AFFIRMATIVE ACTION IN QUESTION: A COHERENT THEORY FOR SECTION 15(2)

Mark A. Drumbl[*] and John D.R. Craig[**]

Affirmative action programs are constitutionally protected in Canada under section 15(2) of the Charter. This section has received little judicial interpretation and, consequently, no coherent approach to the interpretation of section 15(2) has been developed. Furthermore, there is an urgent need to define the meaning of section 15(2), as affirmative action programs can be used to perpetuate stereotypes and discrimination while being given a blanket endorsement through section 15(2). The authors suggest that section 15(2) does not merely promote substantive equality, as this is the function of section 15(1), but embodies the social justice conception of equality, which allocates social benefits based on group membership. Membership in a group, however, may be a poor indicator of need as the least disadvantaged of the target group will often benefit the most. The authors look at a number of authorities from Europe and the United States which have considered the contours of affirmative action programs. Ultimately, the authors suggest that, as section 1 and section 15(2) perform essentially the same role with respect to Charter rights, the test for section 15(2) should be similar to the section 1 Oakes test. The proposed section 15(2) test would result in an interpretation of section 15(2) which would limit the potential gulf between substantive equality and the social justice model.

Au Canada, les programmes d'accès à l'égalité bénéficient de la protection constitutionnelle de l'art. 15(2) de la Charte. Ce texte ayant peu fait l'objet d'interprétation juridique, aucune approche cohérente n'existe encore à son égard. Il est donc impératif d'en définir le sens, les programmes d'action positive ainsi globalement légitimisés risquant de perpétuer les stéréotypes et la discrimination. Les auteurs soutiennent que l'art. 15(2) ne sert pas seulement à promouvoir l'égalité matérielle, ce qui est la fonction de l'art. 15(1), il incarne aussi le principe d'égalité dans son acception de justice sociale, qui assure la prestation des avantages sociaux en fonction de l'appartenance au groupe. Mais cette appartenance peut être un piètre indicateur des besoins, puisque ce sont souvent les membres les moins nécessiteux du groupe cible qui bénéficient le plus. Les auteurs examinent les travaux d'éminents penseurs européens et américains sur la question. En conclusion, les auteurs suggèrent que l'art. 15(2), comme l'art(1), soit soumis au critère énoncé dans l'arrêt Oakes, puisque les deux textes jouent essentiellement le même rôle en regard de la Charte. Le critère proposé pour l'art. 15(2) donnerait lieu à une interprétation susceptible de réduire le fossé qui sépare la notion d'égalité matérielle et le modèle de justice sociale.

I. INTRODUCTION

In recent years, the highest courts of the United States and the European Community have issued judgments concerning the legitimacy of public affirmative action programs.[1] These decisions reflect some element of judicial

[*] Associate-in-Law, Columbia University. I would like to acknowledge the input of my former colleagues at Tory Tory DesLauriers and Binnington, Toronto.

[**] Doctoral student-in-law, Lincoln College, University of Oxford.

[1] *Kalanke* v. *Freie Hansestadt Bremen*, [1995] I.R.L.R. 660 (E.C.J.); *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097 (1995). Both are discussed *infra* in text associated with notes 58ff and 72ff, respectively.

scepticism about the constitutionality of such policies and programs, and also question their practical and political merit.

In contrast to their American and European counterparts, Canadian courts have been reticent about the issue of affirmative action. Moreover, the intermittent judicial pronouncements on this issue have been contradictory. This is somewhat odd given that affirmative action has been constitutionalized in Canada by way of section 15(2) of the *Charter of Rights and Freedoms*. This provision stipulates that a state law, program, or activity, even though discriminatory and in breach of the equality guarantees of section 15(1) of the *Charter*, is nevertheless constitutional if it "has as its object the amelioration of conditions of disadvantaged individuals or groups." At first blush, it would appear that differential treatment is permitted in Canada so long as it affords some assistance to a "disadvantaged" group. As we will argue below, the application of section 15(2) must, however, have been intended to be more sophisticated than this.

It is, thus, important to develop an interpretative approach which makes sense out of the *prima facie* limitless affirmative action mandate granted to the state by section 15(2). The formulation of such an approach can be facilitated by an examination of the recent decisions of the United States Supreme Court and the European Court of Justice, as well as the scattered jurisprudence of Canada's lower courts relating to both section 15(2) and equivalent affirmative action saving provisions in human rights legislation. It is hoped that this analysis will promote some discussion of and shed some light on a very important constitutional provision which, since its inception, has avoided significant judicial and scholarly attention.

II. SUBSTANTIVE EQUALITY AND CONSTITUTIONALLY PROBLEMATIC AFFIRMATIVE ACTION

Affirmative action, also known as positive action, employment equity, or benign discrimination, comes in a variety of forms.[2] A program to make office buildings accessible to persons in wheelchairs is affirmative action for the disabled. An employer-sponsored program to provide child care, insofar as it facilitates the entry of women into the workforce, could be termed affirmative action for women. In fact, any system of quotas which requires an employer to hire persons from any pre-established group is affirmative action for the individuals and groups which benefit. Christopher McCrudden has identified five different categories of positive action, which can be summarized as follows:[3]

---

[2] The term 'affirmative action' has traditionally been given a very broad definition. See, for example, W.S. Tarnopolsky and G. Beaudoin, *The Canadian Charter of Rights and Freedoms*, (Toronto: Carswell, 1982) at 423:

> The various positive or affirmative steps which have been taken to prevent or overcome discriminatory practices or to ameliorate the disadvantage of certain groups, which have either been ordered following a finding of past discrimination or required by governments as a condition of doing business, or which have even been voluntarily adopted, have come to be known as 'affirmative action' programs.

J. Keene, *Human Rights in Ontario*, 2d ed. (Toronto: Carswell, 1992) advances the following as a "good general definition" of 'affirmative action,' at 167:

> Affirmative Action includes changing systems to ensure equality of opportunity, but it means considerably more. It means implementing a comprehensive plan to achieve definite, measurable results according to goals and timetables established and reviewed in the same manner as any other business objective. The major aim of Affirmative Action is to change the existing distribution of employment. Changes can be tracked statistically, in the same way the original work force was analyzed. Goals and timetables are developed in short, intermediate and long term focus. Actual results are compared with the stated goals at appropriate times and, if necessary, adjustments to the plan are made to improve 'production.'

[3] C. McCrudden, "Rethinking Positive Action" (1986) 15 I.L.J. 219 at 223-25. A similar categorization has been provided by J. Ledvinka and V.G. Scarpello, *Federal Regulation of Personnel and Human Resource Management* (1991). They have described (at 166-67) four categories of affirmative action: 1) the concerted recruitment of candidates from disadvantaged groups; 2) the introduction of measures designed to eliminate prejudicial attitudes held by current managers and other personnel; 3) the identification and modification of current employment practices that might otherwise impede members of disadvantaged groups; and 4) the preferential hiring and promotion of members of disadvantaged groups in order to increase their representation in the workplace.

1) The eradication of discrimination, through the identification and dismantling of discriminatory practices, and the accommodation of real differences between individuals;

2) The adoption of facially neutral but purposefully inclusionary policies which have the effect of improving the prospects of members of particular groups;

3) The implementation of outreach programmes, which are designed to publicize job opportunities to members of particular groups, and to attract qualified candidates from these groups;

4) Preferential treatment in employment and other areas, whereby members of particular groups are conferred benefits denied to members of other groups;

5) The redefinition of the merit principle, which results in group membership becoming a job-related qualification, rather than an exception to it.

According to McCrudden's classification, all aspects of anti-discrimination law can accurately be termed "affirmative action," since the primary objective of this branch of the law is to positively affect the position of individuals who find their life prospects impeded by unequal, unjustifiable treatment resulting from their membership in a particular group.

However, in the context of section 15(2) of the *Charter*, it is not necessary to consider all the possible forms which affirmative action can take. Section 15(2) only becomes relevant in the situation where a program would otherwise be discriminatory within the meaning of section 15(1). For this reason, it is necessary to consider the scope of section 15(1) of the *Charter*.

Significantly, section 15(1) does not merely guarantee 'formal' equality, or equal treatment at all costs. The concept of "discrimination" has been defined by the Supreme Court of Canada as a distinction based on a personal characteristic which imposes a burden, obligation or disadvantage on the members of one group which is not imposed on the members of another group.[4] Distinctions based on real and relevant differences between the members of certain groups are not, therefore, discriminatory and in violation of section 15(1).[5] In fact, such legislative distinctions may be absolutely vital if 'substantive' equality[6] is to be achieved. Thus, a program funding special

4 *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174-75.

5 On this point, see *R.* v. *Hess and Nguyen*, [1990] 2 S.C.R. 906 at 926-30 (per Wilson J.).

6 One of the best definitions of 'substantive equality' is provided by Advocate-General Tesauro in *Kalanke*, *supra* note 1 at 663: "The principle of substantive equality necessitates taking account of the existing inequalities which arise because a person belongs to a particular class of persons or to a particular social group; it enables and

education classes for disabled children, which would certainly be of an affirmative action nature according to McCrudden's first category, would not discriminate against non-disabled children, assuming there is a real and relevant different between those who benefit and those who are excluded. Such a program, by advancing substantive equality, would not run afoul of section 15(1), and would, therefore, not have to rely on section 15(2) for its constitutionality.[7]

Affirmative action only raises constitutional difficulties under section 15(1) (*i.e.*, is 'constitutionally problematic') where it allocates a social benefit to individuals on the basis of their membership in a group, although group membership is irrelevant to the issue of whether individuals want or need the benefit. All individuals, regardless of their ethnic origin or gender, desire job training, employment, or contractual opportunities. A governmental affirmative

---

requires the unequal, detrimental effects which those inequalities have on the members of the group in question to be eliminated or, in any event, neutralised by means of specific measures."

[7] This example is taken from *Eaton* v. *Brandt (County) Board of Education* (1995), 22 O.R. (3d) 1, where the Ontario Court of Appeal considered a s. 15 challenge to special education programs for disabled children. [Reversed on other grounds, Supreme Court of Canada, No. 24668, October 9, 1996, [1996] S.C.J. No. 98.] With regard to the relationship between ss. 15(1) and (2), Arbour J.A. held at 10-11:

> It is unnecessary to determine whether the special education programs offered pursuant to the provisions of the *Education Act* and regulations would need the protection of s.15(2) of the *Charter* in the event of an allegation that they discriminate against mainstream students. Even though these programs were enacted in part to ameliorate the conditions of disabled students, they arguably do nothing more than to provide these students with the real equality that they are entitled to under s.15(1). In such a case, they may not be viewed as "affirmative action" programs as understood under s.15(2).

The appeal to the Supreme Court of Canada did not specifically involve consideration of s. 15(2). Nor does it appear that the Supreme Court contemplated s. 15(2) in deciding to overturn the Ontario Court of Appeal. The Supreme Court of Canada did not provide reasons for overturning the appeal court. It did, however, indicate that reasons would follow. Nonetheless, given the rapidity with which the Supreme Court reached its decision in this matter, it appears that the choice to overturn the Ontario Court of Appeal was not based on substantive concerns related to s. 15, but, rather, on procedural concerns. Specifically, it appears that notice was not given to affected parties before the rights-claimant sought the intervention of the courts. In the absence of such advance notice, the government was at a disadvantage in offering argument and evidence supporting the constitutional validity of the legislation. In such a situation, statute and case law provide that legislation shall not be adjudged to be invalid. See J. Morris, "Top Court rejects integration as a right" *Globe and Mail* (10 October, 1996) A1 and T. Claridge, "Court to explain disabled ruling" *Globe and Mail* (11 October, 1996) A8.

action program which grants social benefits to individuals because of their ethnic origin or gender, and denies it to others on those same bases (basically, affirmative action falling within McCrudden's fourth category), risks being in conflict with section 15(1) of the *Charter*, and must be assessed under the terms of section 15(2).

The rationale underlying section 15(2) is often linked to the concept of substantive equality. Thus, it has been said that by constitutionalizing affirmative action, section 15(2) "... reinforce(s) the important insight that substantive equality requires positive action to ameliorate the conditions of socially disadvantaged groups."[8] In the name of substantive equality, so it is argued, section 15(2) mandates governmental attempts to divide society into 'have' and 'have-not' groups. Differentially favourable treatment of the 'have-nots' at the expense of the 'haves' will, it is theorized, equalize the societal playing field.

To argue that section 15(2) merely promotes substantive equality is attractive, yet unsatisfactory for several reasons. First, given that section 15(1) already gives effect to the principle of substantive equality within the Canadian constitutional framework, section 15(2) must permit some forms of state action which pursue objectives beyond what is commonly understood as substantive equality. Any other conclusion would render section 15(2) redundant. This conclusion is reinforced by the broad wording of section 15(2), since the provision seemingly immunizes from constitutional review any governmental law or program which has the *objective* of improving the circumstances of members of a 'have-not' category, even if the law or program imposes substantial burdens on other persons, including other 'have-nots.'[9] Assuming this to be true, then the scope of section 15(2) could extend considerably beyond the principle of substantive equality.

Furthermore, it should be obvious that society is not constituted along the 'have'/'have-not' continuum apparently envisaged by the drafters of section 15(2). In fact, the categorization of individuals into these two camps on the basis of their group membership can often be entirely arbitrary. There are many people who *prima facie* ought to be part of the 'haves,' yet live in a situation of

---

8 C. Sheppard, Study Paper on *Litigating the Relationship Between Equity and Equality* by C. Sheppard (Toronto: Ontario Law Reform Commission, 1993) at 28.

9 One could conclude that a program which has a valid affirmative action objective would survive constitutional scrutiny under s. 15(2), without having to meet the 'proportionality' element of s. 1 of the *Charter*. This possibility was raised, though rejected, by McLachlin J. in *R.* v. *Hess and Nguyen*, *supra* note 5 at 945-46.

disadvantage. Moreover, the 'have-nots' are incredibly diverse and heterogeneous. In fact, this diversity has resulted in legal challenges to affirmative action programs where the promotion of the interests of one 'have-not' group has been perceived as undermining the interests of another 'have-not' group. Because the use of group membership to determine 'haves' and 'have-nots' may very well be a crude endeavour, the relationship between substantive equality and constitutionally problematic affirmative action may not be particularly close.

We, therefore, conclude that section 15(2) is concerned with a form of affirmative action which does not fit comfortably within the concept of substantive equality, and cannot, therefore, be sustained within the present understanding of section 15(1). Constitutionally problematic affirmative action, then, is any state law or program which generalizes about an individual's social and economic status on the basis of group membership, and allocates social benefits accordingly. Treating individuals differently on the basis of generalizations about the groups to which they belong, while ignoring their actual needs and abilities, is the hallmark of discrimination. Such treatment, where done for legitimate affirmative action purposes, must be justified under whatever test, or set of principles, is adopted for interpreting section 15(2).

III. THE AFFIRMATIVE ACTION DEBATE – INDIVIDUAL VERSUS SOCIAL JUSTICE

Affirmative action is controversial; of that there can be no question. The debate as to its merits has existed for years in both legal and political circles. Not surprisingly, affirmative action owes its origins to the deep racial divisions existing in the United States, and the systemic discrimination which Black Americans have faced for over three centuries.[10] Although it is beyond the scope of this article to revisit this aspect of American history and society, it is worth remembering that affirmative action arose in the United States in response to racial discrimination which was structurally ingrained, and could be ameliorated only through bold, systemic measures. Nevertheless, a substantial number of legal scholars have argued against the adoption of laws and programs which

[10] Affirmative action programs originated in the United States with President John F. Kennedy's Executive Order 10925 (1961), which required certain federal contractors to take "affirmative action" to ensure that individuals were not discriminated against with regard to race, creed, colour, or national origin. Four years later, President Lyndon B. Johnson issued Executive Order 11246 (1965), which required federal contractors holding contracts of $50,000 or more to initiate affirmative action programs to recruit and hire minority employees.

seek to remedy disadvantage through discrimination. Morris Abram, for example, has written that "[affirmative action] violates the basic principles that hold together our heterogeneous society and secure our civil peace."[11] In his view, affirmative action embodies a results-oriented approach to equality, which confers social benefits on members of disadvantaged groups without actually addressing the underlying causes of disadvantage in society. In this sense, affirmative action is a quick, yet illusory, "fix."[12] Abram argues that it is a mistake to abandon the merit principle in favour of a system which allocates social goods according to personal characteristics such as race. In his view, "we simply cannot interpret our laws to support both colour-blindness for some citizens and colour-consciousness for others," as the two approaches are mutually exclusive.[13]

Professor Ramesh Thakur has discussed the sociological impact of affirmative action, arguing that it is counter-productive, "undermines the dignity of a collective entity and retards the realization of human worth of its individual members."[14] In particular, he lists the following as the undesirable effects of preferential policies:[15]

- they rest on the assumption that the non-target group is so superior to the target group that the latter cannot possibly compete without extra help;
- they reinforce the sense of inferiority of the members of the target group, who are considered to be incapable of uplifting themselves by their own wit and ability;
- they perpetuate the target group's sense of being victims and not masters of their own destiny.

Thus, the groups targeted by affirmative action programs become labelled as victims who are incapable of succeeding without state intervention.[16]

---

11 M.B. Abram, "Affirmative Action: Fair Shakers and Social Engineers" (1986) 99 Harvard L.R. 1312 at 1312.

12 *Ibid.* at 1317-18.

13 *Ibid.* at 1319.

14 R.Thakur, "From the Mosaic to the Melting Pot: Cross-National Reflections on Multiculturalism" in ed. Chadran Kukathas, *Multicultural Citizens: The Philosophy and Politics of Identity* (Sydney Centre for Independent Studies, 1993) 103 at 115.

15 *Ibid.*

16 C. McCrudden, *supra* note 3 at 241; S. Minnich, "Comment – *Adarand Construction, Inc.* v. *Pena*" (1995) 46 Case Western L.R. 279 at 309-12; R. K. Robinson, J. Seydel and H.J. Sloan, "Reverse Discrimination Employment Litigation: Defining the Limits of Preferential Promotion" (1995)46 Labor L.J. 131 at 139:"Preferences based on race may produce the unintended effect of reinforcing commonly held stereotypes. Such stereotypes lead people to believe that certain protected groups cannot achieve success

As both Abram and Thakur make clear, the arguments launched against affirmative action range from the jurisprudential to the political to the social. Such arguments find a home in the 'individual justice' approach to equality law. This approach centres on the relationship between the state and the individual, and in particular, on the view that the state's role in ameliorating disadvantage is two-fold: 1) the elimination of any use of a personal characteristic as a criterion for the conferral of a social benefit, where the personal characteristic is irrelevant to an individual's suitability for receiving the benefit; and 2) the elimination of criteria which, though facially neutral, impede the ability of individuals with certain personal characteristics to obtain a social benefit. The role of the state, then, is to eliminate unjustifiable barriers which prevent individuals from having the opportunity to obtain a benefit. As noted above, many state measures to promote individual opportunity – including those furthering substantive equality – can accurately be termed 'affirmative action' but are not constitutionally problematic in Canada. Problems only arise where the state intervenes directly in the allocation of social benefits, and prescribes an allocation based on personal characteristics which are irrelevant to the issue of whether individuals want or need the social benefit. Such state intervention cannot be supported by the 'individual justice' model, nor (as explained above) by the principle of substantive equality. Instead, it finds support in the competing 'social justice' model. This model takes as its starting premise the view that discrimination against certain groups is so pervasive that real equality for the members of the group can never be achieved through the simple identification and removal of discriminatory barriers. Instead, systemic remedies conferring benefits on the group are required to remedy past injustice against the group. Thus, the social justice model permits the *allocation* of social benefits to individuals on the basis of their group membership, since past discrimination has resulted in the *deprivation* of social benefits in precisely the same manner.[17] In other words, the model basically authorizes the state to remedy past discrimination by favouring the present-day members of the historically victimized groups. Given the interplay between sections 15(1) and 15(2) of the

'without special protection based on a factor having no relationship to individual worth.' As a consequence, the classification of candidates on the basis of race often results in the stigmatization of individuals because of their membership in a racial group."

17 For a comprehensive discussion of the social justice model, see R.H. Fallon and P.C. Weiler, "*Firefighters* v. *Stotts*: Conflicting Models of Racial Justice" [1984] Sup. Ct. Rev. 1. See also, C. McCrudden, *supra* note 3 at 237-38. McCrudden discusses three principles linked to the social justice model: compensation, distributive justice, and social utility.

Charter, it would seem that a social justice conception of equality underlies section 15(2).

By focusing on groups, as opposed to their individual members, proponents of the social justice model avoid the most obvious difficulty with constitutionally problematic affirmative action, namely that group characteristics such as sex, skin colour, and national origin are often poor indicators of an individual's actual disadvantage and actual need, thus making it difficult to draw a meaningful dichotomy between 'haves' and 'have-nots.' This, in itself, seems sufficient to generally favour an equality model which focuses on the individual, and rejects the relevance of group membership in the allocation of social benefits. This view is supported by another problem related to reliance on the social justice model – 'affirmative-action capture' – where the individuals who benefit most from preferential policies are the members of the target groups whose relative benefits from the program are the smallest (i.e., the most economically, socially and educationally advantaged members of the targeted 'have-not' group). Thakur assesses this phenomenon:[18]

> Affirmative action based on promoting sectarian interests is self-negating because, for a number of reasons (for example lack of access to information or resources), such programmes are captured by those who are privileged rather than disadvantaged. Those who are the real objects of affirmative action end up being trebly disadvantaged. First, their problems continue. Second, the spotlight of public policy shifts away from their problems, for affirmative action by expatiating the guilt of the hereditary privileged permits them to ignore the continuing problems with an easier conscience. Third, the conviction grows that the poor surely now deserve to be poor because of indolence or other self-inflicted faults.

A further dilemma arising from the group-centred approach of the 'social justice' model is noted by Abram, who points out that it is rarely clear which groups are sufficiently disadvantaged to deserve special treatment, nor how the matter should be determined. Since different groups have had different historical and social experiences, it becomes difficult to weigh and judge the varying grievances of these groups for the purpose of deciding the varying levels of compensation which should be paid to them. According to Abram, in the absence of neutral means of determining target groups, affirmative action becomes a "crude political struggle" between groups seeking favoured status. Unfortunately, it is the best organized, or most popular, groups who are likely to triumph in the struggle.[19]

---

[18] *Supra* note 14 at 118.

[19] *Supra* note 11 at 1321.

Even if section 15(2) does give constitutional effect to the group-centred social justice model of equality, the theoretical and practical problems with this model, taken together, support a cautious approach to constitutionally problematic affirmative action. As will be discussed below, the recent decisions of the European Court of Justice and the United States Supreme Court, in fact, demonstrate just such an approach.

IV. AFFIRMATIVE ACTION IN CANADA

A. Section 15(2) of the *Charter of Rights and Freedoms*

Section 15(2) of the *Charter* has seen little judicial interpretation. Nevertheless, a review of the jurisprudence that does exist demonstrates that courts have generally resisted permitting governments to legitimize discriminatory treatment under the guise of a section 15(2) ameliorative program and, instead, have sought to narrow the potential scope of the provision. However, there are definite exceptions, leading ineluctably to the conclusion that a coherent approach to section 15(2) has yet to emerge.

The case of *Silano* v. *British Columbia* presents an interesting example.[20] In *Silano*, the British Columbia Supreme Court was faced with a challenge to the validity of a provincial social assistance program, under which the guaranteed income distributed to recipients was higher for those over the age of 26 than for those under 26. The Court found that the program infringed section 15(1) because it embodied differential treatment based upon age, an enumerated ground of discrimination. Moreover, it was held that the choice of the age of 26 as a dividing line was unreasonable and unfair. More germane to the present discussion, however, is the fact that the *Silano* bench rejected the use of section 15(2) as a mechanical 'saving' provision for any law or program with an ameliorative purpose. In applying section 15(2), the Court adopted a 'rational connection' criterion, and concluded that persons over the age of 26 were not shown to be more disadvantaged by reason of age than those under the age of 26. Basing a distinction on this age difference was, therefore, irrational, with the result that section 15(2) was inapplicable.

A contrary analytical approach to section 15(2) appears in the more recent decision of the Ontario Court (General Division) in *R.* v. *Willocks*,[21] where an affirmative action program was challenged because it benefited one particular

[20] (1987), 42 D.L.R. (4th) 407 (B.C.S.C.).
[21] (1995), 22 O.R. (3d) 552 (Gen. Div.).

disadvantaged group, but not any other. In this case, Watt J. was faced with a claim by a Jamaican-Canadian accused of spousal assault that his section 15 rights were violated when he was denied participation in an alternate justice program available only to Aboriginal offenders. Watt J. dismissed the claim, principally concluding that the alleged differential treatment was not caused by the application of the law. Hence, section 15(1) was not triggered. In the alternative, Watt J. held that the alternate justice program, even if found to be discriminatory, would be immunized from review because it constituted a "special program" under section 15(2). The government could thus rely on section 15(2) to defend such a program, since the provision permits the allocation of social benefits to one disadvantaged group and not to others. Watt J. elaborated a test for the application of section 15(2):[22]

> In any program which is designed to ameliorate the conditions of a disadvantaged group, others will be "disadvantaged" as a result of their non-eligibility for participation. Section 15(2) acknowledges as much. What must be avoided is gross unfairness to others. The *Charter* does *not* ask ... that an affirmative action program within ... section 15(2) .. address at once all individuals or groups who suffer similar disadvantage. *There must be some room left to establish and give effect to priorities amongst disadvantaged groups, provided there is no gross unfairness. There is none here ....*

As we shall argue in Part VII below, Watt J.'s adoption of the "gross unfairness" test to 'save' the alternate measures program exceeds the proper scope of section 15(2). It will suffice, at this stage, to note that the "gross unfairness" test does not appear to have any roots in the prior jurisprudence, nor has it been followed in any case-law subsequent to *Willocks*.

Section 15(2) has received very limited attention from the Supreme Court of Canada, especially in terms of its use as a justification for legislation found to infringe section 15(1). Such an argument, however, was raised by the Attorney

---

[22] *Ibid.* at 571 [emphasis added]. The "gross unfaimess" test, in all fairness, does recognize that the application of s. 15(2) should not be unfettered. Other Canadian courts, especially in the early days of *Charter* litigation, simply viewed s. 15(2) as an exception to the general rule of equality established by s. 15(1). See, for example: *Re Apsit and Manitoba Human Rights Commission* (1985), 23 D.L.R. (4th) 277 (Man. Q.B.) at 285-86. In our view, such a blind application of s. 15(2) to exempt any ameliorative measure from the guarantee of equality leads to unpredictable and undesirable results. Interestingly enough, in a subsequent decision, the same court abandoned the broad exemptive approach to s. 15(2) and adopted a more nuanced "rational connection" approach, stating that s. 15(2) could only be triggered when there is a real nexus between the object of the program and its form and implementation: *Apsit* v. *Manitoba Human Rights Commission*, [1988] 1 W.W.R. 629 (Man. Q.B.) at 642 ("*Apsit No. 2*"). The merits of this "rational connection" approach are discussed *infra*.

General for Ontario in the case of *R.* v. *Hess and Nguyen.*[23] That case concerned the constitutional validity of section 146(1) of the *Criminal Code*, which provided that every male person who has sexual intercourse with a female person (who is not his wife) under the age of fourteen years would, on an absolute liability standard, be found guilty of an indictable offence. The accused raised the argument, ultimately unsuccessful, that this provision violated his right to equality under section 15(1). In response to this argument, the Attorney General for Ontario submitted that section 146(1) should be saved by section 15(2), because section 146(1) seeks to promote the well-being of young women, a historically disadvantaged group.

The only Justice to address the affirmative action point was McLachlin J., who wrote for herself and Gonthier J. To this end, the *Hess* decision is of limited persuasive value concerning the interpretation of section 15(2). Nevertheless, McLachlin J.'s comments merit discussion. In short, she perfunctorily dismissed the Attorney General for Ontario's submission. McLachlin J. was clearly concerned with the potential overreach of section 15(2), and thus suggested some limiting criteria. In her own words:[24]

> I prefer the approach to section 15(2) adopted by Huddart L.J.S.C. in *Re MacVicar and Superintendent of Family and Child Services* (1986), 34 D.L.R. (4th) 488 (B.C.S.C.) at pp. 502-3:
>
> > To ensure that the section 15(1) guarantee of equal protection and benefit has real effect, section 15(2) must be construed as limited to its purpose .... It was not intended to save from scrutiny all legislation intended to have positive effect ....

The *MacVicar* decision, referred to by McLachlin J., concerned a section 15 challenge to section 8(1)(b) of the *Adoption Act,*[25] which stipulated that the

---

[23] *Supra* note 5.

[24] *Ibid.* at 946. An adjunct to the potential overreach of s. 15(2) is the fact that its breadth may promote lawsuits incompatible with any interpretation of affirmative actions. For example, in *R.* v. *Music Explosion Ltd.* (1990), 59 C.C.C. (3d) 571, the Manitoba Court of Appeal was faced with a claim that a municipal by-law requiring parental consent in order for a minor under sixteen years of age to play a licensed videogame constituted affirmative action and, hence, fell within s. 15(2). Incredibly, this argument was successful at trial, where it was held that the by-law ameliorated the condition of a disadvantaged group because of age and mental disability, specifically lack of maturity. On appeal, the Manitoba Court of Appeal reversed, concluding that the by-law restricted the rights of young people. It is hoped that the development of a coherent theory to s. 15(2) will discourage such litigation. Again, the decision at trial shows the undesireable results of viewing s. 15(2) as a blind exception to s. 15(1) which is triggered whenever an ameliorative purpose, however remote, is ascribed to the impugned legislation.

[25] R.S.B.C. 1979, c. 4.

written consent of the parents of a child must be provided in order for the adoption of that child to occur. However, where the mother and father "have never gone through a form of marriage with each other," the statute only mandated the consent of the mother. It was held that this latter provision violated section 15(1) on the basis of sex and marital status.

The Superintendent of Family and Child Services submitted that this section 15(1) violation could be excused on the basis of section 15(2). It was claimed that because section 8(1)(b) eliminated the need to locate an unknown or reluctant father, the provision was ameliorative to children by speeding up the adoption process. Although Huddart L.J.S.C. ultimately found that section 8(1)(b) was not in the nature of affirmative action and, therefore, was outside the scope of section 15(2), he did offer some comments on when section 15(2) would be applicable.[26] As in *Silano*, an approach was proferred which focused on the need for a "rational connection":[27]

> Section 15(2) is intended to protect legislation which singles out a group for preferential treatment in order to cure a disadvantage. There must be a rational connection between the preferential treatment and the disadvantage. Section 15(2) excuses discrimination under section 15(1) if the persons in favour of whom the distinction is made are disadvantaged and the object of the discrimination is the amelioration of that disadvantage.

Consequently, had Huddart L.J.S.C. determined that the section 8(1)(b) program was of an affirmative action nature, he would have justified it under section 15(2). After all, section 8(1)(b) created a distinction between women and men which promoted the interests of women over those of men. However, this simplistic approach ignores the context in which section 8(1)(b) operates. First, it fails entirely to query how permitting an unmarried mother to unilaterally decide whether a child should be placed for adoption reduces the disadvantage faced by women and children in society. Second, it fails to address the issue of whether the fact that two parents are not married to each other is a reasonably reliable indicator that the father will somehow impede the adoption process. It is interesting to note that, although he advocated a fairly mechanical and decontextualized interpretation of section 15(2), Huddart L.J.S.C. himself recognized the dangers of such an approach:[28]

> If [section 8(1)(b)] could be saved, little discriminatory legislation could ever be attacked successfully, for almost all positive law has as its stated object the betterment or amelioration of the conditions in our community of a disadvantaged individual or group.

---

[26] McLachlin J. did not refer to these in her reasons in *Hess*.

[27] (1986), 34 D.L.R. (4th) 488 (B.C.S.C.) at 502.

[28] *Ibid.* at 503.

B. Affirmative Action Under Human Rights Legislation

The recognition of the legitimacy of affirmative action programs in federal and provincial human rights legislation is, in a sense, of more direct importance to the lives of Canadians than section 15(2). Unlike the *Charter*, which applies only to state action, human rights legislation binds private employers and individual citizens. Further, as the Supreme Court of Canada has held, human rights statutes are quasi-constitutional in nature, and are to be given a broad and purposive interpretation so as to ensure the attainment of their objectives.[29] At the very least, then, the interpretative approaches adopted by courts in relation to affirmative action savings provisions in human rights legislation will provide some guidance for section 15(2).

A recent decision of the Ontario Court of Appeal, interpreting section 14(1) of the *Ontario Human Rights Code*, squarely addresses the extent to which affirmative action provisions permit derogations from the principle of equal treatment. Section 14(1) states:[30]

> A right under Part I [the substantive rights] is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

In *Re Ontario Human Rights Commission* v. *Ontario*[31] (hereinafter *"OHRC"*), the Court was faced with a challenge to the validity of a financial assistance program ("ADP") designed by the provincial Ministry of Health to assist visually impaired persons to purchase closed circuit television magnifiers. Eligibility for the program was, at all relevant times, limited to those under twenty-two years of age.

---

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

[30] The language of some of the other Canadian human rights statutes is very similar to s. 14(1) of Ontario's *Code*. See, for example: *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 16(1); *Nova Scotia Human Rights Act*, R.S.N.S. 1989, c. 214, s. 6(h)(i); *Manitoba Human Rights Code*, S.M. 1987-88, c. 45, s. 11. Other provinces broadly exempt "special programs" approved by the human rights commission from compliance with the provisions of the provincial human rights legislation. See, for example: *Newfoundland Human Rights Code*, R.S.N. 1990, c. H-14, s. 19; *Northwest Territories Fair Practices Act*, R.S.N.W.T. 1988, c. F-2, s. 9. Some provinces, such as Alberta, Saskatchewan and Prince Edward Island, have not dealt with the issue of affirmative action in their human rights legislation.

[31] (1994), 19 O.R. (3d) 387 (C.A.).

The plaintiff in *OHRC*, Edwin Roberts, was a seventy-one year-old man who, although otherwise eligible for the financial assistance, had his claim denied on the basis that he was too old. Although he could have challenged the ADP under section 15(1) of the *Charter*, he instead alleged that it violated his right under sections 1 and 8 of the *Ontario Human Rights Code* to equal treatment with respect to services provided. Age is a prohibited ground of discrimination under section 1 of the *Code*.

A Board of Inquiry was appointed to assess Robert's claim. It found that, although the age restriction in the ADP appeared to violate the *Code*, it was a "special program" saved by section 14(1). The Human Rights Commission unsuccessfully challenged this decision in Divisional Court, which held that once a program is found to be a "special program" under section 14(1), then it is automatically exempted from review under the *Code*. The Court of Appeal, in a split decision, reversed the lower courts and found in favour of Roberts.

Houlden J.A. would have applied a rational connection test in determining whether or not the ADP was exempted from the application of the *Code* by reason of section 14(1). In his view, the mere finding that a program is a "special program" under section 14(1) is insufficient to trigger the provision. Instead, there must also be "a rational or logical basis" for the discrimination caused by the program. He wrote:[32]

> … where exclusion from an affirmative action program is based on one of the prohibited grounds in section 1, there must, in my opinion, be a rational or logical connection between the prohibited ground and the provision of services under the program; otherwise, the special program instead of relieving discrimination results in discrimination.

Houlden J.A. observed that the ADP is restricted on two grounds: handicap and age. While he agreed that limiting the program to visually impaired persons was protected by section 14(1),[33] he repeatedly emphasized that the age restriction in the ADP "has no logical or rational connection with admission to the program."[34] For this reason, the age restriction could not be justified under section 14(1). However, Houlden J.A. added that "if it could be shown that those excluded by age from the special program were more advantaged than those who were eligible for the program," then section 14(1) would apply.[35]

---

[32] *Ibid*. at 426. The "rational connection" approach was also adumbrated by the Manitoba Court of Queen's Bench in *Apsit No. 2*, *supra* note 22.

[33] *Ibid*. at 423.

[34] *Ibid*. at 429. See also at 425 & 430.

[35] *Ibid*. at 429.

Like Houlden J.A., Weiler J.A. disagreed with the view of the lower courts that section 14(1) operates as an automatic exemption for "special programs." In her view, the provision has two purposes: to exempt affirmative action programs from review and to promote substantive equality.[36] Thus, an affirmative action program which discriminates in a manner contrary to substantive equality is not protected under section 14(1). This conclusion, according to Weiler J.A., follows from the general raison d'etre of the *Code* itself, namely the promotion of substantive equality:[37]

> Affirmative action programs are aimed at achieving substantive equality by enabling or assisting disadvantaged persons to acquire skills so that they can compete equally for jobs on a level playing field with those who do not have the disadvantage. In relation to daily living, affirmative action programs are aimed at assisting those with a disadvantage to attain the same level of enjoyment of life as those who do not have the disadvantage.

Weiler J.A. then drew a distinction between challenges to affirmative action based on substantive equality grounds, and those asserting formal equality, because "[a]ffirmative action programs are best protected by statute from challenges based on the principles of formal equality."[38] Section 14(1) exempts programs from attack by persons outside the disadvantaged group (generally 'advantaged' persons), in order to ensure that a person who is not disadvantaged in a manner addressed by the program cannot challenge its legality by reliance on formal equality or equal treatment. Thus, Weiler J.A. wrote:[39]

> The words of section 14(1) are clear; exclusion of an individual from a program designed to respond to needs that an individual does not have, does not constitute reviewable discrimination.

Since Roberts was not a person falling outside the group which needs financial assistance for visual aid devices, section 14(1) could not be relied upon to justify excluding him from the ADP.[40] In fact, Roberts was a person who would have benefited from the program but for a distinction drawn on the basis of age, a

---

[36] In reaching this conclusion, Weiler J.A. drew heavily from the legislative history of the *Ontario Human Rights Code* (*ibid*. at 397). See specifically: Ontario Legislative Assembly Debates, vol. 5 (9 December 1980) at 5096-98; vol. 4 (1 December 1981) at 4114. Some academic authors would agree, for example Keene, *supra* note 2 at 165-66: "[S]ection 14, while technically an exception to the *Code*, is in fact clearly intended to allow enhancement of the rights of the groups protected by the legislation."

[37] *Supra* note 31 at 399-400.

[38] *Ibid*. at 400.

[39] *Ibid*. at 401 (emphasis in original).

[40] *Ibid*.

prohibited ground of discrimination under the *Code*. On this point, Weiler J.A. concluded:[41]

> To say that section 14(1) exempts the *age discrimination* in the .. ADP program from review, is to interpret the section so as to permit substantive equality to be undermined, when substantive equality is one of the section's very purposes .... Fairness, and the recognition of substantive equality, require that discrimination, in the provision of a service to a person who is a member of a disadvantaged group for whom a special program is designed, not be tolerated and be subject to review.

She then proceeded to address the issue of rational connection. She found persuasive the reasons of the British Columbia Supreme Court in *Silano*,[42] concerning the use of a rational connection test under section 15(2), and further observed:[43]

> Although not similar in wording, section 15(2) of the *Charter* and section 14(1) of the *Code* are similar in spirit .... Both section 15(2) of the *Charter* and section 14(1) of the *Code* are aimed at protecting substantive equality .... When two pieces of remedial legislation, such as section 15(2) of the *Charter* and section 14(1) of the *Code* share the same purpose, it is desirable that in so far as possible they be interpreted in a congruent manner.

Thus, Weiler J.A. agreed that affirmative action programs should be designed so that the exclusion of members of certain groups from the program is rationally connected to the program.[44] When "an individual whom a special program is designed to assist is being discriminated against and…there is no rational connection between the prohibited ground of discrimination and the program, [then] the provider of the program must remove the discrimination."[45]

The analyses of Houlden and Weiler JJ.A. are quite similar, as both viewed the purpose of section 14(1) as the promotion of 'substantive equality,' both applied a rational connection test, and both found that the age discrimination in the ADP was irrational, thereby preventing the application of section 14(1). In assessing the relevance of their reasons to the interpretation of section 15(2), it is important to recall that there are significant differences between the analyses of discrimination under human rights legislation, and under the *Charter*. As was noted by Houlden J.A., the ADP discriminated on two grounds: disability and age. Section 14(1) exempted the ADP from challenge by a non-visually-impaired person, because those who are visually-impaired (like Roberts) have

41 *Ibid*. at 402.
42 *Supra* note 20.
43 *Supra* note 3 at 405.
44 *Ibid*. at 406. Weiler J.A. also uses the term "reasonably related" at 407.
45 *Ibid*. at 407.

a real need for visual aid devices which is simply not shared by others. This application of section 14(1) makes perfect sense, of course, because an allegation of discrimination against the ADP by a sighted person would be absurd. However, recourse to section 14(1) is necessary even in the case of a common sense distinction premised on disability because the *Ontario Human Rights Code*, like other human rights statutes, deems any distinction based on a prohibited ground to be discriminatory. Such legislation takes equal treatment as the general principle, with considerations of substantive equality becoming relevant at the justification stage. The situation is different under section 15 of the *Charter*, since considerations of substantive equality operate at the level of section 15(1). Thus, a mere distinction based on an enumerated ground is not discriminatory unless it imposes a burden, obligation or disadvantage on the members of one group, which is not imposed on the members of another group.[46] The fact that a sighted person is denied financial assistance for visual aid devices would hardly be discriminatory under this test, since real and relevant differences between individuals, arising from group membership, may form the basis of legislative distinctions without infringing section 15(1).

Since section 15(1) takes into account matters of substantive equality, it is difficult to understand Weiler J.A.'s analogy between section 14(1) (which she construed as giving effect to substantive equality), and section 15(2) (which seems to reach beyond substantive equality, for the purpose of giving effect to the social justice model). Perhaps the true parallel between the Ontario Court's interpretation of section 14(1) and section 15(2) lies in Houlden J.A.'s concluding comment that if it had been shown that those excluded by age were more advantaged than those who were eligible for the program, then section 14(1) may well have applied.[47] Both Weiler and Houlden JJ.A. appear to have taken the position that article 14(1) allows group membership to be adopted as a criterion for the allocation of social benefits where there is some evidentiary basis[48] for concluding that group membership is an indicator of whether the

---

[46] *Andrews* v. *Law Society of British Columbia*, *supra* note 4.

[47] *Supra* note 31 at 430.

[48] Neither Weiler nor Houlden, JJ.A. provide direction as to what the evidentiary standard should be (i.e., 'reasonable'?; 'compelling'?; 'striking'?). On this note, the British Columbia Court of Appeal, in a very indirect reference to s. 15(2) and its evidentiary requirements, noted that in order for s. 15(2) to be triggered, the group given a special advantage must be shown to be disadvantaged in comparison with persons denied the advantage: *Harrison* v. *University of British Columbia*, [1988] 2 W.W.R. 688 (C.A.). The Court then added that in this determination, it would have to be shown that the need to exclude others from the benefits conferred by the ameliorative program was "properly considered." In our view, such a lax standard is equally directionless, with the added caveat that it may be prone to misuse.

individual members are 'advantaged' or 'disadvantaged.' Such an approach is related to the social justice model of equality, although as noted above, it is fraught with difficulties because notions of 'advantage' and 'disadvantage' are inherently relative and subjective. For example, if a young, white single father is denied a job or a place in a training program because an employment equity policy requires that the job or training be given to a women or a member of a racial minority, will his discrimination claim under the *Code* be barred by section 14(1)? Some might well argue that his situation as a single father makes him disadvantaged; others might say that his white male status makes him advantaged. It seems problematic to premise derogations from the basic principle of equal treatment upon such shifting ground. Moreover, we must decide whether, and to what extent, we are prepared to accept a society in which the *actual* wants and needs of individuals are ignored in preference to *assumptions* about their wants and needs derived from their personal characteristics. In the case of invidious discrimination, human rights legislation is designed precisely to overcome the use of such assumptions. In the case of affirmative action, one can say at the very least that employing such assumptions to allocate social benefits is bound to lead to a rough form of social justice.

OHRC demonstrates that a searching inquiry should be undertaken before a court condones the use of an individual complainant's group membership as indicative of 'advantage' or 'disadvantage.' Even assuming that it was reasonably open to the Ontario Health Ministry to conclude that older persons like Roberts are more financially secure, and thus better able to afford visual aid devices without government assistance, why should the Ministry be allowed to generalize about Roberts' financial needs from his age, when it could reasonably have inquired about his actual needs? As Houlden J.A. observed, means tests based an a person's actual needs could have been adopted by the Ministry, thus avoiding entirely the age discrimination.[49]

Ultimately, *OHRC* decides that the allocation of social benefits to individuals on the basis of their group membership, where group membership is an irrational basis for determining individual needs, is impermissible despite the existence of an affirmative action saving provision like section 14(1). This should hardly be considered a controversial holding, and as will be argued in Part VII below, the rational connection principle should be part of the interpretative analysis for section 15(2). The more interesting questions, not resolved by *OHRC*, include: may the state (or a private party) confer benefits only on members of 'disadvantaged' groups, even though alternative approaches (such as individual

[49] *Supra* note 31 at 425.

means testing) are available which would provide better evidence of actual need than group membership?; and how reliable must group membership be as an indicator of disadvantage and need before the state can adopt it in lieu of individualized testing? If there is to be a coherent approach to Canadian affirmative action saving provisions like section 15(2) and section 14(1), then these questions must be answered. To this end, we turn to the recent jurisprudence from Europe and the United States.

V. AFFIRMATIVE ACTION IN THE EUROPEAN COMMUNITY

On February 9, 1976, the states of the European Community ('EC') adopted Directive 76/207, which requires each state to implement the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The mandate of the EC in the field of anti-discrimination law is thus narrow, relating solely to sex discrimination in employment-related matters. Article 2(1) of the Directive defines "equal treatment" to mean that "there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status." Several exceptions, or derogations, from the principle of equal treatment are then outlined. These include:

> Article 2(2) – This directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.
>
> Article 2(3) – This directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.
>
> Article 2(4) – This directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in (access to employment, vocational training and promotion, and working conditions).

Articles 2(2) and (3) have been interpreted to apply to employment situations where actual physical or biological differences between men and women justify distinguishing between the sexes in employment. Article 2(2), for example, would justify a theatre company in auditioning and hiring only male actors to play male roles, while article 2(3) could be advanced by an employer to support an employer's maternity leave policy. These provisions give effect to the concept of 'substantive equality,' by ensuring that legitimate, relevant differences between the sexes can be taken into account in employment without contravening the principle of equal treatment. The European approach is not unlike that of Canada, where sex-based distinctions premised on actual, relevant

differences between men and women would not be discriminatory and, therefore, would not contravene section 15(1) of the *Charter*.[50]

On the subject of affirmative action, article 2(4) of Directive 76/207 is the European equivalent of section 15(2) of the *Charter*. Both provisions contemplate positive action to achieve anti-discrimination goals, and both operate as derogations from the principle of equality. The European Court of Justice (E.C.J.) has had two opportunities to consider the meaning and scope of article 2(4), and has adopted a strict interpretation of permissible positive action.

First, in *Commission* v. *France*,[51] the European Commission challenged France's implementation of Directive 76/207 as failing to bring the provisions of French collective agreements into conformity with the principle of equal treatment. Although France had taken some measures to amend its *Labour Code* in a manner consistent with the Directive,[52] it had refused to declare void any terms in existing collective agreements granting particular, or special, rights to women. Instead, the *Labour Code* amendments preserved all existing particular rights, while stipulating that "employers, groups of employers and groups of employed persons shall proceed, by collective negotiation, to bring such terms into conformity with the provisions [(of Directive 76/207)]."[53] France had, therefore, preferred to rely on collective negotiations, as opposed to legislation, to ensure that collective agreements satisfied the requirements of the Directive.

The case was argued by the European Commission primarily on the basis that France had contravened the principle of equal treatment by explicitly preserving all particular rights granted to women but denied to men. France countered that its blanket exemption of the particular rights was permitted by Articles 2(3) and (4) of the Directive. Essentially, then, France advanced an affirmative action argument to justify its refusal to legislate-away the allocation of certain employment rights on the basis of sex. In particular, France sought to justify the continued existence of the following special rights for women under Article 2(4): the reduction of working time for women over 59 years of age; an earlier retirement age; time off for the adoption of a child; leave for sick children; a day off on the first day of the school year; hours off on Mother's Day; and payments to assist in meeting the costs of child care.[54]

---

50 See *Hess, supra* note 5.

51 Judgment of October 25, 1988, Case 312/86 at 6315.

52 France had, in fact, passed Law 83-635, which imposed a general prohibition on the adoption in collective agreements of measures which discriminated on the basis of sex.

53 *Supr*a note 51 at 6318, see Article 19.

54 *Supra* note 51 at 6321.

As is customary in proceedings before the European Court of Justice, the Court had the benefit of the reasons of an Advocate General prior to rendering its own decision. In his opinion, Advocate General Sir Gordon Slynn considered the question of whether the specific provisions of Article 2 of the Directive could support the retention of certain special rights for women. Slynn observed, however, that derogations from the principle of equal treatment must be strictly construed, and that the purpose of Article 2 is to ensure that men and women receive equal treatment save where there is a relevant difference between the sexes (i.e. a biological or reproductive difference) justifying differential treatment. Applying this test, Slynn found that particular rights for women, such as a lower retirement age, or special child care benefits, could not be justified under either Articles 2(3) or 2(4). He reasoned:[55]

> It cannot, however, be said that men do not, or may not ever, need such rights or privileges or that the latter can be classified as relating solely to the biological condition of womanhood. A father, in modern social conditions, may just as much be responsible for looking after sick children or need to pay childminders; he may no less for health reasons need to retire early or to have time off from certain stressful jobs. *France's insistence on the traditional role of the mother, as I see it, ignores developments in society whereby some men in 'single parent families' have the sole responsibility for children or whereby parents living together decide that the father will look after the children, in what would traditionally have been the mother's role, because of the nature of the mother's employment.*

Thus, because France was promoting a traditional and stereotypical view of the roles of men and women in society, it could not rely on the derogations from equal treatment found in Article 2 of the Directive to justify denying certain employment benefits to men. France was, therefore, in breach of its duty to implement legislation to achieve the equal treatment of men and women. Although the removal of the impugned benefits from women was an alternative available to France, "equality could equally well be achieved by a levelling-up process applying the same benefits to men."[56]

The E.C.J. endorsed Slynn's view of Article 2(4), holding as follows:[57]

> The exception provided for in Article 2(4) is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life.

Because many of the special rights which France sought to justify were equally needed and desired by both men and women (for example, child care

---

[55] *Ibid*. at 6328 [emphasis added].
[56] *Ibid*. at 6330.
[57] *Ibid*. at 6336-37.

subsidies), France could not rely on Article 2(4). France had, therefore, failed in its duty to implement Directive 76/207.

Commission v. *France* demonstrates the danger that affirmative action arguments can be advanced by the state to justify paternalistic, stereotypical, and counterproductive measures. The French government argued that any particular right granted to women was, by that fact alone, a protective measure designed to ameliorate existing disadvantages experienced by women. Two counter-arguments demonstrate the fallacy of France's reasoning. First, where both men and women are equally in need of a right or benefit (for example, reduced working hours after the age of 59), then any distinction based on sex must be irrational, since it cannot be directed at reducing an actual inequality between men and women. Second, and most importantly, this kind of irrational distinction has not arisen by chance, but is a reflection of gender stereotypes. Thus, women are granted shorter working hours than men because they are 'the weaker sex,' or they have a right to the exclusive receipt of child care subsidies because they are 'primary care givers.' In fact, most of the particular rights supported by France were premised on stereotypical views of women's physical abilities and family roles. Their continued existence could only impede the attainment of equal treatment, by perpetuating the social attitudes which give rise to sex discrimination. It is clearly a misuse of affirmative action to allocate social benefits between 'have' and 'have-not' groups on the basis of the very stereotypes which have relegated individuals to 'have not' status. France's position that certain 'benefits,' such as a lower retirement age for female workers, constituted affirmative action for women seems patronizing.

The European Court of Justice's next, and most recent, foray into the affirmative action debate came in *Kalanke* v. *Freie Hansestadt Bremen*.[58] There, the applicant was a male worker, who had failed to receive a promotion because the respondent, the German city of Bremen, had decided to promote another equally qualified employee, a women. Bremen had passed a law stipulating that:

> In the case of an assignment to a position in a higher pay, remuneration and salary bracket, women who have the same qualifications as men applying for the same post are to be given priority if they are underrepresented.

Kalanke brought proceedings under German law, and the Federal Labour Court concluded that a 'tie-breaker' system, which gave preference to equally qualified women over men, was compatible with German constitutional and civil law. However, the Court referred the issue to the E.C.J., for a determination of

[58] *Supra* note 1 at 660.

whether German law was consistent with Directive 76/207. A basic affirmative action issue was, therefore, at stake: could sex be used as a determining factor in hiring, without contravening the principle of equality between the sexes?

Advocate-General Tesauro's advisory opinion concluded that Bremen's 'tie-breaker' policy was inconsistent with Article 2(1) of Directive 76/207, and could not be salvaged by Article 2(4). Tesauro took a theoretical approach to the affirmative action issue before him, noting that positive action is generally viewed as a means of achieving equality for disadvantaged groups by granting preferential treatment to them. Therefore, it is a product of the "collective," as opposed to "individual," vision of equality.[59] Tesauro then observed that the 'tie-breaker' principle, which applies wherever women make up less than fifty percent of the workforce, constitutes a quota system falling within this 'collective' model, and is obviously discriminatory on the basis of sex.

The issue considered by Tesauro was whether the 'tie-breaker' could be saved under Article 2(4) of Directive 76/207. He interpreted this provision as follows:[60]

— Article 2(4) authorizes Member states of the EC to adopt measures benefiting women which require some positive state action in order to implement them;

— However, on its face, Article 2(4) permits only positive action which is designed to promote and achieve equal opportunities for men and women, in particular by removing the existing inequalities which affect women's opportunities in the field of employment;

— Equality of opportunity, in the context of Article 2(4), means putting people in a position to attain equal results, and hence restoring conditions of equality as between members of the two sexes as regards starting points.

In light of these three points, Tesauro concluded that it was "obvious" that the impugned 'tie-breaker' policy was "not designed to guarantee equality as regards starting points," but instead guaranteed equal "results" by imposing a quota that women make up fifty percent of the workforce.[61] He thus turned to the issue of whether Article 2(4) could support state actions entailing the predetermination of "results" through the imposition of quotas. In examining the provision more closely, Tesauro observed that while the purpose of Article 2(4) is the promotion of substantive equality:[62]

59 *Ibid*. at 662.
60 *Ibid*. at 662-63.
61 *Ibid*. at 663.
62 *Ibid*.

> …that objective may be pursued only through measures designed to achieve an actual situation of equal opportunities, with the result that the only inequalities authorized are those necessary to eliminate the obstacles or inequalities which prevent women from pursuing the same results as men on equal terms.

Article 2(4), in the view of Tesauro, should be construed as a derogation from the principle of equal treatment, allowing for preferential treatment to ameliorate the general situation of disadvantage experienced by women, which is caused by past discrimination and the existing difficulties connected with playing a dual (i.e., familial and career) role.[63] Tesauro observed that hiring quotas were irrelevant to the disadvantage experienced by women resulting from their traditional familial role. Instead, what was mandated by Article 2(4) included measures relating to the organization of work, and in particular, working hours and child care. With regard to the present effects on women of past discrimination, Tesauro agreed that women continue to be marginalized in employment, and that Article 2(4) mandated positive measures to eliminate this condition of disadvantage. However, such positive action may only be directed at "opportunities," and not "results," and "must therefore be directed at removing the obstacles preventing women from having equal opportunities."[64] Examples of such measures would include educational guidance and vocational training. Ultimately, according to Tesauro, positive action should not be employed to remedy, "through discriminatory measures, a situation of impaired inequality in the past."[65] Bremen's policy of granting women priority in hiring simply because of their sex thus conflicted with Directive 76/207, and could not be saved by Article 2(4).

Having reached this conclusion, Tesauro then criticized the impugned 'tie-breaker' plan. First, he noted that employment quotas for a particular group are triggered by that group's under-representation in a particular sector. However, simple under-representation is not necessarily attributable to discrimination. Affirmative action allocating benefits to members of disadvantaged groups is, therefore, "mechanical," and has an "inherent element of arbitrariness."[66] Second, even if under-representation of a group in the workplace is linked to past discrimination, then affirmative action quotas merely rebalance the workforce without removing the obstacles that created the situation. Thus:[67]

---

63 *Ibid*. at 664.
64 *Ibid*.
65 *Ibid*.
66 *Ibid*. at 665.
67 *Ibid*.

> Formal, numerical equality is an objective which may salve some consciences, but it will remain illusory and devoid of all substance unless it goes together with measures which are genuinely destined to achieve equality.

Advocate-General Tesauro's detailed advisory opinion to the E.C.J. stands in contrast to the very brief reasons handed down by the Court[68], which also concluded that Bremen's 'tie-breaker' policy contravened Directive 76/207, and was not saved by Article 2(4). Despite their brevity, the Court's reasons endorse the theoretical perspective taken by Tesauro and, in particular, confirm his view that the purpose of Article 2(4) is to promote equality of opportunity, and not equality of outcome. The Court stated first that because Article 2(4) is a derogation from the principle of equal treatment, it should be interpreted strictly. It went on to hold that:[69]

> National rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive.
>
> Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity.

Thus, the E.C.J. has committed itself to the view that because Article 2(4) derogates from the principle of equal treatment only with regard to *equal opportunities*, then it cannot be employed to justify a measure allocating actual jobs to women, for the sole reason that they are women. Unlike Advocate-General Tesauro, the E.C.J. provided no reasons for its view that conferring a job on a person because of her sex is inconsistent with equality of opportunity. However, this conclusion seems to follow from the overriding importance of 'equal treatment' in Directive 76/207 (which requires that men and women be treated the same way in employment), and the strict interpretative approach taken by the Court in relation to the derogation found in Article 2(4).

Certainly, the *Kalanke* decision demonstrates considerable judicial caution in the field of affirmative action. However, it would appear that there is still room under Article 2(4) for limited but, nevertheless, group-based, affirmative action measures benefiting women, even if such measures result in unequal treatment of the sexes. For example, Advocate-General Tesauro was of the view

---

[68] Because the European Court of Justice is required to render unanimous judgements, its reasons tend to be brief, in order to accommodate the competing views of the various judges.

[69] *Ibid*. at 667-68.

that Article 2(4) permits vocational training programs to be directed solely at women, to address their under-representation in a particular sector. In his view, vocational training promotes equality of opportunity, as opposed to equality of results and is, therefore, a permissible group-based derogation from equal treatment. To this limited extent, then, Article 2(4) has been given an interpretation consistent with the social justice model of equality: a social benefit – for example, vocational training – may be allocated solely to women, because of their sex, so long as receipt of the benefit promotes equality of opportunity, and not equality of results.[70]

While this might appear to be a neat resolution to the affirmative action dilemma presented by *Kalanke*, the task of drawing a line between opportunities and results may prove problematic for the Court (and other European courts applying the *Kalanke* decision) in the future. For example, will the Court really be prepared to uphold under Article 2(4), a program in a Member state which grants job training only to women, while denying it to men? Obviously, training programs are an important social benefit, desired by both men and women. Denying a place in a program to an individual because of his sex seems to be a breach of the principle of equal treatment qualitatively similar to the breach considered in *Kalanke*. Moreover, training programs are designed to lead to jobs, and some jobs may well be conditioned on the completion of a training program. Consider, for example, a training program for air traffic controllers, in which the only persons hired as air traffic controllers are those who have completed the program. Would an affirmative action program guaranteeing positions for women in such a program promote equality of opportunity, or equality of outcome? Perhaps the answer depends on the factual relationship between the training program and eventual employment. If a training program leads inexorably to a job, then the program and the job are so closely linked that the implementation of a quota for women within the training program should be classified as an 'equality of outcome' measure. A more tenuous link between the training program, and eventual employment, might justify considering the training as an 'opportunity' measure. Ultimately, the distinction between opportunities and outcomes is not entirely clear.

[70] J.E. Morrison argues in his article, "Color-blindness, Individuality and Merit: An Analysis of the Rhetoric Against Affirmative Action" (1994) 79 Iowa L.R. 313 at 313-14, that equality of opportunity promotes individualism, and is therefore incompatible with the social justice model. Yet, Advocate-General Tesauro was of the view that a group-based preferential policy could be classified as an equality of opportunity measure. It is submitted that Advocate-General Tesauro is correct that equality of opportunity and social justice are not mutually exclusive.

VI. AFFIRMATIVE ACTION IN THE UNITED STATES

The genesis of affirmative action occurred in the United States, yet this is also where its implementation has stirred the most controversy. On March 6, 1995, President Bill Clinton ordered an "intense, urgent review" of all executive orders requiring affirmative action, while his Republican rival for the Presidency in 1996, Senator Bob Dole, promised to eliminate all federal affirmative action programs. Moreover, several American states[71] held referendums in the 1996 Presidential election, asking voters to decide whether or not state-imposed affirmative action should be terminated.

The fact that affirmative action is in question in American political circles is reflected in the recent judgment of the United States Supreme Court in *Adarand Constructors, Inc.* v. *Pena*,[72] where the Court considered the constitutionality of a federal affirmative action program[73] giving general contractors a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged" persons. The decision is of considerable significance because the majority of the Court held that all government-imposed affirmative action programs awarding social benefits to members of disadvantaged racial groups should be viewed with scepticism and should, therefore, be subject to strict scrutiny. The appellant in the case, Adarand, is a construction company

---

[71] The six states are California, Washington, Florida, Illinois, Oregon, Colorado, and Nevada. The recent American political developments surrounding affirmative action are discussed in R.K. Robinson, R.L. Fink and B.M. Allen, "*Adarand Constructors, Inc.* v. *Pena*: New Standards Governing the Permissibility of Federal Contract Set-Asides and Affirmative Action" (1995) 48 Labor L.J. 661. Since his re-election in November 1996, however, President Clinton has been more supportive of affirmative action measures, particularly in relation to College admissions. See "Bucking Public and Courts, Clinton Calls for Affirmative Action" *International Herald-Tribune* (16 June 1997) 1.

[72] *Supra* note 1. For a detailed discussion of the history and significance of the case, see Robinson, Fink and Allen, *ibid*. See also: Minnich, *supra* note 16; J.A. Ellis, Case Comment, (1996) 34 Duquesne L.R. 403; G.S. Janoff, "*Adarand* v. *Pena*: The Supreme Court Requires Strict Equal Protection Scrutiny of Federal Government Affirmative Action Programs" (1995) 69 Tulane L.R. 1689.

[73] Under Federal law, all prime contracts must include a provision that the prime contractor will receive additional compensation if it hires subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals. The prime contract must also include a provision that "the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged …" See: *The Small Business Act*, 72 Stat. 384, as am.; 15 U.S.C. s. 631 ff.; *Surface Transportation and Uniform Relocation Assistance Act of 1987*, Pub. L. 100-17, 101 Stat. 132, s.106(c)(1).

specializing in guardrail work. In 1989, a highway construction contract was awarded by the Federal Department of Transportation to Mountain Gravel & Construction Co., which then solicited bids for guardrail work from subcontractors. Adarand submitted the lowest bid, but the contract went instead to Gonzales Construction Co., which was designated as a company controlled by "socially and economically disadvantaged" individuals. Because of this designation, Mountain Gravel received an additional payment[74] under the affirmative action program when it awarded the guardrail contract to Gonzales. However, it was clear that without this payment, the contract would have gone to Adarand.

Having lost the contract, Adarand filed suit alleging that the Federal program promoting the awarding of subcontracts to "socially and economically disadvantaged" individuals was a race-based preference which violated Adarand's constitutional right to equal protection as guaranteed by the Fifth and Fourteenth Amendments of the United States *Bill of Rights*. The lower courts had upheld the program by applying an intermediate level of scrutiny. The United States Supreme Court, by a 5-4 majority, held that the lower courts erred by failing to apply strict scrutiny.

For the Court,[75] Justice O'Connor first confirmed that the duty to uphold the principle of equal protection was the same for both the Federal government and the governments of the States. This position effectively laid to rest any suggestion that a Federal government law or program discriminating on the basis of race, sex or some other ground should be subject to less strict constitutional scrutiny than an identical State law or program.[76]

Justice O'Connor then turned to the issue of whether the standard of constitutional scrutiny applicable in equal protection claims should be more relaxed where the purpose of the impugned law or program is to ameliorate the conditions of an historically disadvantaged group. While it is clear that strict scrutiny should apply in cases where an impugned law disadvantages a 'discrete and insular' racial minority, the standard of scrutiny to be applied in challenges to affirmative action had not been firmly resolved by the Court in previous

---

74 The payment was approximately 10% of the final amount of the subcontract.

75 O'Connor J.'s opinion concerning the application of strict scrutiny was joined in its entirety by Rehnquist C.J. and Kennedy J. Scalia and Thomas JJ. both issued their own reasons, concurring with the view that strict scrutiny should be applied.

76 *Supra* note 1 at 2108.

decisions.[77] In *Richmond* v. *J.A. Croson Co*.,[78] a majority of the Court had concluded that the standard of scrutiny applicable in an equal protection claim involving a State law did not depend on the race of those burdened or benefited, and that strict scrutiny should be applied in analyzing all race-based classifications. Justice O'Connor considered *Richmond,* along with the prior jurisprudence, and identified three general propositions: 1) scepticism – any preference based on racial or ethnic criteria must receive a most searching examination; 2) congruence – the standard of review for equal protection claims should be the same regardless of the level of government involved;[79] 3) consistency – the standard of review for an equal protection claim should not depend on the race of those burdened or benefited.[80] In adopting this principle of consistency and, thereby, rejecting a lower standard of scrutiny for benign discrimination, or affirmative action, Justice O'Connor was of the view that it is not always clear whether a race-based classification is, in fact, benign. A classification which appears superficially benign may, in fact, be based on, or may reinforce, stereotypes.[81] On this point, Justice O'Connor emphasized that a racial classification premised merely on "good intentions" may well be perceived by many as resting on the assumption that those who are granted preferential treatment are less qualified in some respect arising purely from their race. Such a perception can only exacerbate, as opposed to reduce, racial prejudice. She thus concluded that:[82]

> … any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.
>
> …
>
> Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

---

77 O'Connor J. observed that the Court's failure to achieve a clear majority in *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978), *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), and *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986) "left unresolved the proper analysis for remedial race-based governmental action." *Ibid*. at 2109-10.

78 488 U.S. 469 (1989).

79 In reaching this conclusion, O'Connor J. explicitly overruled the Court's 1990 decision in *Metro Broadcasting* v. *F.C.C.,* 497 U.S. 547, where it was held that "benign" federal racial classifications should be subject to intermediate, as opposed to strict, scrutiny (*supra* note 1 at 2113).

80 *Ibid*. at 2112.

81 *Ibid*.

82 *Ibid*. at 2111 and at 2113.

In Justice O'Connor's view, the application of strict scrutiny to affirmative action programs is not necessarily fatal to their constitutionality. In fact, if race-based action is necessary to further a compelling interest, and is narrowly tailored to achieve that interest, then it will survive an equal protection challenge.[83] However, strict scrutiny "is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means" that is necessary.[84] She thus remanded the case to the lower courts for reconsideration according to the strict scrutiny standard outlined in her judgment.

Both Justices Scalia and Thomas concurred in the result reached by Justice O'Connor, but added their own opinions. Justice Scalia took the view that there can be no such thing as a 'compelling interest' which would justify racial discrimination, even where the purpose is to remedy past discrimination. He wrote:[85]

> To pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Justice Thomas agreed with the import of Justice Scalia's reasons, concluding that "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice."[86]

Dissenting opinions were delivered by Justices Stevens, Souter[87] and Ginsburg. While Justice Stevens agreed that racial affirmative action should be approached with scepticism, he disagreed with the majority's adoption of the principle of 'consistency.' In his opinion, to require the judiciary to assess affirmative action in the same manner as invidious discrimination was unjustified because of the significant differences between benign and malign discrimination. He wrote that "[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks

---

83 *Ibid*. at 2117. As an example, O'Connor J. observed that in *United States* v. *Paradise*, 480 U.S. 167 (1987), "every Justice of the Court agreed that the Alabama Department of Public Safety's 'pervasive, systemic, and obstinate discriminatory conduct' justified a narrowly tailored race-based remedy."

84 *Ibid.*

85 *Ibid.* at 2119.

86 *Ibid*.

87 Souter J.'s opinion was based on the application of *stare decisis*, and is not relevant to the present discussion.

to eradicate racial subordination."[88] Justice Stevens was of the view that the appropriate standard of scrutiny for the Federal affirmative action program at issue in *Adarand* was intermediate scrutiny. Since this was the standard applied by the lower courts, he would have dismissed the appeal.

Justice Ginsberg agreed with the reasons of Justice Stevens but wrote herself to emphasize that a majority of the Court had recognized the continuing constitutionality of racial affirmative action. In her view, only Justices Scalia and Thomas had closed the door to race-based preferences. The other seven members of the Court, though disagreeing on the appropriate standard of review for affirmative action, agreed that such programs may be implemented so long as they are tailored in a manner which can survive 'sceptical' review. Justice Ginsburg endorsed the application of scepticism in affirmative action cases because of the harm which can inure to "some members of the historically favoured race" through the denial of benefits.[89] Judicial scepticism should be directed at ensuring that preferences are "not so large as to trammel unduly upon the opportunities of others or interfere too harshly with the legitimate expectations of persons in once-preferred groups."[90] She added that the divisions in the case "… should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgement of Congress' authority to act affirmatively …."[91]

Thus, like Advocate-General Tesauro in *Kalanke*, the majority of the United States Supreme Court decided that a restrictive approach should be taken to affirmative action. Nevertheless, the social justice model of equality lives on in American constitutional jurisprudence even after *Adarand*, although perhaps in a very limited form. As Justice Ginsburg emphasized in her dissent, the majority of the Court agreed that benign racial preferences are not automatically unconstitutional (only Justices Scalia and Thomas took this absolutist view), with the result that race-based remedial action may be taken by governments so long as the strict scrutiny test is met. This standard requires, that a racial preference be implemented for a "compelling" purpose, and that it be "narrowly tailored" to achieve that purpose. Thus, "[t]he court has not totally turned its back on federal affirmative action."[92]

---

88 *Ibid*. at 2120.

89 *Ibid*. at 2136.

90 *Ibid*.

91 *Ibid*. at 2135.

92 Robinson, Fink and Allen, *supra* note 71 at 666; see also: Minnich, *supra* note 16 at 312: "*Adarand* is not and should not be viewed as a death knell for all affirmative action programs."

Generally, to satisfy the "compelling" purpose requirement under the strict scrutiny test, the relevant governmental body will be required to show that it has engaged in prior discrimination,[93] and to demonstrate through strong evidence that remedial action is warranted. Even if an affirmative action program has a "compelling" objective, it may fail constitutional scrutiny under the "narrowly tailored" requirement if a race-neutral alternative would achieve the objective, or if the impact of the program on non-beneficiaries is unduly harsh.[94] For this reason, it is clear that race-based affirmative action will be difficult, though not impossible, to justify.

Both the United States Supreme Court and the European Court of Justice have adopted a similarly cautious attitude with respect to affirmative action, though their interpretative approaches are rather different. While both Courts view affirmative action as a derogation from the general principle of equal treatment, and have advocated judicial scepticism as a result, the E.C.J.'s endorsement of affirmative action linked to 'opportunities,' but not 'results,' is a distinction which has not emerged in the American jurisprudence. Thus, the United States Supreme Court would apply the same strict scrutiny standard to race-based affirmative action programs, regardless of whether they confer places in state-run training programs, or actual jobs. In this sense, permissible affirmative action in the United States is both broader than in the European Community (because programs conferring actual jobs or contracts on members of disadvantaged groups are permissible in the U.S. as remedial measures, unlike in the E.C.), yet narrower (because all state-mandated affirmative action is subject to strict scrutiny in the U.S., whereas the E.C.J. appears to prefer a deferential approach to affirmative action programs promoting equality of opportunity). One clear advantage of the American approach to affirmative action is that it avoids the potentially thorny determination of whether an affirmative action program furthers 'opportunities' or 'results.'[95]

VII. LESSONS FOR SECTION 15(2) – TOWARDS A COHERENT THEORY

[93] Proof of prior discrimination by a state actor will often be satisfied by evidence of a significant imbalance in the actor's workforce, or in a pool of persons receiving benefits from the actor. See *Johnson* v. *Transportation Agency, Santa Clara*, 480 U.S. 616 (1987).

[94] See *City of Richmond* v. *J.A. Croson*, 469 U.S. 493 (1989); Robinson, Fink and Allen, *supra* note 71 at 667-68. Robinson, Fink and Allen also observe that a program which is temporary will be more likely to pass must under the 'narrowly tailored' test (at 668).

[95] Although it is obvious that the impugned federal program in *Adarand* would be classified by the E.C.J. as furthering equality of results, as opposed to equality of opportunity.

The ability of affirmative action programs to derogate from the principle of equal treatment, and to extend even beyond the principle of substantive equality, justifies the cautious scepticism which has emerged in the jurisprudence from Europe, the United States, and from some Canadian lower courts. Such a judicial approach is necessary because of the theoretical and practical difficulties posed by programs which generalize about individuals on the basis of their group membership, and which deny social benefits to individuals simply because of their sex, skin colour, or cultural background.

As was demonstrated above, laws and programs which recognize real and relevant differences between people flowing from their group membership, and which provide social benefits in reliance on such differences, are not constitutionally problematic in Canada. Such laws and programs are the essence of substantive equality – people who are different should be treated differently. However, a program which allocates a social benefit to individuals because they are from an economically and socially 'disadvantaged' group, while denying it to individuals from 'advantaged' groups, may run afoul of section 15(1) of the *Charter*. Such a program has only a limited connection with substantive equality because group membership alone is often an inaccurate indicator of real and relevant economic and social differences between individuals. To say that a woman should be given a job because she is a woman is qualitatively different from saying that a visually impaired man should be given financial assistance to purchase visual aid devices because of his disability. While the latter proposition flows from the principle of substantive equality, the former can only be justified under the remedial tenets of the social justice model. Affirmative action which solely promotes the social justice concept would, in our view, be contrary to section 15(1) of the *Charter,* and in the absence of section 15(2), would have to be assessed under section 1 and the *Oakes* test. Although section 15(2) effectively ousts the application of section 1, that does not mean that the limiting principles adopted under section 1 are irrelevant to section 15(2). In fact, because section 15(2) (like section 1) acts as a saving provision for state action which would otherwise be unconstitutional, we believe that a coherent and limiting theory of the provision is required. We would suggest, in light of the jurisprudence discussed above, that the following principles should serve as a guide.

A. Scepticism and Legitimate Ameliorative Objectives

The best way to assign section 15(2) to its proper role within Canada's Constitution, and to a role with which we can be comfortable, is to return to the motivation behind its inclusion in the *Charter*. Although one cannot know

exactly why section 15(2) exists, there is no evidence that section 15(2) was enacted to aggressively promote affirmative action programs based on the social justice model, or to blindly exempt such programs from constitutional scrutiny.[96] One commentator has suggested that section 15(2) should be understood merely as an interpretative guide to section 15(1).[97] In our view, section 15(2) was probably included in the Charter as a reminder to the judiciary that the state is not necessarily discriminating in an unconstitutional manner when it allocates a social benefit to members of a particular group for the purpose of ameliorating the disadvantaged conditions of that group. We also think that section 15(2), to the extent that it gives effect to the social justice model, is a derogation from the equality principles embodied in section 15(1) and, therefore, serves to justify certain laws and programs which would otherwise infringe section 15(1).

As the European Court of Justice has held in relation to Article 2(4) of Directive 76/207, derogations from the principle of equal treatment should be approached with considerable caution and should be construed strictly. *Commission* v. *France*[98] demonstrates that such caution is necessary to avoid the misuse of affirmative action arguments to justify programs which actually perpetuate stereotypes and discrimination.[99] It was exactly this same reasoning which contributed to O'Connor J.'s view in *Adarand*[100] that benign discrimination should always be approached with scepticism. Moreover, the theoretical and practical difficulties with constitutionally problematic affirmative action, discussed in Part III above, support cautious scepticism.

The recent case of *Egan* v. *Canada*[101] evinces the desirability of adopting a strict approach to affirmative action under section 15(2). In this case, the Supreme Court of Canada was faced with a section 15 challenge to a federal old

---

96 *MacVicar*, *supra* note 27 at 502-03. See also, W.S. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983) 61 Can. Bar Rev. 242, in N. Finkelstein, ed., *Laskin's Canadian Constitutional Law*, 5th ed., vol 2 (Toronto: Carswell, 1986) at 1268-69, who argues that s. 15(2) was included in the *Charter* as a protective, but not proactive, device "out of excessive caution."

97 H. Orton, "Section 15, Benefits Programs and Other Benefits at Law: The Interpretation of Section 15 of the *Charter* since *Andrews*" (1990) 19 Man. L.J. 288 at 299.

98 *Supra* note 51.

99 In *Hess, supra* note 5 at 929, Wilson J. urged caution in justifying sex-based distinctions because, "[a]ll too often arguments of this kind have been used to justify subtle and sometimes not so subtle forms of discrimination. They are tied up with popular yet ill-conceived notions about a given sex's strength or weaknesses or abilities and disabilities."

100 *Supra* note 81.

101 [1995] 2 S.C.R. 513.

age allowance which was available to heterosexual spouses (either married or common law), but not to homosexual partners. The alleged ground of discrimination was, therefore, sexual orientation. The federal Crown tendered the argument that the impugned spousal allowance was a program protected by section 15(2), since its object was to promote the interests of elderly women. Although this argument was never seriously entertained by the Court — since the allowance was available to both men and women — it demonstrates the less than satisfactory uses to which section 15(2) might potentially be put. In particular, one should be troubled by the possibility that the state would seek to use the cloak of affirmative action to justify discrimination against members of groups excluded from the impugned program for no rational reason. Of course, this problem only results from an interpretation of section 15(2) which views it as a mechanical exception to section 15(1). As several courts have already recognized, this interpretation is untenable. The drafters of the *Charter* surely could not have intended that the right against discrimination in section 15(1) should be so easily evaded by the state.

Thus, the overriding principle which should inform the interpretation of section 15(2) is *scepticism*. Courts should be cautious when entertaining the argument that discrimination is justified under section 15(2). Although scepticism should guide the entire analysis of section 15(2), it is particularly important when courts are assessing whether an impugned program actually has a *legitimate ameliorative objective*. Courts should ask themselves the following questions:[102]

i) Is there convincing evidence that at the time the program was created, its purpose was to ameliorate the disadvantaged conditions of a particular group?

ii) Assuming that the state intended the impugned program to be ameliorative, does it actually accomplish this, or does it perpetuate stereotypes about, and discrimination against, the group intended to benefit from the program?

This latter question is significant because, as we observed in Part III above, some commentators have taken the view that affirmative action based on the

[102] This was the approach employed by the Nova Scotia Court of Appeal in *Reference Re Family Benefits Act* (1986), 186 A.P.R. 338. The Court examined the legislative history of the impugned programs, and determined that, "[t]here is no evidence that benefits payable under the *Family Benefits Act* can be classified as an affirmative action program" (at 356). *Contra*, however, is the position of the Saskatchewan Court of Appeal which has held that maintenance payable to persons under the age of 18 constitutes an ameliorative program within s. 15(2) designed to minimize disadvantage based on age: *Penner* v. *Danbrook,* [1992] 4 W.W.R. 385. With respect, this latter position is simplistic and fails to inquire into the history behind the program.

social justice model inevitably reinforces stereotypes about the target group(s).[103] Both Justices Scalia and Thomas took this view in *Adarand* with regard to race-based benign discrimination, concluding that it could never be sustained under the United States *Bill of Rights*.[104] Obviously, the presence of section 15(2) in the *Charter* means that some constitutionally problematic affirmative action will be permissible.

B. Reliability and Rational Connection

Section 15(2) gives effect to the social justice model of equality and, thereby, permits the state to ameliorate the conditions of a disadvantaged group by generalizing that its individual members are disadvantaged and, therefore, in need of social benefits to a greater extent than individuals who are not group members.

Both the European Court of Justice, and the United States Supreme Court, have accepted the legitimacy of limited derogations from the principle of equal treatment on the basis of the social justice model. As noted above, however, their approaches differ. The American Court would apply strict scrutiny to any race-based benign discrimination conferring a social benefit of any sort. The European Court has distinguished between impermissible 'results' programs, which allocate actual jobs to women, and permissible 'opportunity' programs, which allocate other benefits like training to women. The distinction between equal opportunity and equal outcome flows from the actual wording of Article 2(4) of Directive 76/207, though it may have some intuitive appeal under section 15(2) of the *Charter*. Nevertheless, there are practical difficulties in applying the distinction, and it is not entirely clear why a member of an 'advantaged' group should have a cause of action for being denied a job, yet have no recourse for being denied the training which leads to a job. Both jobs and training are desirable social benefits, of considerable value to individuals. The preferable approach, in our view, would be to subject all constitutionally problematic affirmative action measures to the same standard of sceptical review, regardless of the social benefit involved.

Because the 'have'/'have-not' categorization warranted by the social justice model can be crude, its use should be limited to only the clearest of cases. In particular, if the state wishes to employ group membership as the sole criterion for determining the social and economic needs of individuals, then the state

---

[103] Thakur, *supra* note 14; *supra* note 16.

[104] *Supra* notes 85-86.

should be required to introduce compelling evidence that such generalizations are *reasonably reliable*.[105] Such evidence might demonstrate a striking historical under-representation of persons from a particular group in the enjoyment of a particular social benefit, or might show that the members of a particular group have, historically, been the victims of actual discrimination by the state, and that the affirmative action program is required as a remedy.[106]

One of the most popular means of limiting section 15(2) has been to import a *rational connection* requirement into the provision. In Canada, this idea first emerged in *Silano,*[107] and was endorsed by the majority in *OHRC* with regard to section 14(1) of the *Ontario Human Rights Code*. The United States Supreme Court, as part of its strict scrutiny standard for race-based benign discrimination, also applies a form of rational connection within its requirement that discrimination be "necessary" for attaining a compelling state interest.

A requirement that the discriminatory impact of an affirmative action program be necessary for attaining its ameliorative objectives is not evident on the face of section 15(2), but makes eminent sense in light of the purpose of the provision, which is to promote equality. Thus, as Weiler J.A. stated in *OHRC*:[108]

> Special programs aimed at assisting a disadvantaged individual or group should be designed so that restrictions within the program are rationally connected to the program. Otherwise, the provider of the program will be promoting the very inequality and unfairness it seeks to alleviate.

If the state has demonstrated that its use of group membership as a criterion for determining disadvantage and need is reasonably reliable, then there will be a rational connection between the disadvantage of the target group and the allocation of the social benefit. However, the rational connection principle, in our view, should be framed not only in terms of the target group, but also with reference to the excluded group(s). Thus, even if membership in the group targeted by the impugned program is a reliable indicator of actual disadvantage and actual need, the exclusion from the program of members of other groups must be rationally connected to the ameliorative objective of the impugned program. In this way, the test requires the state to go a further step and

---

[105] As Houlden J.A. held in *OHRC, supra* note 31 at 430, had he been satisfied that age was a reliable indicator of advantage, he would have applied s. 14(1) of the *Code* to justify the age discrimination.

[106] These factors resemble those considered by American courts when applying strict scrutiny. *Supra* note 93.

[107] *Supra* note 20.

[108] *Supra* note 31 at 406.

demonstrate that the membership of individuals in the excluded group(s) is a reasonably reliable indicator of 'advantage,' such that denying them a particular social benefit is itself rational. The application of this aspect of the test would respond in particular to situations such as those in *Silano* and *OHRC*, where a program of an undoubted affirmative action nature is being challenged for discriminating between the members of two 'have not' groups, and where the members of both groups have a similar need for the social benefit involved.

C. Minimal Discriminatory Impact

In our view, an affirmative action program which infringes section 15(1) of the *Charter* should only be sustained under section 15(2) if it accomplishes its ameliorative objective with a *minimal discriminatory impact* on the members of the excluded group(s). Certainly, the social justice goal of section 15(2) allows for the remedial redistribution of social benefits from 'haves' to 'have-nots.' Nevertheless, it would be absurd to suggest that the impact of a constitutionally problematic affirmative action program on the victims of discrimination (i.e., the individuals denied a social benefit) is irrelevant. To do so would be to undermine the protection afforded by section 15(1). After all, section 15(2) is a derogation from the general anti-discrimination principles embodied in section 15(1), and for this reason should be construed strictly, lest section 15(1) be gutted. We would suggest that the following two considerations should form the basis of the analysis for minimal discriminatory impact:

(a) Individualized, non-discriminatory alternatives – It must be determined whether the legislature could have reasonably achieved its ameliorative objective in a manner which would not require the use of group-based generalizations about individuals. More specifically, the state should be required to demonstrate that the use of individualized (and hence non-discriminatory) criteria is impractical in the circumstances, and that group-based generalizations are the only means of effecting its ameliorative goal. In *OHRC,* for example, Houlden J.A. found that the Ontario Health Ministry could have achieved its affirmative action goal of offering financial support to visually-impaired citizens through individual means-testing.[109] This supports the view that if the state is able to achieve an affirmative action objective without infringing section 15(1), then it certainly should not be able to rely on section 15(2) to justify its use of group-based generalizations which contravene section 15(1).

[109] *Ibid.* at 425.

(b) Temporal limits and review mechanisms – The United States Supreme Court has concluded that an affirmative action program will be more likely to survive constitutional scrutiny under the 'narrowly tailored' test if it is implemented as a temporary ameliorative measure, as opposed to a permanent fixture in allocating social benefits.[110] This view was adopted by Advocate General Tesauro in *Kalanke*, where he stated that, "Article 2(4) of the Directive…requires there to be obstacles to be removed and the measure taken to be temporary, inasmuch as it is lawful only so long as conditions of disadvantage exist and persist."[111] Because the social justice model allows for derogations from the principle of substantive equality in order to *remedy* past discrimination, affirmative action programs premised on the social justice model should not have an aura of permanence. Instead, they should be framed as temporary deviations, necessitated by the existence of disadvantaged conditions. The analysis under section 15(2) should, therefore, require that a constitutionally-problematic affirmative action program be implemented only for a specific period of time, thereby demonstrating that the program is a temporary measure. Alternatively, section 15(2) should require that a formal review mechanism be included within any program, to assess after a specific period of time whether the program is actually accomplishing its ameliorative goals, and whether the conditions of disadvantage addressed by the program continue to exist. Either of these alternatives will minimize the discriminatory impact of affirmative action on the individuals excluded because of their group membership.

D. Unjustified Burdens and Proportionality

Even where an affirmative action program has a legitimate ameliorative objective and meets the requirements of reliability and minimal discriminatory impact, it should not be sustained under section 15(2) if the actual method adopted for allocating social benefits to the members of the target group imposes a burden on those denied the benefit which is disproportionate in the circumstances.[112] It is worth recalling that constitutionally problematic affirmative action will always impose a burden or disadvantage on those excluded from the program. The issue, then, is how much of a burden our *Constitution* will allow to be placed on excluded individuals for the sake of

---

[110] *Supra* note 94.

[111] *Supra* note 1 at 664-65.

[112] In its affirmative action jurisprudence, the United States Supreme Court considers whether the burden imposed is "unduly harsh" (*supra* note 94). This is similar to the "gross unfaimess" test in *Willocks, supra* note 21, which may be too permissive.

ameliorating disadvantage. In his decision in *R.* v. *Willocks*,[113] Watt J. accepted that the impact of an impugned program on the victims of section 15(1) discrimination should be considered under section 15(2). He then adopted the 'gross unfairness' test: provided there is no gross unfaimess to the members of the excluded group(s), an affirmative action program will be sustained under section 15(2). In our opinion, an analysis which focuses on gross unfairness is too low a standard in light of the need for a sceptical and strict approach to section 15(2). Instead, the controlling consideration should be whether, in light of the conditions of disadvantage addressed by the impugned affirmative action program, the means chosen to ameliorate those conditions are *proportionate.*

In applying such a proportionality test, we would suggest that an affirmative action program which *takes away* social benefits already enjoyed by the members of advantaged groups, and reallocates them to the members of the target disadvantaged group, may often be a disproportionate means of achieving an ameliorative goal.[114] Moreover, if the state has chosen to allocate a social benefit of great value to the members of a disadvantaged group, such as actual jobs, when it could reasonably have achieved its affirmative action objective by allocating a different social benefit of lesser value, for example, places in a job training program,[115] then the impact on those denied the benefit may well be found to be disproportionate. The proportionality test should be sensitive to uses of affirmative action by the state as a 'quick fix.' Not only can 'quick fixes' have a disproportionate impact, but they also rarely succeed in ameliorating the actual causes of disadvantage. This was a concern of Advocate General Tesauro, who opined that the effect of certain kinds of affirmative action (which he labelled as equality of outcome) may "salve some consciences," yet be "illusory and devoid of all substance."[116]

E. The Relationship Between Sections 1 and 15(2) of the *Charter*

It is no coincidence that the principles which we have suggested for assessing constitutionally problematic affirmative action under section 15(2) bear a resemblance to the elements of the *Oakes* test for section 1 of the *Charter*. Both sections 1 and 15(2) play a similar role in *Charter* analysis, since they each allow the state to justify laws which have been found to infringe *Charter* rights. However, where an affirmative action program is found in violation of section

[113] *Supra* note 21.

[114] McCrudden agrees. See *supra* note 3 at 242.

[115] It is here, perhaps, that the distinction drawn by Advocate-General Tesauro in *Kalanke* between actual jobs and places in training programs may be relevant.

[116] *Supra* note 1 at 665.

15(1), the relevant saving provision is not section 1, but section 15(2). Thus, in *Apsit No. 2,*[117] the Manitoba Court of Queen's Bench held that a program proferred as coming within the "exception" to section 15(1) created by section 15(2), but which fails to meet the requirements of section 15(2), cannot then be justified under section 1. It was further held that section 15(2) creates its own natural limits on section 15(1) rights; hence, there is no room for further inquiry when the government fails to establish compliance with section 15(2).

As we have stated repeatedly, section 15(2) allows the state to ameliorate conditions of disadvantage, but in a manner extending beyond the substantive equality principle embodied in section 15(1). Section 15(2) thus gives effect to the social justice model. For a variety of reasons outlined above, we believe that section 15(2) should be interpreted cautiously. To this end, *Oakes* principles such as legitimate objective, minimal impairment, rational connection and proportionality, modified to apply in the unique context of constitutionally problematic affirmative action, serve to limit the scope of section 15(2), while still allowing the state to act in a manner consistent with the social justice model. We would opine that in the absence of section 15(2), constitutionally problematic affirmative action could not be sustained under the traditional section 1 test, because the group-based generalizations required by the social justice model are simply too inaccurate to pass muster under the rational connection, minimal impairment and proportionality aspects of *Oakes*. Such a fate does not necessarily await constitutionally problematic affirmative action under the principles we suggest for section 15(2), because the analysis begins from the premise that group-based generalizations which infringe section 15(1) may be employed for ameliorative purposes, so long as certain limiting conditions are met.

VIII. CONCLUSION

By adopting a thoughtful interpretation of section 15(2) illuminated by the European and American experiences, we believe that the potential gulf between substantive equality and the social justice model can be limited. Thus, while an affirmative action program premised on the social justice model can never be entirely consistent with substantive equality, it will bear a closer resemblance to substantive equality if the group-based generalizations drawn about individuals are reasonably reliable, the program itself imposes a minimal discriminatory impact on those excluded, and the impact on the excluded

[117] *Supra* note 22.

individuals is not disproportionate when considered in light of the disadvantaged conditions addressed by the program.

It is hoped that the articulation of such interpretative principles can help fill the vacuum presently animating affirmative action jurisprudence in Canada. In the least, these principles can assist section 15(2) in becoming part of, as opposed to an exception from, the constitutional fabric underpinning Canadian society.