

# A CRITIQUE OF THE ABELLA REPORT\*

Carole Geller

*Dans son examen de L'égalité dans l'emploi: Un rapport à la commission extra-parlementaire par Mme le juge Abella, Carole Geller souligne certains domaines problématiques importants. Un de ceux-ci est l'acceptance par le juge de la définition d'"égalité" contenue dans les termes de référence de la Commission – ce qui limite le genre de recommandations qu'elle peut faire. L'auteure conteste la mise sur le même pied par Abella de l'équité dans l'emploi et des programmes d'action positive. Elle conclut que les recommandations du rapport, pour l'équité dans l'emploi obligatoire – à la place des programmes d'action positive avec quotas garantis – assure que la longue attente pour l'égalité continuera.*

In June 1983 Judge Rosalie Silberman Abella was appointed by the previous federal government to examine the employment practices of eleven crown corporations and to recommend measures to achieve equality in employment within these organizations for four groups: women, native people, visible minorities, and persons with disabilities. These particular groups make up approximately 60 per cent of the Canadian population. The Commission received 274 written submissions, held 137 meetings across Canada, and consulted with an additional 160 individuals. The end result of this process is a 270 page report that outlines 117 recommendations.

The terms of reference required the Commission to "inquire into the most efficient, effective, and equitable means of promoting employment opportunities, eliminating systemic discrimination, and assisting all individuals to compete for employment opportunities on an equal basis." (p. ii).

Abella rejected the limitation confining the inquiry to the eleven crown corporations, because as she put it, their employment practices can not be assessed fairly in "a cultural vacuum" (p. v). She therefore examined employment practices in both the public and private sectors of the economy.

In Part One of this two-part report,

Abella provides statistics on the inequality in employment of all four groups. These statistics are depressingly similar to those we have seen over the years. For women, the situation is similar to that discussed in the Royal Commission Report on the Status of Women in Canada published in 1970. Indeed the statistics point out that the situation has not changed substantially from the situation that prevailed in the early nineteenth century.<sup>1</sup> Women earn 63 per cent of the male wage, Native women earn 40 per cent of the male wage, and 50 per cent of persons with disabilities who want to work are unemployed. It is apparent from the statistics, and Abella concurs, that the passage and enforcement of anti-discrimination laws and the voluntary "affirmative action" measures employed by governments in attempts to change this situation are not effective. Abella recommends a mandatory approach by both federal and provincial governments that would require all employers, public and private, to adopt an "employment equity" program.

In Part Two she outlines the steps necessary to achieve employment equity. The Report examines education and training programs and makes recommendations for change so that all groups can obtain the skills necessary to achieve equality. The chapter on child care describes the problems women face because of the pervasive view that since women are the child bearers, it is "natural" for them to be the child rearers. The chapter outlines the cost of child care, the fact that childcare workers are paid abysmally low salaries, and the need for more and better child care facilities. The Report recommends universal child care as the ideal and makes interim recommendations until this goal can be achieved.

It is chapters one and six of the Report, the first and last chapters, that are the weakest, most problematic sections. Chapter one defines "equality" and chapter six attempts to provide a mandatory model to achieve this equality.

In defining equality, Abella accepts what has now become commonplace amongst liberal equality thinkers:

1. equality does not mean treating everyone alike and requires the accommodation of some difference;
2. discrimination need not be intentional to be unlawful; and
3. systemic discrimination requires systemic remedies.

Throughout the report the language of systemic group discrimination is used. Yet, Abella's major concern is "to open the competition to all who would have been eligible but for the existence of discrimination." While Abella talks about the group, the remedies she recommends are based on the individual.

The problems with the report begin with the word "equality." The term "equality" has been in the public domain for centuries. It has over that period of time meant many different things to those who employed it. Is equality a goal to strive for but one that can never be realized? Is equality something that Canadian women have already achieved?<sup>2</sup> Abella decides that she does not know what equality means but is sure that we all know when something is "fair."

Perhaps because she is not sure she would know equality if she experienced it, Abella accepts the version of equality as contained in the terms of reference. All individuals should be able to compete on an equal basis. This acceptance of what William Ryan, amongst others,<sup>3</sup> calls the "fair play" model of life is a serious limitation. It accepts an individualistic equal opportunity to compete model of equality as the goal to strive for. Other theories of equality are ignored or perhaps were never contemplated. Because of the acceptance of this form of equality, Abella is limited in the kinds of recommendations she can make.

At times Abella states that "employment equity" and "affirmative action" (the American program that attempts to achieve equality in employment) are the same. They are not. The two programs do have some basic similarities. Affirmative action requires the removal of systemic barriers which have a disparate impact on the group, and so does employment equity. The collection of data by employers on the makeup of their workforce

and the filing of the data with an enforcement agency is required by both programs. However, it would appear that the removal of systemic barriers and data collection is all the two programs have in common.

Affirmative action requires the employer to prepare and implement an affirmative action program where the data shows under-representation or under-utilization of one of the groups. This program requires the identification and elimination of systemic barriers, and the adoption of goals and timetables to ensure that the group previously excluded is quickly brought into the workforce. The enforcement agency in the United States, The Office of Federal Contract Compliance Programs, is not required to conduct an investigation of a company to find out if the exclusion, as shown by the statistics, is caused by systemic barriers or by chance. This "bottom line" approach requires that companies alter the exclusion when it is found no matter what caused it. Basically this program views equality as providing a group remedy, on a no-fault basis, in order to ensure equality of results in the workplace.

Employment equity, on the other hand, while accepting the need to remove systemic barriers appears to stop when that result is achieved. It requires the enforcement agency to investigate exclusion or under-representation, as shown by statistics, to see if these problems have been caused by systemic barriers. Like the enforcement of anti-discrimination laws, whether by courts or Human Rights Commissions (which Abella concluded was flawed), this enforcement model is flawed. It requires the finding of fault, and the adjudication of companies on an individual one-by-one basis.

As Abella accepts the idea of an individual opportunity to compete, it is logical to believe that the removal of overt and systemic barriers will place groups in that position. Abella is not, however, that naive. She knows that the groups are not in an equal position now and will not be, even when the barriers are removed. That is why she deals with changes in education and training, and the necessity for universally accessible child care. To place the groups in equally competitive positions will require, at a minimum, the implementation of all 117 recommendations in the report.

Abella accepts the myth that all are created equal when she adopts the concept of an individual opportunity to



Illustration by Jane Northey

compete as her version of equality. From her perspective, as that is the case, when all receive an equal education and when all children are looked after by society as a whole, all will be equally competitive. This liberal ideology of equality can be traced back to Aristotle.<sup>4</sup> It formed the basis for the American Declaration of Independence<sup>5</sup> and it is still the major equality theory in use in both Canada and the United States. It leads to the situation where all are presumed to be equal, all can strive for success with the guarantee that irrelevant characteristics, such as race or sex, will not be utilized to differentiate between individuals. It guarantees a few winners and many losers. This fair play model is accepted by many as producing just results. Those who "make it" deserve their success; and those who do not deserve their failure. It guarantees that those in power need not fear the losers in this "game" or "race," as it is usually described. After all, their success is based on their individual merit. How could anything be fairer than that? When someone violates the rules of the game, the anti-discrimination laws can be used to ensure individual fairness. The anti-discrimination laws, based on the need to find fault and concentrating on the isolated individual victim, reinforce the equal opportunity model of equality.

Mandatory employment equity sees the removal of systemic barriers as the measure to be employed in the search for equality. American courts have recognized that the removal of the systemic barriers, and the guarantees of neutrality will reinforce the existing inequalities – not do away with them.<sup>6</sup> Canadian human rights practitioners are aware that this is true. The Toronto Police Department removed the 5 foot 8 inch height requirement for police constables in 1978. This was in response to the finding of an Ontario Board of Inquiry that such a height requirement employed by the Ottawa police department had a disparate impact on women and constituted systemic discrimination.<sup>7</sup> According to Jane Pepino, changes have indeed occurred in the six years that neutrality has prevailed.<sup>8</sup> The Toronto Police Department is now hiring short, fat, white, Anglo-Saxon protestant police constables!

For women, Indians, disabled and visible minorities a "fair share" model of equality offers the best chance of achieving some modicum of equality in the workplace. This model requires ensuring equitable results in the workplace, not an

individualistic equal opportunity to compete. To ensure equitable results would require the removal of systemic barriers, the adoption of goals and timetables, and an enforcement agency to ensure that corporations not only adopt goals and timetables, but achieve them. In other words, *what is needed is a mandatory affirmative action program, not a mandatory employment equity program.*

Abella noted the cynicism and frustration of the groups who have been consulted and have presented their views to government on this issue many times over the past decade. This report, with its recommendations for mandatory employment equity instead of no-fault quotaed affirmative action programs, ensures that the wait for equality will continue and the cynicism and frustration will only grow greater.

<sup>4</sup>Wayne Roberts, *Feminism, Femininity, and Class Consciousness Among Toronto Working Women, 1893 to 1914* (Toronto: New Hogtown Press, 1976). In discussing the situation of working women from 1893 to 1914, Wayne Roberts states that women were receiving from one-third to one-half less wages than men for performing the same work.

<sup>5</sup>*The Charter of Rights and Freedoms: A Guide for Canadians* (Ottawa: Ministry of Supply and Services, 1982) in explaining the section 15(1) equality guarantees states at p. 16: "For the first time in Canadian history, the Constitution will make it clear that, for women, equality is not a right to be acquired, but a state that exists."

<sup>6</sup>William Ryan, *Equality* (New York: Vintage Books, 1982); Jill McCalla Vickers, "Major Equality Issues of the Eighties" (1983), 1 *Can. Human Rights Y.B.* 47.

<sup>7</sup>Aristotle, *Nicomachean Ethics*, Bk.5, translated by W.D. Ross (Oxford: Clarendon Press, 1925).

<sup>8</sup>Louis Henkin, "Constitutional Rights and Human Rights" (1978), 15 *Harv. C.R.C.L.L. Rev.* 593. M. Judd Harmon, *Essays on the Constitution of the United States*, ed. M. Judd Harmon (Pt. Washington, N.Y.: Kennikat Press, 1978).

<sup>9</sup>See for example, *N.A.A.C.P. v. Allen* (1974), 493 F. 2d 614 (5th Cir.). The Court in this case in discussing the remedy to be provided after a finding that there had been discriminatory hiring practices by the state police said at p. 617:

*When the deprivation by state officials of rights secured by the Equal Protection Clause of the Fourteenth Amendment is so clearly demonstrated, the federal Chancellor*

*has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future* (quoting from *Louisiana v. U.S.* (1965), 380 U.S. 145, 154).

In discussing the scope of the District Court's discretionary equitable powers, the Court stated:

*The power is broad and the nature of the relief it prescribes is inherently flexible. The remedy it decrees however, must be feasible, workable, effective, . . . and promise realistically to work, and to work now.*

<sup>7</sup>*Colfer v. Ottawa Board of Police Commissioners* (1978, Ontario Board of Inquiry, unreported case).

<sup>8</sup>Beth Symes, "Affirmative Action – To Right Past Wrongs," (1982 unpublished paper) quotes Jane Pepino, a member of the Board of Commissioners of Police of Metropolitan Toronto.

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## DÉESSE BRUNE

Des yeux comme vous n'avez  
jamais vu  
De la poésie en bas des reins  
Quelque chose de nu  
Quelque chose pour rien

Un corps pour monter  
aux nues  
Des mots qui ne disent rien  
Quelque chose d'entendu  
Quelque chose de très bien

Une pleine nuit de pleine lune  
Avec un corps comme le mien  
Une pleine nuit de pleine  
brume  
Pour que je me sente bien

Je te suis, déesse brune  
Jusqu'au petit matin  
Montre-moi déesse brune  
Comment faire avec tes mains.

*Céline Messner*  
Montréal, Québec