevant equity data gathered.

Canadian Association of University Teachers, Submission to the EEART, April 2022

Our task force has come to the conclusion that we need a statutory mechanism and framework with clear accountabilities to ensure that the meaningful consultations pillar is strengthened. How? We need to adopt a representative or enhanced employee voice mechanism.

Enhancing employee voice in a modernized *Employment Equity Act* framework

We have worked on how to support the *Employment Equity Act* framework to encourage employers and workers to engage in dialogue about key features. The goal is to ensure that employment equity really is the kind of comprehensive approach to barrier removal that our workplaces require.

The task force canvassed the prospect of models of representative voice that are available in other jurisdictions, such as the works councils model that originated in Germany and that has taken on distinct forms within the European Union. Generally, the model applies to large firms – fewer than 10% of German workplaces – and builds the right for workers to co-determine a number of areas of work, excluding issues that are subject to collective bargaining like wages and pensions. Works councils at minimum enable information sharing and consultation on workplace issues; in Germany they also include the right to veto certain employer decisions. They are credited with several advantages, including drawing employees and employers into a relationship of heightened trust, and fostering employee retention by enabling working conditions to be addressed and changed. The literature also shows that works councils have functioned best in contexts where cultural norms on workplace cooperation run deep.⁶³⁸

Under Section 28(2)(4) of the Integrated Accessibility Standards Regulation (IASR) of the *Accessibility for Ontarians with Disabilities Act (AODA)*, a union representative, or worker representative when not represented by a union, can be called upon to help to develop an individual employment plan.

Our task force thought the best option was to stick to examples that are already in place in the federal jurisdiction. We also recognized that there is an important opportunity for meaningful consultations on equity matters within the federal public service in relation to the *Accessible Canada Act*, and as woven into the development of the Public Service Accessibility Strategy.⁶³⁹

Federally, we already have two important examples of joint committees that are both consultative and oversight enhancing, notably on health and safety and pay equity. These mechanisms are legislated. They provide opportunities to promote a further goal: harmonization.

Table 5.3: Occupational health and safety and Pay equity committees comparison

Committee requirements	Occupational health and safety committees	Pay equity committees
Basic requirement	20+ employees in the workplace	Employer or group of employers with 100+ employees or 10-99 employees if some or all are unionized
Composition	Half management and half labour, co-chaired by management and employees; employee representatives selected by fellow workers	Minimum 3 people; 50% of whom must be women; comprising 2/3 employees to whom the pay equity plan relates; and at least 1 employer representative; Representation proportional to the number of bargaining agents where employees are unionized; Where there are non-unionized employees, at least one person must be selected by those employees to represent them (if employer unable to establish the committee, employer must apply to the Pay Equity Commissioner to authorize different requirements)
Vote	N/A	One vote, as a group, for members representing employers and one vote, as a group, for members representing employees
Meetings	Meet 9 times per year (between monthly and every 3 months)	Plan is developed over a 3-year period
Responsibilities	<ul style="list-style-type: none"> - Consider and expeditiously dispose of health and safety complaints; - Participate in all of the inquiries, investigations, studies and inspections pertaining to employee health and safety; - Participate in the implementation and monitoring of a program for the provision of personal protective 	Participate in developing a pay equity plan for the workplace, and serve as a joint decision-making forum for employee and union involvement in pay equity

Chapter 5: Reactivating the meaningful consultations pillar

	<p>equipment, clothing, devices, or materials, and, if there is no policy committee, participate in the development of the program;</p> <ul style="list-style-type: none"> - Participate in the implementation of changes that may affect occupational health and safety, including work processes and procedures, and, if there is no policy committee, participate in the planning of the implementation of those changes; and - Inspect all or part of the workplace each month, so that every part of the workplace is inspected at least once a year. 	
Information requirements	Committee may request from employer information it considers necessary to identify existing or potential hazards with respect to materials, processes, equipment, or activities.	Employer to provide any information considered necessary by the pay equity committee members to establish and update the plan
Employer obligations	Committee shall have full access to employer (and government) reports, studies and tests relating to the health and safety of the employees, or to the parts of those reports, studies and tests that relate to the health and safety of employees.	Employers must support the work of the PE committees, provide information about training opportunities and facilitate members' participation in the training

The recommendation to establish a joint employment equity committee reflects some existing practice. The Canadian Human Rights Commission has recommended committee-based consultations to develop employment equity plans. Its 2019 horizontal audit reveals that in the banking and financial industry alone, which is not highly unionized, employment equity committees are present in 82.9% of employers surveyed.⁶⁴⁰

The proposals below incorporate some of the thresholds recommended in Chapter 7:

<p>Recommendation 5.2: All covered public service employers, alongside federally regulated private sector employers with 100+ workers and FCP employers with 100+ workers should be required to establish a joint employment equity committee, as appropriate with sub-committees notably for departments or specific trades.</p> <p>Recommendation 5.3: For federally regulated private sector employers (LEEP and FCP) with 50 – 99 workers, the <i>Employment Equity Act</i> framework should support the voluntary establishment of joint employment equity committees. If the covered employers with 50 – 99 workers have at least one bargaining agent, then the joint employment equity committees are required.</p> <p>Recommendation 5.4: Covered employers should benefit from a reasonable transition window to establish the joint employment equity committees.</p>

Recommendation 5.5: Wherever practicable, terms of service should be harmonized with terms of service of workplace health and safety committees.

The who of meaningful consultations

Without a shift in who is negotiating, and how they negotiate, there may be little change in what is negotiated.

Linda Briskin, Afterward, in David M. Rayside & Gerald Hunt, Equity, diversity, and Canadian Labour, University of Toronto Press, 2007 at page 246

One of the key features of representative voice mechanisms is that they create the conditions to draw in, in a meaningful manner, those who best know their workplace context and can support the work of identifying and removing barriers. They do not replace the potential support of external equity consultants nor do they replace the oversight role of the state. They emphasize, however, the importance of independent, supported structures that can foster workplace cooperation. Law reform that supports this function in the *Employment Equity Act* framework will help to bring labour law and workplace equality law into closer conversation.

Workers from historically underrepresented groups need to be included in the joint employment equity committees. The conundrum is what to do when groups are indeed underrepresented in the workplace. The task force heard from representatives of students and youth, who were concerned to ensure that dialogue could be fostered between older and younger workers.⁶⁴¹

One model emerging from the Los Angeles Black Worker Center is community “oversight tables”. The oversight table brought in constituents from neighbouring communities to support a sectoral hiring initiative in the construction industry. The oversight table reviewed strategies for recruitment and retention, helping the industry to understand some of the hiring challenges. Its members could also make sure some workers did not get “passed over” for employment when they came to the job sites, or find out why they might be quitting.⁶⁴² This innovative model might be experimented with in some sectors, in some workplaces, in some communities. It is not an across-the-board model that the task force would be prepared to recommend for *Employment Equity Act* inclusion.

Employee resource networks representing employment equity groups can serve a valuable role in allowing workers from employment equity groups to exchange and share strategies. There might be some overlap with the membership of the more structured representative voice mechanism. Membership of workers from employment equity groups is an important way to ensure that the joint employment equity committee is benefitting from on the ground knowledge that workers have about workplace barriers and promising practices.⁶⁴³

The point is not to substitute existing workplace actors or replace regulatory oversight. Instead, our task force’s proposal seeks to build on the synergies provided when well-supported workplace actors are in turn able to support and sustain meaningful consultations and ongoing workplace learning and implementation of employment equity. Research encourages us to stress complementarity, paying close attention to a mix of features like expertise, trust, accountability, and ability to teach employers and other workplace actors.⁶⁴⁴

Recommendation 5.6: The Joint Employment Equity Committee should comprise a minimum of 5 members, and at least half of the members should be employees who do not exercise managerial functions.

Recommendation 5.7: The Joint Employment Equity Committee should strive to represent each of the employment equity groups.

Recommendation 5.8: The Joint Employment Equity Committee should strive to represent workers from across the work life cycle.

Recommendation 5.9: In unionized workplaces, representation should be proportional to the number of bargaining agents in the workplace, with sub-committees as appropriate.

Recommendation 5.10: In non-unionized workplaces, elections of worker representatives should be preferred.

Recommendation 5.11: If a workplace is unable to establish a Joint Employment Equity Committee, the employer should apply to the Employment Equity Commissioner to resolve the matter using ADR techniques. The Employment Equity Commissioner should also have the power to authorize modifications to the legislative requirements.

Recommended features of the proposed joint employment equity committees

There are a few features that should be retained, and that are found in the two existing models. Drawing on the model of both the joint health and safety committee and the pay equity committee, the task force recommends that the joint employment equity committee should have the following responsibilities:

Recommendation 5.12: Time spent on a Joint Employment Equity Committee should be considered work time and compensated accordingly.

Recommendation 5.13: Joint Employment Equity Committee members should be provided with training in order to be able to carry out their responsibilities.

Recommendation 5.14: The Joint Employment Equity Committee should be permitted to collect, analyze and review relevant data to assist the employer in the implementation of employment equity. The Joint Employment Equity Committee should have full access to all of the government and employer reports, studies and tests relating to employment equity or parts of those reports, studies and tests that relate to employment equity but shall not have access to the medical records of any person except with the person's consent.

Recommendation 5.15: Joint Employment Equity Committees should be permitted to conduct exit interviews with departing staff to identify workplace barriers that might be addressed in subsequent employment equity plans.

Recommendation 5.16: Joint Employment Equity Committee members' liability should be limited to provide protection for good faith acts or omissions under the authority of the *Employment Equity Act*.

Like pay equity committee members and others exercising their rights under the *Pay Equity Act*, the Joint Employment Equity Committee members and others exercising their rights under the *Employment Equity Act* should enjoy comprehensive legislative protection against reprisals:

Recommendation 5.17: The *Employment Equity Act* should be revised to include comprehensive, detailed protection for Joint Employment Equity Committee members and others exercising their rights under the *Employment Equity Act* against reprisals by the employer or any person acting on behalf of the employer, or by the bargaining agent or any person acting on behalf of the bargaining agent.

Privacy protections and unions

The Office of the Privacy Commissioner of Canada pointed out the specific situation of trade unions under existing privacy laws:

On the matter of trade unions, we note that these entities are not subject to the *Privacy Act*. Neither are these entities subject to PIPEDA with respect to their core union activities, because those activities would not be considered commercial activity. By the same token, public sector unions are not typically considered a federal work, undertaking or business (FWUB) under PIPEDA. This means that disclosing any personal information, particularly sensitive personal [information], to a union must be carefully considered ... The notice and consent, safeguarding and accountability privacy principles would be of primary concern, as would any use of purportedly de-identified information and risk of re-identification.

Office of the Privacy Commissioner, Submission to the EEART, 14 September 2022

Reforms to federal privacy legislation are currently under debate, notably through an omnibus *Digital Charter Implementation Act*, Bill C-27 that during our task force passed second reading in the House of Commons and if passed in its entirety would replace the existing *Personal Information Protection and Electronic Documents Act (PIPEDA)*. It will be crucial for legislative reform to ensure an appropriate level and approach to privacy protection to ensure that it does not become a barrier to meaningful consultations with unions. In keeping with a human rights approach to privacy protections, consultation by trade unions needs to be enabled, rather than unduly limited, by privacy protections.

Recommendation 5.18: The relevant privacy legislation should be revised following meaningful consultations with representative trade unions to ensure effective trade union participation in the implementation of employment equity.

Workplace training: Building communities of learning

Introduction

Meaningful consultations provide an opportunity to learn.

Teaching and learning opportunities on employment equity are the ground on which this reform stands. The commitment must come from all: we need a “mindset of continuous learning”:

We recommend that the Task Force consider ways to encourage a mindset of continuous learning when it comes to equity and ensure that there are opportunities for assessing how well these frameworks are supporting the objectives of the [*Employment Equity Act*].

DisAbled Women’s Network, Submission to the EEART, 2 June 2022

And in particular, there must be a clear governmental commitment to ensuring that the training and support are readily available and that the learning is shared. Without it, employment equity can be reformed over and over but it will not be sustainable.

FETCO appreciates that government needs to ensure compliance but feel improvements are needed. Employers feel government could focus less energy on crunching numbers and more on research, best practices, education; more on the positive side and less on the hammer of compliance and enforcement. It is better to focus on the concrete measures employers are putting in place to address diversity, equity and inclusion.

FETCO, Submission to the EEART, 28 April 2022

Our task force heard repeated, sustained requests like these for support to do the real work of employment equity. We have tried to provide a path that values representation but calls for less numbers-crunching.

Employers in particular have been calling for more training and support for decades. In a 2002 study, employers reported dissatisfaction with implementation of the Federal Contractors Program, but cost did not appear to be a major factor as they reported only modest costs to implementation. Rather, they sought the tools and support necessary to implement employment equity.⁶⁴⁵

The messages that employers communicated to our task force were consistent with this early finding. The UN treaty bodies have also stressed how important it is for training and support to be provided to employers to fulfil their responsibilities under employment equity programmes.⁶⁴⁶

It is not enough simply to legislate. It is crucial to ensure that regulatory oversight agencies of government have the human resources, financial resources and administrative latitude to be able to act creatively, immediately and effectively in support of full implementation of employment equity. This could hardly be more important if we recognize that workplace inclusion is pivotal to building and sustaining a robust Canadian democracy and offering a distinctive and meaningful reflection of Canada in and to the world. The task force is persuaded that this cannot be more crucial.

Teaching and learning in the federal public service

As concerns the federal public service, the task force wished in particular to honour Truth and Reconciliation Commission Call to Action No. 57, which names professional development and training for public service employees:

Call to Action 57: We can upon federal, provincial, territorial, and municipal governments to provide education to public servants on the history of Aboriginal peoples, including the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

The National Indigenous Economic Strategy's Call to Economic Prosperity No. 96 would require public servants to receive training on Indigenous businesses and Indigenous procurement mandates. Call to Economic Prosperity No. 98 would link government procurement targets to departmental and personal performance measures. Call to Economic Prosperity No. 100 is a national database of verified Indigenous businesses for government procurements purposes. There are employers and workers organizations across Canada that have long worked to make employment equity a reality in their workplaces. It is time to ensure that their experiences are more broadly acknowledged and shared, across the federal jurisdiction and beyond.

Recommendation 5.19: Employment equity training should prioritize Truth and Reconciliation Commission calls to action on education and support learning about positive initiatives to promote Indigenous economic prosperity.

Recommendations on workplace training have been repeated by past task forces. The following recommendation is adapted from Recommendation 40 of the Joint Union/Management Task Force on Diversity and Inclusion:

Recommendation 5.20: Leadership training in the federal public service should include training on systemic discrimination including systemic racism, substantive equality and equitable workplace inclusion.

The training we need

The *Employment Equity Act* framework should be an opportunity to build concrete communities of learning across all federally regulated workplaces.

The challenge of being able to identify workplace barriers should not be underestimated.

Unconscious bias training, while popular, runs the risk of minimizing the work required to take sufficient distance to be able to see and name practices that have been exclusionary. As mentioned in the introduction, the EEOC Task Force on harassment found, based on the available and limited empirical data, that sensitivity training as it is currently conducted can sometimes be “mildly” positive, other times neutral, and in some instances actually be counterproductive. The disappointing results from US EEOC Task Force studies of the limits of training lead us to recall: we cannot rely on training fads. We need proven results and we need to create ways to learn from what works. This is part of the

Chapter 5: Reactivating the meaningful consultations pillar

redesign of the Workplace Opportunities: Removing Barriers to Equity (WORBE) program that is discussed next.

We stress the training element separately because it can be easily overlooked. But employment equity is a reflexive approach to achieving change. It depends on the understanding and participation of everyone in the workplace. It needs to draw people together rather than tear them apart. That takes teaching and learning.

We stress teaching and learning because we can, indeed must, learn from each other.

The training may come from and through initiatives that are sponsored by unions and employers themselves:

One example of training comes from a union-management agreement:

According to a 2011 report, in the absence of legislation on employment equity in Saskatchewan, the Canadian Union of Public Employees proactively signed Aboriginal Employment Partnership Agreements with a number of employers in health care, between 2002-2006. There was an increase from 1% of Indigenous employees prior to 1995 to 6% in 2008, with a target of 10%. Other partnership agreements were signed with educational institutions and built equity plans in a number of municipalities.

Training was provided, through governmental funding, notably to ensure that non-Indigenous workers understood their responsibility to provide a welcoming and inclusive workplace for Indigenous workers.

CUPE, Creating a Representative Workforce: An Overview of Partnership Agreements and Equity Plans in CUPE Workplaces in Saskatchewan, April 2011; CUPE, Presentation to the EEART, 31 March 2022

Training advisory services

As we will address in Chapter 6, the advice from government on training should be coming from an entity that has oversight on the entire process – the one-stop-shop.

In Quebec, the *Commission des droits de la personne et des droits de la jeunesse* has offered an Advisory Service on Reasonable Accommodation. Its model of readily accessible support, allowing employers to call in with questions on how to address requests, has been heavily solicited. Requests have increased from an annual total of 24 in 2011 to 144 in 2021.⁶⁴⁷

New Zealand also has an advice line providing support to employers in hiring people with disabilities.⁶⁴⁸

Recommendation 5.21: An advice line under the jurisdiction of the Employment Equity Commissioner should be established to provide effective, efficient support to workplaces – employers and Joint Employment Equity Committees - on employment equity implementation.

Not just teaching, but learning

Government can support this learning and offer training, but it should also be constantly improving what it is able to offer, by taking stock of the innovation that is happening within the workplaces where it is exercising oversight. It should not just be collecting paper.

Employers and the proposed Employment Equity Commissioner will be learning from some of the experts that are engaged to provide the training.

All will be learning that much of the expertise comes from the people who have experienced exclusion and are working to remove workplace barriers to include us all.

There is generally a need for more systematic consultation with LGBTQI2S subject matter experts and employees themselves, particularly within training design and implementation.

LGBT Purge Fund, Emerging from the Purge: Reviewing the State of LGBTQI2S Inclusion in Canada's Federal Workplaces, May 2021

We therefore encourage the Employment Equity Commissioner, when supporting this teaching and learning through workplace training, to make sure it is studying effectiveness.

Recalling the report of the US EEOC Task Force referenced in the Introduction, although it called for better data, it did not urge training to be abandoned. On the contrary, it stressed that training – especially compliance training that helps employers meet their legal obligations – should be an important part of an overall support package. It should not be a stand-alone response.⁶⁴⁹

Training is part of a bigger challenge: changing cultures. Holistic approaches to support are critical.

While training needs to be supported at the highest organizational levels, the US EEOC Task Force stressed the importance of compliance training for middle managers and first line supervisors, as they are at the heart of identifying and implementing prevention. This resonates with research presented in Chapter 4 about human resource practices on accommodation requests. This training should underscore the relationship between transparency and equity across the board.

Recommendation 5.22: Training support should be geared to different organizational levels in the covered employers, and should be attentive to the needs and expertise of middle managers and first line supervisors, as well as members of the Joint Employment Equity Committee.

The training should be regular and reinforced. It should be conducted by qualified, interactive trainers.⁶⁵⁰

Stakeholders stressed that those offering employment equity training should be representative of the inclusion employment equity seeks to achieve. They should not be expected to give this training for free or at the drop of a hat; if employment equity work is valued, it should be commissioned and remunerated in a manner that respects that value.

While large employers will be able to bring in their own support, this does not replace the importance of having training provided in a comprehensive and accessible manner by those responsible for

Chapter 5: Reactivating the meaningful consultations pillar

government oversight. Access to training is especially important if the *Employment Equity Act* will apply to smaller employers than it has in the past.

Training should include trauma-informed approaches, reinforcing a “first do no harm” approach. This is part of ensuring that employment equity does not lose sight of who matters – the workers themselves.

Workplaces will require readily available guidance tools supporting implementation, including templates that are easily located online and available in accessible formats. It is important to keep in mind that employers themselves – if the entire equity ecosystem is effective – will include employment equity group members too. Guidance must be truly accessible, within the meaning of the *Accessible Canada Act*.

Training on accessibility

Representatives of accessibility organizations stressed how important it is for a climate to be built that allows questions to be asked, and for people to be able to learn deeply.

One participant in the extended engagements emphasized that there is a need to dispel assumptions that addressing disability issues is necessarily complex.

Our task force considers that we have a responsibility to learn and to teach ourselves. Workplace training supports ongoing learning. It also takes the burden off individuals who may be underrepresented workers themselves.

But the core point is this: it does a disservice to disabled workers not to ask respectful questions with a view to fostering understanding.⁶⁵¹

There is a need to foster disability confidence by sharing information about promising practices that can be followed by employers to support accessibility. The Canadian Council on Rehabilitation and Work recommended that the federal government establish a central accommodation fund alongside funding for training to contribute to establishing certain workplace transformations that would undercut concerns about ‘undue hardship’.⁶⁵²

Incentivizing training through Workplace Opportunities: Removing Barriers to Equity (WORBE)

“Altering the legal incentives that reward a cosmetic approach, however, is necessary but insufficient. Ultimately, an evidence-based approach to compliance requires innovative employers to collaborate with researchers and regulators.”

Susan Bisom-Rapp, “The Role of Law and Myth in Creating a Workplace that ‘Looks Like America’ (2022) 43:2 Berkeley Journal of Employment and Labor Law 251 at 293

Introduction

There is so much more that can be done to foster employment equity, to ensure that barriers to equity in the workplace are removed, and to change incentive structures. Workplaces require supportive and sustainable initiatives. There is room for creativity both in legislation and through special funds.

The Moran report reviewing the *Accessibility for Ontarians with Disabilities Act* suggested that tax incentives be provided to incentivize accessibility beyond the legislative minima.⁶⁵³

The task force initially thought some of that additional incentivized learning might come from the WORBE program. After all, it was launched in 2014 as a grants and contributions program to support employers covered by the *Employment Equity Act* to improve representation through partnership and industry-tailored strategies. The program launched with \$500,000 but when the *Employment Equity Act* Review Task Force was launched, of the \$6.6 million announced, \$2.5 million was earmarked for WORBE expansion.

Some of the WORBE projects funded were hands on initiatives designed to foster local initiatives. Consider, for example, a promotional video about “Le port de Montréal: un port différent” produced by the Maritime Employers Association (MEA) to dispel stereotypes.

However, our task force struggled to gain access to some of the research on training commissioned through the program. We could not get some of the studies we needed directly from WORBE, only summaries with links to funded groups’ web pages or annual reports. This limited learning from the projects that were funded.

The takeaway is that the learning was not shared broadly with those most concerned or interested in a comprehensive, readily accessible manner.

This is a pity.

Stakeholders added that currently, WORBE contains no apparent directive on how resources should be allocated.

We need research and project results that we can learn from. A theme throughout this report has been that it is disturbing how little is known about what works in employment equity, despite 37 years. Repeatedly the task force heard from constituents – within and beyond government – who called for comparative studies that could assist in finding out what actually works, and what does not.

FETCO has called for government to ensure an “ongoing iterative process of consultation and collaboration (research).”⁶⁵⁴ They called for learning to be widely shared, so that employers can also learn. This call was echoed by some in the federal public service as well.

Dual focus: Sectors in need of change and emerging workplace issues

WORBE has significant potential to provide us with the data we need about sectors that have stubborn representation gaps, and about sectors or specific employers that are leaders on achieving substantive equality in the workplace. For example, on 28 February 2023, it was announced that WORBE would focus on addressing barriers in the high tech sector.

Canada is a leader in aeronautics and houses the airline industry's most significant international organizations – International Civil Aviation Organization (ICAO) and International Air Transport Association (IATA), both of which have sought to address the significant underrepresentation of women in the profession of airline pilots. What might be done to galvanize sectoral change?

WORBE also has tremendous potential to be a source of ongoing learning on emerging workplace issues. This report has highlighted two very different emerging issues: the use of non-disclosure agreements and the use of artificial intelligence. Over the life of employment equity in Canada, there will be more. WORBE should be part of a reflexive approach that supports ongoing learning and serious research into workplace practices, guided by the extensive reports prepared in covered workplaces.

In its refocus, WORBE must remain centred on supporting the covered employment equity groups and their representatives.

WORBE has a distinct opportunity to foster a more significant and integrated role for researchers. We were inspired also by the US Equal Employment Opportunities Commission's 2016 Select Task Force on the Study of Harassment in the Workplace, which offered recommendations that would encourage and in some cases mandate employers to work with researchers to assess the impact of policies, including as part of settlement agreements in the context of dispute settlement.⁶⁵⁵

We recommend that WORBE be well funded, with selections through competitive processes undertaken with the input of the Employment Equity Advisory and Review Panel recommended in Chapter 6. We recommend encouraging the integration of researchers in initiatives to assess the impact of workplace policies to achieve equity, and that links be explored to the federal tri-agency funding councils.

Finally, WORBE can foster a commitment to communities of learning beyond Canada. This report has canvassed some of the interesting developments in other countries. WORBE can be drawn upon to help foster sectoral discussions across selected jurisdictions to promote deeper learning about barrier identification and elimination and promising practices to support equitable inclusion.

Recommendation 5.23: WORBE projects should be selected with the input of the Employment Equity Advisory and Review Panel.

Recommendation 5.24: WORBE should be repurposed to:

- support sectors in greatest need of closing the representation gap
- integrate researchers in initiatives to assess the impact of workplace policies to achieve equity, including through links with the federal tri-agency funding councils
- build and share practical knowledge on emerging workplace issues that may pose barriers and how to address them, and
- ensure that employment equity groups are at the centre of the knowledge development and sharing

Recommendation 5.25: WORBE-funded projects and learning outcomes should be made publicly available and readily accessible online.

Overall, we were heartened by the depth of commitment to meaningful consultations that we heard throughout the task force’s work. Meaningful consultations are not simply one among many obligations under the *Employment Equity Act* framework. They are one of the three foundational pillars, necessary to support the *Employment Equity Act* framework. Meaningful consultations – and the training necessary to support them - embody the spirit of equitable inclusion, by folding “nothing about us without us” into the architecture of equitable inclusion.

⁶⁰⁴ LGBT Purge Fund, *Emerging from the Purge Inclusion Report* (2021) at 64 (Recommendation 1).

⁶⁰⁵ Canadian Human Rights Commission, *Levelling the Field: Developing a Special Program or Special Measure under the Canadian Human Rights Act or the Employment Equity Act* (2022) at 15.

⁶⁰⁶ US Center for Disease Control, *6 Guiding Principles of A Trauma-Informed Approach*, (17 September 2020); Katharine Manning, “We Need Trauma-Informed Workplaces” *Harvard Business Review* (31 March 2022).

⁶⁰⁷ Dionne Pohler & Chris Riddell, “Multinationals’ Compliance with Employment Law: An Empirical Assessment Using Administrative Data from Ontario, 2004-2015 (2019) 72:3 *ILR Review* 606 at 628.

⁶⁰⁸ See Adelle Blackett & Colleen Sheppard, “Collective Bargaining and Equality: Making Connections” (2003) 142 *International Labour Review* 419; Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen’s University Press, 2010) at 61–64.

⁶⁰⁹ Canadian Labour Congress, Presentation to the EEART, 29 March 2022.

⁶¹⁰ Canada has ratified 9 of the ILO’s 10 fundamental conventions, including the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

⁶¹¹ See e.g. Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Canada, Convention on the Rights of Persons with Disabilities*, CRPD/C/CAN/CO/1, 8 May 2017, at paras 12 & 56; United Nations Committee on the Elimination of Racial Discrimination, *General recommendation No. 34 adopted by the Committee: Racial discrimination against people of African descent, International Convention on the Elimination of All Forms of Racial Discrimination*, CERD/C/GC/34, 3 October 2011 at para 19.

⁶¹² *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 SCR 391; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1; *Meredith et al. v. Canada (Attorney General)*, 2015 SCC 2; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4; *British Columbia Teacher’s Federation v. British Columbia*, 2016 SCC 49, Majority allowing the appeal substantially for the dissenting reasons of Donald J. in *British Columbia Teachers’ Federation v. British Columbia*, 2015 BCCA 184.

⁶¹³ *British Columbia Teacher’s Federation v. British Columbia*, 2016 SCC 49, Majority allowing the appeal substantially for the dissenting reasons of Donald J. in *British Columbia Teachers’ Federation v. British Columbia*, 2015 BCCA 184 at para. 334.

⁶¹⁴ *Chambly v Bergevin* [1994] 2 SCR 525 at 551.

⁶¹⁵ *Central Okanagan School District No. 23 v Renaud*, (1992) SCC 81, [1992] 2 SCR 970.

⁶¹⁶ *Central Okanagan School District No. 23 v Renaud*, (1992) SCC 81, [1992] 2 SCR 970 at 990-991.

⁶¹⁷ *Central Okanagan School District No. 23 v Renaud*, (1992) SCC 81, [1992] 2 SCR 970 at 991 & 988.

⁶¹⁸ *Central Okanagan School District No. 23 v Renaud*, (1992) SCC 81, [1992] 2 SCR 970 at 990–991, citing *Office and Professional Employees International Union, Local 267 v Domtar Inc.*, Ontario Divisional Court, March 19, 1992, unreported (explaining that a union may become party to discrimination in two ways: (1) “by participating in the formulation of the work rule that has the discriminatory effect on the complainant” (2) through “failure to accommodate the religious beliefs of an employee notwithstanding that it did not participate in the formulation or application of a discriminatory rule or practice”)

⁶¹⁹ Lizzie Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (Oxford University Press, 2015) at 259.

⁶²⁰ See e.g. Canadian Union of Professional Employees, Presentation to the EEART, 10 May 2022.

⁶²¹ People First of Canada, *Overcoming Barriers to Employment: A Review of the Employment Equity Act*, 15 June 2022, at 26.

⁶²² Emphasis added.

⁶²³ Canadian Labour Congress, Submission to the EEART, 28 April 2022.

⁶²⁴ Canada Post, Submission to the EEART, 3 May 2022.

⁶²⁵ Committee on Economic, Social and Cultural Rights, General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, 27 April 2016, paras 31–33.

⁶²⁶ Treasury Board of Canada Secretariat, Annual Report: Employment Equity in the Public Service of Canada, 2019-2020 at 6.

⁶²⁷ Source: Rafael Gomez, “Ensuring Compliance and Progress with the Employment Equity Act: A Review of Worker Voice Mechanisms in the Federally Regulated Private Sector,” Unpublished Paper prepared for the EEART, 31 October 2022.

⁶²⁸ Canadian Human Rights Commission, *Final Report – Employment Equity: Employment Systems Review*, 8 November 2022, at 3, 13-14, 27-30.

⁶²⁹ Rafael Gomez, “Ensuring Compliance and Progress with the *Employment Equity Act*: A Review of Worker Voice Mechanisms in the Federally Regulated Private Sector,” Unpublished Paper prepared for the EEART, 31 October 2022.

⁶³⁰ Source: Rafael Gomez, “Ensuring Compliance and Progress with the Employment Equity Act: A Review of Worker Voice Mechanisms in the Federally Regulated Private Sector”, Unpublished Paper prepared for the EEART, 31 October 2022.

⁶³¹ See Rafael Gomez, “Ensuring Compliance and Progress with the *Employment Equity Act*: Worker Voice Mechanisms in the Federally Regulated Private Sector”, Consultancy Paper Commissioned for the *Employment Equity Act* Review Task Force, 31 October 2022 at 6.

⁶³² See Christian Lévesque, Gregor Murray & Stéphane LeQueux, “Union Disaffection and Social Identity : Democracy as a Source of Union Revitalization” (2005) 32:4 *Work and Occupations* 400 at 418.

⁶³³ *Canadian Human Rights Act* Review Panel, Report of the Canadian Human Rights Commission Review Panel, (2000) (Chair: Hon. Gérard LaForest) at 22.

⁶³⁴ J. Helen Beck, Jeffrey G. Reitz & Nan Weiner, “Addressing Systemic Racial Discrimination in Employment: The Health Canada Case and Implications of Legislative Change” (2002) 28 *Canadian Public Policy* 373 at 389.

⁶³⁵ *Canadian Human Rights Act* Review Panel, Report of the Canadian Human Rights Commission Review Panel, (2000) (Chair: Hon. Gérard LaForest) at 31.

⁶³⁶ *Canadian Human Rights Act* Review Panel, Report of the Canadian Human Rights Commission Review Panel, (2000) (Chair: Hon. Gérard LaForest) at 32.

⁶³⁷ Evaluation and Data Development Strategic Policy, *Evaluation of the Federal Contractors Program: Final Report* (Ottawa: Human Resources Development Canada, April 2002).at 13.

⁶³⁸ Rafael Gomez, Ensuring Compliance and Progress with the *Employment Equity Act*: A Review of Worker Voice Mechanisms in the Federally Regulated Private Sector, Report to the EEART, 31 October 2022.

⁶³⁹ Accessibility Strategy for the Public Service of Canada, Appendices G & H: What We Heard. Presentation by Yazmine Laroche, Deputy Minister Champion for Federal Employees with Disabilities and Federal Public Service Employees to the EEART, 14 June 2022.

⁶⁴⁰ Canadian Human Rights Commission, Horizontal audit on Indigenous employment in the banking and financial sector, 2019 at 7-8.

⁶⁴¹ See notably Force Jeunesse, presentation to the EEART, 2 June 2022.

⁶⁴² Janice Fine, “New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships between Government and Civil Society Are Showing the Way Forward” (2018) 17 *University of Chicago Legal Forum*, Article 7, 142 at 169–170.

⁶⁴³ Janice Fine, “New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships between Government and Civil Society Are Showing the Way Forward” (2018) 17 *University of Chicago Legal Forum*, Article 7, 142 at 145–146.

⁶⁴⁴ Janice Fine, “New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships between Government and Civil Society Are Showing the Way Forward” (2018) 17 *University of Chicago Legal Forum*, Article 7, 142 at 151–154.

⁶⁴⁵ Evaluation and Data Development Strategic Policy, *Evaluation of the Federal Contractors Program: Final Report* (Ottawa: Human Resources Development Canada, April 2002).

⁶⁴⁶ UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada, International Convention on the Elimination of All Forms of Racial Discrimination, 13 September 2017 CAN/CO/21-23 at para 32(a); Committee on the Rights of Persons with Disabilities, General Comment No. 8 (2022) on the Rights of Persons with Disabilities to Work and Employment, CRPD/C/GC/8, 9 September 2022 at para 81(p)(v).

⁶⁴⁷ Commission des droits de la personne et des droits de la jeunesse (CDPDJ), “Advisory service on reasonable accommodation/ Service-conseil en accommodements raisonnables” (last consulted 24 November 2022), online: <<https://www.cdpdj.qc.ca/en/our-services/activities-and-services/advisory-service-reasonable-accommodation>>.

⁶⁴⁸ Employment New Zealand: “Hiring disabled people” (last consulted 24 November 2022), online: <<https://www.employment.govt.nz/workplace-policies/employment-for-disabled-people/hiring-disabled-people/#scrollto-employer-advice-line>>.

⁶⁴⁹ Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, Recommendations Regarding Anti-Harassment Compliance Training, June 2016, available online: https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686314.

⁶⁵⁰ The US EEOC’s pre-pandemic report suggested they should be live. Experiences during the pandemic suggest there are alternatives that may not only be reasonable but to be encouraged. Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, Recommendations Regarding Anti-Harassment Compliance Training, June 2016, available online: https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686314.

⁶⁵¹ Canadian Council on Rehabilitation and Work, Presentation to the EEART, 9 June 2022.

⁶⁵² Canadian Council on Rehabilitation and Work, Presentation to the EEART, 9 June 2022.

⁶⁵³ *Second Legislative Review of the Accessibility for Ontarians with Disabilities Act, 2005* (November 2014) (Reviewer: Mayo Moran, Provost and Vice-Chancellor of Trinity College at the University of Toronto) at 68.

⁶⁵⁴ FETCO, Submission to the EEART, 28 April 2022.

⁶⁵⁵ Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, Recommendations Regarding Anti-Harassment Compliance Training, June 2016, available online: https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686314.

Chapter 6: Fundamentally rethinking the regulatory oversight pillar

Introduction: Regulatory oversight needs fundamental repair

Employment equity is perceived to be about reports and not about advancing and progress.

Teamsters, Presentation to the EEART, 8 April 2022

The success of a human rights enforcement system can ultimately be measured by one test - does the system lead to measurable and real reduction in the discrimination faced by citizens protected by the law.

Mary Cornish, Achieving Equality A Proposal For A New Canadian Human Rights Enforcement System, Submission to Canadian Human Rights Act Review Panel, 1999

Workplaces should have significant latitude to promote equitable inclusion, reasonable latitude on how to implement employment equity, and no latitude to drag their feet on achieving and sustaining employment equity.

As we looked closely at the regulatory oversight and accountability measures in place for the *Employment Equity Act* framework, our task force came away with the concern that the existing legislation, like some other employment law frameworks, might, in the words of political scientist Leah Vosko, “inadvertently incentivize non-compliance.”⁶⁵⁶

The current Employment Equity Act framework might be incentivizing foot dragging, not providing enough guidance to implement, and putting a brake on the creativity necessary to exceed unduly rigid indicators and achieve a barrier free workplace for all.

We have said it before: for employment equity to mean achieving substantive equality, the implementation through barrier removal, meaningful consultations and regulatory oversight must be proactive too. And the failure to implement and to engage in meaningful consultations must entail consequences.

Professor Vosko’s work on employment standards legislation has led her to question the reliance on a mix of “new governance” strategies that privilege persuasion and information sharing without enough attention placed on deterrence.⁶⁵⁷ We took note as well of the many stakeholders who told us that we need to focus on ensuring that the *Employment Equity Act* framework is actually enforced. There was lost confidence in the ability of individual human rights complaints and individual grievances to resolve these systemic questions.

We reviewed decisions raising employment equity concerns rendered by the Federal Public Service Labour Relations and Employment Board in response to employee complaints of “abuse of authority”

under Section 77(1)(a) of the *Public Service Employment Act*. These decisions confirm the challenge of fitting systemic complaints into individual cases. The review similarly suggests how important it is for adjudicators to have specialized expertise and training in equity. The chair of the Board, Edith Bramwell and general counsel Asha Kurian, also stressed the importance of a holistic approach to addressing employment equity.⁶⁵⁸

We need hospitals, of course. But we heard an urgent plea for us to focus on proactive prevention and care. Regulatory oversight must be nimble, supportive and sustained.

We have a framework that seeks to stimulate change through implementation via self-evaluation and reporting, through meaningful consultations and regulatory oversight. It is well designed to do so, so long as each of the pillars is fortified.

But we have all the evidence we need to affirm that we cannot achieve employment equity if even one of the pillars is weak. And while we have provided recommendations to strengthen implementation and meaningful consultations, it is clear that the regulatory oversight pillar is broken, and in need of quite fundamental repair.

Without sufficiently robust regulatory oversight, workplaces lose all three key reasons why they might seek to comply with the *Employment Equity Act*, namely:

- economic—it costs less to comply than to risk fines and penalties
- social—they do not want to be unfavorably compared to others in their industry, and
- normative—they believe it is the right thing to do⁶⁵⁹

Our current approach to regulatory oversight misses all three reasons. The *Employment Equity Act* framework offers:

- very little by way of economic incentive
- limited visibility to employers who are doing well in the industry and little objective basis for comparison, and
- insufficient guidance to employers who want to do the right thing by fostering equitable inclusion on how to do so

This chapter canvasses where we are on regulatory oversight, and offers recommendations on where we need to go.

Where we are:

The role of the Labour Program

The Minister of Labour, largely through the Labour Program's Workplace Equity Division, is responsible for the administration of the *Employment Equity Act*. It is called upon to:

- develop and conduct information programs to foster public understanding the Employment Equity Act and foster public recognition of its purpose⁶⁶⁰
- undertake research related to the purpose of the Employment Equity Act⁶⁶¹
- promote the purpose of the Employment Equity Act⁶⁶²

- publish and distribute information, guidelines and advice to private sector employers and employee representatives regarding the implementation of employment equity⁶⁶³
- develop and conduct programs to recognize private sector employers and employee representatives for outstanding achievement in implementing employment equity⁶⁶⁴
- issue penalties to private sector employers for non-compliance with the Employment Equity Act⁶⁶⁵
- submit an Annual Report to Parliament on the status of employment equity in the federally regulated private sector⁶⁶⁶
- make available to employers any relevant labour market information respecting designated groups in the Canadian workforce in order to assist employers in fulfilling their obligations under the Employment Equity Act⁶⁶⁷, and
- administer the Federal Contractors Program (FCP)⁶⁶⁸

The Labour Program also administers the WORBE program discussed in Chapter 5, alongside an Employment Equity Achievement Awards program.

Employment Equity Achievement Awards Program:

The Employment Equity Achievement Awards Program has honoured awardees from the Legislated Employment Equity Program or the Federal Contractors Program since 2016 for

- Outstanding commitment to employment equity
- Innovation
- Sector distinction
- Employment equity champion

The awards program was paused for two years during the COVID-19 pandemic. It is set to relaunch at a ceremony in 2023, and is to include a new Indigenous Reconciliation award.

The awards program is administered by the Labour Program.

Based on the announcements, quite a number of the awards may reflect commitment to diversity and inclusion, or the launching of initiatives or programs aimed at increasing representation.

Some others reflect innovative, promising practices, such as working through memoranda of agreement with Indigenous communities to advertise, assess and assist with the hiring of Indigenous candidates.

The publicly shared information on the awards program have tended not to provide specific detail on the results of the promising practices, or whether and how recipients have successfully implemented employment equity in keeping with the current requirements of the *Employment Equity Act* framework.

The Labour Program's limited means:

The Labour Program's responsibilities and powers are broad. The capacity and results have been less so.

Consider that only 4 employers have ever received a notice of assessment of a monetary penalty. The last penalty was issued in 1991, which is also when the largest penalty was issued - \$3,000.00. Under the FCP, no contractor has been found to be in non-compliance since the 2013 redesign.⁶⁶⁹

This is despite the fact that the Labour Program conducts compliance assessments annually for federally regulated private sector employers. For the FCP, the Labour Program conducts individual compliance assessments the year after the contract award date, then every three years afterward.

There are built-in limits in the *Employment Equity Act* framework, explored throughout this report, that affect what the Labour Program can do. The point of the *Employment Equity Act* framework should have been to create incentives for employers to comply wherever possible.

If we knew that employment equity was actually being achieved and sustained, the limited assessments of penalties would be something to celebrate. But that is far from the reality.

Consider that currently, when a compliance officer in the Labour Program finds that an employer is not meeting an undertaking – for example, the employer has failed to review and revise its employment equity plan as required by Section 13 of the *Employment Equity Act*, or has failed to consult with employee representatives as required by Section 15 – the compliance officer is required to notify the employer and “attempt to negotiate a written undertaking.”⁶⁷⁰ That's it.

Consider also that Workplace Equity Officers used to be available across Canada, working out of regional offices, and close to the workplace actors themselves. They were able to undertake on-site visits to FCP contractors. The positions were eliminated in 2013. Compliance assessments are now based on reporting rather than on-site visits. While there is a lot that can be done with virtual meetings and we were told that the Labour Program has gotten creative with them during the pandemic, there are limits.

Our task force recognized the depth of knowledge of our interlocutors on the policy side of the Workplace Equity Department, including the capacity developed to administer the tool developed by the Labour Program. The Workplace Equity Information Management System (WEIMS) program enables LEEP and FCP employers to prepare and submit their reports online. The chair and vice-chair were provided with a demonstration of WEIMS' capabilities alongside an emerging platform to share results on the pay transparency requirements under the *Employment Equity Act* framework.

On pay transparency under the *Employment Equity Act* framework, we were told that there was little ongoing exchange between the Labour Program and the Pay Equity Commissioner, despite the closely related framework and objectives under the *Pay Equity Act*. There are silos enabled by law.

Regarding data management, we were informed that a separate module of WEIMS is made available to the Canadian Human Rights Commission to review individual employer reports, and the Labour Program and the Canadian Human Rights Commission report meeting to discuss current and emerging issues. Canadian Human Rights Commission staff told the task force that they have to

request some information available to the Labour Program on the WEIMS data management system directly from employers.

Remarkably, too, both the Labour Program and the Canadian Human Rights Commission told us that the audits conducted by the Canadian Human Rights Commission are not shared with the Labour Program that subsequently advises employers.

We could of course simply recommend that each institution share more information and collaborate. The impediments to sharing seemed not to be strictly legally mandated. Under Section 34 (3) of the *Employment Equity Act*, the Canadian Human Rights Commission is permitted to communicate or disclose “on any terms and conditions that the Commission considers appropriate”, to a minister of the Crown in right of Canada or to any officer or employee of Her Majesty, “for any purpose relating to the administration or enforcement” of the *Employment Equity Act*.

Regrettably, the current practice seems to reflect the institutional silos that have developed over time.

The division may have had merits in the past, but currently it is part of the problem.

So many years into a process that should be helping us to achieve employment equity, our task force came away concerned. The bifurcation of responsibilities seems to be a big part of the problem facing regulatory oversight of the *Employment Equity Act* framework.

Public Service Commission of Canada – an employer and an auditor

Employment equity implementation and regulatory oversight in the federal public service is cross-cutting.

In the core federal public administration, responsibility for carrying out the obligations under the *Employment Equity Act* is shared:

- The Public Service Commission (PSC) assumes responsibility for appointments to the public service or from within the public service, including promotions, under the Public Service Employment Act (Sections 11 & 29). These responsibilities are delegated to deputy heads of departments.
- The Treasury Board Secretariat’s Office of the Chief Human Resources Officer (TBS-OCHRO) assumes human resources responsibilities under the Financial Administration Act (Section 11.1), including classifications of positions and establishing policies and programs to implement employment equity in the public service. The president of the Treasury Board tables public sector reports to Parliament on an annual basis.

The Public Service Commission’s employment equity responsibilities also include conducting investigations and audits under the *Public Service Employment Act* (Sections 11 & 17). As discussed in Chapter 4, this includes the power to conduct audits to determine whether there are biases or barriers that disadvantage persons belonging to any equity-seeking group. When assuming this role, the Public Service Commission has all the powers of a commissioner under the *Inquiries Act*.

The takeaway is that the Treasury Board Secretariat and the Public Service Commission share responsibility for identifying and removing barriers to achieving and sustaining employment equity, and for supporting departments to implement positive measures to close representation gaps.

We stress two features:

- First, the language of the Public Service Employment Act does not refer specifically to groups as designated by the Employment Equity Act. Any equity-seeking group is broader and suggests the kind of recognition of the importance of barrier removal that this report has emphasized.
- Second, the Public Service Commission has an auditing responsibility for recruitment processes. But the relationship between its own role in hiring – essentially delegated to departments and agencies - and its function as an auditor requires serious attention.

Responsible for safeguarding a merit-based, representative and non-partisan federal public service for the benefit of all Canadians, the Public Service Commission reports independently to Parliament.

Constituencies that met with our task force expressed frustration, however, at not being able to obtain the kind of granular data on merit and representativeness in the federal public service that show what is really happening on hiring, promotion and retention in the federal public service.

Names matter. If the Public Service Commission is the joint employer with responsibility for appointments, should we really be calling their reviews of employment practices by the deputy heads of departments to whom they have delegated their authority audits?

We learned that this concern is not merely a matter of terminology.

We were informed in particular that the Office of the Auditor General of Canada’s anticipated audit of an inclusive workplace for racialized employees was not expected to cover recruitment in the public service in part because the Public Service Commission conducts its own audits. We understood that the Auditor General’s decision was in part to respect responsibilities that are legislatively granted to other federal institutions and to avoid duplication.⁶⁷¹

We accorded the utmost seriousness to the call by the Public Service Commission for accountability to be increased by focusing on outcomes rather than simply monitoring efforts, that is, for an oversight body to ensure that progress is actually made to close gaps.⁶⁷²

The Canadian Human Rights Commission

In effect, a demonstrably effective process which is frustratingly limited in coverage has been replaced by a broader process which lacks features critical to effective implementation.

J. Helen Beck, Jeffrey G. Reitz and Nan Weiner, “Addressing Systemic Racial Discrimination in Employment: The Health Canada Case and Implications of Legislative Change” (2002) 23 Canadian Public Policy 373 at 387

Following the *National Capital Alliance on Race Relations* case before the Canadian Human Rights Tribunal, the *Canadian Human Rights Act* was amended to prevent employment equity cases – that is, cases relying on statistics - from coming forward. Subsequently, the Canadian Human Rights Commission has been responsible for monitoring compliance, a responsibility entrusted to them as an independent agency. Stakeholders came to see the role initially assumed by the Labour Program in

Chapter 6: Fundamentally rethinking the regulatory oversight pillar

what was then HRDC as presenting a potential “conflict of interest” given its proximity to employers in other programs.⁶⁷³ So responsibilities were divided up.

The Canadian Human Rights Commission monitors compliance by conducting compliance audits for both the federal public service and federally regulated private sector employers. It is also able to receive and examine complaints regarding non-compliance.⁶⁷⁴

As discussed in detail below, the Canadian Human Rights Commission may also apply to the Chairperson of the Canadian Human Rights Tribunal to request that an Employment Equity Review Tribunal be appointed, with power to issue decisions enforceable as court orders.⁶⁷⁵ This application is made when an employer requests a review of a decision issued by the Canadian Human Rights Commission⁶⁷⁶ or the Canadian Human Rights Commission requests the confirmation of its decision.⁶⁷⁷ The Employment Equity Review Tribunal itself has barely ever been used.

The Canadian Human Rights Commission’s annual report is also submitted to Parliament, comprising information about the Canadian Human Rights Commission’s audits and enforcement activities.

The Canadian Human Rights Commission’s own implementation report

Given the CHRC’s role in auditing others, in both the public sector and the private sector, it was important to look at how it understood implementation within its own workplace.

The CHRC reported in November 2022 that it met its employment equity targets for all four equity groups, using the higher LMA rather than WFA applied in the federal public service as a benchmark. The CHRC added that as a small organization, “for some of the equity seeking groups, the departure of one or two employees can have a significant impact on representation”.⁶⁷⁸ The report contains a workforce analysis in statistical terms, but an environmental scan revealed several areas of concern including access to career development opportunities, conflicting messages about parental leave, cumbersome and lengthy processes for accommodation requests that affect both workers with disabilities and religious minority workers seeking accommodation of their religious holidays, and the use of inappropriate language to discuss non-CHRC employees.

The language of systemic barriers was used sparingly, however, and obstacles to career development were not considered to be systemic employment equity barriers since the Employment Systems Review “did not identify differential treatment of employees **because** they belonged to an equity seeking group” but rather because there is an employee perception of arbitrariness. It was surprisingly unclear from the report whether belonging to an equity group was considered to be one of the factors. Moreover, without identifying a specific link to equity groups in the report, ready access to French language training was identified as a “common barrier to career advancement” with the problem apparently at the level of receiving the appropriate approvals to take the training due to high workload.⁶⁷⁹

The CHRC recommended formalizing and structuring its approach to talent management, and better communication about staffing plans and decisions. It also recommended “right-size workload expectations”, the kind of measure that can support workers with family responsibilities and workers with disabilities who are disproportionately affected, but also support all employees’ mental health and work-life balance. The report underscored the importance of catalyzing support for achieving employment equity from the level of the Chief Commissioner.

A Transformative Framework to Achieve and Sustain Employment Equity

The Canadian Human Rights Commission's audits

The Employment Equity Unit, housed in the Proactive Compliance Branch of the Canadian Human Rights Commission, is small, and smaller than it was when it was first established. The dynamic, committed but clearly overworked team of professionals charged with auditing every Canadian workplace under federal *Employment Equity Act* jurisdiction, including the federal public service, could fit in one small conference room, with seats to spare.

The traditional approach is to conduct conventional audits of all employer implementation and consultation requirements under the *Employment Equity Act*. This entails enforcing the nine employer obligations under Section 22(1) of the *Employment Equity Act*, and summarized by the Commission in its auditing framework⁶⁸⁰ as:

1. Collection of workforce information
2. Workforce analysis
3. Review of employment systems, policies and practices
4. Employment equity plan
5. Implementation and monitoring of employment equity plan
6. Periodic review and revision of employment equity plan
7. Information about employment equity
8. Consultation and collaboration
9. Employment equity records

Under the *Employment Equity Act*, the CHRC conducts a comprehensive, conventional audit, then CHRC follows up with written directions to the employer to undertake necessary steps. There are statutory limits: as discussed in Chapter 4, the directions may not cause undue hardship; the direction must not require unqualified people to be hired or breach the merit principle in the federal public service. They may not require new jobs to be created. They must not impose a quota; rather, they must consider the appropriate factors for setting numerical targets.

An employer may request a review of a direction, or the CHRC may apply for a Tribunal order to confirm a direction. Both are understood that this is meant to be a last resort. The focus of the legislation is on persuasion.

Recently, in an attempt to be responsive and creative, despite limited resources, the Canadian Human Rights Commission has also been conducting horizontal audits. They include a *Horizontal Audit on Indigenous employment in the banking and financial sector* released in 2019, and a *Horizontal Audit in the Communications Sector: Improving Representation for People with Disabilities*, released in 2022.

The CHRC has largely lost what limited on-site capacity it initially had. The paper-intensive approach to audits – which in one recent case for the public service entailed an audit survey sent to the 47 public service departments and agencies with 500+ employees and out of which they selected 18 to submit to a full documentary assessment coupled with interviews with employees from different levels of the organization - may reflect the restrictions in the context of a pandemic where most employees were not working in the office, but one unavoidable issue for the CHRC remains the limits to what can be done with its current resources.

There is no use putting a gloss on this challenge: the CHRC's Employment Equity Division, with 11 staff members, does not have anywhere near the capacity necessary to undertake their crucial oversight work.

Although it is responsible for undertaking conventional audits of employers, covering all 9 requirements found in the Employment Equity Act, it has only audited 423 employers between 1997 and 2021 for a total of 814 audits.⁶⁸¹

Not surprisingly, we learned that some employers tend to react to the audits, rather than undertaking proactive measures in advance.⁶⁸² Given the small number of audits conducted, there is little incentive to do otherwise.

The CHRC informs employers in its Framework for Compliance Audits that although the information gathered is treated as confidential under Section 34 of the *Employment Equity Act*, the CHRC is subject to disclosure requirements of the *Access to Information Act*, which take precedence.

Our task force was told by the outgoing Chief Commissioner that the CHRC shared a commitment to transparency and strengthening the *Employment Equity Act* framework. On direct request from the task force chair, the CHRC made a small selection of anonymized audits available for the purpose of this review. The CHRC shared conventional audits and background audits to a horizontal audit that had not yet been released on the representation of racialized people in the federal public service. Horizontal audit reports are already publicly available on the CHRC's website.

The conventional audits reviewed are discussed below in some detail precisely because they have rarely been externally reviewed.

The conventional audits contained employment equity data profiles including analyses of the percentage of the equity group in the specific workplace as well as the attainment rates and a discussion of those results over time. Past audits were summarized and discussed in relation to the current audit results. They addressed employment equity groups as a whole.

Alongside the representation analysis was a separate section providing information about the employer, its employment equity program, previous employment equity audits and the audit's findings.

It was important to see within those documents that the CHRC affirmed that employment equity is not just about the numbers. It stressed the steps that need to be taken beyond current levels of representation.

Unfortunately, some of the audits were not terribly detailed. They did not suggest that the audits permitted a "deep dive" into the employer's organizational behaviour. They suggested that much of the auditing took the form of an exchange and analysis of documents submitted. Given the size of the audit team, this is hardly a surprise.

On implementation including barrier removal, in one case, the audit revealed that the governmental unit or agency had not completed an employment systems review or a valid employment equity plan based on recent workforce analysis and the results of an employment systems review (ESR). They indicated that they intended to hire a consultant to conduct an ESR. The CHRC noted that they were required to conduct the audit sooner than it was apparently planned to be conducted.

A Transformative Framework to Achieve and Sustain Employment Equity

Although the language of diversity and inclusion was all over the reports, the CHRC's audit showed that it was not letting generic EDI practices substitute for the specific requirements of the *Employment Equity Act*:

- It is also important that the CHRC clarified that a Diversity and Inclusion Strategic Plan, which had some similarities to an Employment Equity Action Plan, was not based on the Employment Systems Review so was not an “evidence-based” action plan.
- Similarly, some of the Diversity and Inclusion training could not be considered a “strategy” for external hiring of racialized persons into management and executive roles. Promised items - like a toolkit to support the hiring - were not submitted to the CHRC for review.

The examples of barriers identified by the CHRC varied. They included barriers in gaining access to telework. Another audit indicated that there was “systemic hostility toward racialized women who eat lunches from their cultural backgrounds at work” with co-worker complaints about smells and “an order from an executive against ‘smelly food’ in the workplace.”

The CHRC's remedial action called upon the agency to develop formal strategies for hiring. The CHRC was clearly moving beyond the merely symbolic to identify whether strategies were actually in place to develop a specialized skillset among the staff of the department, train hiring managers to address attitudinal barriers, and address the untapped internal talent of overqualified and loyal staff whose belief in the mandate of the organization contributed to them staying in junior roles despite their educational and professional attainment.

In other audits, the CHRC wanted to see actual performance goals for hiring managers to close the employment equity gaps for racialized workers. Although the evaluations were somewhat terse and a bit formulaic, the message was clear: the performance indicators for hiring should be specific; moreover, even if a group happens to be appropriately represented, there is still a responsibility to monitor to maintain the workforce availability rate.

The CHRC looked closely at the organizational resources available to carry out the employer's plan. Finally, the CHRC wanted to see an annual analysis of reasonable progress but could not, in the absence of that plan. Audits showed that the CHRC sought evidence-based employment equity plans.

In some audits, the CHRC might report that barriers must be addressed. They might direct an employer to build a “management action plan,” that is, a schedule of the items requiring remedial action with a deadline by which to complete them.

But the CHRC provided no guidance on how to do so in the audit report.

In another audit, and in the absence of an employment systems review report that should already have been available, the CHRC called for an employment systems review to be prepared by a particular date. But these kinds of audits just illustrate the problem: most of these legislated requirements should already have been completed and ready for the CHRC's compliance audit.

It was frankly troubling to read this kind of advice, given to employers that have been in the program for decades. And the employer was in the federal public service, which should set an example. The audit sounded at best like the kind of advice that should have been coming from the body responsible for monitoring compliance to employers that had just enrolled in the program or had produced their first report.

The upshot: this public service employer was given a later date to complete what should already have been done by law. The CHRC provided little guidance on how.

There were no immediate consequences for not already having met the legal requirements.

It is some consolation that the audit process closes only once the CHRC has assessed the evidence to ensure that each employer has met the requirements of the Management Action Plan prepared by the CHRC. But the auditors are overworked and under-resourced.

Since the Labour Program does not receive the audits, there is no ability to follow up when the employer submits the next employment equity report.

A betting employer could wager that not much will happen.

Even the list of barriers identified in an audit of a high performing unit, which was praised for exceeding workforce availability for the groups under consideration, and for taking important outward-facing initiatives suggested that there would be problems in sustaining employment equity. The report found the following barriers:

- Affinity bias, or hiring, promoting or granting “acting” assignments to people who look like or have similar backgrounds to them
- Lack of transparency in staffing processes
- Unconscious bias or stereotypes, and
- Lack of intercultural competence

The audits listed these problems, but without much granularity. Without follow up support, it is reasonable to worry that little will change.

On meaningful consultations, the *Employment Equity Act* requirements did not figure prominently in the conventional audit reports reviewed. Consultations were assessed as one of the sub-lines under the barrier-removal line of inquiry. In the background audits conducted for the announced horizontal audit for racialized employees in the federal public service, departments were assessed on whether they consulted with racialized employees to identify possible barriers in recruitment training, coaching, evaluation, promotion, discipline and termination; in respect of workflow and procedures; in respect of workplace climate and acceptance, and in respect of the availability of accommodation.

In one case, the documentation provided to the CHRC by an employer – largely slides of presentations – were considered not to constitute proof of consultations with racialized employees on barriers. Positive practices were acknowledged, but were not considered to replace the need for consultations with racialized employees for the purposes of an employment systems review.

Employers might submit a schedule of meetings with bargaining agents in which EDI was on the agenda. But reference to bargaining agents was almost entirely absent from the audits provided for the task force’s review.

The CHRC audits call for consultation, and clearly have a sense of what is inadequate, but seems not to offer guidance on how to structure consultations in order to be compliant with the Employment Equity Act.

Horizontal and Blitz Audits are an example of the room available for innovation on regulatory oversight even in the midst of significant constraints:

- The CHRC has shown creativity given its extremely limited resources, by establishing a *horizontal auditing practice* that allows it to identify and take a deeper dive into systemic issues faced by a particular designated group and publish a sector-wide report. They have the potential advantage of providing insight into specific issues in specific sectors.
- The CHRC has also developed *blitz audits* to reach more employers, by focusing on 2 of the entire 9 obligations listed above that the CHRC is required to audit under the *Employment Equity Act* – this approach is used with smaller employers, that is, those with fewer than 300 employees.

But frustrations have been expressed about these auditing practices, given the generality of the reporting in the horizontal audits currently available to the public and the small number of workplaces ultimately audited. According to the Public Service Alliance of Canada, for example, horizontal audits run the risk of lowering the standard necessary to ensure that employment equity is meaningfully implemented.⁶⁸³

The CHRC's 2019 *Horizontal Audit on Indigenous Employment in the Banking and Financial Sector* entailed 36 completed surveys and 10 second level audits. In contrast, in over 20 years since 1997, the CHRC reported that it had completed close to 80 audits in the sector of 240,000 employees, or fewer than 4 audits in the entire sector per year.

The CHRC's 2022 *Horizontal Audit in the Communications Sector: Improving Representation for People with Disabilities* entailed 58 employers – in an important development, identified in an annex - who completed the survey, and 17 who were subjected to a full audit. Much of it took place during the COVID-19 pandemic so the CHRC graciously acknowledged the participation despite the challenges. It reported however that only 41.4% of those surveyed had taken any measures to eliminate employment barriers. Only 2 of 17 had established performance indicators for hiring managers. They noted that while the representation of people with disabilities in the communications sector had increased — from 1.7% in 2011 to 3.7% in 2019 — it is still well below the availability rate of 9.1%. The CHRC's own frustration seemed apparent: it reported that “even after 25 years of the Act being in force, the Commission still had to require all 17 of the employers that were the subject of a full audit to sign a management action plan.”⁶⁸⁴

Both horizontal audits seemed to confirm the extent of the underrepresentation, and the lack of comprehensive communication on how to identify employment barriers with the specificity needed to address them. The CHRC expressed the hope that the audit findings would assist the concerned sectors. Yet the separation between the Labour Program and the CHRC as well as the chronic underfunding do not facilitate the kind of follow up that would be needed to foster effective change.

Commendable creativity aside, the conclusion is unavoidable: Employment equity is the federal government's commitment to substantive equality at work. It requires and deserves more than 11 overworked auditors and poorly coordinated, bifurcated regulatory oversight. It is time for change.

It is important for legislative frameworks to assume good faith. The federal government is accountable for ensuring that there is proper public oversight. But surely, we can accept that non-compliance can

happen for reasons other than a lack of knowledge. If we persist in assuming that all we need is more training, the legislative framework that seeks to support one of Canada’s fundamental values, substantive equality, risks being undermined.

The one-stop shop: Fundamentally rethinking oversight

It is time for change.

One suggestion we received was that employers should be able to count on a “*guichet unique*” – a one-stop shop – through which to engage with questions affecting workplace equity. The one-stopshop should include both the specialists who can accompany employers, as well as the measures and programs of governmental financial aid necessary to make achieving substantive equality in the workplace a reality.

The suggestion corresponds with some of the most important contemporary thinking on how to deliver services in an effective and efficient manner. It is the approach we recommend.

Regulatory oversight to achieve and sustain employment equity

There is nothing inevitable about the employment equity enforcement gap.⁶⁸⁵ Research confirms that the success of Canada’s employment equity framework depends in significant measure on “increased and vigorous enforcement”.⁶⁸⁶

We are nowhere near there.

The time has come to adopt a unified model, which would ensure that one independent entity, reporting directly to Parliament, has comprehensive regulatory oversight for the Employment Equity Act framework.

This would be consistent with the contemporary equity frameworks put in place by the federal government under the *Pay Equity Act* and the *Accessible Canada Act*.

Creating the position of an Employment Equity Commissioner was recommended by a wide range of stakeholders, including the Canadian Human Rights Commission.

There are many strengths to the Commissioner model, which requires individual integrity and credibility alongside a depth of expertise in alternative dispute resolution methods to provide guidance, support, and identify sustainable ways to ensure that the frameworks, and their purposes, are achieved. However, commissioners cannot achieve equity or accessibility alone. They require **significant** resources including personnel to make sure the breadth of their mandate is respected. To succeed, they must be supported by a robust office helping to carry out and sustain their mandate.

Cultivating independent guidance and regulatory oversight

The Employment Equity Commissioner will be key to ensuring that employers and joint equity committees receive the guidance they need to achieve substantive equality in the workplace.

A Transformative Framework to Achieve and Sustain Employment Equity

We heard from employers and service providers who are putting in place innovative employment equity programs, often working with great energy and intentionality to arrive at their representation goals. When they do so, they should be able to count on supportive, sustainable guidance. For example, one service provider adopted a strategic hiring approach and indicated they did so on the recommendation of the CHRC. However, they received no written advice. They anticipated some media attention but were surprised not to have the CHRC take a more explicit position to explain the practice to the public at large.

There should be public audits of EE progress, comparable across departments so that departments are held accountable for progress in an explicit way. It is not easy to discern how departments are doing on EE, other than to work through reams and reams of TBS data. Total transparency requires resources – to ensure that departments and central agencies can report explicitly, rather than making it difficult to understand the data. It has been great to have access to the data, but analysis is needed so that citizens, employees, bargaining agents and others can easily track progress.

Natural Resources Canada, Written Submission to the EEART

It is also clear that employers that adopt special measures under the *Employment Equity Act* to achieve greater representation within their workplace, or special programs to improve representation of other equity groups under the *Canadian Human Rights Act* need to be prepared to defend their programs. For example, we heard from a major Crown corporation that explained their decision to adopt a closed pool for a strategic hire and their resolve to do so transparently and to face public opinion on the matter.

Employers implementing special programs should be able to count on clear, written guidance from the Equity Commissioner.

Recommendation 6.1: An Employment Equity Commissioner should be established.

A model for guidance – the Pay Equity Commissioner:

The model of the Pay Equity Commissioner offers some important insights for a revised *Employment Equity Act* framework. The Pay Equity Commissioner is a full-time member of the CHRC, established under the CHRA. The Commissioner's mandate as set out in Section 104(1) of the *Pay Equity Act*, is to

- ensure the administration and enforcement of the *Pay Equity Act*
- assist persons in understanding their rights and obligations under the *Pay Equity Act*, and
- facilitate the resolution of disputes relating to pay equity

The Pay Equity Commissioner's list of duties to carry out the mandate is significant, and includes monitoring implementation of the *Pay Equity Act* and offering assistance to employers, employees and bargaining agents, notably in relation to complaints, objections and disputes. The Commissioner decides whether a matter falls within their jurisdiction. The education and information dimension of the duties figures prominently, alongside the duty to develop tools to promote compliance with the *Pay Equity Act* and publish research (Section 104(2) (c) & (e)), including an opportunity or obligation as

the case may be to provide advice to the Minister or to the House of Commons or Senate under Sections 114 & 115.

The Pay Equity Commissioner is also responsible for conducting compliance audits, with a full complement of auditing powers. The Commissioner may require an employer to conduct an internal audit and report the results. The Commissioner may also conduct investigations. On reasonable grounds to believe that there is a contravention of the *Pay Equity Act*, the Commissioner has the power to order the employer, employee or bargaining agent to terminate the contravention. Finally, the *Pay Equity Act* contemplates administrative monetary penalties in the event of a violation, with a view to promoting compliance rather than punishing (Section 126). Administrative monetary penalties (AMPs) are financial penalties or fines, which can be imposed when the regulatory scheme is violated, without having to go to court. AMPs seek to provide fair and efficient approaches to ensure compliance.⁶⁸⁷ Violations – classified as minor, serious or very serious – are subject to a range of penalties with maxima of \$30,000 for employers between 10 -99 employees and \$50,000 for over 100 employees (Section 127). While specific violations are set by regulations, the legislation is clear: due diligence or reasonable belief in the existence of facts that if true would exonerate the employer are not available defenses (Section 133). Continuing violations constitute separate violations for each day they were committed or continued (Section 134).

The Commissioner may receive complaints from employers, employees or bargaining agents for a specific but fairly comprehensive set of matters. But the emphasis remains on finding an amicable solution and there is significant legislative scope to shape the litigation. The Pay Equity Commissioner is required to try to settle the matters, first (Section 154(1)) and may dismiss them if they are trivial, frivolous, vexatious or in bad faith; if they are beyond the Pay Equity Commissioner's jurisprudence; or if the subject matter has been adequately dealt with another procedure.

The Pay Equity Commissioner has the power to review the notice of violation (Section 139), and the notice of decision contemplated in Section 161(1). The message is clear: the *Pay Equity Act* is meant to be complied with, and enforced. The process remains firmly within the hands of one office for a considerable time, although the Pay Equity Commissioner retains at any stage after a notice of dispute has been received, the right to refer the matter to the chairperson of the Tribunal. The Tribunal may also conduct a review. This is all in the shadow of the privative clause in Section 171 – “Every decision made under Section 170 is final and is not to be questioned or reviewed in any court.”

The *Pay Equity Act* already anticipates in Section 104(2)(f) that the Commissioner will “maintain close liaison with similar bodies or authorities in the provinces in order to coordinate efforts when appropriate”. With a new Employment Equity Commissioner, both jurisdictions should be encouraged to coordinate efforts as appropriate. This might be implicit if the Employment Equity Commissioner, like the Accessibility Commissioner, is also housed within the CHRC. However, as discussed below, it might well be time to offer a different institutional vision for the enforcement of workplace equity.

The list of recommendations below draws in part on the Pay Equity Commissioner model. The recommendations are not meant to offer a comprehensive list of the Employment Equity Commissioner's powers or responsibilities.

A Transformative Framework to Achieve and Sustain Employment Equity

A catalyst for change: Learning from the federal research funding agencies:

We heard repeatedly that an agency able to catalyze change is crucial. We learned from the model of implementation provided through the Canada Research Chairs program. While employers (the universities) might have initially acted because they faced requirements that were imposed by a funding agency due to a court settlement, many have now integrated proactive policies and approaches into their regular practices and explain their broader actions, beyond the Canada Research Chairs program, more generally as part of their adherence to EDI principles.⁶⁸⁸ There was a fruitful balance struck: the funding agencies could at once offer incentive in the form of prestigious, well-funded research chairs, while requiring responsiveness to equity to meet established goals, and offering hands-on accompaniment to build employment systems review processes. The consequences of not making reasonable progress were clear: loss of future funding. Not only have goals increasingly been met. The effective, hands on, proactive regulatory oversight through the federal tri-agency funding councils and led by the Social Sciences and Humanities Research Council, has made a significant difference.

We urge that the reasons for this progress not be overlooked in any proposed redesign of the federal research funding landscape.

We can learn from this process to support employment equity regulatory oversight. Compliance under the *Employment Equity Act* seeks to be reflexive and responsive. It needs regulatory oversight to be independent, supportive and strong.

Recommendation 6.2: The Employment Equity Commissioner should be independent and should report directly to Parliament.

Recommendation 6.3: The Employment Equity Commissioner should have legislative responsibility and powers that include the powers in Section 42 of the *Employment Equity Act*.

Recommendation 6.4: The Employment Equity Commissioner should have the legislative authority to collect information on the employment practices and policies of all covered employers in the federal public service and private sector, as well as under the Federal Contractors Program, for the purpose of ensuring that employment equity is implemented in their workplaces.

Recommendation 6.5: The Employment Equity Commissioner, like other federal commissioners including the Privacy Commissioner of Canada, the Commissioner of Official Languages, the Information Commissioner of Canada, the Public Sector Integrity Commissioner of Canada and the Commissioner of Lobbying, should be considered a contracting authority exempted from Section 4 of the *Government Contracts Regulations*.

Recommendation 6.6: The Employment Equity Commissioner should be responsible for regulatory oversight including workplace auditing.

Cultivating independent review – Advisory and review panel

It is only by regularly reviewing the [Employment Equity] Act that we can better identify and evaluate areas where accountability, compliance and enforcement improvements are needed. The current twenty-year gap in reviewing the Act is unacceptable, and has only deepened and exacerbated labour market inequities faced by marginalized workers. The government must regularly review the Act every five years as is currently prescribed.

Unifor, Strengthening the Federal Employment Equity Act: Unifor's Submission to the Federal Employment Equity Task Force, April 2022 at 12

It is well known that the 5-year review cycle Parliament foresaw in the *Employment Equity Act* has not been a reality. We recommend that an independent advisory panel be created, and that it hold responsibility for undertaking reviews no less frequently than once every 10 years.

We recommend that a 10-person advisory and review panel be established to inform the work of the Employment Equity Commissioner. The panel should comprise experts in employment equity and related human rights and labour and employment relations issues. Members should broadly reflect a composite of Canadian society as a whole, and ensure intersectional representation of each of the employment equity groups. It should be convened at least twice per year. It should have the responsibility to conduct the reviews that are to be submitted to Parliament by the Employment Equity Commissioner and rendered public. The advisory and review panel's budget should include the resources to undertake the reviews no less than once every 10 years.

Recommendation 6.7: An Employment Equity Advisory and Review Panel should be established under the *Employment Equity Act* to inform the work of the Employment Equity Commissioner.

Recommendation 6.8: The Employment Equity Advisory and Review Panel should have the responsibility to conduct reviews no less frequently than once every 10 years, to be submitted to Parliament by the Employment Equity Commissioner and rendered public.

Ensuring institutional autonomy

Employment equity can readily be sidelined, not only through ideological attacks, but institutionally through severe funding challenges.⁶⁸⁹ Human rights commissions across Canada have not been immune to significant budget cuts. Our task force has expressed our significant concern about the small staff size of those responsible for auditing compliance with the *Employment Equity Act* in both the public service and the private sector.

Employment equity programs are constitutionally protected under Sections 15(1) and 15(2) of the *Charter*, understood together. Attention must be paid to institutional autonomy and the ability to meet the magnitude of the task available.

Law does indeed convey commitment. And a lack of funding undermines law's commitments.

Funding levels ultimately tell us what commitments we mean to keep. Our task force unfortunately heard a fair bit of cynicism on this point.

More troubling still is the deep-set presumption that equity work will be close to voluntary work, done out of duty and love by the very people who have faced structural inequity throughout their working lives. That assumption is replete with stereotypes on the basis of the very grounds that employment equity seeks to redress. Those stereotypes fuel employment barriers and pay inequities. The assumption perpetuates the undervaluing of the work to be done and can lead to stress and burnout for the people doing the equity work. Government should be setting a better example.

It is time to break out of the idea that equity work should be done on a nickel and a dime. If we are committed to championing employment equity in this global moment of rising intolerance, if we understand how critical substantive equality is to our workplaces, our economy as a whole, and our identity as Canadians, we must show it.

Employment equity requires real change; real support to implementation in workplaces; real auditing and oversight. If any one of the pillars is weak, it will remain highly unstable, and fail to achieve its results. If fortified, it can support societal inclusion and growth.

Recommendation 6.9: The staffing and funding envelope for the Employment Equity Commissioner should be commensurate with the magnitude of the responsibility, including the auditing responsibilities, and reviewed periodically to provide the regulatory oversight necessary to achieve and sustain employment equity across federally regulated employers.

Recommendation 6.10: The Employment Equity Commissioner should be legislatively guaranteed a separate budgetary envelope sufficient to ensure that the purposes of the *Employment Equity Act* can be fulfilled through appropriate staffing and mobility, and guided by the funding available to other independent commissioners that report directly to Parliament, including the Auditor-General of Canada. In particular,

- the auditing responsibility of the Employment Equity Commissioner should be funded at a level commensurate with the volume of covered employers in the federally regulated sector for which it assumes responsibility, and
- the responsibility for statistical analysis should be increased to meet the needs of an expanded Employment Equity Act and to ensure that the Office of the Employment Equity Commissioner can participate meaningfully in the Employment Equity Data Steering Committee.

Recommendation 6.11: The *Employment Equity Act* should provide that the Employment Equity Commissioner enjoys sufficient remedial and enforcement powers to ensure that the purposes of the legislation can be fulfilled.

Recommendation 6.12: The *Public Service Employment Act* and the *Canada Labour Code* should be amended to require them to notify the Employment Equity Commissioner when a matter relates to the *Employment Equity Act* and provide the power to refer a matter to the Employment Equity Commissioner.

Recommendation 6.13: Notice should be given to the Employment Equity Commissioner when a policy grievance has been referred to adjudication and a party to the grievance raises an issue involving the interpretation or application of the *Employment Equity Act*, in accordance with the regulations. The Employment Equity Commissioner should have standing in order to make submissions on the issues in the policy grievance.

Recommendation 6.14: The Employment Equity Commissioner should enjoy immunity and be precluded from giving evidence in civil suits in a manner analogous with Sections 178 & 179 of the *Pay Equity Act*.

Institutional architecture

Establishing supportive and sustainable regulatory oversight

The Committee emphasizes the importance of ensuring coordination and complementarity between the interlocking measures and strategies adopted, and between the various competent bodies with a view to ensuring coherence and enhancing impact, while avoiding duplication of efforts and promoting the optimal use of resources.

ILO Committee of Experts on the Application of Conventions and Recommendations, General Observation on Discrimination based on Race, Colour and National Extraction, 2019

We want to ensure that the Employment Equity Commissioner is able to assure the level of regulatory oversight necessary to meet the purpose of the *Employment Equity Act*. There are three options:

- Option 1. House an Employment Equity Commissioner within the CHRC, through a buttressed proactive compliance branch
- Option 2. Create a stand-alone Office of the Employment Equity Commissioner
- Option 3. Build an Office of Equity Commissioners

Option 1: House an Employment Equity Commissioner within the CHRC, through a buttressed proactive compliance branch

Currently the Canadian Human Rights Commission houses the Employment Equity Division, the Accessibility Commissioner's Unit and the Pay Equity Commissioner's Unit within the Proactive Compliance Branch. The total staff of that branch is 65 persons, including the director general's office. The Pay Equity Commissioner and the Accessibility Commissioner have a staff comprising primarily full time but also a few part time workers totalling 25 and 28 persons respectively. The Employment Equity Division has a staff of 11 persons.

Our task force heard concerns in particular about the capacity given to the CHRC to assume the responsibility for yet another commissioner. Some stakeholders categorically requested that the oversight bodies be separate from the CHRC and Tribunal systems, and representative of equity groups. Some cited a lack of resources to address the magnitude of the challenge. Others pointed to a lengthy history of inaction or inadequate action on systemic barriers, particularly as they relate to systemic racism.

The conclusions of the 2020 Hart Report are clear: while the CHRC has made a “laudable commitment” to strengthen how it handles race-based complaints, and taken “significant preliminary steps”, the path ahead of it is long and challenging.

In the thorough review of practices and procedures, former Ontario Human Rights Tribunal Vice-Chair Mark Hart identified a range of challenges. One was the discretion provided under Section 41(1)(a) or (b) of the *Canadian Human Rights Act* to dismiss a complaint where it appears that the alleged victim ought to exhaust grievances or another procedure under another Act of Parliament may be more appropriate. He called for these provisions not to be used automatically or perfunctorily and to be alive to the prospect that racialized complainants may face barriers to having their grievances processed appropriately.⁶⁹⁰ Another centred on reducing the risk of anti-claimant bias, which he characterized in light of the #MeToo movement to affirm that “there is a difference between moving from a place of ‘I don’t believe you until you can prove it’, to starting from a place of hearing and accepting the claimant’s stated experience with an approach of openness and curiosity, without abdicating the need to ultimately assess the evidentiary support for the allegation required by the legal process”.⁶⁹¹ Yet another was the absence of support to most racialized claimants to properly prepare their complaints. He cited promising practices to support complainants in place in other Canadian jurisdictions, such as the Nova Scotia Human Rights Commission, but that require resources.⁶⁹² The extent to which the CHRC, for limited resource reasons, may elect only to represent a complainant in a race-based complaint through “partial participation” was also a source of concern given the negative impact on cases that are already “notoriously difficult to prove at a hearing”.⁶⁹³ And he was consistently mindful of the limited resources available to the CHRC and quite explicitly sought to tailor his recommendations in light of the limits.

The overall thrust of the Hart Report is that for the CHRC to be successful, it requires not only sustained commitment, but significant resources.⁶⁹⁴

The CHRC has embarked upon a modernization process, which it describes as a work-in-progress.⁶⁹⁵

On 6 March 2023, the Public Service Staff Relations Board found that the CHRC had breached the “no discrimination” clause of its collective agreement. This has prompted inquiries into the CHRC and to state the least, has not helped instill confidence in the CHRC.

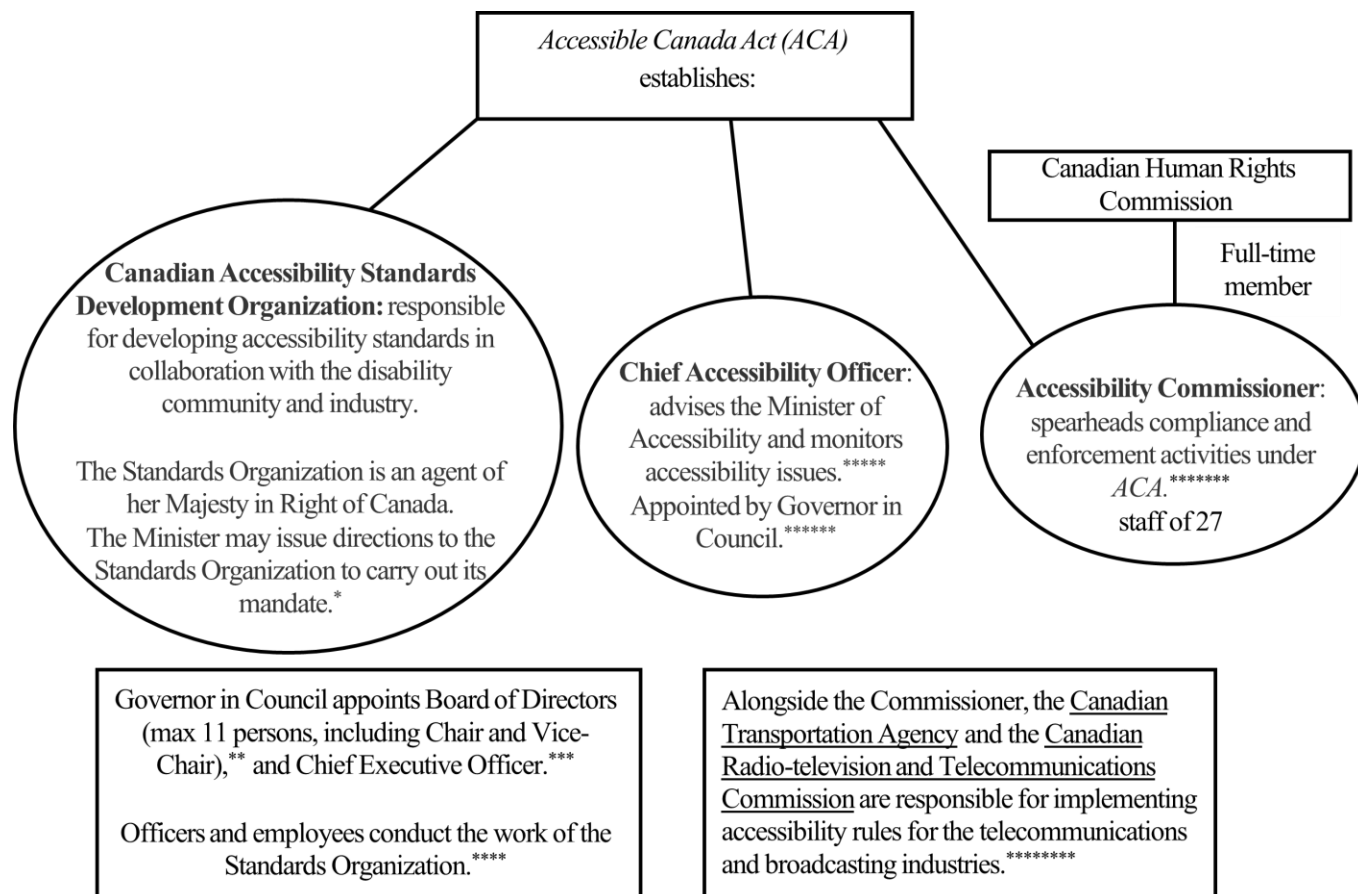
The widely acknowledged limited resources of the CHRC are a source of considerable concern. Does it make sense to continue to add critical equity responsibilities to the CHRC’s mandate without a clear commitment to securing for it a budgetary envelope that would enable these mandates to be conducted in the fulsome, comprehensive manner that a federal all-of-government commitment to employment equity would require?

There are structural integration questions that also need to be thought out. Consider, for example, that while the Pay Equity Commissioner is established under the Canadian Human Rights Commission and reports to the Minister (of Labour), the Pay Equity Commissioner’s staff reports ultimately to the Chief Commissioner. The integration of thematic commissioners within the Canadian Human Rights Commission requires great care from a structural perspective, and significant resources.

The *Accessible Canada Act* and the Accessibility Commissioner

The model below offers a map of the Accessibility Commissioner’s partial integration into the Canadian Human Rights Commission structure:

Figure 6.1: The Accessible Canada Act and the Accessibility Commissioner⁶⁹⁶



The integration of thematic commissioners within the Canadian Human Rights Commission may respect the preference for broad human rights mandates to remain within national human rights institutions within the *Principles Relating to the Status of National Human Rights Institutions* known as the Paris Principles. However, the remarkable and chronic underfunding, the serious concerns raised by some of the equity groups and the lack of sustained attention to functional fit call for a response of a different magnitude.

During its 2019 visit to Canada, the Special Rapporteur on the Rights of Persons with Disabilities commended developments under the *Accessible Canada Act* ensuring independent monitoring through the Canadian Human Rights Commission, while underlining the importance of ensuring that the Commission receive “an unequivocal national monitoring mandate and appropriate financial and human resources to implement this function”.⁶⁹⁷

If this option is adopted, the funding envelope and the institutional configuration will need to be significantly rethought.

This is our second-best option of the three.

Option 2: Create a stand-alone Office of the Employment Equity Commissioner

The 2004 Bilson report recommended the creation of an entire, stand-alone Pay Equity Commission, with a specific tribunal structure devoted to pay equity appeals. Our task force has received similar appeals, for an independent enforcement body mandated to audit, to investigate and to ensure the removal of barriers, with the power to hear, address and adjudicate complaints. They have tended to be responses to the concerns about the Canadian Human Rights Commission identified above. They reflect the thrust of this report: ensuring that employment equity constitutes a one-stop-shop for employers to obtain the insight and guidance they need to ensure that employment equity is effectively implemented.

In considering this option, we drew inspiration from the many independent offices that currently exist. Below we map several of them, with a view to providing insight into staffing, budgeting, and structural reporting. There is much to learn from them.

Each represents responsibilities understood as central to our self-understanding in Canada. From the Office of the Attorney General to the Office of Official Languages and the Office of the Privacy Commissioner, the significance of the role is reflected in the significance of the autonomy provided. Employment equity warrants comparable treatment.

There are challenges, however. Primary among them is that rather than harmonizing employment equity with other existing legislative frameworks on equity, a separate office *runs the risk of building yet another silo*. It may also leave employment equity on its own and too vulnerable in the future.

For these reasons and as explained below, we support this option but would prefer option 3.

Option 3: Establish an Office of Equity Commissioners

It is because of the importance of harmonization that this report introduces the prospect of building an Office of Equity Commissioners. The Office would include the Pay Equity Commissioner and the Accessibility Commissioner, both currently housed in the Canadian Human Rights Commission and part of the Proactive Compliance Branch.

There are important examples of institutional experimentation with the appropriate mix of human rights and labour rights bodies across Canada.⁶⁹⁸ Experimentation with human rights enforcement structures continues across Canada. Both the work to integrate equity tribunals in Ontario and the integration in Québec of the pay equity commission with the labour standards and occupational safety and health tribunal suggest the kind of creativity that seems important federally to achieve employment equity and support harmonization of responsibilities on Canadian workplaces.

Our consultations point toward the value in establishing an Office of Equity Commissioners, through which the Employment Equity Commissioner, the Pay Equity Commissioner and the Accessibility Commissioner could be jointly housed.

It would be our expectation that like the Office of the Official Languages Commissioner and the Office of the Privacy Commissioner, a recommended Office of Equity Commissioners should report directly to Parliament.

Chapter 6: Fundamentally rethinking the regulatory oversight pillar

The Office of the Equity Commissioner's relationship to the Canadian Human Rights Commission should be a horizontal dotted line, with initiatives to ensure that there is collaboration with the Chief Human Rights Commissioner including in its role as Canada's National Human Rights Institution.

The Office of Equity Commissioners should receive a staffing and budgetary envelope that is on par with the seriousness of the responsibility that they face. A separate budgetary envelope for the Office of Equity Commissioners is key; the task force has understood the challenge of holding resources constant for employment equity when there are competing demands and employment equity is not clearly prioritized.

The Office of Equity Commissioners should have a dedicated team of auditors, and significantly increased in number, on par with the extensive responsibility, who are conversant with all three covered mandates, representative of employment equity groups and highly qualified in understanding and addressing substantive equality.

It is clear that the Accessibility Commissioner's mandate exceeds the workplace although the workplace is a critical dimension that invariably intersects with other areas. We consider this to be a positive feature of the proposed Office of Equity Commissioners, as it avoids further silos when barrier removal serves multiple accessibility purposes in society.

The relationship of the Office of Equity Commissioners to the Canadian Human Rights Tribunal, through which the Employment Equity Review Tribunal is linked, should be similar to the relationship between the Canadian Human Rights Commission and the Canadian Human Rights Tribunal.

The establishment of an Office of Equity Commissioners will not be a panacea.

The Office of Equity Commissioners must be fully supported, and there must be support around the Commissioners to ensure sustainability.

Models to guide the choice of options

There are other Commissioner models available within the federal government and beyond. The task force canvassed a number of Commissioners' offices within the federal system, to gain a closer understanding of the different structures within and beyond the Canadian Human Rights Commission that might inform the decision about the appropriate options for an Employment Equity Commissioner. The Office of the Auditor General of Canada, the Official Languages Commissioner and the Privacy Commissioner offer particular insights, including on funding levels.

Office of the Auditor General of Canada

The Office of the Auditor General of Canada (OAG) is independent of government, although it is subject to the *Employment Equity Act* and acknowledges the cross-cutting, underlying value to its work and for its own workplace. The Office of the Auditor General also understands its vision to be a transformative one – “to bring together people, expertise and technology to transform Canada's future, one audit at a time.”⁶⁹⁹ It is noteworthy that the OAG's publicly available, online employment equity report was one of the rare public reports to include the employment equity plan with each commitment, measure, targets and results.

The OAG differs from most other government departments and agencies because of its independence from the government of the day and its reporting relationship to Parliament. Controls are in place to ensure the OAG's independence, including exemptions from certain Treasury Board policy requirements, its status as a separate employer, and a 10-year non-renewable term for the Auditor General.

Office of the Auditor General of Canada, 2020-21 Employment Equity Report

In the 2018 report, the Auditor General explained why the report into inappropriate sexual behaviour in the Canadian Armed Forces was conducted in the following terms:

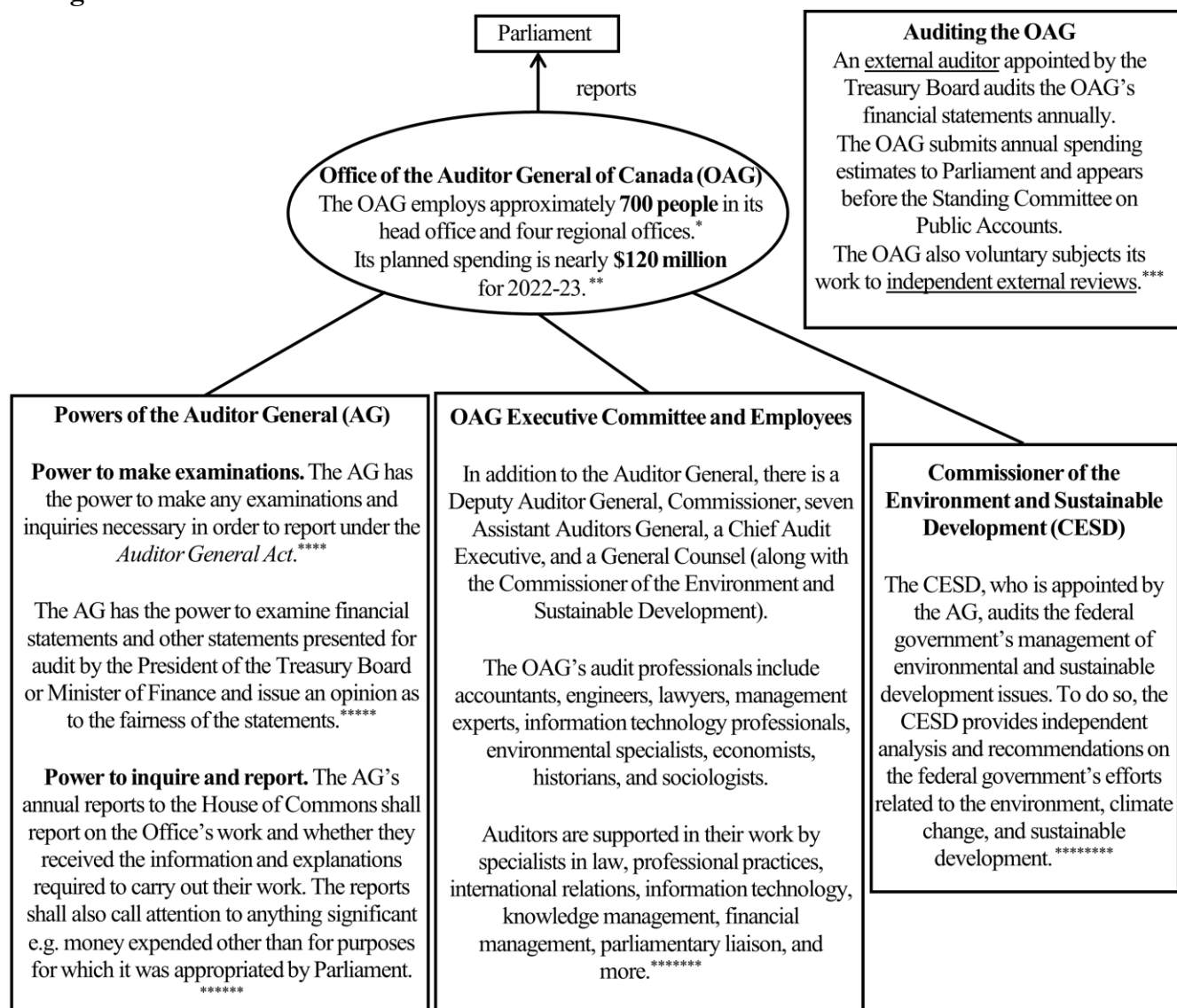
This audit is important because inappropriate sexual behaviour is wrong. It undermines good order and discipline, goes against the professional values and ethical principles of the Department of National Defence and the Forces, and weakens cohesion within the Forces... Moreover, if inappropriate sexual behaviour persists, it could negatively affect the Forces' recruitment and retention efforts.⁷⁰⁰

It conducted the review following the External Review of Sexual Harassment in the Canadian Armed Forces and referenced it. The 2000 Task Force also recommended that external advice and independent review should be enabled. They recommended that a three-member external advisory group, including one member from the private sector in the position of management, be appointed for 5-year mandates to advise on implementation in the public service.

During the deliberations, we considered whether the Auditor-General might be an appropriate institution to assume responsibility for the all-of-government approach to achieving employment equity. This was an imperfect fit, not least because the *Employment Equity Act* requires private sector reporting beyond Crown corporations. *Employment Equity Act* implementation requires auditing, certainly, and it requires so much more to foster ongoing implementation. We want the dynamic regulatory oversight and engagement of the Commissioner model foregrounded through the Pay Equity Commissioner.

However, the Auditor General's model is important for another reason: it gives a really clear example of the independence, the people power and the resources necessary to do auditing work well. Serious auditing requires serious resource allocation.

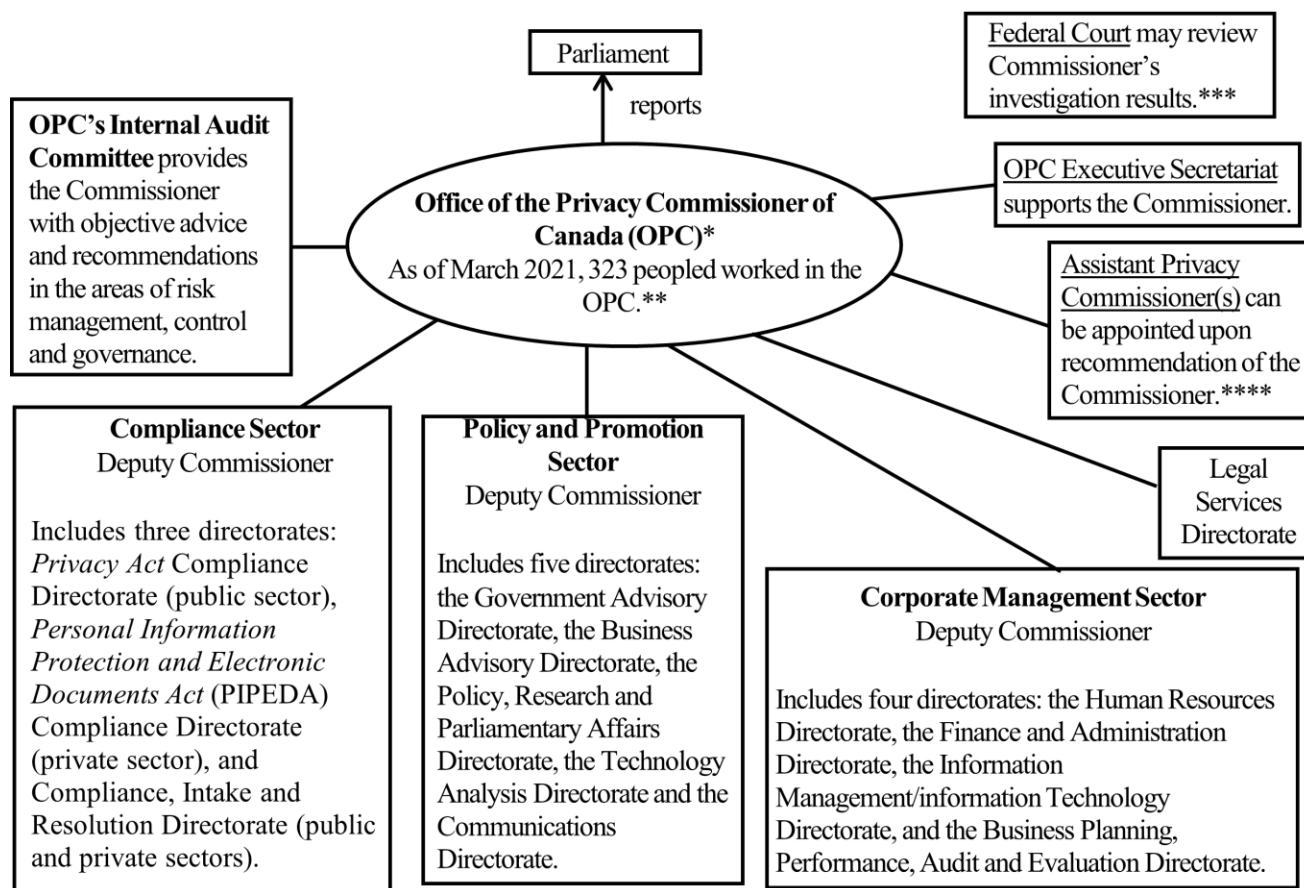
Figure 6.2: Office of the Auditor General of Canada⁷⁰¹



Office of the Privacy Commissioner of Canada (OPC)

Privacy rights are also fundamental rights protected by the *Charter*. The institutional structure is distinct from that of the commissioners housed within the Canadian Human Rights Commission. The resource envelope is significantly larger than that available to Accessibility Commissioner or the Pay Equity Commissioner:

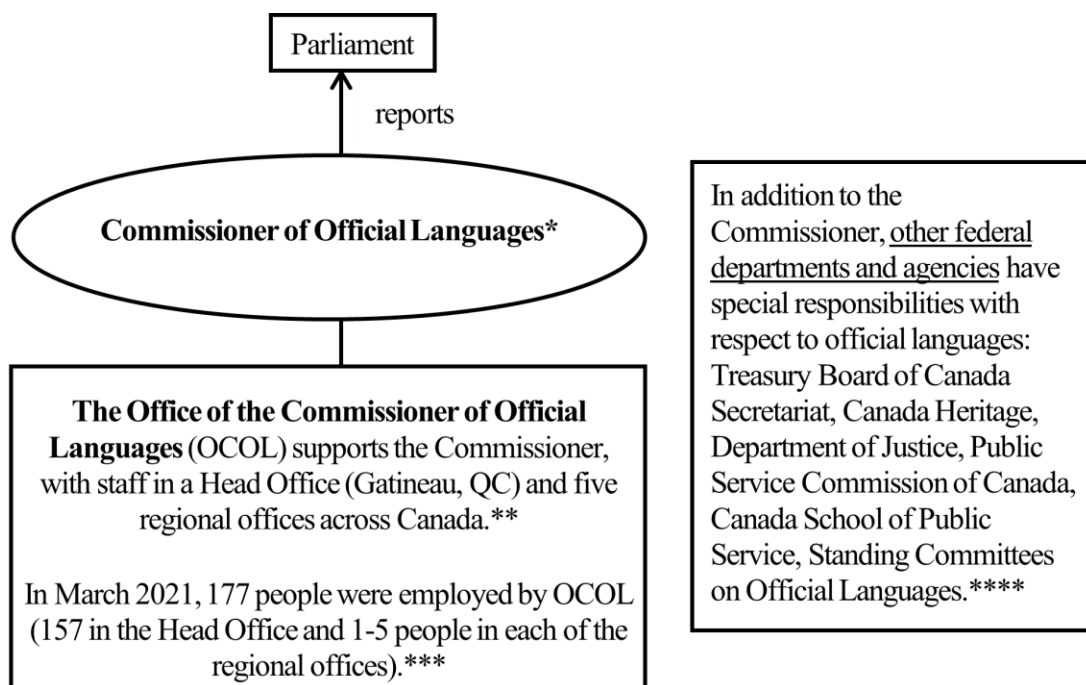
Figure 6.3: Office of the Privacy Commissioner of Canada⁷⁰²



Office of the Commissioner of Official Languages

Finally, the Office of the Commissioner of Official Languages is an example of a significant governmental priority – whose emergence was discussed in the introduction to this report and parallels that of employment equity. There is much to be learned from this model and it should be looked at as a close comparator. We heard that it reaches out directly and works with the Public Service Commission and TBS-OCHRO on official language representation and measures. Its regional office-structure is informative for the effective institutionalization of employment equity and other equity mandates.

Figure 6.4: Commissioner of Official Languages⁷⁰³



Recommendation 6.15: Establishing an Office of Equity Commissioners should be closely considered with a view to harmonizing and appropriately funding and ensuring effective equity oversight and parliamentary reporting in the federal jurisdiction with consideration given to the structures and funding of the Office of Auditor-General of Canada, the Office of the Privacy Commissioner of Canada, and the Office of Official Languages.

Special programs: A role for the Employment Equity Commissioner

Introduction

There is latitude for employers to adopt voluntary employment equity programs linked to prohibited grounds of discrimination under the *Canadian Human Rights Act*. To recall, the grounds are:

- race
- national or ethnic origin
- colour
- religion
- age
- sex (including pregnancy)
- sexual orientation
- marital status
- genetic characteristics
- gender identity or expression
- family status
- disability, and

- conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered

For example, and as mentioned earlier, the task force heard from employers who have already included 2SLGBTQI+ workers in employment equity programs. Section 16(1) of the *Canadian Human Rights Act* allows federally regulated employers and service providers to develop and implement voluntary “special programs”. It clarifies that:

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 based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

Section 16(3) similarly enables information to be collected on prohibited grounds of discrimination to adopt and carry out the special program, plan or arrangement. The Canadian Human Rights Commission may provide advice and assistance to the employer.

This task force has witnessed few signs that voluntary approaches can be counted on to achieve employment equity, although they can become the basis for claims for more sustained, formal programs as we have already observed for 2SLGBTQI+ and Black workers. Yet Section 54.1(2) of the *Canadian Human Rights Act* prevents the Canadian Human Rights Tribunal from requiring an employer to adopt a special program, plan or arrangement even when a discrimination complaint is substantiated.

In contrast, in Québec, there are strong measures to allow public institutions to require employment equity programs to be put in place.

Mandated employment equity on the basis of an inquiry by the Commission des droits de la personne et des droits de la jeunesse

The Québec *Charter of Human Rights and Freedoms* anticipates that public and some private enterprises can have an employment equity program imposed on them. Not only is the Commission des droits de la personne et des droits de la jeunesse (Cdpdj) required, when requested, to provide assistance to devise an employment equity program, to supervise their administration, to investigate and to require reports.⁷⁰⁴ Section 88 allows that if the Cdpdj, after investigation, confirms that discrimination in employment⁷⁰⁵ exists, it may propose the implementation of an equal access employment program. If its proposal is not followed, it may take the matter to a tribunal, usually but not necessarily the Québec Human Rights Tribunal, to obtain an order for the program to be devised and implemented. This process was followed in the landmark decision, *Commission des droits de la personne et des droits de la jeunesse v. Gaz métropolitain*.⁷⁰⁶

Researchers have expressed concern that the Cdpdj has not used this and other powers provided to it to redress discrimination more frequently,⁷⁰⁷ although the Cdpdj indicated to our task force that it has launched a process of judicializing files that are ready to go before the human rights tribunal to seek compliance; in other words, it is ready to use its legislated powers proactively.⁷⁰⁸ The key takeaway for the federal reform is that the power must be accompanied by a strong and efficient process for

implementation. The distinct role of the Employment Equity Commissioner will be essential to the success of any proactive approach to diagnosing and implementing employment equity.

An Employment Equity Commissioner should play an important role in supporting employers, including providing brief written advice on the special programs that the employers seek to adopt.

It should also be in a position to recommend and monitor special programs.

Recommendation 6.16: The Employment Equity Commissioner should be able to recommend special programs if an investigation establishes underrepresentation of an equity group represented by a ground of discrimination in the *Canadian Human Rights Act* that warrants a special program to remedy it.

Investigatory powers are addressed in greater detail below, under initiatives to harmonize equity frameworks.

Harmonizing equity frameworks

Introduction

Bargaining agents must be able to bring forward employment equity complaints under the *Employment Equity Act* and trigger an audit, including when they have not been properly consulted.

Canadian Association of Public Employees, Submission to the EEART, 28 April 2022

If the laws on equity are not harmonized, the complexity will undermine their transformative potential. This would be tragic because we have rarely had greater consensus on the part of employers, workers and society at large on one basic truth: Canada needs all of us, all of our talents, all of our contributions, all of our know how and ways of thinking and doing and being in the world.

Employers did not come before the task force to complain about employment equity. They told us that they want to foster workplace equity but they want to do it in a coherent, comprehensive manner. FETCO for example wanted to know that new obligations would be “practicable” in the organizations, and that the burden on organizations would be “reasonable and realistic”.⁷⁰⁹ The Conseil du Patronat du Québec asked us to harmonize the timelines during which reports would need to be submitted.⁷¹⁰ The task force took these considerations to heart.

Unions similarly told us that it was important to harmonize frameworks for equity.⁷¹¹ Workers may feel discouraged by how hard it is to figure out their rights and to see what is actually being done to achieve and sustain substantive equality.

Harmonization must include the *Employment Equity Act* framework’s approach to accountability and penalties for non-compliance. If employment equity is truly an all of society matter, it must help to lead rather than lag behind the newer equity schemes for pay equity and accessibility.

The imperative of harmonization

It is the right moment to get the harmonization piece around federal equity legislation right. The *Accessible Canada Act* has come into force since 2019, with regulations in force since December 2021. Initial accessibility plans were required on 31 December 2022 for the federal public service and Crown corporations; they are required on 1 June 2023 for federal private sector organizations with over 100 workers, and on 1 June 2024 for federal private sector organizations with between 10 – 99 workers.⁷¹²

It is expected the *Accessible Canada Act* of 2019, will identify, remove and prevent employment barriers (including ones created by policies) for people with disabilities. Identifying barriers through employment systems reviews is also contained within the *Employment Equity Act*. We see an overlap in the two pieces of legislation with respect to employment systems reviews and the requirement to develop accessibility plans. There is nothing in the *Accessible Canada Act* to reconcile the overlap. We ask the taskforce to examine how the *Employment Equity Act* can support the requirements under the *Accessible Canada Act*.

Canadian Association of Professional Employees, Submission to the EEART, 28 April 2022

Accessibility is cross-cutting. The *Accessible Canada Act* necessarily extends beyond employment, to encompass the built environment, information and communication technologies, communication, procurement of goods, services and facilities, design and delivery of programs and services, transportation, and other areas designated under regulations.⁷¹³ To remove employment barriers, workplaces themselves need to consider many of these aspects, including the built environment, communications and workers' access to adaptive technologies.

Harmonization between statutory frameworks would not necessarily be unidirectional and is likely to focus on the functional and operational integration to ensure that equity objectives are met.

Five areas would make a big difference to the effectiveness of regulatory oversight under the *Employment Equity Act* framework and across proactive equity mandates.

- harmonize timelines for implementation
- harmonize reporting
- harmonize and update complaints procedures
- harmonize and repurpose penalties, and
- harmonize sustainable support for employment equity groups

Harmonize timelines: Achieving employment equity alongside barrier-free workplaces by 2040

I now believe quite firmly that the only way we're going to achieve true and full accessibility is for the various standards and objectives to have a definable date in place and a government that is willing to enforce the implementation of these measures. ... I looked at the previous reviews and listened to people's real-life stories of the barriers they were facing and the dispiriting situations that they found themselves in.... I know there is a strong difference of opinion on this, but I would simply put it to you that as you look at other endeavours by government, whether they are matters related to climate change or the environment, or whether you're dealing with students as I do at the University of Toronto in political science, you have to have a date, a deadline and a clear objective in mind. If you don't, it just becomes an endless process.

The late Hon. David Onley, former Lieutenant Governor of Ontario, Presentation to the Standing Senate Committee on Social Affairs, Science and Technology, on Bill C-81, the Accessible Canada Act, 1 May 2019

First, harmonize timelines. The principle is simple: when commitments are made, they should be respected.

Goals are short term or long term under the *Employment Equity Act*. Implicitly then, they are meant to be achieved.

The *Accessible Canada Act* has a clear timeline. The Minister is responsible for realizing a Canada without barriers on or before 1 January 2040.

Implementing pay equity is a short-term, 3-5-year process. Most of the work subsequently is on maintaining pay equity.

Canada has committed to achieving the UN Sustainable Development Goals by 2030.

Achieving equality in the workplace should also come to be understood as something that must be achieved. That would mean that today's children could count on employment equity – and enter workplaces who can welcome them and are simply working to sustain equity. It is of course a significant commitment, but we need to be able to achieve and sustain employment equity.

Achieving employment equity is complex, but attainable, like the barrier removal that must be achieved under the *Accessible Canada Act* by 2040.

A legislated governmental goal for achieving employment equity would give greater meaning to the establishment of short-term goals in the *Employment Equity Act*.

The *Employment Equity Act* should be revised to ensure that the long-term goals are understood to entail sustaining employment equity and a commitment to a broader societal striving for representation that reflects the Canadian population.

Recommendation 6.17: The *Employment Equity Act* should be revised to clarify that the Minister is responsible for achieving employment equity by 1 January 2040, and sustaining it.

Harmonize reporting:

The current public reporting structure requires analysts to perform significant effort in order to understand the current state of employment equity in an organization, how the employment equity numbers compare to the broader community and what progress has been made toward achieving an employer's employment equity plan.

Unifor, Strengthening the Federal Employment Equity Act: Unifor's Submission to the Federal Employment Equity Task Force, April 2022 at 14

Second, harmonize reporting. At one level, the *Accessible Canada Act's* plans and the *Employment Equity Act's* employment equity plans will contain overlapping features, and as mentioned above, there might be mutual learning. Our task force heard that in some cases, the precise character of the requirements under the *Employment Equity Act* are preferable to the approach currently adopted to accessibility plans.⁷¹⁴

The Accessibility Commissioner and the Employment Equity Commissioner should be able to streamline the reporting requirements and be legislatively encouraged to determine – through regulations or guidelines – who will assume responsibility for the employment-related dimensions. This means paying attention to the dates set, and the periodicity.

Table 6.1: Reporting requirements between the Employment Equity Act, Pay Equity Act, and the Accessible Canada Act

Type of reporting requirement	Employment Equity Act	Pay Equity Act	Accessible Canada Act
Timing	Every private sector employer shall, on or before June 1 in each year, file a report with the Minister of Labour about the preceding calendar year. (s. 18 (1))	Federally regulated employers under the Legislated Employment Equity Program (LEEP) must submit annual employment equity reports by June 1.	Regulated entities must prepare and publish an initial accessibility plan by the following dates: The federal government, Crown corporations, Parliamentary entities, RCMP, and Canadian Forces - December 31, 2022 Businesses with 100 or more employees - June 1, 2023 Businesses with 10 to 99 employees - June 1, 2024. (Regs s. 4(1)) Regulated entities must notify the Accessibility Commissioner within 48 hours after they publish an accessibility plan, description of their feedback process, or progress report. (Regs ss. 7, 12, 16) Regulated entities must prepare and publish an updated version of an accessibility plan within 36 months of when the plan was last

Table 6.1: Reporting requirements between the Employment Equity Act, Pay Equity Act, and the Accessible Canada Act

Type of reporting requirement	Employment Equity Act	Pay Equity Act	Accessible Canada Act
			<p>required to be published. (Regs s. 4(4))</p> <p>Regulated entities must publish a progress report by the anniversary of the date by which the accessibility plan was last required to be published for each year in which there is no date by which a version of the accessibility plan is required to be published. (Regs s. 13)</p>
Contents	<p>Private sector employers' reports must contain prescribed information and a description of measures the employer has taken to implement employment equity, including results and consultations between the employer and employee representative. (s. 18(1), (6))</p>	<p>Regulated employers' reports must consist of prescribed statistical information, a narrative of employment equity activities, including results and consultations between the employer and employee representative.</p> <p>The Pay Equity Commissioner may order an employer to conduct an internal audit and report results. (ss. 118, 120(1)-(4))</p>	<p>Initial accessibility plans must include policies, programs, practices and services in relation to identifying and removing barriers, and preventing new barriers. (ss. 47, 51, 56, 60, 65, 69)</p> <p>Progress reports must contain information about the implementation of the regulated entity's accessibility plan, including the manner in which persons with disabilities were consulted to prepare the progress report, the feedback received and how the feedback was taken into consideration. (ss. 44(1)-(5), 49(1)-(5), 53(1)-(5), 58(1)-(5), 62(1)-(5), 67(1)-(5), 71(1)-(5))</p>
Exemptions	<p>The Minister may exempt an employer from reporting requirements, on application, for up to one year if special circumstances warrant. (s. 18(8))</p> <p>Employers may file a consolidated report if the Minister finds they have common control/direction. (s. 18(7))</p>	<p>Upon request, the Pay Equity Commissioner may authorize extensions for posting plans, revised plans, or phase-in periods (s. 112).</p> <p>The Governor in Council may make regulations exempting any employer, employee, position from the application of any provision in the Act. (s. 181(1)(a))</p> <p>There are general exemptions from application of the Act for the governments of Yukon, the Northwest Territories and Nunavut (s. 10) and for Indigenous governing bodies (s.</p>	<p>Certain regulated entities are exempt from reporting obligations if they have an average of fewer than 10 employees during particular periods of time. (Regs s. 3(1), (2), (5))</p>

Table 6.1: Reporting requirements between the Employment Equity Act, Pay Equity Act, and the Accessible Canada Act

Type of reporting requirement	Employment Equity Act	Pay Equity Act	Accessible Canada Act
		11(1), until the Governor in Council orders otherwise.	
Publication, distribution and retention	Employment equity report shall be completed using the prescribed forms and in accordance with the instructions. (Regs Part II) An employer shall provide a copy of the report to employees’ representatives and to the Commission. (s. 18(9)-(10))	LEEP employers complete and submit reports using the Workplace Equity Information Management System (WEIMS) online reporting tool. Employers must retain all records, reports, electronic data or other documents relevant to the establishment of the pay equity plan for the period of the pay equity plan as well as a copy of the final pay equity plan that it posts until the day it posts the next revised pay equity plan or a later day prescribed by regulation. (s. 90)	The Regulations prescribe language, heading, and publication requirements (Regs ss. 14-15) Alternative formats of accessibility plans, progress reports, and descriptions of feedback process must be made available. For print, large print or electronic, the federal government and large organizations of 100 or more employees have 15 days, small organizations of 99 employees or less have 20 days. For Braille and audio, all organizations have 45 days. (Regs ss. 8, 9, 17) Regulated entities must retain accessibility plans or progress reports for seven years, either on a digital platform accessible to the public, or in electronic or print copy if the entity does not have such a platform. Feedback received must be kept for seven years (Regs ss. 18(1)-(2), 19)

Recommendation 6.18: Legislative amendments should permit the Accessibility Commissioner and the Employment Equity Commissioner to streamline reporting as it relates to barrier removal related to accessibility in employment. They should have the power to specify and appropriately adapt the requirements through regulations or guidelines.

At another level, our task force was told that public reporting can be significantly supported by having oversight that offers data software to improve the sophistication of the data received while simplifying the public reporting. The goal should be that users can assess and learn from the relative progress over time. This is an important responsibility that we would encourage an employment equity commissioner to develop, with the support of the Employment Equity Data Steering Committee.

Harmonize and update complaints procedures

Enforcement has been a longstanding challenge, and notoriously weak component of accessibility-related legislation across Canada. Without visible enforcement and tangible action to incentivize compliance, legislating accessibility standards is moot. As a stakeholder in the Onley review said, enforcement of the AODA is like “telling drunk drivers about impaired driving laws and asking them to obey or trying to enforce speed limits without radar” (2019).

Canadian Centre on Rehabilitation and Work, Report: Review of accessibility-related legislation, regulations and standards on employment in Canada, July 2021, citing The Hon. David Onley, Listening to Ontarians with Disabilities: Third Review of the Accessibility for Ontarians with Disabilities Act, 2005, January 2019

Third, harmonize and update complaints procedures. When lined up with other equity frameworks, the *Employment Equity Act* stands out. The *Employment Equity Act* traded a limited systemic human rights complaint prospect available in 1986 for a broad audit process. The hope might have been that we would gain in depth of commitment – a truly more proactive approach to dealing with underrepresentation that would build on the collaborative efforts of all.

Instead, we have a somewhat opaque process channeled through a dysfunctional bifurcation between the Labour Program and the Canadian Human Rights Commission that may mask rather than remove barriers to representation. Progress right from the start has been extremely slow.⁷¹⁵

The regulatory oversight under the *Employment Equity Act* needs to be at once close to employers, not necessarily geographically but in terms of the comprehensive quality and nature of the support. And it needs to be able to respond when there is no reasonable progress.

The scope for complaint is narrow. As mentioned above, the employer or the CHRC may seize the Tribunal to review a direction following an audit. Now, 23 years later, the Tribunal has yet to render a substantive decision. The severely limited auditing, despite the best efforts of the small, dedicated and knowledgeable staff working on employment equity in the proactive compliance branch, might explain why.

We have recommended clarifying that employers are required to make reasonable progress on achieving employment equity, and a responsibility to sustain employment equity once it has been achieved. The following recommendation ensures the Employment Equity Commissioner’s oversight powers:

Recommendation 6.19: The *Employment Equity Act* should be amended to permit the Employment Equity Commissioner to

- attempt to negotiate a written undertaking from the employer to take specified measures to remedy the failure to make reasonable progress on achieving employment equity, in keeping with Section 25(1) of the *Employment Equity Act*; and if unsuccessful,
- issue directions including special measures to remedy the non-compliance

This recommendation respects the existing structure of the *Employment Equity Act*, and is sustainable.

A complaints-based process should not be allowed to take over an approach that stimulates compliance through persuasion and incentives and regulatory support and oversight.

The 1997 *National Capital Alliance on Race Relations (NCARR) v. Health and Welfare Canada* showed what was possible when the evidence was made available to be able to demonstrate the existence of systemic discrimination in the federal public service. It is an example of the useful contributions that complaints procedures can make to redressing systemic racism and systemic discrimination.⁷¹⁶ Our task force was told by senior public officials that this case made a concrete difference toward achieving equality in the workplace. This perspective was reflected in the 2000 *Canadian Human Rights Act* Review Panel.

Had the amendments been in place earlier, the decisions rendered in [Action travail des femmes and NCARR] would not be part of Canadian jurisprudence. The understanding they have given us of systemic discrimination itself ... and the rationale for an employment equity remedy, would not be there.

J. Helen Beck, Jeffrey G. Reitz and Nan Weiner, “Addressing Systemic Racial Discrimination in Employment: The Health Canada Case and Implications of Legislative Change” (2002) 28:3 Canadian Public Policy 373 at 387- 388

We did not hear during our consultations that the solution is simply to return to a complaints model and jettison auditing. On the contrary, the 1996 amendments were put in place to go beyond the limits of a complaints-based approach. Our task force agrees with the 2000 *Canadian Human Rights Act* Review Panel: we should enable the *Canadian Human Rights Act* and the *Employment Equity Act* to complement and reinforce each other, to eliminate enforcement gaps.⁷¹⁷

It is time, now, to arrive at a balance of both.

The task force listened carefully to the many representations made that the *Employment Equity Act* needs to be enforceable. We understood those concerns and we recognized that the *Employment Equity Act* is an outlier, even amongst the two other proactive equity models for pay equity and accessibility:

Table 6.2: Complaints Procedures under the Accessible Canada Act and the Pay Equity Act:

Aspect of complaint procedures	Accessible Canada Act	Pay Equity Act
Filing a complaint	A complaint may be filed with the Accessibility Commissioner by an individual who has suffered physical or psychological harm, property damage, economic loss or has been otherwise harmed by a regulated entity’s contravention of regulations made under the <i>Accessible Canada Act</i> . (s. 94(1))	A complaint may be filed with the Pay Equity Commissioner for: a violation of the <i>Pay Equity Act</i> , regulations or order; bad faith, arbitrariness, or discrimination in discharging duties under the Act; or reprisals by an employer or bargaining agent. (ss. 149-152) A notice of dispute or objection may be filed relating to a pay equity plan. (s. 147-148)

Chapter 6: Fundamentally rethinking the regulatory oversight pillar

Notice to Commissioner	The Accessibility Commissioner must cause a written notice of a complaint to be served on the regulated entity against which the complaint was made. (s. 95(5))	Certain employers must notify the Pay Equity Commissioner that it has established a pay equity committee. (ss. 16(3), 17(3), 67(3), 68(3)) An employer or pay equity committee must notify the Pay Equity Commissioner if they determine that there is at least one predominantly female job class but no predominantly male job classes, unless a regulation provides otherwise. (s. 39)
Investigation	The Accessibility Commissioner may investigate a complaint. (s. 95)	The Pay Equity Commissioner may investigate a complaint, dispute or objection. (s. 156) The Commissioner must attempt to assist the parties to settle matters appropriate for settlement. (s. 154(1))
Procedural mechanisms	The Commissioner may use dispute resolution mechanisms to attempt to resolve complaints. (s. 99) The Commissioner must deal with complaints as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit. (s. 109)	There is generally a right to present evidence and make representations to the Commissioner for the employer, bargaining agent and member that represents non-unionized employees, after filing a notice of dispute. (s. 157) The Commissioner may refer an important question of law or jurisdiction to the Chairperson of the Canadian Human Rights Tribunal. (s. 162)
Orders	After concluding an investigation, the Commissioner must dismiss an unsubstantiated complaint or, for a substantiated complaint, order a regulated entity to take corrective measures, provide a complainant with opportunities they were denied or pay compensation to the complainant. (ss. 101(1)-102(1))	After concluding an investigation, the Commissioner must dismiss an unsubstantiated complaint or objection, or, for a substantiated complaint or objection, order measures such as requiring the employer or bargaining agent to terminate certain behaviour, pay compensation to the employee, or amend the pay equity plan. (ss. 158-160)
Review, appeal and further action	The Commissioner may on application review a decision not to investigate or discontinue a complaint. After the review, the Commissioner's decision is final and not to be reviewed by a court. (s. 103) An appeal of a decision or order may be made to the Canadian Human Rights Tribunal by a complainant or regulated entity. The Tribunal's decision is final and not to be reviewed by a court. (ss. 104(1), 106(4))	A party may request that the Commissioner review a decision to dismiss or discontinue an investigation of a dispute, objection or complaint. (s. 161) An appeal may be made to the Canadian Human Rights Tribunal by an employer, bargaining agent or other person affected by a decision or order. The Tribunal's decision is final and not to be reviewed by a court. (ss. 168-171)

What we did not receive was a litany of requests for individual complaints to be brought before the Employment Equity Tribunal about individual employment equity determinations. There is a deep understanding that employment equity is systemic and proactive.

There are other reasons to be cautious about fully opening up the ability to bring complaints.

Pay equity is distributive but for workers it has been crafted so that it only ever benefits employees who are compared to each other. So, while the pay equity plan prevails to the extent of any inconsistency with existing collective agreements, pay increases are deemed to be incorporated into the collective agreement. The kind of complaints that would come before the Pay Equity Commissioner are much more contained in scope than those that could arise in the context of employment equity. Lengthy procedures on affirmative action from jurisdictions like the United States, India and South Africa reveal the real risks of judicializing and of adopting a rigid quota-based approach.

Individual complaints procedures can be more than a distraction. They can overwhelm the systemic focus of the *Employment Equity Act* if they are not carefully tailored toward achieving the systemic remedy. The employment equity framework should not devolve into an individual complaints mechanism. The focus has to remain on making the requirements of the Act enforceable.

We did not take these risks lightly.

The example in Northern Ireland shows careful attention to encouraging actively negotiating agreements while permitting legally enforceable agreements to be sought by the Commission comes close to the kind of model that we prefer. It was built upon and is not terribly far from our model, despite the very significant differences in coverage (Catholic and Protestant men and women) as discussed in Chapter 3. Regulatory oversight appears to be sufficiently strong and there are important if invariably limited indicators of success over time. The key seems to be that employment equity is actually implemented, with effective auditing and compliance measures as well as a willingness and ability on the part of the Commission to use its powers.⁷¹⁸

So, what would a complaints procedure add if there is a well-functioning Employment Equity Commissioner?

What we recommend is a dynamic process that incentivizes agreement rather than litigation.

The Canadian Labour Congress has expressed the view that bargaining agents should be able to bring complaints.⁷¹⁹ We have kept the focus on shoring up the meaningful consultation pillar.

Our task force proposes a limited complaint model, that may be brought by any worker in an employer's covered workplace, on the grounds that an employer's implementation obligations under the *Employment Equity Act* are not being respected.

The complaints are to be brought to the Employment Equity Commissioner.

There is to be a presumption that the Employment Equity Commissioner shall dismiss a complaint unless the Commissioner considers there to be sufficient evidence, brought by the complainant, to dislodge the presumption that the internal mechanisms to implement employment equity are functioning appropriately.

Should the Employment Equity Commissioner decide that there is sufficient evidence, an audit by the Employment Equity Commissioner would be the remedy.

Chapter 6: Fundamentally rethinking the regulatory oversight pillar

The proposed use of the presumption adapts a recommendation provided by the *Canadian Human Rights Act* Review Panel in 2000 to the context of the *Employment Equity Act* framework.

The entire mechanism as proposed is meant to prevent the complaints procedure from simply bypassing existing complaints or grievance procedures available to federally regulated employees.

The following recommendations support the establishment and powers of the recommended Employment Equity Commissioner:

Recommendation 6.20: Sections 40(3.1), 40.1(2) and 54.1 *Canadian Human Rights Act*, which cumulatively prevent employment equity decisions from being rendered by the Canadian Human Rights Tribunal, should be repealed.

Recommendation 6.21: The *Employment Equity Act* should be amended to permit cases arising in the circumstances currently anticipated under Sections 40(3.1), 40.1(2) and 54.1 *Canadian Human Rights Act* to be submitted in the form of a complaint to the Employment Equity Commissioner.

Recommendation 6.22: The discretion in Section 41(2) *Canadian Human Rights Act* for the Canadian Human Rights Commission should be transferred to the Employment Equity Commissioner.

Recommendation 6.23: The *Employment Equity Act* should be amended to enable a complaint to be brought by any worker in an employer's covered workplace, on the grounds that an employer's implementation obligations under the *Employment Equity Act* are not being respected.

Recommendation 6.24: The complaints should be brought to the Employment Equity Commissioner.

Recommendation 6.25: The Employment Equity Commissioner shall dismiss a complaint unless the Commissioner considers there to be sufficient evidence, brought by the complainant, to dislodge the presumption that the internal mechanisms to implement employment equity are functioning appropriately.

Recommendation 6.26: Should the Employment Equity Commissioner decide that there is sufficient evidence, an audit by the Employment Equity Commissioner would be the remedy.

Recommendation 6.27: The Employment Equity Commissioner should have the legislative authority and necessary powers to investigate the covered complaints.

Recommendation 6.28: The Employment Equity Commissioner should be legislatively encouraged to use alternative dispute resolution techniques to resolve disputes.

The following recommendations should support a strengthened role for the Employment Equity Tribunal:

Recommendation 6.29: The English-language title of the Employment Equity Review Tribunal should be renamed the Employment Equity Tribunal.

Recommendation 6.30: The Employment Equity Tribunal should have the staff and resources necessary to be able to hear and decide matters in an expeditious manner.

Care will be required to ensure that the Employment Equity Tribunal's powers align with those allotted to the Employment Equity Commissioner.

Recommendation 6.31: The Employment Equity Commissioner should be able to refer to the Employment Equity Tribunal an important question of law that the Employment Equity Commissioner might consider to be more appropriate for the Tribunal to determine.

The provisions in the *Employment Equity Act* and the *Canadian Human Rights Act* should be reviewed to ensure that the role, powers and responsibilities of the Employment Equity Tribunal are fully in keeping with the recommendation to implement an Employment Equity Commissioner. For ease of reference, the provisions might be moved from the *Canadian Human Rights Act* into the *Employment Equity Act*. The review includes the following specific recommendations:

Recommendation 6.32: The role of the Employment Equity Tribunal should be revised to:

1. Provide that it is responsible for responding to an inquiry into a question of law or jurisdiction referred to the Chairperson of the Tribunal by the Employment Equity Commissioner by rendering a determination
2. Clarify that it is responsible for rendering a decision on appeal from a decision of the Employment Equity Commissioner referred to it by an employer, bargaining agent or other member of the mandated employment equity committee, and
3. Include a strong privative clause consistent with the case law including and subsequent to *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 SCR 653; 2019 SCC 65

The issue of qualifications of members presents its own challenge and should not be left to chance.

Recommendation 6.33: Section 48.1(2) of the *Canadian Human Rights Act* should be amended to ensure that appointments of members of the Canadian Human Rights Tribunal must be made having regard to the need for adequate knowledge and experience in employment equity matters among the members of the Tribunal.

We were concerned to ensure that the tribunal would both be public and encourage alternative dispute resolution:

Recommendation 6.34: Section 29(3) *Employment Equity Act* should be replaced with the equivalent of Section 166 (1) & (2) of the *Pay Equity Act*, to clarify that a hearing must be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the hearing under the conditions provided in Section 166 (1)(a) –(d) and Section 166(2).

Recommendation 6.35: The *Employment Equity Act* should expressly enable the Employment Equity Tribunal to use methods of alternative dispute resolution, including mediation where appropriate, to conduct hearings virtually, to provide for contemporary open court principles that include posting decisions on the appropriate website(s), and to include contemporary approaches of sending a request to appear before the Employment Equity Tribunal beyond registered mail.

Finally, we wanted to ensure that orders would be enforceable and that the relationship between tribunals and their powers would be clarified:

Recommendation 6.36: Orders made under *the Employment Equity Act* by the Employment Equity Commissioner or the Employment Equity Tribunal should be made enforceable by the Court.

Recommendation 6.37: The *Employment Equity Act* should clarify the relationship between the powers of the Tribunal under the *Canadian Human Rights Act*, and the powers set out in the *Employment Equity Act*, with particular attention to the relationship between Section 29(1)(c) of the *Employment Equity Act* and the limitation in relation to privileged evidence under Section 50(1)(4) of the *Canadian Human Rights Act*.

Harmonizing and repurposing penalties

Section 36 sets out monetary penalties for violations of the *Employment Equity Act*. However, the violations under Section 35 are for failures to file the employment equity report required, and without reasonable excuse, failure to include the required information, or knowingly providing false or misleading information. The penalties are limited to \$10,000 for a single violation or \$50,000 for repeated or continued violations.

Far from new, reports on compliance have consistently challenged what is meant by the term, both under the legislation and under the Federal Contractors Program:

It appears that the very definition of "compliance" is problematic. In FCP today, "compliance" effectively is defined as not refusing to do employment equity, rather than the stated requirement in the U.S. where "good faith effort" is defined and treated as actually making progress. A related problem for compliance reviews is that there is no way to distinguish between different levels of involvement/commitment to employment equity. This suggests that a compliance "continuum" – a range of compliance tools or procedures – would help. Such a continuum could be linked to a range of penalties rather than just the ultimate penalty of disbarment.⁷²⁰

Regulatory oversight needs to be taken seriously to avoid undermining the objectives of the *Employment Equity Act* framework. That includes adapting measures to apply to the Federal Contractors Program.

In Chapter 4, we recommended that the *Employment Equity Act* be amended to ensure that reasonable progress goes beyond simply producing a plan that could yield reasonable progress if it were implemented. The plan needs to be implemented.

Stakeholders who came before our task force recognized that penalties were at best a last resort. They understood that a focus on penalties would detract from the collective work needed to build inclusive practices in the workforce.

What bothered stakeholders was the sense that the *Employment Equity Act* could essentially be ignored, and that employers could start their processes if and when they were audited by the CHRC. That seemed to challenge the good faith process that underlies the reflexive *Employment Equity Act* framework.

The Canadian Human Rights Commission in its submissions to the task force added that a full range of remedial powers should be made available. These included penalties scaled to the level of non-compliance and the size of the employer.

Ensuring that penalties are appropriate to achieve results is also part of Canada’s international obligations.⁷²¹

Our task force agreed. The main recommendations made are to **harmonize and repurpose penalties** under the *Employment Equity Act* framework, so that they reflect the more contemporary understandings in the other related equity legislation, the *Accessible Canada Act* and the *Pay Equity Act*.

Table 6.3: Penalty provisions under the Employment Equity Act, Accessible Canada Act, and Pay Equity Act

Penalty provisions	Employment Equity Act	Accessible Canada Act	Pay Equity Act
Regulations	<i>Employment Equity Regulations</i> , SOR/96-470	<i>Accessible Canada Regulations</i> , SOR/2021-241	<i>Pay Equity Regulations</i> , SOR/2021-161
Penalty provisions	Part 3 – Assessment of Monetary Penalties	Part 3 – Administrative Monetary Provisions, Sections 25(1)-27(2) AND Regulations, SCHEDULE 2 (Section 23 and subsections 25(1) and 26(1)) Penalties	Part 7 – Administrative Monetary Penalties, ss. 125- AND CHAPTER 8 – PENAL PROVISIONS
Range of penalties	Violations (not offences) Per s. 35(1), every private sector employer commits a violation of this Act who (a) without reasonable excuse, fails to file an employment equity report as required by section 18; (b) without reasonable excuse, fails to include in the employment equity report any information that is required, by section 18 and the regulations, to be included; or	Gravity of Offences Classification for gravity of offenses (minor, serious, very serious) is provided in the Act (s. 28, Section 1 – Classification of Violations). Minor Minor penalties for regulated entities (ss. 47(1)-73(8)) include: failure to implement or update the accessibility plan within prescribed time, failure to give notice to the accessibility commissioner, failure to consult persons with disabilities, failure	Administrative monetary penalties Per s. 127(2) of the Pay Equity Act, the maximum penalty in respect of a violation that may be fixed under regulations (TBD) is: (a) \$30,000 for an employer that... has between 10-99 employees; OR (b) \$30,000 for a bargaining agent representing some or all of the unionized employees of an employer referred to in paragraph (a);

	<p>(c) provides any information in the employment equity report that the employer knows to be false or misleading.</p> <p>Assessment of monetary penalty 36 (1) The Minister may, within two years after the day on which the Minister becomes aware of a violation, issue a notice of assessment of a monetary penalty in respect of the violation and send it by registered mail to the private sector employer.</p> <p>(2) The amount of a monetary penalty shall not exceed</p> <p>(a) \$10,000 for a single violation; and</p> <p>(b) \$50,000 for repeated or continued violations.</p>	<p>to make the accessibility plan or progress report available on request, failure to establish process for receiving feedback, failure to notify accessibility commissioner of the publication of process or progress report.</p> <p>Person other than a regulated entity:</p> <p>First violation: \$250 - \$2500</p> <p>Second violation: \$2500-\$6250</p> <p>Third violation: \$6250 - \$12,500</p> <p>Fourth or subsequent violation: \$12,500-\$18,750</p> <p>Small Business:</p> <p>First violation: \$500-\$5000</p> <p>Second violation: \$5000-\$12,500</p> <p>Third violation: \$12,500-\$25,000</p> <p>Fourth or subsequent violation: \$25,000-\$37,500</p> <p>Regulated entity other than a small business:</p> <p>First violation: \$1000-\$10,000</p> <p>Second violation: \$10,000-\$25,000</p> <p>Third violation: \$25,000-\$50,000</p> <p>Fourth or subsequent violation: \$50,000-\$75,000</p> <p>Serious</p> <p>A serious offence is failure to provide reasonable assistance to Accessibility Commissioner during inspection (s. 73(8)).</p> <p>Person other than a regulated entity:</p> <p>First violation: \$2500-\$6250</p> <p>Second violation: \$6250-\$12,500</p> <p>Third violation: \$12,500-\$25,000</p> <p>Fourth or subsequent violation: \$25,000-\$37,500</p> <p>Small Business:</p> <p>First violation: \$5000-\$12,500</p> <p>Second violation: \$12,500-\$25,000</p> <p>Third violation: \$25,000-\$50,000</p>	<p>(c) \$50,000 for an employer that... is considered to have 100 or more employees; OR</p> <p>(d) \$50,000 for a bargaining agent representing some or all of the unionized employees of an employer referred to in paragraph (c).⁷²²</p> <p>Penal Offences Per s. 115 of the Pay Equity Act: <u>115</u>. Whoever (1) contravenes the second paragraph of <u>section 4</u> (failure to submit a report), the first paragraph of <u>section 10</u> (failure to establish a company-wide pay equity plan), <u>section 14</u> (failure to post and distribute pay equity information), <u>14.1</u> (failure to retain pay equity plans), <u>15</u> (acting in bad faith, arbitrary or discriminatory manner), <u>16</u> (failure to enable employees to participate on pay equity committee) or <u>23</u> (failure to allow non-represented employees to designate representatives to the pay equity committee), the second paragraph of <u>section 29</u> (failure of members of pay equity committee to protect confidentiality of data obtained), the first paragraph of <u>section 31</u> (failure to establish a pay equity plan), <u>section 34</u> (failure to establish a pay equity plan for enterprises with less than 50 employees), <u>35</u> (failure to post pay equity information), <u>71</u> (failure to make adjustments to compensation within applicable time limits), <u>73</u> (reducing remuneration payable to one employee to achieve pay equity) or <u>75</u> (failure to post the results of pay equity plan within prescribed time), the second paragraph of <u>section 76</u> (failure to post amendments to plan referenced in s. 75), <u>section 76.1</u> (failure to conduct a pay equity audit), <u>76.2.1</u> (failure to conduct a participatory process in audit)</p>
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A Transformative Framework to Achieve and Sustain Employment Equity

		<p>Fourth or subsequent violation: \$50,000-\$75,000 Regulated entity other than a small business: First violation: \$10,000-\$25,000 Second violation: \$25,000-\$50,000 Third violation: \$50,000-\$100,000 Fourth or subsequent violation: \$100,000-\$150,000 Very Serious Very serious offences are: obstruction of Accessibility Commissioner or their delegate, giving false statements either to the Accessibility Commissioner and/or delegate or in the making of any records, reports, etc. (ss. 124-126) Person other than a regulated entity: First violation: \$6250-\$12,500 Second violation: \$12,500-\$25,000 Third violation: \$25,000-\$37,500 Fourth or subsequent violation: \$37,500-\$62,500 Small Business: First violation: \$12,500-\$25,000 Second violation: \$25,000-\$50,000 Third violation: \$50,000-\$75,000 Fourth or subsequent violation: \$75,000-\$125,000 Regulated entity other than a small business: First violation: \$25,000-\$50,000 Second violation: \$50,000-\$100,000 Third violation: \$100,000-\$150,000 Fourth or subsequent violation: \$150,000-\$250,000</p>	<p>or 76.3 (failure to post audit results in the prescribed timeframe), the second paragraph of section 76.4 (failure to post amended results subject to employee feedback) or section 76.5.2 (reducing remuneration to maintain pay equity), 76.6.1 (failure to pay departing employee in lump sum), 76.8 (failure to retain information to conduct pay equity audit for six years) or 76.9 (acting in bad faith, arbitrary or discriminatory manner) (2) fails to send a report, a document or information required under this Act, or provides false information, (3) takes or attempts to take reprisals as described in section 107, or (4) hinders or attempts to hinder the Commission, a member or mandatary of the Commission or a member of its personnel in the performance of its or his duties, is guilty of an offence and is liable to a fine. The fine shall be of Fewer than 50 employees: \$1,000 - \$15,000; Fewer than 100 employees: \$2,000 - \$30,000; 100 or more employees: \$3,000 - \$45,000; and Any other person: \$1,000 - \$15,000. <u>For a second or subsequent offence, the amounts set out shall be doubled.</u></p>
Additional notes	The Employment Equity Regulations do not create more offences or penalties than what is prescribed in	Per s. 23 of SOR/2021-241, small business means a regulated entity with an average	Per s. 4, this Act applies to every employer whose enterprise employs 10 or more employees.

	the Act. The closest thing to penalties that are available for federal public sector employers are directed undertakings by a compliance officer (s. 25(1)). Directions are very limited as per s. 33(1).	of fewer than 100 employees during the year.	To date, the regulations do not create new penalties or offences.
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Recommendation 6.38: To ensure reasonable progress in the implementation of employment equity, penalties should be updated and harmonized with comparable penalties under the *Pay Equity Act* and the *Accessible Canada Act*, scaled to the size and nature of the employer and to the level of non-compliance.

Harmonize sustainable support for employment equity groups

Establish an Ombudsperson for Indigenous Reconciliation as a trusted safe space mandated to resolve the widest possible range of issues pertaining to bias, racism, discrimination faced by Indigenous federal employees. The office of the Ombudsperson for Indigenous Reconciliation would provide managers and employees with a confidential environment where informal conversations and conflict resolution drive improved workplace understanding, support and relationships.

Many Voices one Mind: A Pathway to Reconciliation: Welcome, Respect, Support and Act to fully Include Indigenous Peoples in the Federal Public Service. Final Report of the Interdepartmental Circles on Indigenous Representation, 4 December 2017

Finally, we wanted to pay careful attention to the request by several employment equity groups to have someone with regulatory oversight available to foster understanding and support in a transversal manner. They would allow workers themselves to seek confidential guidance, informal interventions in support of employment equity interventions, training and enhanced capacity for implementation of the *Employment Equity Act* alongside pay equity and accessibility.

We did not simply want to multiply responsibilities. To foster integration and harmonization, we would recommend that in addition to vesting transversal responsibility for women workers in the Pay Equity Commissioner and transversal responsibility for disabled workers in the Accessibility Commissioner, four newly created deputy commissioners, or ombudspersons should be created, with transversal responsibilities for Indigenous reconciliation (First Nations, Métis and Inuit workers), Black workers, racialized workers and 2SLGBTQI+ workers.

Recommendation 6.39: In addition to vesting transversal responsibility for women workers in the Pay Equity Commissioner and transversal responsibility for disabled workers in the Accessibility Commissioner, four newly created deputy commissioners, or ombudspersons should be created, with transversal responsibilities for Indigenous reconciliation (First Nations, Métis and Inuit workers), Black workers, racialized workers and 2SLGBTQI+ workers.

The overall funding of the Office of Equity Commissioners would need to be commensurate with the significance of this additional responsibility.

Oversight through employment equity leadership at the top

Introduction

Finally, it is an important principle that employment equity goals should apply internally to the public oversight bodies that apply the *Employment Equity Act* framework. Our task force heard particular concern to sustain leadership on equity within the federal public service.

Deputy Minister Champions

Deputy Minister champions' role entails championing a range of corporate initiatives, programs or functional communities across the federal Public Service. They are appointed by the Clerk of the Privy Council, and according to the Government of Canada website are asked to provide support and guidance to communities or programs from a strategic level and “to build awareness of and advance issues.” The Deputy Minister champions structure includes a range of university champions with a role in public service renewal, as well as Deputy Minister champions of development programs and communities, including the human resources community, Christine Donoghue, who we met separately in relation to the work of TBS-OCHRO.

Our task force was pleased to meet with the three Deputy Minister champions appointed for employment equity – Indigenous Federal Employees, Federal Employees with Disabilities, and Visible Minorities. Their comments to the task force have been discussed at various points throughout this report. We met with each of the three Deputy Minister champions independently; they appeared alongside members of the equity group(s) that they support. Some of the representatives who came with them had already met with the task force, through their separately organized networks. The network briefs were submitted to the task force both autonomously and in consolidated form through TBS-OCHRO.

We were told that the Deputy Minister champion structure has flourished throughout the public service, although support for them was uneven. We were told that they understand their role as advocating on behalf of the equity group that they support, embodying the principle that those with relatively greater privilege should use that power to advocate for greater inclusion. Others appropriately stressed co-creation and consultation, underscoring that bargaining agents must play a crucial role in achieving employment equity.

The *Emerging from the Purge Report* offered the following reflection on the various roles of champions and allies that have emerged throughout the federal public service:

Some entities make use of executive-level Champions for different marginalized groups and who often act as spokespeople at executive tables for their groups. Champions are not paid for this role and they do not generally receive training to support them in their responsibilities. Further, the degree to which Champions can impact EDI efforts seems to depend on their degree of authority in their main line of work, as opposed to having authority because of the Champion role itself. Overall, there is a lack of clarity on the specific roles and responsibilities between equity staff, Champions, network chairs and positive space ambassadors. The degree of interaction between Champions, equity staff, and ERGs also varies greatly between entities.

LGBT Fund et al., Emerging from the Purge: Reviewing the State of LGBTQI2S Inclusion in Canada's Federal Workplace (Ottawa: LGBT Purge Fund, 2021) at 60

The Canadian Labour Congress also queried the effectiveness of the system of champions.⁷²³

It is terribly important for the ally relationship to be appropriately understood. The role of Champion is crucial, but it should never supplant the role of meaningful consultation with employees themselves, through their chosen representatives. As discussed in Chapter 5, the meaningful consultation pillar needs to be strengthened, independently. While members of equity groups may benefit from the appropriate support of allies, they also require autonomy. Champions may provide helpful guidance and support. **But champions are part of the third pillar, accountability, and along with other Deputy Ministers, they need to be attentive to their relative power, and assessed on the results that they achieve.**

Achieving goals in the federal public service: Linking responsibility and performance

Legislation should achieve results. Public monitoring agencies should meet their goals, including those under the *Employment Equity Act*.

The federal public service already has a Treasury Board Policy on Results, which took effect on 1 July 2016.

For the federal core public administration, the Treasury Board, this across-the-board policy has as its dual objective to “improve achievement of results across government” and “enhance the understanding of the results government seeks to achieve, does achieve, and the resources used to achieve them”. The Treasury Board secretariat is expected to provide leadership, oversee resource alignment reviews and evaluations, report, raise compliance issues with the deputy head or president of the Treasury Board, and support policy implementation.

The Policy on Results applies to almost all departments as defined in the *Financial Administration Act* and includes Parliamentary entities and Crown corporations. It includes ESDC, which is responsible for monitoring the *Employment Equity Act* as it applies to the federally regulated private sector, including reporting by the federally regulated private sector. It also applies to the CHRC, whose compliance audits include both the federal public service as well as federally regulated private sector employers.

A Transformative Framework to Achieve and Sustain Employment Equity

In understanding this policy, the Labour Program staff stressed that “equity-related targets can feature in different ways in performance measurement and evaluations” conducted under this policy.

The CHRC’s report recommends “working toward a diversity and inclusion plan that is developed in consultation with employees and unions and is regularly updated.”⁷²⁴ The CHRC reports that a focal point was appointed in 2020 to support implementation of the employment equity and anti-racism agenda. The report focused a lot on comments garnered from consultations. It emphasized accommodations. Starting with the requirement to conduct an employment systems review might have offered more conclusive recommendations.

As of 1 April 2021, deputy heads need to designate a senior official responsible for employment equity, diversity and inclusion (SDOEEDI). That senior designated official’s responsibilities are set out in a Directive on Employment Equity, Diversity and Inclusion dated 1 April 2020. The task force heard that this move to accountability should become a part of how deputy ministers are evaluated. This would send a strong message.

Several networks that appeared before the task force emphasized that deputy ministers should be held directly accountable for achieving results under the *Employment Equity Act* through their performance evaluations.

We agree. It has long been reaffirmed: responsibility for achieving employment equity must reside in positions sufficiently senior in an organization to make management’s commitment clear to all.⁷²⁵ Government can set a crucial example in this regard.

Recommendation 6.40: Deputy heads in the federal public service should be held directly accountable through their own performance evaluations for ensuring reasonable progress to achieve employment equity, and to sustain employment equity once it has been achieved.

Recommendation 6.41: Other employers covered under the *Employment Equity Act* framework should report on how their senior leadership is held accountable in their performance evaluations for ensuring reasonable progress to achieve employment equity, and to sustain employment equity once it has been achieved.

⁶⁵⁶ Leah F. Vosko and the Closing the Enforcement Gap Research Group, *Closing the Enforcement Gap : Improving Employment Standards Protections for People in Precarious Jobs* (University of Toronto Press, 2020) at 28, see also 263.

⁶⁵⁷ Leah F. Vosko and the Closing the Enforcement Gap Research Group, *Closing the Enforcement Gap : Improving Employment Standards Protections for People in Precarious Jobs* (University of Toronto Press) 2020 at 27-29.

⁶⁵⁸ Chair, Federal Public Service Labour Relations and Employment Board, Edith Bramwell & General Counsel, Asha Kurian, Meeting with the Task Force Chair, 15 December 2022.

⁶⁵⁹ Janice Fine, “New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships between Government and Civil Society Are Showing the Way Forward” (2018) 17 *University of Chicago Legal Forum*, Article 7, 142 at 144.

⁶⁶⁰ *Employment Equity Act*, Section 42(1)(a).

⁶⁶¹ Section 42(1)(b).

⁶⁶² Section 42(1)(c).

⁶⁶³ Section 42(1)(d).

⁶⁶⁴ Section 42(1)(e).

⁶⁶⁵ Section 36.

⁶⁶⁶ Section 20.

⁶⁶⁷ Section 42(3).

⁶⁶⁸ Under Section 42(2), the Minister is responsible for the administration of the Federal Contractors Program for Employment Equity.

⁶⁶⁹ Labour Program and Canadian Human Rights Commission, Presentation to the EEART, 22 July 2021.

⁶⁷⁰ *Employment Equity Act*, SC 1995, c. 44, Section 25.

⁶⁷¹ Auditor General of Canada, Karen Hogan, Meeting with the EEART Chair, 15 December 2022.

⁶⁷² Public Service Commission of Canada, Presentation to the EEART, 18 March 2022.

⁶⁷³ Evaluation and Data Development Strategic Policy, *Evaluation of the Federal Contractors Program: Final Report, Employment and Social Development Canada*, (Ottawa, ON: Human Resources Development Canada, April 2002) at 11.

⁶⁷⁴ Sections 25(2), 25 (3) and 26 (1).

⁶⁷⁵ Sections 28 -32.

⁶⁷⁶ Section 27(1).

⁶⁷⁷ Section 27(2).

⁶⁷⁸ Canadian Human Rights Commission, *Final Report – Employment Equity : Employment Systems Review*, 8 November 2022 at 17.

⁶⁷⁹ Canadian Human Rights Commission, *Final Report – Employment Equity : Employment Systems Review*, 8 November 2022 at 23.

⁶⁸⁰ Canadian Human Rights Commission, Framework for Compliance Audits Under the *Employment Equity Act: Audit Process and Statutory Requirements* (May 2015) at 6.

⁶⁸¹ Canadian Human Rights Commission, Consultations with the EEART, 22 July 2021.

⁶⁸² Canadian Human Rights Commission, Consultations with the EEART, 22 July 2021.

⁶⁸³ Public Service Alliance of Canada, Presentation to the EEART, 29 March 2022

⁶⁸⁴ Canadian Human Rights Commission, Horizontal Audit in the Communications Sector: Improving Representation for People with Disabilities (21 September 2022) at 4.

⁶⁸⁵ This assertion parallels affirmations on the enforcement of employment standards generally. See Leah F. Vosko and the Closing the Enforcement Gap Research Group, *Closing the Enforcement Gap : Improving Employment Standards Protections for People in Precarious Jobs*, University of Toronto Press, 2020 at 4. (“Despite this bleak picture, a second contention runs through this book: there is nothing inevitable about the enforcement gap.”).

⁶⁸⁶ Harish C. Jain et al., “Effectiveness of Canada’s Employment Equity Legislation for Women (1997-2004): Implications for Policy Makers” (2010) 65 *Relations industrielles* 304 at 324.

⁶⁸⁷ See e.g. Section 269 of the *Canada Labour Code*, which states the purpose of administrative monetary penalties within Part IV of the *Canada Labour Code*.

⁶⁸⁸ SSHRC, Presentation to the EEART, 29 April 2022.

⁶⁸⁹ E. Pearl Eliadis, *Speaking Out on Human Rights: Debating Canada’s Human Rights System* (Montréal, QC: McGill-Queen’s University Press, 2014) at 188.

⁶⁹⁰ Mark Hart, Consultant’s (Final) Report: Strengthening the Commission’s handling of Race-based Cases (30 April 2020) at 53ff & Recommendation 6.2.

⁶⁹¹ Mark Hart, Consultant’s (Final) Report: Strengthening the Commission’s handling of Race-based Cases, 30 April 2020, page 64 & Recommendation 8.2.

⁶⁹² Mark Hart, Consultant’s (Final) Report: Strengthening the Commission’s handling of Race-based Cases, 30 April 2020, page 33ff.

⁶⁹³ Mark Hart, Consultant’s (Final) Report: Strengthening the Commission’s handling of Race-based Cases, 30 April 2020, page. 69ff & Recommendation 10.1.

⁶⁹⁴ Mark Hart, Consultant’s (Final) Report: Strengthening the Commission’s handling of Race-based Cases, 30 April 2020, page.

⁶⁹⁵ Canadian Human Rights Commission, Modernizing our complaints process. Online.

⁶⁹⁶ * *Accessible Canada Act*, SC 2019, c. 10 ss. 17(1) and (2), 21(1) [ACA]; Government of Canada, “News Release - Historic appointment of Canada’s first Accessibility Commissioner” (April 25, 2022), online: <<https://www.canada.ca/en/employment-social-development/news/2022/04/historic-appointment-of-canadas-first->

[accessibility-commissioner.html](#)> . ** *Accessible Canada Act*, s. 22, 23. *** *Accessible Canada Act*, s. 30. **** *Accessible Canada Act*, s. 33. ***** Government of Canada, “News Release: Historic appointment of Canada’s first Accessibility Commissioner” (25 April 2022). ***** *Accessible Canada Act*, s. 111. ***** Appointed under *Canadian Human Rights Act* s. 26(1). Also responsible for monitoring the Government of Canada’s compliance with the UN Convention on the Rights of Persons with Disabilities. Canadian Human Rights Commission, “*The Accessible Canada Act*” online. After consulting with the Chief Commissioner of the Canadian Human Rights Commission, the Accessibility Commissioner may delegate their powers, duties or functions to another member of the Canadian Human Rights Commission (other than the Chief Commissioner) or to a member or staff of that Commission. *ACA* s. 40(2), 40(3). ***** *Accessible Canada Act* ss. 42(1), 60(1); Canada Radio-television and Telecommunications Commission, *The Accessible Canada Act* and the *CRTC Accessibility Reporting Regulations* (Sept 20, 2022), online: <<https://crtc.gc.ca/eng/industr/acces/index.htm>>; Canadian Transportation Agency, “Summary of the *Accessible Canada Act* and Reporting Regulations: A Guide on Accessibility Plans” (Feb 18, 2022), online: <<https://www.otc-cta.gc.ca/eng/summary-accessible-transportation-planning-and-reporting-regulations-accessibility-plans>>; Laverne A Jacobs et al, *The Annotated Accessible Canada Act*, University of Windsor, Faculty of Law, 2021 CanLIIDocs 987, <https://canlii.ca/t/t58r>.

⁶⁹⁷ See also United Nations Human Rights Council, Report of the Special Rapporteur on the Rights of Persons with Disabilities, Catalina Devandas-Aguilar, Visit to Canada, A/HRC/43/41/Add.2, 19 December 2019 at para 22.

⁶⁹⁸ One of the earliest reports, ultimately influential for the 2006 reforms in Ontario, is the *Ontario Human Rights Code Review Task Force, Achieving Equality: A Report on Human Rights Reform* (Ontario Ministry of Treasury and Economy, 26 June 1992) (Chair: Mary Cornish).

⁶⁹⁹ Office of the Auditor General of Canada, 2020-21 Employment Equity in the Office of the Auditor General of Canada – Annual Report 2020-21.

⁷⁰⁰ Office of the Auditor General of Canada, 2018 Fall Reports of the Auditor General of Canada to the Parliament of Canada, Report 5 – Inappropriate Sexual Behaviour – Canadian Armed Forces, at para. 5.12

⁷⁰¹ * Office of the Auditor General of Canada, “Who We Are,” online: <https://www.oag-bvg.gc.ca/internet/English/au_fs_e_370.html#organization>. The OAG’s legislative basis is in the *Auditor General Act*, the *Financial Administration Act*, among other statutes. ** Office of the Auditor General of Canada, “2022-23 Departmental Plan” (Feb. 4, 2022), online: <https://www.oag-bvg.gc.ca/internet/English/acc_rpt_e_44002.html>. *** Office of the Auditor General of Canada, “Who We Are.” online: <https://www.oag-bvg.gc.ca/internet/English/au_fs_e_370.html#organization>. **** *Auditor General Act*, RSC, 1985, c. A-17, s. 5. ***** *Auditor General Act*, RSC, 1985, c. A-17, s. 6; *Financial Administration Act*, RSC, 1985, c. F-11, s. 64. ***** *Auditor General Act*, RSC, 1985, c. A-17, s. 7(1) and (2). ***** Office of the Auditor General of Canada, “Who We Are” online: <https://www.oag-bvg.gc.ca/internet/English/au_fs_e_370.html#organization>. ***** Office of the Auditor General of Canada, “Who We Are,” online: https://www.oag-bvg.gc.ca/internet/English/au_fs_e_370.html#organization; *Auditor General Act*, RSC, 1985, c. A-17, s. 15.1; The CESD has responsibilities under the *Auditor General Act*, the *Federal Sustainable Act*, and the *Canadian Net Zero Emissions Accountability Act*.

⁷⁰² * For a detailed summary see Office of the Privacy Commissioner of Canada, “Organizational Structure” (Oct 21, 2019), online: <<https://www.priv.gc.ca/en/about-the-opc/who-we-are/organizational-structure/>>. Unless otherwise indicated, citations are to this source. In 2018, following an organizational review, the OPC adopted a new structure to be more proactive and have more impact. The Governor in Council appoints the Privacy Commissioner after consultation with leaders of each party in the Senate and House of Commons, and appointment by resolution of the Senate and House of Commons. *Privacy Act*, RSC, 1985, c. P-21, s. 53(1) [*Privacy Act*]. The Privacy Commissioner may appoint officer and employees as necessary to perform their functions and duties, and may engage on a temporary basis persons with technical or specialized knowledge to assist the Commissioner and with approval of Treasury Board, pay that person. *Id.* s. 58(1) and (2). The Privacy Commissioner may also delegate powers, duties, and functions to any person, except for making reports to Parliament. *Id.* s. 59(1). ** Government of Canada, “Infographics for Offices of the Information and Privacy Commissioner of Canada” (March 2021), online: <<https://www.tbs-sct.canada.ca/ems-sgd/edb-bdd/index-eng.html#infographic/dept/256/people>>. *** *Privacy Act*, RSC, 1985, c. P-21, s. 41. **** *Privacy Act*, RSC, 1985, c. P-21, s. 56(1).

⁷⁰³ * The Privacy Commissioner is an agent of Parliament appointed by the Governor in Council after consultation with leaders of each party in the Senate and House of Commons, and appointment by resolution of the Senate and House of Commons. *Official Languages Act*, RSC, 1985, c. 31 (4th Supp), s. 49(1) [*Official Languages Act*]; Office of the Commissioner of Official Languages, “Mandate & roles” (7 November 2022), online: <https://www.clo-ocol.gc.ca/en/aboutus/mandate>. Staff and employees necessary for the Commissioner’s work shall be appointed in a manner authorized by law. *Official Languages Act*, s. 51. The Privacy Commissioner may engage on a temporary basis persons with technical or specialized

knowledge to assist the Commissioner and, with approval of Treasury Board, pay that person. Id. s. 52. ** Office of the Commissioner of Official Languages, “About us” (12 September 2022), online: <clo-ocol.gc.ca/en/contact/index#head>. *** Government of Canada, “Infographic for Office of the Commissioner of Official Languages” (17 November 2022), online: <https://www.tbs-sct.canada.ca/ems-sgd/edb-bdd/index-eng.html#infographic/dept/242/people>. **** Office of the Commissioner of Official Languages, “Mandate & roles” (7 November 2022), online: <https://www.clo-ocol.gc.ca/en/aboutus/mandate>; *Official Languages Act*, RSC, 1985, c. 31(4th Supp), s. 70. The Commissioner has the power to delegate any powers, duties, or functions (except for reporting functions to the Treasury Board, Governor in Council, and Parliament, and appearing as a party in court proceedings).

⁷⁰⁴ *Charter of Human Rights and Freedoms*, CQLR c C-12, s 87, second paragraph & s 89 [*Québec Charter*]. Note that the first paragraph of Section 87 requiring an affirmative action program to be approved by the *Commission des droits de la personne et des droits de la jeunesse*, unless it has been imposed by an order of a tribunal is not in force.

⁷⁰⁵ Sections 86 ff of the *Québec Charter* also applies to education, health services or other services generally available to the public.

⁷⁰⁶ 2008 QCTDP 24. The decision was allowed in part by the Quebec Court of Appeal in 2011. *Gaz métropolitain v. Commission des droits de la personne et de la jeunesse* 2011 QCCA 1201 (modifying one of the punitive damage awards and considering that the order of a committee to counter sexual and sexist harassment in the workplace should have been a “simple recommendation”).

⁷⁰⁷ See e.g. Marie-Thérèse Chicha & Éric Charest, *Le Québec et les programmes d'accès à l'égalité : Un rendez-vous manqué? Analyse critique de l'évolution des programmes d'accès à l'égalité depuis 1985* (Centre d'études ethniques des universités montréalaises, Avril 2013) at 9, 46-52.

⁷⁰⁸ Québec Commission des droits de la personne et des droits de la jeunesse, Consultations with the EEART, 17 February 2022.

⁷⁰⁹ Federally Regulated Employers – Transportation and Communications (FETCO), Submission to the EEART, 28 April 2022.

⁷¹⁰ Conseil du Patronat du Québec, Commentaires du CPQ dans le cadre d'une table ronde avec le Groupe de travail sur la révision de la Loi sur l'équité en matière d'emploi (Fédérale), Submission to the EEART, April 2022.

⁷¹¹ E.g. Public Service Alliance of Canada, Presentation to the EEART, 29 March 2022.

⁷¹² *Accessible Canada Regulations*, SOR/2021-241, Section 4(1).

⁷¹³ *Accessible Canada Act*, SC 2019, c 10, s 5.

⁷¹⁴ Public Service Alliance of Canada, Presentation to the EEART, 29 March 2022.

⁷¹⁵ *Canadian Human Rights Act* Review Panel, Promoting equality: a New Vision: the Report of the Canadian Human Rights Commission Review Panel, (Ottawa: Justice Canada, 2000) at 20.

⁷¹⁶ J. Helen Beck, Jeffrey G. Reitz & Nan Weiner, Addressing Systemic Racial Discrimination in Employment: The Health Canada Case and Implications of Legislative Change” (2002) 23 *Canadian Public Policy* 373 at 376.

⁷¹⁷ *Canadian Human Rights Act* Review Panel, Promoting equality: a New Vision: the Report of the Canadian Human Rights Commission Review Panel, (Ottawa: Justice Canada, 2000) at 21 - 22.

⁷¹⁸ Carol Agócs & Bob Osborne, “Comparing Equity Policies in Canada and Northern Ireland: Policy Learning in Two Directions?” (2009) 35:2 *Canadian Public Policy/ Analyses de Politiques* 237 at 251-255; Raya Muttarak et al., « Does Affirmative Action Work? Evidence from the Operation of Fair Employment Legislation in Northern Ireland » (2012) 47:3 *Sociology* 560 at 575-576.

⁷¹⁹ Canadian Labour Congress, Submission to the EEART, 28 April 2022.

⁷²⁰ Evaluation and Data Development Strategic Policy, Evaluation of the Federal Contractors Program: Final Report, Employment and Social Development Canada, (Ottawa: Human Resources Development Canada, 2002) at 21.

⁷²¹ See e.g. Human Rights Council, Report of the independent expert on minority issues, Gay McDougall: Mission to Canada, A/HRC/13/23/Add.2, 8 March 2010 at para. 86.

⁷²² Provisions shortened and excerpted for readability.

⁷²³ Canadian Labour Congress, Presentation to the EEART, 29 March 2022.

⁷²⁴ Canadian Human Rights Commission, *Final Report – Employment Equity: Employment Systems Review* (8 November 2022), at 12, 18-19.

⁷²⁵ See e.g. Renée Dupuis, “Aboriginal Peoples and Employment Equity” in Royal Commission on Aboriginal Peoples, *Sharing the Harvest: The Road to Self-Reliance* (Ottawa: National Library of Canada, 1993) 165.

Chapter 7: Technical regulatory implications of employment equity coverage

Introduction: Why comprehensive coverage matters

In Chapter 1, this report offered a close look at who is covered, and who should be covered, under the *Employment Equity Act* framework in the changing world of work. We were particularly attentive to ensuring that employment equity coverage allowed us to get a full picture of employment practices in federally regulated workplaces. We cannot afford to leave members of employment equity groups behind. The goal is to foster equitable inclusion in decent work, for all workers.

We recall that employment equity cannot achieve this goal alone. But employment equity is an important piece in the overall puzzle. Equitable employment practices, including pay transparency, challenge occupational segregation. Through pay equity, those practices also help us to identify and value the skills that women – who are also members of all the other employment equity groups - bring to the job.

Precarious work poses a particular challenge to achieving equitable inclusion. The task force presented data indicating, for example, that disabled workers have been overrepresented among temporary employees. The trend was in part linked to the pandemic and the urgent need to staff quickly. The task force's attention was also drawn to disabled workers' potentially reduced access to health and disability benefits under work arrangements that are not permanent. Researchers have noted that employment equity gains for women occurred more frequently in part time, temporary work than in full time, permanent employment.⁷²⁶ This is a particular concern: if employment equity for workers in historically underrepresented groups means admission into work that is precarious, have we really fostered substantive equality?

This chapter recognizes that while the broad principle of equitable inclusion is clear, details really matter.

This chapter is therefore rather technical, with purpose. Our task force seeks to leave no one behind. This chapter also reflects something that task force members repeated: employment equity should be understood as an opportunity to draw in talent that has been overlooked, and to make our workplaces – and our pluralist society – stronger for all of us.

We recognize as well that labour market conditions are constructed in part in response to regulatory frameworks. There is a delicate balance to be achieved, to ensure that a revised *Employment Equity Act* framework does not contribute to an increase in precarious work. We need to avoid creating a framework that can easily be avoided when the employment relationship is avoided. In this report our task force thought about how to build an inclusive approach to employment equity, to cover a broader range of workplaces and ensure that barriers to equity are being removed there, too.

This leads to three implications and recommendations for the *Employment Equity Act* framework:

Implication No. 1: We need to know what is happening to Canadian workplaces

To do employment equity justice, we need to be able to take a cold, hard look at what is happening to Canadian workplaces. We need to understand the barriers faced by discouraged workers and ensure that our measurement tools – notably labour market availability – do not embed disadvantage. We need to understand the overrepresentation of employment equity groups in precarious work and the barriers to their equitable inclusion in decent work, into stable, sustainable, supportive employment. We need to be alive to the economic factors – canvassed in Chapter 1 – that pull work toward greater precariousness, as well as the holistic approach required to preserve decent work and economic growth.

None of this means that stable, sustainable and supportive employment will not change over time. There is a fine balance. Models of work and workplace norms need also to be transformed by how employment equity groups themselves understand workplace lifecycles, and call attention to the fundamental character of care, for ourselves and for our environment.⁷²⁷

Concretely this means that labour law and human rights law, including the *Employment Equity Act* framework, is intended to apply broadly and to foster equitable inclusion and sustainable economic growth, full and productive employment, and decent work for all.

An example of the broad reach is in the definition of employment under the *Canadian Human Rights Act*, which “includes a contractual relationship with an individual for the provision of services personally by the individual.” **All covered workplaces must prevent and remedy systemic discrimination and ensure substantive equality.**

This was the reasoning adopted in the Bilson report on pay equity:

The corollary of [concluding that equal pay for work of equal value is a human right], in our view, is that any pay equity legislation should include as many workers as possible within its scope, rather than excluding them simply because the nature of their employment relationship or the organization of their work does not fall easily into a traditional paradigm. We think this inclusive orientation is all the more important in the current economic environment.

Pay Equity: A New Approach to a Fundamental Right, at 181

We agree. We also recognize that the *Employment Equity Act* framework seeks to ensure that employment equity groups are equitably represented across the employment spectrum and specifically that they are not overrepresented in precarious work. The focus is rightly, therefore, on ensuring that employment equity groups have equitable opportunities to gain access to decent, stable, and sustainable and supportive employment.

Temporary and part-time employees under the Employment Equity Act framework

The current *Employment Equity Act* framework already provides an important window into what is happening in workplaces under federal jurisdiction, by calling for balanced reporting on temporary employees and part time employees:

Definitions of “employee” in the *Employment Equity Regulations*

permanent full-time employee means a person who is employed for an indeterminate period by a private sector employer to regularly work the standard number of hours fixed by the employer for employees in the occupational group in which the person is employed.

permanent part-time employee means a person who is employed for an indeterminate period by a private sector employer to regularly work fewer than the standard number of hours fixed by the employer for employees in the occupational group in which the person is employed.

temporary employee means a person who is employed on a temporary basis by a private sector employer for any number of hours within a fixed period or periods totalling 12 weeks or more during a calendar year, but does not include a person in full-time attendance at a secondary or post-secondary educational institution who is employed during a school break.

For the purposes of the Act, **employee**, in respect of

- (a) a private sector employer, means a person who is employed by the employer, but does not include a person employed on a temporary or casual basis for fewer than 12 weeks in a calendar year;
- (b) a portion of the federal public administration referred to in paragraph 4(1)(b) or (c) of the Act to which the *Public Service Employment Act* applies, means a person who has been appointed or deployed to that portion pursuant to that Act, but does not include
 - (i) a person appointed as a casual worker under subsection 50(1) of that Act, or
 - (ii) a person appointed for a period of less than three months; and
- (c) a portion of the federal public administration referred to in paragraph 4(1)(b) or (c) of the Act to which the *Public Service Employment Act* does not apply, means a person appointed to that portion in accordance with the enactment establishing that portion, but does not include a person employed on a temporary or casual basis for a period of less than three months.

(The employment of a casual employee under the *Public Service Employment Act* (Section 50(2)) may not exceed 90 working days in one calendar year; the casual employee is not covered by the PSEA and is not eligible for any internal appointment processes.)

The 1986 *Employment Equity Regulations* contained a reporting requirement for workplaces where the number of temporary employees comprised 20% or more of the total number of employees of the employer (Form 3). Employers were required to indicate all temporary employees, based on the date in the calendar year on which the number of temporary employees was the greatest (Forms 1-3).

These requirements remain largely the same in the current regulations. Form 2 requires reporting on “all employees of the employer in Canada” comprising permanent full-time employees, permanent part-time employees, and “temporary employees where the number of temporary employees at any time during the reporting period constitutes 20% or more of the employer’s workforce.”

In this manner, temporary employees are reasonably captured in the required Employment Equity Act reporting for private sector workforces. No representations were made to us in our extensive consultations that this should be changed. The coverage is appropriately balanced and we do not recommend changes at this time.

Implication No. 2: Covered employers should report on their entire workforce

The second implication is that covered employers should report on their entire workforce, including dependent contractors as defined in Section 3(1) of the *Canada Labour Code*. The reason is simple: we want to have a meaningful portrait of who is doing work in their workplace. We need to know what their opportunities for advancement are within it in accordance with employment equity principles. We need to be able to see whether workers who are designated group members are disproportionately finding themselves working as dependent contractors, without the opportunity to advance within the workplace.

Including dependent contractors is an important feature of the harmonization that simplifies reporting across proactive schemes. We note that the *Pay Equity Act* includes dependent contractor, ensuring further harmonization with the *Canada Labour Code*, Part I.

Recommendation 7.1: Reporting under the *Employment Equity Act* should include dependent contractors, consistent with the *Pay Equity Act* and the *Canada Labour Code*.

Implication No. 3: Supportive, sustainable coverage for LEEP, federal employers abroad, and the FCP

The final implication is that almost 40 years later, we need to ensure that the coverage of the Legislated Employment Equity Program (LEEP) for federally regulated private sector employers (FRPS), federal employers abroad, and the Federal Contractors Program (FCP) is optimal. We suggest minimal change to LEEP, mostly to harmonize it with the changes that we propose for FCP. In making proposals, we have continued our focus in Chapter 6 to harmonize with other proactive legislation – the *Pay Equity Act* and the *Accessible Canada Act*. Our goal is to broaden coverage while reducing administrative burdens on employers.

The bottom line is this: change will not come with a stroke of a pen. These changes can only be sustainable if the commitment to support employers is present. We must put our money where our principles are on employment equity.

Harmonizing LEEP

In successful organizations, diversity and inclusion are not optional. The case for diversity and inclusion extends beyond treating employees fairly and equitably. Diversity and inclusion enable the public service to leverage the range of perspectives of our country's people to help address today's complex challenges.

Building a Diverse and Inclusive Public Service: Final Report of the Joint Union/Management Task Force on Equity and Inclusion, 2017

Both labour law and human rights law are comprehensive frameworks: the starting point is inclusion.

Exclusions need compelling justifications. There are a lot of small employers within federal jurisdiction, as Figures 7.1 and 7.2 below indicate. They are likely to require particular support and adaptations. That said, full exclusion is hard to continue to justify in the Canada of 2023. We were heartened by the employers who met with us. They repeated: we have buy in. What they want to know is that we are paying attention to the special challenges that smaller employers may have, and ensuring that they have the support they need.⁷²⁸

Proactive pay equity legislation, one of the most technically complex areas in human rights law, establishes a 10+ cut off for what are essentially practical reasons given the small number of jobs. We heard from major employers that the real challenge is to simplify or harmonize legislative frameworks.⁷²⁹

Currently the *Employment Equity Act* has beyond the federal public service focused on larger workplaces, that is private sector employers that are federally regulated with over 100 employees. The related Federal Contractors Program similarly covers contractors with 100 employees if the contract value is over 1 million dollars.

The portrait of the federally regulated private sector (FRPS) could not be more revelatory – the vast majority of employers are not covered by the *Employment Equity Act*. Yet 87% of employees in the federally regulated private sector work for the 4% of employers who have over 100 employees.

Figure 7.1: Distribution of employees in the FRPS by company size, 2021⁷³⁰

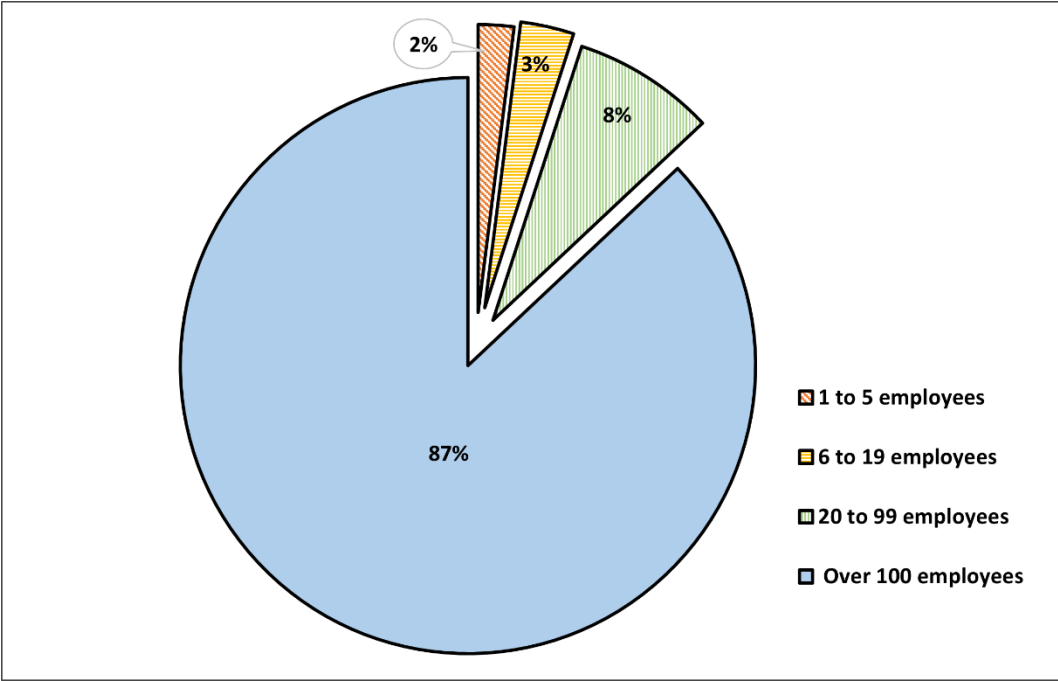
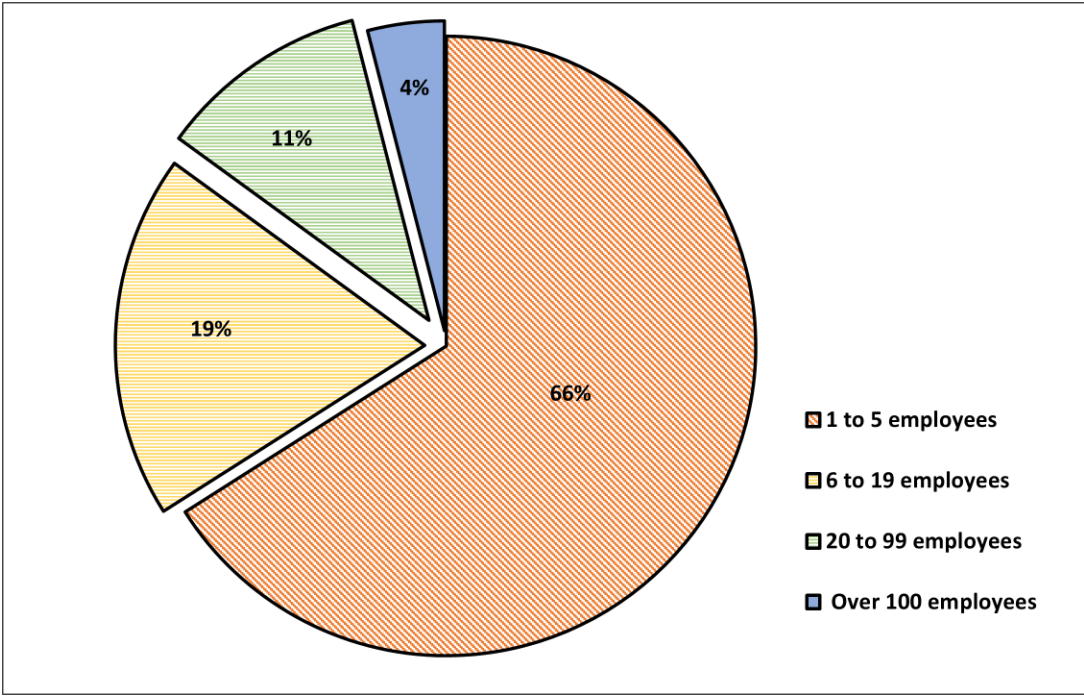


Figure 7.2: Distribution of employers in the FRPS by company size, 2021⁷³¹



Most of the small companies with 1 – 5 employees are in the road transportation sector. Most of the large companies with 100 + employees are also in the road transportation sector (289 companies with 63,790 employees), although the single largest number of employees who work in companies with over 100 employees is in the banking sector (53 companies with 252,086 employees).

A Transformative Framework to Achieve and Sustain Employment Equity

The task force received a range of recommendations from consulted groups and academic experts proposing that the number of employees required to be covered under LEEP be reduced.

We note the following:

On the one hand, to do so would mean that a significant number of employers would be added, although some of them are likely to be covered if as we recommend larger employers would report on their dependent contractors, likely including some of those situated in the 1 – 10 employee range.

Inclusion under the *Employment Equity Act* framework makes sense only if it provides a composite picture of the enterprise, including from the perspective of its networks of integration, and the prospects for employee mobility within it. Supporting large employers so they can report on their dependent contractors fosters transparency and offers the ability to understand what is actually happening with respect to employment equity groups in the workplace.

There is an important symbolic value to ensuring that a broad range of workplaces understand that they contribute to achieving substantive equality at work. And pragmatically, it is the medium-sized employers that should be encouraged and supported to report.

On the other hand, and this is fundamental: for inclusion of this nature to be remotely sustainable, there must be a commitment to robust support to employers. They need support for reporting to be sustainable. Our task force consulted extensively with leading experts in the field. We were reassured that a key to extending employment equity to small to medium sized enterprises is to ensure access to support and training.

Equitable inclusion will not happen by a stroke of the legislative pen; there must be a commitment to supportive, sustainable measures so that the legislative inclusion can meaningfully translate into equitable inclusion.

Perhaps most importantly, we heard from some small employers themselves. What we heard was a commitment to equity, and a request for latitude, harmonization of requirements across equity frameworks like pay equity and accessibility, and support for implementation:

We are small enough that we are not yet subject to the EEA, however we are growing. We care about diversity and inclusion (D&I) and making employees feel more included. If the threshold changes, could there be a window where reporting might be voluntary and where we can start working through the changes? Perhaps the government could make resources available. That would be very helpful for a company of our size.

A small federally-regulated employer, EEART Consultations, 7 April 2022

The federal *Pay Equity Act* applies to employers that have 10 or more employees. The responsibilities vary depending on the size of the employer. Notably, every covered employer must establish a pay equity plan (Section 13). The pay equity committee is mostly optional for employers with 10-99 employees (Section 16), while employers with 100+ employees or a group of employers that has 10 – 99 employees where one employer in the group has unionized employees when they became subject to the *Pay Equity Act* is required to establish a pay equity committee (Section 17).

In Quebec, the *Pay Equity Act* applies to all employers. Each is required to submit a report on the implementation of the Act in their enterprises (Section 4). Employers with between 10 and 49 employees have the responsibility for determining and making adjustments to “afford the same remuneration, for work of equal value” (Section 34). The responsibility to create a pay equity plan falls to all employers with between 50 and 99 employees. Large employers, with 100 or more employees, must establish a pay equity committee that includes representation from their employees (Section 16).

Comparatively, reporting requirements apply to employers with 20 or more employees in France based on *La loi du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées* in France, to employers with 100 or more employees in Australia under the *Equal Employment Opportunity (Commonwealth Authorities) Act 1987*, to companies with 50 or more employees in South Africa under the *Employment Equity Act* and the *Broad-based Black Economic Empowerment Act*. In Northern Ireland, all employers with 11 or more employees have employment equity monitoring responsibilities under the *Fair Employment Act*.

In light of this comparative experience and to encourage harmonization across equity schemes federally, our task force recommends the following:

Recommendation 7.2: The *Employment Equity Act* should apply to separate employer organizations in the federal public sector with 10 or more employees, listed in Schedule V of the *Financial Administration Act* (separate agencies), and other public-sector employer organizations with 10 or more employees, including the Canadian Forces (officers and non-commissioned members in the Regular and Reserve Forces) and the Royal Canadian Mounted Police (regular and civilian members, excluding federal public service employees).

Recommendation 7.3: The *Employment Equity Act* should apply to employers with 10 or more employees in the federally regulated private sector.

Recommendation 7.4: Employers with between 10 and 49 employees should be required to achieve reasonable progress on attaining representation of employment equity groups consistent with labour market availability. They should be provided with meaningful access to training and support.

Recommendation 7.5: Employers with 50 or more employees and all covered employers in the federal public service should be required to achieve reasonable progress on attaining representation of employment equity groups consistent with labour market availability. They should also be required to assume the existing employer obligations under the current *Employment Equity Act*, with an appropriate transition window for reporting. They should be provided with meaningful access to training and support.

Recommendation 7.6: The *Employment Equity Regulations* should carefully specify the transition periods for when an employer is considered to become subject to the *Employment Equity Act* in a manner that harmonizes them with the *Pay Equity Act*, and facilitates training and reporting by employers.

Federally regulated employers' operations abroad

The focus of the *Employment Equity Act* has tended to be on employees of private sector employers based “in Canada”. Yet much has changed in available technologies for reporting and in our sense of Canada in the world.

Initiatives on business and human rights focus on how Canadian employers abroad treat workers along their global supply or value chains. Canadian initiatives to implement the UN Guiding Principles on Business and Human Rights are emerging. In addition to the recent Canadian Ombudsperson for Responsible Enterprise, there are calls for Canada to introduce robust due diligence legislation and to move forward on proposed Modern Slavery bills. Many of these initiatives, like the *Employment Equity Act* framework, focus on reporting requirements. The Supreme Court of Canada in *Nevsun Resources Ltd. v Araya*,⁷³² has opened the door to the prosecution of violations of customary international law in Canada by Canadian companies operating abroad. Most recently, the Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Cali-Tzay, in his visit to Canada from 1 – 10 March 2023, “expressed concern that Indigenous Peoples around the world are suffering negative, sometimes devastating consequences from Canadian extractive industries, mainly mining operations” and called on Canada to ensure that Canadian transnational companies are held accountable for human rights violations committed abroad.⁷³³

Our task force held consultations with the International Development Research Centre (IDRC), a federal agency with local offices in five countries: India, Jordan, Kenya, Senegal and Uruguay. Some of the workforce comprises “expatriates” from Canada while in most cases local directors are nationals of the countries where IDRC is located. We were told that employees recruited in Canada and posted overseas, who rotate in and out of Canada after 5 to 10-year postings abroad, are not typically included in employment equity calculations.⁷³⁴

We have also considered the Canadian Armed Forces, and draw inspiration from the fact that on inclusion under the *Employment Equity Act* framework, specific employment equity regulations were developed in 2002 following appropriate consultations, to adapt provisions to their specific context and safeguard their operational effectiveness.⁷³⁵

Global Affairs Canada has a workforce of 13, 106 employees comprising, as of March 2022, 7723 Canada-Based Staff (CBS) and 5383 Locally Engaged Staff (LES). Of the total number, 6443 staff were based in Canada, while 6669, or 51%, were based in 178 missions abroad.

Its employment equity reporting covers CBS, whether located in Canada or on mission abroad (rotational and non-rotational staff). Based on 2021 data, attainment gaps persist for disabled workers across the board and for women and Black employees at the diplomatic level. Heads of mission were 47% women and 12% visible minority.⁷³⁶

Global Affairs Canada wrote the following about employment issues for its LES in its Departmental Plan for 2021-2022 in addition to its commitment to worker safety abroad and during the pandemic:

Global Affairs Canada is committed to further improving and innovating services for Government of Canada employees at missions through ongoing engagement with both Locally Engaged Staff (LES) and Canada-Based Staff (CBS). The LES workforce comprising over 5,400 members provides critical program delivery, information technology, administrative, consular and other services at missions in support of both Global Affairs Canada and other Canadian government programs. Consultations with LES and with key partners have led to new milestones in the reform of how this important workforce is managed. In 2021-22, this will include improvements to policies supporting compensation, employment and staffing, labour relations, and pension and insurance benefits for LES. The department recognizes that there is still significant work to be done to address the ongoing viability of the LES benefits program and to improve how this workforce is treated compared to other workforces of the Government of Canada.

Global Affairs Canada, Departmental Plan 2021-2022

The example of the inclusion of Global Affairs Canada, located in 178 missions around the world, in the *Employment Equity Act* is important. Other covered workplaces with staff recruited in Canada should be covered within the *Employment Equity Act* framework.

Reporting on Canadian public service and private sector hiring practices abroad for employers covered under the *Employment Equity Act* framework would support the effective implementation of employment equity. It would provide a comprehensive portrait of recruitment and promotion opportunities for Canadian citizens and permanent residents abroad, including any barriers they may face in returning to Canada in employment commensurate with their skills. We note that these promotion practices are particularly important for those workers – Canadians and permanent residents of Canada – who return to Canada either with their employer or with other Canadian employers.

Recommendation 7.7: All covered public service employers and federally regulated private sector employers should be required to include Canadians or permanent residents of Canada working abroad in their workplace implementation and reporting responsibilities under the *Employment Equity Act* framework.

Recommendation 7.8: Specific *Employment Equity Regulations* should be adopted as necessary to ensure the effective inclusion of Canadians or permanent residents of Canada working abroad, with due regard to operational effectiveness.

Recommendation 7.9: Specific guidance and training should be developed by the Employment Equity Commissioner to support the effective implementation of the recommendations to covered workers abroad.

Reviving the Federal Contractors Program

The Government of Canada is the largest purchaser of goods and services in Canada. It spends approximately \$22 billion per year, purchasing goods and services, including construction services.⁷³⁷ Although a thorough analysis of procurements practices is beyond the scope of this report, there are a few recommendations that warrant attention.

The Federal Contractors Program is a tangible way through which the Canadian government literally can continue to put its money where its human rights commitments are: it requires those who provide goods and services to it to achieve substantive equality in their workplaces. But like much in the *Employment Equity Act* framework, it has become bureaucratized and its *raison d'être* has gotten lost. The starting principle, which is part of the applicable law, is that employers who contract with the federal government must respect substantive equality in the workplace.

But the Federal Contractors Program is not as it used to be. Adopted in 1986 and evaluated to be a unique program supporting social justice aims by extending the reach of the federal employment equity framework offering leadership by the federal government,⁷³⁸ it is now a dim reflection of its earlier institutionalization and its longstanding objectives. It currently covers contractors who employed 100 employees or more who bid on contracts above the \$1 million threshold. At its peak coverage prior to the change in 2013, it applied to contractors with 100 employees or more who bid on contracts worth \$200 000 dollars. The decreased impact is stark:

Table 7.1: Federal Contractors Program coverage⁷³⁹

Year	Number of employers	Number of universities and colleges	Number of employees
2013	1,045	59	1,233,766
2022	410	26	609,658

The initial program

The Federal Contractors Program had been a program that was functionally “equivalent” to the *Employment Equity Act*, but through the link to government contracts or procurements:

The Minister is responsible for the administration of the Federal Contractors Program for Employment Equity and shall, in discharging that responsibility, ensure that the requirements of that Program with respect to the implementation of employment equity by contractors to whom the Program applies are equivalent to the requirements with respect to the implementation of employment equity by an employer under the Act.

Former Section 42(2) Employment Equity Act, 1995 ch. 44, 42-43-44 Eliz. II., 15 December 1995

The initial FCP had eleven criteria:

1. Communication of employment equity policy to employees.
2. Assignment of a senior official to be responsible for Employment Equity.
3. Collection/maintenance of workforce information on designated group and non-designated group employees by occupation and salary level (i.e., workforce survey).

4. Analysis of company workforce data to compare designated group representation within the organization to their availability in the supply of qualified workers from which the contractor may reasonably be expected to recruit employees.
5. Elimination of systemic discrimination by reviewing, where an under-representation exists, formal and informal employment systems.
6. Establishment of goals and timetables for hiring, training and promotion of designated group members where there is an under-representation.
7. Establishment of an employment equity work plan for reaching goals and timetables.
8. Adoption of special measures and accommodation where necessary to ensure that goals are achieved, including the provision of reasonable accommodation.
9. Establishment of a favourable climate for the successful integration of designated group members within the organization.
10. Adoption of monitoring procedures for the employers to assess the progress and results achieved in implementing employment equity.
11. Providing authorization to enter premises thus allowing Human Resources Development Canada (HRDC) representatives to access records noted in 3 above.

The reports on changes to the program over time reveal frustration: the FCP had significant potential to make a difference, but its ability to do so was clearly getting lost:

It is not difficult to pick up a sense of frustration, of an opportunity not taken advantage of, particularly given the key finding of the evaluation that there was clear evidence that FCP had the capacity to impact in a substantial way on employers.

Professor Christopher McCrudden, Buying Social Justice: Equality, Government Procurement, & Legal Change (Oxford University Press, 2007) at 605

After all, **a comprehensive report found that only 10% of FCP employers had fully implemented FCP requirements.** Yet 90% of FCP employers indicated that they were only involved in any employment equity activities at all because of the FCP. This finding was a considerable improvement over the results of the 1992 evaluation.

The final report evaluating the FCP in 2002 underlined the dramatic cut in funding to the program and program decentralization, reasons cited for the “challenges” created to the administration of the program. The report concluded that despite the value and need for the program, it could not be implemented under the existing conditions.⁷⁴⁰ The findings were accepted by management.⁷⁴¹ At the time, the program covered 845 large scale employers with a cumulative total of over 800,000 employees. However, coverage outside of Quebec and Ontario was small, particularly in the Atlantic region.⁷⁴²

At that time, representatives of designated groups and in particular Indigenous representatives called for the contract value to be reduced to \$50,000 or \$100,000, and for the numerical threshold limit to be reduced to include employers of 50 – 99 workers.⁷⁴³ They noted the small and decreasing size of the Canadian workforce.

Currently, the equivalent of the contractors’ program in Quebec applies to employers with 100 employees or more who apply for contracts of \$100,000 or more.⁷⁴⁴

Our task force takes seriously the fact that in 2017, the United Nation’s Committee on the Elimination of Racial Discrimination called on Canada to “[i]mprove the mandatory contractor compliance mechanism’s labour rights approach conditions in the federal employment equity regulation.”⁷⁴⁵

Our task force was informed that a new iteration of the Federal Contractors Program is expected to be launched in 2024-25 to include requirements based both on the *Accessible Canada Act* and the *Pay Equity Act*.

In light of the canvassed considerations and examples, as well as the results of the consultations, we recommend equivalency with employer implementation under the *Employment Equity Act* and a change to the threshold. We also recommend a different approach to include colleges and universities that apply for federal research grants. Finally, we recommend that some existing exclusions of legal service contracts, grants and contributions, international cooperation and construction contracts should be rethought.

Equivalency with employer implementation under the *Employment Equity Act*

The reference to equivalency is no longer a part of Section 42(2) of the *Employment Equity Act*, which currently indicates only that “the Minister is responsible for the administration of the Federal Contractors Program for Employment Equity.” As it turns out, the notion of equivalency in the legislative requirement did not stop some quite significant differences from being operationalized. While the Legislated Employment Equity Program (LEEP), which remains an integral part of the *Employment Equity Act*, has been interpreted to include casual employees, the FCP was understood to exclude them. Consultations with unions were considered only to be recommended under FCP, although they are mandatory in the legislation as applied both to the federal public service and to federally regulated employers under LEEP. FCP employers were similarly interpreted not to have reporting requirements, unlike the clear reporting requirements in the legislation as applied to private sector employers, and despite overwhelming support for reporting by employers as a way to assess progress on achieving employment equity. Finally, the CHRC’s auditing responsibilities did not include the FCP.⁷⁴⁶

Several groups that consulted with our task force or that submitted written briefs recommended that we return to the standard of substantive equivalency. The Canadian Association of University Teachers provided a detailed assessment of the kind of commitments that it considered should apply to federal contractors:

- That the federal contractor "commitment" include the obligation to provide annual reports including comprehensive workplace surveys: and,
 - That the workplace surveys and reports of the contractors be publicly accessible, subject to reasonable protection of personal information;
 - That the workplace surveys provide data on the number of employees in the designated groups by occupation, and/or sub-occupation where practicable;
 - That the workplace surveys further collect and display data by occupational status full-time, part time, continuing, contract, and other relevant status. For academic staff, additional classifications

would include the following: assistant, associate, and full professor; tenure track, non-tenure-track and tenured;

- That the workplace surveys collect and display data to reveal any potential employment inequity in salary level attainment by designated group, i.e., where do the members of the designated group fall in the salary grid of the establishment's occupational group.

Canadian Association of University Teachers, Submission to the EEART, April 2022

Recommendation 7.10: The implementation requirements for employment equity by contractors to whom the Federal Contractors Program applies should be equivalent to the implementation requirements for employers covered under the *Employment Equity Act*.

Threshold

We have taken into account the existing limited coverage of the FCP and the many recommendations to return to pre-2013 levels or below, and have been guided by the levels established in other jurisdictions, including other jurisdictions in Canada. We considered in particular that with a view to fostering equitable inclusion and sending an important message on the value of harmonizing legislative schemes across Canada, the threshold would appropriately be set to be consistent with the Québec contractors program (*Programme d'obligation contractuelle - OBC/POC*) at \$100,000.

The takeaway is that the current levels are too high given the nature of the program, to ensure that contractors with whom the federal government is entering into relationship are actually fostering substantive equality in hiring.

We were also concerned to avoid a situation in which firms could cumulate several contracts of \$90,000 with the federal government without meeting the threshold. We make a further recommendation on the cumulative amount for qualifying under the Federal Contractors Program.

Recommendation 7.11: The monetary threshold for the inclusion of contractors under the Federal Contractors Program should be established at close to pre-2013 levels, and with a view to broader harmonization with existing contractors programs across Canada, at \$100,000.

Recommendation 7.12: The monetary threshold should be assessed in terms of the cumulative contract value. No contractor should be able to cumulate contracts that total more than \$200,000 without subscribing to the Federal Contractors Program.

Recommendation 7.13: The threshold for the number of workers should be equivalent to the threshold established for employers under the *Employment Equity Act*.

The Federal Contractors Programs and the higher education sector

Education is what got us here, and education is what will get us out.

Honourable Senator Murray Sinclair, Chancellor, Queen's University

There has been significant movement on equity in higher education. This sector, under provincial jurisdiction, is crucial to redressing core barriers to equitable workplace inclusion. We address these barriers in Chapter 4. Barriers persist for those who work in higher education too. They include wage disparities, unconscious or implicit biases in the evaluation of curriculum vitae, accent biases, biases in the manner in which reference letters are written and the terms used to describe equity group members such as women or racialized minorities, gender biases in citation practices and peer review, biases in teaching evaluations, and the “equity tax” leading to disproportionately high and unacknowledged workloads for members of underrepresented equity groups.⁷⁴⁷

Federal tri-agency funding bodies receive significant research support from the federal government. The Advisory Panel on the Federal Research Support System recommended an increase of 10% annually for five years to the granting councils’ base budget, in addition to other investments.⁷⁴⁸ The Canadian Alliance of Student Associations acknowledged that universities and colleges receive federal funding and considered it important to be able to review the equity outcomes and consider models that support equity.⁷⁴⁹ The Canadian Association of University Teachers considered that there were improvements in universities covered by the FCP, and recommended the following:

CAUT recommends a return to the original threshold for federal contractors of \$200,000 and an eventual expansion of the program to include:

- a) Contractors with fewer than 100 employees but more than 50 including contract employees;
- b) Casual or contract employees of the federal contractor; and
- c) Contracts over \$100,000, as opposed to contracts over \$200,000.

We recommend that the definition of federal contracts under the FCP be expanded to capture federal research grants.

Canadian Association of University Teachers, Submission to the EEART, April 2022

Queen’s University, itself a federal contractor, has also called for the threshold for employers to be widened:

The Government of Canada should widen the threshold for employers to apply for federal funding annually. As a Federal Contractor, Queen’s must have an Employment Equity program. In fulfilling this obligation, Queen’s collects workforce information, completes a workforce analysis, establishes short-term and long-term numerical goals, and makes reasonable progress and efforts to achieve those goals. Therefore, we believe that mandating Employment Equity programs to apply for federal funding is a tremendous employment equity incentive that should be extended to more participants through different programs/initiatives.

Queen’s University, Human Rights and Equity Office, 19 April 2022

We welcome these recommendations, and initially considered including research grants as part of the determination of the threshold for coverage under the Federal Contractors Program. However, given the lower recommended thresholds and magnitude of grants, we consider that it is preferable to make a willingness to comply with the Federal Contractors Program a pre-condition for colleges and universities in the higher education sector, including their researchers, to apply for federal research grant funding and to participate in the work of the federal research granting councils and including the Canadian Knowledge and Science Foundation proposed by the Advisory Panel on the Federal Research Support System chaired by Dr. Frédéric Bouchard.⁷⁵⁰ The timing is apposite, given their report's emphasis on the importance of equitable inclusion.⁷⁵¹ Our recommendation is designed to foster clarity, consistency and transparency, as researchers themselves will know that their employer is part of the Federal Contractors Program and committed to equitable inclusion through the *Employment Equity Act* framework:

Recommendation 7.14: Colleges and universities should be required to agree to participate in the Federal Contractors Program to be eligible to apply for federal research grants and other federal research funding and to participate in federal research granting councils, including the proposed Canadian Knowledge and Science Foundation.

Legal services providers

Federal contracts for legal services providers range from the use of external law firms to provide advice to government, to contracts with online legal database providers or publishers. There seems little reason not to cover a major publisher of legal databases, with contracts valued at over a million dollars, when a range of small firms are included under the FCP.

In addition, professional, scientific, and technical services constitute one of the primary areas of employment in Canada according to the 2021 Census data; legal services are an important part of that employment.

Many large law firms have embraced EDI initiatives and have productive relationships with faculties of law that have sought to expand their representation of members of equity groups. Participation by these employers in the FCP program should be understood as a positive feature of bringing them into a community of learning that should benefit the legal profession and beyond.

It should be noted that contracts for the performance of legal services may be entered into only under the authority of the Minister of Justice. There is, however, a schedule of contracting authorities that are exempted from this rule. They include various commissioners, including the Auditor General and the Privacy Commissioner.⁷⁵²

Our task force was informed that legal service providers are excluded from the Federal Contractors Program, for reasons linked to solicitor-client privilege.

The state of the law in Canada is that solicitor-client privilege can be rebutted to allow for the global amount of legal fees that could be disclosed, if there is no reasonable possibility that disclosing the global amount would reveal solicitor-client communications.⁷⁵³ It is noted that the amount of contracts for some legal services, notably with legal database providers, is already made publicly available by the Government of Canada pursuant to open government practices.

The reasons offered for continuing to exempt legal service providers from coverage under the Federal Contractors Program would seem no longer to apply. In particular, if the legal service providers are included in the Open Canada online directory, they should be eligible to be included under the FCP if the other conditions have been met.

Recommendation 7.15: Legal services providers eligible to be included in the Open Government Canada online directory with individual contracts of \$100,000 or cumulative contracts that total more than \$200,000 in any given fiscal year should be included in the Federal Contractors Program.

Grants and contributions

The Grants and Contributions (G & C) programs of the federal government fund activities touching all sectors of Canadian society. The federal G & C programs have been reviewed by the Auditor-General of Canada.⁷⁵⁴ The Treasury Board has undertaken reforms to simplify processes, reduce administrative and reporting burdens on recipients, and better engage stakeholders in the design of programs.

The Comptroller General of Canada reported that there is clear evidence of improved access to information on G & C opportunities. The simplified and standardized application processes, tangible reduction in reporting requirements, greater consistency in funding practices within and across departments and movement from a culture of risk aversion to risk management have all helped to improve the functioning of G & C programs.⁷⁵⁵

At first blush, to consider including G & C program recipients under the *Employment Equity Act* framework through the FCP might seem contrary to the goal of simplifying the program. Yet the concerns to simplify have focused on requirements that were considered to be excessive and even redundant prior to the recent reforms. The Treasury Board notes that since 2013 and again since 2017, these have been reduced by almost 50%, with a “tell us once” approach that has reduced duplicate requests to recipients. The online application process streamlines matters and is apparently preferred by recipients. Simplification also means there is an increased use of single agreements, consolidated reporting, and single payments, challenges that may have existed in the past for inclusion seem less obvious now. The Treasury Board notes that there is a centralized website that provides “one-stop access” to apply for funding opportunities.⁷⁵⁶ Recipients can report digitally.

Auditing processes are already in place under the G & C program, and on-site audits have been reduced by 87% since 2008; the Treasury Board of Canada secretariat reports the focus is one of risk management rather than risk aversion, with auditing centred on the relative level of risk.

Employment equity would therefore not be a redundant add on. On the contrary, simplification could allow the G & C program to support core government objectives, like employment equity. Simplification should enhance the ability of incentives-based programs covering a wide array of governmental priority areas to reflect the face of Canada.

It is however clear that the G & C programs are so vast that a wide range of employers included in them should *not* be covered under the FCP. These include most obviously provincial governments and municipalities, who would rightly claim jurisdictional overreach.

Yet G & C programs also cover a range of incentives mechanisms, for example the reimbursements that the federal government provides to automotive companies and dealers as incentives for consumers to purchase electronic vehicles. These grants and contributions could total over \$100 million.

The recent improvements and simplification pave the way for streamlining of a government program that fosters inclusion across Canada. It is anticipated that inclusion of some of these employers will enable the employment equity framework to shed a spotlight on sources of real ingenuity and inclusion, for example, in the NGO sector.

Recommendation 7.16: An analysis should be undertaken of the aspects of the grants and contributions program that could appropriately be made subject to the *Employment Equity Act* framework, with a threshold comparable to the thresholds proposed for Federal Contractors Program employers.

The international cooperation sector and Canada in the world

Grants and contributions are in particular a key manner through which some non-governmental organizations are funded. The sector itself is vast, but one dimension warrants particular attention for the purposes of employment equity coverage: non-governmental organizations that represent Canada in the world. Their autonomy is key; so too is the vision that they reflect of Canada to the rest of the world.

Recently, one of the world's leading international development organizations, Médecins Sans Frontières/ Doctors Without Borders, spoke out to pledge to change the vision that international development organizations like themselves have unfortunately perpetuated, citing the ways in which they unwittingly perpetuated racist stereotypes of "white saviours". International aid organizations are particularly well placed to contribute to revisiting the image of Canada in the world to one that reflects an inclusive understanding of our country's workers and their potential to lead in a broad range of employment worldwide.

In a recent letter to Finance Minister Chrystia Freeland, 77 international development organizations sought increases in funding, from the \$8.15 billion pledged in the past budget to \$10 billion in 2025. The aid organizations said it well: "Foreign aid is not a handout. It is an investment in the type of world we all want to see."⁷⁵⁷ We consider this to include the perspective of equity. Many have started their own reflection on these issues – do they portray an exclusionary vision of Canadians, or do they show the extent to which Canada represents the world through its demographics?⁷⁵⁸ There is a tremendous opportunity here, one that Canadian development and human rights organizations should be encouraged to take seriously through adherence to employment equity principles. The task force was struck by one reflection made by a task force participant, suggesting that Canadians of the same origin as the host country were posted in those locations. We would suggest that Canada should be leading the charge to showcase equitable inclusion in all its diversity throughout operations abroad. NGOs should receive support from the proposed Employment Equity Commissioner to be able to foster equitable inclusion in international cooperation organizations.

Recommendation 7.17: Canada's international cooperation sector should be expressly included within the ambit of the Federal Contractors Program.

Recommendation 7.18: Workers in international cooperation organizations recruited in Canada, whether based in Canada or posted abroad, should be included in the calculation of the applicable numerical threshold under the *Employment Equity Act* framework, alongside the total amount of the contribution agreements with the Government of Canada.

The construction industry

Currently the Federal Contractors Program excludes construction. Construction does not include architecture or engineering contracts, which are included in the FCP.⁷⁵⁹ In Canada, the construction industry is one in which unionization rates have remained relatively high, but the representation of employment equity group members has reportedly been low. This is an area to which the FCP could apply, but does not. The main reason shared with the task force is that it is characterized by subcontracting.

In Quebec, the 2006 Task Force on the Full Participation of Black Communities in Quebec Society called for “the Minister of Labour to request that the Commission de la construction du Québec create a position within its organization to oversee the interests and fair representation of Quebecers from visible minorities in construction trades.”⁷⁶⁰ The magnitude of the challenge of achieving equitable representation on the basis of gender, as required by law,⁷⁶¹ in an industry that has been recognized as almost entirely male has been analyzed by the Commission itself.⁷⁶²

From existing procurements arrangements involving setbacks, in particular for First Nations, Métis and Inuit peoples, the federal government already has experience ensuring that sub-contractors contractually agree to report the relevant demographic data to the bidding contractor. Auditing procedures are already in place. The size of these contracts is significant in already heavily regulated trades that have had histories of under inclusion. The potential to help to move the needle on achieving and maintaining employment equity in this sector should not be underestimated.

Recommendation 7.19: Construction industry contractors who meet the threshold requirements should be included under the Federal Contractors Program.

Recommendation 7.20: The threshold number of employees should be assessed by combining the total number of workers across the main bidding contractor and its subcontractors, with due regard for anticipated variations over the lifecycle of the contract.

Supporting equity groups as employers in government procurements and preserving policy space in trade agreements

There is a related aspect to procurements that many stakeholders from employment equity groups mentioned, directly or indirectly. That is, beyond their inclusion in employment equity programs as workers, many were interested in seeing greater opportunities for entrepreneurship supporting employment equity group members.

International human rights law calls for it.⁷⁶³

Chapter 7: Technical regulatory implications of employment equity coverage

It is also a feature of the United States efforts to promote “diverse business enterprises” (DBE) that have had to rely on participation goals, tied to contract value, rather than other incentives. Our task force was informed of the many familiar limits and differences.

Currently, a mandatory set-aside program is in place for procurements designed for an area, community or group in which First Nations, Métis or Inuit peoples constitute at least 51% of the population and where Indigenous populations are recipients of the goods, services or construction. The bidder must certify that at least 33% of the value of the work performed under the contract is to be performed by an Indigenous business. Subcontractors are required to provide the requisite information to enable compliance to be substantiated. A previously applied requirement for Indigenous businesses to have at least 33% First Nations, Métis or Inuit employees is no longer applied to those businesses subject to the 2021 eligibility criteria.

As discussed in Chapter 3, procurements policies offer an important opportunity to move beyond the more limited framework currently captured in Section 7 of the *Employment Equity Act* and better reflect principles of Indigenous self-determination reflected in the *United Nations Declaration on the Rights of Indigenous Peoples Act*, and Canada’s commitment to truth and reconciliation.

More generally, Public Services and Procurement Canada has acknowledged the importance of supplier diversity, recognizing that entrepreneurs from equity groups have been historically under-represented in federal procurements. While it has indicated that “Procurement Assistance Canada is making a significant effort to reduce barriers and provide targeted support for businesses run by women, Indigenous Peoples, Black and racialized Canadians, persons with disabilities, and lesbian, gay, bisexual, queer, transgender, transsexual and two-spirited (LGBTQ2+) Canadians”⁷⁶⁴ the initiatives seem tied to summits and similar initiatives to encourage applications.

There has, moreover, been progress within trade agreements, with the inclusion of chapter specific reservations and exceptions relating to Indigenous peoples and Indigenous businesses. The *Canada-United States-Mexico Agreement* (CUSMA) contains a general exception, which clarifies that the Canadian government can adopt or maintain measures necessary to fulfil its legal obligations to Indigenous peoples, with specific reference to Section 35 Aboriginal Rights as recognized and affirmed in the *Constitution Act, 1982*, as well as self-government agreements.

The trade dimension is important more broadly, for its impact on who it might have excluded from the operation of the FCP. For example, UNIFOR noted that the automotive sector used to be heavily covered by the FCP before it was revised. It included employers who hired internationally. UNIFOR recalled the important relationship between trade agreements and employment equity.⁷⁶⁵

We note that some of Canada’s recent trade agreements include provisions on the respect of fundamental principles and rights at work as defined by the International Labour Organization, notably in Chapter 23 of CUSMA and Chapter 23 of the *Canada-European Union Comprehensive Economic and Trade Agreement* (CETA). Recent trade agreements include equality rights and place attention on adopting and maintaining the “effective elimination of discrimination in respect of employment and occupation” and sanction the “sustained or recurring” failure to enforce labour standards. For example, Article 23:4 of CUSMA contains a non-derogation clause,

- clarifying that “it would be inappropriate” for Canada or the other parties to “encourage trade or investment by weakening or reducing the protections afforded in each Party’s labor laws,” and
- specifically preventing waiver or derogation if the waiver or derogation would be “inconsistent” with the right, or would weaken adherence to it.

Article 23:4 of CUSMA offers a similar requirement to uphold levels of protection.

These provisions constitute an important step in the direction of recognizing the interface between trade, labour and human rights standards. They underscore a message reinforced throughout this report: the *Employment Equity Act* framework is meant to be enforced.

Procurement policies should be interpreted in keeping with these provisions. These provisions may also be understood to ensure the policy space necessary – at least with the trading partners in the covered agreements – to add clauses to procurements agreements that support employment equity goals.

Contractors programs comparatively

United States

The employment equity mechanism that has most influenced the Canadian FCP has been in the United States. Executive Order 11246 of 24 September 1965 on Equal Employment Opportunity is the core of U.S. affirmative action measures. It is a federal contractors program. Its coverage is broad and includes the construction industry. Federal contractors are required to undertake affirmative action measures to ensure non-discrimination in employment on the basis of race, colour, national origin, religion, gender and sexual orientation/ gender identity, and maintain records of their hiring and employment practices if they have contracts of \$10,000 or more. For employers with 50 or more employees and contracts in excess of \$50,000, they are required to have a written plan. In the case of disability, the measures apply and a plan is required with 50 employees and contracts of \$15,000; the amount is 50 employees and \$150,000 in the case of veterans.⁷⁶⁶

In the United States, the Office of Federal Contract Compliance Programs (OFCCP) is responsible for administration and enforcement. For large contracts of over \$10 million, it undertakes pre-award reviews, with a list of “in compliance” federal contractors made available through a pre-award registry.⁷⁶⁷ The registry allows federal agency contracting offers to request pre-award clearance from OFCCP.

The OFCCP also conducts compliance audits and complaint investigations under Section 206 of the Executive Order. In 2021, 1,125 compliance audits were conducted, which resulted in 135 conciliation/ settlement agreements. The OFCCP also receives complaints “by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order”– 1,531 in 2021 alone. It investigated and resolved only 114 complaints; however, referring most of the complaints to the Equal Employment Opportunity Commission (EEOC) for investigation and resolution whenever it has reason to believe that the practices violate Title VI or Title VII of the Civil Rights Act of 1964.⁷⁶⁸ Professor Stacy Hawkins also reports that the possibility that federal contractors who are in severe or continued non-compliance may be debarred is a rarely used tool.⁷⁶⁹

European Union

In contrast, the 2014 EU Directive on Public Procurements preserves significant space for EU Members to determine what will be covered by the agreement, and permits contract performance conditions to favour the measures that promote equality between men and women for work, increase participation of women in the labour market and the reconciliation of work and private life, alongside compliance “in substance” with fundamental International Labour Organization (ILO) Conventions. It also allows “more disadvantaged persons than are required under national legislation” to be recruited.⁷⁷⁰ In implementing this Directive, Spain requires bidders to show that the workplace already meets a representational target to benefit from the preference. Creatively, Spain foresees that in deciding who to award the contract on a plurality of considerations that go beyond the price dimensions, it may seek reports from unions or human rights organizations (and other organizations related to some of the other social justice concerns including environmental justice concerns) to verify the social and environmental considerations.⁷⁷¹

One important early observation in the research should be kept in mind, however. Professor Christopher McCrudden notes that some states adopt legislation but have little activity actually linking procurements with equality. Other states use the policy latitude they have to act, and link equality with procurements in practice, without much legislative fanfare.⁷⁷²

South Africa

South Africa’s program for broad based Black Economic Empowerment, drawing on the post-apartheid constitutional mandate for positive action to remedy the effects of racial segregation and exclusion. The *Black Economic Empowerment Act* as amended in 2014⁷⁷³ includes a broad range of measures including employment equity generally and for these purposes, preferential procurement from enterprises that are owned and managed by Black people. “Black people” is a generic term in South Africa that is defined to include “Africans, Coloureds, and Indians” and incorporates a pre-27 April 1994 citizenship or citizenship eligibility requirement. Amendments to the South African *Employment Equity Amendment Act*, 2022, signed into law on 14 April 2023 and entering into force on 1 September 2023, expressly link eligibility for government procurement contracts to compliance with employment equity requirements and non-discrimination.

In light of the significance of trade agreements and the need to secure the policy space to include equality in procurements, as well as the importance of the comparative examples, we offer the following recommendations.

Recommendation 7.21: Specific provisions should be made in future negotiations to ensure policy space for setbacks on behalf of employment equity groups under the *Employment Equity Act*.

Recommendation 7.22: The federal government should use its policy space to include setbacks on behalf of employment equity groups under the *Employment Equity Act* in awarding procurement contracts to promote the equitable inclusion of entrepreneurs from employment equity groups in the award of federal contracts. Prior government-to-government consultations should take place as concerns First Nations, Métis and Inuit peoples.

Recommendation 7.23: International agreements on procurements negotiated by the Government of Canada should explicitly clarify that Canada retains the ability to adopt or maintain its commitment to substantive equality, including through the *Employment Equity Act* framework.

Time to include Parliamentary employees

Parliamentary employees are currently not covered under the *Employment Equity Act* framework, for largely historical reasons. The Supreme Court of Canada recognized in 2005 that the *Canadian Human Rights Act* applies to them:

Canada (House of Commons) v. Vaid, [2005] 1 S.C.R. 667, 2005 SCC 30:

The employment roster of the House of Commons in 2005 is very different from that of 1867. In the early period, the House of Commons had only 66 permanent staff and 67 sessional employees. At present, according to the Human Resources Section of the House of Commons, there are 2377 employees. These include many departments and services unknown in 1867. The Library of Parliament alone employs 298 people, more than twice the total number of House employees in 1867. The Information Services for the House now has 573 employees. Not all of these greatly expanded services relate directly to the House's function as a legislative and deliberative body. Parliamentary Precinct Services employs over 800 staff including a locksmith, an interior designer, various curators, five carpenters, a massage therapist, two picture framers, a chief of parking operations and two traffic constables. Parliamentary Corporate Services includes several kitchen chefs, lesser cooks and helpers, three dishwashers/potwashers and other catering support staff. There is no doubt that the House of Commons regards all of its employees as helpful but the question is whether that definition of the scope of the privilege it asserts is too broad. ...

The appellants having failed to establish the privilege in the broad and all-inclusive terms asserted, the respondents are entitled to have the appeal disposed of according to the ordinary employment and human rights law that Parliament has enacted with respect to employees within federal legislative jurisdiction. ...

There is no indication in the language of s. 2 that the [Canadian Human Rights Act](#) was not intended to extend to employees of Parliament. There is no reason to think that Parliament "intended" to impose human rights obligations on every federal employer except itself. ...

I conclude therefore that the [Canadian Human Rights Act](#) does apply to employees of the Senate and House of Commons.

Currently the House of Commons has budgeted 1,807 full time equivalent employees, as detailed in the table below, and the Library of Parliament has budgeted 383.52 full time equivalent employees, not including guides, students or interns.⁷⁷⁴

Table 7.2: Budgeted full time equivalent employees⁷⁷⁵

House of Commons offices	Number of employees (full time equivalents)
Office of the Clerk and Secretariat	62
Procedural Services	329
Office of the Law Clerk and Parliamentary Counsel	38
Office of the Deputy Clerk, Administration	52
Parliamentary Precinct Operations	470
Office of the Sergeant-at-Arms and Corporate Security	68
Digital Services and Real Property	441
Human Resources Services	162
Finance Services	186
Total	1,807

Recommendation 7.24: Parliamentary employees should be included within the scope of the *Employment Equity Act*. This may be accomplished in a manner analogous to the inclusion of Parliamentary employees under the *Pay Equity Act* framework, through amendments to the *Parliamentary Employment and Staff Relations Act*.

Successorship

As is the case in much collective bargaining, employment standards across Canada and pay equity legislation in Québec and Ontario, it would be prudent for an *Employment Equity Act* to anticipate that the alienation of an enterprise or the modification of its legal structure shall have no effect upon employer’s obligations under the *Employment Equity Act* and covered programs. Adding a provision of this nature in no way takes away from the premise that employees have a right to a workplace that is free from systemic discrimination and harassment.⁷⁷⁶

Of course, this kind of provision would not be expected to grant jurisdiction in the event of the loss of federal jurisdiction. However, it could usefully be clarified, as was the *Canada Labour Code* following the recommendation of the Task Force chaired by Andrew Sims, Q.C. to review Part I of the *Canada Labour Code*, that successorship should apply to businesses that move from provincial to federal jurisdiction.⁷⁷⁷ The task force chaired by Professor Bilson considered this recommendation and made an analogous recommendation when it proposed federal pay equity legislation in 2004, and was attentive to ensuring that any existing provincial plans could be considered for their compliance with federal requirements.⁷⁷⁸

Recommendation 7.25: The *Employment Equity Act* should be amended to provide that successorship provisions should apply to businesses that move from provincial to federal jurisdiction alongside transitional provisions in the *Employment Equity Regulations* to address reporting requirements.

Other proposals

In a myriad of ways, our task force heard from stakeholders that there is an appetite for ensuring that employment equity is recognized to benefit society as a whole. Many were seeking ways to ensure that its scope was as comprehensive as possible. Employment equity groups, and some employers and unions wanted to go further, to think about how to strengthen entrepreneurship by employment equity groups.

While this report could not consider everything, we have tried to consider and respond carefully to quite a lot. There is necessary detail, but we have kept the focus on the big picture – strengthening the three pillars of implementation through barrier removal, meaningful consultations and regulatory oversight. Coverage is not for its own sake, but to build a sustainable and supportive scheme to foster equitable inclusion for all.

We were buoyed by the fact that stakeholders who came before us were not just viewing employment equity as a constraint but as a competitive advantage, for individual employers, for economic growth, and for Canadian society as a whole. This includes how we represent ourselves in the world.

The recommendations offered in this chapter seek to respect those broader societal aspirations. This report identifies the areas where coverage should and can quite logically be extended. We pay attention to thresholds, and seek to promote communities of learning.

Employment equity is not and cannot be everything to everyone. But it can be true to its own objectives and must be understood as an important part of the holistic approach to labour law and human rights law.

⁷²⁶ See e.g. Harish C. Jain et al., “Effectiveness of Canada’s Employment Equity Legislation for Women (1997-2004): Implications for Policy Makers” (2010) 65 *Relations industrielles* 304 at 324.

⁷²⁷ See Patricia Monture, *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995); Leah F. Vosko, *Managing the margins: Gender, citizenship and the international regulation of precarious employment* (Oxford University Press, 2010); Dominique Méda, “Working against an End: Shifting Gears for a New Beginning” in Isabelle Ferreras, Julie Battilana & Dominique Méda, *Democratize Work: The Case for Reorganizing the Economy* 111 (University of Chicago Press, 2022).

⁷²⁸ See e.g. Canadian Trucking Alliance, Stakeholder Consultations, 7 April 2022.

⁷²⁹ See e.g. Written submission of the Conseil du patronat du Québec, Presented to the EEART on 8 April 2022.

⁷³⁰ Sources: Federal Jurisdiction Workplace Survey, 2015; Survey of Payroll Hours and Employment, November 2015 & November 2021; Employer Annual Hazardous Occurrence Report Database, 2019; Industrial Relations Information System, 2022; Labour Program calculations.

⁷³¹ Sources: Federal Jurisdiction Workplace Survey, 2015; Canadian Business Counts, December 2021; Employer Annual Hazardous Occurrence Report Database, 2019; Labour Program calculations.

⁷³² 2020 SCC 5, [2020] 1 S.C.R. 166.

⁷³³ United Nations Human Rights Special Procedures, End of Mission Statement, *Special Rapporteur on the Rights of Indigenous Peoples*, 10 March 2023 at 9. The final report of his visit to Canada is expected in September 2023.

⁷³⁴ International Development Research Centre (IDRC), Presentation to the EEART, 12 April 2022.

⁷³⁵ Canadian Armed Forces *Employment Equity Regulations* SOR/2002-421.

⁷³⁶ Deputy Minister of Foreign Affairs, Deputy Minister of International Development, Deputy Minister of International Trade, and Associate Deputy Minister of Foreign Affairs before the Standing Senate Committee on Foreign Affairs and International Trade (AEFA) 2022-06-09: <https://www.international.gc.ca/transparency-transparence/briefing-documents-information/parliamentary-committee-comite-parlementaire/2022-06-09-aeфа.aspx?lang=eng#a6-3>.

⁷³⁷ Public Services and Procurement Canada, “Helping businesses work with government” (19 January 2023).

⁷³⁸ Evaluation and Data Development Strategic Policy, *Evaluation of the Federal Contractors Program: Final Report* (Ottawa: Human Resources Development Canada, April 2002) at 11.

⁷³⁹ Source: Labour Program data.

⁷⁴⁰ Evaluation and Data Development Strategic Policy, *Evaluation of the Federal Contractors Program: Final Report* (Ottawa: Human Resources Development Canada, April 2002) at 18-19.

⁷⁴¹ Evaluation and Data Development Strategic Policy, *Evaluation of the Federal Contractors Program: Final Report* (Ottawa: Human Resources Development Canada, April 2002) at 5.

⁷⁴² Evaluation and Data Development Strategic Policy, *Evaluation of the Federal Contractors Program: Final Report* (Ottawa: Human Resources Development Canada, April 2002) at 3.

⁷⁴³ Evaluation and Data Development Strategic Policy, *Evaluation of the Federal Contractors Program: Final Report* (Ottawa: Human Resources Development Canada, April 2002) at 15 – 16.

⁷⁴⁴ See « Programme d’obligation contractuelle égalité et emploi », online : https://www.tresor.gouv.qc.ca/fileadmin/PDF/faire_affaire_avec_etat/cadre_normatif/form_prog_egalite_em_ploi.pdf.

⁷⁴⁵ UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada, International Convention on the Elimination of All Forms of Racial Discrimination, 13 September 2017 CAN/CO/21-23, Para. 32(e).

⁷⁴⁶ Evaluation and Data Development Strategic Policy, *Evaluation of the Federal Contractors Program: Final Report* (Ottawa: Human Resources Development Canada, April 2002) at 14–15. The report noted that the flexibility of the FCP program was something that stakeholders did not want to lose in the search for equivalency.

⁷⁴⁷ See Frances Henry, Enakshi Dua, Carl E. James, Audrey Kobayashi, Peter Li, Howard Ramos and Malinda S. Smith, *The Equity Myth: Racialization and Indigeneity at Canadian Universities* (UBC Press, 2017); *Ryerson University v. Ryerson Faculty Association*, 2018 CanLII 58446 (ON LA) (Arbitrator: William Kaplan); Canadian Association of University Teachers, *Underrepresented and Underpaid: Diversity & Equity Among Canada’s Postsecondary Education Teachers* (April 2018); Holly O. Witteman, Michael Hendricks, Sharon Straus, Cara Tannenbaum, “Are gender gaps due to evaluations of the applicant or the science? A natural experiment at a national funding agency” (2019) 393 *The Lancet* 531.

⁷⁴⁸ *Report of the Advisory Panel on the Federal Research Support System* (Ottawa: Innovation, Science and Economic Development Canada, 2023) (Chair: Frédéric Bouchard) Recommendation 5.

⁷⁴⁹ Canadian Alliance of Student Associations, Presentation to the EEART, 2 June 2022.

⁷⁵⁰ *Report of the Advisory Panel on the Federal Research Support System* (Ottawa: Innovation, Science and Economic Development Canada, 2023) (Chair: Frédéric Bouchard)

⁷⁵¹ *Report of the Advisory Panel on the Federal Research Support System* (Ottawa: Innovation, Science and Economic Development Canada, 2023) (Chair: Frédéric Bouchard)

⁷⁵² *Government Contract Regulations* SOR/87-402, Subsection 4(2).

⁷⁵³ *Maranda v. Richer*, 2003 SCC 67 at paras. 31-34; *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, (2005) 251 DLR (4th) 65 at paras. 7 – 13 (ON CA); *R. v. Haevischer*, 2014 BCSC 1008 at paras. 21-35; *Newfoundland and Labrador Legal Aid Commission (Re)*, 2019 NLSC 171 at paras 22-61.

⁷⁵⁴ See e.g. Government of Canada Office of the Chief Audit Executive, *Audit of Grants and Contributions - Oversight and Monitoring Final Report* (May 2021); Health Canada and the Public Health Agency of Canada, *Audit of the Management of Grants and Contributions at Health Canada* (March 2018); Employment and Social Development Canada, *Audit of Grants and Contributions Control Framework* (November 2018); Public Safety Canada, *Internal Audit of Grants and Contributions Audit Report* (November 2017).

⁷⁵⁵ Message from the Comptroller General of Canada in Treasury Board of Canada Secretariat, Plan to Reform the Administration of Grant and Contribution Programs: 2017 Results Report.

⁷⁵⁶ <https://www.canada.ca/en/employment-social-development/services/funding/gcos.html>

⁷⁵⁷ “Keep the promise: An open letter to Canada’s Finance Minister Chrystia Freeland” available online: <https://cooperation.ca/wp-content/uploads/2023/02/Open-Letter-to-Chrstia-Freeland_ENG_v2.pdf>.

⁷⁵⁸ Karen McVeigh, “MSF ran ‘white saviour’ TV ad despite staff warnings over racism”, *The Guardian* (10 September 2020); Dr. Chinonso Emmanuel Okorie & MSF Norway General Director Lindis Hurum, “Anti-racism: When you picture Doctors Without Borders, what do you see?” (January 2023), online (video): *YouTube* <<https://www.youtube.com/watch?v=8DFemg94ufU>>.

⁷⁵⁹ Public Services and Procurement Canada, *Supply Manual, Annex 5.1: Federal Contractors Program for Employment Equity*, Section 2(a) (“The FCP for employment equity applies to: construction (construction does not include architecture and engineering which are subject to the FCP; *Directive on the Management of Procurements*, Section D.3 Federal Contractors Program).

⁷⁶⁰ “Task Force Report on the Full Participation of Black Communities in Quebec Society” (Ministry of Immigration and Cultural Communities, March 2006) (Chair: Yolande James) at 17, Recommendation 2.7.

⁷⁶¹ Act respecting Labour Relations, Vocational Training and Workforce Management in the Construction Industry, CQLR c. R-20, Section 126.0.1.

⁷⁶² Charles Morrissette, *Analyse d’impact réglementaire : Mise en place de mesures de redressement du Programme d’accès à l’égalité des femmes de l’industrie de la construction* (12 mai 2016).

⁷⁶³ See e.g. Convention on the Rights of Persons with Disabilities, A/RES/61/106, 13 December 2006, Article 27(1)(f). See also Committee on the Rights of Persons with Disabilities, General Comment 8 (2022) on the Rights of Persons with Disabilities to Work and Employment, CRPD/C/GC/8, 9 September 2022 at paras 38 & 39.

⁷⁶⁴ Public Services and Procurement Canada, “Helping businesses work with government” (19 January 2023).

⁷⁶⁵ UNIFOR, Presentation to the EEART, 10 May 2022.

⁷⁶⁶ Stacy Hawkins, “Affirmative Action Law & Policy in the United States: Past, Present and Future,” unpublished paper prepared for the EEART, 31 August 2022.

⁷⁶⁷ Office of Federal Contract Compliance Programs, “National Pre-Award Registry” (last consulted 16 April 2023), online: <<https://www.dol.gov/agencies/ofccp/pre-award>>.

⁷⁶⁸ <https://www.dol.gov/agencies/ofccp/about/data/accomplishments>

⁷⁶⁹ Hawkins identified 36 results in a search that includes the possibility of exclusion of any type, not simply non-compliance with OFCCP regulations. Stacy Hawkins, “Affirmative Action Law & Policy in the United States: Past, Present and Future,” unpublished paper prepared for the EEART, 31 August 2022.

⁷⁷⁰ Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on Public Procurements and repealing Directive 2004/18/EC, Official Journal of the European Union L 94 (28 March 2014) at 97.

⁷⁷¹ Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014.

⁷⁷² Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (Oxford University Press, 2007) at 412.

⁷⁷³ *Act No. 46 of 2013, Broad-Based Black Economic Empowerment Amendment Act, 2013* (27 January 2014); JL van de Rheede, *The Appropriateness of Equality Legislation in Addressing the Challenges faced by Black Professional Employees in South Africa*, Thesis presented in fulfilment of the requirements for a PhD in Law at the University of the Western Cape, 11 November 2019.

⁷⁷⁴ Library of Parliament Annual Report 2021-2022 https://lop.parl.ca/staticfiles/PublicWebsite/Home/About/CoporateDocuments/PDF/Annual_Report_2021-2022-e.pdf

⁷⁷⁵ Figures may not add up due to rounding. Source: House of Commons, *Report to Canadians 2022*.

⁷⁷⁶ See the discussion in *Pay Equity: A New Approach to a Fundamental Right* (Pay Equity Task Force Final Report, 2004) (Chair: Beth Bilson) at 194–195.

⁷⁷⁷ Task Force Report, *Seeking a Balance: Review of the Canada Labour Code, Part 1* (Ottawa: Public Works and Government Services Canada, 1995).

⁷⁷⁸ *Pay Equity: A New Approach to a Fundamental Right* (Pay Equity Task Force Final Report, 2004) (Chair: Beth Bilson) at 194–196.

Conclusion and recommendations

It takes all of us

[W]hat matters most is that the essence of legal standards infiltrates working life.

Lizzie Barmes, Bullying and Behavioural Conflict at Work: The Duality of Individual Rights
(Oxford University Press, 2016) 265

We heard repeatedly that Canada has an opportunity to lead by example. On employment equity, as we acknowledge our past with humility and work toward an equitably inclusive future, we continue show the world that a deeply pluralist, open, democratic and equitable society is possible.

It is clear that despite many calls from across Canada and internationally, the federal *Employment Equity Act* framework, covering the 5.1% of the workforce that is in federal jurisdiction, and broader scope with the recommended expansion of the Federal Contractors Program, cannot alone meet the high aspirations expressed by some who came before the task force. One of the takeaways is that while the federal jurisdiction plays a leadership role, it will become necessary for the lessons of employment equity to be embraced in jurisdictions that do not yet have employment equity frameworks.

In this sense, it is worth carefully considering the prospect of promoting harmonization, through the international conventions that Canada has ratified. This will enable us to reflect substantive equality fully, moving beyond addressing discrimination in individual cases alone. The United Nations Special Rapporteur on the Rights of Persons with Disabilities, Catalina Devandas-Aguilar, on a visit to Canada in 2019, encouraged the federal government to foster mechanisms for intergovernmental collaboration with provinces and territories.⁷⁷⁹ The task force was informed that dialogue is already underway between the federal and provincial governments to establish and maintain collaboration to reduce overlap between federal and existing provincial equity programs and legislation.⁷⁸⁰ Some of our recommendations will foster greater harmonization with the employment equity framework in Québec. We note that following amendments to the *Employment Equity Act* framework to encompass pay transparency, British Columbia has announced that it is working to bring pay transparency to that province. Federal leadership on employment equity is meaningful beyond the federal jurisdiction.

This report has engaged with the law and legal frameworks, out of the firm conviction that law reform really matters. But law is not enough. And substantive equality must be understood in context; it is meant to be lived.

People most need to internalize substantive equality norms. There needs to be deep listening through meaningful consultations, timely support, sufficient resources, alongside commitment, knowledge and leadership from the top within workplaces, and from the governmental institutions charged with oversight.⁷⁸¹ And we need to care.

This report has been built around the experiences and expertise shared with our task force by the range of people and groups who came before us. From them, we were able to reinforce the conviction that working well together is part of building a society in which we can also live well together – all of

us. This is happening within government too – we cannot count the number of times public service employees referenced the Clerk of the Privy Council’s call for leaders to commit to “personally learning about racism, reconciliation, accessibility, equity and inclusion, and fostering a safe, positive environment”.

This report has tried to honour the substantial amount of work that has gone before us, by bringing that work into the discussion through this report. In 2017, union and management took away the following lesson:

If there is one lesson that task force members would highlight from their rich and robust discussions, it is that real change in an organization’s culture happens only when people understand:

- why it makes sense
- how they can be proactively engaged as drivers of change when they are provided with adequate and timely support to make it happen

Building a Diverse and Inclusive Public Service: Final Report of the Joint Union/Management Task Force on Equity and Inclusion, 2017

We take away the same lesson. Particularly in a moment that can readily become polarized, we need to be able to challenge misinformation and confusion about employment equity. Much of this is already happening in Canada. Canadians need to see practical ways to make a difference.

We trust this report offers a small contribution to both.

We therefore call for transformation that is perhaps more fundamental than might have been imagined. Our commitment to equitable inclusion must be at the level of our societies. It must be an understanding of deep equality that values the quality of human relationships and that works to enable our society to flourish. In this sense it takes an understanding of our mutuality, and some would even say, the grace to recognize that despite all of our hard work and skill and experience, we continue to learn what our maturing, pluralist society requires and we believe, is developing, each time we move genuinely and resolutely to acknowledge truth, and foster reconciliation.

Workplaces are such a crucial part of that equation, of building and sustaining a strong democracy. They need to be supported to achieve and sustain the *Employment Equity Act* framework of equitable inclusion. Our task force came away with the conviction that at some level, this truth is understood. But we need to make it a reality in the lives of many in our society who have been excluded. Through our broader public policy supporting decent work, through our specific legislative frameworks supporting equitable inclusion, we have a unique and urgent opportunity to build back better, for all of us.

In this spirit, we offer the following concluding recommendations:

Recommendation C. 1: An all of government approach should be adopted, recognizing that employment equity is transversal and affects us all.

Recommendation C.2: The *Employment Equity Act* should be revised to confirm that it is considered quasi-constitutional human rights legislation.

Recommendation C.3: International human rights treaties ratified or acceded to by Canada that inform a proactive, systemic approach to the employment equity framework should be specifically referenced in the revised *Employment Equity Act*.

Recommendation C.4: The federal government should encourage the harmonization of employment equity frameworks across jurisdictions in Canada, in keeping with Canada's international human rights and international labour standards commitments.

Recommendation C.5: The Government of Canada should encourage the International Labour Organization to undertake a general survey on special measures, to ensure comprehensive comparative experiences can effectively be shared.

Comprehensive list of report recommendations

Chapter 1: Equitable inclusion in the changing world of work: Toward supportive and sustainable coverage

Recommendation 1.1: The purpose of the *Employment Equity Act* should be updated as follows: “The purpose of this Act is to achieve and sustain substantive equality in the workplace through effective employer implementation, meaningful consultations and regulatory oversight of employment equity and, in the fulfilment of that goal, to:

- correct the conditions of disadvantage in employment experienced by employment equity group members
- give effect to the principle that employment equity means more than treating persons in the same way but also requires barrier removal including special measures
- support the implementation of Canada's international human rights commitments to substantive equality and meaningful consultations in the world of work, including in the *United Nations Declaration on the Rights of Indigenous Peoples*, and
- foster equitable inclusion and sustainable economic growth, full and productive employment and decent work for all”

Recommendation 1.2: Employment equity data collection and benchmarks should be systematically rethought to eliminate barriers and foster data justice.

Chapter 2: Data justice

Recommendation 2.1: An Employment Equity Data Steering Committee should be established under the *Employment Equity Act* to support implementation, meaningful consultations, and regulatory oversight to achieve and sustain employment equity.

Recommendation 2.2: The Employment Equity Data Steering Committee should have as a clear mandate to adopt a human rights-based, data justice approach.

Recommendation 2.3: The Employment Equity Data Steering Committee should comprise high level representation that includes as titular members Statistics Canada, the Employment Equity Commissioner, ESDC's Chief Data Officer, the Canadian Human Rights Commission, the Labour Program, the Public Service Commission and TBS-OCHRO.

Recommendation 2.4: The Employment Equity Data Steering Committee should include sub-committees with appropriate technical specialists within the federal government that are meaningfully representative of employment equity group members.

Recommendation 2.5: The mandate of the Employment Equity Data Steering Committee should include

- recommending appropriate expansions or merging of databases, sources and surveys that affect the ability of federally regulated employers and employers subject to the Federal Contractors Program to report on the representation of employment equity groups and subgroups
- prioritizing the identification and removal of barriers in data benchmarks that affect discouraged and overqualified workers, and
- undertaking research in collaboration with academics and broader communities that are meaningfully representative of employment equity groups

Recommendation 2.6: Labour market surveys conducted by Statistics Canada should include a question, developed in consultation with the Employment Equity Data Steering Committee, asking how long workers looked for employment in their field of study.

Recommendation 2.7: The Employment Equity Data Steering Committee should be considered part of the *Employment Equity Act* framework.

Recommendation 2.8: The *Employment Equity Act* should specify that the collection of distinctions-based, disaggregated and intersectional data is authorized to meet the purpose of achieving and sustaining substantive equality for members of employment equity groups.

Recommendation 2.9: Distinctions-based, disaggregated and intersectional data should be collected whenever reasonably possible and with due regard to privacy protections, with the purpose of ameliorating the conditions of all equity groups and with special attention to members of the most underrepresented employment equity groups.

Recommendation 2.10: The *Employment Equity Regulations* or guidelines prepared under them should offer sustainable support to workplaces on how to prioritize employment equity initiatives on those employment equity groups and subgroups that are the most underrepresented in the workplace, while retaining responsibility for achieving employment equity for all employment equity groups.

Recommendation 2.11: The *Employment Equity Act* should specifically clarify that the purpose of data collection is to support achieving and sustaining employment equity in the workplace, by building trust in support of implementation, meaningful consultations and regulatory oversight.

Conclusion and recommendations

Recommendation 2.12: The *Privacy Act* and *PIPEDA* should be reviewed and as appropriate amended to clarify expressly that the data collection frameworks are to be interpreted to support the human rights purpose of the *Employment Equity Act*, including in implementation, meaningful consultations and regulatory oversight.

Recommendation 2.13: Self-identification should remain voluntary under the *Employment Equity Act* framework.

Recommendation 2.14: Employers should be required under the *Employment Equity Act* framework to ask all workers to complete a self-identification survey on initial hiring, on an annual basis, and on separation from the employer.

Recommendation 2.15: Completing the self-identification survey should be mandatory, but the survey should include the option not to self-identify under each question related to membership in an employment equity group or sub-group.

Recommendation 2.16: The self-identification survey should be available in accessible formats, include all of the employment equity groups and disaggregated sub-groups, and clarify that a worker may self-identify as being a member of as many of the employment equity groups and disaggregated sub-groups as apply.

Recommendation 2.17: Within the federal public service, self-declaration on appointment should be streamlined with self-identification for the purposes of the *Employment Equity Act*.

Recommendation 2.18: Within the federal public service, self-identification survey data should be centralized and streamlined, making the Treasury Board Secretariat the central record recipient and recorder to facilitate appropriate employment equity data sharing between units.

Recommendation 2.19: The self-identification survey should be available for workers to update at any moment in their work lifecycle and resubmitted to employees on an annual basis for any updates.

Recommendation 2.20: Employers should be permitted to remind workers to complete the separate, confidential and voluntary self-identification survey at the end of the accommodation process, so long as self-identification for the purpose of employment equity is understood to remain voluntary, confidentiality can be assured, and the datasets are understood to remain separate.

Recommendation 2.21: The *Employment Equity Act* should expressly clarify that data collection and reporting on sub-group members are permitted, and permit special measures to be taken to improve the hiring, promotion and retention of those sub-group members that are relatively less well represented in the employer's workplace.

Recommendation 2.22: The *Employment Equity Regulations* or guidelines prepared under them should provide detailed guidance on how to collect disaggregated data and report it in a meaningful manner to understand underrepresentation and where to prioritize.

Recommendation 2.23: The *Employment Equity Regulations* or guidelines prepared under them should provide directives to avoid misleading reporting if persons are counted multiple times across a number of disaggregated or intersecting groups.

Recommendation 2.24: The Employment Equity Data Steering Committee should be mandated to consider how best to draw on existing and emerging projections capabilities to redress the time lag in the calculation of labour market availability.

Recommendation 2.25: The federal public service should cease producing and relying on workforce availability to meet its responsibilities under the *Employment Equity Act* framework.

Recommendation 2.26: The “Canadian workforce” under Section 5(b)(i) of the *Employment Equity Act* should be the default benchmark in the *Employment Equity Regulations*.

Recommendation 2.27: Requests for derogations from the default benchmark should be addressed to the Employment Equity Commissioner on a case-by-case basis for a defined time period.

Recommendation 2.28: So long as representation is lower than Census population levels appropriate to the geographic context, employers should be permitted to continue to work to correct underrepresentation of employment equity groups, focusing on obtaining critical mass.

Recommendation 2.29: The Employment Equity Commissioner should develop tools that foster appropriate, accessible public sharing of employer reports. Protocols should be developed to ensure that proprietary information can be excepted from the information that is shared consistent with the *Employment Equity Act* and privacy laws.

Recommendation 2.30: An open government site for employment equity reports should be created to make all reports filed under the *Employment Equity Act* framework available through the accessible, searchable database.

Recommendation 2.31: the Employment Equity Commissioner should be provided with all reasonable latitude to ensure that employment equity data are made available for employment equity implementation and oversight as soon as possible after it is prepared.

Chapter 3: Rethinking equity groups under the *Employment Equity Act* framework

Recommendation 3.1: The term “designated groups” in the *Employment Equity Act* should be replaced by the term “employment equity groups”.

Recommendation 3.2: Employment equity group members should be referred to as “workers” in the *Employment Equity Act* framework.

Recommendation 3.3: The *Employment Equity Act* framework should adopt the term “Indigenous workers” with a distinctions-based approach to First Nations, Métis and Inuit peoples.

Recommendation 3.4: The *Employment Equity Act* should clarify that its use of “Indigenous workers” with a distinctions-based approach to First Nations, Métis and Inuit peoples is intended to be consistent with Section 35 of the *Constitution Act, 1982* and Section 91(24) of the *Constitution Act, 1867*.

Recommendation 3.5: The federal government should prioritize meaningful consultations consistent with First Nations, Métis and Inuit peoples’ right to self-determination to seek to resolve data sovereignty issues and redress data gaps in labour market information on reserves.

Conclusion and recommendations

Recommendation 3.6: The issue of Indigenous self-identification for the purposes of the *Employment Equity Act* framework should be made the subject of an urgent process of meaningful consultation within the meaning of the Canadian constitution and the *United Nations Declaration on the Rights of Indigenous Peoples Act*.

Recommendation 3.7: Section 7 of the *Employment Equity Act* should be supplemented by a framework fostering Indigenous self-determination that is co-constructed through meaningful consultations with a view to free, prior and informed consent with Section 35 of the *Constitution Act, 1982* and Articles 18 -21 and 26-32 of the *United Nations Declaration on the Rights of Indigenous Peoples*.

Recommendation 3.8: The transformative framework should include special measures that ensure continuing improvement of First Nations, Métis and Inuit peoples' economic and social conditions.

Recommendation 3.9: The definition of disability in the *Accessible Canada Act* should replace the current definition of persons with disabilities in the *Employment Equity Act*.

Recommendation 3.10: The Employment Equity Data Steering Committee should prioritize developing quantitative and qualitative data on persons with disabilities that are disaggregated and intersectional, including through commissioned research, and in meaningful consultation with employers' and workers' representatives and representative organizations of disabled workers.

Recommendation 3.11: Psychosocial or intellectual disabilities should be considered from a disaggregated and intersectional manner to ensure that the implementation, meaningful consultation and regulatory oversight in employment equity effectively responds to the specific needs of those with invisible disabilities.

Recommendation 3.12: The *Employment Equity Act* framework should draw inspiration from the *Accessible Canada Act* and the Canadian Survey on Disability to identify appropriate subgroups.

Recommendation 3.13: The Treasury Board of Canada and the Public Service Commission should work closely and on a priority basis with the Employment Equity Commissioner to establish targeted hiring initiatives for persons with disabilities to achieve and sustain the established 2025 hiring goal in the federal public service.

Recommendation 3.14: Women should remain an employment equity group.

Recommendation 3.15: Employment equity implementation, meaningful consultation, and regulatory oversight should be approached in a disaggregated and intersectional manner.

Recommendation 3.16: The Employment Equity Data Steering Committee should study how best to obtain a suitably representative, disaggregated, and intersectional characterization of the Black population in Canada, in meaningful consultation with representative organizations of people of African descent.

Recommendation 3.17: Black workers should constitute a separate employment equity group for the purposes of the *Employment Equity Act* framework.

Recommendation 3.18: 2SLGBTQI+ workers should comprise a new employment equity group under the *Employment Equity Act* framework.

Recommendation 3.19: The *Employment Equity Act* and accompanying regulations should provide for the language of 2SLGBTQI+ to be updated as appropriate, in meaningful consultation with 2SLGBTQI+ communities concerned.

Recommendation 3.20: In consultation with the Employment Equity Data Steering Committee and concerned representatives of 2SLGBTQI+ workers, Statistics Canada should develop appropriate questions for the Census or other suitable surveys to support the implementation of an employment equity group for 2SLGBTQI+ workers.

Recommendation 3.21: Transitional measures should be adopted under the *Employment Equity Act* or accompanying regulations to ensure that employers can commence coverage of 2SLGBTQI+ employment equity group members by conducting employment systems reviews and preparing action plans drawing on general population data before Labour Market Availability benchmarks become available.

Recommendation 3.22: The term “visible minority” in the *Employment Equity Act* framework should be replaced by the term “racialized workers”.

Recommendation 3.23: The *Employment Equity Act* framework should continue to cover racialized workers.

Recommendation 3.24: The federal government should consider ratifying the Global Convention on the Recognition of Qualifications concerning Higher Education.

Recommendation 3.25: A principled approach to the issues of exclusion should come from a comprehensive, proactive approach to barrier removal across protected grounds under the *Canadian Human Rights Act*.

Recommendation 3.26: The Employment Equity Commissioner should have the ability to investigate and recommend special employment equity programs (special temporary measures) for defined equity groups based on evidence of disadvantage that has resulted in underrepresentation in employment.

Recommendation 3.27: The Employment Equity Data Steering Committee should be mandated to advise on whether a question on religion should be present in each Census rather than every 10 years.

Recommendation 3.28: The inclusion of religious minorities under the *Employment Equity Act* should be considered for comprehensive study by the newly re-established Law Commission of Canada.

Chapter 4: Strengthening implementation: The barrier removal pillar

Recommendation 4.1: The *Employment Equity Act* should be clarified to ensure that employers are understood to have an obligation to make reasonable progress to achieve employment equity, and to sustain employment equity once it has been achieved.

Conclusion and recommendations

Recommendation 4.2: The *Employment Equity Act* should

- define barriers as practices that affect equity groups in a disproportionately negative way
- specify that barrier removal applies across each stage of the employment lifecycle, and should be reported upon in the employment systems review, and
- provide for the *Employment Equity Regulations* or guidelines prepared under them to support comprehensive barrier removal and reporting

Recommendation 4.3: Reporting by employers, including employment systems reviews should be required by all covered employers on a 3-year reporting cycle.

Recommendation 4.4: A transitional process should be implemented to ensure that report submission dates by employers are staggered.

Recommendation 4.5: The *Employment Equity Regulations* should contain schedules to support employers in preparing an employment equity plan.

Recommendation 4.6: Guidelines should be developed that include promising practices for identifying and eliminating barriers in the workplace, including how to conduct employment systems reviews that identify and eliminate barriers across the work lifecycle and incorporate climate surveys.

Recommendation 4.7: The *Employment Equity Regulations* or guidelines prepared under them should provide for reporting on individual reasonable accommodations requested and provided in the workplace to be included in employment systems reviews.

Recommendation 4.8: The notion of “undue hardship” in Section 6(a) of the *Employment Equity Act* should be defined to mean that it would be impossible to take the reasonably necessary measure without “undue hardship”.

Recommendation 4.9: The *Employment Equity Act* should be amended to clarify that once employment equity has been achieved for any employment equity group, employers have an ongoing responsibility to sustain employment equity.

Recommendation 4.10: Sections 34(1) of the *Public Service Employment Act* should be drawn upon proactively to support targeted hiring competitions to redress the underrepresentation of employment equity groups in a proactive and equitable manner.

Recommendation 4.11: Section 31(1) of the *Public Service Employment Act* should be changed from permissive to a requirement.

Recommendation 4.12: The qualification standards should be established through meaningful consultations with the Joint Employment Equity Committee.

Recommendation 4.13: The interpretation of merit in Section 30(4) of the *Public Service Employment Act* should be tightened, notably through attentive use of the Public Service Commission’s general regulatory powers in Section 22(1), to ensure that appointments based on merit occur through competitions assessed by committees composed in consultation with the relevant Joint Employment Equity Committee(s).

Recommendation 4.14: The language of “right fit” should be abandoned in the Public Service of Canada in favour of a concept that communicates an equitably inclusive approach to appointments.

Recommendation 4.15: Section 6(c) of the *Employment Equity Act* should be abrogated.

Recommendation 4.16: The *Employment Equity Regulations* or guidelines prepared under them should ensure that employers report on workplace harassment and violence policies and their preventative actions.

Recommendation 4.17: The *Employment Equity Regulations* or guidelines prepared under them should provide for workplace benefit packages to be considered in the employment systems review process.

Recommendation 4.18: Urgent policy attention should be devoted to assessing the distribution of official language training opportunities to ensure that they are made available to employment equity group members in the federal public service, without discrimination.

Recommendation 4.19: Meaningful consultations should be undertaken between the federal government and First Nations, Métis and Inuit peoples with a view to establishing a national Indigenous languages allowance within the federal public service to acknowledge and compensate Indigenous language users in positions where Indigenous language capacity is required, recommended or relied upon.

Recommendation 4.20: The *Employment Equity Regulations* should provide for the use of artificial intelligence in recruitment or other forms of worker evaluation or assessment to be reported upon in employers’ employment systems reviews.

Recommendation 4.21: Guidelines and training should be developed and updated by the Employment Equity Commissioner, including on artificial intelligence use across the employment lifecycle with particular attention to recruitment and hiring.

Recommendation 4.22: The federal government should enter into consultations with employers’ and workers’ representatives and concerned communities with a view to amending the *Canada Labour Code* to enable religious minorities to avail themselves of one or more annual paid leave days reasonably available to them to observe religious high holidays.

Recommendation 4.23: The federal government should, in consultations with concerned groups, consider amending the *Canadian Human Rights Act* and the *Canada Labour Code* to ensure that NDAs are not misused for the purpose of silencing human rights complainants or whistleblowers.

Recommendation 4.24: The *Employment Equity Regulations* should be amended to require employers to report on the number of NDAs signed with categories regarding the broad subject matter and potential barriers that they covered. The reporting should include non-nominative information about the designated employment equity group(s) to which the complainant(s) and the alleged perpetrator(s) may belong.

Recommendation 4.25: A study should be undertaken of the use of NDAs to resolve employment matters within federal jurisdiction and its impact on respecting human rights and achieving employment equity in the workplace.

Conclusion and recommendations

Recommendation 4.26: The Government of Canada is encouraged to ratify the ILO Domestic Workers Convention, 2011 (No.189).

Recommendation 4.27: Studies of the feasibility of basic income policies should be encouraged. They should pay particular attention to the effect of basic income strategies on redressing barriers to equitable workplace inclusion faced by employment equity groups.

Recommendation 4.28: The Canadian Armed Forces should be required to calculate availability and set goals for all employment equity groups covered under the *Employment Equity Act*.

Recommendation 4.29: Dedicated assistance should be provided to the CAF by the Employment Equity Commissioner to support and enable it to sustain reasonable progress to achieve employment equity for all employment equity groups.

Recommendation 4.30: The call in the Bastarache report for an independent external review and genuinely independent and adequately resourced oversight body for the RCMP should be implemented.

Chapter 5: Reactivating the meaningful consultations pillar

Recommendation 5.1: The *Employment Equity Act* should clarify that the obligation to make reasonable progress to achieve employment equity, and to sustain employment equity once it has been achieved

- is incorporated into collective agreements governing employees of covered employers, and
- encourages, rather than limits, collective bargaining that deepens equitable inclusion, notably on staffing or classification

Recommendation 5.2: All covered public service employers, alongside federally regulated private sector employers with 100+ workers and FCP employers with 100+ workers should be required to establish a joint employment equity committee, as appropriate with sub-committees notably for departments or specific trades.

Recommendation 5.3: For federally regulated private sector employers (LEEP and FCP) with 50 – 99 workers, the *Employment Equity Act* framework should support the voluntary establishment of joint employment equity committees. If the covered employers with 50 – 99 workers have at least one bargaining agent, then the joint employment equity committees are required.

Recommendation 5.4: Covered employers should benefit from a reasonable transition window to establish the joint employment equity committees.

Recommendation 5.5: Wherever practicable, terms of service should be harmonized with terms of service of workplace health and safety committees.

Recommendation 5.6: The Joint Employment Equity Committee should comprise a minimum of 5 members, at least half of the members should be employees who do not exercise managerial functions.

Recommendation 5.7: The Joint Employment Equity Committee should strive to represent each of the employment equity groups.

Recommendation 5.8: The Joint Employment Equity Committee should strive to represent workers from across the work life cycle.

Recommendation 5.9: In unionized workplaces, representation should be proportional to the number of bargaining agents in the workplace, with sub-committees as appropriate.

Recommendation 5.10: In non-unionized workplaces, elections of worker representatives should be preferred.

Recommendation 5.11: If a workplace is unable to establish a Joint Employment Equity Committee, the employer should apply to the Employment Equity Commissioner to resolve the matter using ADR techniques. The Employment Equity Commissioner should also have the power to authorize modifications to the legislative requirements.

Recommendation 5.12: Time spent on a Joint Employment Equity Committee should be considered work time and compensated accordingly.

Recommendation 5.13: Joint Employment Equity Committee members should be provided with training in order to be able to carry out their responsibilities.

Recommendation 5.14: The Joint Employment Equity Committee should be permitted to collect, analyze and review relevant data to assist the employer in the implementation of employment equity. The Joint Employment Equity Committee should have full access to all of the government and employer reports, studies and tests relating to employment equity or parts of those reports, studies and tests that relate to employment equity but shall not have access to the medical records of any person except with the person's consent.

Recommendation 5.15: Joint Employment Equity Committee s should be permitted to conduct exit interviews with departing staff to identify workplace barriers that might be addressed in subsequent employment equity plans.

Recommendation 5.16: Joint Employment Equity Committee members' liability should be limited to provide protection for good faith acts or omissions under the authority of the *Employment Equity Act*.

Recommendation 5.17: The *Employment Equity Act* should be revised to include comprehensive, detailed protection for Joint Employment Equity Committee members and others exercising their rights under the *Employment Equity Act* against reprisals by the employer or any person acting on behalf of the employer, or by the bargaining agent or any person acting on behalf of the bargaining agent.

Recommendation 5.18: The relevant privacy legislation should be revised following meaningful consultations with representative trade unions to ensure effective trade union participation in the implementation of employment equity.

Recommendation 5.19: Employment equity training should prioritize Truth and Reconciliation Commission calls to action on education and support learning about positive initiatives to promote Indigenous economic prosperity.

Conclusion and recommendations

Recommendation 5.20: Leadership training in the federal public service should include training on systemic discrimination including systemic racism, substantive equality and equitable workplace inclusion.

Recommendation 5.21: An advice line under the jurisdiction of the Employment Equity Commissioner should be established to provide effective, efficient support to workplaces – employers and Joint Employment Equity Committees - on employment equity implementation.

Recommendation 5.22: Training support should be geared to different organizational levels in the covered employers, and should be attentive to the needs and expertise of middle managers and first line supervisors, as well as members of the Joint Employment Equity Committee.

Recommendation 5.23: WORBE projects should be selected with the input of the Employment Equity Advisory and Review Panel.

Recommendation 5.24: WORBE should be repurposed to

1. support sectors in greatest need of closing the representation gap
2. integrate researchers in initiatives to assess the impact of workplace policies to achieve equity, including through links with the federal tri-agency funding councils
3. build and share practical knowledge on emerging workplace issues that may pose barriers and how to address them, and
4. ensure that employment equity groups are at the centre of the knowledge development and sharing

Recommendation 5.25: WORBE-funded projects and learning outcomes should be made publicly available and readily accessible online.

Chapter 6: Fundamentally rethinking the regulatory oversight pillar

Recommendation 6.1: An Employment Equity Commissioner should be established.

Recommendation 6.2: The Employment Equity Commissioner should be independent and should report directly to Parliament.

Recommendation 6.3: The Employment Equity Commissioner should have legislative responsibility and powers that include the powers in Section 42 of the *Employment Equity Act*.

Recommendation 6.4: The Employment Equity Commissioner should have the legislative authority to collect information on the employment practices and policies of all covered employers in the federal public service and private sector, as well as under the Federal Contractors Program, for the purpose of ensuring that employment equity is implemented in their workplaces.

Recommendation 6.5: The Employment Equity Commissioner, like other federal commissioners including the Privacy Commissioner of Canada, the Commissioner of Official Languages, the Information Commissioner of Canada, the Public Sector Integrity Commissioner of Canada and the Commissioner of Lobbying, should be considered a contracting authority exempted from Section 4 of the *Government Contracts Regulations*.

Recommendation 6.6: The Employment Equity Commissioner should be responsible for regulatory oversight including workplace auditing.

Recommendation 6.7: An Employment Equity Advisory and Review Panel should be established under the *Employment Equity Act* to inform the work of the Employment Equity Commissioner.

Recommendation 6.8: The Employment Equity Advisory and Review Panel should have the responsibility to conduct reviews no less frequently than once every 10 years, to be submitted to Parliament by the Employment Equity Commissioner and rendered public.

Recommendation 6.9: The staffing and funding envelope for the Employment Equity Commissioner should be commensurate with the magnitude of the responsibility, including the auditing responsibilities, and reviewed periodically to provide the regulatory oversight necessary to enable employment equity to achieve and sustain employment equity across federally regulated employers.

Recommendation 6.10: The Employment Equity Commissioner should be legislatively guaranteed a separate budgetary envelope sufficient to ensure that the purposes of the *Employment Equity Act* can be fulfilled through appropriate staffing and mobility, and guided by the funding available to other independent commissioners that report directly to Parliament, including the Auditor-General of Canada. In particular,

- the auditing responsibility of the Employment Equity Commissioner should be funded at a level commensurate with the volume of covered employers in the federally regulated sector for which it assumes responsibility, and
- the responsibility for statistical analysis should be increased to meet the needs of an expanded *Employment Equity Act* and to ensure that the Office of the Employment Equity Commissioner can participate meaningfully in the Employment Equity Data Steering Committee

Recommendation 6.11: The *Employment Equity Act* should provide that the Employment Equity Commissioner enjoys sufficient remedial and enforcement powers to ensure that the purposes of the legislation can be fulfilled.

Recommendation 6.12: The *Public Service Employment Act* and the *Canada Labour Code* should be amended to require them to notify the Employment Equity Commissioner when a matter relates to the *Employment Equity Act* and provide the power to refer a matter to the Employment Equity Commissioner.

Recommendation 6.13: Notice should be given to the Employment Equity Commissioner when a policy grievance has been referred to adjudication and a party to the grievance raises an issue involving the interpretation or application of the *Employment Equity Act*, in accordance with the regulations. The Employment Equity Commissioner should have standing in order to make submissions on the issues in the policy grievance.

Recommendation 6.14: The Employment Equity Commissioner should enjoy immunity and be precluded from giving evidence in civil suits in a manner analogous with Sections 178 & 179 of the *Pay Equity Act*.

Conclusion and recommendations

Recommendation 6.15: Establishing an Office of Equity Commissioners should be closely considered with a view to harmonizing and appropriately funding and ensuring effective equity oversight and parliamentary reporting in the federal jurisdiction with consideration given to the structures and funding of the Office of Auditor-General of Canada, the Office of the Privacy Commissioner of Canada, and the Office of Official Languages.

Recommendation 6.16: The Employment Equity Commissioner should be able to recommend special programs if an investigation establishes underrepresentation of an equity group represented by a ground of discrimination in the *Canadian Human Rights Act* that warrants a special program to remedy it.

Recommendation 6.17: The *Employment Equity Act* should be revised to clarify that the Minister is responsible for achieving employment equity by 1 January 2040, and sustaining it.

Recommendation 6.18: Legislative amendments should permit the Accessibility Commissioner and the Employment Equity Commissioner to streamline reporting as it relates to barrier removal related to accessibility in employment. They should have the power to specify and appropriately adapt the requirements through regulations or guidelines.

Recommendation 6.19: The *Employment Equity Act* should be amended to permit the Employment Equity Commissioner to

- attempt to negotiate a written undertaking from the employer to take specified measures to remedy the failure to make reasonable progress on achieving employment equity, in keeping with Section 25(1) of the *Employment Equity Act*; and if unsuccessful, and
- issue directions including special measures to remedy the non-compliance

Recommendation 6.20: Sections 40(3.1), 40.1(2) and 54.1 *Canadian Human Rights Act*, which cumulatively prevent employment equity decisions from being rendered by the Canadian Human Rights Tribunal, should be repealed.

Recommendation 6.21: The *Employment Equity Act* should be amended to permit cases arising in the circumstances currently anticipated under Sections 40(3.1), 40.1(2) and 54.1 *Canadian Human Rights Act* to be submitted in the form of a complaint to the Employment Equity Commissioner.

Recommendation 6.22: The discretion in Section 41(2) *Canadian Human Rights Act* for the Canadian Human Rights Commission should be transferred to the Employment Equity Commissioner.

Recommendation 6.23: The *Employment Equity Act* should be amended to enable a complaint to be brought by any worker in an employer's covered workplace, on the grounds that an employer's implementation obligations under the *Employment Equity Act* are not being respected.

Recommendation 6.24: The complaints should be brought to the Employment Equity Commissioner.

Recommendation 6.25: The Employment Equity Commissioner shall dismiss a complaint unless the Commissioner considers there to be sufficient evidence, brought by the complainant, to dislodge the presumption that the internal mechanisms to implement employment equity are functioning appropriately.

Recommendation 6.26: Should the Employment Equity Commissioner decide that there is sufficient evidence, an audit by the Employment Equity Commissioner would be the remedy.

Recommendation 6.27: The Employment Equity Commissioner should have the legislative authority and necessary powers to investigate the covered complaints.

Recommendation 6.28: The Employment Equity Commissioner should be legislatively encouraged to use alternative dispute resolution techniques to resolve disputes.

Recommendation 6.29: The English-language title of the Employment Equity Review Tribunal should be renamed the Employment Equity Tribunal.

Recommendation 6.30: The Employment Equity Tribunal should have the staff and resources necessary to be able to hear and decide matters in an expeditious manner.

Recommendation 6.31: The Employment Equity Commissioner should be able to refer to the Employment Equity Tribunal an important question of law that the Employment Equity Commissioner might consider to be more appropriate for the Tribunal to determine.

Recommendation 6.32: The role of the Employment Equity Tribunal should be revised to:

1. Provide that it is responsible for responding to an inquiry into a question of law or jurisdiction referred to the Chairperson of the Tribunal by the Employment Equity Commissioner by rendering a determination
2. Clarify that it is responsible for rendering a decision on appeal from a decision of the Employment Equity Commissioner referred to it by an employer, bargaining agent or other member of the mandated employment equity committee, and
3. Include a strong privative clause consistent with the case law including and subsequent to *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 SCR 653; 2019 SCC 65

Recommendation 6.33: Section 48.1(2) of the *Canadian Human Rights Act* should be amended to ensure that appointments of members of the Canadian Human Rights Tribunal must be made having regard to the need for adequate knowledge and experience in employment equity matters among the members of the Tribunal.

Recommendation 6.34: Section 29(3) *Employment Equity Act* should be replaced with the equivalent of Section 166 (1) & (2) of the *Pay Equity Act*, to clarify that a hearing must be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the hearing under the conditions provided in Section 166 (1)(a) –(d) and Section 166(2).

Conclusion and recommendations

Recommendation 6.35: The *Employment Equity Act* should expressly enable the Employment Equity Tribunal to use methods of alternative dispute resolution, including mediation where appropriate, to conduct hearings virtually, to provide for contemporary open court principles that include posting decisions on the appropriate website(s), and to include contemporary approaches of sending a request to appear before the Employment Equity Tribunal beyond registered mail.

Recommendation 6.36: Orders made under the *Employment Equity Act* by the Employment Equity Commissioner or the Employment Equity Tribunal should be made enforceable by the Court.

Recommendation 6.37: The *Employment Equity Act* should clarify the relationship between the powers of the Tribunal under the *Canadian Human Rights Act*, and the powers set out in the *Employment Equity Act*, with particular attention to the relationship between Section 29(1)(c) of the *Employment Equity Act* and the limitation in relation to privileged evidence under Section 50(1)(4) of the *Canadian Human Rights Act*.

Recommendation 6.38: To ensure reasonable progress in the implementation of employment equity, penalties should be updated and harmonized with comparable penalties under the *Pay Equity Act* and the *Accessible Canada Act*, scaled to the size and nature of the employer and to the level of non-compliance.

Recommendation 6.39: In addition to vesting transversal responsibility for women workers in the Pay Equity Commissioner and transversal responsibility for disabled workers in the Accessibility Commissioner, four newly created deputy commissioners, or ombudspersons should be created, with transversal responsibilities for Indigenous reconciliation (First Nations, Métis and Inuit workers), Black workers, racialized workers and 2SLGBTQI+ workers.

Recommendation 6.40: Deputy heads in the federal public service should be held directly accountable through their own performance evaluations for ensuring reasonable progress to achieve employment equity, and to sustain employment equity once it has been achieved.

Recommendation 6.41: Other employers covered under the *Employment Equity Act* framework should report on how their senior leadership is held accountable in their performance evaluations for ensuring reasonable progress to achieve employment equity, and to sustain employment equity once it has been achieved.

Chapter 7: Technical regulatory implications of employment equity coverage

Recommendation 7.1: Reporting under the *Employment Equity Act* should include dependent contractors, consistent with the *Pay Equity Act* and the *Canada Labour Code*.

Recommendation 7.2: The *Employment Equity Act* should apply to separate employer organizations in the federal public sector with 10 or more employees, listed in Schedule V of the *Financial Administration Act* (separate agencies), and other public-sector employer organizations with 10 or more employees, including the Canadian Forces (officers and non-commissioned members in the Regular and Reserve Forces) and the Royal Canadian Mounted Police (regular and civilian members, excluding federal public service employees).

Recommendation 7.3: The *Employment Equity Act* should apply to employers with 10 or more employees in the federally regulated private sector.

Recommendation 7.4: Employers with between 10 and 49 employees should be required to achieve reasonable progress on attaining representation of employment equity groups consistent with labour market availability. They should be provided with meaningful access to training and support.

Recommendation 7.5: Employers with 50 or more employees and all covered employers in the federal public service should be required to achieve reasonable progress on attaining representation of employment equity groups consistent with labour market availability. They should also be required to assume the existing employer obligations under the current *Employment Equity Act*, with an appropriate transition window for reporting. They should be provided with meaningful access to training and support.

Recommendation 7.6: The *Employment Equity Regulations* should carefully specify the transition periods for when an employer is considered to become subject to the *Employment Equity Act* in a manner that harmonizes them with the *Pay Equity Act*, and facilitates training and reporting by employers.

Recommendation 7.7: All covered public service employers and federally regulated private sector employers should be required to include Canadians or permanent residents of Canada working abroad in their workplace implementation and reporting responsibilities under the *Employment Equity Act* framework.

Recommendation 7.8: Specific *Employment Equity Regulations* should be adopted as necessary to ensure the effective inclusion of Canadians or permanent residents of Canada working abroad, with due regard to operational effectiveness.

Recommendation 7.9: Specific guidance and training should be developed by the Employment Equity Commissioner to support the effective implementation of the recommendations to covered workers abroad.

Recommendation 7.10: The implementation requirements for employment equity by contractors to whom the Federal Contractors Program applies should be equivalent to the implementation requirements for employers covered under the *Employment Equity Act*.

Recommendation 7.11: The monetary threshold for the inclusion of contractors under the Federal Contractors Program should be established at close to pre-2013 levels, and with a view to broader harmonization with existing contractors programs across Canada, at \$100,000.

Recommendation 7.12: The monetary threshold should be assessed in terms of the cumulative contract value. No contractor should be able to cumulate contracts that total more than \$200,000 without subscribing to the Federal Contractors Program.

Recommendation 7.13: The threshold for the number of workers should be equivalent to the threshold established for employers under the *Employment Equity Act*.

Recommendation 7.14: Colleges and universities should be required to agree to participate in the Federal Contractors Program to be eligible to apply for federal research grants and other federal research funding and to participate in federal research granting councils, including the proposed Canadian Knowledge and Science Foundation.

Conclusion and recommendations

Recommendation 7.15: Legal services providers eligible to be included in the Open Government Canada online directory with individual contracts of \$100,000 or cumulative contracts that total more than \$200,000 in any given fiscal year should be included in the Federal Contractors Program.

Recommendation 7.16: An analysis should be undertaken of the aspects of the grants and contributions program that could appropriately be made subject to the *Employment Equity Act* framework, with a threshold comparable to the thresholds proposed for Federal Contractors Program employers.

Recommendation 7.17: Canada's international cooperation sector should be expressly included within the ambit of the Federal Contractors Program.

Recommendation 7.18: Workers in international cooperation organizations recruited in Canada, whether based in Canada or posted abroad, should be included in the calculation of the applicable numerical threshold under the *Employment Equity Act* framework, alongside the total amount of the contribution agreements with the Government of Canada.

Recommendation 7.19: Construction industry contractors who meet the threshold requirements should be included under the Federal Contractors Program.

Recommendation 7.20: The threshold number of employees should be assessed by combining the total number of workers across the main bidding contractor and its subcontractors, with due regard for anticipated variations over the lifecycle of the contract.

Recommendation 7.21: Specific provisions should be made in future negotiations to ensure policy space for setbacks on behalf of employment equity groups under the *Employment Equity Act*.

Recommendation 7.22: The federal government should use its policy space to include setbacks on behalf of employment equity groups under the *Employment Equity Act* in awarding procurement contracts to promote the equitable inclusion of entrepreneurs from employment equity groups in the award of federal contracts. Prior government-to-government consultations should take place as concerns First Nations, Métis and Inuit peoples.

Recommendation 7.23: International agreements on procurements negotiated by the Government of Canada should explicitly clarify that Canada retains the ability to adopt or maintain its commitment to substantive equality, including through the *Employment Equity Act* framework.

Recommendation 7.24: Parliamentary employees should be included within the scope of the *Employment Equity Act*. This may be accomplished in a manner analogous to the inclusion of Parliamentary employees under the *Pay Equity Act* framework, through amendments to the *Parliamentary Employment and Staff Relations Act*.

Recommendation 7.25: The *Employment Equity Act* should be amended to provide that successorship provisions should apply to businesses that move from provincial to federal jurisdiction alongside transitional provisions in the *Employment Equity Regulations* to address reporting requirements.

Conclusion and recommendations

Recommendation C.1: An all of government approach should be adopted, recognizing that employment equity is transversal and affects us all.

Recommendation C.2: The *Employment Equity Act* should be revised to confirm that it is considered quasi-constitutional human rights legislation.

Recommendation C.3: International human rights treaties ratified or acceded to by Canada that inform a proactive, systemic approach to the employment equity framework should be specifically referenced in the revised *Employment Equity Act*.

Recommendation C.4: The federal government should encourage the harmonization of employment equity frameworks across jurisdictions in Canada, in keeping with Canada's international human rights and international labour standards commitments.

Recommendation C.5: The Government of Canada should encourage the International Labour Organization to undertake a general survey on special measures, to ensure comprehensive comparative experiences can effectively be shared.

⁷⁷⁹ See e.g. United Nations Human Rights Council, Report of the Special Rapporteur on the rights of persons with disabilities, Catalina Devandas-Aguilar, Visit to Canada, A/HRC/43/41/Add.2, 19 December 2019 at para. 26 (also suggesting the federal government to encourage provinces to use mechanisms for intergovernmental collaboration, and financial disbursements).

⁷⁸⁰ Joint Presentation of the Labour Program and the Canadian Human Rights Commission to the EEART, 22 July 2021.

⁷⁸¹ Carol Agócs, "Conclusion – Looking forward: The unfinished business of employment equity" in Carol Agócs, ed., *Employment Equity in Canada: The Legacy of the Abella Report* (University of Toronto Press, 2014) 306.

Appendix A: Terms of reference - Employment Equity Act Review Task Force

List of abbreviations

EEA

Employment Equity Act

ESDC

Employment and Social Development Canada

GBA+

Gender Based Analysis+

LMA

Labour Market Availability

NGO

Non-governmental Organizations

WFA

Workforce Availability

Context

Canadians have the right to be treated fairly in workplaces free from barriers and inequalities. One of the ways the Government of Canada promotes equity and diversity in federally regulated workplaces is through the [*Employment Equity Act*](#) (EEA).

The purpose of the EEA is:

- “to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability”, and
- “to correct the conditions of disadvantage in employment experienced” by the designated groups:
 - women
 - Aboriginal peoples

A Transformative Framework to Achieve and Sustain Employment Equity

- persons with disabilities, and
- members of visible minorities

The EEA places the onus on employers under federal jurisdiction to:

- analyze their human resources systems, policies and practices to identify barriers and inequalities
- develop and implement a plan to remove these barriers and inequalities, and
- be accountable for results

Employers make progress toward achieving equity in the workplace when they close the representation and wage gaps experienced by members of the designated groups in their workforce.

State of equity

Federally regulated private sector

According to the [Employment Equity Act: Annual Report 2019](#), the representation rate of:

- **women**, after peaking to 45.5% in 1993, has declined to 39.4% compared to 48.2% [labour market availability](#) (LMA) in 2018
- **Indigenous peoples** remains low, accounting for 2.3% compared to 4.9% LMA in 2018
- **persons with disabilities** remains low, accounting for 3.4% compared to 9.1% LMA in 2018
- **members of visible minorities** remains high, accounting 23.8% compared to the 21.3% LMA 2018

Federal public service

According to [Employment Equity in the Public Service of Canada for Fiscal Year 2018 to 2019](#), the representation rate within the core public administration of:

- **women** (54.8%) continues to exceed the LMA (48.2%) and the [workforce availability](#) (WFA) (52.7%)
- **Indigenous peoples** (5.1%) exceeds the LMA and the WFA (4.0%)
- **persons with disabilities** (5.2%) is under the core public administration, compared with LMA (9.1%) and the WFA (9.0%)
- **members of visible minorities** (16.7%) is under the LMA (21.3%) and slightly greater than the WFA (15.3%)

Economic and social changes

Since the EEA passed in 1986, the Government of Canada has made some progress in creating fairer workplaces. The Government recognizes that key economic and social changes have occurred; however, more work is necessary.

Demographics

The ageing population and shifting immigration patterns are resulting in a workforce that is older and more ethno-culturally diverse. This is:

- increasing the need to address accessibility barriers (since older workers are more likely to have a disability), and
- resulting in the need to address systemic racism in workplaces

Nature of work

Non-standard work relationships are now a persistent and a substantial feature of the Canadian labour market:

- about 37% of Canadian workers were in non-standard work relationships in 2019, and
- some of these non-standard work arrangements, such as part-time and temporary work, are gendered, featuring more women than men

Evolution of diversity and inclusion in the workplace

There is an evolution in how Canadians understand and perceive diversity and inclusion in the workplace, such as:

- greater recognition of barriers experienced by members of the LGBTQ2+ communities
- an emphasis on the distinct employment circumstances of different Indigenous populations (First Nations on- and off-reserve, Inuit, and Métis), and
- a nuanced knowledge of various forms of disability and recognition of different labour market outcomes among different visible minority groups

Challenges to the federal employment equity framework

These economic and social changes have highlighted challenges to the federal employment equity framework.

- Calls to include other members amongst the EEA's designated groups, including LGBTQ2+ communities
- Renewed attention to systemic racism. It has highlighted:
 - calls by stakeholders to retire the term "visible minorities" and rethink the category, and
 - the need to gather disaggregated data for different groups that currently fall under this designated group
- Adoption of a distinctions-based approach to government programs involving Indigenous peoples (First Nations, Inuit, and Métis). This raises the question of how employment equity could reflect the unique interests, priorities and circumstances of each people
- Persistent gaps call for a joint approach with employers, stakeholders and partners. It is essential to identify key barriers and to promote best practices to close these gaps. This could include:

A Transformative Framework to Achieve and Sustain Employment Equity

- improving compliance and enforcement practices to support employers that work on achieving equity and hold accountable those that do not, and
- moving beyond annual reporting of metrics to help get the full picture in federally regulated private sectors and the federal public service on the state of:
 - equity
 - diversity, and
 - inclusion

In addition, the COVID-19 pandemic has brought challenges for many workers, and has affected certain groups more than others:

- Indigenous peoples
- recent immigrants
- members of visible minorities, and
- women

Mandate

The mandate of the Task Force is to advise the Minister of Labour on how to modernize and strengthen the federal employment equity framework by launching a review of the *Employment Equity Act* and its supporting programs.

The Task Force will:

- study issues related to equity, diversity and inclusion in the workplace
- engage with stakeholders, various partners, and Canadians to hear their views on equity
- undertake research and analysis using a range of sources
- examine other existing practices in Canada and other countries
- apply a [Gender Based Analysis+](#) (GBA+) lens and consider intersectionality throughout its work, and
- submit a report to the Minister of Labour, through the Deputy Minister of Labour

Scope of work

With a focus on improving and building upon the foundation of the EEA, the Task Force will study the following areas:

Area 1: Equity groups

- What changes should be made to the current EEA designated group names and definitions, such as “Aboriginal” and “visible minorities”?
- What changes should be made to the EEA include to reflect current understandings of Indigenous peoples, disability, ethnocultural diversity and gender equality?
- Should the EEA reflect the various experiences and labour market circumstances of populations within the visible minorities group, such as Black Canadians?
 - If so, what changes to the EEA could best reflect the experiences and circumstances of each of the visible minority groups?

- Should the EEA reflect the current understandings of various types of disability within the persons with disabilities group?
 - If so, what changes to the EEA could best reflect the current understandings of various types of disability within the persons with disabilities group?
- Should the EEA reflect the distinct experiences and labour market circumstances of First Nations, Inuit and Métis peoples who are within the Aboriginal peoples group?
 - If so, what changes to the EEA could best reflect the First Nations, Inuit and Métis peoples' experiences and circumstances?
- Should the EEA's designated groups include additional populations, such as the LGBTQ2+ communities?

Area 2: Supporting equity groups

- What changes to employment equity legislation, regulations, programming and research could better support equity groups?
- What barriers do equity groups face in the workplace?
- What best practices have employers implemented to remove these barriers?
- What can the Government of Canada do to promote and share these best practices?
- What measures could improve promoting and retaining equity groups?
- What roles can other organizations play in promoting employment equity, for example:
 - unions
 - employer associations, and
 - Non-governmental Organizations (NGO)

Area 3: Improving accountability, compliance and enforcement

- What support could employers receive when they are working to achieve equity in their workplaces?
- What could encourage employers to do more to achieve equity in their workplaces? In particular:
 - What are the most effective ways to communicate and raise employers' awareness of the benefits of equity, diversity and inclusion?
 - What changes to the Labour Program of Employment and Social Development Canada's (ESDC) and the Canadian Human Rights Commission's roles and responsibilities could improve compliance with and enforcement of the EEA?
- In addition to focusing on gaps in workforce representation and wages, how can the employment equity framework better measure employers' efforts and progress made toward equity?
- What are the most effective benchmarks to measure equity in the workplace?
- What incentives and penalties should the Government of Canada implement to help close persistent equity gaps and hold employers accountable?
- Are there unique circumstances within the core federal public service and other federal organizations that affect their state of:
 - equity
 - diversity, and
 - inclusion

- What changes to the EEA could support the Government of Canada's efforts to improve the core public administration's and other federal organizations' state of:
 - equity
 - diversity, and
 - inclusion

Area 4: Improving public reporting

- What changes to the EEA are necessary to better support the public conversation on:
 - equity
 - diversity, and
 - inclusion
- What changes to the EEA could improve public reporting of employment equity results? Specifically:
 - What measures, data sources, reporting frequency and formatting could lead to improvements?
- What are the key data gaps?
- How could changes help fill key data gaps?

Operating structure

The Task Force operates:

- at arm's-length from the Government of Canada to provide independent advice, and
- in a transparent manner as per the Government of Canada's policy on [Open Government](#)

A Secretariat:

- supports the Task Force's activities, such as research, writing, and consultations, and
- is housed within the Labour Program of Employment and Social Development Canada (ESDC)

The Task Force consists of 12 members, including a Chair and a Vice-Chair. The members have a wide range of expertise and experience related to equity (including workplace equity), such as:

- accessibility
- gender equality
- Indigenous employment, and
- anti-racism

The **Chair**:

- leads the Task Force
- chairs meetings and guides members towards consensus when making decisions
- prepares and presents the Task Force's report on behalf of the full membership, and with the support of the Secretariat
- is the public spokesperson for the Task Force, and

Appendix A: Terms of reference - Employment Equity Act Review Task Force

- provides updates to the Minister, in full respect of the independence and arm's length nature of the Task Force

The **Vice-Chair:**

- supports the Chair and members in fulfilling the Task Force's mandate
- with the Chair:
 - exercises leadership on the work of the Task Force, and
 - guides members towards consensus when making decisions

The **members:**

- provide their expertise and knowledge in an open-minded way
- participate in a personal capacity and not as representatives of any organizations with which they are associated
- foster an environment that is barrier-free and respectful of human rights principles, and
- work collaboratively to reach consensus to the extent possible

In the event a member cannot continue, the remaining members will constitute the task force. This is the case unless the Minister of Labour decides otherwise.

Report

The Task Force will submit a report to the Minister of Labour through the Deputy Minister of Labour. The report will inform the Government of Canada's approach for next steps to modernize and strengthen the federal employment equity framework. It will provide:

- an overview of the Task Force's work (including GBA+ / intersectional analysis)
- key findings
- evidence-based advice and recommendations, with justifications and intended outcomes, to address any appropriate legislative and/or non-legislative responses, and
- key considerations and a proposed approach for implementation of each recommendation

The Task Force's report may also provide further recommendations in areas where the Government of Canada could:

- make further research, analysis and/or policy development
- address other data gaps
- measure results, and
- address other matters related to the main issues of the review

If the Task Force is unable to reach consensus on its advice and recommendations, the report should note this, with accompanying reasoning.

Appendix B: Task Force members⁷⁸²

Adelle Blackett – Chair

Adelle Blackett is a Professor of Law and the Canada Research Chair in Transnational Labour Law and Development at the Faculty of Law, McGill University. She holds civil law and common law degrees from McGill University, a doctorate in law from Columbia University. She is widely published, and won both the 2020 Canadian Council on International Law's scholarly book award and the 2020 Principal's Prize for Excellence in Teaching (Full Professor category).

She has assumed several key leadership roles on equity in the post-secondary educational sector, and has also served as:

- an expert for the International Labour Organization
- a commissioner at the Commission des droits de la personne et des droits de la Jeunesse, and
- chair of the Human Rights Experts Panel of the federal Court Challenges Program

An elected fellow of the Royal Society of Canada, she is the recipient of:

- the Christine Tourigny Award of Merit and Advocate Emeritus status from the Barreau du Québec, and
- the Canadian Association of Black Lawyers' Pathfinder Award for her significant contributions to the legal community and the community at large

She holds honorary doctorates in law from Queen's University and Université catholique de Louvain.

Dionne Pohler – Vice-Chair

Dionne Pohler is an associate professor at the University of Saskatchewan Edwards School of Business and the University of Toronto's Centre for Industrial Relations and Human Resources. She is also a research fellow with the Rotman Institute for Gender and the Economy and the University of Saskatchewan Centre for the Study of Co-operatives. Dionne holds 4 international research awards and is the recipient of several Social Sciences and Humanities Research Council grants in recognition of her contributions to the topics of:

- work and employment
- labour relations
- public policy, and
- cooperative development

Tao (Tony) Fang - Member

Tony Fang is a Professor of Economics and the Stephen Jarislowsky Chair in Cultural and Economic Transformation at Memorial University of Newfoundland. He also holds the J. Robert Beyster Faculty Fellowship at Rutgers University and is a Fellow of the Royal Society of Arts.

Appendix B: Task Force members

He was an adjunct professor at the University of Toronto and served on the World Bank's Expert Advisory Committee on Migration and Development (2014 to 2019). His areas of research interest encompass issues of:

- pay equity and employment equity
- pension
- retirement policy and the ageing workforce
- education
- immigration, and
- minimum wages

Tony has published extensively in industrial relations, labour economics, and human resource management. In recognition of his research work, he is the recipient of several awards from the Social Science and Humanities Research Council of Canada.

Kari Giddings – Member

Kari Giddings is currently a member of the Calgary Anti-Racism Action Committee. During her extensive career at Canadian Pacific Railway, she contributed to the development of diversity and employment equity strategies, accommodation and training programs. Her contribution led Canadian Pacific Railway to being recognized as one of Canada's Best Diversity Employers for several years. Throughout her 35-year career, Kari has engaged and built lasting relationships with numerous community organizations supporting diverse job seekers in Calgary and across Canada.

Kari holds a Masters of Communication Studies and a B.A. Applied Social Science.

Helen Kennedy – Member

Helen Kennedy, specializes in 2SLGBTQI human rights both in Canada and globally. Under Helen's leadership a critical gap has been filled in Canada with the building of the country's first and only transitional home for 2SLGBTQI homeless youth. Helen has consulted with the Pentagon in Washington on the US military's "Don't Ask, Don't Tell" policy, helped secure the mandate of the UN Independent Expert on SOCIESC and provided expert opinions to governments and international treaty bodies. In 2019, she was invited to consult with the Pope and Senior Vatican officials regarding decriminalization of LGBTQI people globally. She is a founding member of Canadians for Equal Marriage, a former Co-Secretary General of ILGA World, and the recipient of The Lifetime Achievement Award at Start Proud's 2018 Leaders to be Proud of Awards.

Raji Mangat – Member

Raji Mangat, lawyer, is the Executive Director at West Coast Legal Education and Action Fund. As a former clerk at the Supreme Court of Canada, she has dedicated her career to improving access to justice and promoting intersectional, gender-based equity through legal advocacy and educational tools. Raji also serves on the boards of the Vancouver Public Library and Health Justice.

Fo Niemi - Member

As executive director of the Centre for Research-Action on Race Relations, Fo Niemi is working to advance public education, training, and support for victims of all forms of discrimination, including racial discrimination. He has contributed to a number of endeavours throughout his career, such as:

- government missions on race relations and human rights
- the Quebec Human Rights Commission's public hearings on discrimination and violence against gays and lesbians, and
- the Quebec government's task force on racial profiling

Due to his wealth of experience, he has been recognized for his human rights work by a number of organizations.

Kami Ramcharan – Member

Kami Ramcharan is currently the President of KVR Management Support Services Inc. Throughout her 35-year career within the federal public service; she has been a leader for diversity, inclusion and employment equity. Kami worked on a number of complex and challenging roles, such as:

- Director General of the Diversity Division at the Canada Public Service Agency (now the Office of the Chief Human Resources Officer). In this role, she developed an innovative long-term and sustainable strategy to bring employment equity and duty to accommodate into the heart of the management agenda across the Government of Canada. From that point forward, she has been a Champion of Diversity and Inclusion in the many other positions that she held
- Principal Consultant, KVR Management Support Services Inc., she has supported the Office of the Comptroller General in the development of a diversity strategy to support improved representation within the financial management community of the federal public service

Kami holds an Executive Masters Business Administration and is a Certified Public Accountant.

Sandra Sutter – Member

Sandra Sutter, a Cree Métis woman, currently sits on the National Indigenous Economic Development Board of Crown-Indigenous Relations and Northern Affairs Canada. Guided by her deep passion for Indigenous community, she is involved in many organizations, such as:

- Careers – the Next Generation
- Circle for Aboriginal Relations Society, and
- Métis Women's Economic Security Council (Province of Alberta)

She is a recipient of the Métis Entrepreneurial Business Award from Métis Nation Region 3 and received a Citation in Indigenous Community Engagement from the University of Alberta (Faculty of Extension). Sandra manages Indigenous Partnerships for the PTW Group of Companies, and was recognized with a WXN Top 100 Most Powerful Women in Canada award.

An accomplished artist, her reconciliation focused album Cluster Stars received 12 nominations and was awarded Best Americana Recording from the Native American Music Awards, as well as best

Appendix B: Task Force members

Producer/Engineer at the Indigenous Music Awards. She received an Esquao and an Aboriginal Role Model of Alberta Award. In June, Sandra was awarded a Summer Solstice Indigenous Music Award for Métis Artist/Group of the year.

Josh Vander Vies – Member

Josh Vander Vies is a lawyer and the founder of Versus Law Corporation, which works to:

- defend Canadian not-for-profit organizations, and
- protect the integrity of sport and the rights of athletes

As a professional speaker and retired Paralympian, he has experience working with Charitable Impact Foundation (Canada) and the International Paralympic Committee. Josh is also:

- the founder of the Canadian Disability Foundation, and
- a member of the Disability Advisory Group for the Minister of Employment, Workforce Development and Disability Inclusion

Marie Clarke Walker – Member

Marie Clarke Walker is a dedicated mentor and a strong believer that social justice is essential to universal and lasting peace. She is the first racialized woman to serve as Secretary-Treasurer and to be elected Executive Vice-President of the Canadian Labour Congress (CLC). Marie was also CLC's representative on the Pay Equity Task Force.

She is currently a Titular Member on the International Labour Organization (ILO) governing body. In 2017, in her role of Worker Vice-Chair, she helped to negotiate the historic Convention and Recommendation on Violence and Harassment in the World of Work.

Marie has been deeply involved with the struggle for human rights and equality as she served on the:

- Canadian Peace Alliance (board member)
- Canadian Centre for Policy Alternatives (board member)
- Canadian Centre for Occupational Health and Safety (board member)
- Malvern Community Coalition (co-chair), and
- Coalition of Black Trade Unionists (executive member)

Ruth Williams – Member

Ruth Williams is a status Indian from the High Bar Indian Band currently registered with the Tl'etinqox Government. Proud founding member and former Chief Executive Officer of All Nations Trust Company, and currently Business Advisor and Project Manager of the Company's Pathways to Technology Project and Housing Resource Services.

Leader in social and economic development for First Nations peoples in British Columbia for 35 years, she has been involved in housing issues with the:

- Aboriginal Housing Committee of British Columbia

A Transformative Framework to Achieve and Sustain Employment Equity

- Kamloops Native Housing Society (President)
- First Nations Market Housing Fund (Vice-Chair), and
- Province of British Columbia's committee for the development of a 10-year action plan for Indigenous housing

In 2010, Ruth received an honorary Doctor of Law from Thompson River University and a member of the Order of BC in 2020.

⁷⁸² Professor Marie-Thérèse Chicha was an initial member of the task force, and was recommended by the chair to serve as one of the initial two vice chairs. Although she resigned for personal reasons soon after the consultations began in February 2022, we are grateful that her published scholarship was able to inform this report.

Appendix C: List of the Employment Equity Act Review Secretariat staff

This list comprises full time and part time members of the *Employment Equity Act* Review Secretariat from July 2021 to December 2022. A limited secretariat was available from January – April 2023.

***Note: The Task Force was subject to a full stop work order from August 16, 2021 – January 14, 2022 due to the call for federal election.**

- Abdillahi, Fadumo – Junior Policy Analyst (worked on engagement session logistics, records of discussions, policy matters)
- Arnaoudova, Olga – Policy Officer (worked on engagement session logistics, records of discussions, policy matters)
- Burrs, Christian – Policy Manager / Acting Executive Director (former, until January 2022)
- Ducharme, Martin – Manager (Managed budget, ministerial requests)
- Hansbury, Elise – Policy Analyst / Policy Manager (former; until June 2022)
- Holder, Eldon – Executive Director (January - December 2022)
- Kara, Riaz – Executive Director (former, until July 2021)
- El-Khatib, Leila – Strategic Policy Manager (former, until June 2021)
- Leung, Arnon Ho Yiu - Policy Officer (worked on engagement session logistics, records of discussions, policy matters, TBS submission)
- Lokman, Rima – Advisor, Project Services (coordinated written submissions, worked on GCcollab, records of discussions, communications)
- Munyana, Christella – Executive Assistant to the Executive Director
- Muzondo, Chenaimwoyo Tukiso, Policy Analyst
- Naseem, Syed – Special Advisor (from September 2022)
- Plattner, Sylvie - Senior Manager (managed contracts and finances, ministerial requests)
- Saouab, Abdou – Director, Policy (from July 2022)
- Uddin, Salah (Mohammed) – Policy Analyst (former)
- Watt, Vanessa – Senior Program Advisor (worked on grants and contributions, developed engagement plan, engagement session logistics for Zoom)

Appendix D: Index of engagement session and meeting attendees

Engagement session and meeting participants

The *Employment Equity Act* Review Task Force met and engaged with the following individuals, partners and stakeholder organizations between February 2022 to October 2022. These sessions were held over 51 days, holding a total of 109 meetings and engagement sessions with a total of 337 attendees representing 176 stakeholder organizations, partners and government departments.

Abdallah, Ahmed, Canadian Centre for Gender and Sexual Diversity

Abou-Dib, Mariam, Teamsters

Abu-Naqaos, Qussai, Muslim Federal Employee Network

Achampong, Kofi, Black Class Action Secretariat

Achiume, Tendayi, UCLA Law School/ UN Special Rapporteur

Agócs, Carol, Western University

Ahmed-Omer, Dahabo, Black North Initiative

Ali Khan, Muhammed, Indigenous Services Canada

Amazan, Guerda, Maison d'Haïti

Ambrose, Jenelle, Black Female Lawyers Network

Anderson, Lorraine, Canadian Human Rights Commission

Arndt, Greg, Jade Transport Ltd.

Arya, Sara, Canadian Bankers Association

Ashton, Rob, International Longshore and Warehouse Union

Atif, Katia, Action-Travail des Femmes

Austin, Stephanie, Treasury Board Secretariat

Babiuk-Ilkiw, Colleen, Canadian Federation of Business and Professional Women

Balima-Vittin, Cecile, International Labour Organization

Barnett, Rachel, Native Women's Association of Canada

Beaudry, Jeff, Assembly of First Nations

Bégin, Colonel Marie-Eve, Canadian Armed Forces

Appendix D: Index of engagement session and meeting attendees

Belanger, Neil, British Columbia Aboriginal Network on Disability Society
Belisle, Terri, Students Commission of Canada
Bengio, Luna, Treasury Board Secretariat
Bernard, Claire, Commission des droits de la personne et de droits de la jeunesse du Québec
Bérubé, Dominique, Social Sciences and Humanities Research Council
Bett, Jason, Public Service Pride Network
Betts, Renate, Côte des Neiges Black Community Association
Betty, Courtney, Black Class Action Secretariat
Bickerton, Geoff, Canadian Union of Postal Workers
Birch, Gary, Neil Squire Society
Blackburn, Karl, Conseil du Patronat du Québec
Blackham, Jonathan, Canadian Trucking Alliance
Blair, Fraser, BC Maritime Employer Association
Blaise, Farah, Canadian Human Rights Commission
Borbey, Patrick, Public Service Commission
Boucher, Daniel, Indigenous Executive Network / Indigenous and Northern Affairs Canada
Boucher, Martin, Commission des droits de la personne et de droits de la jeunesse du Québec
Boucher, Patrick, Indigenous Services Canada
Boudreau, Louise, Canada Post
Boudreau, Marie-Lynne, Tri-agency Institutional Program Secretariat
Bowman, Bridget, National Association of Friendship Centres
Boyce, Tyler, Enchanté Network
Brayton, Bonnie, DisAbled Women's Network
Breault, Laurent, Conseil Québécois LGBT
Brook, Jennifer, Canadian Association of Professional Employees
Brook, Karen, Canadian Association of Professional Employees
Brown, Andrew, Employment and Social Development Canada-Labour Program
Brown, Lachlan, Students Commission of Canada
Burnett, Gillian, Canadian Human Rights Tribunal

A Transformative Framework to Achieve and Sustain Employment Equity

Burns, Mike, Chief, Statistics Canada
Cadotte, Gaveen, Public Service Commission
Cairns, Sheelah, Canada Post
Carr, Jennifer, Professional Institute of the Public Service of Canada
Carr, Krista, Inclusion Canada
Cassivi, Rear-Admiral Luc, Canadian Armed Forces
Chazou-Essindi, Germaine, National Arts Centre Corporation
Chevrier, Christopher, Employment and Social Development Canada
Chui, Tina WL, Statistics Canada
Church, Kevin, Employment and Social Development Canada - Labour Program
Cobb, Amanda, Canadian Pacific Railway
Coiquaud, Urwana, HEC Montréal
Colagiovanni, Joseph, Hines
Colman, Geoff, Communications Research Centre Canada
Cooke-Sumbu, Elizabeth, Cumberland African Nova Scotian Association
Côté, Diane, Canadian Institutes of Health Research
Crichlow, Dr. Wesley, University of Ontario Institute of Technology
Cukier, Wendy, Ryerson University
Cummings, Kasey, TELUS
Dale, Vincent, Statistics Canada
Dandy, Elizabeth, Canadian Union of Public Employees
Daoust, Gail, Canadian Armed Forces
David, William, Assembly of First Nations
Dawodharry, Ryan, Jewish Public Service Network
Day, Heather, C.S. Day Transport Ltd.
De Jaegher, Justine, Canadian Association of University Teachers
de Sousa, José, U. Paris-Saclay & SciencesPo
Decter, Ann, Canadian Women's Foundation
Delaney, Sara, Professional Institute of the Public Service of Canada

Appendix D: Index of engagement session and meeting attendees

DeSousa, Sharon, Public Service Alliance of Canada
Dong, Taylor, BC Maritime Employer Association
Donoghue, Christine, Treasury Board Secretariat - Office of the Chief Human Resources Officer
Douglas, Justin, Public Service Commission
Douglas, Michelle, LGBT Purge Fund
Drissi Kaitouni, Yasmina, Conseil d'intervention pour l'Accès des femmes au travail
Drouin, Jovane, Canadian Broadcasting Corporation
Druhan, Colin, Pride at Work
Dugas, Chantal, Air Canada
DuPerron, Sarah, Treasury Board Secretariat - Office of the Chief Human Resources Officer
Earle, Kory, People First of Canada
Edbom, Evan, Sutco Transportation Specialists
El Bilali, Larbi, Health Canada
Elcock, Hartland, Canadian Bankers Association
El-Khatib, Leila, Muslim Federal Employee Network
Enayeh, Nour, Alliance des femmes francophones du Canada
Epale, Dina, Canadian Association of Professional Employees
Esmonde, Jackie, Canadian Civil Liberties Association
Fam, Abdou Lat, Commission des droits de la personne et de droits de la jeunesse du Québec
Fells, Vanessa, African Nova Scotian Decade for People of African Descent Coalition
Fitzgerald, Tamsin, Les Femmes Michif Otipemisiwak
Flegel, Peter, Canadian Heritage
Fletcher, Shelley, People First of Canada
Folino, Frank, Public Services and Procurement Canada - Translation Bureau
Fonseca, Sara, Black Class Action Secretariat
Fontaine, Guillaume, Public Service Commission
Foy, Sean, Federal Black Employee Caucus
Frate, Nicolino, Treasury Board Secretariat - Office of the Chief Human Resources Officer

A Transformative Framework to Achieve and Sustain Employment Equity

French, Robert, African Nova Scotian Decade for People of African Descent Coalition / Valley African Nova Scotian Development Association

Fuhr, Erica, Jazz Aviation/Chorus Aviation

Gaboton, Richard, Professional Institute of the Public Service of Canada

Gagné, Diane Université du Québec à Trois-Rivières

Gagnon, Annie, Treasury Board Secretariat - Office of the Chief Human Resources Officer

Gagnon, Dr. Suzanne, University of Manitoba

Galabuzi, Grace-Edward, Ryerson University

Gardaad, Fatima, Canadian Labour Congress

Gillespie, Ian, Immigration, Refugees and Citizenship Canada

Go, Amy, Chinese Canadian National Council for Social Justice

Gobel, Ursula, Society, Social Sciences and Humanities Research Council

Gooden, Junique, National Educational Association of Disabled Students

Grant, Michele, Teslin Tlingit Council

Grasse, Bev, Neil Squire Society

Guiste, Raymund, Tropicana Community Services

Haan, Maureen, Canadian Council on Rehabilitation and Work

Haji, Sharif, Africa Centre - Council for the Advancement of African Canadians in Alberta

Hamilton, Kaiya/Kirk, Public Service Pride Network

Harwood, Brenda, Jazz Aviation

Hashim, Mohammed, Canadian Race Relations Foundation

Hassan, Fatma, Canadian Race Relations Foundation

Hassan, Sandra, Employment and Social Development Canada-Labour Program

Hauta, Tija, Canadian Roots Exchange

Hawkins, Stacy, Rutgers Law University, USA

Hedges-Chou, Sarah, Canadian Labour Congress

Hensen, Richard, Public Service Pride Network

Hickey, Brian, Employment and Social Development of Canada

Hudon, François, Employment and Social Development Canada - Labour Program

Appendix D: Index of engagement session and meeting attendees

Huggins, Nadine, Royal Canadian Mounted Police

Hunter, Karen, Assembly of First Nations

Hynes, Derrick, Federally Regulated Employers – Transportation and Communications

Irish, Debbie, Canadian Council on Rehabilitation and Work

Irving, Dr. Dan, Institute Interdisciplinary Studies / Pauline Jewett Institute of Women's and Gender Studies (Sexuality Studies), Carleton University

Jacobs, Rufus, Congress of Aboriginal Peoples

Jafri, Nuzhat, Canadian Council of Muslim Women

Jakubiec, Dr. Brittany, Egale Canada

Jean Francois, Louis Edgar Groupe 3737

Joe, Francyne, National Association of Friendship Centres

John-Baptiste, Sandra, Tropicana Community Services

Jones, Chiedza, Black Business Initiative

Jones, Migdalia, Tropicana Community Services

Joomun, Wasimah, Canadian Alliance of Student Associations

Joseph, Kessie, Canadian Human Rights Commission

Kabis, Marie-Josée, Treasury Board Secretariat - Office of the Chief Human Resources Officer

Kanyamunyu, Julius, Black Business Initiative

Karim, Farouk, Canadian Union of Postal Workers

Kaur-Grover, Deepika, Sikh Public Servants Network

Kelly, Tammy, Canadian Union of Public Employees

Khan, Tabassum, Muslim Federal Employees Network

Khan, Waheed, Community of Federal Visible Minorities

King, Chidi, International Labour Organization

Kobayashi, Audrey, Queen's University

Kokozaki, Kalim, Community of Federal Visible Minorities

Kootoo-Chiarello, Toonejoulee, Indigenous Federal Networks

Krane, Jaclyn, Canadian Council on Rehabilitation and Work

Kula, Jocelyn, Employment and Social Development Canada

A Transformative Framework to Achieve and Sustain Employment Equity

Kumar, Mohan, Statistics Canada

Kwan, Elizabeth, Canadian Labour Congress

LaBillois, Tony, Statistics Canada

Lafortune, Mathilde, Fédération des femmes du Québec

Lamache, Emmett, BGC Canada

Lamba, Seema, Public Service Alliance of Canada

Langille, Ellen, Native Women's Association of Canada

Lapolice, Jean-Sibert, Federal Black Employee Caucus

Laroche, Yazmine, Public Service Accessibility / Champion for Federal Employees with Disabilities

LeClair, Dale Robert, Canada Post

Leclerc, Karine, Statistics Canada

Leclerc, Nicole, International Development Research Centre

Lee, Stan, Public Service Commission

Leonard, Tim, Statistics Canada

Lepofsky, David, Accessibility for Ontarians with Disabilities Act Alliance

Lequain, Anne-Cecile, Canada Post

Leung, Angela, Health Canada

Levandier, Tara, Inclusion Canada

Levesque, Bruno, Public Service Commission

Lewis, Leslie-Anne, Canadian National Railway Company

Lifshen, Marni, Canadian Council on Rehabilitation and Work

Lipic, Lydia, Public Service Pride Network

Loiselle, Solange, Kativik Regional Government

Lyons-MacFarlane, Maggie, National Educational Association of Disabled Students

Lysyk, Stephanie, Nisga'a Lisims Government

MacFarlane, Julie, Can't Buy My Silence

Macklin, Christine, Unifor

MacLaine, Cameron, Native Women's Association of Canada

MacLaughlin, John, Black Class Action Secretariat

Appendix D: Index of engagement session and meeting attendees

MacLeod, Alfred, Treasury Board Secretariat
Maheux, Helene, Statistics Canada
Marchand, Isabelle, Statistics Canada
Martel, Laurent, Statistics Canada
Martins, Dwayne, Canadian Institutes of Health Research
Mason, Stephanie, Canada Post
Masoud, Huda, Statistics Canada
Mazan, Ryan, Inuvialuit Regional Corporation
Mbenoun, Jeanette, Commission des droits de la personne et de droits de la jeunesse du Québec
McKenna, John, Air Transportation Association of Canada
McSheffrey, Robert, Public Service Commission
Members of the Indigenous Federal Employees Network
Mielnik, Monika, Bell
Mikaelian, Virginie, Fédération des femmes du Québec
Millar, Harvi, Management Technologies
Miller, Greg, Canadian Human Rights Tribunal
Mills, Rachel, Inclusion Canada
Mitchell, Gail, Women and Gender Equality Canada
Mitchell, Nancy, Diversity Institute - Ryerson University
Mohammed, Natasha, Canadian Heritage
Mohler, Elizabeth, Citizens with Disabilities – Ontario
Morin, Karine, Natural Sciences and Engineering Research Council
Morin, Louis-Philippe, University of Ottawa
Morin, Michael, Public Service Commission
Morrison, Heather, Inuit Tapiriit Kanatami
Mpala, Shelton, Black North Initiative
Murray, Gregor, Université de Montréal
Narain, Vrinda, McGill University
Narducci, Piero, Canadian Human Rights Commission

A Transformative Framework to Achieve and Sustain Employment Equity

Ngan, Vincent, Public Service Pride

O'Loan, Tim, Indigenous Knowledge Keeper

Odell, Tracy, Canadians with Disabilities / Citizens with Disabilities – Ontario

Olivier-Nault, Jessica, Fédération des travailleurs et travailleuses du Québec

Olowolafe Jr., Isaac, Dream Maker Inc.

Onah, Emmanuel, Africa Centre - Council for the Advancement of African Canadians in Alberta

Onwuachi-Willig, Angela, Boston University, School of Law

Ouellet, Major Eric, Department of National Defence, Canadian Armed Forces (CAF)

Outerbridge, Sage, Black Business Initiative

Pageau, Steve, Employment and Social Development Canada

Pang, Winnie Man Yin, Canadian Heritage

Peera, Rishma, Employment and Social Development Canada

Perkins, Zelda, Can't Buy My Silence

Perreault, Marie-Claude, Conseil du Patronat du Québec

Petit-Frère, Christian, Canadian Bankers Association

Phillips, Greg, Canadian Association of Professional Employees

Pierre, Myrlande, Commission des droits de la personne et de droits de la jeunesse du Québec

Pigeau, Lisa, Les Femmes Michif Otîpemisîwak

Polgar, Andrea, Public Service Pride Network

Potskin, Jonathon, Two-Spirit in Motion Society

Proulx, Zia, Employment and Social Development Canada - Labour Program

Prud'homme, Jean-François, Employment and Social Development Canada

Quan-Watson, Daniel, Crown-Indigenous Relations and Northern Affairs Canada / Champion for Visible Minorities for the Federal Public Service

Racine, Éliane, Force Jeunesse

Rakhra, Ravinder, Public Service Commission

Ramsaroop, Chris, Justice 4 Migrant Workers

Ramsey, Tracy, Unifor

Rasekhi-Nejad, Arash, Métis National Council

Appendix D: Index of engagement session and meeting attendees

Robertson, Gary, Employment and Social Development Canada - Labour Program

Rousseau, Larry, Canadian Labour Congress

Roussel, Renée, Employment and Social Development Canada - Labour Program

Roy, Allison, Representative, BGC Canada

Roy, Jean-François, Statistics Canada

Russell, Jyssika, Enchanté Network

Ryan, Brandy, Canada Post

Saba, Tania, Université de Montréal

Salvati, Maria, Canadian National Railway Company

Sandhu, Bhagwant, Community of Federal Visible Minorities

Sarr, Dr. Moussa, Groupe 3737

Saunders, Adam, Canadian Human Rights Commission

Scher, Hugh, Black Class Action Secretariat

Schroeder, Monica, People First of Canada

Sealy-Harrington, Joshua, Ryerson University

Seck, Hawa, Black Business Initiative

Sellar, Randall, Shaw

Senft, Emma, Canadian Pacific Railway

Seremba, Brian, Federation of Black Canadians

Shanks, Dave, Students Commission of Canada

Sharma, Harsh, Employment and Social Development Canada - Labour Program

Sharma, Shalini, Canadian Council for Youth Prosperity

Sheppard, Colleen, McGill University

Sidhu, Navjeet, Unifor

Simard, Louise, Métis National Council

Simpson, Jan, Canadian Union of Postal Workers

Singh, Balpreet, World Sikh Organization of Canada

Singh, Navdip-Kaur, Sikh Public Servants Network

Skowronski, Grace, Canada Post

A Transformative Framework to Achieve and Sustain Employment Equity

Smallman, Vicky, Canadian Labour Congress
Smith, Frank, National Educational Association of Disabled Students
Smith, Malinda, University of Calgary
Smylie, Lisa, Women and Gender Equality Canada
Snider, Ceilidh Canadian Human Rights Commission
Southwell, Rustum, Black Business Initiative
Sowinski, Mercedes, Employment and Social Development Canada
Sparkes, Melanie, The Rosedale Group
Spence, Kathryn, Statistics Canada
Spencer, Nadine, Black Business and Professional Association
Squitti, Sidney, Native Women's Association of Canada
Stein, Michael, Harvard Law School
Strachan, Glenda, Griffith University
Stüber, Eberhard, Swedish Gender Equality Agency
Suk, Julie, Fordham University School of Law
Sylla, Amy, CBC/Radio-Canada
Tao, Erica, Canadian Heritage
Taylor, Julian, Treasury Board Secretariat - Office of the Chief Human Resources Officer
Theede, Stephanie, Westcan Bulk Transport
Thermitus, Tamara, McGill University
Thie, Claire, Indigenous Services Canada
Thompson, Nicholas Marcus, Black Class Action Secretariat
Tierney, Jenny, Inuit Tapiriit Kanatami
Tiessen, Kaylie, Unifor
Tippins, Philippe, Public Service Pride Network
Topping, Geoff, Challenger Motor Freight Inc.
Trespalacios Rubio, Magda, FedEx Canada
Triki-Yamani, Amina, Commission des droits de la personne et de droits de la jeunesse du Québec
Tsevi-Fanson, Isabel, NAV CANADA

Appendix D: Index of engagement session and meeting attendees

Tuitoek, Pauline, Statistics Canada

Van Every, John, Van Every Inc.

Venkatesh, Vasanthi, Justice 4 Migrant Workers

Vertus, Ed, Director, Groupe 3737

Vézina, Samuel, Statistics Canada

Villefrance, Marjorie, Maison d'Haïti

Vipond, Siobhán, Canadian Labour Congress

Vogt, Jack, BC Maritime Employer Association

Wadher, Leena, Canadian Pacific Railway

Walsh, Kordell, Canadian Alliance of Student Associations / University of New Brunswick Student Union

Warburton, Pamela, Agriculture and Agri-Food Canada Canada

Webb, Melissa, Nunatsiavut Government

Wells, Letitia, Indigenous Class Action Lawsuit

Westland, Robin, Tr'ondëk Hwëch'in Government

Whitaker, Robin, Canadian Association of University Teachers / Memorial University

White, Danielle, Indigenous Services Canada / Indigenous Executive Network

Whiteduck, Judy, Native Women's Association of Canada

Williams, Shanay, Inuvialuit Regional Corporation

Willis, David, Communications Research Centre Canada

Willis, Heather, Citizens with Disabilities – Ontario

Wilson, Christopher, The Coalition of Black Trade Unionists, Ontario

Wilson, Gina, Champion for Indigenous Federal Employees, Women and Gender Equality

Wise, Amichai, Jewish Public Servants Network

Woo-Paw, Teresa, Act2End Racism

Wright, Heather, BC Maritime Employer Association

Wu, May Ming, Health Canada / Steering Committee for Visible Minorities

Young, Tuma, Cape Breton University / Wabanaki Two Spirit Alliance

Zagler, Gertrude, Employment and Social Development Canada - Labour Program

Zentner, Yvette, Indigenous Class Action Lawsuit

Zhu, Jing, Employment and Social Development Canada

Stakeholder organizations and partners

Accessibility for Ontarians with Disabilities Act Alliance

Act2End Racism

Action-Travail des Femmes

Africa Centre - Council for the Advancement of African Canadians in Alberta

African Nova Scotian Decade for People of African Descent Coalition

Air Canada

Air Transportation Association of Canada

Alliance des femmes francophones du Canada

2 Spirits in Motion Society

Assembly of First Nations

BC Maritime Employer Association

Bell

BGC Canada

Black Business and Professional Association

Black Business Initiative

Black Class Action Secretariat

Black Female Lawyers Network

Black North Initiative

Boston University, School of Law

British Columbia Aboriginal Network on Disability Society

C.S. Day Transport Ltd.

Can't Buy My Silence

Canada Post

Canadian Alliance of Student Associations

Canadian Armed Forces (CAF)

Canadian Association of Professional Employees

Appendix D: Index of engagement session and meeting attendees

Canadian Association of University Teachers
Canadian Bankers Association
Canadian Broadcasting Corporation
Canadian Centre for Gender and Sexual Diversity
Canadian Civil Liberties Association
Canadian Council for Youth Prosperity
Canadian Council of Muslim Women
Canadian Council on Rehabilitation and Work
Canadian Federation of Business and Professional Women
Canadian Heritage
Canadian Human Rights Commission
Canadian Human Rights Tribunal
Canadian Institutes of Health Research
Canadian Labour Congress
Canadian National Railway Company
Canadian Pacific Railway
Canadian Race Relations Foundation
Canadian Roots Exchange
Canadian Trucking Alliance
Canadian Union of Postal Workers
Canadian Union of Public Employees
Canadian Women's Foundation
Cape Breton University
Carleton University
Challenger Motor Freight Inc.
Champion for Indigenous federal employees
Champion for Visible Minorities for the Federal Public Service
Chinese Canadian National Council for Social Justice
Chorus Aviation

Citizens with Disabilities – Ontario

Commission des droits de la personne et de droits de la jeunesse du Québec

Communications Research Centre Canada

Community of Federal Visible Minorities

Congress of Aboriginal Peoples

Conseil du Patronat du Québec

Conseil Québécois LGBT

Côte des Neiges Black Community Association

Council of Canadians with Disabilities

Crown-Indigenous Relations and Northern Affairs Canada

Cumberland African Nova Scotian Association

D'économie, U. Paris-Saclay & SciencesPo (France)

Department of National Defence

DisAbled Women's Network

Diversity Institute, Ryerson University

DM Champion for Federal Employees with Disabilities

Dream Maker Inc.

Egale Canada

Employment and Social Development Canada

Employment and Social Development Canada - Labour Program

Employment and Social Development of Canada

Enchanté Network

Federal Black Employee Caucus

Federally Regulated Employers – Transportation and Communications (FETCO)

Fédération des femmes du Québec

Fédération des travailleurs et travailleuses du Québec

Federation of Black Canadians

FedEx Canada

Force Jeunesse

Appendix D: Index of engagement session and meeting attendees

Fordham University School of Law

Griffith University

Groupe 3737

Harvard Law School

Health Canada

Health Canada / Steering Committee for Visible Minorities

HEC Montréal

Hines, Houston, TX, USA

Immigration, Refugees and Citizenship Canada

Inclusion Canada

Indigenous and Northern Affairs Canada

Indigenous Class Action Lawsuit

Indigenous Executive Network

Indigenous Federal Employees Network

Indigenous Federal Networks

Indigenous Knowledge Keeper

Indigenous Services Canada

International Development Research Centre

International Labour Organization

International Longshore and Warehouse Union

Inuit Tapiriit Kanatami

Inuvialuit Regional Corporation

Jade Transport Ltd.

Jazz Aviation

Jewish Public Servants Network

Justice 4 Migrant Workers

Kativik Regional Government

l'Accès des femmes au travail (CIAFT)

Les Femmes Michif Otipemisiwak

LGBT Purge Fund
Maison d'Haïti
Management Technologies
McGill University
Memorial University
Métis National Council
Muslim Federal Employees Network
National Arts Centre Corporation
National Association of Friendship Centres
National Educational Association of Disabled Students
Native Women's Association of Canada
Natural Sciences and Engineering Research Council
NAV CANADA
Neil Squire Society
Nisga'a Lisims Government
Nunatsiavut Government
People First of Canada
Persons with Disabilities Network at AAFC
Pride at Work
Professional Institute of the Public Service of Canada
Public Service Accessibility
Public Service Alliance of Canada
Public Service Commission
Public Service Pride Network
Queen's University
Royal Canadian Mounted Police
Rutgers Law University, USA
Ryerson University
Shaw

Appendix D: Index of engagement session and meeting attendees

Sikh Public Servants Network

Social Sciences and Humanities Research Council

Statistics Canada

Students Commission of Canada

Sutco Transportation Specialists

Swedish Gender Equality Agency

Teamsters

TELUS

Teslin Tlingit Council

The Coalition of Black Trade Unionists, Ontario

The Rosedale Group

Tr'ondëk Hwëch'in Government

Translation Bureau, Public Services and Procurement Canada.

Treasury Board Secretariat

Treasury Board Secretariat - Office of the Chief Human Resources Officer

Tri-agency Institutional Program Secretariat

Tropicana Community Services

UCLA Law School/ UN Special Rapporteur

Unifor

Université de Montréal

Université du Québec à Trois-Rivières

University of Calgary

University of Manitoba

University of New Brunswick Student Union

University of Ontario Institute of Technology

University of Ottawa

Valley African Nova Scotian Development Association

Van Every Inc.

Wabanaki Two Spirit Alliance

Westcan Bulk Transport

Western University

Women and Gender Equality Canada

World Sikh Organization of Canada

Appendix E: List of enhanced engagements

Table AE.1: National Indigenous Partners

Partner	Status and date
Assembly of First Nations	Not yet submitted
Congress of Aboriginal Peoples	Not yet submitted
Les Femmes Michif Otipemisiwak	Engagement session October 2022
National Association of Friendship Centres	Submitted on October 27, 2022
Native Women's Association of Canada	Submitted on November 1, 2022

Table AE.2: Accessibility / disability organizations

Organization	Status and date
British Columbia Aboriginal Network on Disability Society	Not yet submitted
Canadian Council on Rehabilitation and Work	Submitted on June 27, 2022
Inclusion Canada	Submitted on June 6, 2022
National Educational Association of Disabled Students	Submitted on August 15, 2022
People First of Canada	Submitted on June 15, 2022

Table AE.3: 2SLGBTQI community

Organization	Status and date
Enchanté Network	Submitted on August 31, 2022

Table AE.4: Black Canadian communities

Organization	Status and date
Black Canadian Communities: <ul style="list-style-type: none">• Africa Centre - Council for the Advancement of African Canadians in Alberta• Black Business Initiative• Groupe 3737• Tropicana Community Services Report submitted by: Dr. Harvi Millar, Management Technologies	Submitted on July 21, 2022

Appendix F: Index of written submissions

The *Employment Equity Act* Review Task Force received 126 comprehensive written submissions from government officials and departments, partners and stakeholder organizations, including employers, unions, professional associations and those from employment equity groups and other communities, such as women, 2SLGBTQI+ Canadians, Indigenous people, Black and racialized Canadians, people with disabilities and other underrepresented groups.

The Task Force also received over 300 written submissions covering the full scope of the review, and over 350 expressions of views shared via electronic correspondence.

The following provided comprehensive written submissions to inform the work of the Task Force:

- Alliance for Equality of Blind Canadians
- Black Class Action Secretariat
- Canada Post
- Canada Border Services Agency - Prairie Region
- Canada Border Services Agency - Visible Minority Advisory Committee
- Canada Revenue Agency - LGBTQ2 Network
- Canadian Association of Counsel to Employers
- Canadian Association of Professional Employees
- Canadian Association of University Teachers
- Canadian Bankers Association
- Canadian Bar Association
- Canadian Council of Muslim Women
- Canadian Council on Rehabilitation and Work
- Canadian Disability Alliance
- Canadian Federation of University Women
- Canadian Heritage – Advisory Committee on (Dis)Ability
- Canadian Human Rights Commission
- Canadian Institutes of Health Research
- Canadian Labour Congress
- Canadian Nuclear Safety Commission
- Canadian Race Relation Foundation
- Canadian Union of Postal Workers
- Canadian Union of Public Employees
- Canadian Women's Foundation
- Canadian Women's Sex-Based Rights
- Chartered Professionals in Human Resources Canada
- Chinese Professionals Association of Canada
- Community of Federal Visible Minorities
- Conseil du patronat du Québec
- Crichlow, Wesley, PhD, Professor Critical Race Intersectional Theorist, Faculty of Social Science and Humanities, University of Ontario Institute of Technology

A Transformative Framework to Achieve and Sustain Employment Equity

- Dalhousie University – Employment Equity Council
- Deputy Minister Champion for Visible Minorities for the Federal Public Service, Daniel Quan-Watson, Deputy Minister of Crown-Indigenous Relations and Northern Affairs Canada
- Egale Canada
- Employment and Social Development Canada - Black Engagement and Advancement Team and Black United
- Employment and Social Development Canada - Visible Minorities Network
- Environment and Climate Change Canada - Black Employees Network
- Federal Black Employees Caucus
- Federally Regulated Employers – Transportation and Communications
- Health Canada - Workplace Wellness Committee
- Health Canada - Visible Minorities Network
- Infrastructure Canada
- International Longshore and Warehouse Union Canada
- Jewish Public Service Network
- JusticeTrans
- Kootenay Women in Trades
- LGB Alliance Canada
- LiveWorkPlay
- Muslim Federal Employees Network
- National Association of Friendship Centres
- National Indigenous Economic Development Board
- National Joint Council - Joint Employment Equity Committee
- National Security and Intelligence Review Agency Secretariat
- Nòkwewashk, Natural Resources Canada
- Office of the Secretary to the Governor General
- Professional Institute of the Public Service of Canada
- Public Service Alliance of Canada
- Public Service Commission of Canada
- Queen's University - Human Rights and Equity Office
- Sikh Public Servants Network
- South Asian Legal Clinic of Ontario, the Ontario Council of Agencies Serving Immigrants, and Colour of Poverty-Colour of Change
- Treasury Board Secretariat - Indigenous Employee Network
- Treasury Board Secretariat – Office of the Chief Human Resources Office
- Treasury Board Secretariat – Office of the Chief Human Resources Officer with:
 - Canadian Space Agency
 - Agriculture and Agri-Food Canada
 - Anti-Racism Ambassadors Network
 - Black Executive Network
 - Canada Border Services Agency
 - Canada Energy Regulator
 - Canada Mortgage and Housing Corporation
 - Canada Revenue Agency:
 - Canada Revenue Agency (Department)
 - People With Disabilities Network
 - Canadian Armed Forces
 - Canadian Food Inspection Agency

Appendix F: Index of written submissions

- Canadian Radio - Television and Telecommunications Commission
- Canadian Security Intelligence Service:
 - Black, Indigenous, and Persons of Colour Network
 - Gender-based Analysis Plus Network
 - Diversity and Inclusion Program, Gender-based Analysis Plus
 - Pride Network
 - Employee Submission 1
 - Employee Submission 2
- Canadian Transportation Agency - Committee on Diversity and Inclusion
- Communications Security Establishment
- Crown-Indigenous Relations and Northern Affairs Canada
- Department of National Defence - Defence Advisory Group for Persons with Disabilities
- Deputy Minister Champion for Federal Indigenous Employees, Gina Wilson, Deputy Minister of Women and Gender Equality and Youth
- Elections Canada
- Employment and Social Development Canada:
 - Human Resources Services Branch - Diversity and Inclusion Team
 - Employees with Disabilities Network
- Health Canada and Public Health Agency of Canada - Equity, Diversity and Inclusion Office
- Health Canada - Persons with Disabilities Network
- Immigration, Refugees and Citizenship Canada:
 - Immigration, Refugees and Citizenship Canada (Department)
 - Federal Internship for Newcomers Program
- Impact Assessment Agency of Canada
- Innovation, Science and Economic Development Canada
- Jewish Public Service Network
- Justice Canada:
 - Justice Canada (Department)
 - Justice Canada Employees
 - Advisory Committee on Sexual Orientation, Gender Identity and Expression
 - Advisory Committee for Women
- Muslim Federal Employees Network
- National Managers' Community
- Natural Resources Canada:
 - Natural Resources Canada (Department)
 - Visible Minority Advisory Council & Black Employees Advisory Council
- Office of Public Service Accessibility
- Office of the Auditor General of Canada:
 - Employee Submission 1
 - Employee Submission 2
 - Employee Submission 3
- Privy Council Office
- Public Health Agency of Canada - Persons with Disabilities Network
- Public Prosecution Service of Canada
- Public Service Commission of Canada

A Transformative Framework to Achieve and Sustain Employment Equity

- Public Service Interdepartmental Network on Employment Equity and Diversity Community of Practice
- Public Services and Procurement Canada
- Royal Canadian Mounted Police:
 - Royal Canadian Mounted Police (Department)
 - Racial Diversity Employee Network
- Sikh Public Servants Network
- Statistics Canada
- Deputy Minister Champion for Federal Indigenous Employees, Gina Wilson, Deputy Minister of Women and Gender Equality and Youth
- Women and Gender Equality Canada
- United Food and Commercial Workers Union
- Unifor
- United Steelworkers
- Vancouver Lesbian Collective
- Via Rail
- Williams Sale Partnership
- Women's Declaration International
- Women's Legal Education & Action Fund
- World Sikh Organization of Canada
- Women's Space Vancouver
- World Education Services

Appendix G: Engagement session attendees – Individual meetings with Task Force Chair & Vice Chair or Task Force Chair alone

Table AG.1: Engagement session attendees for individual meetings with Task Force Chair and Vice Chair alone

Organization	Attendees	Sector
Canadian Human Rights Commission (CHRC): Accessibility Commissioner	<ul style="list-style-type: none"> Michael Gottheil, Accessibility Commissioner 	Federal Public Service
CHRC: Chief Commissioner	<ul style="list-style-type: none"> Marie-Claude Landry, Chief Commissioner 	Federal Public Service
Social Sciences and Humanities Research Council (SSHRC)	<ul style="list-style-type: none"> Marie-Lynne Boudreau, Director at Tri-agency Institutional Program Secretariat Valérie Laflamme, Associate Vice President, TIPS for SSHRC 	Federal Public Service
SSHRC – Office of the President	<ul style="list-style-type: none"> Ted Hewitt, President 	Federal Public Service
University of Sherbrooke	<ul style="list-style-type: none"> Professor Isabelle Letourneau, Associate Professor, School of Management, Department of management and human resources management 	Academic
York University	<ul style="list-style-type: none"> Professor Carl James, Jean Augustine Chair in Education, Community and Diaspora 	Academic
Office of the Auditor General	<ul style="list-style-type: none"> Karen Hogan, Auditor General of Canada Andrew Hayes, Deputy Auditor General Jerry V. DeMarco, Commissioner of the Environment and Sustainable Development 	Federal Public Service

Table AG.1: Engagement session attendees for individual meetings with Task Force Chair and Vice Chair alone

Organization	Attendees	Sector
	<ul style="list-style-type: none"> • Paule-Anny Pierre, Assistant Auditor General 	
CHRC: Pay Equity Commissioner	<ul style="list-style-type: none"> • Lori Straznicky, Federal Pay Equity Commissioner 	Federal Public Service
Federal Public Sector Labour Relations and Employment Board	<ul style="list-style-type: none"> • Edith Bramwell, Chairperson • Asha Kurian, General Counsel 	Federal Public Service
Specialist in Privacy Law	<ul style="list-style-type: none"> • Aida Abraha, LL.M. 	Law
Universidade Federal de Ouro Preto, Brazil	<ul style="list-style-type: none"> • Professor Flávia Souza Máximo Pereira 	Academic

Appendix H: Expert consultancies commissioned by Employment Equity Act Review Task Force

Table AH.1: Expert consultancies commissioned by *Employment Equity Act* Review Task Force

Report title and date	Researchers/Experts
Rethinking the relationship between Indigenous Rights and Employment Equity - August 2022	Joshua Nichols, Assistant Professor, McGill University Aaron Mills, Assistant Professor, Canada Research Chair in Indigenous Constitutionalism and Philosophy, McGill University
Working Paper on Employment Equity and Inclusion: Through the Lens of Substantive Equality - September 2022	Colleen Sheppard, Professor of Law, McGill University Vrinda Narain, Associate Professor of Law, McGill University Tamara Thermitus, Ad. E., Visiting Fellow, Faculty of Law, McGill University
Investigating Potential New Datasets to Foster Our Understanding of the Labour Market - August 2022	Louis-Philippe Morin, Associate Professor, Department of Economics, University of Ottawa
Ensuring Compliance and Progress with The Employment Equity Act: A Review of Worker Voice Mechanisms in the Federally Regulated Private Sector – October 2022	Rafael Gomez, Professor; Director of the Centre for Industrial Relations and Human Resources, University of Toronto
Affirmative Action Law & Policy in the United States: Past, Present, and Future - September 2022	Stacy Hawkins, Vice dean and professor of Law at Rutgers Law School
Think Piece on Three Topics: Adding Equity-seeking Groups to Those Covered under the Employment Equity Act, Improving Employee Self-identification and Monitoring of Equity Results, and Workplace Employment Equity Committees - August 2022	Carol Agócs, Professor Emerita of Political Science, Western University

Appendix I: ILO Conventions ratified by and in force in Canada

Fundamental

C029 – Forced Labour Convention, 1930 (No. 29) ratified 13 June 2011

C087 – Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) ratified on 23 March 1972

C098 – Right to Organise and Collective Bargaining Convention, 1949 (No. 98) ratified on 17 June 2017

C100 – Equal Remuneration Convention, 1951 (No. 100) ratified on 16 November 1972

C105 – Abolition of Forced Labour Convention, 1957 (No. 105) ratified on 14 July 1959

C111 – Discrimination (Employment and Occupation) Convention, 1958 (No. 111) ratified on 26 November 1964

C138 – Minimum Age Convention, 1973 (No. 138) ratified on 8 June 2016

C182 – Worst Forms of Child Labour Convention, 1999 (No. 182) ratified on 6 June 2000

C187 – Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) ratified on 13 June 2011

Governance (Priority)

C081 – Labour Inspection Convention, 1947 (No. 81) ratified on 17 June 2019

C122 – Employment Policy Convention, 1964 (No. 122) ratified on 16 September 1966

C144 – Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) ratified on 13 June 2011

Technical

C001 – Hours of Work (Industry) Convention, 1919 (No.1) ratified on 21 March 1935

C014 – Weekly Rest (Industry) Convention, 1921 (No. 14) ratified on 21 March 1935

C026 – Minimum Wage-Fixing Machinery Convention, 1928 (No. 26) ratified on 25 April 1935

C027 – Marking of Weight (Packages Transported by Vessels) Convention, 1929 (No. 27) ratified on 30 June 1938

C032 – Protection against Accidents (Dockers) Convention (Revised), 1932 (No. 32) ratified on 6 April 1946

C080 – Final Articles Revision Convention, 1946 (No. 80) ratified on 31 July 1947

Appendix I: ILO Conventions ratified by and in force in Canada

C088 – Employment Service Convention, 1948 (No. 88) ratified on 24 August 1950

C108 – Seafarers’ Identity Documents Convention, 1958 (No. 108) ratified on 31 May 1967

C116 – Final Articles Revision Convention, 1961 (No. 116) ratified on 25 April 1962

C160 – Labour Statistics Convention, 1985 (No. 160) ratified on 22 November 1995

C162 – Asbestos Convention, 1986 (No. 162) ratified on 16 June 1988

MLC, 2006 – Maritime Labour Convention, 2006 (MLC, 2006) ratified on 15 June 2010

Amendments of 2014 to the MLC, 2006 ratified on 16 January 2017

Amendments of 2016 to the MLC, 2006 ratified on 8 January 2019

Amendments of 2018 to the MLC, 2006 ratified on 26 December 2020

Appendix J: List of other international human rights treaties to which Canada is a party (with year of ratification or accession)

- Convention on the Prevention and Punishment of the Crime of Genocide (1952)
- International Convention on the Elimination of All Forms of Racial Discrimination (1970)
- International Covenant on Economic, Social and Cultural Rights (1976)
- International Covenant on Civil and Political Rights (ICCPR) (1976)
 - Optional Protocol to the ICCPR (complaint mechanism) (1976)
 - Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty (2005)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1981)
 - Optional Protocol to CEDAW (complaint mechanism) (2002)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)
- Convention on the Rights of the Child (CRC) (1991)
 - Optional Protocol to the CRC on the Involvement of Children in armed conflict (2000)
 - Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (2005)
- Convention on the Rights of Persons with Disabilities (2010)
 - Optional Protocol to the Convention on the Rights of Persons with Disabilities (2018)

Appendix K: Comparative law table of employment equity legislation

Table AK.1: Employment equity legislation coverage in the public and private sectors by country

Sector	Canada (fed)	Australia	Brazil	France	India	Northern Ireland	South Africa	Sweden	USA (fed)
Public sector	Yes	Yes	Yes	Yes, but limited	Yes	Yes	Yes	Yes	Yes
Private sector	Yes	Yes (for AA)	No	Yes	No	No	Yes	Yes	Yes

Table AK.2: Type of employment equity legislation coverage by country

Type of coverage	Canada (fed)	Australia	Brazil	France	India	Northern Ireland	South Africa	Sweden	USA (fed)
Constitutional protection	Section 15(2) Canadian Charter	No	Yes, the constitution characterizes the government as an agent of social transformation towards principles like substantive equality and social justice.	No	Yes, mandatory AA for “Scheduled-Castes and Scheduled Tribes” in Part IV of the Constitution, arts 14-16, 46, 366 (25), 342	No	Yes, subsections 9(1)-(5) of the Amended 1996 Constitution	Yes, Chapter 1, Article 3 of the Instrument of Government promotes non-discrimination, minority rights and multiculturalism	Yes, equal Protection Clause of the 14th Amendment to the U.S. Constitution
Laws and regulations	EAA	Fair Work Act, Equal	Lei de Cota, N° 7.824, De	La loi du 11 février 2005	Untouchability Practices	Fair Employment	Employment Equity Act,	Equal Opportunities	Title VII of the Civil

Table AK.2: Type of employment equity legislation coverage by country

Type of coverage	Canada (fed)	Australia	Brazil	France	India	Northern Ireland	South Africa	Sweden	USA (fed)
		Employment Opportunity (Commonwealth Authorities) Act 1987 ; Affirmative Action (Equal Employment Opportunity for Women) Act 1986 ; Human Rights and Equal Opportunity Commission Act 1986	11 De Outubro 2012, Lei 10.639/03 ; Lei 11.645/08 ; Estatuto da Igualdade Racial ; LEI N° 14.457, DE 21 DE SETEMBRO DE 2022 (Women's employment) ; Article 93, Law 8.213 (1991) (Disability) ; Law 12.990 (2014) (Public Service)	pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées , art. 26	Act, 1955 ; Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989	and Treatment (Northern Ireland) Order 1998 ; Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003 ; Northern Ireland Act, 1998 , s. 75	No 55 of 1998 ; Act No. 04 of 2022: Employment Equity Amendment Act, 2022 ; Broad-Based Black Economic Empowerment Amendment Act; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000	Act (No. 433 of 1991) ; The Swedish Discrimination Act, 2008	Rights Act of 1964 ; Pregnancy Discrimination Act of 1978 , Age Discrimination in Employment Act, American with Disabilities Act of 1990 ; Executive Order 11246 ; Rehabilitation Act of 1973 ; Vietnam Era Veterans' Readjustment Assistance Act of 1974 Regulations: 41 CFR Part 60-1 - Obligations of Contractors and Subcontractors 41 CFR Part 60-2

Table AK.2: Type of employment equity legislation coverage by country

Type of coverage	Canada (fed)	Australia	Brazil	France	India	Northern Ireland	South Africa	Sweden	USA (fed)
									- Affirmative Action Programs 41 CFR Part 60-741 - Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities
Government procurements contracts	Yes	Yes	Yes, see new decree DECR ETO N° 11.430, DE 8 DE MARÇO DE 2023	No	Yes	No	Yes – see the Black Economic Empowerment Act associated policies	No	Yes – see EEO 11246
Court imposed	Initially	No	Court-affirmed	No	Yes, for transgender rights	No	No	No	No

Table AK.3: Employment equity legislation measures by country

Measures	Canada (fed)	Australia	Brazil	France	India	Northern Ireland	South Africa	Sweden	USA (fed)
Numerical targets	No	Yes	Yes, 50% in designated universities	Yes, 6% quota for disabled persons	Yes, up to 50%	Yes	Yes, s. 15(2)(3) of EEA	No	Yes, “placement goals” as per 41 CFR 60 2.16(a) of EEO 11246
Timetables	No	No	No	No	N/A	No	Yes, s. 20(2) of EEA	No	No
Employment systems review for barrier removal	Yes	Yes, s. 6 of the EEOA	No	No	No	Yes, art. 55 of the Fair Employment and Treatment Act and Section 75 of the Northern Ireland Act	Yes, s. 15(2)(1) of EEA	No	Yes, 41 CFR 60 2.10(a)(1)
Action plans	Yes	Yes, s. 9 of EEOA	Yes	Yes	Yes	Yes	Yes, s. 20(2) of EEA.	Yes, for pay equity, s. 11 of the Equal Opportunities Act	Yes, 41 CFR 60 2.1(b) of EEO 11246
Joint committees	Yes	Yes	No	No reference	No reference	No	Yes, ss. 16-17 of EEA	No	Yes, Section 709 of Title VII of the Civil Rights Act of 1964
Oversight agencies	Public Service Commission	Australian Human Rights and Equal	Ministério da Educação	Comité interministérielle du handicap;	National Human Rights Commission;	Northern Ireland Civil Service	Department of Labour Commission	Swedish Gender	Department of Labor; Employment

Table AK.3: Employment equity legislation measures by country

Measures	Canada (fed)	Australia	Brazil	France	India	Northern Ireland	South Africa	Sweden	USA (fed)
		Opportunity Commission, Workplace Gender Equality Agency	(Ministry of Education)	Ministère de l'éducation nationale et de la jeunesse	National Commission for Scheduled Castes, National Commission for Scheduled Tribes	Commission, The Equality Commission	for Employment Equity and the Commission for Conciliation, Mediation and Arbitration	Equality Agency	Equity Opportunity Commission; Office of Federal Contract Compliance Programs (OFCCP)
Enforcement	Canadian Human Rights Commission and Minister of Labour, via Labour Program at Employment and Social Development Canada	Australian Human Rights Commission	Ministry of Education, Ad-hoc commissions/boards created to verify student eligibility	Conseil Départemental de la Citoyenneté et de l'Autonomie	Dept of Social Justice & Empowerment	Northern Ireland Civil Service Commissioners; Fair Employment Agency and Fair Employment Tribunal	Chapter V, ss. 35—45	Equal Opportunities Ombudsman; Equal Opportunities Board and Commission	Obligations of Contractors, 41 CFR 60 1.20(a) of EEO 11246
Scorecards	No	Yes, for gender equality	No	No	No	No	Yes, BBBEEA	No	No

Table AK.4: Employment equity legislation coverage of equity groups by country

Equity group	Canada (fed)	Australia	Brazil	France	India	Northern Ireland	South Africa	Sweden	USA (fed)
Indigenous workers	Yes	Yes, Aboriginals of Torres Strait Islands	Yes	N/A	No	N/A	Overlap with Black workers (settler colonial past)	No	Yes
Women workers	Yes	Yes	Yes	Yes	Yes	Voluntary	Yes	Yes	Yes
Disabled workers	Yes	Yes	Yes	Yes	Yes	Voluntary	Yes	Yes	Yes
Black workers	Visible minorities	Indirectly (see below)	Yes	No	No	No	Yes, but both Acts define Black as “Africans, Coloureds and Indians.” The Pretoria High Court read in Chinese people	No	Minorities
Racialized workers	Visible minorities	Indirectly (migrants whose first language is not English)	Yes	No	N/A	Voluntary	Yes	No	Minorities
2SLGBTQI+ workers	No	No	No	No	Yes, trans workers in Karnataka state	Voluntary	No	No	Sexual Orientation and gender identity
Other equity groups	No	Persons who have migrated to Australia	No	Lower-income neighbourhood	Scheduled castes and tribes;	Religion and political opinion	No	No	No

Table AK.4: Employment equity legislation coverage of equity groups by country

Equity group	Canada (fed)	Australia	Brazil	France	India	Northern Ireland	South Africa	Sweden	USA (fed)
		and whose first language is not English (and their children); Equal Employment Opportunity Act, s. 3(b)		ds, high immigrant areas, persons whose first language is not French	“backwards classes,” or economically disadvantaged classes				

Appendix L: The 10 highest-paying and lowest-paying jobs in Canada (based on average employment income for full-time full-year employees)

Table AL.1: Average employment income for full-time full-year employees in the 10 highest paying jobs in Canada, by population type, 2021⁷⁸³

Occupation - National Occupational Classification (NOC) 2021	Total population	Indigenous identity	Non-Indigenous identity	Visible minority population	Black population	Not a visible minority	Men+	Women+
Total for all 10 occupations	\$77,200	\$64,700	\$77,700	\$69,700	\$62,050	\$79,600	\$85,400	\$67,000
Judges	\$274,000	\$260,000	\$274,400	\$272,000	\$220,000	\$274,000	\$284,800	\$261,500
Seniors managers - public and private sector	\$188,800	\$129,200	\$190,400	\$159,600	\$132,800	\$193,200	\$208,800	\$141,400
Petroleum engineers	\$185,000	\$210,000	\$184,600	\$168,000	\$139,000	\$194,000	\$190,000	\$161,000
Specialists in surgery	\$184,000	\$152,000	\$184,400	\$161,400	\$176,000	\$194,400	\$200,000	\$153,200
Managers in natural resources production and fishing	\$183,200	\$168,000	\$184,000	\$179,000	\$152,000	\$183,400	\$186,000	\$158,800

Table AL.1: Average employment income for full-time full-year employees in the 10 highest paying jobs in Canada, by population type, 2021⁷⁸³

Occupation - National Occupational Classification (NOC) 2021	Total population	Indigenous identity	Non-Indigenous identity	Visible minority population	Black population	Not a visible minority	Men+	Women+
Specialists in clinical and laboratory medicine	\$182,200	\$160,000	\$182,400	\$158,600	\$144,000	\$194,600	\$192,600	\$168,400
Lawyers and Quebec notaries	\$176,800	\$146,600	\$177,400	\$129,200	\$113,800	\$186,400	\$198,600	\$151,000
Mining engineers	\$174,000	\$120,000	\$175,000	\$135,500	\$122,000	\$188,000	\$183,200	\$122,400
Securities agents, investment dealers and brokers	\$167,000	\$104,000	\$168,000	\$116,200	\$104,400	\$194,200	\$198,800	\$98,000
Financial and investment analysts	\$156,000	\$101,200	\$156,800	\$133,400	\$81,900	\$172,400	\$203,800	\$96,200

Table AL.2: Population count for full-Time full-Year employees in the 10 highest paying jobs in Canada, by population type, 2021⁷⁸⁴

Occupation - National Occupational Classification (NOC) 2021	Total population	Indigenous identity	Non-Indigenous identity	Visible minority population	Black population	Not a visible minority	Men+	Women+
Total for all 10 occupations	9,912,810	367,245	9,545,565	2,389,535	351,595	7,523,275	5,493,725	4,419,090
Judges	2,580	80	2,495	155	30	2,425	1,370	1,205
Seniors managers - public and private sector	187,475	4,710	182,765	23,905	2,485	163,570	131,780	55,690
Petroleum engineers	3,670	70	3,600	1,275	195	2,395	3,035	630
Specialists in surgery	5,865	65	5,800	1,845	110	4,020	3,860	2,005
Managers in natural resources production and fishing	7,670	420	7,245	480	70	7,190	6,870	795
Specialists in clinical and laboratory medicine	18,455	140	18,315	6,290	390	12,160	10,585	7,860
Lawyers and Quebec notaries	70,990	1,435	69,560	11,925	1,635	59,065	38,355	32,640

Table AL.2: Population count for full-Time full-Year employees in the 10 highest paying jobs in Canada, by population type, 2021⁷⁸⁴

Occupation - National Occupational Classification (NOC) 2021	Total population	Indigenous identity	Non-Indigenous identity	Visible minority population	Black population	Not a visible minority	Men+	Women+
Mining engineers	2,355	50	2,310	630	120	1,725	1,995	355
Securities agents, investment dealers and brokers	9,235	125	9,110	3,210	400	6,020	6,330	2,900
Financial and investment analysts	45,185	515	44,665	18,915	2,160	26,265	25,165	20,015

Table AL.3: Average employment income for full-time full-year employees in the 10 lowest paying jobs in Canada, by population type, 2021⁷⁸⁵

Occupation - National Occupational Classification (NOC) 2021	Total population	Indigenous identity	Non-Indigenous identity	Visible minority population	Black population	Not a visible minority	Men+	Women+
Total for all 10 occupations	\$77,200	\$64,700	\$77,700	\$69,700	\$62,050	\$79,600	\$85,400	\$67,000
Mâîtres d'hôtel and hosts/hostesses	\$28,900	\$31,000	\$28,750	\$23,200	\$15,000	\$30,200	\$40,400	\$25,600
Artisans and craftspersons	\$28,720	\$25,800	\$28,840	\$33,600	\$29,000	\$27,840	\$33,640	\$24,780
Tailors, dressmakers, furriers and milliners	\$28,320	\$34,000	\$28,200	\$28,760	\$22,400	\$28,000	\$33,200	\$27,680
Food and beverage servers	\$27,000	\$20,300	\$27,360	\$29,400	\$29,900	\$25,840	\$31,400	\$25,720
Estheticians, electrologists and related occupations	\$26,120	\$23,200	\$26,200	\$24,400	\$25,600	\$26,960	\$28,950	\$25,800
Painters, sculptors and other visual artists	\$25,720	\$23,000	\$25,840	\$27,300	\$31,000	\$25,460	\$29,560	\$22,580
Home child care providers	\$25,260	\$23,500	\$25,320	\$28,640	\$27,400	\$22,080	\$30,000	\$25,100

Table AL.3: Average employment income for full-time full-year employees in the 10 lowest paying jobs in Canada, by population type, 2021⁷⁸⁵

Occupation - National Occupational Classification (NOC) 2021	Total population	Indigenous identity	Non-Indigenous identity	Visible minority population	Black population	Not a visible minority	Men+	Women+
Taxi and limousine drivers and chauffeurs	\$23,680	\$33,500	\$23,100	\$18,700	\$15,820	\$30,400	\$23,300	\$29,350
Bartenders	\$23,240	\$21,800	\$23,360	\$24,400	\$25,600	\$23,040	\$24,560	\$22,380
Hairstylists and barbers	\$22,620	\$23,000	\$22,620	\$22,720	\$21,600	\$22,600	\$25,800	\$21,960

Table AL.4: Population count for full-Time full-Year employees in the 10 lowest paying jobs in Canada, by population type, 2021⁷⁸⁶

Occupation - National Occupational Classification (NOC) 2021	Total population	Indigenous identity	Non-Indigenous identity	Visible minority population	Black population	Not a visible minority	Men+	Women+
Total for all 10 occupations	9,912,810	367,245	9,545,565	2,389,535	351,595	7,523,275	5,493,725	4,419,090
Mâîtres d'hôtel and hosts/hostesses	710	40	665	130	35	575	160	545
Artisans and craftspersons	4,290	190	4,095	650	45	3,645	1,905	2,390
Tailors, dressmakers, furriers and milliners	5,120	90	5,035	2,085	150	3,035	590	4,530
Food and beverage servers	10,890	515	10,375	3,640	335	7,250	2,495	8,400
Estheticians, electrologists and related occupations	9,695	260	9,435	3,150	170	6,550	1,005	8,690
Painters, sculptors and other visual artists	4,380	165	4,215	620	80	3,765	1,985	2,395
Home child care providers	16,615	635	15,980	8,035	555	8,580	485	16,130

Table AL.4: Population count for full-Time full-Year employees in the 10 lowest paying jobs in Canada, by population type, 2021⁷⁸⁶

Occupation - National Occupational Classification (NOC) 2021	Total population	Indigenous identity	Non-Indigenous identity	Visible minority population	Black population	Not a visible minority	Men+	Women+
Taxi and limousine drivers and chauffeurs	13,450	770	12,675	7,710	1,725	5,740	12,575	875
Bartenders	2,340	205	2,135	340	80	2,000	910	1,430
Hairstylists and barbers	14,355	605	13,745	2,955	415	11,400	2,500	11,855

⁷⁸³ Source: Census 2021, LAB 22 prepared for Task Force.

⁷⁸⁴ Source: Census 2021, LAB 22 prepared for Task Force.

⁷⁸⁵ Source: Census 2021, LAB 22 prepared for Task Force.

⁷⁸⁶ Source: Census 2021, LAB 22 prepared for Task Force.

Appendix M: Occupations under the National Occupational Codes that employ 90% or more men or women, 2021 Census

Table AM.1: Occupations under the National Occupational Codes that employ 90% or more men or women, 2021 Census⁷⁸⁷

Occupations	% of men+ of total gender	% of women+ of total gender
Drillers and blasters - surface mining, quarrying and construction	99.25	0.64
Elevator constructors and mechanics	98.94	1.06
Heavy-duty equipment mechanics	98.88	1.11
Bricklayers	98.86	1.17
Other small engine and small equipment repairers	98.47	1.53
Oil and solid fuel heating mechanics	98.30	1.70
Plumbers	98.29	1.72
Fishing masters and officers	98.27	1.73
Construction millwrights and industrial mechanics	98.26	1.74
Heating, refrigeration and air conditioning mechanics	98.22	1.77
Electrical power line and cable workers	98.19	1.78
Automotive service technicians, truck and bus mechanics and mechanical repairers	98.12	1.87
Logging machinery operators	98.08	1.92
Industrial electricians	98.06	1.92
Steamfitters, pipefitters and sprinkler system installers	97.99	2.04
Roofers and shinglers	97.94	2.06
Ironworkers	97.79	2.21
Concrete finishers	97.76	2.24
Carpenters	97.58	2.42
Crane operators	97.56	2.41
Glaziers	97.52	2.54
Motorcycle, all-terrain vehicle and other related mechanics	97.50	2.50

Appendix M: Occupations under the National Occupational Codes that employ 90% or more men or women, 2021 Census

Table AM.1: Occupations under the National Occupational Codes that employ 90% or more men or women, 2021 Census⁷⁸⁷

Occupations	% of men+ of total gender	% of women+ of total gender
Sheet metal workers	97.49	2.49
Electricians (except industrial and power system)	97.42	2.58
Boilermakers	97.29	2.71
Contractors and supervisors, carpentry trades	97.12	2.88
Structural metal and platework fabricators and fitters	97.08	2.99
Railway carmen/women	97.07	3.13
Appliance servicers and repairers	96.93	3.15
Chain saw and skidder operators	96.79	3.21
Gas fitters	96.59	3.47
Power system electricians	96.45	3.55
Water well drillers	96.30	3.70
Floor covering installers	96.26	3.77
Railway yard and track maintenance workers	96.24	3.76
Electrical mechanics	96.20	3.85
Contractors and supervisors, heavy equipment operator crews	96.13	3.87
Oil and gas well drilling and related workers and services operators	96.08	3.92
Underground production and development miners	96.07	3.93
Telecommunications line and cable installers and repairers	96.03	3.97
Contractors and supervisors, pipefitting trades	95.64	4.30
Tilesetters	95.52	4.48
Heavy equipment operators	95.51	4.48
Transport truck drivers	95.50	4.50
Plasterers, drywall installers and finishers and lathers	95.49	4.51
Tool and die makers	95.47	4.58
Machinists and machining and tooling inspectors	95.43	4.57
Concrete, clay and stone forming operators	95.39	4.61

Table AM.1: Occupations under the National Occupational Codes that employ 90% or more men or women, 2021 Census⁷⁸⁷

Occupations	% of men+ of total gender	% of women+ of total gender
Industrial instrument technicians and mechanics	95.32	4.73
Welders and related machine operators	95.26	4.74
Residential and commercial installers and servicers	95.23	4.77
Auto body collision, refinishing and glass technicians and damage repair estimators	95.16	4.82
Supervisors, mining and quarrying	95.16	4.78
Engineer officers, water transport	95.10	5.23
Automotive and heavy truck and equipment parts installers and servicers	95.07	4.96
Contractors and supervisors, oil and gas drilling and services	94.93	5.03
Public works maintenance equipment operators and related workers	94.88	5.12
Railway conductors and brakemen/women	94.52	5.48
Supervisors, logging and forestry	94.38	5.55
Firefighters	94.30	5.70
Contractors and supervisors, machining, metal forming, shaping and erecting trades and related occupations	94.24	5.80
Supervisors, mineral and metal processing	94.23	5.86
Railway and yard locomotive engineers	93.87	6.13
Machine fitters	93.85	6.38
Electronic service technicians (household and business equipment)	93.79	6.21
Aircraft mechanics and aircraft inspectors	93.75	6.23
Power engineers and power systems operators	93.75	6.25
Foundry workers	93.66	6.14
Other repairers and servicers	93.64	6.36
Home building and renovation managers	93.42	6.58
Oil and gas drilling, servicing and related labourers	93.32	6.68
Contractors and supervisors, electrical trades and telecommunications occupations	93.27	6.73

Appendix M: Occupations under the National Occupational Codes that employ 90% or more men or women, 2021 Census

Table AM.1: Occupations under the National Occupational Codes that employ 90% or more men or women, 2021 Census⁷⁸⁷

Occupations	% of men+ of total gender	% of women+ of total gender
Sawmill machine operators	93.20	6.80
Machine operators, mineral and metal processing	93.20	6.80
Underground mine service and support workers	93.16	6.73
Contractors and supervisors, mechanic trades	93.16	6.84
Mechanical engineering technologists and technicians	93.12	6.88
Taxi and limousine drivers and chauffeurs	93.11	6.90
Contractors and supervisors, other construction trades, installers, repairers and servicers	92.77	7.24
Air pilots, flight engineers and flying instructors	92.53	7.47
Central control and process operators, mineral and metal processing	92.31	7.49
Aircraft instrument, electrical and avionics mechanics, technicians and inspectors	92.29	7.62
Fire chiefs and senior firefighting officers	92.29	7.71
Insulators	92.27	7.73
Construction trades helpers and labourers	92.15	7.85
Metalworking and forging machine operators	92.02	8.02
Supervisors, forest products processing	91.86	8.14
Labourers in mineral and metal processing	91.79	8.21
Other trades helpers and labourers	91.68	8.28
Telecommunications equipment installation and cable television service technicians	91.57	8.45
Non-destructive testers and inspectors	91.42	8.58
General building maintenance workers and building superintendents	91.12	8.89
Pulp mill, papermaking and finishing machine operators	91.09	8.91
Cabinetmakers	91.05	8.95
Machining tool operators	91.03	8.92
Utility maintenance workers	90.94	9.14

Table AM.1: Occupations under the National Occupational Codes that employ 90% or more men or women, 2021 Census⁷⁸⁷

Occupations	% of men+ of total gender	% of women+ of total gender
Land surveyors	90.72	9.28
Pulping, papermaking and coating control operators	90.38	8.97

⁷⁸⁷ Source: Census 2021.

Appendix N: February 2022 consultation paper: Achieving equality at work

Révision de la loi sur
l'équité
en matière d'emploi



Employment
equity
Act Review

Achieving Equality at Work

Review of the *Employment Equity Act* Framework

Consultation paper

February 2022

Employment Equity Act Review Task Force

Table of contents

- [Preface: Task Force appointment and mandate](#)
- [ESDC consultation and engagement activities privacy notice statement](#)
- [Introduction](#)
 - [We want to understand what matters the most to you](#)
 - [Purpose of the *Employment Equity Act* and its supporting programs](#)
 - [Scope of the *Employment Equity Act* and its supporting programs](#)
 - [Framework of employment equity](#)
 - [Changing nature of work, workers and workplaces](#)
 - [Topics and questions for consultation](#)
- [Area I: Redefining and including equity groups](#)
- [Area II: Supporting equity groups](#)
- [Area III: Improving accountability, compliance and enforcement](#)
 - [Reporting obligations and compliance in the LEEP and FCP programs:](#)
 - [The system of compliance in the public service of Canada](#)
- [Area IV: Improving public reporting](#)
 - [Labour market metrics](#)
 - [Limitations of the current state of data collection](#)
- [Appendix: Current division of roles and responsibilities between key enforcement players under the *Employment Equity Act* framework](#)

Preface: Task Force appointment and mandate

On July 14, 2021, the Honourable Filomena Tassi, Minister of Labour, launched the *Employment Equity Act* Review Task Force. She appointed Professor Adelle Blackett as chairperson to lead the review, working collaboratively with vice-chairpersons Professors Marie-Thérèse Chicha and Dionne Pohler, and 10 members (Professor Tao (Tony) Fang; Kari Giddings, Helen Kennedy, Raji Mangat, Fo Niemi, Kami Ramcharan, Sandra Sutter, Josh Vander Vies, Marie Clarke Walker and Ruth Williams) offering expertise, lived and professional experience and perspectives related to equity. She mandated the Task Force to undertake a comprehensive review of the *Employment Equity Act* (EEA) framework and its supporting programs, including the Legislated Employment Equity Program (LEEP), the Federal Contractors Program (FCP), and the Workplace Opportunities – Removing Barriers to Equity (WORBE) initiative, and to advise the Minister of Labour on how to modernize and strengthen the federal employment equity framework. Specifically, the Task Force will:

- study issues related to equity, diversity and inclusion in the workplace;
- engage with stakeholders, various partners, and Canadians to hear their views on equity;
- undertake research and analysis using a wide range of sources;
- examine other existing practices in Canada and in foreign jurisdictions;
- apply a Gender-based analysis+ (GBA+) lens and consider intersectionality throughout its work; and
- submit a report to the Minister of Labour, through the Deputy Minister of Labour.

Appendix N: February 2022 consultation paper: Achieving equality at work

With a focus on improving and building upon the foundation of the EEA, the Task Force will study the following key areas from its Terms of Reference:

- Area 1 - The definition and possible expansion of the designated groups under the EEA;
- Area 2 - Leading practices to better support equity groups;
- Area 3 - Ways of improving accountability, compliance and enforcement; and
- Area 4 - Ways of improving public reporting to enhance the public conversation around equity, diversity and inclusion in workplaces.

The *Employment Equity Act* was amended in 1995. Amendments introducing pay transparency reporting under the *Employment Equity Act* and Regulations came into force on January 1, 2021. However, this is the first comprehensive review to have been launched since the *Employment Equity Act's* initial entry into force in 1986.

The Task Force was subject to a stop work order since the August 15, 2021 election call. On December 16, 2021, the Prime Minister of Canada issued a mandate letter directing the Honourable Seamus O'Regan, Minister of Labour “to accelerate the review of the *Employment Equity Act* and ensure timely implementation of improvements” in collaboration with the President of the Treasury Board, the Minister of Housing and Diversity and Inclusion and the Minister of Women and Gender Equality and Youth. The task force’s work therefore resumed as of 14 January 2022 with a renewed commitment to studying and consulting widely, and preparing concrete, independent, evidence-based recommendations in the form of a public report, on how to modernize the Act.

This paper, and the questions posed in it, are meant to guide those engagements, and inform the Task Force’s final report. Please feel free to provide comments on all or some of the questions, or on any other related issues that you consider relevant.

You are invited to submit written submissions as soon as they are available. This call for written submissions will remain open until **April 28, 2022**. Participation is welcomed either by email or through the post.

- To participate by email, please send your input to EDSC.LEE-EEA.ESDC@labourtravail.gc.ca
- To participate by mail, please provide your input to the address in the contact information below.

Employment Equity Act Review Task Force
C/O *Employment Equity Act* Review Secretariat
(Mailstop # 911)
ESDC, 140 Promenade du Portage, phase IV
Gatineau, QC, K1A 0J9

Please note that any analysis set out in this discussion paper has been developed for consultation purposes only by the *Employment Equity Act* Review Task Force, and should not be interpreted as representing the views and/or recommendations of the Government of Canada or of the Task Force. The Task Force’s final report will be published on Canada.ca.

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Instructions for obtaining this information are outlined in ESDC Info Source. Info Source may also be accessed online at any Service Canada Centre.

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Your submission, or portions thereof, may be published on Canada.ca or included in publicly available reports on the consultation; it may also be compiled with other responses to the consultation in an open-data submission on Open.Canada.ca, or shared throughout the Government of Canada or with other levels of government.

Introduction

We want to understand what matters the most to you

One of the most important ways in which this Task Force can learn about the issues that matter the most in the review of the *Employment Equity Act* framework is by ascertaining the views of affected persons, communities and organizations.

We want to hear from you, and to understand what matters most to you.

The Task Force will be actively engaged in consultations, but the accelerated timeframe under which we are required to work will make it impossible to meet with all concerned individuals and groups. We therefore hope to get the benefit of as wide a range of views as possible, through a mix of oral and written submissions. The written submissions need not be produced in any particular format; they can be as short or long as you like.

This consultation paper is intended to assist you in providing submissions to the taskforce by offering brief overviews of the *Employment Equity Act* framework and discussions of issues identified over the life of the *Employment Equity Act* framework in Canada. The consultation paper focuses on asking questions, which are deliberately open-ended, and designed to highlight key topics for consideration. The questions are not exhaustive. Rather, they are crafted to focus attention on a range of opinions and perspectives on how the *Employment Equity Act* framework can be modernized and improved. You should feel free to answer those questions that concern you the most or to which you consider you can best contribute.

Please also visit our *Employment Equity Act* Review Portal at Task Force on the *Employment Equity Act* Review - Canada.ca. It has been designed to make information about the *Employment Equity Act* framework and our consultation process accessible, and to facilitate the submission of views.

We are also keenly interested in learning from experiences of employment equity and related systemic, proactive measures to achieve equality in other jurisdictions, both within Canada and internationally.

A Transformative Framework to Achieve and Sustain Employment Equity

Keep in mind, of course, that this review focuses on the federal *Employment Equity Act* and its supporting programs, notably the Legislated Employment Equity Program (LEEP), the Federal Contractors Program (FCP), and the Workplace Opportunities – Removing Barriers to Equity (WORBE) initiative.

Purpose of the Employment Equity Act and its supporting programs

The purpose of the *Employment Equity Act* is to achieve equality in the workplace.⁷⁸⁸

In 1984, then judge Rosalie Abella reasoned in “Equality in Employment: A Royal Commission Report”, that equality in employment:

“Is a concept that seeks to identify and remove, barrier by barrier, discriminatory disadvantages. Equality in employment is access to the fullest opportunity to exercise individual potential”.⁷⁸⁹

For Judge Abella, “laws reflect commitment”.⁷⁹⁰ The Abella Report explained why a reactive, complaints-based approach was insufficient to address the complex character of systemic discrimination. It also concluded that voluntary measures were insufficient to yield proactive, substantive change. The Abella Report was trailblazing, and it is important to acknowledge the pivotal work that framed legislation on employment equity as a distinctly Canadian contribution to understanding systemic discrimination and requiring proactive mechanisms to remove barriers to achieving equality in employment, for the benefit of all. The Abella Report grounded employment equity in the substantive equality framework of Section 15 of the Canadian Charter of Rights and Freedoms; the systemic framework for achieving equality has been endorsed and buttressed in the jurisprudence of Canadian courts. Substantive equality continues to anchor contemporary reflection on employment equity. The Canadian framework has also been influential in the development of law on proactive measures to remedy inequality internationally.

Scope of the Employment Equity Act and its supporting programs

The current *Employment Equity Act* framework focuses on removing barriers and promoting equity for four designated groups:

- women
- Aboriginal peoples
- persons with disabilities, and
- members of visible minorities

The *Employment Equity Act* framework applies to the following employers and requires them to implement and maintain employment equity:

- the federal public service (i.e. core public administration)
- separate agencies (e.g., Canada Revenue Agency, Canadian Food Inspection Agency, Parks Canada) with 100 or more employees
- other public service employers (e.g., the Canadian Armed Forces and the Royal Canadian Mounted Police)

Appendix N: February 2022 consultation paper: Achieving equality at work

- organizations with 100 or more employees in the federally regulated private sector, federal Crown corporations and other federal government business enterprises (e.g., port authorities) covered under the Legislated Employment Equity Program (LEEP). LEEP employers include approximately 500 private-sector employers, 30 Crown corporations, and 5 other federal organizations.
- provincially regulated contractors who do business with the Government of Canada (i.e. the Federal Contractors Program (FCP)). The FCP requires organizations who do business with the Government of Canada to implement employment equity in their workplaces. They must ensure that their workforce is representative of Canada's labour force with respect to the members of the 4 designated groups under the *Employment Equity Act*. The FCP applies to provincially-regulated organizations with a combined workforce in Canada of 100 or more permanent full-time and permanent part-time employees that have received an initial federal government goods and services contract valued at \$1 million or more (including applicable taxes).⁷⁹¹

Framework of employment equity

The *Employment Equity Act* framework comprises five basic elements. It requires employers under covered workplaces to:

- analyze the degree of underrepresentation of persons in designated groups in their workforce
- analyze their employment systems, policies and practices to identify all employment barriers against persons in designated groups
- develop and implement a plan to remove these barriers and correct underrepresentation
- improve representation of the four designated groups in their workforce, and
- report on efforts made and results achieved⁷⁹²

While some progress for equity groups has been made under this proactive framework, as assessed most recently in the *Employment Equity Act: Annual Report 2020* and the *Employment Equity in the Public Service of Canada for Fiscal Year 2019 to 2020*, significant challenges to achieving equality persist. There is a rich body of literature from academics, employers, unions and community groups assessing the strengths and weaknesses of the *Employment Equity Act* framework over time and in different federally regulated sectors or federal contractors. This literature will inform the Task Force's review.

Changing nature of work, workers and workplaces

A great deal has changed since the *Employment Equity Act* was adopted in 1986 and revised in 1995.

Significant economic and technological changes affect the character and designation of federally-regulated workforces covered by the Act. For this reason, initiatives to modernize laws that apply to federal workplaces extend beyond the *Employment Equity Act* Review, and include initiatives to modernize federal labour standards in Part III of the Canada Labour Code. Insights from that process may also inform the *Employment Equity Act* review.

Moreover, society's understanding of substantive equality and equity, diversity and inclusion – including truth and reconciliation, anti-Black racism, and 2SLGBTQI – has deepened. In particular, Call to Action No. 7 of the Truth and Reconciliation Commission calls for a strategy to eliminate

A Transformative Framework to Achieve and Sustain Employment Equity

educational and employment gaps. The COVID-19 pandemic has spotlighted persisting inequality. It intersected with heightened, world-wide reckoning with the need to redress anti-Black racism and stop anti-Asian hate. This moment has sharpened our understanding of historical marginalization, and revives the urgency of a review to reassess how to achieve equality.

Topics and questions for consultation

You are invited to consider the following broad, overarching questions:

- What have been the main successes of the *Employment Equity Act* framework?
- What have been the main shortcomings of the *Employment Equity Act* framework?
- How does the changing nature of work affect the ability to achieve equality in the workplace?
- What are the main opportunities and challenges faced by employers in achieving equality in the workplace?
- Does the *Employment Equity Act* framework enable Canadian workplaces specifically, and Canadian society generally to benefit from equity, diversity and inclusion?
- Does the *Employment Equity Act* framework enable unions, employers' associations, and non-governmental organizations to support achieving equality?
- Does the *Employment Equity Act* framework adequately capture the range of barriers to equality in the workplace?
- How does the *Employment Equity Act* framework compare to other regulatory frameworks, internationally and in Quebec? What can be learned from comparative and international examples?
- How can the Government of Canada generally, and the Ministry of Labour specifically, improve its support to achieving equality in Canadian workplaces?

Our Task Force encourages those making submissions to take into account the expected impact of your proposals on workers and their families, employers, communities, and the Canadian economy.

Area I: Redefining and including equity groups

Societal understanding of inequality and lived experiences of systemic discrimination has deepened over time. With it, there is renewed appreciation that accurately naming and defining equity groups matters to achieving equality at work. The legislative language has not kept pace. Employer associations, unions, community groups and researchers, alongside international treaty bodies⁷⁹³ have urged the government to modernize the language in the *Employment Equity Act* and its supporting programs to ensure that it aligns with careful, intersectional, contemporary understandings and concerns of Indigenous Peoples, persons living with disabilities (personnes en situation de handicap)⁷⁹⁴, Black and racialized people, and gender identity and gender equality.

To remove barriers, they must be seen – this involves respectfully naming them, and accurately defining them.

The challenge extends beyond naming and defining, however. Umbrella categories such as “women”, “Aboriginal Peoples”, “persons with disabilities” and “visible minorities” can inadvertently lose sight

of the fact that disadvantage is historically constructed, obscure significant differences in experiences and the specific barriers faced by sub-group members, and mask the barriers created by the intersections of grounds of discrimination such as race, gender and (dis)ability. Take the following two examples from the 2016 Census data. First, non-Canadian born visible minority women earn considerably less than non-visible minority women (\$4,500 less on average annually). In other words, intersectionality matters to identify barriers to achieving equality. Second, while Japanese Canadians have the highest annual mean earnings (\$58,700), Black Canadians have annual mean earnings of \$43,400, a difference of \$15,300. In other words, inclusion in the same group could lead to the perpetuation of systemic discrimination, rather than the removal of barriers to employment. The Abella Report anticipated these challenges, calling for Census to collect “as much detail on group affiliation as possible, including data on race, in order to ensure that the rate of improvement for those most seriously disadvantaged can be monitored.”⁷⁹⁵

Similarly, there is a growing recognition that members of groups like 2SLGBTQI experience barriers to employment that may require expanding coverage under the *Employment Equity Act* framework. Similar calls for inclusion have been made with respect to seniors, youth, veterans, immigrants, religious minorities and workers with family responsibilities (worker-carers). In some cases, groups as framed may be heavily represented along gendered or racial grounds. Moreover women constitute a significant proportion of the workers with family responsibilities, as the Abella Report anticipated.⁷⁹⁶

In its terms of reference, the Task Force has been asked to consider the following questions, to which you are invited to turn your attention in your submissions:

- What changes should be made to the current EEA designated group names and definitions, such as “Aboriginal” and “visible minorities”?
- What changes should the EEA include to reflect current understandings of Indigenous peoples, disability, ethnocultural diversity and gender equality?
- Should the EEA reflect the various experiences and labour market circumstances of populations within the visible minorities group, such as Black Canadians?
 - If so, what changes to the EEA could best reflect the experiences and circumstances of each of the visible minority groups?
- Should the EEA reflect the current understandings of various types of disability within the persons with disabilities group?
 - If so, what changes to the EEA could best reflect the current understandings of various types of disability within the persons with disabilities group?
- Should the EEA reflect the distinct experiences and labour market circumstances of First Nations, Inuit and Métis peoples who are within the Aboriginal peoples group?
 - If so, what changes to the EEA could best reflect the First Nations, Inuit and Métis peoples’ experiences and circumstances?
- Should the EEA’s designated groups include additional populations, such as the 2SLGBTQI communities?

In this vein, the Task Force encourages submissions to reflect on the societal and economic significance as well as the labour relations and human resources management considerations associated with any proposed changes – including necessary transitional measures – that would redefine and include equity groups to the *Employment Equity Act* framework.

Area II: Supporting equity groups

Labour market discrimination undermines substantive equality and slows economic growth. Breaking down barriers to employment equity is both a moral and legal imperative. In addition, it offers an economic opportunity for all Canadians to reach their full potential in the labour market while improving Canada's economy.

Barriers to achieving workplace equality can be seen through common indicators. These include lower earnings, hiring and retention challenges, underrepresentation in management and executive positions and a related lack of career advancement, as well as the persistence of social stigma. These indicators may reveal themselves along intersectional grounds, for example wider wage gaps for Indigenous women, Black or racialized women, or women living with disabilities. The key is that they extend beyond a narrow assessment of aggregate numbers of people hired on entry, and suggest the importance of a career life-cycle approach to supporting equity groups in employment.

Some of these approaches involve increasing awareness of the nature of equality and the differences that inequality may take depending on the ground of discrimination and its intersections. The literature increasingly focuses on the specificity of the barriers and practices to foster inclusion for groups and sub-group members, including application screening processes that take into account lived-experience or career gaps; considering non-nominative application processes; applying robust anti-discrimination/antiharassment policies and anti-harassment training for managers and employees; and promoting more widely all opportunities (including senior management positions) throughout the organization. Measures like proactively adopting accessible software, designing barrier-free workplace infrastructure, or even rethinking the standard 40-hour work week as noted in the Abella Report, may facilitate applications by persons living with disabilities and more generally improve retention.

In its terms of reference, the Task Force has been asked to consider the following questions, to which you are invited to turn your attention in your submissions:

- What changes to employment equity legislation, regulations, programming and research could better support equity groups?
- What barriers do equity groups face in the workplace?
- What best practices have employers implemented to remove these barriers?
- What can the Government of Canada do to promote and share these best practices?
- What measures could improve promoting and retaining equity groups?
- What roles can other organizations play in promoting employment equity, for example, unions, employer associations, and non-governmental organizations (NGOs)?

The Task Force encourages submissions that reflect on the nature and scope that these measures could take in the *Employment Equity Act* and its supporting programs, to assist in removing barriers to achieving equality at work. What would a comprehensive and supporting approach to achieving equality at work look like?

Area III: Improving accountability, compliance and enforcement

The Abella Report stressed that “[t]he requirement to implement employment equity lacks credibility without an enforcement component.”⁷⁹⁷ The discussion under Area III considers first compliance

under the LEEP and FCP programs, and second accountability, compliance and enforcement in the federal public service. Moreover, the Annex to this consultation paper includes a detailed table providing the current division of roles and responsibilities between key enforcement institutions/actors under the *Employment Equity Act* framework. It details both systems of obligation and compliance, as well as promotional initiatives.

A key observation after 35 years of employment equity implementation in Canada is that the *Employment Equity Act* framework emphasizes report completion, rather than employers' actual progress in implementing and achieving employment equity. The *Employment Equity Act* framework was built on the understanding that employers would have “flexibility in the redesign of their employment practices in order to accommodate the uniqueness of each employer’s structure, location, and type of business,”⁷⁹⁸ with guidance from the enforcement agency. They would not require prior approval, and internal objectives would not be required by statute. Rather, the focus was on the methodology. This raises important questions about how to improve accountability, compliance and enforcement.

Reporting obligations and compliance in the LEEP and FCP programs:

Consider, notably, the accountability, compliance and enforcement for the LEEP and FCP programs, which include a mix of reporting obligations and compliance audits and assessment:

- **Reporting obligations:** Both LEEP and FCP employers are required to file reports with the Ministry of Labour’s Labour Program on the composition of their workforce and their employees from the four designated groups.
 - Under the *Employment Equity Act*, LEEP employers that fail to file the mandatory reports are liable to receive monetary penalties of up to \$50,000, issued by the Minister of Labour.⁷⁹⁹ It should be noted, however, that under the current framework for reporting compliance, employers reach 100% compliance – that is, every employer subject to the Act complies annually with their reporting obligations.
 - In contrast, FCP employers that fail to meet program requirements may lose the right to bid on federal government contracts or see the termination of existing contracts. While the Government may place the contractor’s name on the FCP Limited Eligibility to Bid List, and this list could be made public, currently, there are no contractors on the list.⁸⁰⁰
- **Compliance audits / assessments:** The Labour Program conducts compliance assessment of FCP organizations. Drawing on data from the Labour Program, the Canadian Human Rights Commission (CHRC) conducts individual and horizontal compliance audits of federally regulated private sector employers to ensure compliance with the *Employment Equity Act*. They assess whether employers have persisting employment equity gaps, and help to build employment equity forward plans.⁸⁰¹ The CHRC’s horizontal audit model was introduced in 2018, and is focused on systemic barriers experienced by designated group members, in an attempt to address persistent representation gaps for a designated group in specific sectors of the economy. It seeks to ensure that employers have adequate plans to correct underrepresentation, identify specific barriers that impede progress, gather information about best practices and special measures that increase representation and help retain employees, and share them with employers through the publication of sector-wide reports. There is specific attention to how a diversity and leadership lens may support promotion of higher representation of members of equity groups in management.

A Transformative Framework to Achieve and Sustain Employment Equity

The reporting compliance rate of 100% does not provide a full picture, and reflects report completion rather than reasonable progress toward implementation. But what should happen if the results are considered by the enforcement agency to be unreasonably low? Concerned actors have pointed out that this focus on report completion does not inform and drive real change toward workplace equity and has resulted in a gap between policy and practice.

The system of compliance in the public service of Canada

The mandate to oversee employment equity in Canada's public service is shared, but there have been calls for it to be clarified.⁸⁰²

First, the Treasury Board of Canada Secretariat-the Office of the Chief Human Resources Officer (TBS-OCHRO) has been delegated responsibility to administer employment equity policies as they apply to the core public administration. TBS-OCHRO is responsible for holding departments accountable for meeting employment equity targets through the Management Accountability Framework (MAF), which includes employment equity indicators. TBS-OCHRO also relies on surveys of employees to obtain a picture of employees' perceptions of workplace well-being. In addition, separate agencies with 100 or more employees, listed under Schedule V of the *Financial Administration Act* (FAA), are responsible for submitting annual employment equity reports to TBS-OCHRO. These reports are tabled in Parliament at the same time as the Treasury Board President's employment equity report for the public service of Canada.

Second, the Public Service Commission (PSC) oversees the public service appointment processes, including employment equity and accommodations, through a range of mechanisms including audits, studies, and system-wide surveys.

Third, the CHRC is responsible for conducting compliance audits. It can order federal public service organizations to undertake any corrective measures deemed necessary in order to be compliant with the *Employment Equity Act*.

The *Employment Equity Act* is silent on what advisory role the Minister of Labour and the Labour Program could play vis-à-vis the federal public service. More generally, a Joint Union/ Management Task Force expressed concern about the trend toward oversight focusing on system-wide patterns instead of scrutiny of how each federal department is performing in various areas, including employment equity.⁸⁰³ It has issued extensive recommendations, alongside recommendations from the 2019-2020 PSC Audit of Employment Equity Representation in Recruitment. These recommendations will inform the work of the *Employment Equity Act* Review Task Force. There is an important leadership role that enhanced government accountability, reporting and sharing of promising practices can offer.

In its terms of reference, the Task Force has been asked to consider the following questions, to which you are invited to turn your attention in your submissions:

- What support could employers receive when they are working to achieve equity in their workplaces?
- What could encourage employers to do more to achieve equity in their workplaces? In particular:

- What are the most effective ways to communicate and raise employers' awareness of the benefits of equity, diversity and inclusion?
- What changes to the Labour Program of Employment and Social Development Canada's (ESDC) and the Canadian Human Rights Commission's roles and responsibilities could improve compliance with and enforcement of the EEA?
- In addition to focusing on gaps in workforce representation and wages, how can the employment equity framework better measure employers' efforts and progress made toward equity?
- What are the most effective benchmarks to measure equity in the workplace?
- What incentives and penalties should the Government of Canada implement to help close persistent equity gaps and hold employers accountable?
- Are there unique circumstances within the core federal public service and other federal organizations that affect their state of equity, diversity, and inclusion?
- What changes to the EEA could support the Government of Canada's efforts to improve the core public administration's and other federal organizations' state of equity, diversity, and inclusion?

Task Force members would especially encourage submissions on the leadership role that the Government of Canada can assume on accountability, compliance and enforcement. How might the *Employment Equity Act* framework become a catalyst for the sustained change needed to achieve workplace equality? Do initiatives like “Workplace Opportunities – Removing Barriers to Equity” (WORBE) – the grants and contributions program designed to support employers subject to the *Employment Equity Act* framework to improve designated group representation in areas of low representation through partnerships and industry-tailored strategies – enhance the *Employment Equity Act* framework? What training initiatives might be provided? How might employers on the smaller side of those covered by the *Employment Equity Act* framework, be specifically supported? How might the CHRC, including the specialized Employment Equity Review Tribunal established in the event of noncompliance but that has to date never issued a decision on the merits of the *Employment Equity Act*, as well as the ESDC, be better drawn upon to foster accountability and compliance, ensure implementation, and achieve workplace equality?

Area IV: Improving public reporting

Labour market metrics

Public reporting under the *Employment Equity Act* framework relies on a number of labour market metrics. Federal institutions and actors have selected distinct approaches over time to report on employment equity measurement.

- **Labour market availability (LMA)** refers to the share of designated group members in the workforce, by National Occupational Classification (NOC) code,⁸⁰⁴ from which the employers could hire. LMA is derived from the Census (currently 2016) and postcensus survey on disability conducted by Statistics Canada (currently 2017). The representation of each of the

four designated groups is compared to their availability in the labour market. A workforce is considered fully representative when the representation of designated group members is equal to their LMA. The LMA is used to measure attainment rates of private sector employers (LEEP and FCP organizations).

- **Workforce availability (WFA)** is a subset of the LMA that is used to assess attainment rates in the federal public service. To determine WFA, additional criteria are applied to the LMA population, such as education levels specific to the public service, citizenship,⁸⁰⁵ location, working age (15 – 64) and National Occupational Classification (NOC) code comparisons. Both TBS-OCHRO and PSC use this indicator to arrive at an estimate that is more precise than LMA of designated group members' availability.
- **Representation** is the share of designated group members in a given labour force (such as the (a) entire federally regulated private sector workforce, (b) the banking and financial services sector and/or (c) an individual bank).
- **Attainment rate** refers to the extent to which representation approaches, meets or exceeds labour market availability. The attainment rate is calculated by dividing the representation by the LMA. The attainment rate allows for the identification of gaps between the representation of a particular designated group and its LMA. For example, if a designated group's representation is below its LMA, the attainment rate will be less than 100% and further analysis may be required to identify if barriers to employment exist and where appropriate corrective measures would need to be implemented. Progress is considered to have been made when the gap between a designated group's representation and LMA narrows (namely, the attainment rate approaches 100%) or when a group's representation equals or exceeds LMA (namely, the attainment rate equals or surpasses 100%). In 2018, the Labour Program moved from simple representation rates in employment for assessments of the federally regulated private sector, to a focus on measuring overall attainment rates of the designated groups in its measurement of employment equity based on labour market availability (LMA). The shift to attainment rate represented a shift in focus, seeking to illustrate progress over time rather simply identifying gaps in representation.

Limitations of the current state of data collection

Attainment rates of Canadian LMA and WFA for the designated groups offer quantitative evidence of some of the progress made on employment equity targets over time. Task Force members are also interested in gaining a solid appreciation of the strengths and limits to the current state of data collection. The following list of limitations is indicative, but not exhaustive.

One limitation pertains to the time lag in measuring representation that arises from the reliance on Census data, available every 5 years, to calculate the LMA and the WFA. Employers and others have expressed concern that they are held accountable on the basis of outdated data. What are the prospects for Statistics Canada and appropriate *Employment Equity Act* enforcement institutions to developing a methodology to update LMA and WFA estimates between censuses?

The Joint Union/ Management Task Force on Diversity and Inclusion also expressed concerns in the 2017 Building a Diverse and Inclusive Public Service: Final Report of the Joint Union/Management Task Force on Diversity and Inclusion regarding the use of WFA estimates by many departments as a target. They consider that achieving WFA estimates should be considered as a floor and not a ceiling.

A further limitation under the EEA and the FCP is that employers must survey their employees to assess the workforce representation of persons in each designated group. However, employers only count employees who self-identify, or agree to the employer identifying them as members of an equity group. Does voluntary self-identification lead to inaccurate reporting? Should employers be able to augment their representation data with data collected for other purposes, including through human resources information systems, or through duty of reasonable accommodation requests for people living with disabilities, or hiring data available through the employment agencies whose services they use? Similarly, how might self-identification processes be drawn upon to obtain more accurate sub-group data?

A related limitation signalled by some employers is that no appropriate NOC codes exist for many of the positions in their industries and sectors. Assigning certain jobs to inappropriate NOC codes may inaccurately suggest gaps for which they are then held accountable. Are there alternatives – including international classifications – that might address this challenge?

In addition, data aggregated nationally might fail to reveal some important barriers. For example, women employees aged 25 to 54, according to recent wage gap data from Statistics Canada, earned roughly 88 cents on the dollar compared to men (a wage gap of 12.1% when compared to men in terms of their average hourly wage in 2019). This important dimension is absent from aggregated employment equity data. How might more carefully disaggregated data and nuanced analysis be developed to support achieving equality?

Finally, some employers underscore that it is conceivable that due to reasons ranging from the employers' geographical location to COVID-19 pandemic induced considerations, employers can have large representation gaps despite sustained efforts to remove barriers to employment. What broad considerations might this reflection invite, particularly as our society turns to building back better?

In its terms of reference, the Task Force has been asked to consider the following questions, to which you are invited to turn your attention in your submissions:

- What changes to the EEA are necessary to better support the public conversation on equity, diversity, and inclusion?
- What changes to the EEA could improve public reporting of employment equity results? Specifically:
 - What measures, data sources, reporting frequency and formatting could lead to improvements?
- What are the key data gaps?
- How could changes help fill key data gaps?

Task Force members encourage you to offer broad reflections on what employment equity indicators should optimally capture, and what supporting institutions and frameworks can offer to improve public reporting. For instance, can geographical zones of comparison be more effectively framed to ensure that we offer an accurate portrait of representation of equity groups, for example Indigenous peoples? Do our data tools capture labour market segmentation or underemployment, including the overrepresentation of some groups in occupational categories for which they are overqualified? Are the metrics effectively capturing

all workers who should be counted to achieve equality? We count what matters. Are we counting what matters most to achieving equality at work through the *Employment Equity Act* framework?

Appendix: Current division of roles and responsibilities between key enforcement players under the *Employment Equity Act* framework

Key players	Roles and responsibilities	Products
Minister of Labour	<p>Is responsible for the administration of the Act and, via the Labour Program, has the power to:</p> <ul style="list-style-type: none"> • develop and conduct information programs to foster public understanding of this Act and to foster public recognition of the purpose of this Act⁸⁰⁶ • undertake research related to the purpose of this Act⁸⁰⁷ • promote the purpose of this Act⁸⁰⁸ • publish and distribute information, guidelines and advice to private sector employers and employee representatives regarding the implementation of employment equity⁸⁰⁹ • develop and conduct programs to recognize private sector employers and employee 	<p>The <i>Employment Equity Act</i>: Annual Report:</p> <ul style="list-style-type: none"> • is submitted to Parliament • consolidates and highlights the employment equity results achieved by the federally regulated private sector employers subject to the Act <p>The Employment Equity Data Report:</p> <ul style="list-style-type: none"> • is prepared and posted online every 5 years to coincide with Statistics Canada’s release of census data • provides information and links to the Open Government Portal, where employers can view and download workforce population or labour market availability (LMA) data

Key players	Roles and responsibilities	Products
	<p>representatives for outstanding achievement in implementing employment equity⁸¹⁰</p> <ul style="list-style-type: none"> • issue penalties to private sector employers for non-compliance of the Act⁸¹¹ • submit an Annual Report to Parliament on the status of employment equity in the federally regulated private sector⁸¹² • make available to employers any relevant labour market information respecting designated groups in the Canadian workforce in order to assist employers in fulfilling their obligations under the Act • administer the Federal Contractors Program (FCP) 	
Labour Program (LP)	Is responsible for 2 employment equity programs and, as such administers the:	The individual LEEP employers' annual statistical forms that are reported to LP are posted online and made available to the public. Starting in 2022, LEEP

Key players	Roles and responsibilities	Products
	<ul style="list-style-type: none"> • Legislated Employment Equity Program (LEEP) and employers' compliance with annual reporting requirements under the Act • Federal Contractors Program (FCP) and is solely responsible for assessing contractors' compliance with implementation of employment equity in their workplace <p>Is responsible for 2 employment equity initiatives and, as such administers the:</p> <ul style="list-style-type: none"> • Workplace Opportunities: Removing Barriers to Equity (WORBE) grants and contributions initiative • Employment Equity Achievement Awards (EEAA) to recognize outstanding private sector employers and 	<p>employer's wage gap data will be posted online. LP provides an online Workplace Equity Information Management System (WEIMS) to assist LEEP and FCP employers in meeting their obligations and LP in administering these programs. LP provides various tools and guides online.</p>

Key players	Roles and responsibilities	Products
	<p>employee representatives⁸¹³ And, is responsible to provide tools and guidance to employers and contractors to assist them in complying with their employment equity obligations</p>	
<p>The Canadian Human Rights Commission (CHRC)</p>	<p>Is responsible for compliance and enforcement of non-reporting requirements under the Act and, as such:</p> <ul style="list-style-type: none"> • conducts conventional and horizontal audits to assess whether employers are meeting their obligations under the Act⁸¹⁴ • supports employers who need guidance and improvement • receives and examines complaints regarding non-compliance⁸¹⁵ • applies to the Chairperson of the Canadian Human Rights Tribunal to request that an Employment Equity Review Tribunal be appointed, with power to issue 	<p>The Annual Report of the CHRC:</p> <ul style="list-style-type: none"> • is submitted to Parliament • consolidates information on the CHRC's employment equity audits and enforcement activities

Key players	Roles and responsibilities	Products
	<p>decisions enforceable as court orders.⁸¹⁶ This application is made when an employer requests a review for a decision issued by the CHRC⁸¹⁷, or the CHRC requests the confirmation of its decision⁸¹⁸</p>	
<p>Legislated Employment Equity Program (LEEP) employers</p> <ul style="list-style-type: none"> • Federally regulated private sector employers, Crown corporations and other federal organizations that have 100 or more employees 	<p>Have the following obligations:</p> <ul style="list-style-type: none"> • survey their workforce to collect data on the representation, industrial sector, geographical location, employment status, occupational group, salary distribution, and shares of hires, promotions and terminations of designated group members • identify any under representation of the designated groups in each occupational group in their workforce 	<p>The LEEP Employer Annual Report:</p> <ul style="list-style-type: none"> • is submitted to the Minister of Labour, via WEIMS to the LP • contains the following information: <ul style="list-style-type: none"> ○ prescribed statistical forms provided by industrial sector, geographical location, employee status (for example, permanent full-time, permanent part-time and temporary), occupational group, salary range, hourly wage gaps, bonus and overtime gaps, hiring, promotion and termination ○ a narrative of employment equity activities that the employer conducted, including: <ul style="list-style-type: none"> ▪ measures taken

Key players	Roles and responsibilities	Products
	<ul style="list-style-type: none"> • review their employment systems including written and unwritten policies and practices in order to identify employment barriers • prepare and implement a plan to remove employment barriers and achieve equitable representation⁸¹⁹ • submit annual employment equity reports to the Labour Program, by June 1st 	<ul style="list-style-type: none"> ▪ results achieved following these activities, and ▪ consultations between the employer and employee representatives
<p>Federal Contractors Program (FCP) organizations</p> <ul style="list-style-type: none"> • Provincially regulated contractors who do business with the Government of Canada that: <ul style="list-style-type: none"> ○ have a combined workforce in Canada of 100 or more permanent full-time and permanent part-time employees, and 	<p>Have the following obligations:</p> <ul style="list-style-type: none"> • collect workforce information • complete a workforce analysis and achievement report • establish short-term and long-term numerical goals • make efforts to ensure progress towards equitable representation of the 4 designated 	<p>Copies of the workforce self-identification questionnaire as well as the workforce survey return and response rates are submitted to the LP The Achievement Report:</p> <ul style="list-style-type: none"> • is submitted to the LP • includes workforce analysis results and goals to achieve employment equity <p>The updated Achievement Report:</p> <ul style="list-style-type: none"> • is submitted to the LP 3 years after the initial report and every 3 years thereafter • includes previous data and new workforce analysis results and goals for a subsequent compliance assessment, and information on efforts and

Key players	Roles and responsibilities	Products
<ul style="list-style-type: none"> ○ have received an initial federal government goods and services contract valued at \$1million or more 	<p>groups within its workforce</p>	<p>progress made to achieve the set goals</p>
<p>The Treasury Board of Canada (TB)</p> <p>TB has delegated its responsibilities under the Act to the Treasury Board of Canada Secretariat - The Office of the Chief Human Resources officer (TBS-OCHRO)</p>	<p>The Treasury Board of Canada is charged with carrying out the obligations of an employer under the Act, in accordance with the Financial Administration Act⁸²⁰ and, as such:</p> <ul style="list-style-type: none"> • administers employment equity policies as they apply to the core public administration of the Government of Canada (departments under Schedule I and IV of the Financial Administration Act)⁸²¹ • collects annual employment equity reports from separate federal agencies and other public sector organizations (under Schedule V of the Financial Administration 	<p>The Employment Equity in the Public Service of Canada Report:</p> <ul style="list-style-type: none"> • is tabled in Parliament by the President of the Treasury Board • consolidates information on the state of employment equity in the federal public service

Key players	Roles and responsibilities	Products
	<p>Act, the RCMP and the Canadian Armed Forces) for tabling in Parliament, simultaneously with the Treasury Board President's employment equity report for the core Public Service of Canada⁸²²</p>	
<p>The Public Service Commission of Canada (PSC)</p>	<p>Is charged with carrying out the obligations of an employer under the Act, in accordance with the Public Service Employment Act⁸²³ and, as such:</p> <ul style="list-style-type: none"> • promotes and safeguards a merit-based, representative and non-partisan public service that serves all Canadians • reports independently to Parliament on its mandate 	<p>The Public Service Commission of Canada Annual Report:</p> <ul style="list-style-type: none"> • is submitted to Parliament by PSC • consolidates information on employment equity as it relates to staffing processes in the public service
<p>Separate agencies</p> <ul style="list-style-type: none"> • set out in Schedule V to the Financial Administration Act and that employ one hundred or more employees⁸²⁴ 	<p>Are responsible for carrying out similar employer obligations and, as such:</p> <ul style="list-style-type: none"> • administer employment equity policies as they apply to their employees; • submit annual reports on employment 	<p>Employment equity annual reports submitted to TBS-OCHRO</p>

Key players	Roles and responsibilities	Products
	equity to TBS-OCHRO	
Employees and unions representatives	<p>Under the Act, have the rights to:</p> <ul style="list-style-type: none"> • be consulted on and collaborate in the preparation, application and revision of the employer's Employment Equity Plan⁸²⁵ <p>Under the Act, consultation and collaboration between employers and unions are not considered forms of co-management. Final responsibility for compliance rests with the employer.</p>	N/A

⁷⁸⁸ *Employment Equity Act*, S.C. 1995, c. 44, Section 2.

⁷⁸⁹ Judge Rosalie Silberman Abella, Commissioner, *Equality in Employment: A Royal Commission Report*, October 1984, at 3.

⁷⁹⁰ Abella Report, at 202.

⁷⁹¹ The FCP does not apply to contracts for the purchase or leasing of real property, or to construction or legal service contracts. The FCP has been amended over time, to increase the initial \$ 200 000 threshold contract amount that would trigger a federal contractor becoming subject to the program's requirements.

⁷⁹² After the adoption of the EEA, and in the context of a complaint of discrimination against women in the workplace under the *Canadian Human Rights Act*, the Supreme Court of Canada confirmed that the Canadian Human Rights Tribunal had the remedial powers to order the employer to implement a proactive employment equity program to address and correct the effects of systemic discrimination. See *Action Travail des Femmes v Canadian National Railway Company*, [1987] 1 SCR 1114.

⁷⁹³ For example, the United Nations Committee on the Elimination of Racial Discrimination (CERD) recommended that Canada revisit the use of the term visible minorities (CERD, Concluding observations, 2017).

⁷⁹⁴ Commission des droits de la personne et des droits de la jeunesse, *Personnes en situation de handicap* | CDPDJ

⁷⁹⁵ Abella Report, at 46; see also 209-211. The Abella Report specifically referenced the Black Employment Program in Nova Scotia, instituted in 1973 and administered by the federal government, whose mandate was to promote Black employment in the federal public service. Abella Report, at 197.

⁷⁹⁶ Abella Report, at 28-29 & Chapter 5 on childcare. The Report also considered the omission of paid domestic workers from employment and human rights legislation at the time to be inexplicable, p. 51.

⁷⁹⁷ Abella Report, p. 214.

⁷⁹⁸ Abella Report, pp. 204-205.

⁷⁹⁹ Section 35 of the Act. The last fines levied for LEEP employers (four cases total) were in 1990 (two cases) and 1991 (two cases). The highest fine levied for this was \$3,000 and costs.

⁸⁰⁰ Employment and Social Development Canada. (2020). Federal Contractors Program.

⁸⁰¹ The CHRC does not share the results of these audits with the Labour Program given the confidentiality of information exchanged between the CHRC and the employer. Instead, the CHRC reports on its employment equity audits and enforcement activities as part of its Annual Report to Parliament. The 2019 ESDC Evaluation of the Employment Equity Programs (the 2019 ESDC Evaluation) recommended that the Labour Program gain access to audit reports produced by CHRC.

⁸⁰² See Joint Union/Management Task Force on Diversity and Inclusion, 2017 Building a Diverse and Inclusive Public Service: Final Report of the Joint Union/Management Task Force on Diversity and Inclusion.

⁸⁰³ Joint Union/Management Task Force on Diversity and Inclusion. (2017), 2017 Building a Diverse and Inclusive Public Service: Final Report of the Joint Union/Management Task Force on Diversity and Inclusion, section 8 b) Analysis, observations and recommendations.

⁸⁰⁴ The NOC provides a standardized language for describing the work performed by Canadians. It serves as a framework to define and collect statistics, analyze labour market trends and extract career planning information.

⁸⁰⁵ The criterion of permanent residency is not applied.

⁸⁰⁶ Section 42(1)(a) of the Act.

⁸⁰⁷ Section 42(1)(b) of the Act.

⁸⁰⁸ Section 42(1)(c) of the Act.

⁸⁰⁹ Section 42(1)(d) of the Act.

⁸¹⁰ Section 42(1)(e) of the Act.

⁸¹¹ Section 36 of the Act.

⁸¹² Section 20 of the Act.

⁸¹³ These initiatives arise from the Minister of Labour's legislated responsibility to provide recognition to private sector employers for outstanding achievement in implementing employment equity (section 42 (1) 5) of the Act).

⁸¹⁴ Section 22 of the Act.

⁸¹⁵ Sections 25(2), 25 (3) and 26 (1) of the Act.

⁸¹⁶ Sections 28 -32 of the Act.

⁸¹⁷ Section 27(1) of the Act.

⁸¹⁸ Section 27(2) of the Act.

⁸¹⁹ See sections 5 to 19 of the Act.

⁸²⁰ Section 4(4) of the Act.

⁸²¹ In 2018-2019, 67 departments and agencies fell under TBS-OCHRO purview.

⁸²² Section 21 of the Act.

⁸²³ Section 4(4) of the Act.

⁸²⁴ Section 4 (1) c) of the Act.

⁸²⁵ Section 15 of the Act.