



Guidelines for Drafting and Implementing A Diversity and Equality Policy in Legal Workplaces & Sample Diversity and Equality Policy

Prepared by the Equality, Equity and Diversity Committee

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Introduction

Diversity in the modern workplace is a fact of everyday life – just as it is in our community at large. For employers in the legal profession, facilitating diversity will ensure that law firms and other legal workplaces continue to have access to competent, qualified and talented individuals.

In addition to being a legal and professional responsibility, it makes good business sense for law firms to incorporate diversity and equality principles in the workplace. Studies from the corporate world present a strong business case for diversity and equality initiatives. Companies who have implemented such policies have seen improved productivity in the workplace, reduced employee turnover and absenteeism, enhanced corporate reputations, and an increased potential to recruit the best candidates. Implementing a diversity and equality policy will help a law firm to represent and serve Canada's diverse population while in turn benefiting the firm itself.

The Law Society of Alberta's Equity Ombudsperson reports that many law firms wait until there is a workplace crisis to adopt a diversity and equality policy. Trying to create a new policy or adapt an existing harassment policy to diversity and equality issues while in the midst of a crisis is a challenge for management and the individual(s) concerned. Waiting for a crisis is costly, decreases morale, may create a potential liability and is a risk to the law firm's reputation.

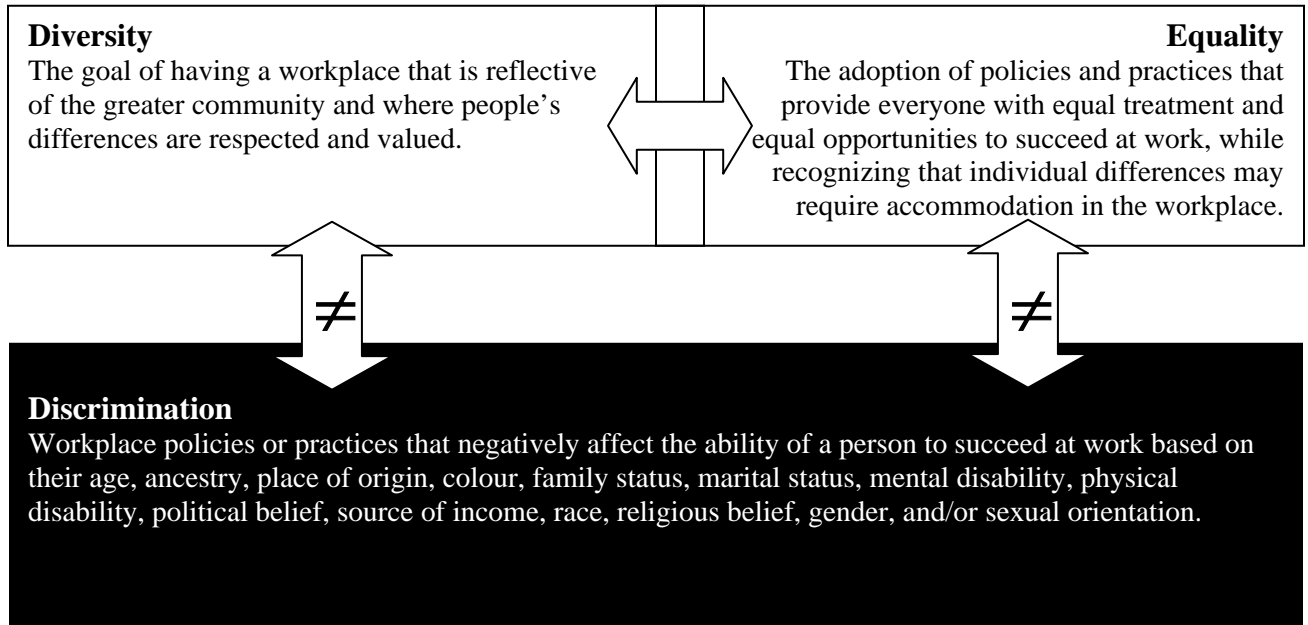
In response to this reality, the Law Society has prepared this document to help legal workplaces prevent crisis management of discrimination and harassment in the workplace. Instead, the guidelines and sample policy set out policies and practices that will help ensure that the day-to-day decision-making in firms is done in accordance with diversity and equality principles. The policy aims to maximize the performance of every person at the firm by ensuring that opportunities to succeed are available regardless of personal characteristics.

This document consists of two sections that will guide legal professionals through the process of developing and implementing a diversity and equality policy in the workplace. Appendix A provides a sample policy on diversity and equality.

- **Section 1** provides information on why a diversity and equality policy is essential for a law firm to thrive in the new millennium economically, legally, and ethically.
- **Section 2** details the process of developing, implementing and monitoring a policy on diversity and equality.
- **Appendices**
 - A: Sample Policy on Diversity and Equality;
 - B: Success Stories;
 - C: Discussion on the Law of Equality and the Duty to Accommodate;
 - D: Human Rights, Citizenship and Multiculturalism Act and the Alberta Code of Professional Conduct

Terms

Before going further it will be helpful to briefly explain the meaning of the terms diversity, equality and discrimination as they are used in this document. The following diagram provides definitions for each term and shows how the terms are interconnected, in the context of the workplace.



Note on Other Workplace Policies

The focus of the diversity and equality policy is to ensure that diversity and equality considerations inform employment decisions made by a firm. In addition to employment decisions there are also a number of other policies and practices that contribute to fostering and maintaining a diverse and equal workplace. The Law Society of Alberta has prepared guidelines and sample policies in the following areas to assist legal workplaces to create a workplace that values, respects, and professionally manages a diverse group of individuals:

- **Respectful Workplace** – Outlines a new approach to dealing with discrimination and harassment in the workplace by changing the focus of such policies from formal complaint driven processes to a focus on prevention. Preventing discrimination and harassment, including personal harassment, occurs through awareness training, developing conflict resolution skills, and providing informal resolution options. Also provides guidelines to firms on the process to develop and implement their own respectful workplace policy and a sample policy.
- **Gender Inclusive Communication** – Provides guidelines on how to use gender inclusive language in a law firm setting including job titles, forms of address, and pronoun alternatives.

- **Maternity and Parental Leave** – Outlines the legal requirements regarding leave and benefits, federal EI benefits, and other considerations for firms in drafting a maternity and parental leave policy. Also provides a sample policy.
- **Alternative Work Schedules** – Discusses the advantages of alternative work schedules to help lawyers manage work-life balance issues. Includes a discussion of full-time and part-time schedules, the need for mutual flexibility, and concerns of firms. Also provides a sample policy.
- **Bereavement, Compassionate, and Family Responsibility Leave** – Discusses the issue of work-life balance and suggests how providing bereavement, compassionate and family responsibility leave can assist lawyers.
- **Equality in Employment Interviews** – Outlines what interview practices are discriminatory and provides guidelines and a sample policy on how to conduct an interview that promotes the equality of all candidates.

1. – Rationale for Implementing a Diversity and Equality Policy

1.1. The Business Case

Canada is a nation of diversity. In the past number of decades Canada's workforce demographics have changed, in terms of gender, age, race, national origin and physical ability. Diversity in our population means that the needs of Canadians in the workforce and marketplace are also increasingly diverse. A law firm that embraces this reality by understanding, anticipating and responding to these needs will be well positioned in its field.

Fostering a diverse workplace that reflects the greater community makes good business sense. Canada's visible minority population now represents almost 4 million people, which is 13.4 percent of our population, and continues to grow.¹ According to the 2001 Census, 18.4% of the population was born outside of Canada, the highest proportion in 70 years.² Other statistics show that:

- Alberta's foreign-born population is 15% of total residents, our visible minority population is 11% of total residents, and our Aboriginal population is 5% of total residents.³
- Calgary's visible minority population is expected to increase to 25% in 2005 from 16% in 1996.⁴
- Women now occupy 46% of the Canadian workforce and 56% of women are employed, compared to 68% of men.⁵
- In Alberta 62% of women and 75% of men are employed.⁶
- Workers are juggling multiple responsibilities to their families and communities. For example 25% of employees now care for an elderly family member and 15% of employees care for both children and an older family member.⁷

The business community has responded to these trends by implementing diversity programs. A recent Conference Board of Canada study found that 81% of the corporations they surveyed have a workforce diversity policy and 79% have formal processes and practices to foster diversity. Their survey involved 53 companies in Canada who are all included in the Financial Post's listing of the Top 300 Canadian

¹ Making a Visible Difference: The Contribution of Visible Minorities to Canadian Economic Growth, The Conference Board of Canada, Briefing by Pedro Antunes, Judith MacBride-King, Julie Swettenham April 2004.

² Ethnic Diversity Survey: Portrait of a Multicultural Society, Statistics Canada, September 2003, Catalogue no. 89-593-XIE, online at <http://www.statcan.ca>

³ Statistics Canada, Community Profiles, online at: <http://www12.statcan.ca>

⁴ The City of Calgary, Community & Neighbourhood Services, Diversity Fact Sheet, online: <http://content.calgary.ca/CCA/City+Hall/Business+Units/Community+and+Neighbourhood+Services/Community+Development+Projects+and+Initiatives/Diversity+Calgary.htm>

⁵ Women in Canada: Work Chapter Updates, Statistics Canada, August 2001, Catalogue no. 89F0133XIE, online at <http://www.statcan.ca>

⁶ Women in Canada: Work Chapter Updates, Statistics Canada, August 2001, Catalogue no. 89F0133XIE, online at <http://www.statcan.ca>

⁷ Centre for Families, Work and Well-Being, University of Guelph, "Work-Life Compendium 2001, Executive Summary and pg. 10, online: <http://www.worklifecanada.ca/families2.shtml>

corporations.⁸ Examples of four success stories, (3 from the corporate world and one from the legal world) are found in Appendix B.

Summary of Competitive Advantages

A comprehensive study done on diversity management summarizes seven competitive advantages that can be gained from valuing and managing diversity in the workplace:⁹

- **Maximized Supplier Relationships:** Making the business a better supplier of goods and services to others who require and/or value diversity by being more responsive to design, production or marketing elements of the value chain.
- **Superior Marketplace Understanding:** Anticipating and responding to customer needs to drive repeat business and profit margins, as well as capture non-traditional, emerging, ethno-specific markets.
- **Enhanced Leadership Effectiveness:** Establishing an environment that fosters flexibility, innovation, adaptation, and productivity in the face of increasingly dynamic and demanding business climates.
- **Higher Quality Team Interactions and Decision-Making:** Bringing the synergy of differing perspectives to problem solving, new product development, new market opportunities, etc. stimulates creative thought processes and mutual learning.
- **Winning the Competition for Talent:** Attracting, retaining, motivating and utilizing the best and brightest workforce by improving employee satisfaction and morale.
- **Better Global Reach and Relations:** Establishing the company as a global enterprise and attracting increased domestic and foreign investors and shareholders.
- **Improved Corporate Profile:** Being recognized as a desirable place to work and a good corporate citizen for valuing and contributing to the social benefits of developing harmonious, equitable and progressive societies.

Therefore, there are good business reasons and competitive advantages for law firms to incorporate equality and diversity principles into the workplace.

1.2. The Meaning Of Equality at Law

A core objective of a diversity and equality policy is to ensure that individuals in a diverse workplace are treated equally. In a workplace context, equality means that in both purpose and effect, an employer's workplace policies and practices provide each individual with an equal opportunity to succeed at work. In law, providing a workplace environment where individuals have an equal opportunity to succeed, means, with some exceptions, accommodating differences.

The concept of equality at law has developed significantly in the past two decades since the advent of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). While the *Charter* governs the relationship between the state and individuals and not private

⁸ The National Corporate Social Responsibility Report: Managing Risks, Leveraging Opportunities, The Conference Board of Canada, Report by David Greenall, May 2004.

⁹ Rhonda Kohnen, Diversity Management Ramifications, MBA Independent Study, University of Calgary, 2003.

workplaces¹⁰, the equality principles developed under the *Charter* have had a significant impact on human rights and employment law, which apply to private workplaces. Appendix C provides a thorough discussion of the law of equality, its development since the implementation of the *Charter* and its impact on workplace policies.

In summary, employers are required by law to provide a workplace environment where employees are treated equally. Equality in law means substantive equality. Sometimes, substantive equality can be achieved by treating people the same – for example, through equal pay for equal work. However, the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 noted that: “formal distinctions in treatment will be necessary in some contexts in order to accommodate the differences between individuals and thus to produce equal treatment in a substantive sense”. Therefore, some differences among employees in the workplace, including those related to (dis)ability and family status require employers to make changes to current workplace policies and practices that pose barriers to equal opportunities. This is especially true where practices on their face apply equally to all employees but have an adverse impact on an employee’s ability to succeed at work. The concern in law is whether the employer’s policy has a discriminatory effect against an individual in the workplace. The only exception to the application of substantive equality in the workplace is where there is a bona fide occupational requirement or the policy or practice is otherwise justified. In either case, the employer is required to accommodate the employee to the point of undue hardship. This is discussed more fully in Appendix C.

A core aim of a diversity and equality policy is to achieve substantive equality in the workplace as required by law. The discussion of substantive equality is important to the meaning of equality as it applies in these guidelines and sample policy. For example, certain client promotional or development activities if held outside of regular business hours may have a discriminatory effect against some individuals in the workplace. If such activities are scheduled, it would be important to make accommodations, such as advance notice and compensation for child care expenses so there is not an adverse impact on employees on the basis of their family status. The sample policy provides guidelines for various workplace practices such as client entertainment, interviews, and work assignment that attempt to be responsive to equality concerns.

1.3. Challenges to Equality in the Legal Profession

The legal profession, like other professions in Canada, still faces many challenges before it achieves diversity and equality in its workforce. The following examples illustrate some of the challenges in this regard:

1. In 2003 the Joint Committee on Equality, Equity and Diversity commissioned a study on bias and equity in Alberta’s legal profession as a follow-up to their 1991 study.¹¹ This study collected data on grounds of discrimination including gender, race, ethnicity, religion, disability, and sexual orientation.

¹⁰ *Canadian Charter of Rights and Freedoms*, s. 32, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11.

¹¹ 1991 the **Joint Committee on Women in the Legal Profession** commissioned a survey on gender bias in the legal profession in Alberta. The survey found that 97% of women and 78 % of men believed that there was some bias or discrimination against women in the legal profession. The types of discrimination that women reported occurred in:

The **Report on Equity and Diversity in Alberta's Legal Profession** found that:

- 92% of women and 69% of men thought that there is some form of bias or discrimination against women in the profession;
- 33% of the men and 14% of the women thought there is discrimination against men in the profession;
- 91% of the lawyers of colour believed there is racial discrimination in the profession;
- 73% of lawyers with disabilities believed there is discrimination on the basis of disability in the profession;
- 88% of gay, lesbian and bisexual respondents believed there is discrimination on the basis of sexual orientation in the profession; and
- 83% of women with children and 32% of men with children believed there is discrimination on the basis of parental status in the profession.

Of those who personally experienced discrimination all pointed to other lawyers and clients as those most commonly responsible for the discrimination. The nature of the discrimination experienced included:

- racist comments,
- denial of opportunities to work on files,
- being mistaken for someone other than a lawyer,
- feeling the need to modify religious practices,
- parenting (lack of accommodation and consequences at work),
- participation in work-related social or business development activities, and
- involvement in activities related to workplace advancement:¹²

In response to the studies noted above, the Law Society has undertaken initiatives to promote equality within the legal profession. As part of its mandate, the Joint Committee on Equality, Equity, and Diversity has developed guidelines

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- hiring (54%),
 - remuneration (51%),
 - career advancement (80%),
 - lack of accommodation for family commitments (72%),
 - access to clients and assignment of files (50%), and
 - sexual harassment (31% - observed or personally experienced unwanted sexual advances, and 65% - observed or personally experienced unwanted teasing, jokes and comments of a sexual nature).

The study also found that one-third of lawyers who identified themselves as visible minorities reported experiencing discrimination from other lawyers based on their race. In addition 20% of women and 8% of men felt they had been discriminated against on the basis of age. Other areas of discrimination noted by respondents included sexual orientation, religion, and type of law practiced.

¹² Merrill Cooper, Joan Brockman, Irene Hoffart, "Report on Equity and Diversity in Alberta's Legal Profession", Report Highlights, January 26, 2004 at 3. (Available under Publications on the Law Society of Alberta's website at www.lawsocietyalberta.com). The Joint Committee on Equality, Equity, and Diversity of the Law Society of Alberta includes members of the Canadian Bar Association – Alberta Branch, University of Calgary Faculty of Law and University of Alberta Faculty of Law.

and sample policies in key areas, such as parental leave, interviewing practices, and alternative working schedules. Through consultations with members of the profession the Committee concluded that information should be provided to assist firms and legal workplaces in the development and implementation of a diversity and equality policy.

2. In February 2000, the Council of the Canadian Bar Association unanimously approved the report entitled ***Racial Equality in the Canadian Legal Profession***. The report describes significant barriers that prevent people from certain racialized communities from becoming members of the legal profession. For example visible minority and Aboriginal law students have much less success finding articles and are less likely to be hired after articles. Lawyers from racialized communities are often denied opportunities to move up the corporate ladder to partner or senior partner positions. In addition, firms make assumptions about their skills, interests and abilities that prejudice the nature of work assigned to visible minority lawyers if they are hired, such as assuming Aboriginal lawyers would bring land claims work. The report found that “systemic racism permeates the culture of the legal profession, frustrating its best efforts to render justice”.¹³
3. **The Office of the Equity Ombudsperson**, established by the Law Society of Alberta, offers assistance to law firms, lawyers, articled students and support staff in dealing with discrimination and harassment. From 2001 to 2003 The Equity Ombudsperson received an average of 280 calls per year. The major areas of concern of the callers were discrimination/accommodation, personal harassment, sexual harassment, alternative work schedules, policy issues, and requests for general information. Statistics kept by the Equity Ombudsperson reveal that the majority of callers are female, and that the majority of concerns come from persons in staff or associate positions who are calling about persons who are partners or managers.¹⁴

1.4. The Law and Professional Responsibilities

The inequities that exist in the legal profession suggest that discrimination has been a problem in the past and continues to occur. Discrimination in employment is prohibited both by the Alberta *Human Rights, Citizenship and Multiculturalism Act* and by the *Alberta Code of Professional Conduct* (Appendix D).

1.5. Written Policies

Law firms will benefit by having a written diversity and equality policy for a number of reasons:

1. Written policies encourage respect for the dignity of all staff and members of the law firm by providing consistent and fair treatment for everyone.

¹³ St. Lewis, J.; Trevino, B. (Co-Chairs). (1999). *Racial equality in the legal profession. Report 1. The challenge of racial equality: Putting principles into practice*; St. Lewis, J. (1999) *Report 2. Virtual Justice: Systemic Racism and the Canadian Legal Profession*. Presented to the Council of the Canadian Bar Association by the Working Group on Racial Equality in the Legal Profession. (Ottawa: Canadian Bar Association).

¹⁴ Statistics provided by the Law Society of Alberta’s Equity Ombudsperson for the years 2001 to 2003.

2. Written policies show that the law firm's management takes its legal, professional and equality obligations seriously.
3. Written policies on workplace equality and diversity encourage respect for and acceptance of the law and the Code of Professional Conduct.
4. The existence of written policies allows the law firm to communicate its commitment to equality and diversity principles to people outside the law firm, such as prospective recruits and clients.
5. Written policies minimize the risk of workplace harassment or discrimination complaints and of harm to individual members of the organization, as well as the risk that a law firm will be held liable for such unlawful harassment or discrimination.
6. Written policies on workplace diversity and equality issues help to attract gifted individuals from equality-seeking communities. The development of written policies may also assist in retaining lawyers who will thereby know that the firm is taking active steps to address their concerns.
7. Written policies may provide the necessary focus for education programs on preventing and responding to workplace harassment and discrimination.

2. Part II - How to Develop, Implement, and Monitor an Equity and Diversity Policy

2.1. Establishing a working group to develop and monitor the policy

The starting point is to establish a working group of interested individuals to develop the diversity and equality policy. It is most important that the working group include respected staff and members of the firm who will champion the policy. They should be people who appreciate the importance of the issues to be addressed and who will be willing and able to communicate these matters to others. The composition of the committee is critical to the credibility of the process and the policies produced.

In developing a diversity and equality policy, it is beneficial to have as diverse a representation on the working group as possible. It is recognized that in smaller firms or organizations, that this may not always be possible. To the extent possible, the working group should be drawn from those in the firm who are directing minds, partners, associates, and staff. Representation from both genders and persons of differing age, race, ethnic origin, family status, sexual orientation, and religion, as well as individuals with disabilities is advantageous. Individuals should be included on the working group with a view to maximizing the diversity of life experiences that will inform the development of the policy. If there are lawyers or individuals in the law firm with expertise in the relevant employment and human rights law, consideration should be given to including them on the working group as well. Once the initial drafting work is done some members of the working group should continue to monitor and review the policy, including people with leadership roles in the firm.

2.2. Developing the policy

2.2.1. Education

The next step is for the working group to understand and learn about diversity and equality policies. This initial process will help the committee to determine which areas may need improvement in their working environment. In doing so they should consider the following points.

- **Business case**
Consider how this policy will help the firm with its overall business plans and strategies. Is there a high turnover of employees? Is retention of women lawyers an issue? How diverse is the firm's staff? Does the firm have a diverse client base, or do they want to develop one?
- **Review of firm's current policies and practices**
What current personnel policies exist? What policies should be added or updated? Do all firm members understand the policies? Do firm members trust that the policies apply equally to all? Do they acknowledge and value firm members' diversity by accommodating needs like alternative work schedules and compassionate leave? A similar series of questions should be asked about the firm's informal or unwritten workplace practices that may affect staff on a day-to-day basis (work assignment, mentoring).
- **Review of law/literature**
Are policies up to date regarding employment and human rights law? Is the firm meeting its duty to accommodate?

2.2.2. Consultative Process

- **Why involvement of staff is key**
If firm members understand that their input is sought after and valued in the creation of the policy they will be more likely to feel invested in the policy's future success. A good way to involve staff may include conducting a survey gathering opinions on workplace policies and practices or attitudes on diversity in the workplace.
- **Communication strategy**
The committee should clearly indicate why the information is being gathered, how it will be used, and provide a guarantee of confidentiality. The firm may also want to hire a diversity consultant to help the committee in planning and implementing the policy. An outside consultant may receive more honest and open responses regarding the workplace and ease concerns about confidentiality.
- **Ongoing Consultation**
After the information gathering is complete the results will provide the committee with valuable information on where the firm is doing well and where it needs to improve. Once the committee comes up with a draft plan

and policy it should be distributed to firm members for their comments and feedback.

2.2.3. Writing the Policy

The consultation process in itself is a powerful mechanism for changing workplace culture. Once the initial consultations are complete the committee can begin writing a policy to reflect their vision for their workplace. The committee should consider short term and long term objectives to the policy, possible reactions to change within the organization, resources, and integration of the policy into strategic business plans for the firm.

Attached to these guidelines is a sample policy that legal workplaces may wish to use as a starting point for their discussions on the policy and as a template for their own policy.

2.3. Implementing and Communicating the Policy

2.3.1. Communicating with the Firm

- The initial presentation of the policy and a clear statement of management support are critical to its success. A letter explaining the rationale for the policy, including the business case, should go out when the development committee is being formed.
- Once the policy is adopted, it should be distributed to members of the firm with a covering memorandum reiterating the strong support of management.

2.3.2. Training

- Individuals charged with implementing and applying the policy should receive special training to ensure that they are well informed of the specifics of the firm's policy.
- Workshops should be organized to inform all staff and members of the firm about the provisions of the policy and the objectives that it is intended to meet. Workshops should be tailored to the firm's needs as identified in the survey. Awareness and skills training workshops can also be considered in areas such as: basic education on human rights and equality, cross-cultural communication skills, peer or expert testimonials on the success of diversity in an organization, and so on.

2.3.3. Prepare for Organizational Change

- Factors that may cause opposition within the workplace should be identified, and discussed frankly. Resistance to change should be expected and planned for.
- One way to maximize success is by ensuring that firm members considered part of the "mainstream" are included in the change process. They are often a large and powerful group whose support is essential to the policy's success. The policy must make a real effort to be all encompassing and benefit all members of the organization.

2.3.4. Ongoing Management Support

- A critical factor in creating and maintaining a diverse and equal workplace is continued support for, and enforcement of, the policy by management. Members of the firm will believe that management is serious about the policy if they hear about it on an ongoing basis.
- Suggestions on how to show ongoing support include: ongoing awareness and skills training workshops, reminders and tips in the firm's newsletter, and benchmarking and publicizing the firm's progress through the years.

2.4. Promoting the Policy

2.4.1. Within the Workplace

The firm should include the policy with their other workplace policies whether in a handbook or online. The firm may also wish to distribute a copy to all personnel when it is initially introduced and/or post copies of it in a common area. Members of the firm should also have up to date information on who to contact regarding the policy.

2.4.2. During Hiring

The policy should be made available to all prospective members of the firm at the initial interview stage. Such a practice will make a strong statement about the firm's support for the policy and its objectives. Firms may also wish to publicize the existence of the policy in their recruitment materials and on their website.

2.5. Reviewing, Evaluating and Revising the Policy

The policy must not be allowed to only exist on paper. It must be a living policy that is adjusted to meet the changing needs of the firm and members of the firm.

2.5.1. Ongoing Review by the Working Group

- The committee should have the responsibility to review and revise the policy on a periodic basis. The first review should take place after there has been sufficient time to evaluate its operation.
- The committee may want to initially work with a five-year plan with goals for each year.
- The policy could contain a sunset clause requiring its review after a certain period of time.

2.5.2. Ongoing Firm Member Involvement

Feedback

Individual staff and members of the firm should be encouraged to communicate their comments on the policy to the committee, either on an ongoing basis, or during the course of a review. They should also be kept informed of the progress of the policy, including results of the surveys and audits.

Yearly Monitoring

- The committee should have a plan to monitor employees opinions of the firm on a regular basis, remembering that change is often a slow process. It will also help the committee and management know the strengths and weaknesses of the policy. Yearly monitoring will provide the committee with feedback on whether the committee's goals are being met and help them plan for the future.
- Exit surveys of members that leave the firm may also indicate areas the committee should address.

2.5.3. Organizational Audit

- An organizational audit can be done every few years to determine if the policy is successful and if organizational change is occurring.
- The audit would look at formal and informal practices in place at the firm and compare them to the firm's goals for diversity and equality.
- Possible areas to look at and benchmark include: retention rates of articling students and new associates, use of personnel policies such as parental leave and alternative work schedules, and so on.

2.6. Best Practices

A project from the U.S. entitled ***Creating Pathways to Diversity: Law Firm Diversity Recommended Practices*** provides valuable information on how law firms can better design, implement and monitor effective diversity programs.¹⁵ The study looked at current law firm diversity planning and implementation through focus groups and an extensive survey of major law firms. Their findings identified the most common challenges to a diversity program and critical success factors, and are summarized below.

2.6.1. Critical Success Factors

1. Understanding of the Business Case for Diversity – A firm must develop a written plan that clearly makes the business case for diversity.
2. Senior Partner Commitment – A senior partner must direct the program and be given the authority, resources and accountability for its implementation.
3. Collaboration between Partners, Staff and Knowledgeable Experts
4. Firm-wide Ownership and Participation
5. Confidential Resources for All Lawyers to Contribute Ideas and Voice Concerns

2.6.2. Barriers to Success

1. Little understanding about the relationship between diversity and the bottom line or its connection to strategic business initiatives.
2. Myth of the Meritocracy – a cultural bias that conceptualizes diversity as coming at the expense of quality legal service, instead of seeing diversity as enhancing quality.

¹⁵ Minority Corporate Counsel Association, *Creating Pathways to Diversity: Law Firm Diversity Recommended Practices*, 2001. Available online: www.mcca.com

3. Revolving Door for Incoming Lawyers of Colour – diversity at the associate level is not reflected in the senior partnership or management of most firms.
4. Lack of senior partner commitment and involvement in the planning and execution of diversity initiatives.
5. Insufficient infrastructure and resources for diversity programs.
6. Attrition of women lawyers driven by lack of viable work/life programs.
7. Negative stereotypes and assumptions about ability and work ethic, which become self-fulfilling prophecies.
8. Emphasis on entry-level recruitment instead of lateral hires who can provide roles and mentors for young associates.
9. Good intentions but little willingness to examine specific issues of each firm historically.
10. External consultants design and implement a training program that is not owned or understood by the firm's senior management.

2.7 Further Information

Office of the Equity Ombudsperson

The Law Society of Alberta established the Office of the Equity Ombudsperson to provide confidential advice, information and assistance to lawyers, articling students and support staff working in the legal profession on issues of discrimination or harassment by lawyers. For assistance on the development of a Diversity and Equality Policy, please contact the Office of the Equity Ombudsperson by telephone: Toll Free: 1-888-429-3939.

Appendix A – Sample Diversity and Equality Policy

This policy is a sample policy developed by the Equality, Equity and Diversity Committee to be used by law firms and other legal workplaces as a basis for discussion and development of their own policy.¹⁶ This sample policy is not intended to be prescriptive, although there are clauses that reflect legal requirements. Additionally, not all clauses are applicable to all workplace settings. For example, the policy refers to the “firm” which does not apply to corporate and government law departments. As well, the section dealing with partnership would clearly not apply to a corporate law department or government law department setting. Even within the law firm context, considerations will differ depending upon the size of firm. Appendix C deals with the legal duties of employers including the legal duty to accommodate. This sample policy is meant to provide a starting place or template for legal workplace employers to discuss, write and implement their own diversity and equality policy.

1. **Statement of Principle**
2. **Responsibility and Authority**
3. **Right to Equal Opportunities at Work**
4. **Employment Decisions Covered by this Policy**
5. **Workplace Guidelines**
6. **Monitoring the Policy**
7. **Complaint Procedures**
8. **Conclusion**

1. Statement of Principle

[Name of firm] aims to create a workplace environment where diversity is encouraged and in which every member of the firm can realize his or her potential for excellence.

This policy is intended to guarantee equal opportunities for all firm members including students, legal and non-legal staff, associates, and partners.

Discrimination on the grounds of race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, sexual orientation, source of income or family status is prohibited by the *Alberta Human Rights, Citizenship and Multiculturalism Act* and the *Alberta Professional Code of Conduct*, and is expressly prohibited at [Name of firm], in any work-related activity, or in any of the firm’s employment or recruitment practices.

[Name of firm] acknowledges that barriers to equality are often systemic; that discriminatory practices and attitudes are often entrenched as custom within workplaces, and are not recognized as harmful; and that sometimes, employees must be treated differently in order to achieve substantive equality.

¹⁶ This policy is based on the Law Society of Upper Canada’s “Guide to Developing a Policy Regarding Workplace Equity in Law Firms” (available online at: <http://www.lsuc.on.ca/equity/models.jsp>). The Law Society of Alberta thanks the Law Society of Upper Canada for their assistance with this policy.

[Name of firm] has undertaken a critical examination of its policies and practices, and will take positive measures to ensure that employment terms, conditions and opportunities with the firm are implemented in accordance with equality principles for all employees and prospective employees.

2. Responsibility and Authority

The ultimate responsibility and authority for applying this policy rests with [_____].

3. Right to Equal Opportunities at Work

1. Applicants for employment and employees have a legal right to equal opportunities at [name of firm].
2. [Name of firm] prohibits any treatment which has a discriminatory effect on anyone in respect of his or her race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, sexual orientation, source of income or family status.
3. The firm is committed to the identification and elimination of barriers to employment, or to success in employment, that adversely affect any member of the firm or candidate for employment with the firm, based on the grounds of race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, sexual orientation, source of income or family status.
4. The firm retains the ability to have special programs that aim to enhance employment opportunities at the firm for those who are in groups that have faced restrictions in the past.

4. Employment Decisions Covered by this Policy

All employment decisions made by [name of firm] are covered by this policy. These decisions include but are not limited to:

- Job Advertising
- Recruitment
- Hiring
- Evaluation
- Firm Committees
- Remuneration
- Benefits
- Availability of Support Services
- Availability of Leave
- Professional Development Opportunities
- Assignment of Work
- Client Entertainment Opportunities
- Advancement
- Offers of Partnership

Any decision made in any of these areas must be made on the basis of performance-based criteria such as qualifications, experience, and merit.

5. Workplace Guidelines

5.1 Recruitment

1. All [name of firm] promotional materials will attempt to encourage diversity among applicants to the firm. They will:
 - State that [name of firm] is an equal opportunity employer that welcomes applicants from diverse backgrounds and with non-traditional qualifications.
 - List firm policies which aim to prohibit discrimination, such as workplace equity or harassment policies.
 - List firm policies that have been implemented to remove barriers and promote equal opportunities, such as flexible work arrangement policies.
2. Attempts will be made to circulate firm materials among historically disadvantaged groups within law schools and to encourage a diversity of applicants to apply at [name of firm].
3. Where students are invited to participate in activities outside of the interview itself, the firm will inform all students of these activities at the earliest opportunity, in recognition of the fact that some candidates will have family, work, religious, and other responsibilities to arrange for in order to attend.
4. Recruiting events will not be held at facilities which engage in discriminatory admission practices and the firm will ensure that no extraneous costs need be incurred for attending such a function.

5.2 Interviewing candidates for employment or articles

1. The firm will adopt written interview questions to ensure uniform guidelines to members of the firm who may be involved in conducting articling and other job interviews from time to time. They will alert interviewers as to the legal proscriptions against discrimination in employment interviews. They will help to ensure that interviews are conducted with the purpose and effect of facilitating the selection of candidates with appropriate qualifications, aptitudes and interests, and do not exclude or disfavour candidates on the basis of gender, race or other irrelevant personal characteristics. The firm will also provide written guidelines to job candidates to reassure them that their applications will receive fair and realistic assessments. Through such use, written guidelines can help to prevent and respond to complaints and concerns about the interviewing process. In turn, the guidelines will also ensure the best applicants are attracted to the firm.
2. During the initial interview, the interviewer will:

- Outline the firm's expectations and the job description in some detail.
 - Ask all candidates the same open and direct questions about their ability to perform.
 - Carefully explain the evaluation criteria.
 - Inform every applicant about the firm's respectful workplace, harassment, flexible work arrangement and other personnel policies.
3. The applicant should be given an opportunity to explain, with reference to the written job description, why she or he is qualified for the job.
 4. When questions relating to personal commitment or future plans are necessary at an interview, all applicants should be asked identical questions. These questions should be open-ended so that candidates can choose whether or not to discuss their personal backgrounds.
 5. Human rights legislation prohibits denying employment opportunities on the grounds of race, religious beliefs, colour, gender, family status, sexual orientation, physical disability, mental disability, age, ancestry, place of origin; therefore questions that even indirectly solicit such personal information are to be avoided by those interviewing for the firm. Instead, open ended questions that allow an applicant to offer what, if any, personal information that person feels appropriate should be asked.

5.3 Commitment to Diversity

[Name of firm] is committed to taking steps to promote diversity in the profession and at the firm. Therefore, where job candidates, recruits, or associates seeking professional enrichment or promotion are equal in their qualifications preference should be given to a candidate from a group traditionally underrepresented in the firm.

5.4 Hiring and Promotion

1. All persons making hiring decisions for the firm will be asked to attend an orientation session to give them the opportunity to become familiar with this policy and to discuss its implementation.
2. Decisions regarding hiring, job evaluations, remuneration, professional development and admission to partnership will be carried out by committees representing as much of the diversity within the firm as possible.
3. When assessing candidates for job openings and promotion, interviewers will apply objective criteria which relate to the job description and essential skills necessary to perform the job in question.
4. The committee should avoid reliance on non-essential criteria such as personal "comfort" and "fit" with the candidate, as these criteria tend to reflect personal biases.

5. When making an assessment of a candidate's ability to perform the essential duties of the job, the committee should keep in mind the obligation to make reasonable accommodations to the point of undue hardship. An individual who would be capable of performing the essential duties of the job when provided with reasonable accommodation should be considered to be as capable as a similarly qualified individual who requested no accommodation.
6. The firm will encourage diversity in the composition of management and other committees of the firm.

5.5 Firm Policies

A variety of policies are in place at [name of firm] which are intended to assist in achieving the ultimate goal of an equal and diverse workplace free of discriminatory practices. These policies include: [can be summarized and referred to here]

- Maternity and Parental Leave
- Alternate work schedules
- Respectful Workplace (Anti-harassment)
- Gender Inclusive Language Policy
- Bereavement, Compassionate and Family Responsibility Leave
- Violence policy

5.6 Work Assignment

The distribution and assignment of work and client responsibilities will promote the development of individual talents and interests without relying on preconceptions respecting the preferences and abilities of individuals based on their personal characteristics.

5.7 Client Entertainment and Firm Functions

Client entertainment opportunities and firm functions will provide a range of activities that are appealing and suitable for a wide cross section of the firm members. For example, in addition to attending a hockey game, the firm could sponsor an evening at the theatre or ballet.

5.8 Evaluations

1. Evaluations of associates at [name of firm] will be conducted [bi-annually] to ensure that problems are identified at an early stage and can be rectified.
2. Evaluations will be conducted by a committee of [number] persons and records will be kept of each evaluation category and recommendation.
3. Evaluation criteria will be based on performance expectations explained to associates in detail at the initial interview and again at hiring. Evaluations will not be based on stereotypes of any sort. Problems identified will be

discussed with the associate and suggestions for improvement will be offered.

4. Open discussion with the associate will be encouraged at each evaluation to allow the associate to notify the firm of any area of dissatisfaction.

5.9 Mentors

1. Any lawyer has the option at any point to select a mentor from among the senior lawyers and partners at the firm who have offered to serve in that capacity. The firm will encourage senior partners and lawyers to act as mentors to other lawyers in the firm.
2. If the lawyer's evaluation has identified specific problems, he or she may consider that a mentor's assistance in addressing the problems would be helpful.
3. A mentor may be present at any evaluation of the lawyer's performance and may write a separate report for the associate's file.

5.10 Compensation

1. All compensation decisions at [name of firm], including salary levels and bonuses, will be made by a committee in accordance with the evaluation criteria presented at the initial interview and used in subsequent performance reviews. These criteria are intended to be neutral and merit-based.
2. There will be consistency between the remuneration of lawyers with substantially similar qualifications, abilities, tenure, and productivity levels.
3. There will be no reduction in compensation for full-time lawyers who work on a flexible work schedule. Such flexible working arrangements will not affect the eligibility for bonuses.
4. Where lawyers work on a part-time or reduced hour basis, compensation will be fairly and proportionately calculated taking into account the nature of practice and the hours worked. When a part-time or reduced hour arrangement is negotiated, the lawyer and firm should discuss the effect of the arrangement on other factors, such as billing rates, availability of work, availability of benefits (including office allocation and parking) and partnership eligibility. The firm must reasonably accommodate the employee with respect to these matters.
5. Flexible working arrangements will not affect a lawyer's eligibility for benefits, although some benefits based on days of employment may be pro-rated in accordance with the terms of a flexible working arrangement that involves reduced hours.

5.11 Professional Development

1. All lawyers at [name of firm] are considered to be a long-term investment in the future of the firm.
2. The professional development of each lawyer is a priority for the firm, regardless of tenure, scheduling choices, or type of law practiced.
3. Each lawyer will be considered eligible for educational opportunities or conference attendance on the basis of the relevancy of the particular opportunity to that lawyer's current or planned future area of practice. Any restriction of educational opportunities due to budget restraints will be applied equitably.
4. Lawyers will be given equal access to a range of challenging , quality work within the firm, in accordance with their preferred area of practice, ability, and the demand for the work within the firm. In each department associates will be given challenging, quality work assignments that encourage the growth of each lawyer's skills.

5.12 Partnership

1. Partners will be chosen by a partnership committee that is representative of the diversity of the firm, and partnership decisions will be made on the basis of written objective criteria based on the needs of each firm.
2. The partnership committee will be guided by the associate's evaluations through the years at the firm. Any sudden shifts in the evaluator's attitude toward an associate as the partnership decision approaches will be carefully scrutinized to ensure that they do not arise from discrimination on any prohibited ground.
3. An associate should not be penalized with respect to the partnership decision for having taken advantage of flexible working arrangements, aside from a possible delay in eligibility for partnership where a leave arrangement involves absence from the firm in excess of six months. In such cases, the delay shall be no longer than the actual time of absence.

6. Monitoring the Policy

1. This policy will be reviewed and evaluated on an annual basis.
2. As part of the annual review, the composition of the firm's lawyer complement will be assessed. If no substantial changes in the composition of the firm can be shown, the policy will be reviewed and amended to effect the desired changes.

7. Complaint Procedures

1. Where a member of the firm or an applicant for employment believes that there has been a failure or breach of the policy, he or she should follow the complaint procedures identified in the firm's [respectful workplace/harassment] policy.

2. The firm will treat all such complaints in a serious manner, will investigate all formal complaints, and will discipline any person found in breach of this policy without regard to his or her status within the firm.
3. Where a member or employee of the firm has been discriminated against by a non member of the firm, such as a client, opposing counsel, court personnel, or a member of the judiciary, [name of firm] will support and assist that person alleging discrimination in whatever manner seems appropriate.

8. Conclusion

[Name of firm] has adopted a policy of zero tolerance towards discrimination and all barriers to equal opportunity.

To support values of equality and diversity the firm will apply those values in its own employment decisions.

[Name of firm] will review this policy on an annual basis and revise it as necessary to ensure that it is accomplishing its goals.

Appendix B – The Business Case for Implementing a Diversity and Equality Policy: Success Stories

Success Stories

A firm that commits to providing a diverse and equal work environment makes a strategic move towards recruiting and retaining talent, improving relationships with clients, and improving performance. The following examples highlight the successes that other businesses have achieved by implementing diversity and equality policies:

- **Deloitte & Touche** launched an initiative aimed at retaining and advancing women within its corporation in 1993 after noticing it was losing some of its best high-performers who were women. Their CEO remarked that our “biggest investment as a firm is our people. You can’t employ half your population and have them leave prematurely and not have a very bad business result.”

The Chairman, CEO and top management initiated a number of different programs to address the issue including:

- the education of all management professionals on gender dynamics in the workforce;
- a series of Executive Women Breakfast Forums to assist with internal and external mentoring and networking;
- ensuring women received an equitable share of high-profile engagements; and
- providing programs like elder-care consultation and referral, child-care resources and referral, back-up child-care and multiple types of flexible work arrangements.

Three years later they found that managerial turnover had decreased 3.5% for managers and 8.6% for senior managers. In addition over a four-year period the percentage of women partners admitted rose from 8% to 21%. Both men and women have cited the initiative as a positive influence on their decision to accept job offers – they want to work for a firm with a progressive reputation.¹⁷

- **The Royal Bank of Canada** has worked on a number of diversity initiatives for over 15 years. For example in Toronto’s Chinese community most bank staff are of Chinese origin, speak Mandarin or Cantonese with clients, and marketing is targeted to the Chinese demographic. These tailored services have considerably benefited the bank in this area. The bank also found that an Asian employee was key to the Bank’s success in winning a \$500 million bid for a project in the People’s Republic of China due to their understanding of Chinese culture, values, and language skills.

A further diversity success has been the bank’s Flexible Work Arrangements Program that includes flextime, job sharing, flexiplace and a compressed workweek. A study of the effectiveness of the program found 85% of

¹⁷ Dr. Phebe-Jane Poole, *Diversity: A Business Advantage* (Ajax Ontario: Poole Publishing Company 1997) at 176-77.

employees felt they could manage their work and family responsibilities better. In addition the majority of managers confirmed that employees were managing work and family responsibilities better; that productivity had increased or stayed the same; and that employees were absent less often.¹⁸

- **PricewaterhouseCoopers**, a professional services organization, has implemented a work-life balance program. They wanted to retain top-talent staff and found that their highly self-motivated employees had a hard time disciplining themselves to achieve work-life balance. They found that the key for transformation to occur was the firm's leaders' personal commitment to and achievement of a balanced lifestyle and a diverse workforce. Their program included the following policies:
 - Flexible benefits
 - Flexible working pattern for all staff (not just parents)
 - Career breaks
 - Compassionate and emergency leave
 - Lifestyle Management support and training
 - For Parents: Enhanced maternity leave, fully paid paternity leave, time off for dependents, and childcare vouchers.

The benefits have been:

- Improved staff satisfaction with work life balance up from 40% to 60%
- Improved staff retention – for example the increase in return rates from maternity leave are up from 40% in 1998 to 80% in 2003

The firm found that owing to habitual long hours working managers needed support in helping their teams to work flexibly. They are pleased with their results to date and survey their staff every quarter on their efforts.

PricewaterhouseCoopers see this as a long-term issue:

“Doing business in the 21st century means doing business against a backdrop of phenomenal change, be it demographic shifts, globalization, technological advances etc. There is thus enormous pressure to adapt new ways of working. By promoting flexibility and work-life balance we will have a competitive edge over others, for the corollary is a business which is flexible and adaptable to anticipate change and one which stays ahead of the game.”¹⁹

- **LeBoeuf, Lamb, Greene & MacRae** - In September 1991, LeBoeuf, Lamb, Greene & MacRae, L.L.P. was one of the original 35 signatories to the "Statement of Goals of New York Law Firms and Corporate Legal Departments for Minority Representation and Retention" (the "Statement of Goals") prepared by The Association of the Bar of the City of New York ("ABCNY"). LeBoeuf Lamb also signed the ABCNY 1998 Restatement of Goals for the Hiring, Retention and Promotion of Attorneys of Color and the Retention and Promotion of Women. In

¹⁸ Poole, *supra* note 9 at 178-183.

¹⁹ The Work Foundation, Employers for Work-Life Balance, Case Studies. Online: <http://www.employersforwork-lifebalance.org.uk>

August 2003, the Firm renewed its compliance with the Statement of Goals by signing ABCNY's 2003 Statement of Diversity Principles, which includes an updated Statement of Diversity Goals and Diversity Practices for New York Law Firms and Law Departments (the "Statement of Diversity Principles").

To further LeBoeuf Lamb's commitment to the retention and advancement of diverse associates, it has adopted a Diversity Plan. LeBoeuf Lamb has also committed to improving the Diversity Plan by instituting programs that address the Minority Corporate Counsel Association's Top Ten Diversity Recommended Practices ("MCCA Recommended Practices"), which include development and communication of the business case for diversity, involvement of senior partners in diversity efforts, top-down diversity training, accountability, development of effective mentoring programs, lateral hiring, work-life balance, expanded recruiting, incentives for diversity initiatives and equal treatment programs. Details of LeBoeuf Lamb's Diversity Plan are on their website at www.llgm.com.

Appendix C - Discussion on the Law of Equality

The concept of equality at law has developed significantly in the past two decades since the advent of the *Canadian Charter of Rights and Freedoms* (“the *Charter*”). While the *Charter* governs the relationship between the state and individuals and not private workplaces²⁰, the equality principles developed under the *Charter* have had a significant impact on human rights law. Therefore, before moving to the discussion on human rights law that does apply to legal workplaces, there is a discussion on the application of equality principles under the *Charter*.

Equality under the Charter

Section 15(1) of the *Charter* provides a guarantee of equal protection and equal benefit of the law without discrimination. In law, this equality guarantee is a substantive rather than formal guarantee.²¹ To understand the difference between formal and substantive equality it is useful to compare a pre-*Charter* case on equality to a case that applies the *Charter*'s equality provision.

In the pre-*Charter* case of *Bliss v. A.G. of Canada* [1979] 1 S.C.R. 183, a pregnant woman claimed discrimination against the federal government on the basis of sex when she was denied unemployment insurance benefits. The requirements to qualify for benefits were more onerous for pregnant women than for other women or men. The pregnant woman would have qualified for benefits if she were not pregnant. The Court in the case acknowledged that the legislation treated men and women differently but said that any inequality between the sexes in this area was created by nature, not by legislation. The concept of equality applied in this case is referred to as formal equality because it focuses only on whether the law applies equally to the group of people affected by it. In this case because pregnant women were all treated equally by the legislation there was seen to be no discrimination.

In contrast to formal equality, substantive equality focuses on the impact of a law on an individual or group. The case of *Eldridge v. British Columbia*²² (*Attorney General*) [1995] S.C.C.A. No. 397 [*Eldridge*] is an example of the application of substantive equality under the *Charter*. The case concerned a claim by deaf persons that the lack of funding for sign language interpretation in B.C.'s medicare system was discriminatory. On its face, or formally, the medicare system appeared to provide services equally to deaf and hearing individuals, as they were both provided state funded medical services. However, the Court noted that there were circumstances where deaf patients could not communicate effectively with their physician without an interpreter, an issue that the hearing patients did not face. As a result the Court ruled that the government is required to take positive steps to ensure that this disadvantaged group benefits equally from government services such as medicare.

A seminal case that confirmed the shift from formal to substantive equality is the *Law Society of British Columbia v. Andrews* [1989] 1 S.C.R. 143 [*Andrews*]. In the case the

²⁰ *Canadian Charter of Rights and Freedoms*, s. 32, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11.

²¹ *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 [*Andrews*], *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*], *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54 [*Martin*]

²² *Eldridge v. British Columbia (Attorney General)* [1995] S.C.C.A. No. 397 [*Eldridge*]

Court explicitly rejected a test that asks whether the law *applies* equally to those affected by it.²³ Instead, substantive equality focuses on the *effects* of legislation. It asks whether the ultimate impact of legislation on a group or individual is unequal in a negative way. Inequality can generally be found in two types of circumstances. The first is when an individual or group is denied a benefit that others receive. The second type of circumstance is when an individual or group experiences a disadvantage that others do not. Another important point from *Andrews* is that it is not necessary to find an intention to discriminate in order to find inequality.²⁴ Inequality may still be found where the legislation has a disproportionate effect, such as in *Eldridge*. The following quote from *Andrews* helps to summarize these principles:

... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.²⁵

Following *Andrews* the case of *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 [Law] further explained that equal treatment sometimes requires that individuals or groups be treated differently from others. The Court stated that “formal distinctions in treatment will be necessary in some contexts in order to accommodate the differences between individuals and thus to produce equal treatment in a substantive sense”.²⁶ Again *Eldridge* provides a good example of this principle by requiring sign language services to be provided to deaf medical patients so that they receive the same quality of care as hearing patients. Laws must be sensitive to the needs, capacities and merits of different individuals.²⁷

The *Law* case also clarified that the overarching purpose of the equality guarantee is to preserve and protect an individual’s human dignity:

It may be said that the purpose of s. 15 (1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect, and consideration.²⁸

Equality and Human Rights Legislation

The cases discussed to this point have been examples of how equality is understood under the *Charter*. As the *Charter* does not apply to most legal workplaces it is important to note that a similar concept of equality applies under human rights

²³ *Andrews*, *supra* note 14 at 29.

²⁴ *Ibid.* at 37.

²⁵ *Ibid.* at 37.

²⁶ *Law*, *supra* note 14 at 25.

²⁷ *Eldridge*, *supra* note 15 at 53. A recent case which confirms these principles is *Nova Scotia (Workers’ Compensation Board) v. Martin*, *supra* note 14.

²⁸ *Law*, *supra* note 14 at 51.

legislation, which does apply to legal workplaces. The next case discusses an equality claim under a provincial human rights code.

The case of *Meiorin*²⁹ concerned a female firefighter who was dismissed because she could not meet the minimum aerobic standard in a physical fitness assessment required by the government. She argued that the minimum physical fitness standard was discriminatory on the basis of sex, contrary to the British Columbia Human Rights Code. The evidence in the case demonstrated that most women have lower aerobic capacities than men based on their physiological differences. Therefore the aerobic standard adversely affected women and this constituted a *prima facie* case of discrimination. When applying human rights legislation the Court decided that as with *Charter* claims the presence or lack of an intention to discriminate was not material to a finding of discrimination.³⁰ The concern is whether the employer's policy or practice has a discriminatory effect.

Once a *prima facie* case of discrimination is proven the employer can justify the practice if they can show it is a bona fide occupational requirement. However in this case evidence showed that the aerobic capacity required by the government's standard was not reasonably necessary for either men or women to perform the work of a forest firefighter safely and efficiently. To succeed in justifying a standard (or practice) as a bona fide occupational requirement an employer also has to show that it is impossible to accommodate individual employees' differences without imposing undue hardship on the employer.³¹ This latter requirement is referred to as an employer's duty to accommodate and is legally required when workplace policies or practices have a discriminatory effect on employees who are members of a protected group.

Factors re: duty to accommodate: cost, size of business, interchangeability of facilities, impact on other workers (see Renaud)

Another defence available to employers in Alberta is found in section 11 of the Human Rights, Citizenship and Multiculturalism Act, which allows contraventions of the Act that are "reasonable and justifiable in the circumstances." This defence is broader than the bona fide occupational requirement, and will apply where there are justifications for the employer's practices that do not relate to the requirements of the job – for example, financial considerations. Nevertheless, the employer is still required to accommodate employees to the point of undue hardship before this defence will be successful.³²

Equality under human rights legislation therefore shares similar characteristics to equality under the *Charter*. In both cases the focus of the inquiry is the effect of an action on an individual or group. A difference in human rights legislation is that the employer has the availability of a defense if they can prove the practice is a bona fide occupational requirement and that they have tried to accommodate the individual to the point of undue hardship.

²⁹ *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)* (Meorin Grievance), [1999] 3 S.C.R. 3.

³⁰ *Ibid.* at 48.

³¹ *Ibid.* at 54.

³² See *United Food and Commercial Workers, Local 401 v. Alberta Human Rights and Citizenship Commission* (2003), 21 Alta. L.R. (4th) 261 (C.A.).

The duty to accommodate requires employers to demonstrate that it is impossible to accommodate the affected employee without imposing undue hardship. As McLachlin C.J. noted in *Meiorin*,³³

...the essence of equality is to be treated according to one's own merit, capabilities and circumstances. True equality requires that differences be accommodated. . .

Whether accommodation would amount to undue hardship in a given case will depend upon a number of factors, including financial cost, impact on other employees, safety considerations, and the adaptability of work place personnel and facilities. The analysis is contextual, and will depend upon the size of the employer's operations. These factors are not exhaustive, and will be balanced against the employee's right to be free from discrimination.³⁴ Since *Meiroin*, it has become more difficult for employers to demonstrate undue hardship – the standard requires that it be *impossible* to accommodate the employee in the circumstances.

The right to non-discrimination and the duty to accommodate have clear implications for those formulating and implementing workplace policies. Consideration must be given to whether these policies directly or indirectly discriminate by imposing limits on the hiring, advancement, compensation, or benefits of lawyers because of their personal characteristics, and whether such policies reasonably accommodate those for whom they are designed.

In past cases employment policies and practices that have been found to violate equality principles include:

- a requirement that an employee work on her religious Sabbath³⁵
- sexual harassment and pregnancy discrimination³⁶
- failure to hire because of a perceived disability.³⁷

³³ *Supra* note 29 at 44.

³⁴ See *Central Okanagan School District No. 23 v. Renaud*, [1992], 2 S.C.R. 970, citing *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 at 521.

³⁵ *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536.

³⁶ *Janzen v. Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252.

³⁷ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*, [2000] 1 S.C.R. 665.

Appendix D - Human Rights, Citizenship and Multiculturalism Act and Alberta Code of Professional Conduct

Human Rights, Citizenship and Multiculturalism Act

Section 7(1) of the Alberta *Human Rights, Citizenship and Multiculturalism Act* (R.S.A. 2000, c. H-14) states that an employer shall not:

- (a) refuse to employ or refuse to continue to employ any person, or
- (b) discriminate against any person with regard to employment or any term or condition of employment, because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, sexual orientation*, source of income or family status of that person or of any other person.

*sexual orientation was read in by the Supreme Court of Canada in 1998.

Similarly section 8 (1) of the Act prohibits discrimination on the same prohibited grounds during the hiring process. It states that:

No person shall use or circulate any form of application for employment or publish any advertisement in connection with employment or prospective employment or make any written or oral inquiry of an applicant

- a) that expresses either directly or indirectly any limitation, specification or preference indicating discrimination on the basis *on the prohibited grounds** or
- b) that requires an applicant to furnish any information concerning (the prohibited grounds).

Sections 7(3) and 8(2) provide for a bona fide occupational requirement defence in relation to each section:

7(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

8(2) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Section 11 provides for a further defence:

11 A Contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

Alberta Code of Professional Conduct

The *Alberta Code of Professional Conduct* also prohibits discrimination and harassment under Chapter 1, Rule 8:

A lawyer must not harass any person or discriminate against any person on the basis of race, language, creed, colour, national or ethnic origin, gender, religion, marital status, sexual orientation, age, mental disability or physical disability or otherwise or on the basis of any similar personal attribute.

The general commentary to Rule 8 is very helpful in understanding how this rule is to be applied and makes it explicit that accommodation of differences is an ethical obligation:

C.8 A lawyer has an ethical obligation to recognize the essential dignity of each individual and the principle of equal rights and justice for all persons. Rule #8 applies to lawyers' personal, social and professional relationships with all persons and classes of persons, including clients and prospective clients, employees, other lawyers, and society in general. Rule #8 is not intended to prohibit practices that are reasonable and justifiable or otherwise permissible under principles of general law. Discrimination is where a person or a group is disadvantaged, denied an opportunity or treated adversely because of a distinction relating to personal attributes within the prohibited grounds. Stereotyped views often cause discriminatory conduct. In some cases strictly equal or even-handed application of rules or policies may be discriminatory against a person or a group because of the differing impact those rules or policies have on those individuals or groups. This is called adverse discrimination and creates a duty to take reasonable steps to accommodate the special needs of those individuals and groups.

Harassment may encompass conduct which:

- (a) undermines another person's dignity by causing embarrassment, discomfort or humiliation;
- (b) creates an intimidating or hostile environment for the recipient of the harassment;
- (c) is an abuse of one's status and exploits the power imbalance between the person or persons engaging in harassing conduct and the recipient of the harassment;
- (d) if submitted to or rejected, affects decisions regarding the person's future. If the recipient of the harassment is a client, this may affect the future provision of legal advice and services. In the employment context this may include matters such as promotion, salary, benefits and job security;
- (e) either explicitly or implicitly must be submitted to as a term or condition prescribed by the harasser; for example, as a condition for the provision of legal services or as a condition of employment.

Harassment can be sexual, discriminatory or personal in nature. Sexual harassment is specifically addressed in Commentary 9. Discriminatory

harassment is harassment focused on a personal characteristic within one of the prohibited grounds. It could take the form of name-calling nicknames (for an individual or a group of people), demeaning the character of a person or group of persons or telling jokes about a person or a group of people.

Personal harassment is disrespectful and degrading conduct generally that is not specifically focused within the prohibited grounds. It includes conduct that is rude, insulting, belittling or vindictive (see also Rules #2, #5 and #6 in this chapter and related commentaries).

The key in determining whether conduct is harassment is the impact the conduct has had on the complainant, not the intent with which it was done. Harassment is different from offending a person; it involves undermining another person's personal integrity.

The rule against harassment applies in the workplace. Employers and others in positions of authority have a positive duty to provide a harassment-free working environment that does not undermine personal integrity, economic potential or both. Legal employers are expected to have a harassment policy in place explaining both the conduct expected in that work place and the steps to be taken if an employee wishes to make a complaint about conduct.

The rule against harassment is a pervasive rule. It applies to lawyers' relations with clients, other lawyers, others who work in the justice system (judges, court officials and staff, the police and prison guards, etc.) and members of the general public.

Sexual harassment is also explicitly prohibited in the *Code* in Chapter 1, Rule 9 and related commentary in C.9:

R. 9 A lawyer must not sexually harass a colleague, staff member, client or other person.

C.9 A lawyer is ethically bound to promote the dignity and equality of all those in the work environment by avoiding discriminatory practices in compliance with Rule #8 and, specifically, by rejecting sexual harassment.

Verbal or physical conduct having a sexual element constitutes sexual harassment when:

- (a) it undermines another person's dignity by causing embarrassment, discomfort, humiliation or offence;
- (b) it interferes with a person's work performance by creating an intimidating or hostile work environment;
- (c) submission to or rejection of such conduct affects decisions regarding that person's employment, including matters such as promotion, salary, benefits and job security; or
- (d) submission to such conduct is made, either explicitly or implicitly, a term or condition of employment or the rendering of professional services.

Sexual harassment can occur as behaviour by men toward women, by women toward men, between men or between women. Sexual assault is an obvious example of sexual harassment. Other examples include the following behaviours in situations in which the offender knows or ought to know that the behaviour is unwelcome, embarrassing or offensive or will adversely affect a recipient's work environment (see paragraphs (a) through (d) above):

- telling sexist jokes, displaying material of a sexual nature or using sexually suggestive gestures;
- using sexually derogatory or degrading words to describe an individual or persons of one gender or sexual orientation;
- making innuendos, inquiries, propositions, requests or demands of a sexual nature;
- leering;
- pinching, patting, rubbing or other physical contact.