Court File No. C27917

COURT OF APPEAL FOR ONTARIO

BETWEEN:

MARILYN FERREL, SANDRA WHITING,
GRACE EDWARD GALABUZI and KRISTEN LANGE

Applicants
(Appellants)

-and-

ATTORNEY GENERAL OF ONTARIO

Respondent
(Respondent in Appeal)

-and-

WOMEN'S LEGAL EDUCATION AND ACTION FUND
and DISABLED WOMEN'S NETWORK CANADA

Interveners

-and-

AFRICAN CANADIAN LEGAL CLINIC
and CONGRESS OF BLACK WOMEN

Interveners

-and-

ONTARIO FEDERATION OF LABOUR

Interveners

APPLICATION under ss. 15, 24, 32 and 52 of the *Constitution Act, 1982* and Rules 14.05(d), (g) and (g.1) of the *Rules of Civil Procedure*

FACTUM OF THE INTERVENERS, WOMEN'S LEGAL EDUCATION AND ACTION FUND and DISABLED WOMEN'S NETWORK CANADA

WOMEN'S LEGAL EDUCATION
& ACTION FUND
415 Yonge Street
Suite 1800
Toronto, ON
M5B 2E7

Jennifer Scott
Carissima Mathen

Tel: (416)595-7170 (228)
Fax: (416) 595-7191

Solicitors for the Interveners,
Women's Legal Education and Action Fund and
DisAbled Women's Network Canada

TO: THE REGISTRAR OF THE COURT OF APPEAL FOR ONTARIO

AND TO:

SANSON & HART
Barristers & Solicitors
123 Edward Street
Toronto, ON
M5G 1E2

Chile Eboe-Osuji
Mark Hart
Barbara Bedont

Tel: (416)591-1395
Fax: (416)591-9200

Solicitors for the Appellants

MINISTRY OF THE ATTORNEY GENERAL
Constitutional Law Branch
720 Bay Street, 8th floor
Toronto, ON
M5G 2K1

Janet E. Minor
Richard J. K. Stewart

Tel: (416)326-4468
Tel: (416)326-4137
Fax: (416)326-4015

Solicitors for the Respondent

CAVALLUZZO HAYES SHILTON
McINTYRE & CORNISH
Barristers & Solicitors
43 Madison Avenue
Toronto, ON
M5R 2S2

Mary Cornish
Fay C. Faraday

Tel: (416)964-1115
Fax: (416)964-5895

Solicitors for the Intervener
Ontario Federation of Labour

AFRICAN CANADIAN LEGAL CLINIC
330 Bay Street, Suite 306
Toronto, ON
M5H 2S8

Caroline Engmann
Michelle Williams

Tel: (416)214-4747
Fax: (416)214-4748

Solicitors for the Interveners,
African Canadian Legal Clinic and
Congress of Black Women

PART 1 - THE FACTS

1. The Women's Legal Education and Action Fund and the DisAbled Women's Network Canada (the "Interveners") adopt the facts as set out in the Appellants' factum.

PART II - POINTS IN ISSUE

2. The issues in this appeal are whether *Bill 8, An Act to Repeal Job Quotas and Restore Merit-Based Employment Practices in Ontario* ("*Bill 8*"), contravenes section 15(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), and, if so, whether the contravention is justified under section 1 of the *Charter*.

PART III - ARGUMENT

3. The Interveners submit that:

(a) *Bill 8* is subject to review;

(b) legislated employment equity such as the *Employment Equity Act, 1993* (the "*EEA*") is necessary to give effect to the right to be free from systemic discrimination in employment;

(c) *Bill 8* infringes section 15 of the *Charter* because:

  (i) the repeal of the *EEA* through *Bill 8* is a *prima facie* breach of section 15; and,

  (ii) the effect of *Bill 8* upon the members of the designated groups is profoundly discriminatory; and

(d) *Bill 8* is not justified under section 1 of the *Charter*.

(A) *BILL 8* IS SUBJECT TO REVIEW

(a) *Charter* Review of Legislation with Substantive Legal Effects

4. The *Charter* guarantees and protects fundamental rights and freedoms and constrains all governmental action inconsistent with those rights and freedoms. As the "guardian of the constitution", the judiciary must review all constitutional challenges to government action.

Hunter v. *Southam Inc.*, [1989] 2 S.C.R. 145 at 155

5. Review of governmental action may "require the courts to confront the tide of popular opinion. But that has always been the price of maintaining constitutional rights".

RJR-MacDonald Inc. v. *Canada (A.G.)*, [1995] 3 S.C.R. 199 at 329

6. The Interveners submit that legislation enacted to repeal legislation and, in this case, to thereby amend an existing regulatory framework by major truncation of its compliance and enforcement mechanisms, is no less government action, no less law with substantive legal effects, and no less subject to *Charter* scrutiny than any other legislation. Section 32(1)(b) of the *Charter* provides that the *Charter* applies to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. The Interveners therefore submit that *Bill 8* is subject to review to determine whether, as law, it is inconsistent with the provisions of the *Constitution* and therefore, to the extent of the inconsistency, of no force or effect pursuant to section 52 of the *Charter*.

7. In the court below, Dilks J. distinguished *Bill 8* from other legislation on the ground that because *Bill 8* repeals legislation, it lacks any "substantive element" and therefore cannot be measured against the requirements of the *Charter*.

Reasons for Judgment of Dilks J., Appeal Book, Vol.1, Tab 3, para. 23

8. The Interveners submit that such reasoning would: (a) exempt all repealing legislation from *Charter* scrutiny, and (b) conflict with the purposive, contextual, effects sensitive approach to *Charter* analysis that has been repeatedly mandated and affirmed by the Supreme Court of Canada.

Eldridge v. *B.C.*, [1997] S.C.J. No. 86 at paras. 54-55

9. The Interveners submit that in constitutional review of legislation a court must analyze the context of the legislation and its effects. Constitutional analysis does not and cannot take place within the "four corners of the impugned legislation".

R. v. *Turpin*, [1989] 1 S.C.R. 1296 at 1332

10. Furthermore, the Interveners submit that *Bill 8* clearly does have substantive content and significant effects. Not only did *Bill 8* have the substantive effect of negativing the whole of the *EEA*, but it also abolished the long standing employment equity provisions in policing and education by amending the *Police Services Act* and the *Education Act*. In addition, *Bill 8* also expressly mandated the destruction of data collected under section 10 of the *EEA*.

Job Quotas Repeal Act, 1995, sections 1(5), 2 and 4

(b) Governmental Characterization of its Legislative Action Cannot Shield *Bill 8* From Review

11. The Government states that "the social policy response to this problem [systemic discrimination] is ultimately a matter of political choice". The clear inference the Government wishes this Court to accept is that such choices are beyond the purview of a court's jurisdiction to review.

> *Statement of Fact and Law of the Respondent*, November 22, 1996 (Ontario Court General Division), para. 7

12. If this Court accepts the principle that all legislation is government action, whether that legislation repeals, amends or enacts, then the Interveners submit that it is immaterial whether legislation is motivated by political, partisan or ideological choice. Government legislative action commonly reflects the political and social policy choices and preferences of the government of the day to some extent. In this case, the Government's ideology and stated policy with respect to employment equity was given effect through legislative means: *Bill* 8. There should be no immunity from *Charter* review on the basis of the Government's characterization of *Bill 8* as political or a matter of policy.

(B) LEGISLATED EMPLOYMENT EQUITY IS NECESSARY TO GIVE EFFECT TO THE RIGHT TO BE FREE FROM SYSTEMIC DISCRIMINATION

(a) Systemic Discrimination In Employment

13. Systemic discrimination in employment can be described as a web of direct and indirect barriers, embedded in the accepted norms shaping employment rules, policies and practices, that have the cumulative effect of excluding members of disadvantaged groups from equal access to and treatment in employment. These barriers both reflect and reinforce the discriminatory attitudes that are relied on to rationalize the exclusion or under-representation of these groups on the basis of alleged defects ascribed to them. Simultaneously, the presence and success of persons in the workplace is assumed to reflect innate merit, although such opportunities have actually been secured through the unjust exclusion of others with equal merit.

> *Canadian National Railway* v. *Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1139

14. Substantial empirical data dating back to the 1970s clearly establish the prevalence of systemic discrimination in employment notwithstanding that such discrimination is prohibited in the human rights legislation of all thirteen Canadian jurisdictions. This empirical research consistently demonstrates that - when compared to white non-disabled men - women, Aboriginal people, racial minorities and persons with disabilities:

(a) have higher rates of unemployment, or of part-time, casual or discontinuous employment when permanent full-time work is desired;

(b) are concentrated in a narrower range of occupations throughout the labour market and/or within particular workplaces;

(c) receive lower pay, despite equal qualifications, for the same work or for work of equal value when measured by skill, responsibility, effort and working conditions;

(d) are under-represented in management and other senior decision-making positions, including those positions most significant in shaping employment policies and practices;

(e) are harassed in the workplace because of their gender, race, disability or embodied combination of these; and,

(f) are presumed, by reason of their virtual exclusion, or their relegation to low-paid, low-skilled or non-supervisory jobs, to be unqualified, uninterested or unwilling to pursue employment opportunities historically closed to their group.

Statistics Canada (Kelly), "Visible Minorities: a Diverse Group", *Canadian Social Trends*, (Ottawa, 1995), Appeal Book, Vol. 9, Tab 86

B.C. Human Rights Review ("*Black Report*"), (December 1994), p. 5-10

Achieving Equality: A Report on Human Rights Reform ("*Cornish Report*"), (June 26, 1992), p. 21-23

Billingsley and Muszynski, *No Discrimination Here?*, (Toronto, May 1985), Appeal Book, Vol. 9, Tab 88

Henry and Ginzberg, *Who Gets the Work?*, (Toronto, January 1985), Appeal Book, Vol. 9, Tab 87

Equality in Employment: A Royal Commission Report ("*Abella Report*"), (Ottawa, 1984), Appeal Book, Vol. 7, Tab 79

Joint Affidavit of Carol Agocs and Nanette Weiner ("*Agocs/Weiner Affidavit*"), Appeal Book, Vol. 1, Tab 9, p.11, para. 21

(b) Judicial and Quasi-Judicial Recognition of Systemic Discrimination

15. Human rights law has changed significantly during the last forty years due in large part to a heightened understanding by lawmakers and the judiciary of the nature of discrimination and the ways it is manifested in Canadian society. For example, while early human rights laws held that proof of intent was required to prove discrimination, by the late 1970s human rights boards

and courts acknowledged that an emphasis on intent could not adequately respond to the many instances where the discriminatory effect of policies and practices is unintended and unforeseen.

Canadian National Railway v. *Canada*, *supra*, at 1134-38

16. The Ontario Human Rights Commission as early as 1977 recognized that prejudice and intent alone could not account for the persistent exclusion of disadvantaged groups and warned against the widespread effects of discrimination resulting from unconscious and seemingly neutral practices.

> Ontario Human Rights Commission, *Life Together: A Report on Human Rights in Ontario* (Toronto: Queen's Printer for Ontario, 1977), p.33

17. Through an increased understanding of the pervasive nature of systemic discrimination came the recognition that it is frequently manifested in employment and as such, employers began to face certain legal obligations. In 1985, the Supreme Court affirmed that intent is not required to prove a claim of discrimination and that the right to be free from discrimination may require employers to take positive measures to accommodate the needs of employees. In 1987, the Court held that employers may be liable for the discriminatory conduct of their employees, whether or not the employer is aware of or condones the illegal conduct. The Court's willingness to impose these various obligations was explained as follows:

> If [the Canadian *Human Rights Act*] is concerned with the *effects* of discrimination rather than its *causes* (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy — a healthy work environment.
>
> *Robichaud et al.* v. *The Queen*, [1987] 2 S.C.R. 84 at 94
>
> *Janzen and Govereau* v. *Platy Enterprises Ltd., et al.*, [1989] 1 S.C.R. 1252 at 1292-93

Ontario Human Rights Commission v. *Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 at 552-53

18. The Supreme Court applied these human rights principles in its first decision interpreting section 15 of the *Charter* when it affirmed that proof of intent is not required to establish a breach of section 15 and that the focus of the equality analysis must be on redressing discriminatory effects. It held that legal differentiation between groups does not necessarily constitute discrimination; sometimes identical treatment will produce inequality; sometimes different treatment will have this effect. It underlined that the essence of true equality is the accommodation of difference. Since that ruling, the Court has consistently held that granting legal benefits to disadvantaged groups is not discrimination against persons who have no need of such equality-advancing entitlements.

Eldridge et al. v. *British Columbia (A.G.)*, *supra*, at paras. 61-62

Conway v. *Canada (A.G.)*, [1993] 2 S.C.R. 872 at 877

Andrews v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 169

19. Concurrent with the recognition in human rights law and *Charter* jurisprudence that systemic discrimination remains the most pernicious form of discrimination, and that positive measures may be required to remedy such discrimination, there has also been a growing acknowledgement that the enforcement of human rights through an individual complaints-based system cannot by itself remedy such discrimination.

Black Report, *supra*, at 15

20. The complaints-based system is ineffective because it is reactive in nature and as such, the responsibility for pursuing a claim of discrimination, which is an onerous burden, rests solely with the complainant. In order for a complaint to be filed, the complainant must have some indication that discrimination may have occurred and must have the knowledge, resources and initiative to pursue the claim. Those persons who have experienced the most severe inequality are often the least likely to file a complaint. However, absent a complaint being filed, compliance with human rights legislation remains largely unenforceable.

Black Report, supra, at 15-16

21. The current human rights enforcement process, no matter how finely tuned, inevitably misses many of the underlying causes of discrimination which may be systemic in nature. For example, an individual complainant who has been rejected for a job may have no idea that the rejection resulted from systemic barriers. In the event a complaint is filed, the investigation usually focuses on the individual and is not sufficiently broad to uncover systemic barriers which go to the root of the discrimination.

Black Report, supra

22. Moreover for those persons who do file human rights complaints and have their complaints determined, the remedies awarded for findings of discrimination are inevitably individual in nature. Decision makers in respect of individual complaints rarely attempt to root out and remedy underlying causes of discrimination which may be systemic in nature.

S. Steffen, "Human Rights Commissions and Race Discrimination" in E. Mendes, Ed., *Racial Discrimination Law and Practice* (Toronto: Carswell, 1995), pp. 2-4-2-5 and 2-32

23. The Supreme Court of Canada recognized the intractable nature of systemic discrimination and the need for systemic remedies in its unanimous 1987 ruling in *Canadian National Railway*. In that case the remedies affirmed by the Court included the immediate elimination of pervasive sex-discriminatory barriers at CN along with three positive measures: an information and publicity campaign to recruit women for traditionally "male" jobs; ongoing hiring quotas to achieve and maintain within blue-collar jobs at CN a proportion of women equivalent to their proportion in blue-collar jobs in the Canadian labour market; and a comprehensive monitoring process including audits and quarterly reports to track the recruitment, hiring, promotion, transfer and termination of women at CN.

Canadian National Railway v. *Canada*, *supra*, at 1139

24. The Supreme Court recognized that ordering concrete measures to expedite the inclusion of a critical mass of women where they were grossly under-represented would counter the discriminatory attitudes and stereotypes that had rationalized their exclusion. By allowing women to demonstrate their abilities to those who accept "objectively false" assumptions about women, the Court held:

> [It] is no longer possible to see women as capable of fulfilling only certain traditional occupational roles. It will become more and more difficult to ascribe characteristics to an individual by reference to the stereotypical characteristics ascribed to all women.

Canadian National Railway v. *Canada*, *supra*, at 1144

(c) Systemic Discrimination Requires Mandatory Anti-Discrimination Laws

25. In the same manner that it was recognized that education alone could not uproot discrimination and hence human rights legislation was needed, it has come to be recognized that self-initiated complaints which are the bedrock of the human rights model cannot redress systemic discrimination. As a result, various legislatures have enacted mandatory, anti-systemic discrimination laws.

Black Report, *supra*, at 17

C. Tremblay, "Enforcement Mechanisms in Employment Equity Assessment and Direction for the Nineties" in Mendes, *supra*, at 6-54

26. The Ontario *Pay Equity Act, 1987*, S.O. 1987, c.34 (the "*PEA*"), is one example of an anti-discrimination law. The *PEA* was enacted out of a recognition that systemic pay inequity could not be redressed on a complaint by complaint basis and that pay equity could only be achieved by examining the problem in its environment and by imposing obligations on employers to redress systemic pay inequities.

27. The Canadian *Employment Equity Act*, R.S.C. 1995 c.44, is a further example of a mandatory, anti-systemic discrimination law. The *Act* was first enacted in 1986 and has undergone two parliamentary reviews since that time, both of which have recommended that its provisions be strengthened. In 1995, the *Act* was amended to more closely resemble the Ontario *Employment Equity Act*.

Appellants' Factum, para. 13

28. The Ontario *EEA* is yet another example of such legislation. It was enacted by the government of the day on the basis of more than a decade of research, statistics and caselaw which demonstrate that:

(a) voluntary anti-discrimination measures are ineffective;

(b) collection of data is required to understand the nature and extent of the discriminatory barriers at play;

(c) the participation of disadvantaged groups is necessary to destroy discriminatory stereotyping and to assist in the removal of systemic barriers; and,

(d) workforce participation of a "critical mass" of the previously excluded groups is necessary to effect permanent cultural change.

Canadian National Railway v. *Canada, supra*

J. Westmoreland-Traoré, "*Opening Doors: A Report of the Employment Equity Consultations*", Appeal Book, Vol. 3, Tab 26

Cornish Report, supra

Abella Report, supra

Agocs/Weiner Affidavit, supra, pp. 73-76

(d) The Provisions of the *EEA*

29. Review of the actual provisions of the *EEA* shows their close link to the development of anti-discrimination law and the understanding of systemic discrimination outlined at paragraphs 13 to 25. The *EEA* is based upon the following principles:

(a) Every member of a designated group is entitled to be hired, retained, treated and promoted in a manner that is free of discriminatory barriers;

(b) A workforce free of discriminatory barriers will tend to reflect the proportion of the designated groups in the community; and,

(c) Employers must ensure that employment practices and policies are free from systemic or deliberate barriers which discriminate against members of the designated groups.

Employment Equity Act, 1993, supra, section 2

30. The *EEA* recognizes that employers, not employees, are responsible for ensuring that workplaces are free of discrimination, and that systemic discrimination in employment will never be remedied unless barriers to workplace equality are actively and aggressively sought out. Therefore, the *EEA* places on individual employers the obligation to identify and remove such barriers.

31. The *EEA* recognizes that although merit as a principle of evaluation is not necessarily inappropriate, the means used to ascertain merit may not be neutral and often carry unconscious biases and prejudices. The *EEA* also recognizes that under-representation of designated group members is a sound indicator that systemic barriers may exist in the employer's practices and policies. The *EEA* requires employers to conduct workforce surveys to determine to what extent members of the designated groups are represented. The employer then compares the numbers of the designated groups within the organization with the numbers of designated group members available for work in the same occupations and geographic area.

Young, I., "*Justice and the Politics of Difference*" (Princeton: Princeton University Press, 1990) at 200-214

Employment Equity Act, 1993, supra, section 10

O.Reg. 390/94, sections 3-4, 7-8, 11

32. If the workforce survey reveals under-representation, the employer, and union if applicable, conduct a review of the employer's practices and policies to determine whether and to what extent barriers, both systemic and deliberate, are responsible for the under-representation. Based on the workforce survey and the review, the employer develops a three-year employment equity plan. Numerical goals and timetables are set by the employer (and union) based on any under-representation and anticipated hiring. The plan also sets out qualitative goals and timetables with respect to the use of measures to remove barriers. The *EEA* recognizes that individual workplaces may have varied circumstances and allows employers (and unions) to work out these goals and timetables; the process is a self-managed one.

Employment Equity Act, 1993, supra, section 11(2)

O.Reg. 390/94, sections 14-19

33. The steps set out in the employment equity plan may include positive measures (the Aboriginal Internship Program), supportive measures (flex-time), barrier elimination measures (removal of irrelevant height and weight requirements) and accommodation measures (obtaining voice-activated software). The employment equity plan is monitored over its three-year term to assess how well the organization is managing its plan and moving towards representation. The *EEA* recognizes that revisions may be required and that more than one plan may be necessary to achieve the elimination of barriers.

O.Reg. 390/94, sections 21-23

Employment Equity in Action: An Overview of Ontario's Employment Equity Regulations, June 1994, Appeal Book. Vol. 3, Tab 27, p. 9

(C) *BILL 8* CONTRAVENES SECTION 15 OF THE *CHARTER*

34. The Interveners submit that *Bill 8* infringes section 15 because:

(a) the repeal of the *EEA* through *Bill 8* is a *prima facie* breach of section 15; and,

(b) the effect of *Bill 8* upon the members of the designated groups is profoundly discriminatory.

(a) The Repeal of the *EEA* is a *Prima Facie* Breach of Section 15

35. The Interveners submit that the repeal of the *EEA* is a *prima facie* breach of section 15 of the *Charter* for the following reasons:

(a) the *EEA*, as human rights legislation, is designed to promote equality;

(b) the *EEA* is necessary to redress systemic discrimination in employment; and,

(c) the Government has not enacted legislation providing equal or better human rights protection.

(i) The Special Nature of the *EEA*

36. The Preamble to the *EEA* sets out the Act's commitment to the principles of the Ontario *Human Rights Code*:

> The people of Ontario have recognized in the *Human Rights Code* the inherent dignity and equal and inalienable rights of all members of the human family and have recognized those rights in respect of employment in such statues as the *Employment Standards Act* and the *Pay Equity Act*. This Act extends the principles of those Acts...
>
> *EEA*, *supra*, Preamble

37. The *EEA* provides the only known remedial mechanisms that can give effect to a pre-existing right in the Ontario *Human Rights Code*: the right to be free from systemic discrimination in employment. Given that the purpose of the *EEA* is to ensure that employers comply with the *Human Rights Code*, the Interveners submit that the *EEA* is properly characterized as human rights legislation.

38. Human rights legislation "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law". It has been described as quasi-constitutional.

> *Insurance Corporation of British Columbia* v. *Heerspink*, [1982] 2 S.C.R. 145 at 157-158
>
> *Andrews* v. *Law Society of British Columbia, supra*, at 175
>
> *Winnipeg School Division No. 1* v. *Craton*, [1985] 2 S.C.R. 150 at 156
>
> *Ontario Human Rights Commission* v. *Simpson-Sears Ltd., supra*, at 536

39. In declaring human rights legislation quasi-constitutional, the Supreme Court of Canada determined that there is a constitutional commitment to the elimination of discrimination in Canadian society. Such a commitment "is essential, not only to achieving the kind of society to which we aspire, but to democracy itself". As such, human rights protections are permanent: they are not meant to come and go at whim.

> Human Rights legislation is amongst the most pre-eminent category of legislation.... One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised.
>
> *Zurich Insurance Co.* v. *Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at 339

Hunter v. *Southam Inc.*, *supra*, at 155

Andrews, *supra*, at 171-172

(ii) The *EEA* is Necessary to Redress Systemic Discrimination in Employment

40. The evidence establishes: the existence of systemic discrimination in employment, the need for systemic remedies to redress such discrimination; and the inability of a complaints-based system to address the problem. There is no evidence in the Record that the *EEA* is not effective.

Cross-Examination of Andrea Maurice, Appeal Book, Vol.16, Tab 145, pp. 4790

41. In the absence of evidence establishing the ineffectiveness of the *EEA*, the Government relies upon two arguments. It asserts, first, that under-representation is not a reliable indicator of systemic discrimination, and second, that mandatory measures cannot address the "root causes" of systemic discrimination. The Interveners submit that both arguments are insupportable.

Legislative Assembly of Ontario, Hansard, October 11, 1995, Appeal Book, Vol. 6, Tab 72, p.211

42. With respect to the first argument, the Government states that the *EEA* assumes that any workforce which does not exactly mirror the representation of designated groups in the community at large must contain discriminatory barriers. This is a misrepresentation of the *EEA*. The *EEA* does not require "mirroring"; as explained in paragraph 31, it requires the completion of a workforce survey which compares the internal and external available workforce having regard to: (a) occupational and (b) geographic considerations. Given that the *EEA* limits consideration of under-representation to those designated group members who are actually

available for work within particular occupations and communities, the Government has not explained how the under-representation of these members can be anything other than a strong indication of discriminatory barriers. Its attack upon the *EEA* on this basis must therefore fail.

> *Affidavit of Professor Daniel Ondrack*, Appeal Book, Vol. 5A, Tab 71, paras. 20-24 and 67-70
>
> *Statement of Fact and Law of the Respondent*, *supra*, para. 38
>
> *O.Reg. 380/94*, sections 3-4,11

43. Second, the Government asserts, without explanation, that the *EEA* cannot address the underlying attitudes and "root causes" of discrimination. As explained in paragraphs 19 to 24, the jurisprudence and empirical data demonstrate that the only way to redress systemic discrimination is to: (a) aggressively root out the invisible norms and structures which buttress discriminatory attitudes and (b) ensure that a critical mass of previously excluded groups participate in the work force. The *EEA* provides mechanisms to pursue both of these objectives.

(iii) <u>The *EEA* has not been Replaced by other Legislation</u>

44. The Government has introduced no legislation to replace the *EEA*. The Government has made vague and as yet unfulfilled promises to strengthen the Ontario Human Rights Commission, but has not demonstrated that even a strengthened Commission can identify and remedy systemic discrimination without the mandatory remedial measures contained in the *EEA*. The Government has also put together a voluntary Equal Opportunity Plan, despite the strong empirical data which shows that to date, voluntary measures have failed to produce any

substantive changes in the prevalence of systemic discrimination in employment. These proffered alternatives to the *EEA* are prospective, speculative and ill-equipped to remedy the problem.

Cornish Report, supra

Tremblay, "Enforcement Mechanisms" in Mendes, *supra*, at 6-10

H. Jain and R. Hackett, "Measuring Effectiveness of Employment Equity Programs in Canada: Public Policy and a Survey", Appeal Book, Vol. 12, Tab 125, p. 3360

J. Blakeley and E. Harvey, "Socioeconomic Change and Lack of Change, Employment Equity Policies in the Canadian Context", Appeal Book, Vol. 12, Tab 125, p. 3342

45. The Interveners submit that the Government's repeal of legislation that gives effect to a right recognized but not effectively enforced by the Ontario *Human Rights Code*, without either sound justification for the repeal or any equivalent legislative replacement, has stripped members of the designated groups of meaningful and equal protection of the law. Thus, *Bill 8* constitutes a *prima facie* breach of section 15 of the *Charter*.

(b) The Effect of the Repeal is Discriminatory

46. If there is any doubt that the repeal of the *EEA* is a *prima facie* breach of section 15, the Interveners submit that the evidence in this case demonstrates that the effects of the repeal are clearly discriminatory.

47. Section 15 of the *Charter* provides a framework for the "unremitting protection" of equality rights. Equality issues arising under this section cannot be resolved through a fixed rule

or formula. In order to achieve the goal of section 15 - the attainment of equality - the analysis must give central attention to the impact of the law on the individuals or groups affected.

Eldridge v. *British Columbia*, *supra*, at paras. 61-62

Andrews v. *Law Society of British Columbia*, *supra*, at 165 and 168

R. v. *Turpin*, *supra*, at 1333

48. Under an effects-based approach, the Court must consider which group or groups are affected by the impugned law and whether the impugned law has a discriminatory impact on them. The discriminatory impact of the law must be assessed from the perspective of the members of the disadvantaged groups claiming the *Charter* rights, not from the point of view of the state.

Eldridge v. *British Columbia, supra*

Andrews v. *Law Society of British Columbia*, *supra*, at 174 and 182

49. Governments, when enacting legislation, must ensure that such legislation "will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole". In this case, the Government has enacted legislation which negatively affects only "disadvantaged classes of persons". The consequences for those persons has been and continues to be severe.

Eldridge v. *British Columbia*, *supra*, at para. 64

Rodriguez v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 549

50. The empirical data and jurisprudence which show the need for mandatory measures in order to identify and remedy systemic discrimination in employment are so irrefutable that the inevitable consequence of *Bill 8* is that members of the designated groups continue to suffer systemic discrimination.

51. In addition, the Government's requirement under section 1(5) of *Bill 8* that all "information collected and compiled exclusively for the purpose of complying with section 10 of the *Employment Equity Act*" be destroyed, effectively prevents most members of the designated groups from benefiting even from voluntary employment equity programs.

Job Quotas Repeal Act, 1995, section 1(5)

Employment Equity Act, 1993, section 10

52. The Government's argument that section 1(5) applies only to information gathered exclusively for compliance with section 10 of the *EEA*, thereby implying that information gathered for other purposes is not affected, ignores the fact that many employers initiated surveys because of the *EEA*. The requirement to destroy information is a blatant indication to employers that they are not to proceed with their own, voluntary employment equity plans. This is verified by Government briefing notes which direct Government officials to urge employers to "scrap" their employment equity programs.

"Standing Committee on General Government" Legislative Assembly of Ontario, G-3 dated November 17, 1995, Appeal Book, Volume VI, Tab 75, p. G-68, G-73

"Top Ten List of Questions for Job Quotas Repeal" Question 9, Appeal Book, Volume IV, Tab 46

53. Not only has *Bill 8* allowed systemic discrimination in employment to continue, but it has also had an aggravating effect on the designated groups because it communicates an implied approval of systemic discrimination in employment. Such approval encourages the maintenance and fortification of discriminatory barriers in employment and access to employment.

54. Furthermore, by removing the only known mechanism to eliminate systemic discrimination in employment, *Bill 8* communicates to the members of the designated groups a complete disregard for their human rights. Removal of the mechanisms provided in the *EEA* to remedy systemic discrimination discredits the concept of employment equity and the meritorious workplace advancements of designated group members. The overall effect of *Bill 8* is that members of these groups are regarded as "less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration" which the Supreme Court of Canada has recognized as a discriminatory effect.

> *Egan* v. *Canada*, [1995] 2 S.C.R. 513 at 545
>
> *Affidavit of Marilyn Ferrel*, Appeal Book, Vol. 2, Tab 19, para.10

55. In enacting *Bill 8*, the Government has breached its responsibility to ensure that its laws do not disproportionately affect members of disadvantaged groups. *Bill 8* has not returned Ontario to the "status quo" that existed prior to the enactment of the *EEA*. Rather, *Bill 8* turns back the equality clock to a point in time where discrimination is accepted and condoned.

> Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s.15 provides a guarantee.
>
> *Andrews* v. *Law Society of British Columbia*, *supra*, at 172

(D) *BILL 8* IS NOT JUSTIFIED UNDER SECTION 1 OF THE *CHARTER*

56. Section 1 of the *Charter* requires that legislation which impairs *Charter* rights must have an objective which is pressing and substantial and must employ means to achieve that objective which are proportionate, in the sense that they are rationally connected to the objective, impair constitutional rights as little as possible, and whose deleterious effects are outweighed by the legislative objective and benefits. The burden of proof rests on the government which must adduce "cogent and persuasive evidence" capable of sustaining a section 1 justification.

R. v. *Oakes*, [1986] 1 S.C.R. 103 at 138

Miron v. *Trudel*, [1995] 2 S.C.R. 418 at 478

57. To date, the Government has not made a section 1 argument. In the event that the Court finds that section 15 has been infringed, and no section 1 argument is made before this Court, the Interveners submit that judgment be given in favour of the Appellants. In the event a section 1 argument is made by the Government, the Interveners make the following submissions.

(a) The Objective of *Bill 8* is not Pressing and Substantial

58. The Government's stated purpose of *Bill 8* is to restore merit-based employment practices in Ontario. However, far from a pressing and substantial purpose within the meaning of section 1, the true purpose of *Bill 8* is discriminatory. This is evident from the Government's underlying assumption that the protections afforded to members of designated groups by the *EEA* results in a loss of the merit principle in the work place.

59. The Government has repeatedly attacked the *EEA* by claiming that it involves coercion, unfair quotas, discrimination and destruction of the merit principle:

> Hiring by quota is just as wrong as any other form of discrimination.
>
> I don't think it benefits anybody to be told you've got a job because you are a certain colour or because you have native ancestry or because you are a man or a woman. I think it is demeaning.
>
> In my view many of these policies are creating an attitude of mediocrity and the difficulty I have is that they ignore merit and they compromise excellence.
>
> If we want equal opportunity in this province, then we need to ensure that this legislation provides equal opportunity, that we don't have numerical goals that mean quotas and that individuals will continue to be discriminated against.
>
> I think the flames in this province have been fanned by this provincial government [the NDP], which has made it count to be different and which has really focused on racism.
>
> *Statements made by Members of the Progressive Conservative Party and Members of the Current Government during the 1995 Ontario Election Campaign*, Exhibit "C" to *Smith Affidavit*, Appeal Book, Vol. 2, Tab 17, pp. 381, 383, 387, 388.
>
> *Affidavit of Michael Smith*, Appeal Book, Vol. 2, Tab 17, paras. 2-4, 11-14
>
> *Hansard Reports of Standing Committee on Administration of Justice*, Exhibit "A" to *Smith Affidavit*, Appeal Book, Vol. 2, Tab 17, pp. J-716, J-750, J-751, J-885-886, J-907

60. The Government has also stated that it is not interested in redressing so-called past injustices in order to achieve "equality of outcomes":

> It seems to me that there is a whole cottage industry out there finding some tragic event or calamity in the past and demanding redress in the present. I believe it would be a mistake to succumb to this cult of victimization.
>
> Our goal is to take down barriers to equality of opportunity instead of trying to legislate equality of outcomes.

Legislative Assembly of Ontario, No. 18 dated October 30, 1995, Appeal Book, Vol. 6, Tab 74 at 1521

News Release dated July 19, 1995: Harris Announces Government Will Introduce Legislation to Repeal Employment Equity Act, Appeal Book, Vol. 4, Tab 30

61. In the court below, the Government attempted to explain the exclusion of the designated groups by resort to their personal and cultural characteristics, in essence suggesting that they are at least partly, if not wholly, responsible for their "under-representation" in the workforce.

Statement of Fact and Law of the Respondent, *supra*, at para. 38

62. The common element of all of these arguments is that they rely upon and perpetuate the myth that members of the designated groups are justly excluded from or under-represented in the workplace because of their innate lack of merit. After constructing this foundation by resort to discriminatory stereotypes, the Government attempts to construe *Bill 8* as the only course of action that will reverse the misguided forced hiring of such persons, and thereby "restore" merit to Ontario workplaces.

63. The Government uses the phrase "equality of opportunity" to imply that treating everyone the same will ensure equality in Ontario workplaces despite the jurisprudence which establishes that "similar treatment" is often the cause of profound disadvantage and inequality.

Eldridge v. *British Columbia*, *supra*, at paras. 61, 64, 71-72

Andrews v. *Law Society of B.C.*, *supra*, at 164

64. The Government asserts that the *EEA* discriminates against white non-disabled males. The Supreme Court of Canada has repeatedly held that measures which eradicate discrimination do not create an unfair disadvantage for persons who do not need such measures to enjoy protection and benefit of the law.

Andrew v. *Law Society of British Columbia*, *supra*, at 171

R. v. *Edwards Books and Art*, [1986] 2 S.C.R. 763 at 779

65. Finally, the Government's attempt to trace under-representation to the characteristics of the designated groups is a hallmark of formal equality. The formal equality approach is flawed. It is blind to the socially constructed norms and assumptions which form the root of discriminatory attitudes and behaviour and therefore mistakenly identifies the personal characteristics of those who suffer discrimination as the justified cause of their discrimination. The Government's suggestions in this regard are reminiscent of the "discrimination caused by nature" arguments which have been rejected in Canadian law.

Statement of Fact and Law of the Respondent, *supra*, para. 38.

Eldridge v. *British Columbia*, *supra*, paras 68-74

Brooks v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at 1242-43

Bliss v. *Attorney General of Canada*, [1979] 1 S.C.R. 183 at 190

66. Having regard to all of the above, the Interveners submit that the true purpose of *Bill 8* is discriminatory, cannot be pressing and substantial, and should therefore be struck down with no further section 1 inquiry.

R. v. *Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 331-332

(b) *Bill 8* Does Not Satisfy the Proportionality Test

67. However, if the Court accept that the purpose of *Bill 8* is pressing and substantial, the Interveners submit that the Government has not satisfied the proportionality requirement of the section 1 test.

68. The Interveners submit that in order to satisfy the proportionality test, the Government must show the following:

(a) that the repeal of the *EEA* and related employment equity legislation is rationally connected to the goal of restoring merit-based practices in employment;

(b) that the repeal minimally impairs the *Charter* rights of those who have been discriminated against by the removal of the *EEA* and other provisions; and,

(c) that there is proportionality between the legislative objective and the deleterious effects of the *Charter* infringement.

R. v. *Oakes*, *supra*, at 138-139

(i) Rational Connection

69. The Interveners submit that a rational connection between the objective and the means employed to achieve it depends, in the first instance, upon whether "merit" actually existed in Ontario workplaces before the *EEA*, such that it could be restored through the repeal of the *EEA*; and secondly, whether there is a credible link between the abolishment of "quotas" and the "restoration of merit".

70. The Interveners submit that the principal way in which *Bill 8* fails the rational connection test is that it presumes that merit-based employment practices were the standard in Ontario prior to the *EEA*. The Interveners submit that the empirical data which is outlined at paragraph 14 clearly shows otherwise. The Government has not satisfactorily answered how "merit" could have been the primary consideration in Ontario when evidence reveals the systemic under-representation of qualified members of the designated groups.

71. The Interveners submit that there is nothing inherently objectionable about quotas in Canadian law and they are neither discriminatory nor at odds with merit. Quotas were endorsed by the Supreme Court of Canada in *Canadian National Railway*, and "affirmative action" programs are protected under section 15(2) of the *Charter* as well by numerous human rights codes. Furthermore, there is some debate about whether quotas exist in the *EEA*. The *EEA* requires the inclusion of "numerical goals" in any employment equity plan. As stated in paragraph 32, numerical goals are meant to ensure that employers have a way to measure the elimination of discriminatory barriers by reference to the actual composition of the work force. Numerical goals are not rigid and inflexible targets, nor does a mere failure to meet them result in sanctions against an employer. Whether or not numerical goals are "quotas", the Interveners submit that as used within the framework mandated by the EEA, numerical goals clearly do not require or lead to the hiring of unqualified persons.

72. Far from subverting the "merit principle", the *EEA* recognizes that "merit" cannot possibly be a meaningful principle in employment practices and policies which contain discriminatory barriers. As explained at paragraph 31, the *EEA* is founded upon the recognition

in human rights law that the evaluation of "merit" is often not neutral because of its unexamined reliance upon majority group norms and socially constructed stereotypes. The *EEA* is designed to remove systemic or deliberate barriers which make irrelevant or non job-related factors a consideration in recruiting, hiring, retention or promotion practices. Repeal of such an instrument does not advance "merit-based employment practices".

(ii) Minimal Impairment

73. The repeal of the *EEA*, far from minimally impairing the rights of the designated groups, in fact impairs them to the greatest extent possible by removing all of the mechanisms which are necessary to remedy systemic discrimination in employment. There is no evidence on the Record that the Government considered any alternatives to the outright repeal of the *EEA*. The Government conducted no evaluation of the efficacy of the *EEA*. On the contrary, at the time of the repeal the Government was aware that the Ontario *EEA* was regarded as a model by other jurisdictions, including the Federal government which was amending the Federal *Employment Equity Act* to incorporate many features of its Ontario counterpart.

Cross-Examination of Andrea Maurice, Appeal Book, Vol.16, Tab 145, pp. 4790

Issue Note: Proposed Amendments to the Federal Employment Equity Act dated October 10, 1995, Appeal Book, Vol. 4, Tab 38

Information Note: The report, Employment Equity: A Commitment to Merit, of the Federal Standing Committee on Human Rights and the Status of Disabled Persons, June 1995, Appeal Book, Vol. 4, Tab 39

(iii) Proportionality of Deleterious Effects

74. Finally, the Interveners submit that where discrimination is effected by the wholesale repeal of human rights protection, which has been neither justified nor replaced with measures of equivalent protective value, there can be no proportionality between the legislative objective and the deleterious effects of the *Charter* infringement.

PART IV - ORDER REQUESTED

75. The Interveners respectfully request this Court to declare *Bill 8* unconstitutional and therefore of no force or effect.

All of which is respectfully submitted this 23rd day of February, 1998.

Jennifer Scott

Carissima Mathen

Counsel for the Interveners, LEAF and DAWN CANADA

SCHEDULE A

1. *Hunter* v. *Southam Inc.*, [1989] 2 S.C.R. 145.

2. *RJR-MacDonald Inc.* v. *Canada (A.G.)*, [1995] 3 S.C.R. 199.

3. *Eldridge* v. *B.C.*, [1997] S.C.J. No. 86.

4. *R.* v. *Turpin*, [1989] 1 S.C.R. 1296.

5. *Canadian National Railway* v. *Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114.

6. Statistics Canada (Kelly), "Visible Minorities: a Diverse Group", *Canadian Social Trends*, (Ottawa, 1995).

7. *B.C. Human Rights Review*, (December 1994).

8. *Achieving Equality: A Report on Human Rights Reform*, (June 26, 1992).

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10. Henry and Ginzberg, *Who Gets the Work?*, (Toronto, January 1985).

11. *Equality in Employment: A Royal Commission Report*, (Ottawa, 1984).

12. Ontario Human Rights Commission, *Life Together: A Report on Human Rights in Ontario* (Toronto: Queen's Printer for Ontario, 1977).

13. *Robichaud et al.* v. *The Queen*, [1987] 2 S.C.R. 84.

14. *Janzen and Govereau* v. *Platy Enterprises Ltd., et al.*, [1989] 1 S.C.R. 1252.

15. *Ontario Human Rights Commission* v. *Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536.

16. *Conway* v. *Canada (A.G.)*, [1993] 2 S.C.R. 872.

17. *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143.

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21 *Insurance Corporation of British Columbia* v. *Heerspink*, [1982] 2 S.C.R. 145.

22. *Winnipeg School Division No. 1* v. *Craton*, [1985] 2 S.C.R. 150.

23. *Zurich Insurance Co.* v. *Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.

24. Jain, H. and Hackett, R., "Measuring Effectiveness of Employment Equity Programs in Canada: Public Policy and a Survey"(1989) 15:2 Canadian Public Policy.

25. Blakeley, J. and Harvey, E., "Socioeconomic Change and Lack of Change, Employment Equity Policies in the Canadian Context"(1988) 7 Journal of Business Ethics.

26. *Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

27. *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

28. *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.

29. *R.* v. *Edwards Books and Art*, [1986] 2 S.C.R. 763.

30. *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

31. *Bliss* v. *Attorney General of Canada*, [1979] 1 S.C.R. 183.

32. *R.* v. *Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

SCHEDULE B

1. *Job Quotas Repeal Act* ("Bill 8")

2. *Employment Equity Act*, 1993

3. *Education Act*, ss. 8(1).29 and 135(5)

4. *Police Services Act*, ss. 3(2)(c), 17(3), 22(1)(b), 23(2), (4), (5), (13) and (14), 31(1)(f), 41(1)(f) and (g), 48 and 135(1), paras. 10 and 11

5. *Charter of Rights and Freedoms*, ss. 1, 15, 24, 27, 28, 32 and 52

6. Regulations under the *Employment Equity Act*, 1993