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*Affirmative Action and Employment Equity: Policy and Ideology in Canadian Context*

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Employment equity debates moved from an issue raised largely by social movements and individual advocates to a widely accepted element of public policy discourse with the publication in 1984, of *Equality in Employment: A Royal Commission Report*.<sup>1</sup> Under the direction of Commissioner Rosalie Abella, the term "employment equity" was suggested as an equivalent, and alternative, to what was seen to be the more controversial term "affirmative action."

In the federal context today, the term "employment equity" has been enacted into extensive policy positions and in legislation. The term "employment equity" was introduced and generalized in the Canadian discourse with this report, and in subsequent legislation.<sup>2</sup> In most of the provinces, the term "employment equity" today is understood in a manner similar to its application in federal legislation, informed by the use of the term in the Abella Report. In previous arguments we have put forward regarding the politics of backlash, we have stressed the character and discursive impact of conservative views that challenge the principles upon which employment equity policy is grounded.

Our perspective in defense of employment equity policy and legislation as necessary steps in increasing democratic and fair access to employment for designated groups otherwise excluded through systemic discrimination has been explicit. We have also maintained that without active and consistent advocacy and training, employment equity policy alone will not challenge the numerous ideologies and practices that render discrimination to be widely systemic and hegemonic. However, backlash policies often claim to represent majorities, when it is actually only minority organizations, or even a few individuals, who aggressively prosecute challenges to particular policies or laws. The effectiveness of backlash relies in part upon creating confusion and disorganization among the supporters of equity policies. Therefore, there is another element to the politics of backlash that deserves attention. This is a notable tendency, among defenders of employment equity, to offer concessions to the ideological ground of backlash in an effort to gain legitimacy. Usually, this is presented as a purely pragmatic, strategic orientation, a method of conflict avoidance in the present in order to gain a policy foothold that will allow for greater advances in the future.

It is our contention that from as early as the 1980s, Canadian discourse in defense of employment equity has been influenced by a strategy of yielding ground to the backlash, initially reacting to the debate as it unfolded in the US context. There are two dimensions that are visible in this connection. One dimension is largely ideological, in the explicit replacement of the term "affirmative action" with "employment equity" in the Abella Report and subsequent legislation. Another dimension is policy related, indicated in the development of the Ontario Employment Equity Act under the NDP government of Bob Rae in the early 1990s.

What follows is an elaboration of this argument regarding concessions, or accommodation, to the backlash from employment equity advocates. Some elements of the general framework of backlash in the US context will be elaborated, followed by an indication of how this concession is visible in the Abella Report. We will then turn to a more detailed examination of the Ontario NDP's enactment of employment equity legislation. This section is based largely on interviews with NDP legislators responsible for the Act, conducted as face-to-face interviews in Toronto in 2001. Those interviewed were selected on the basis of their previous involvement with the legislation as participants in the NDP government.<sup>3</sup> The interviews were one to two hours long, and loosely followed a schedule of questions focusing on the experience of the NDP government and the subsequent events surrounding the rise and fall of employment equity legislation.<sup>4</sup> Based on a small sample, these findings are not presented as representative numerically, but rather as the qualitative interpretations and lessons gleaned from senior-ranking former members of the NDP government. These concessions were seen to weaken employment equity advocates in the face of more overt and aggressive backlash that was to emerge, and which continued to affect employment equity discourse in Canada today.

### **Backlash: The US Context**

Published in 1991, Pulitzer Prize winning journalist Susan Faludi's *Backlash: The Undeclared War Against America Women*, traced in detail a series of attacks in US media and policy circles on the gains of the women's movement.<sup>5</sup> The claim was largely put in terms of the historic victory of women's equality, but maintained this coincided with a series of tragic effects, including a crisis in the traditional family, a rise in depression among childless women, and an epidemic of infertility, etc. In Faludi's words:

Women's fight for equality has 'largely been won,' *Time* magazine announces. Enroll at any university, join any law firm, apply for credit at any bank. Women have so many opportunities now, corporate leaders say, that we don't really need equal opportunity policies. . . . And yet. . . . Behind this celebration of the American woman's victory, behind the news, cheerfully and endlessly repeated, that the struggle for women's rights is won, another message flashes. You may be free and equal now, it says to women, but you have never been more miserable. . . . The prevailing wisdom of the past decade has supported one, and only one, answer to this riddle: it must be all that equality is causing all that pain. Women are unhappy precisely *because* they are free. Women are enslaved by their own liberation.<sup>6</sup>

In 550 pages of text, Faludi proceeds to dismantle the argument that feminism has caused a decline in women's equality, confidence and fertility, and demonstrates how numerous studies that demonstrate the contrary – that equality and independence are good for women – received little or no public attention. Affirmative action policies for women were among those challenged in the context of widespread backlash identified by Faludi. The backlash in the US has not, however, only been reflected in ideology. Faludi traces

erosion of abortion services, challenges to daycare funding and accessibility, and, significantly in the context of the current discussion, attacks on women's right to access and promotion in male-dominated professions and blue-collar work.

The backlash against women and feminism in the 1980s followed a previous period of backlash in the US that specifically targeted the legality and discursive legitimacy of affirmative action policies. These policies were not originally developed to focus specifically on women's access to employment without discrimination, but were designed to advance the rights of African Americans.

It was the Civil Rights Act, and the mass movement for racial equality that led to its ultimate passage in the US in 1964, that provided the background to affirmative action policies and practices in the United States. It was regarding charges of "reverse discrimination" against white, able-bodied men, that one of the most significant policy debates occurred, challenging the premise and constitutional legality of affirmative action, and marking the rise of a serious backlash against affirmative action.

The Civil Rights Act called for an end to recognized racial discrimination in employment. A wide variety of US government agencies and institutions that received government funds, including colleges and universities, consequently began to take "affirmative action" to enroll and hire more minorities and women. The idea was to compensate for the effects of past discrimination in order to more fairly represent those groups that had traditionally been underrepresented.

Educational institutions made an extra effort to see that more women and minorities were accepted into their undergraduate, graduate and professional programs. Since admission to institutions of higher education is often highly competitive, affirmative action meant that women and minority candidates were accepted who might otherwise have not been accepted. . . . Opponents of affirmative action soon were calling this process *reverse discrimination*.<sup>7</sup>

The backlash against affirmative action moved into the centre stage of national politics in the US, and gained extensive international attention, when the case of Alan Bakke went before the US Supreme Court. Allan Bakke, a young white male and a Vietnam War veteran, was declined admission to the University of California (U.C.), Davis campus, in 1973 and again in 1974. Students with weaker academic records who were from various minorities were accepted under the university's affirmative action program. The Medical School for U.C. Davis accepted 100 students per year; 16 placements per year were set aside for African Americans, Chicanos, Asian Americans and Native Americans. When Bakke's application was declined a second time in 1974, he filed a law suit against the university, arguing that he had been rejected solely on the basis of his race. Bakke sued for admission on the grounds that his rights under Title VI of the Civil Rights Act of 1964 had been violated.

In 1978, the US Supreme Court ruled on the case.<sup>8</sup> While the Court did find that Bakke should be admitted – which was the ultimate outcome and Bakke proceeded to complete his MD and pursue a medical career – it also found that affirmative action policies in universities, and by inference employers, may consider race and ethnicity as one of a number of factors when offering admission or hiring. The central point was that students or employees could not be denied entrance or employment if race was the *only* factor considered. Both sides of the debate claimed victory.

This case has since become the subject of extensive debate in law, social science, psychology, moral philosophy and politics.<sup>9</sup> While there is certainly ample discussion of the technicalities and specific challenges in implementation of equitable employment practices, there is also a discursive debate that underlies the charged climate. This is, we maintain, in regard to the basic assumption that motivates the enactment of affirmative action policy: the fact of systemic discrimination. Both sides of the argument have claimed the terrain of “rights”. However, advocates of affirmative action presume that the status quo is one where minorities and women experience oppression and systemic discrimination, in ideological and practical ways that threatens their access to equality with others regardless of skill or merit. Opponents of affirmative action, and those who support the grounds of the backlash against affirmative action policy and legislation more particularly, presume that the status quo is fair and equal; discrimination can and does occur, but this must be proven on a case by case basis. Claims for “group rights” or systemic programs of positive redress, rather than leveling an uneven playing field, are seen from such a perspective to render “special interest groups” particular privilege regardless of skill or merit. Cornel West, a supporter of affirmative action but aware of the limitations of the policy, summarizes the US context of the debate:

The vicious legacy of white supremacy – institutionalized in housing, education, health care, employment, and social life – served as the historical context for the civil rights movement in the late 1950s and 1960s. Affirmative action was a *weak* response to this legacy. It constituted an imperfect policy conceded by a powerful political, business and educational establishment in light of the pressures of organized citizens and the disturbances of angry unorganized ones.<sup>10</sup>

Currently, while affirmative action in the US remains contested, there are two arenas of policy enforcement. As Heidi Hartmann summarizes:

Affirmative action in employment refers most properly to two types of government-ordered programs: the federal contract compliance program, in which a presidential executive order requires firms with federal contracts to develop goals and timetables for hiring women and minority men in occupations in which they are underrepresented and to make annual reports on the progress they are making; [and] a variety of affirmative steps that employers are required to take as a result of court involvement in the resolution of discrimination suits. Most of the employers that are required to take specific affirmative steps to recruit,

train and promote women or minorities are private firms, but state and local governments (and federal government agencies) have also been ordered to implement affirmative action by the courts. The federal contract compliance program is enforced by the Office of Federal Contract Compliance Programs (OFCCP) in the US Department of Labor, while most court-ordered affirmative action remedies grow out of litigation under Title VII of the Civil Rights Act.<sup>11</sup>

### **Employment Equity vs. Affirmative Action**

In the Canadian context, as we have summarized elsewhere:

Issues surrounding employment equity became prominent in Canadian public policy discussions during the late 1970s and 1980s, at the same time that affirmative action issues were established in the United States. Canada's official response was the Royal Commission on Equality in Employment (1984), established in 1983 with Judge Rosalie Abella as the Commissioner. . . . This report resulted from a major research initiative carried out in 1983. The Commissioner sent letters to nearly 3,000 individuals and organizations, and received 274 written submissions in response. She held 137 meetings attended by more than 1,000 people, including 92 meetings in 17 cities across Canada, as well as meetings with designated group members, government officials, union and business representatives, and employees and officials from 11 Crown corporations. Thirty-nine substantial research reports were commissioned, on topics including education, child care, racism and pay equity.<sup>12</sup>

The use of the term "employment equity" rather than affirmative action was suggested originally in the Abella Report. This was in order to avoid unnecessary association with the US context and other issues seen to provoke confusing and futile debates. The decision to avoid the term "affirmative action" was at least in part the result of Rosalie Abella's interpretation of presentations to the Commission. This is made explicit:

The achievement of equality in employment depends on a double-edged approach. The first concerns those pre-employment conditions that affect access to employment. The second concerns those conditions in the workplace that militate against equal participation in employment. Efforts to overcome barriers in employment are what have generally been called in North America affirmative action measures. These include making recruitment, hiring, promotion and earnings more equitable. They concentrate on making adjustments in the workplace to accommodate a more heterogeneous workforce. The Commission was told again and again that the phrase 'affirmative action' was ambiguous and confusing. . . . The Commission notes this in order to propose that a new term, 'employment equity', be adopted to describe programs of positive remedy for discrimination in the Canadian workplace. No great principle is sacrificed in exchanging phrases of disputed definition for new ones that may be

more accurate and less destructive to reasonable debate. . . . Ultimately, it matters little whether in Canada we call this process employment equity or affirmative action, so long as we understand that what we mean by both terms are employment practices designed to eliminate discriminatory barriers to provide in a meaningful way equitable opportunities for employment.<sup>13</sup>

At the core of the “disputed definition” of affirmative action in this period was very likely the backlash challenge regarding merit, quotas, and charges of reverse discrimination. This is significant, as it suggests the impact of the backlash against affirmative action in the United States that had received substantial international attention. Moreover, if the phrase “affirmative action” was “ambiguous and confusing”, where was the effort to explain the meaning in the context of proposed Canadian legislation? These issues were not addressed in the Commission’s report. Moreover, while the terms “employment equity” and “affirmative action” are presented as equivalent, actually the scope of the policy shifted with the change in terminology. Educational institutions are usually considered under the purview of affirmative action, and have been in the US context. While education, as well as childcare, were addressed in the Commission’s report, when the federal legislation followed, the terminology of employment equity was adopted and the focus was shifted exclusively to the workplace. The notion of “employment” rather than “action” suggested a narrower lens for the obtainment of equality.

What the Abella Report did maintain, however, in bold and unambiguous terms, was that certain identifiable groups were not being fairly represented in the Canadian public sector work force, despite demonstrated educational and skill capacity. Drawing on the recently enacted Charter of Rights and Freedoms, the Abella Report established the constitutional legitimacy for a pro-active approach to altering the historic bias in employment against women, visible minorities, Aboriginal peoples, and people with a disability. On a normative level, the Abella Report insisted that equality does not require equal treatment; on the contrary differential treatment resulting from systemic discrimination, requires the elimination of specific barriers.

Equality under the Charter, then is a right to integrate into the mainstream of Canadian society based on, and notwithstanding, differences. It is acknowledging and accommodating differences rather than ignoring or denying them. This is the paradox at the core of any quest for employment equity: because differences exist and must be respected, equality in the workplace does not, and cannot be allowed to, mean the same treatment for all. In recognition of the journey many have yet to complete before they achieve equality, and in recognition of how the duration of the journey has been and is being unfairly protracted by arbitrary barriers, section 15(2) permits laws, programs, or activities designed to eliminate these restraints.<sup>14</sup>

The focus on employment in the public sector was later reflected in the federal legislation. However, the legislation stood clear of numeric targets or “quotas”, the issues at the centre of the Bakke dispute. Despite considerable steps in the direction of equity at the federal level, it is reasonable to argue that ideological and practical concessions to the backlash were embedded in the Canadian policies.

Susan Faludi’s analysis of the effectiveness of the backlash against feminism in the US recognizes the significance of this process, though in a more stark and extreme manner. She indicates a trend among a number of leading feminist writers who, in the course of the 1980s, abandoned their previous support for women’s independence and called for various versions of a return to “family values”. Betty Friedan, for example, a founder of American feminism, now warned that women were suffering from a new identity crisis. In her public speeches she advocated a framework outlined in her 1981 book, *The Second Stage*, which argued that there was a maternal call for motherhood ignored by previous feminists, including herself, and she rejected the “confrontational” tactics of the women’s movement.<sup>15</sup> In a period of New Right ascendancy, the ideological ground of what we now identify as the neo-liberal agenda included an assault on feminism and women’s rights. To authors such as US Republican President Ronald Reagan’s aide, Dinesh D’Souza, Friedan’s work was to be celebrated.<sup>16</sup> According to Faludi, voices of “feminist revisionism”, had, by the mid-1980s, moved from “recantation” to “a din, as the media picked up the words of a few symbolically important feminists and rebroadcast them nationwide.”<sup>17</sup>

The context of backlash, and the division among feminists regarding feminism itself, was not lost on backlash ideologues in Canada. Bestselling author and conservative think tank researcher, William Gairdner, for example, in *The War Against The Family*, argues against what he calls “The Feminist Mistake” that refuses to recognize the inherent biological role of women as homemaker and mother. He praises Germaine Greer’s *Sex and Destiny*, which celebrates women’s role as child bearer and mother, as an example of someone who “had the courage to turn her back on her earlier inflammatory work, *The Female Eunuch*.” Gairdner similarly praises Betty Friedan’s “recanting book”, *The Second Sex*, for her rejection of her earlier feminist perspectives.<sup>18</sup>

While the backlash in Canada has over the years found organized expression in various provincial contexts and in the federal Reform Party/Tories, the employment equity debate at the federal level has not explicitly generated the furor witnessed in the US. However, opponents of employment equity have secured a number of concessions, by remaining ready at the wait in the face of advocates fearful of provoking them into open ideological conflict. While overt “feminist revisionism” has not been the standard, pragmatics and gradualism has claimed much of the same ground. This was, as we have demonstrated, evident in the Abella Report, and was articulated by advocates in federal office at the time.

Flora MacDonald, Minister of Employment and Immigration in 1984, reflected on the experience:

My predecessor had appointed a one-person Royal Commission to look into limited aspects of equity in the public service. The commissioner, Rosalie Abella, came to me shortly after I was made minister and said, 'I would like to have my mandate enlarged.' I said, 'Rosie, take the whole thing, whatever you want.' It was on this basis that she wrote her report, using the term 'employment equity.' She did not want to follow what the Americans had done in affirmative action, which had greatly congested the courts. . . . Generally, there wasn't a great deal of support. The opposition came both from those who felt there should be nothing and those who felt there should be much more. I had a lot of difficulty with women's groups, who were saying, 'Why haven't you done this, this, this and this?' To me, they didn't understand the reality of the House. . . . That has always been my way: If you can't get everything you want at the outset, get at least the basis that will allow you to build. . . . The greatest opposition came from those who were disabled. They didn't think the legislation went far enough. . . .<sup>19</sup>

Significantly, opponents of employment equity have shown no similar hesitancy to take the ground of controversy. A notable fear of “provoking a backlash” was a recurring theme among employment equity advocates in policy circles made evident in our study of provincial contexts.<sup>20</sup> The Ontario context provided an important laboratory for backlash debates, not only in the explicit attacks articulated by opponents of employment equity in policy and legislation, but also in the response of employment equity advocates. There is evidence to suggest that Canada’s social democratic tradition has moderated the type of polarization that occurred in the US, by dulling the leading edge of the movement, and accommodating to the backlash even before the overt challenges had fully come into sway.

### **Ontario: NDP Hesitancy and the Backlash**

The rise and fall of employment equity legislation in Ontario closely follows the rise and fall of the Ontario New Democratic Party (NDP) government in the 1990s, and the subsequent election of the Ontario Progressive Conservatives. The Ontario NDP historically held a strong commitment to the development and implementation of employment equity policy. During its one term in office as the majority government (1990-95), under the Premiership of Bob Rae, the NDP implemented the *Act to Provide for Employment Equity for Aboriginal People, People with Disabilities, Members of Racial Minorities and Women*.<sup>21</sup> This legislation was short-lived, removed in an atmosphere of extreme backlash upon the subsequent election of Mike Harris and the Ontario Progressive Conservatives in 1995, one year after the Employment Equity Act had been proclaimed into law.

Elsewhere, we have pointed to the aggressive political and ideological assault carried on by the newly elected Harris Tory government against the Employment Equity Act in Ontario.<sup>22</sup> Here we consider the factors in the NDP government’s strategy that rendered the act exceptionally vulnerable to challenge and ultimate repeal. According to some of

the leading NDP MPPs involved in the process of developing and legislating the Act, hesitancy on the part of Bob Rae's NDP majority government was a significant factor in this regard.

In the early years of the Rae government, there was a broad base of public support for the NDP government's initiative; in fact, many employment equity advocates believed the legislation to be far too weak.<sup>23</sup> The concern to maintain a united base of support across a spectrum of views was the stated goal provided for the NDP government's extensive consultation process prior to the enactment of the law. The slow pace of development is now seen, however, to have cost the NDP dearly.

Before the law was enacted, it was preceded by an extensive process of public consultation. The long process meant that the legislation only passed Third Reading in December, 1993 and was proclaimed into law in early 1994 – less than one year before the 1995 election. The formal process leading up to the law's enactment began in November 1990.<sup>24</sup> In the first Speech from the Throne, the newly elected NDP government identified employment equity as a provincial priority. By March of 1991, Juanita Westmoreland-Traoré had been appointed as Ontario Employment Equity Commissioner. In the summer of the same year, the Commissioner established a Consultation Advisory Committee comprised of representatives of the four designated groups that would ultimately be identified in the title of the legislation, as well as business and labour representatives, and employment equity practitioners already active in the province. Between June 25, 1992 and September 7, 1993, more than 100 presentations and 184 written submissions were received. Then a clause-by-clause review by a designated Standing Committee followed, concluding on December 6, 1993, and an Office of the Employment Equity Commissioner established a Public Education Advisory Committee, before being prepared for Third Reading in December and passage in January of 1994.

Winnie Ng was Executive Assistant/Senior Policy Advisor to the Minister of Citizenship during the period of the Rae government. From her perspective, the long consultation process weakened the capacity of the legislation to withstand the later repeal under Harris.

We went through a whole consultation process. . . . There may have been good will in trying to do the consultation. Trying to do it right was then being seen as part of an educational process. But one can also read it as a delaying tactic. There was hesitancy. And we ended up paying a major political price for it, having the legislation enacted so close to the next election. It didn't give people time to forget and move on. We never had full control within the Ministry, within the Minister's office, to push it. And there was great reluctance from the Premier's office. In retrospect, I think it took too long. In hindsight the whole consultation process and the drafting took more than a year and a half. The consultation took at least a year. So by the time the Bill finally got proclaimed in 1994, there was really not much time to have the whole thing entrenched. That is why it

was so easy for the Harris government, the Tories, to repeal the whole thing.<sup>25</sup>

Elaine Ziemba, former NDP government Minister of Citizenship with responsibilities for Human Rights, Seniors and Persons with Disabilities, identified an ambiguity in the process. She saw that on the one hand there was a strong commitment to public consultation as part of the NDP style of governance; on the other hand the legislation was short lived prior to the election, threatening its survival at the hands of the next government.

I looked at what the federal government did and I saw that there was very little dialogue, or educational seminars. They kind of just did it. Our government was about being open, about dialogue. We were about making sure that people were in the picture and were being updated. I would like to have kept some of that openness. But I also think I would have liked to have just done it. I think we waited too long trying to get everybody on board. . . . I think on reflection, it's about timing. You know always in politics, it's timing.<sup>26</sup>

Rosario Marchese, former Ontario NDP Chair of the Standing Committee on the Administration of Justice, maintained that there should have been more emphasis on mass, general education, and less on consultation with various stakeholders. In fact, his view was that the “consultation” process may have actually created more of a sense of fear and alarm, over-explaining rather than governing as if employment equity were a “business as usual” policy.

Where we failed in my view, is that unless you do the political preparation work to explain to people what you're doing, you're in trouble. . . . So while we dragged this issue through for a couple of years, we weren't really communicating to the public in a way that it would explain what this bill is doing. Rather we were alarming the public.<sup>27</sup>

Marilyn Churley, former NDP Minister of Consumer and Commercial Relations and a strong advocate for employment equity legislation with the Cabinet, was even more definitive.

I think a lesson learned is that you have to do these things more quickly. There is a happy medium – the Tories don't consult at all, or very selectively when they do. But I think that we over-consulted. I would propose that on some of these things that we believe in, we needed to get it done fast. At the end of the day, not everybody is going to be happy any way. So we do the best we can and get the legislation passed in time, so that should there be another government, it is more entrenched. I think that is really important.<sup>28</sup>

Bob Rae, former Premier and ultimately responsible for the legislation and the process of enactment, however, defended the pace of development of the legislation.

Basically, we started to proceed fairly early on in the government, recognizing that it was going to be politically difficult. We were determined to go ahead and get it done. We ran in to all kinds of flak on our labour legislation, with major political opposition. There were huge billboards and we were accused of never consulting. . . We decided that we really did have to try to generate as many incentives as we could. We had the parliamentary committee people who went out and listened. And Members throughout the committee came back and said, 'This is very tough and we are getting a lot of problems.' There were negative reactions. So we had to listen and listen carefully. We went and did a lot of consultation and discussion and tried as much as possible to produce something like a consensus.<sup>29</sup>

When asked specifically about the argument that the consultation process was too lengthy, and that early enactment of the employment equity legislation would have strengthened public support, Bob Rae responded:

No. I don't think I agree with that. My own view is that if we hadn't had the consultation process, we wouldn't have had the benefit of what I felt was needed. I am speaking here as the Premier. I felt I constantly had to go back to the Ministry and say, 'I know you want to go with this.' I mean people would want to go further. But people were also saying the legislation went too far. In fact, the legislation itself was a compromise. Some people were saying that it was better than nothing, but it didn't have this or it didn't have that. It didn't have all the bells and whistles that the advocacy groups had developed, sort of their model legislation. Frankly, I needed the consultation period to get the Legislature closer into line to what I thought was going to be politically manageable. I think if, in fact, had we passed it more quickly, the legislation would have been harder to administer.<sup>30</sup>

Notably, Bob Rae is unique among the respondents interviewed in suggesting that perhaps the lessons of history should be taken into account regarding the substantive content of the legislation. His commitment to legislating employment equity, in hindsight, had changed. He now identified the suggestions of Canadian Civil Liberties Association representative and human rights lawyer, Allan Borovoy,<sup>31</sup> as significant, emphasizing that if there was past discrimination reflected in workplace imbalances, current policies should not be called in to enact redress. According to Rae, Allan Borovoy:

...made some tough presentations to the Standing Committee. His main arguments were from the perspective that you can't hold this generation responsible for what past generations have done. So his argument was that

you had to construct the legislation in such a way that it would be anticipatory about going forward. But you can't sort of blame the past. In terms of targets and objectives which were said to be made, he said those targets and objectives would be too aggressive and would fail to take into account the fact that you're looking at making up for past wrongs. You can't make up for past wrongs – all you can do is basically move forward and make sure that the hiring is done from now on in such a way that you meet certain objectives.<sup>32</sup>

Such an amendment would have eliminated the premise within employment equity policy that a basic goal is to achieve a level of workplace representation where each of the designated groups is comparable to the availability within the population. Rae noted that such an amendment would have been seen at the time within the NDP government leadership as “watering it down too far.”<sup>33</sup> He reflected, however, that when the final legislation was enacted, it may have still been too aggressive: “I think we probably built the bridge a little bit too far.”<sup>34</sup>

In fact, the Ontario Employment Equity Act steered far away from quotas or statistical standards, and small businesses were exempt. Moreover, it was difficult to enforce over the short period that it was enacted. It was also enacted in part on the grounds that employment equity already existed in many areas, and defended as a means of consolidating existing policy. The Act therefore subsumed many other pieces of previously existing Ontario legislation that included equity policies in certain sectors into a single umbrella legislation. When it was repealed, virtually all the legislative infrastructure for equity issues in the province had been eliminated.

The NDP's commitment to employment equity was a central target of the Tory election strategy in 1995, and is commonly seen as a major cause of its defeat. Now in Opposition, the Ontario NDP no longer places the same emphasis on employment equity policy as it did in the 1990s. NDP policy documents include advocacy for employment equity as a general principal of workplace practices, but advocacy for re-enactment of employment equity law in Ontario is no longer presented. By the late 1990s, the earlier commitment to legislative change and implementation "with teeth", had been replaced by a more moderate commitment.<sup>35</sup>

### **Conclusion: The Price of Accommodation to Backlash**

The cases of the Abella Report's recommendation to steer clear of the term affirmative action, and the apparent hesitancy of Bob Rae's Ontario NDP majority government regarding employment equity legislation, are considered here as examples of Canada's leading advocates steering away from “controversy”. In both cases, it is pragmatism that is presented as the central motivating factor, but the presence of backlash arguments in determining what is pragmatic is clear. What is at the core of the controversy is a set of claims propagated largely by the influence of backlash against employment equity in the US and in Canada. The Abella Report and the Rae government's legislation are, arguably, the best case examples of political advocacy for employment equity in Canada. However, the approaches indicate a blunt sword in challenging systemic discrimination.

At both the federal and provincial levels, it is the victims of systemic discrimination who have suffered the most from strategic accommodations to backlash. At the federal level, for example, employment equity legislation which avoids numeric accountability has made implementation of the difficult. As Tania Das Gupta has stated, referring to the federal Employment Equity Act:

In effect, it is a voluntary program. . . . Some equity advocates have argued that the federal employment equity program has not been successful because it has been ‘top down’ and not geared to ‘statistical improvement.’ It seems that most of the federally-regulated employers are concentrating on removing biases from the outreach, screening and interview processes and concentrating less on actually increasing representation from target groups.<sup>36</sup>

In Ontario, advocates for employment equity attempted to reverse the backlash of the Harris Tories through a legal Charter challenge. Though this proved unsuccessful in the courts, the challenge was organized by a broad coalition of organizations that served to support the continuation of a grass roots network of advocates for employment equity, the Alliance for Employment Equity.<sup>37</sup> Winnie Ng later reflected on her experience in this coalition, which sharply contrasts with the sense of frustration expressed in the Ontario Parliament:

The Coalition of Visible Minority Women got involved early on in the Alliance for Employment Equity. Sexism and racism are wings of the same bird of oppression. That was our key point to put on the Alliance agenda. It was a good process. There weren't tensions on race grounds in the Alliance. We were all in the same boat, and it was clear that we were after legislation and government response to address systemic barriers.<sup>38</sup>

In future, strategies to resist and redress the effects of systemic discrimination need to consider the lessons of backlash, not only as they relate to employment equity but in the wider context challenging racism, sexism and all forms of bigotry. In formulating such strategies, the risks of accommodation and concessions to backlash need to be considered with as much attentive care as is commonly applied to considerations of the consequences of failing to make such concessions.

### *Appendix “A”*

Interview questionnaire guidelines:

1. Please describe your level of involvement in the development of the employment equity policy/legislation in the province [in the federal public service]?
2. Please describe your own views regarding employment equity policy in general.
3. How would you describe your own views regarding this particular policy/legislative process [in Ontario/B.C./the federal public service]?
4. At the time, what did you experience as the greatest barriers to the effective implementation of employment equity legislation in the province?
5. At the time, what did you experience as the factors that were most supportive in moving towards the implementation of employment equity legislation in the province?
6. Can you comment briefly on the specific equity-seeking groups covered in the legislation – women, persons with disabilities, Aboriginal people, and members of Racial/Visible minorities – and how these constituencies were involved in the process?
7. How relevant was the issue of same-sex spousal rights to the employment equity legislative process?
8. What was the relevance, if any, to the extension of employment equity legislation at the federal level?
9. Can you comment on the role of private sector business regarding this legislation?
10. Looking back, with the 20-20 vision of hindsight, what would you describe as the most important lessons from this experience?
11. If you had it all to do over again, what do you think you would do differently?
12. What things would you change?
13. Can you comment on the role of the media in helping or hindering the implementation of employment equity?
14. Would you mind commenting, candidly, on how you perceive the role of your own political party in helping or hindering employment equity [specify party]?
15. Can you comment on the role of the other political parties in helping or hindering employment equity [specify party/parties]?
16. Where do you believe public opinion was regarding employment equity policy at the time?
17. How have you come to this conclusion? On what basis have you, or others whose advice you respect, been able to measure public opinion on this issue?
18. Is public education an important factor in this debate?
19. The term “backlash” has commonly been applied to relate to the debate regarding employment equity. How would you define this term?
20. Is the term “backlash” applicable to the employment equity debate in the province? Why or why not?
21. What do you think the future holds regarding employment equity policy in the province? What would you like to see happen in the future?
22. Is there anything you would like to add?
23. Can you suggest other people we might want to talk to regarding our research on employment equity policy in the province?

<sup>1</sup> Rosalie Silberman Abella, Commissioner, *Equality in Employment*, vol. 1 (Ottawa: Minister of Supply and Services, October, 1984). Hereafter referred to as "Abella Report". This paper is part of a wider study on employment equity and the politics of backlash directed by the authors and funded by the Social Sciences and Humanities Research Council of Canada. We are very grateful to the expert research assistance of Hilary Janzen, Julie Devaney and Alberta Danso in the preparation of this paper.

<sup>2</sup> However, in Quebec, New Brunswick and Nova Scotia, the term "affirmative action" continues to be in use in public policy circles.<sup>2</sup> Notably, the federal policy context, particularly at the level of explicit legislation, continues to be more consistently favourable to employment equity than the provincial contexts. Ontario and BC have been the sites of particular, and considerable backlash, the former in an overt manner, the latter more through gradual corrosive measures. We have written about each of these provincial case studies in backlash against employment equity in detail. Regarding Ontario, see Abigail B. Bakan and Audrey Kobayashi, "Employment Equity Legislation in Ontario: A Case Study in the Politics of Backlash", in Carol Agocs (ed.), *Workplace Equality: International Perspectives on Legislation, Policy and Practice*, (The Hague: Kluwer Law International, 2002), 91-107; and "Ontario: Lessons of the Rise and Fall of Employment Equity Legislation from the Perspective of Rights Advocacy" (with Audrey Kobayashi), *Canadian Race Relations Foundation Reports* (March 2003), 35-77. Regarding BC, see "Backlash Against Employment Equity: The British Columbia Experience", *Atlantis*, vol. 29.1 (Fall, 2004), pp. 61-70.

<sup>3</sup> All of the interviews were taped and transcribed, and all of the interviewees provided written permission to be quoted in reference to this research project. No portion of the quotations presented here may be quoted except as part of this study and with prior permission from the authors. Some of the findings from these interviews were presented in draft form in Abigail Bakan and Audrey Kobayashi, "Employment Equity and the Ontario NDP: The Legacy of Defeat", *Canadian Political Science Association*, Quebec City, May 2001.

<sup>4</sup>The interview schedule is attached here as "Appendix A".

<sup>5</sup> Susan Faludi, *Backlash: The Undeclared War Against American Women* (New York: Crown Publishers, 1991)

<sup>6</sup> Faludi, *Backlash*, pp.ix-x

<sup>7</sup> "A Brief History of Civil Rights in the United States of America: The Bakke Case", <[AfricanAmericans.com](http://AfricanAmericans.com)>

<sup>8</sup> Supreme Court Case. 1978. U.S. University of California Regents v. Bakke, 438 U.S. 265 (1978). Available at: <[http://caselaw.lp.findlaw.com/scripts/printer\\_friendly.pl?page=us/438/265.html](http://caselaw.lp.findlaw.com/scripts/printer_friendly.pl?page=us/438/265.html)> (Accessed May 22, 2005).

<sup>9</sup> See for example, Allan P. Sindler, *Bakke, Defunis and Minority Admissions: The Quest for Equality* (New York: Longman, Inc., 1978); F. A. Blanchard and F. J. Crosby, *Affirmative Action in Perspective* (New York: Springer-Verlag and Society for Psychological Study of Social Issues, 1989); Russell Neili, ed., *Racial Preference and Racial Justice: The New Affirmative Action Controversy* (Lanham, Md.: Ethics and Public Policy Centre, 1991); Barbara Bergman, *In Defense of Affirmative Action* (New York: Harper Collins, 1996); George E. Curry, ed., *The Affirmative Action Debate* (New York: Addison-Wesley Publishing Inc., 1996); Lydia Chavez, *The Color Bind: California's Battle to End Affirmative Action* (Berkeley: University of California Press, 1998); M. Ali Raza, A. Janell Anderson, and Harry Glynn Custred, *The Ups and Downs of Affirmative Action* (Westport, Ct.: Praeger, 1999); John David Skrentny, ed., *Color Lines: Affirmative Action, Immigration and Civil Rights Options for*

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America (Chicago: University of Chicago Press, 2001); Jo Anne Ooiman Robinson, *Affirmative Action: A Documentary History* (Westport Ct.: Greenwood Press, 2001); Steven M. Cahn, ed., *The Affirmative Action Debate*, 2nd ed. (New York: Routledge, 2002)

<sup>10</sup> Cornel West, "Affirmative Action in Context", in Curry, *Affirmative Action Debate*, p. 31.

<sup>11</sup> Heidi Hartmann, "Who Has Benefited From Affirmative Action in Employment?", in Curry, *Affirmative Action Debate*, p. 85.

<sup>12</sup> See Bakan and Kobayashi, *Employment Equity Policy in Canada*, p. 13

<sup>13</sup> Abella Report, pp. 6-7

<sup>14</sup> Ibid, p. 13

<sup>15</sup> Betty Friedan, *The Second Stage* (New York: Summit Books, 1981)

<sup>16</sup> See Faludi, *Backlash*, pp. 318-32.

<sup>17</sup> Faludi, *Backlash*, p. 319. These included Germaine Greer, and the most notable media personality, Camille Paglia.

<sup>18</sup> William Gairdner, *The War Against the Family* (Toronto: Stoddart, 1992). Gairdner was a senior advisor to the Reform Party in the early 1990s. See Paul Kellogg, "William Gairdner and the Trouble with Preston Manning" (Feb., 2002), unpublished ms. Cited with permission. For other backlash thinkers, see Martin Loney, *The Pursuit of Division: Race, Gender and Preferential Hiring in Canada* (Montreal and Kingston: McGill-Queen's University Press, 1998); Richard Gwyn, *Nationalism without Walls: the Unbearable Lightness of Being Canadian* (Toronto: McClelland and Stewart, 1995). For an excellent summary of the role of the media in fuelling public opposition to the employment equity legislation in Ontario, see Frances Henry and Carol Tator, *Racist Discourse in Canada's English Print Media* (Toronto: Canadian Race Relations Foundation, March 2000), pp. 69-88.

<sup>19</sup> Flora MacDonald, MP for Kingston and the Islands, 1972-1988, in "Closing the Wage Gap: Employment and Pay Equity", in Judy Rebick, *Ten Thousand Roses: The Making of a Feminist Revolution* (Toronto: Penguin Canada, 2005), pp. 203-4.

<sup>20</sup> See Bakan and Kobayashi, *Employment Equity Policy in Canada*.

<sup>21</sup> Hereafter referred to as the *Employment Equity Act*.

<sup>22</sup> See Abigail B. Bakan and Audrey Kobayashi, "Employment Equity Legislation in Ontario".

<sup>23</sup> This was the view, for example, of the National Action Committee on the Status of Women at the time. See transcripts of the Legislative Assembly of Ontario, Standing Committee on Administration of Justice, August 30, 1993, pp. J-508-12.

<sup>24</sup> The main elements of this chronology are reported in Ontario, Ministry of Citizenship 1993, "The Employment Equity Consultation Process: A Backgrounder", December (Ontario: Ministry of Citizenship).

<sup>25</sup> Interview, Winnie Ng, April 5, 2001, Toronto.

<sup>26</sup> Interview, Elaine Ziemba, April 16, 2001, Toronto. This is a reference to the federal government's development of employment equity legislation.

<sup>27</sup> Interview, Rosario Marchese, April 5, 2001, Toronto

<sup>28</sup> Interview, Marilyn Churley, March 29, 2001, Toronto

<sup>29</sup> Interview, Bob Rae, April 24, 2001, Toronto

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<sup>30</sup> Interview, Bob Rae, April 24, 2001, Toronto

<sup>31</sup> See Allan Borovoy, Canadian Civil Liberties Association, transcripts of the Legislative Assembly of Ontario, Standing Committee on Administration of Justice, September 1, 1993, pp. J-579-80

<sup>32</sup> Interview, Bob Rae, April 24, 2001, Toronto

<sup>33</sup> Interview, Bob Rae, April 24, 2001, Toronto

<sup>34</sup> Interview, Bob Rae, April 24, 2001, Toronto

<sup>35</sup> See for example, General Policy Statement, adopted by ONDP Biennial Convention, May 1998, "The Future of Work: Getting control of our work, our work time and our pensions", General Policy Statements adopted by Ontario NDP Biennial Convention (May 22-24, 1998).

<sup>36</sup> Tania Das Gupta, *Racism and Paid Work* (Canada: Garamond Press, 1996), p. 99.

<sup>37</sup> See Abigail B. Bakan and Audrey Kobayashi, "Ontario: Lessons of the Rise and Fall of Employment Equity Legislation from the Perspective of Rights Advocacy", *Canadian Race Relations Foundation Reports* (March 2003), 35-77

<sup>38</sup> Winnie Ng, Ontario Regional Director for the Canadian Labour Congress, in "It's Not Just About Identity: Women of Colour Organize", in Rebick, *Ten Thousand Roses*, p. 132.