Introduction

Patricia Paradis*

This special issue of the *Forum* is a compilation of papers presented at a panel convened by Debra Parkes,¹ two weeks after the release of the Supreme Court's decision in *Fraser v Canada*² on October 16, 2020. It also includes a paper by Richard Moon, as he originally suggested the idea for such a special issue.

As the first section 15 judgment to find adverse effects discrimination on the basis of sex, *Fraser* has been seen by many as a cause for celebration. Not so, claim the authors in this special issue. Though the authors largely laud the majority for its clarity on the test for discrimination and its comments on substantive equality, they have used this opportunity to interrogate the unrealized promise of substantive equality in section 15 jurisprudence, and to expose the weaknesses in the system of adjudicative litigation, and the blinders of the judiciary in addressing the systemic, socio-economic inequality that continues to prevail in our society.

Anyone wondering why the courts' interpretation of section 15 of the *Charter* has been so fraught, complicated, and largely ineffective will find answers in these articles. There is no 'beating around the bush' (especially as the bush appears to be burning). They incisively expose the factors, the points of view, the privilege, and the chasms between those who seek substantive equality through the courts — people often caught in a web of systemic factors that exacerbate their oppression — and those who judge their claims. These chasms are at the heart, some say, of the dysfunction we've seen with section 15 interpretation over the years, and are emblematic of the society in which they are embedded. Others posit that the court's

* Editor, *Constitutional Forum Constitutionnel*. Executive Director, Centre for Constitutional Studies, University of Alberta.

1 Professor, Centre for Feminist Legal Studies, Peter A. Allard School of Law, University of British Columbia "Fraser v Canada: (20/20 SCC): Vision on Equality?" (30 October 2020), online (video): <https://ubc.zoom.us/rec/play/aV2hcz8czxDVG0G8szx6vjF_MwaHZIXCZ4UypKncxVunXgo6K7GJJTTM_56ow_CKyGBz3WUwhKIROsy.NPggAPapXrC9ceXl?continueMode=true>.

2 2020 SCC 28.

legal duty to find a test is antithetical to the necessarily fluid and contextual nature of equality itself, and that it is therefore not surprising the court has had such difficulty with section 15.

The issue begins with “cautious optimism” about the future of equality rights jurisprudence following the *Fraser* decision, and is then followed by a series of articles that focus on specific problems with the decision, the dissenters, and the fact that pervasive, systemic, societal inequality is not really touched by *Fraser*, nor by the Court’s section 15 jurisprudence more generally. The final article in the issue then presents us with excerpts from articles written in the early days of section 15, which predict many of the problems exposed in *Fraser* some 30 years later. There is much in this issue for scholars of section 15.

In “Cautious Optimism,”³ Jonnette Watson Hamilton gives readers a careful review of the facts in *Fraser*, which she points out is not only the first successful adverse effects claim based on the enumerated ground of sex, but also only the second section 15(1) claim won by women on the ground of sex in 35 years⁴. There is much to celebrate in the decision she says: it simplifies the analytical approach to section 15(1) which has seen four different tests (and subsets of those tests) used to determine a breach of equality rights. The case brings a welcome clarity to equality rights jurisprudence, and makes it ostensibly easier for claimants to know the case they have to meet to prove a breach.⁵

Watson Hamilton notes eight potentially positive aspects of the decision, including Justice Abella’s thorough discussion of adverse effects discrimination, and clarifications on what claimants need not prove to establish a breach.⁶ But she presents several cautions, notably regarding ambiguities in *Fraser* itself⁷, and concern that the dissents may create confusion about which test should be used going forward, as Justices Brown and Rowe use their version of the test (an older version) and rely on the resurrected need to prove arbitrariness, as well as a focus on the ameliorative purpose of the law to say, in effect, that as long as the state has tried to be accommodating, it doesn’t matter if the policy reinforces, perpetuates, or exacerbates disadvantage.⁸ Lastly, in her description of the first lower court decision in which the *Fraser* decision has been applied, Watson Hamilton shows just how confusing the current state of section 15(1) jurisprudence can be.⁹ That decision, along with the other issues she raises in this article, leave her only cautiously optimistic about *Fraser*’s legacy, especially given the Court’s “...abysmal track record in dealing with adverse effects discrimination”.¹⁰

In “The Elephant in the Room,”¹¹ Fay Faraday takes the reader to the very nub, the heart of the Courts’ disarranged approach to equality rights since section 15 was enacted. Using strong visuals of elephants in the room needing to be exposed, and a bonfire of straw men set ablaze by the dissenters, she brings to light the worldviews that create a problematic “reality gap”

3 Jonnette Watson Hamilton, “Cautious Optimism: *Fraser v Canada (Attorney General)*” (2021) 30:2 Const Forum Const 1.

4 *Ibid* at 2.

5 *Ibid* at 3-5.

6 *Ibid* at 6-7.

7 *Ibid* at 13.

8 *Ibid* at 9.

9 *Ibid* at 10-13.

10 *Ibid* at 10.

11 Fay Faraday, “The Elephant in the Room and Straw Men on Fire” (2021) 30:2 Const Forum Const 15.

between majority and dissenting judgments across decades of jurisprudence, and between those making equality rights claims — mostly people who suffer disadvantage — and many of those who judge those claims.¹² In Faraday’s view, these very distinct perceptions of “reality”¹³ have fuelled numerous problems with section 15 jurisprudence, most notably the difficulty with creating a test that actually promotes substantive equality. “The elephant in the room,” she says, “must be named so that the techniques by which the reality of systemic discrimination is erased and sheltered from legal scrutiny can be identified and disrupted.”¹⁴ Faraday contrasts Abella J’s careful, methodical description of the social and economic disadvantages that drive women disproportionately into part-time precarious work and her description of gender-biased pension design, with the dissenters’ inability to see from a “systems-based” perspective. They see the RCMP pension plan merely as the connection between hours worked, and pay, and the decision to work-share as a matter of an individual’s economic “choices”.¹⁵ Lost in the dissents is the fact that the *Charter* was explicitly designed to uncover systemic discrimination and address it.

What is needed, Faraday says, is “clear, precise guidance for governments, lawyers, and judges that takes them on a learning journey, out of blinkered privilege into the real world that those who experience discrimination inhabit”¹⁶ and “analytical guardrails”¹⁷ that keep those who do not understand substantive equality from wandering down a regressive and socially damaging path. Faraday warns that simply appointing a more diverse judiciary will not close the reality gap. On the contrary, a deeper structural and analytical change is needed. As examples, she cites bringing structural and analytical depth to the four equality rights in section 15,¹⁸ and the use of precise language that reinforces the lens by which judges need to see and describe the systemic forces at play which perpetuate and create disadvantage, institutionalize systemic discrimination, and impair access to the real experience of equality. If we are to shift out of the dominant frame and close the reality gap, Faraday says, our jurisprudence must speak explicitly and deeply to the construction of inequality.¹⁹

In “Intersections and Roads Untravelled,” Jennifer Koshan examines the implications of the Supreme Court’s failure to recognize family status as an intersecting and independent ground of inequality in *Fraser*.²⁰ The Court, Koshan says, should have explored the inclusion of family status as an analogous ground under section 15, and in not doing so, failed to recognize its intersection with sex at the important first stage of the discrimination analysis. Such recognition, she says, would have allowed the court to provide “more precise and nuanced protection for women caregivers at the intersection of gender and family in light of the particular inequalities that group faces.”²¹

12 *Ibid* at 16.

13 *Ibid* at 19.

14 *Ibid* at 19.

15 *Ibid* at 22-23.

16 *Ibid* at 24.

17 *Ibid* at 25.

18 *Ibid* at 26.

19 *Ibid* at 28.

20 Jennifer Koshan, “Intersections and Roads Untravelled: Sex and Family Status in *Fraser v Canada* (2021) 30:2 Const Forum Const 29.

21 *Ibid* at 30.

Koshan carefully examines the Court's reasons for not recognizing family status as an analogous ground, and agrees with Justice Abella that the test for analogous grounds may need reworking.²² She finds it surprising though that Justice Abella did not take judicial notice of family or parental status as analogous grounds, especially given decisions in previous cases. In particular, she notes a number of inconsistencies in the Court's approach to analogous grounds — sometimes requiring a strict approach to evidentiary requirements, immutability, or considering 'choice' as an important factor in determining whether a ground of discrimination qualifies as an analogous ground.²³ Koshan cautions that any 'brush-clearing' of problems at the discrimination stage of section 15 analysis, should not be narrow and 'equality-impeding'.²⁴

While she recognizes the positive "cleaning up" of the test for discrimination by Abella J, and the Court's acceptance of intersectionality and anti-essentialism, Koshan points out that **not** considering family status as an analogous ground was clearly a significant, missed opportunity in *Fraser* to formally recognize intersecting grounds under section 15 of the *Charter*. An intersectional approach would have allowed the Court to "see the different ways in which different groups experience inequalities and oppression at the intersections of sex, race, Indigeneity, disability, sexual or gender identity, poverty, family or marital status, and other grounds,"²⁵ as well as to connect to systemic income inequality and poverty. It is time, Koshan says, for the Court to travel that road.²⁶

In her article, "Critical Reflections on *Fraser*," Sonia Lawrence²⁷ looks critically and broadly at what *Fraser* does *not* do — not so much for the claimants, but for equality generally — and she wonders whether the decision has meaningfully improved conditions for the most vulnerable and economically compromised women in Canada. *Fraser* as victory, she says, is myth creation.²⁸ She notes, for example, that though Justice Abella, "throws everything at the wall on section 15 ... in this decision, it ... is not a case about social benefits and redistribution but about salary and benefits"²⁹ — about providing equality to the claimants rather than dealing with broader socio-economic conditions that perpetuate inequality. In part, this failure to confront the societal bases of inequality she says, may be a matter of lacking a stable and clear legal framework for doing so. As Lawrence notes, the history of section 15 is one of "shifting and changing doctrines; of complexity, confusion, and struggle over the meaning and scope of constitutional equality."³⁰ And clarity, she says (and others in this volume clearly concur), has never been "hallmark of this doctrine" in any of its iterations.³¹

Lawrence also points to the lack of appropriate balance by the Court between section 15 and section 1, noting that the success in *Fraser* at the section 15 stage may lead to section 1

22 *Ibid* at 36.

23 *Ibid* at 37.

24 *Ibid* at 36.

25 *Ibid* at 30.

26 *Ibid* at 42.

27 Sonia Lawrence, "Critical Reflections on *Fraser*: What Equality Are We Seeking?" (2021) 30:2 Const Forum Const 43

28 *Ibid* at 51.

29 *Ibid* at 47.

30 *Ibid* at 43-44.

31 *Ibid* at 44.

playing a larger role in future cases. When cases fail the two-step discrimination analysis, then section 1 can become “peripheral” or “irrelevant,” but this will likely change if cases are more successful at the section 15 stage. Given that claims can be blocked in a number of ways, Lawrence suggests that judges need to be conscious of their roles in this process. She wonders too whether there might be a “moral mismatch” to finding discrimination, and then justifying the state’s actions against a minority using section 1.³² Either way, in the wake of *Fraser*, more attention will have to be paid to that balance going forward. Despite her recognition of the welcome “brush-clearing” in *Fraser*, Lawrence’s article expresses a deep disappointment that the decision does not, and cannot, address the growing disparities in wealth, and the racial inequality — the systemic inequality in which we as a society are embedded. She points to the urgent need to look at the limits of law and litigation in the interest of creating a vision that promotes human flourishing.³³

In the issue’s fifth article, Joshua Sealy-Harrington explores the “Alchemy of Equality Rights”³⁴ in *Fraser*, ‘riffing on’ Patricia Williams’ excellent book, *The Alchemy of Race and Rights*.³⁵ There, Williams — an American legal scholar and founding critical race thinker — describes the “immense alchemical fire” required for “the making of something out of nothing,”³⁶ outlining the social construction of both the law and those it regulates. To understand equality, says Sealy-Harrington, the ideological commitment that grounds it must be made transparent, as must the methodologies used to construct the equality analysis. Equality is malleable, and relies on a “web of instinct” — that is what grounds equality’s alchemy.³⁷ “Analytical discipline” and the “neutral principles” demanded by some (conservative) justices in *Fraser* are futile, as equality’s uncertainty will always persist.³⁸

Sealy-Harrington juxtaposes the three sets of reasons in *Fraser* by viewing them through Williams’ lens of Critical Race Theory. He notes, “[t]he three opinions in *Fraser* — viewed through Williams’ critical lens — highlight how equality is fundamentally contextual, how ideology is an unavoidable dimension of equality analysis, and how methodology can be invoked to obscure ideology.”³⁹ To illustrate this point, Sealy-Harrington examines — often searingly — the differences in ideology between the majority and the dissenters in *Fraser*, and he lays boldly bare the disturbing results, in terms of equality and inequality, of those differences. Few “stones” are left unturned in his thorough exploration.

Despite the Court’s commitment to promoting substantive equality, it is time, says Sealy-Harrington, to leave the formal/substantive dichotomy⁴⁰ behind and engage with a new “vocabulary” of equality — one that recognizes its flexibility, malleability, and alchemy, and that meaningfully addresses the vast structural inequalities in Canadian society. He urges advocates to present a more critical perspective on equality rights, for the courts to recognize

32 *Ibid* at 49-50.

33 *Ibid* at 51.

34 Joshua Sealy-Harrington, “The Alchemy of Equality Rights” (2021) 30:2 Const Forum Const 53.

35 Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge, Mass: Harvard University Press, 1991).

36 *Ibid* at 59.

37 *Supra*, note 34 at 66.

38 *Ibid* at 55.

39 *Ibid* at 82.

40 *Ibid* at 54, 69.

it, and for all to have the courage and vision necessary to fundamentally disrupt the ideologies, perspectives, systems, and methodologies that maintain the “pervasive inequality that we see in Canada to this day.”⁴¹

Richard Moon’s article is last in the issue, because he takes the reader on a retrospective look through excerpts from two articles he wrote early in the history of section 15 — one written in 1987 prior to any Supreme Court rulings on section 15, and the other, a comment on *Andrews* in 1989 — concluding that *Fraser* really changes nothing.⁴² Like Sealy-Harrington,⁴³ Moon is of the view that the interpretation of equality rights must be fluid, and that the courts’ adjudicative role limits their ability to address the systemic inequality to which it is tasked.⁴⁴

Moon rightly predicted in his early articles, some of the issues and tensions built into section 15 and effects discrimination that would not disappear. For example, the key tension between a broad societal commitment to substantive equality, and the adjudicative framework to which the courts are confined: that they deal with violations of specific rights, and discrete wrongs. As he says: “Since the focus of review is on particular laws and not on the entire system of laws and the distribution it generates, the courts are not free to structure the system as they see fit.”⁴⁵ Courts are limited in their ability to address the larger problems of systemic inequality, and cannot, as he pointed out, “assess the various legal alternatives the state might choose to advance ... [or] which alternative might be the most effective and the most equitable.”⁴⁶

The courts’ reluctance to recognize the full meaning and implications of the inequality underlying effects discrimination also creates tension. The standards/tests the Supreme Court adopts determine the depth to which it intervenes in the socio-economic organization of society. For example, Moon examines the limitations inherent in restricting the purview of section 15 analysis to state action, which he says rests on the mistaken belief that private (market) activity is not also created by state action. The line between the two, given systemic inequality, and socio-economic context, “will sometimes be difficult to draw,”⁴⁷ and is evident in the divergent decisions of the majority and dissenters in *Fraser*.

Moon also predicted that determining whether a group is “disadvantaged” (what would happen if the “poor” were defined as one of these groups?),⁴⁸ whether a law’s impact rises to the level of “disparate” (setting a high bar will avoid the courts becoming embroiled in complex issues of socio-economic equality),⁴⁹ and whether the “limit” on the right under section 1 is “reasonable”⁵⁰ would pose significant impediments to rectifying the principal harm — systemic inequality — that section 15 is meant to address.

41 *Ibid* at 83.

42 Richard Moon, “Comment on *Fraser v Canada (AG): The More Things Change*” (2021) 30:2 Const Forum Const 85.

43 Sealy-Harrington, *supra* note 34 at 82.

44 Moon, *supra* note 42 at 86.

45 *Ibid* at 88.

46 *Ibid*.

47 *Ibid* at 90.

48 *Ibid* at 87-89.

49 *Ibid* at 93.

50 *Ibid* at 94.

As the last of the papers in this issue, Moon's provides a sobering reflection on what was possible and problematic with section 15 from the beginning. Watson Hamilton, Faraday, Koshan, Lawrence, and Sealy-Harrington all take a hard look at what has and has not been achieved with *Fraser* — the latest installment on the long, winding, and perhaps impossible road to systemic equality for the most vulnerable and compromised, given the adjudicative framework, the ideologies, the judicial privilege, the lack of ability to "see." There is no doubt that the decision in *Fraser* is a significant step forward. But there is much left to be done. The authors in this special issue have all laid bare uncomfortable realities that need to be faced by our judiciary, and adjudicative system — issues that go beyond the problems with section 15. Let us hope that with some alchemy, brush fire clearance, bridging of reality gaps, and exposing of elephants in the room, we can someday say, "ça change! donc ce n'est **plus** la même chose."