Constitutional forum constitutionnel

Cautious Optimism: *Fraser v Canada (Attorney General)*

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I. Introduction

Adverse effects discrimination arises when a law that appears to be neutral on its face has a disproportionate and negative impact on members of a group identified by a protected ground.[1] The discrimination is usually not as easy to see as it is in cases of direct discrimination, where distinctions are drawn by a law, program, or policy. This may be why *Fraser v Canada (Attorney General)*[2] is only the third adverse effects claim under section 15(1) of the *Canadian Charter of Rights and Freedoms*[3] to succeed since section 15 came into force in 1985.[4] *Fraser* is notable simply because it is the first successful adverse effects claim in twenty-two years.[5] But

* Professor, Faculty of Law, University of Calgary. This paper is adapted from a presentation made at "*Fraser v Canada (2020 SCC)*: 20/20 Vision on Equality?", a panel hosted by the Centre for Feminist Legal Studies, Peter A. Allard School of Law, online: <https://allard.ubc.ca/about-us/blog/2020/recording-fraser-v-canada-2020-scc-2020-vision-equality>. It retains some of the informal nature of an oral presentation. I would like to thank Debra Parkes for coordinating and hosting the panel discussion, the other panel members — Danielle Bisnar, Fay Faraday, Jennifer Koshan, Joshua Sealy-Harrington, Margot Young, and Sonia Lawrence — for their thought-provoking presentations, and Jennifer Koshan and Sonia Lawrence for their comments on a draft of this paper.

1 Jonnette Watson Hamilton & Jennifer Koshan. "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Rev Const Stud Studies 191 at 196 ["Adverse Impact"].

2 2020 SCC 28 [*Fraser*].

3 Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4 The other two cases in which adverse effects claims were successful were *Eldridge v British Columbia*, [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge* cited to SCR] and *Vriend v Alberta,* [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend* cited to SCR].

5 At least five adverse effects claims made under section 15 of the *Charter* failed in the intervening twenty-two years: *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia,* 2007 SCC

it is also the first successful adverse effects claim based on the enumerated ground of sex.[6] In fact, *Fraser* is only the second section 15(1) claim won by women on the ground of sex in 35 years; the 2018 pay equity case of *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*[7] was the first.

The claimants in *Fraser* were three retired female members of the RCMP who had temporarily participated in job-sharing in order to work reduced hours while their children were young. Their pension contributions and benefits for the time they job-shared were based on the part-time hours they worked, and they were not entitled to make contributions for — or "buy-back" — the hours they would have worked had they not been job-sharing. Their retirement income was therefore reduced. Their situation differed from that of full-time RCMP members, as well as that of members who took leave without pay, because that leave was fully pensionable if members returned to work and made both the employee and employer contributions to their pension for their leave period. The claimants argued that their inability to make additional contributions to their pensions for the time they job-shared deprived them of the equal benefit of the law based on their sex and family or parental status. Although the Federal Court and the Federal Court of Appeal disagreed and dismissed their claim, a 6:3 majority in the Supreme Court of Canada allowed their appeal. The majority decision, authored by Justice Rosalie Abella, found a breach of section 15(1) that could not be justified under section 1.[8]

The claimant's success was quickly celebrated. Human rights lawyers such as Paula Ethans applauded *Fraser* as a "landmark decision in Canadian equality law."[9] The Women's Legal and Education Action Fund, an intervenor before the Supreme Court, praised *Fraser* as significant for "advancing women's equality," "recognizing the impact of the double burden for women as employees and caregivers," and providing "a much-needed roadmap for future cases involving systemic discrimination and substantive equality."[10]

In this paper, I will first look at reasons why *Fraser* might be worth celebrating, although it is too soon to tell whether the decision will live up to its potential. The need for caution will

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27 [*BC Health Services*]; *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37 [*Hutterian Brethren*]; *R v Kokopenace,* 2015 SCC 28; *Kahkewistahaw First Nation v Taypotat,* 2015 SCC 30 [*Taypotat*]; and *Ewert v Canada,* 2018 SCC 30 [*Ewert*]. The equality claim in *Carter v Canada (Attorney General),* 2015 SCC 5 could also be included, but section 15(1) was not considered after the Court found a breach of section 7.

6 *Eldridge, supra* note 4, was based on the ground of physical disability and the claim in *Vriend, supra* note 4, on the ground of sexual orientation.

7 2018 SCC 17 [*Alliance*]. In *British Columbia Teachers' Federation v British Columbia Public School Employers' Association,* 2014 SCC 70, the Court allowed a *Charter* equality rights claim by women by simply restoring an arbitrator's award.

8 The dissent by Justice Suzanne Côté found no breach at step one of the section 15(1) analysis based on the lack of a distinction based on an enumerated or analogous ground, whereas the dissent by Justices Brown and Rowe found no breach at step two based on the ameliorative nature of the impugned job-sharing program and policy.

9 Paula Ethans, "The Supreme Court Just Made a Stellar Decision on Women's Equality Rights" (26 October 2020), online: *The Tyee* <www.thetyee.ca/Analysis/2020/10/26/Supreme-Court-Women-Equality-Rights/>.

10 "LEAF Celebrates Supreme Court of Canada's Affirmation of Women's Substantive Equality in *Fraser v. Canada (Attorney General)*" (16 October 2020), online: *Women's Legal Education & Action Fund* <www.leaf.ca/news/leaf-celebrates-supreme-court-of-canadas-affirmation-of-womens-substantive-equality-in-fraser-v-canada-attorney-general/>

then be illustrated with a brief look at *Simpson v Canada (AG)*,[11] the first lower court decision to apply *Fraser*.

II. *Fraser*'s Potential to Advance Substantive Equality

First, and in general, *Fraser* is a welcome attempt to simplify the analytical approach to section 15(1). Over the past 35 years, the Supreme Court of Canada developed four different tests for determining a breach of the equality guarantee.[12] In Justice Abella's decision in *Fraser,* there is a lot of refreshingly explicit brush-clearing which should narrow the focus of analysis going forward. Counsel and lower courts can start with *Fraser* in order to understand what claimants must prove and what they need not prove.[13] If it is necessary to look back at older cases, starting with *Fraser* alerts readers to what aspects of that older law are no longer good law.

Second, *Fraser* is clear about what the current test is for proving a breach of section 15(1), and very clear that the same test applies to both direct discrimination and adverse effects discrimination.[14] Since 2018, when *Alliance* and its companion pay equity case, *Centrale des syndicats du Québec v Quebec (Attorney General)*[15] were decided, claimants have needed to prove two things:

> (1) that the impugned law or state action, on its face or in its impact, creates a distinction based on an enumerated or analogous ground; and
>
> (2) that it imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.[16]

Added clarity about the test is a good thing because the test was recently changed, and because Justices Russell Brown and Malcolm Rowe do *not* use the current test in their dissent in *Fraser* and do not warn readers that they are not using the current test.

There have been four different tests for the proof of a violation of section 15(1) and the current test is the second version of the fourth test.[17] The retreat from the third test — often referred to as the *Kapp* test or the *Kapp/Withler* test — began in 2013 with Justice Abella's decision in *Quebec (Attorney General) v A*,[18] but a new test was not articulated until 2015 with

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11 2020 ONSC 6465 [*Simpson*].

12 The four tests are discussed in the text accompanying notes 17-21.

13 In *Fraser, supra* note 2 at paras 26-28, 40-82 of Justice Abella's judgment are enough to orient readers to the current law, with paras 28-39 added if the claim is one of adverse effects discrimination.

14 *Ibid* at para 48.

15 2018 SCC 18 [*CSQ*].

16 *Alliance, supra* note 7 at para 265; *CSQ, supra* note 15 at para 22 (adding "including 'historical' disadvantage" to the end of the second step); *Fraser, supra* note 2 at para 27.

17 The first test was introduced in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews* cited to SCR], the first Supreme Court of Canada case to consider s 15. The second was formulated ten years later in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law* cited to SCR]. The third was set out in *R v Kapp*, 2008 SCC 41 [*Kapp*] and *Withler v Canada (Attorney General)*, 2011 SCC 12 [*Withler*].

18 2013 SCC 5 [*Quebec v A*] at paras 323-24, 327 (per Abella J). Justice Abella's decision in *Quebec v A* began the retreat by stating that prejudice and stereotyping — the focus of the second step in the *Kapp/Withler*

the Court's unanimous decision in *Kahkewistahaw First Nation v Taypotat*.[19] That fourth test was then changed in *Alliance* and *CSQ*, the 2018 pay equity cases.[20] It is that second version of the fourth test — the version put forward in *Alliance* and *CSQ* — that is reiterated by Justice Abella in *Fraser.*

There is one big difference between the first and second versions of the fourth test. The first version in *Taypotat* stated that "[t]he second part of the analysis focuses on arbitrary — or discriminatory — disadvantage," and defined arbitrary disadvantage as being about "whether the impugned law fails to respond to the actual capacities and needs of the members of the group."[21] That focus and definition are absent in the second version of the test in *Alliance*, *CSQ* and *Fraser*.

It was unfortunate that arbitrariness, defined as a lack of correspondence between the law and the actual capacities and needs of the claimants, was used in *Taypotat.* That use recalls the infamous 1995 trilogy of equality cases that split the Court over the role of relevance in a section 15(1) analysis,[22] and the oft-criticized correspondence factor in *Law*.[23] These are all versions of the same idea, all focused on the government's purpose. An arbitrary distinction — one in which the law does not correspond to actual needs and capabilities — is a distinction that is not relevant to those needs and capabilities. In the two pay equity cases, Justice Abella dropped the need to prove arbitrariness without discussion; her majority judgment simply quoted the test from *Taypotat* with the offending words omitted. However, in *Fraser,* Justice Abella expressly stated that claimants need not prove arbitrary disadvantage, adding for good measure that being relevant to a pressing and substantial government objective does not mean that the law is not discriminatory.[24]

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test — were not the only forms of discrimination and the perpetuation of disadvantage should be included as well.

19 *Taypotat, supra* note 5 at paras 19-20 articulated the test as follows:

> The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground….
>
> The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.

20 *Alliance, supra* note 7 at para 265; *CSQ, supra* note 15 at para 22

21 *Taypotat, supra* note 5 at paras 19-20.

22 *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693, *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 201 and *Thibaudeau v Canada*, [1995] 2 SCR 627, 124 DLR (4th) 449 made up the equality trilogy. For a discussion of the split in the court, see Dianne Pothier, "M'Aider, Mayday: Section 15 of the Charter in Distress" (1996) 6 NJCL 295.

23 The correspondence factor — i.e., "[t]he correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others" — was the second contextual factor in *Law, supra* note 17 at 501. It was much criticized for importing section 1 considerations into section 15: see for example Beverley Baines, "Law v. Canada: Formatting Equality" (2000) 11:3 Const Forum Const 65 at 72; Sheila McIntyre, "Deference and Dominance: Equality Without Substance" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis, 2006) 95 at 102-05; Jennifer Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19 at 31-32.

24 *Fraser, supra* note 2 at paras 79-80. Justice Abella added that "that adding relevance to the s. 15(1) test — even as one contextual factor among others — risks reducing the inquiry to a search for a 'rational basis' for

Despite the added clarity in *Fraser* with its reiteration of the test in the two pay equity cases, the dissent of Justices Brown and Rowe puts the need to prove a lack of correspondence between the impugned law and the actual capacities and needs of group members back into their version of the test.[25] Having taken this step, they then rely on that resurrected need to prove arbitrariness, as well as a focus on the ameliorative purpose of the law,[26] to say, in effect, that any action the government takes to remedy disadvantage is good enough.[27] It seems that, for Justices Brown and Rowe, as long as the state "tried to be accommodating,"[28] it does not matter if the impugned provision reinforces, perpetuates, or exacerbates disadvantage.

Taking arbitrariness off the list of things that claimants need to prove should be celebrated. It belongs in section 1 where the government bears the burden of proving that the means they choose to accomplish their objectives can be justified in a free and democratic society, and, more specifically, that the distinction in the impugned law is rationally connected to the government's purposes in enacting that law. However, as the dissent in *Fraser* illustrates, the first version of the current test may continue to bedevil future section 15(1) analyses. In other words, while it is a good thing that *Fraser* reiterated the simplified and clear test for a breach of section 15(1) that was set out in the pay equity cases, there may still be problems in getting lawyers to plead and argue, and lower courts to apply, that test and only that test.

Third, *Fraser* is really quite good at explaining what adverse effects discrimination is and why it matters. The concept is elaborated in twenty-five paragraphs of Justice Abella's judgment that are filled with explanations of what adverse effects discrimination is, different types of adverse effects discrimination, the difference that the recognition of adverse effects discrimination makes, and the relationship between adverse effects discrimination and substantive equality and systemic discrimination.[29] Recognizing adverse effects can capture the institutionalized and systemic differential impact that apparently neutral laws and practices have on historically disadvantaged groups.[30]

Fourth, Justice Abella's brush-clearing in the section entitled "Some further observations" provides more positives. In this section, Justice Abella provides a list of things that claimants need not prove, in addition to arbitrariness and relevance. Some of these points have been stated before, but the collection of all of them together in one judgment is helpful.

Claimants do not have to prove that the negative effect of the law or policy was intended.[31] This point was first made in *Andrews* more than thirty years ago,[32] but it has nevertheless been

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the impugned law (*ibid* at para 79).

25 *Ibid* at para 169.

26 See e.g. *ibid* at paras 210, 218-19. The "ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society" was the third contextual factor in *Law, supra* note 17 at 502.

27 *Fraser, supra* note 2 at paras 168, 177, 181, 190-91, 198, 211-12.

28 *Ibid* at para 228. Section 15(2) — which saves ameliorative laws from charges of "reverse discrimination" according to Justice Abella in *Alliance, supra* note 7 at para 31 — also figured prominently in the dissent of Justices Brown, Rowe and Côté in *Alliance*, *ibid* at paras 74-80, 107-11.

29 *Fraser,* supra note 2 at paras 29-54.

30 "Adverse Impact", *supra* note 1 at 197; Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4:1 McGill JL & Health 17 at 23.

31 *Fraser, supra* note 2 at para 69.

32 S*upra* note 17 at 173-74.

a recurring issue, in part because of the frequent reappearance of an arbitrariness requirement. *Fraser* confirms that the state's purpose in enacting impugned provisions does not save them if they have a discriminatory impact.[33]

Because legislative intent is irrelevant, the government's claim that the law was intended to be ameliorative or remedial will not save that law.[34] As Justice Abella stated in *Quebec v A*, an emphasis during the section 15(1) analysis "on whether the claimant group's exclusion was well motivated or reasonable … redirects the analysis from the *impact* of the distinction on the affected individual or group to the legislature's *intent* or *purpose*."[35]

Regrettably, Justice Abella did not address the oft-cited and apparently contradictory statement in *Withler* that, "[i]n cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole."[36] In *Fraser*, she was explicit that an ameliorative purpose *cannot* shield a law or program from section 15(1) as a whole. So, did *Fraser* overrule *Withler* on this point about how to conduct the typical analysis involving a large benefit program? Or was the analysis in *Fraser* simply atypical?

We can hope that the fact that Justice Abella did not consider the "broader context of the scheme as a whole" in *Fraser* means that it is no longer necessary to do so when the impugned law is part of a larger benefits scheme. The Federal Court of Appeal in *Fraser* had found that there was no adverse treatment of job-sharing members when their overall employment context was considered — including the entire remuneration package of job-sharers and those on leave without pay — and not simply their pension entitlements.[37] Looking at the ameliorative effect of a larger benefits scheme takes comparison well beyond the comparators and the impugned law; it has little to do with determining whether the effect of that law is to perpetuate the claimants' disadvantage.[38] However, it seems like too much to hope for: that silence and a lack of use of this factor in Justice Abella's judgment will change the law. A clearer direction (or better yet, an actual overrule) would have been helpful to counsel and lower courts.

Claimants do not need to prove that their protected characteristic (e.g., sex) caused the disproportionate impact (e.g., less favourable pension consequences).[39] Neither do they have to prove that the impugned law created the claimants' disadvantage (e.g., gender bias in pension plans).[40] Causation has been a major problem in adverse effects discrimination cases in the past,[41] so these points may be particularly helpful in the future. The question of whether the impugned law created the claimants' disadvantage was a problem in the lower courts in *Fraser*, as well as in the dissent of Justices Brown and Rowe at the Supreme Court. In dis-

33 *Fraser, supra* note 2 at paras 79-80.
34 *Ibid* at para 69.
35 *Supra* note 18 at para 333 [emphasis in original].
36 *Ibid* at para 67 [emphasis added].
37 *Fraser v Canada (Attorney General),* 2018 FCA 223 at paras 49-50 [*Fraser FCA*].
38 Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substance Equality after *Withler*" (2011) 16:1 Rev Const Stud 31 at 59-60.
39 *Fraser, supra* note 2 at para 70.
40 *Ibid* at para 71.
41 "Adverse Impact", *supra* note 1 at 201-02, 224-25.

missing the claim, the Federal Court of Appeal had held "[w]e must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision."[42]

As the final bit of brush-clearing, Justice Abella reiterated that the challenged law need not affect all members of the protected group in the same way.[43] Despite being said before,[44] this issue has continued to pose a problem for claimants, often when the ground is sex, the group is women, and the push back is "not all women."[45]

The fifth potential advance in *Fraser* concerns comparators, i.e., disadvantaged as compared to whom? In its application of the law to the facts, Justice Abella reiterated that a mirror comparator analysis must be avoided.[46] Even better, she went on to explicitly state that courts may need to use more than one comparator, and then proceeded to use more than one here — members on leave without pay, suspended members, and full-time members of the RCMP.[47] *Fraser* itself therefore provides an example of the insights to be gained from making multiple comparisons. This is especially important for claimants when the discrimination is adverse effects discrimination because the impugned law is neutral on its face. The more comparisons, the more likely it is that adverse effects discrimination will be recognized.

Sixth, the majority in *Fraser* reaffirmed that individual choice is not relevant as a matter of law to the proof of discriminatory treatment, insisting that "[t]his Court has consistently held that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group."[48] This point needed to be made again because the claimants in *Fraser* failed in the lower courts on the basis that they "elected to job-share."[49] Justice Abella found that the lower courts erred in using choice as a reason to reject the section 15(1) claim.[50]

Justice Abella also recognized that choice or "electing to job-share" may be absent as a matter of fact.[51] A decision to work part-time is often — and was in this case — an encumbered and constrained decision. Unfortunately, when introducing her discussion of choice as a matter of fact (rather than law), Justice Abella stated that *Fraser* "highlights the flaws of <u>over-emphasizing</u> choice in the s. 15 inquiry,"[52] suggesting there is still a role for choice but leaving that role unspecified. In contrast, in *Quebec v A*, Justice Abella had been more prescriptive about the use of choice when she listed only two very specific and narrow instances when choice may still be relevant to section 15(1) claims. There she had indicated that "[individual choice] may be an important factor in determining whether a ground of discrimination quali-

42 *Fraser FCA*, supra note 37 at para 54, quoting *Symes v Canada*, [1993] 4 SCR 695 at 764-65, 110 DLR (4th) 470.
43 *Fraser, supra* note 2 at para 72.
44 See for example *Taypotat, supra* note 5 at paras 52-53.
45 See for example *BC Health Services, supra* note 5.
46 *Fraser, supra* note 2 at paras 94, 128. The point was originally made in *Withler, supra* note 17.
47 *Fraser, supra* note 2 at para 25.
48 *Ibid* at para 86, reaffirming *Quebec v A, supra* note 18 at para 336 ("this Court has repeatedly rejected arguments that choice protects a distinction from a finding of discrimination").
49 *Fraser FCA, supra* note 37 at para 53.
50 *Fraser, supra* note 2 at para 92.
51 *Ibid* at paras 89-91. I am indebted to my colleague, Jennifer Koshan, for this particular point.
52 *Ibid* at para 91 [emphasis added].

fies as an analogous ground … [and] it may factor into the s. 1 analysis."[53] The specificity of *Quebec v A* could be used to define what amounts to "over-emphasizing choice." But should choice be relevant to determining whether a ground is analogous when it reinforces the need for immutability?[54]

Seventh, Justice Abella addressed the types of evidence that are useful in adverse effects discrimination cases. Justice Abella suggested that two types of evidence would be particularly helpful: "evidence about the situation of the claimant group. … [and] evidence about the results of the law."[55] She also specified who could provide each type of evidence and what its purpose would be.[56] And while she acknowledged that both types of evidence should be provided if possible, she stated that both types were not always required.[57]

Eighth, and finally, there is a potential positive in the second step of the test which requires that the burden imposed or the benefit denied must have the effect of "reinforcing, perpetuating, or exacerbating disadvantage."[58] Justice Abella has never offered any analysis of this wording — these particular three words strung together — which she first used in *Taypotat*.[59] She repeated that string of three in *Alliance*, *CSQ* and now *Fraser*, but each time without comment.

The three words mean different things in everyday use. "Exacerbate" is most commonly understood to mean, "to make something that is already bad even worse,"[60] or "to make more violent, bitter, or severe."[61] If the second step of the section 15(1) test required claimants to prove the impugned law exacerbated disadvantage, they would have to prove that the law made their pre-existing disadvantage worse by increasing certain harmful effects.

"Reinforce" typically means "to make something stronger,"[62] i.e., to strengthen by adding additional material or support, or to make more pronounced.[63] It suggests a particular way of making claimants' disadvantage worse, i.e., by embedding pre-existing disadvantage in the law. Justice Abella expressly addressed this point in one of the strongest passages in her *Fraser* judgment:

> For over 30 years, the s. 15 inquiry has involved identifying the presence, persistence and pervasiveness of disadvantage, based on enumerated or analogous grounds. Its mandate is ambitious but not utopian: to address that disadvantage where it is identified so that in the pursuit of equality, inequality can be reduced one case at a time. That is why there is a s. 15(1) breach in this case — not because women continue to have disproportionate responsibility for childcare and less stable working hours than men, but because the pension plan "institutionalize[s] those traits as a basis on which to unequally distribute"

53 *Quebec v A, supra* note 18 at para 343.
54 For a discussion of concerns about choice and the immutability requirement, see Jennifer Koshan, "Intersections and Roads Untravelled: Sex and Family Status in *Fraser* v *Canada*" (2021 30:2 Const Forum Const 29 at 36; Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 JL & Equality 37.
55 *Fraser, supra* note 2 at para 56.
56 *Ibid* at paras 57-58.
57 *Ibid* at paras 60-61, 67.
58 *Ibid* at para 27; *Alliance, supra* note 7 at para 25; *CSQ, supra* note 15 at para 22.
59 *Taypotat, supra* note 5 at para 20.
60 "Exacerbate", online: *Cambridge Dictionary* <https://dictionary.cambridge.org/dictionary/english/exacerbate>.
61 "Exacerbate", online: *Merriam-Webster* <https://www.merriam-webster.com/dictionary/exacerbate>.
62 "Reinforce", online: *Cambridge Dictionary* <https://dictionary.cambridge.org/dictionary/english/reinforce>.
63 "Reinforce", online: *Merriam-Webster* <https://www.merriam-webster.com/dictionary/reinforce>.

> pension benefits to job-sharing participants. … This is "'discrimination reinforced by law' … which this Court has denounced since *Andrews*."[64]

As this passage indicates with its reference to the impugned law institutionalizing pre-existing disadvantage, the idea that a law is discriminatory simply because it entrenches a pre-existing disadvantage fits well with the concept of systemic or institutional discrimination.

Then there is the last of the three words: "perpetuate." Perpetuating disadvantage also requires pre-existing or historical disadvantage.[65] But, in contrast to the word "reinforce," "perpetuate" means "to cause something to continue,"[66] or that something occurs continually or indefinitely.[67] In the section 15(1) context, it refers to making a state of affairs that was already disadvantageous continue to be disadvantageous — not necessarily worse, or more entrenched, but simply the same. The inclusion of the word "perpetuating" recognizes that a law that allows disadvantage to continue is a law with adverse effects that can and should be addressed by section 15(1).

Ironically, this point is perhaps most clearly seen in the dissent by Justices Brown and Rowe. Their dissent would require that the impugned law "contributes to — that is, *augments* — pre-existing disadvantage."[68] They took issue with the idea that a law can violate section 15(1) if it simply "*perpetuates* (that is, *fails to remove*)" disadvantage.[69] Their desire to limit section 15(1) to only those laws and policies that make things worse for members of historically disadvantaged groups is consistent with their attack on substantive equality,[70] as well as their insistence that the state has no positive obligation to remedy systemic discrimination.[71]

Those are the potential positives that I see in *Fraser*. But because something as basic as the test for equality has changed every decade, it is difficult to be confident that any perceived gains will be realized in future cases. I am only cautiously optimistic about what the future will bring, given the Court's abysmal track record in dealing with adverse effects discrimination,[72]

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64 *Fraser, supra* note 2 at para 136 [emphasis added, citations omitted], quoting Fay Faraday, "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada" (2020) 94 SCLR (2d) 301 and *CSQ, supra* note 15 at para 33, quoting *Andrews*, *supra* note 17 at 172.

65 The use of "reinforcing, perpetuating or exacerbating" and the requirement for pre-existing or historical disadvantage appears to raise, and perhaps settle without purporting to do so, the long-standing question about whether pre-existing disadvantage is required for a section 15(1) claim to succeed. See *Weatherall v Canada*, [1993] 2 SCR 872, 105 DLR (4th) 210 and *Trociuk v British Columbia (Attorney General),* 2003 SCC 34.

66 "Perpetuate", online: *Cambridge Dictionary* <https://dictionary.cambridge.org/dictionary/english/perpetuate>.

67 "Perpetuate", online: *Merriam-Webster* <https://www.merriam-webster.com/dictionary/perpetual>.

68 *Fraser, supra* note 2 at para 175 [emphasis in original].

69 *Ibid* at para 211 [emphasis in original].

70 *Ibid* at paras 216-27.

71 *Ibid* at para 209-10.

72 Both *BC Health Services, supra* note 5, and *Hutterian Brethren, supra* note 5, are examples of the Court's failure to even recognize the adverse effects discrimination in each case, a failure exacerbated in the *Hutterian Brethren* case because the adverse effects discrimination was intentional. See Jennifer Koshan

the time and effort it takes to pursue each case, and the fact that Justices Abella and Moldaver will be retiring in the next two years. *Fraser* has already been applied in one case — Justice Lorne Sossin's decision in *Simpson* — but, overall, it seems to have had a mixed influence on that decision.

III. Application of *Fraser* in *Simpson*

The claimant in *Simpson*, a former postsecondary student with disabilities, argued that the Canadian Student Loans Program (CSLP) violated section 15(1) on the ground of disability. The essence of her claim was that some students with disabilities took longer to complete their postsecondary education programs than did students without disabilities, and the former graduated with a higher debt load because the CSLP provides loans on a "per year" rather than "per program" basis.

It must be noted that *Fraser* was handed down after the close of arguments in *Simpson*. Justice Sossin did not seek supplemental submissions from counsel because, as he saw it, *Fraser* "did not purport to modify the existing test for s.15 in adverse effects challenges, on which the parties had made extensive arguments, but rather affirmed and applied that approach."[73] That is correct, but the "existing test" prior to *Fraser* was the test in *Alliance* and *CSQ* — the two 2018 pay equity cases — and that was *not* the test that was cited and applied in *Simpson*. Instead, Justice Sossin summarized the test in *Taypotat*:

> An applicant must show (1) that the impugned law or action imposes a burden or denies a benefit on an enumerated or analogous ground; and (2) that the distinction is discriminatory in that it fails to respond to the needs of the claimant group but instead arbitrarily perpetuates their existing disadvantage;[74]

What Justice Sossin summarized was the first version of the fourth test for a breach of section 15(1). This test included the need for "arbitrary" disadvantage, defined as "whether the impugned law fails to respond to the actual capacities and needs of the members of the group"[75] — a requirement which was omitted in the pay equity cases and in *Fraser.* Justice Sossin's opinion also included an analysis of whether the CSLP responded to the needs of the claimant and other students with disabilities.[76]

It is difficult to know whether or not Justice Sossin appreciated that the test in the pay equity cases and *Fraser* was, in substance, different from that in *Taypotat* and *Quebec v A*. His use of the first version of the current test may illustrate one of the problems with the many

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& Jonnette Watson Hamilton, "Alberta v Hutterian Brethren of Wilson Colony" (2018) 30:2 CJWL 292 (a Women's Court of Canada "judgment").

73 *Simpson, supra* note 11 at para 149.

74 *Ibid* at para 146 [emphasis added], citing *Taypotat, supra* note 5 at paras 19-29. Justice Sossin also relied on Justice Abella's description of two types of adverse effects discrimination claims to pose the question to be answered as follows: "Does the evidence in the record establish that students with disabilities who take longer encounter either 'built-in headwinds' or an absence of accommodation by the CSLP?" (*ibid* at para 159). This question is similar to the test set out in *Fraser* if those two types of adverse effects discrimination are the only two types, and not simply examples. Is "built-in headwinds" a metaphoric way of saying "imposes burdens" and "absence of accommodation" the same as "denies a benefit"?

75 *Taypotat, supra* note 5 at para 20.

76 *Simpson, supra* note 11 at paras 297-308

changes that the Supreme Court has made to the approach to section 15(1), particularly when those changes have not been forthrightly acknowledged and the no-longer-good law is not explicitly overruled.

In the application of step one of the test in *Simpson*, the parties were at odds over whether students with disabilities took longer to complete their education because of their disabilities and whether they accrued more debt than did students without disabilities.[77] Much of the expert evidence on these issues was statistical, and Justice Sossin relied on *Fraser*'s statements about the goal of statistical evidence,[78] as well as Justice Abella's point that neither evidence of statistical disparities nor evidence of broader group disadvantage were necessary to the proof of disparate impact.[79] Justice Sossin also applied one of Justice Abella's brush-clearing points, holding that the evidence did not need to show that every student with disabilities took longer to complete their program or even that the majority of those who took longer had a disability.[80] Instead:

> [I]t is sufficient for Ms. Simpson to show that she is part of a group of students who take longer to complete their postsecondary education as a consequence of their disability, and that some of these students experience an added burden through the operation of the CSLP as a consequence of their disability.[81]

As a result, Justice Sossin found that the claimant's statistical and expert evidence met the burden of proof required for the first step of the section 15(1) test. Many students with disabilities did take longer to graduate and many of those students did accrue more debt than did students without disabilities.[82]

For the second step of the analysis — carried out under the heading "Is this distinction discriminatory in that it fails to respond to the needs of the claimant group but instead perpetuates their existing disadvantage?" — Justice Sossin relied on *Withler* for the "proper approach" to the analysis of an adverse effects discrimination claim.[83] Justice Sossin's greatest reliance on *Withler* was placed on this oft-cited paragraph, a paragraph that is almost the antithesis of Justice Abella's approach in *Fraser*:

> In cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the

77 *Ibid* at para 167.
78 *Ibid* at para 160, quoting *Fraser, supra* note 2 at para 59.
79 *Simpson, supra* note 11 at paras 251-52.
80 *Ibid* at paras 258, 311-12, citing *Fraser, supra* note 2 at para 72.
81 *Simpson, supra* note 11 at para 258.
82 *Ibid* at para 263, 273.
83 *Ibid* at paras 153, citing *Withler, supra* note 17 at paras 40. Justice Sossin also relied on *Withler* for the role of comparators and the way to approach adverse effects discrimination claims: *Simpson, supra* note 11 at paras 153, 157.

> claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.[84]

As noted earlier, looking at the impugned provision in the broader context of the scheme as a whole was not disavowed by Justice Abella.[85] Therefore, it is not surprising to see such a contextualized approach here, especially as the case was argued before *Fraser* was released. Moreover, as also noted earlier, the need for claimants to prove that the law failed to respond to their actual needs and circumstances was not addressed by Justice Abella, but only omitted in her new version of the test.[86] That omission was not enough to stop it from playing a prominent role in Justice Sossin's analysis. I expect we will see more lower courts and counsel following Justice Sossin's lead, i.e., following *Withler*'s approach.[87]

In step two of the analysis, the federal and Ontario governments argued that the assessment of the CSLP had to take into account its ameliorative purpose as well as its responsiveness to the claimant's actual needs and capacities, relying on *Withler* and also the amelioration and correspondence factors in *Law*.[88] Justice Sossin did review the federal government evidence about the evolution of the various CSLP programs, different grants that specifically addressed the needs of students with disabilities at all stages of the loan cycle, and the loan forgiveness programs.[89] As he noted, "I have viewed the evidence in this case in the context of the programs and policies developed to address the needs of students with disabilities [and these] ameliorative programs reflect a recognition that the experiences of students with disabilities, and their financial barriers, are distinct."[90] Justice Sossin also accepted that federal and provincial decision-makers made individualized assessments tailored to the individual needs and circumstances of students with disabilities.[91]

However, he did not accept every argument of the federal and provincial governments in step two. The government of Ontario had contended that, because the CSLP was intended to counter historical disadvantage, it was the antithesis of discrimination.[92] Justice Sossin used *Fraser* to reject this argument, relying on Justice Abella's point that an ameliorative purpose cannot shield a law or program from section 15(1) scrutiny.[93] The governments had also objected to the claimant's reliance on a number of successful human rights claims, arguing they were not relevant because they did not involve section 15(1). Justice Sossin relied on *Fraser*'s use of human rights decisions to accept the claimant's arguments based on those cases.[94]

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84 *Withler, supra* note 17 at para 67 [emphasis added]. For application of the "perfect correspondence" point by Justice Sossin, see *Simpson, supra* note 11 at paras 297-98.

85 See text accompanying notes 35-36.

86 See text accompanying notes 16-23.

87 Or, as the dissent of Justices Brown and Rowe put it, "being "faithful to *Withler*" as they were in considering the operation of the RCMP pension plan: *Fraser, supra* note 2 at para 151.

88 *Simpson, supra* note 11 at para 286-88, citing *Withler, supra* note 17 at paras 37-40 and *Law, supra* note 17 at paras 53, 64, 72-73.

89 *Simpson, supra* note 11 at paras 216-25, 316-26.

90 *Ibid* at para 268.

91 *Ibid* at para 299-300.

92 *Ibid* at para 290.

93 *Ibid* at para 295, citing *Fraser, supra* note 2 at paras 69, 78.

94 *Simpson, supra* note 11 at para 281, citing *Fraser, supra* note 2 at paras 37-40. The use of human rights decisions in the section 15 context can be traced back to *Andrews*, *supra* note 17.

In the end, because Justice Sossin was satisfied that the CSLP gave those administering the program the ability to redress the burden of additional debt throughout the post-application loan cycle,[95] he found that the CSLP law, policies and federal-provincial agreement were not unconstitutional.[96]

However, on the issue of how the CSLP decision-makers' discretionary authority was exercised in the case of the claimant,[97] Justice Sossin held in her favour. By not exercising their authority to relieve the claimant of the burden created by the operation of the CSLP when she took longer to complete her post-secondary education, he found that the operation of the CSLP did perpetuate her disadvantage and did unjustifiably infringe her section 15(1) rights.[98] He granted the claimant personal remedies under section 24(1) of the *Charter* that ensured she would not have to pay, or would be refunded for, any amounts arising from the discriminatory application of the CSLP.[99] He declined to make a declaration that would apply to students in similar circumstances, leaving it up to the relevant governments to implement policies and procedures that would redress the adverse effects on other students.[100]

Justice Sossin's analysis in step two seems to indicate that using the outdated test from *Taypotat*, augmented by the language in *Withler*, made a substantial difference. The fact that the law creating and implementing the CSLP was responsive to the needs of students with disabilities was the reason Justice Sossin found the legislation itself did not infringe section 15(1).[101] Even though he held that the implementation of the law was in breach of the equality guarantee, the law itself corresponded, albeit imperfectly, with the actual needs and capabilities of students with disabilities and so did not itself violate section 15(1).

The mixed reception and application of *Fraser* in *Simpson* is at least partially the result of the ambiguities in *Fraser* itself, namely, Justice Abella's failure to acknowledge the changes made to the test articulated in *Taypotat* and her failure to deal with *Withler's* legacy. As a result of *Fraser*'s ambiguities, as well as the general reluctance of counsel and lower courts to embrace previous changes to the section 15(1) analytical framework,[102] I am only cautiously optimistic that the potential of *Fraser* can be realized.

IV. Conclusion

In *Fraser*, Justice Abella asserted that "inequality can be reduced one case at a time."[103] The changes she made to the law around section 15(1), particularly with respect to adverse effects discrimination, should help realize that assertion. However, whether and how lower courts

95 *Simpson, supra* note 11 at para 326.
96 *Ibid* at para 333-35.
97 *Ibid* at para 327.
98 *Ibid* at para 337-38.
99 *Ibid* at paras 384-385.
100 *Ibid* at paras 388-392.
101 *Ibid* at paras 335, 371-72.
102 See Jonnette Watson Hamilton & Jennifer Koshan, "Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-Kapp" (2010) 47:4 Alta L Rev 927.
103 *Fraser, supra* note 2 at para 136.

and counsel will appreciate and act on the changes made by *Fraser* will likely remain unknown for a few years.

Nevertheless, inequality was reduced in *Fraser* and *Simpson*. Consider the female RCMP members. They began a quest for justice in 1997 that only ended with their success in *Fraser* twenty-three years later. *Fraser*'s reduction of the systemic discrimination perpetuated against some RCMP members based on their sex was relatively modest — a small, incremental step in that particular institutional context.[104] However, the win in *Fraser* will also retroactively benefit other RCMP members who job-shared, or at least some of them.[105]

Consider too the claimant in *Simpson* who sued in 2007 and continued to pay off her student loans for the next 13 years before being relieved of the perpetuation of that discriminatory disadvantage. The win in *Simpson* will probably benefit other students whose circumstances are similar to those of the claimant, assuming the governments in each Canadian jurisdiction direct those implementing the CSLP to redress any burden of more accrued debt that was or is imposed on some students with disabilities because they take longer to complete their programs.

Overall, *Fraser* is a reason to celebrate, albeit modestly. It may have removed some impediments to adverse effects discrimination claims. It may have improved the ability of the courts to see and address systemic discrimination. It may prod legislators to take action to reduce inequality. But, as *Simpson* illustrates, *Fraser* did leave some issues unresolved and some changes unarticulated, and so I am no more than cautiously optimistic about the chances it will have a positive impact on section 15(1) jurisprudence in the years to come.

104 See e.g. Meghan Grant, "Federal Court approves next $100M RCMP sexual harassment class-action lawsuit" (11 March 2020), online: *CBC News* <https://www.cbc.ca/news/canada/calgary/rcmp-class-action-lawsuit-women-non-policing-roles-approval-order-1.5493266>.

105 *Fraser, supra* note 2 at para 138, requiring that remedial measures should accord with the Court's reasons.