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The Elephant in the Room and Straw Men on Fire

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I. Introduction

A great unacknowledged challenge in litigating systemic discrimination claims under the section 15 equality guarantee of the *Canadian Charter of Rights and Freedoms*[1] is that claimants bear a double burden. Like all litigants, they must meet the burden of proving the elements of their legal claim. But, before they can do that, equality claimants must often first meet the extraordinary burden of dislodging judges' phenomenological anchoring in worldviews shaped by privilege. Where judges lack lived experience of systemic oppression, claimants must convince them that oppression *exists*. This gulf between lived experiences — what I call the reality gap — is the elephant in the room in many section 15 cases. The study of unconscious (and explicit) bias in judging generally is not new, and critical scholarship is growing about its implications in particular areas of law.[2] But the same scrutiny has not been applied

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1 s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

2 Melissa L Breger, "Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity and the Bench Trial" (2019) 53:4 U Rich L Rev 1039 at 1041 fairly reports that "The particular intersection of law and implicit bias is a burgeoning area of thought-provoking study, combining concepts of law, legal decision making, brain science, psychology, and human behavior." For just a small selection of scholarship focused on specific areas of law, see: Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen's University Press, 2018); Rosemary Cairns-Way & Donna

to analyze how judicial privilege plays out when interpreting the constitutional right to equality. We simply do not talk about it. Yet, confronting the distorting effects of privilege head on would go a long way to explaining Canada's chaotically inconsistent section 15 jurisprudence. The reality gap manifests as a persistent chasm between majority and dissenting judgments across the decades of the Supreme Court of Canada's equality rulings[3] and is on full display most recently in *Fraser v Canada (Attorney General)*.[4] Instead of being identified and dismantled, the reality gap is sublimated into unflagging doctrinal disputes about and a preoccupation with the legal test by which to prove a breach of section 15.[5] Justice Abella's majority reasons in *Fraser* make meaningful advances towards substantive equality by consolidating and clarifying the Court's section 15 test.[6] But the dissent by Justices Brown and Rowe pushes back by challenging the very notion of substantive equality, which they call "an open-ended and undisciplined rhetorical device by which courts may privilege, without making explicit, their own policy preferences."[7] Meanwhile, the dissent by Justice Côté adheres to a strict formalism which makes *no* mention of either systemic discrimination or substantive equality. Instead, she actively eradicates a gender lens from the analysis: a remarkable feat in a claim about *sex* discrimination.

This article does not propose that the legal analysis that flows from the reality gap is a product of bad faith. Rather, this analytical failure is a reflection of how dominant understandings of the world are entrenched through institutions, systems, practices, and public narratives that create, uphold, reinforce, and render "natural" and invisible the privilege of the privileged. It takes sharply honed and deliberately engaged capacities of emotional intelligence, critical self-reflection, and humility to unlearn the habits of privilege[8] and to acknowledge the ways in which one's own behaviour is complicit in practices of systemic oppression.[9] In the absence of

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Martinson, "Judging Sexual Assault: The Shifting Landscape of Judicial Education in Canada" (2019) 97:2 Can Bar Rev 367; Vicki Lens, "Judging the Other: The Intersection of Race, Gender and Class in Family Court" (2019) 57:1 Fam Ct Rev 72; Denardo Jones, *Punishing Black Bodies in Canada: Making Blackness Visible in Criminal Sentencing* (Master of Laws Thesis, Osgoode Hall Law School of York University, 2019) [unpublished].

3 See e.g. *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*Quebec v Alliance*]; *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18; *Quebec (Attorney General) v A*, 2013 SCC 5 [*Quebec v A*]; *Miron v Trudel,* [1995] 2 SCR 418, 124 DLR (4th) 693. I thank Margot Young for the insight that this gap also appears in unanimous equality rights decisions where it manifests as a gap between judicial and claimant realities.

4 2020 SCC 28 [*Fraser*].

5 Jennifer Koshan & Jonette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19; 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.

6 See Jonette Watson Hamilton, "Cautious Optimism*: Fraser v Canada (Attorney General)*" (2021) 30:2 *Const Forum* Const 1.

7 *Fraser, supra* note 4 at para 146, per Brown and Rowe JJ (dissenting).

8 Scholars of legal ethics have long recognized that developing skills of critical self-reflection and cultural competence are core obligations of a competent lawyer because, without them, a lawyer or judge risks passing off personal bias or ideological preference as *legal* analysis: Sue Bryant & Jean Koh Peters, "Five Habits for Cross-Cultural Lawyering" in Kimberly Holt Barrett & William H George, eds, *Race, Culture, Psychology & Law* (Thousand Oaks: Sage, 2005) 47; Robert K Vischer, "Legal Advice as Moral Perspective" (2006) 19:1 Geo J Leg Ethics 225.

9 For examples of how that critical self-reflection is applied to unlearning systemic discrimination, see: Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in*

that intentional reflective work by judges and lawyers at both a personal and collective level,[10] the reality gap remains real. In other words, it remains the reality of case law. The critical question, then, is: How do we bridge the reality gap and end the cycle of continually and inadequately reinventing section 15 that it fuels?[11] Part II of this article briefly lays out the context of the equality claim advanced in *Fraser* and the divergent reasons of the Supreme Court of Canada. Part III names the elephant in the room: that is, it identifies and examines the distinct techniques of logic by which comprehension of systemic discrimination is erased from legal analysis. Part IV considers how to deepen substantive equality analysis by facing the reality gap head on. It proposes that this can be done by returning to the text and history of section 15; by bringing new precision to phrases that have lost their meaning through rote repetition; and by eliminating the passive language that permeates the equality analysis in order to make explicit the dynamics by which systemic discrimination operates. Analytical developments with this clear focus would provide real guidance on how to bridge the reality gap instead of acting like it isn't there.

II. The *Fraser* Decision

Fraser, decided by a 6-3 split,[12] is only the second appeal at the Supreme Court of Canada in which women have won a section 15 equality claim that alleges discrimination based on sex.[13] The claimants — Joanne Fraser, Alison Pilgrim, and Colleen Fox — are retired RCMP officers. In the 1990s, they enrolled in the RCMP's job-sharing program after returning from maternity leave because they were unable to find childcare that could enable them to continue full-time work. In particular, Ms Fraser and Ms Fox worked in remote rural communities, and Ms Fraser's full-time hours involved rotating 10-hour shifts 7 days a week.[14] The RCMP created the job-sharing program in 1997 to facilitate the retention of female officers who needed to take leave to care for their children.[15] Most of the 140 officers who enrolled in the program between 1997 and 2011 were women with children, and *all* participants between 2010 and 2014 were women, most of whom job-shared because of childcare responsibilities.[16] However, unlike workers whose full-time work was temporarily interrupted by other kinds of leaves or

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Canada (Vancouver: UBC Press, 2010); Ibram X Kendi, *How to be an Anti-Racist* (New York: One World, 2019); Layla F Saad, *Me and White Supremacy: Combat Racism, Change the World, and Become a Good Ancestor* (Naperville, Ill: Sourcebooks, 2020).

10 See e.g. the collective reality recalibration — the transformation of public narratives about Indigenous peoples and Canadian colonialism — demanded by *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconcilliation Commission of Canada, 2015) and *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Canada: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019).

11 Koshan & Watson Hamilton, *supra* note 5.

12 The six-judge majority judgment was written by Justice Abella for herself, Chief Justice Wagner, and Justices Moldaver, Karakatsanis, Martin and Kasirer. One dissenting judgment was written by Justices Brown and Rowe. A second dissenting judgment was written by Justice Côté.

13 The first successful s. 15 sex discrimination appeal brought by women only came in 2018 with *Quebec v Alliance, supra* note 3.

14 *Fraser, supra* note 4 at paras 6-9, per Abella J.

15 *Ibid* at paras 91, 126-28, per Abella J.

16 *Ibid* at para 10, per Abella J.

absences from work, the RCMP Pension Plan[17] did not allow workers who job-shared to "buy back" pension benefits they missed due to their temporarily reduced hours. Pension buy back has significant value for employees because it sustains workers' years of full-time pensionable service, thereby preventing an erosion of their pension benefits.[18] Buy-back also involves no payment by the employer; the worker pays both their own and the employer's contributions for the buy-back period. Being denied buy-back, however, left the claimants and other job-sharing participants with permanently reduced pensions.

Justice Abella, writing for the majority, found that the denial of pension buy-back for RCMP members who job-share had a disproportionate impact on women, constituted adverse impact discrimination based on sex, and violated section 15 of the *Charter*. She declined to make her section 15 ruling based on the intersecting analogous grounds of family or parental status because the record and submissions before the court did "not provide the necessary assistance in exploring the implications" of recognizing these new analogous grounds, and the issue was not addressed in the reasons of the courts below.[19] Moreover, she found that "a robust intersectional analysis of gender and parenting … can be carried out under the enumerated ground of sex."[20] She ruled that the violation was not justifiable under section 1 because no pressing and substantial policy concern was identified. On the contrary, denying buy-back for job-sharers ran counter to the purposes of both the job-sharing program and the buy-back provisions, "which were intended to ameliorate the position of female RCMP members who take leave to care for their children."[21]

In dissent, Justices Brown and Rowe found that the denial of buy-back created a distinction based on sex "because members of the job-sharing program are disproportionately women, whereas uninterrupted full-time employment is a male pattern of employment."[22] However, they found no violation of section 15 because "[o]ffering pension benefits that are prorated to hours worked is not substantive discrimination."[23] Justice Côté, writing a separate dissent, found that the claim failed at the first step of the section 15 analysis because "no distinction can be made out on the basis of sex."[24] Instead, she found that a distinction arose "because one has *caregiving* responsibilities."[25] But she denied the parental or family status claim because the grounds had not been recognized previously as analogous and she would not now recognize them as such.[26]

17 The Pension Plan is created through federal legislation and regulations: *Royal Canadian Mounted Police Superannuation Act*, RSC 1985, c R-11 and *Royal Canadian Mounted Police Superannuation Regulations*, CRC, c 1393.
18 *Fraser, supra* note 4 at para 14, per Abella J.
19 *Ibid* at paras 114-23, per Abella J.
20 *Ibid* at para 116, per Abella J.
21 *Ibid* at para 126, per Abella J.
22 *Ibid* at para 185, per Brown and Rowe JJ (dissenting).
23 *Ibid* at para 205, per Brown and Rowe JJ (dissenting).
24 *Ibid* at para 233, per Côté J (dissenting).
25 *Ibid* at para 234, per Côté J (dissenting) [emphasis in original].
26 *Ibid* at para 238, per Côté J (dissenting).

III. The Reality Gap: Naming the Elephant in the Room

Moving through the three judgments in sequence — from Abella J, to Brown and Rowe JJ, to Côté J — reveals an incremental disappearance of a systems-based frame. While Abella J builds a fairly robust analysis of how systemic discrimination operates, Brown and Rowe JJ merely concede that uninterrupted full-time work is a male employment pattern, and Côté J disregards the systemic altogether. Their different approaches produce three very distinct perceptions of "reality" that increasingly diverge from the claimants' lived experiences of systemic discrimination. The elephant in the room 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. This can then, as Part IV of this article suggests, enable a more complete articulation of substantive equality and provide practical guidance that halts the slide into alternate realities.

As examined below, the reality gap is constituted through at least three techniques: 1) (re) characterizing the issue in dispute; 2) positing the existence of acontextual individual choice unfettered by systems of power and coercive social norms; and 3) questioning the institutional role and competence of courts in a constitutional democracy.

A. (Re)Characterizing the Issue in Dispute

It is beyond dispute that a section 15 equality analysis must proceed from the perspective of the claimant.[27] Similarly, it is a bedrock principle that contextual analysis under section 15 must "tak[e] full account of social, political, economic and historical factors" that shape the *claimants*' situation, and of the *effect* of the impugned law.[28]

Abella J's majority reasons follow these approaches. She begins her analysis from the perspective of the claimants by identifying their personal situations: the barriers to accessing childcare which lead them to enroll in the job-sharing program; their internal advocacy within the RCMP upon realizing that the Pension Plan denied them the ability to buy back pensionable service; and the resultant impact of having permanently reduced pensions.[29] Her reasons alone showcase the claimants' voices.[30] She then situates the claimants' subjective experiences within the broader social, political, economic, and historical context. This context encompasses recognition that the job-sharing program was created to address women's need to reduce hours of work due to childcare obligations and the reality that this is how the program was used: throughout its operation most workers who job-shared were women with childcare responsibilities.[31] She then locates the claimants' experiences within the well-documented historical and continuing reality that gendered social norms and practices impose on women's primary responsibility for childcare and other unpaid care work. She examines how these norms privilege employment structures which are premised on full-time work by

27 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 59, 170 DLR (4th) 1.

28 *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 2, 37-38; *Quebec v A, supra* note 3 at paras 2, 39, 324; *Ermineskin Indian Band and Nation* v *Canada,* 2009 SCC 9 at paras 193-94; *R* v *Turpin*, [1989] 1 SCR 1296 at 1331-32, 96 NR 115.

29 *Fraser, supra* note 4 at paras 6-20, per Abella J.

30 *Ibid* at para. 7, 14, 91, per Abella J.

31 *Ibid* at paras 97, 126-28, per Abella J.

unencumbered male workers and drive public policy decisions which produce a persistent lack of access to childcare. The interaction of these norms and policy decisions generates conditions of work which disadvantage working mothers.

Abella J situates the claimants' personal experience of reducing their work hours to balance work and care obligations within this objectively documented social reality in which women must disproportionately adopt coping strategies — "euphemistically labelled 'choices'" — which impose social and economic disadvantage on them by driving them disproportionately into part-time precarious work.[32] Finally, Abella J locates this experience within the equally well-documented social, economic, and political context of "gender biases within pension plans, which have historically been designed 'for middle and upper-income full-time employees with long service, typically male.'"[33] This patient and clear-eyed analysis reveals the interlocking, multi-directional dynamics by which systemic discrimination operates for these women.

Within this full contextual and systemic analysis, Abella J characterizes the legal inquiry as one about gendered treatment of workers who have temporary interruptions in full-time work. Abella J's analysis reveals how the Plan's effect on the claimants aligns with the broadly documented dynamics of systemic sex discrimination and how these systemic dynamics interlock to create mutually reinforcing oppressive impact for women. She demonstrates how gendered norms about women's care obligations override women's personal labour market attachment, which in turn drives a feminization of poverty through the resultant penalty imposed by gender-biased pension design. Each step in the claimants' experience is shaped by systemic gender discrimination.

This approach contrasts sharply with how the issue in dispute is characterized by the dissents. Brown and Rowe JJ frame the appeal narrowly as presenting "the simple question: is tying pension benefits to hours worked discriminatory?"[34] Their analysis proceeds not from the perspective of the claimants, but from that of the *government employer*. They state that their approach "is contextual" [35] because it "consider[s] the various facets of the Plan and the evidence that is available on the composition of RCMP membership."[36] That is the full context they deem relevant. They emphasize that "Parliament was not obliged to enact the Plan … nor is it barred from repealing it,"[37] that government is allowed to address problems

32 *Ibid* at paras 91, 98-104, per Abella J. This recognition is particularly poignant because, at the time of writing, this very dynamic is being replicated at a grand scale during the COVID-19 pandemic. As schools are closed in favour of remote learning that protects public health, social norms about care work have imposed on women a disproportionate burden of childcare and home schooling. Combined with a lack of access to childcare and recovery plans that focus on supporting physical infrastructure projects that boost male-dominated work, these distinctly gendered pressures and policy choices have lead hundreds of thousands of women to shift from full-time to part-time work or leave the work force altogether with the result that in 2020 women's labour market participation is lower than it has been since the 1980s: Canadian Women's Foundation et al, *Resetting Normal: Women, Decent Work and Canada's Fractured Care Economy* (Toronto: Canadian Women's Foundation, 2020) at 9, 11-12.

33 *Fraser, supra* note 4 at para 108, per Abella J.

34 *Ibid* at para 140, per Brown and Rowe JJ (dissenting).

35 *Ibid* at para 148, per Brown and Rowe JJ (dissenting).

36 *Ibid* at para 184, per Brown and Rowe JJ (dissenting).

37 *Ibid* at para 144, per Brown and Rowe JJ (dissenting).

"incrementally,"[38] and that the job-sharing policy is "an attempt to *accommodate* employees in light of their particular circumstances."[39]

Brown and Rowe JJ grudgingly acknowledge that a distinction arises "based on sex because members of the job-sharing program are disproportionately women, whereas uninterrupted full-time employment is a male pattern of employment."[40] But this concession is based simply on the disproportionate number of job-sharing participants who are women, with no analysis of the broader context that produces this unequal distribution. As a result, they characterize the legal claim as a complaint that the legislation is not "*sufficiently* remedial"[41] and characterize the claimants as grasping for benefits to which they are not entitled: "[they] are seeking to obtain a *full-time* pension benefit in respect of a period where they have worked part-time hours. To be clear, *no other members are entitled to such a benefit*."[42] The claimants' equality claim is cast as illegitimate because it upsets the natural order in which "we posit simply that employers must be able to compensate employees based on hours worked. *This is our central point*."[43] The dissenting judges' inability to see the claim in its systemic context leads them to set fire to their first straw man,[44] asserting that finding a breach of section 15 in this case would eliminate *all* connection between hours worked and pay. Because they erase all notion of systemic discrimination and characterize the claimants as usurping the employer's control over correlating wages to hours worked, they see no "logical" limit to the claim:

> [I]f hours worked are not relevant, then part-time and job-sharing members should receive a full-time pension *without* buying back hours. And if compensation cannot be tied to hours worked, then part-time and job-sharing members should receive a full-time salary as well.[45]

Ultimately, Brown and Rowe JJ characterize the government as the innocent victim of an unprincipled attempt by women to impose a self-defined policy objective:

> [T]he sole reason the Plan is being judicially reviewed is because Parliament and the government tried to be accommodating in their employment options. If they had not offered pension buy-back rights for members who take LWOP [(leave without pay)], there would be no basis for judicial intervention at all. The upshot of our colleague's reasoning is that the public is now burdened with new financial obligations, simply because Parliament and the executive dared to address pre-existing inequality incrementally, instead of taking more radical measures to eliminate it. In the future, they may well reason that inaction is the safer course.[46]

Meanwhile, Côté J, in her separate dissent, eliminates gender from view altogether. Her dissent makes no reference to the law's impact on the claimants. It proceeds from a perspective that is *neither* the claimants' nor the respondents' but purports to a universalism that stands

38 *Ibid* at para 145, per Brown and Rowe JJ (dissenting).
39 *Ibid* at para 142, per Brown and Rowe JJ (dissenting) [emphasis in original].
40 *Ibid* at para 185, per Brown and Rowe JJ (dissenting).
41 *Ibid* at para 211, 213, 222, per Brown and Rowe JJ (dissenting).
42 *Ibid* at paras 160, 214 per Brown and Rowe JJ (dissenting) [emphasis in original].
43 *Ibid* at para 200, per Brown and Rowe JJ (dissenting) [emphasis added].
44 *Ibid* at para 133, where Abella J writes that the arguments by Brown and Rowe JJ "are based on conjecture not reality, calling to mind one writer's wry observation that 'setting straw men on fire is not what we mean by illumination.'"
45 *Ibid* at paras 197-99, per Brown and Rowe JJ (dissenting) [emphasis in original].
46 *Ibid* at para 228, per Brown and Rowe JJ (dissenting).

above the fray. She simply asserts that that "[o]ne does not job-share *because* one is a woman; one job-shares because one needs to take care of someone."[47] Using the exceptions to deny the rule, she further asserts that caregiving status is separate from sex because people who are not women also have care obligations, people have care obligations for those who are not children and the "statistical disparity" in who takes on care work is of dubious significance.[48] For her, this is a complete answer to the question of discrimination. Her extremely formalist logic denies the very existence of systemic discrimination that leads to burdens and disadvantages being carried unequally in an unequal society.[49]

B. Reframing Systemic Dynamics as Individual Choices

The second technique of erasing systemic discrimination is to cast the impugned disadvantage as resulting from the individual claimant's choice, not government action or law. Abella J reviews the systemic analysis which led the Court in *Quebec v A* to reject a "choice-based approach" to equality law as "fundamentally flawed."[50] She reiterates that a contextual analysis must examine how individual exercises of agency occur within structural constraints which are themselves shaped by systemic discrimination and inequality.[51] The legal, social, economic, and political structures which institutionalize systemic discrimination "push people towards their choices, with the result that certain choices may be made more often by people with particular 'personal characteristics.' This is a key feature of systemic inequality."[52] She warns that to deploy an acontextual notion of "individual choice" as a defence against claims of discrimination is "deeply functional in the perpetuation and obfuscation of inequality."[53]

Both dissents ignore existing Supreme Court jurisprudence on this point and, instead, characterize the disproportionate impact on women as the product of individual choice. Brown and Rowe JJ concede that "[s]ome aspects of government employment policies … have contributed to women's systemic disadvantage." But, they continue, "many *private* sources" also contribute to women's systemic disadvantage and a "clear example" of this strictly private source "is how parents share and expect each other to share domestic responsibilities, including childcare."[54] Meanwhile, Côté J adopts the Federal Court of Appeal's analysis that the disproportionate impact on women is a product of the entirely private "decisions the member makes … as a family to balance work and child care, by having one parent, usually the woman,

47 *Ibid* at para 235, per Côté J (dissenting) [emphasis in original].

48 *Ibid* at paras 242, 244-45 per Côté J (dissenting).

49 This bedrock principle was established in human rights jurisprudence that pre-dates the *Charter* and has been the foundation of s. 15 jurisprudence since *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 172-74, 56 DLR (4th) 1.

50 *Fraser, supra* note 4 at paras 88, 92 per Abella J.

51 *Ibid* at paras 87-92, per Abella J.

52 *Ibid* at para 90, per Abella J, quoting Sonia Lawrence, "Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006) 115 at 115-16, 124-25 and Diana Majury, "Women are Themselves to Blame: Choice as a Justification for Unequal Treatment" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 209 at 219-25.

53 *Fraser, supra* note 4 at para 89, per Abella J quoting Margot Young, "Blissed Out: Section 15 at Twenty" in McIntyre & Rodgers, *supra* note 52 at 55-56.

54 *Fraser, supra* note 4 at para 167, Brown and Rowe JJ (dissenting).

work part-time for a few years."[55] Note that by using the gender-neutral words "parents" and "family" to describe who is exercising choice, both dissents erase the profoundly gendered decision-making context and thereby shield the gendered effects of the Plan from scrutiny.

C. Threats to Institutional Competence

The third technique by which systemic discrimination is erased is to reframe the legal challenge as a policy issue, consideration of which stretches the institutional competence of the court. This judicial claim is outrageous and highlights the breadth of the reality gap. Forty years into the *Charter*'s existence, equality claimants must still argue that equality rights *are rights* and that, in a constitutional democracy, the courts' role *is* to interpret and enforce the democratically enacted *Charter* whose constitutional purpose *is* to set constraints on government action.

In their *Fraser* dissent, Brown and Rowe JJ undermine their ability to conduct the section 15 *Charter* analysis by erasing all trace of systemic discrimination before their legal analysis begins.[56] They have reframed the legal inquiry in *Fraser* as one about "compensation for hours worked," and the fact scenario as an exercise of individual choice. This self-inflicted blinkering leaves these judges bewildered as to where the constitutional *right* lies. As a result, they can only surmise that the dispute is about policy, not law, and that it involves an assessment of whether the "policy" adopted by the RCMP is "sufficiently remedial."[57] Moreover, because they have erased all trace of systemic discrimination and systemic analysis, they are unable to track Abella J's reasons as *legal reasoning*. They are left "search[ing] in vain for a logical or rational stopping point to either the entitlements that would flow from her line of reasoning, or the scope of judicial intervention to award them."[58] Their anxiety about this purported unboundedness drives an increasingly alarmist escalation of what is at stake in the case. And so, they set alight another straw man. They posit that, under Abella J's analysis, governments now have a positive duty to remove *all* effects of historic disadvantage *and* they "are constitutionally barred from repealing or even amending such measures." As a result, they write in alarm, section 15 will have a chilling effect on governments' willingness to address pre-existing discrimination.[59] Their anxiety builds to a peak as Brown and Rowe JJ characterize the section 15 analysis as a threat to constitutional democracy itself. They say that the question raised by *Fraser*,

> at its most fundamental level, … is whether, as a matter of law, the Constitution empowers (or even requires) the courts to substitute their views as to how to remedy those disadvantages for those of the legislature and the executive.[60]

Posed in this leading way, the judges inevitably answer that courts are not institutionally competent to play this role. Moreover, given the "complexity" of public policy, "social and economic considerations, like sex and employment," "persistent social phenomenon such as

55 *Ibid* at para 249, per Côté J (dissenting).
56 While the dissent uses increasingly personal and hyperbolic language (see e.g., *ibid* at para 219) this analysis assumes that their perturbation reflects genuine confusion and concern about the law.
57 *Ibid* at paras 143, 168.
58 *Ibid* at para 199.
59 *Ibid* at para 144.
60 *Fraser, supra* note 4 at paras 143, 215, 219.

inequality," and budgetary decision-making, they conclude that courts should "not *fiddle* with the complex mechanics of legislative schemes like the Plan."[61]

All this heat, though, is just a bonfire of straw men. It does not and never has represented the law under section 15. The dissenting judges' anxiety about institutional competence arises directly from fundamental errors they make in interpreting and (not) applying long-established equality law principles under the *Charter*. By avoiding an evidence-based analysis of systemic discrimination in accordance with those established legal principles, they lose their way and end up suggesting that they lack the institutional competence to examine questions of inequality under laws pertaining to social and economic conditions. They imply, without legal analysis, that laws of this nature — the laws which most immediately structure marginalized communities' experience of systemic discrimination — somehow, despite section 32, fall outside the ambit of the *Charter*. Brown and Rowe JJ, joined by Côté J, voiced these same anxieties at length in *Quebec v Alliance* in 2018.[62] Abella J's response then remains apposite as she squarely reminds the judges of their obligation to engage in *Charter* scrutiny:

> [T]here is no evidence to support the *in terrorem* view advanced by my colleagues that finding a breach would have a "chilling effect" on legislatures. That amounts to an argument that requiring legislatures to comply with *Charter* standards would have such an effect. Speculative concerns about the potential for inducing statutory timidity on the part of legislatures has never, to date, been an accepted analytic tool for deciding whether the Constitution has been breached. Legislatures understand that they are bound by the *Charter* and that the public expects them to comply with it. The courts are facilitators in that enterprise, not bystanders.[63]

IV. Bridging the Reality Gap: Lighting the Path of Substantive Equality and Systemic Discrimination Analysis

What gets lost in the dissents' bluster and self-misdirection is that section 15 sets out *enforceable*, *legal rights* to equality. As *constitutional* rights, these guarantees are the *paramount* law of Canada. An inability to understand and apply the law rigorously to protect equality is a serious failure of justice. Yet, judges' capacity to perceive the reality of systemic discrimination remains nascent and uneven. Abella J's consolidation of the section 15 test brings welcome clarity to substantive equality analysis, but much work remains. Ironically, the *Fraser* dissents help identify what *kind* of work needs to be done. The problem is not that the section 15 test is deficient, unknown, or unknowable. Rather, the stumbling block is the reality gap. Decision-makers, *as individuals* and as actors within *institutions of power*, remain challenged to reach beyond their personal experiences of privilege to see the reality of systemic discrimination. Accordingly, the urgent work required now is to develop 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.

Brown and Rowe JJ worry that the concept of "substantive equality" is inherently malleable and has become "an unbounded, rhetorical vehicle by which the judiciary's policy preferences

61 *Ibid* at paras 144, 180, 207, 213-14, per Brown and Rowe JJ (dissenting) [emphasis added].

62 *Quebec v Alliance, supra* note 3 at paras 64-67, per Côté, Brown and Rowe JJ (dissenting).

63 *Ibid* at para 42, per Abella J (for the majority). See Justice Abella's even more pointed rebuke in *Fraser, supra* note 4 at paras 133-36.

and personal ideologies are imposed piecemeal upon individual cases."[64] Again, the straw men burn. The dissenting judges' best attempt to articulate the harm against which section 15 protects is government action that is arbitrary or unfair, concepts that are highly subjective and call for value assessment by the decision-maker.[65] In these passages, the judges reveal that, ultimately, they don't know what substantive equality *means*. Accordingly, attention must now be directed towards building analytical guardrails, which prevent judges straying from the path of substantive equality. The analysis below provides initial guidance on how to build the capacity to bridge the reality gap. As a first step, we return to the text and history of section 15 of the *Charter* and, with precision, make explicit the mechanics by which systemic discrimination is operationalized.[66]

A. The Unique History and Text of Section 15

Section 15(1) of the *Charter* expressly guarantees four distinct rights to equality: "equality before and under the law and equal protection and benefit of the law." Courts rarely explore what those distinct guarantees mean. Instead, they have focused on the words "without discrimination," facilitating a retreat back into formal equality and anti-discrimination analysis.[67] Refocusing on the text of section 15 and on the history of its drafting yields keen insight into the social contract the rights embody. A remarkable part of the *Charter*'s history is the extent to which individual citizens and equality-seeking groups participated in shaping the language that now exists in section 15. Over 900 equality-seeking community groups and individuals made written submissions to the Special Joint Committee of the House of Commons and the Senate, over 100 witnesses gave oral testimony over 50 days, and, in response, "the government agreed to dozens of changes based on citizens' own experiences of rights and their own conceptions of what they needed to live more freely and equally."[68] The four distinct equality rights were the product of this community advocacy, introduced to mark a clear break from the formal equality of the *Canadian Bill of Rights*. Thus, the purpose of the four equality rights was to shift the analysis out of an anti-discrimination frame to one of substantive equality that was "linked to the social and political goals of equality-seeking communities and anchored in an emerging international human rights jurisprudence, not simply in the area of civil and political rights but also, and perhaps more centrally, economic, social and cultural rights."[69]

Returning to the text of section 15 and its history provides a meaningful way to add depth to what a purposive interpretation of section 15 means by reconnecting the legal inte-

64 *Fraser, supra* note 4 at para 219, per Brown and Rowe JJ (dissenting).

65 *Ibid* at paras 191-93, 198, per Brown and Rowe JJ (dissenting).

66 This following analysis draws on ideas introduced in Fay Faraday, *Feminist Equality Rights Litigation: Evolution of the Canadian Legal Landscape* (Toronto: Women's Legal Education and Action Fund, 2020) at 27-33.

67 Mary Eberts & Kim Stanton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence" (2018) 38:1 NJCL 89 at 116; Anne Bayefsky, "Defining Equality Rights" in Anne Bayefsky & Mary Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 1 at 27.

68 Kerri A Froc, "A Prayer for Original Meaning: A History of Section 15 and What it Should Mean for Equality" (2018) 38:1 NJCL 35 at 36-37.

69 Bruce Porter, "Expectations of Equality" in McIntyre & Rodgers, *supra* note 52 at 29; Froc, *supra* note 68 at 40.

rpretation to the "original public meaning" of section 15.[70] At the same time, returning to the text would "rebalance interpretation of s[ection] 15 of the *Charter* to focus on the concept of equality, in the sense of substantive equality, as well as on discrimination."[71] By interrogating what it means to *experience* "equality before and under the law and the right to equal protection and equal benefit of the law," section 15 analysis could begin to articulate conditions of social inclusion and security that are invisible to the privileged because these conditions are taken for granted. By making explicit the contours and textures of experiences that, for the privileged, create a perception that equality is already present, the contrasting experience of equality claimants is simultaneously made visible. Bringing analytical depth to the four equality rights will help enrich an understanding of what substantive equality means and clarify how systemic discrimination is the operating dynamic which impairs access to that real experience of equality.

B. Say What You Mean: Making the Mechanics of Systemic Discrimination Explicit

A decade ago, Jennifer Koshan and Jonette Watson Hamilton wrote that section 15 jurisprudence was filled with "meaningless mantras," words that had lost their meaning after being recited in a *pro forma* way for many years in the absence of judicial analysis that demonstrably tracked or implemented the concepts expressed.[72] This remains true today. There are three areas in which rigorously precise language can reinvigorate those stock phrases while making explicit how systemic discrimination operates.

First, it is important to identify phrases that add little to substantive equality analysis. For example, since *Andrews*, courts have routinely cited that "the promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[73] But this passive, highly abstract, and aspirational statement provides little practical assistance in analyzing violations of substantive equality. This phrase, and others which are similarly oft-repeated but effectively dormant, can be restated in precise language that illuminates how power operates to deny equality. In place of the quotation from *Andrews*, then, I propose the following: *the right to equality means the right to be free from institutionalized and normalized conditions of oppression.* This language focuses attention on the systemic ways in which, by whom, and to whose benefit oppression is institutionalized and normalized. Precise language helps identify government actors and the legislative or policy decisions they make and so drives accountability in accordance with section 32 of the *Charter*.

Second, equality jurisprudence is rife with passive language that obscures the dynamics of systemic discrimination. Courts may have adopted this approach in early human rights and *Charter* equality cases as they shifted from a fault-based to effects-based conception of discrimination. But the practice remains and continues to shape understandings of discrimination. Passive language is dangerous: it either locates the "problem" in the equality claimant themselves or it explicitly fosters innocence about the dynamics that drive discrimination. In

70 Froc, *supra* note 68 at 41.

71 Eberts & Stanton, *supra* note 67 at 117.

72 Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless mantra: Substantive equality after *Withler*" (2011) 16:1 Rev Const Stud 31.

73 *Andrews v Law Society of British Columbia*, *supra* note 49 at 171.

either case, it allows the privileged to remain within a worldview that is unchallenged, offering no avenue towards understanding why others' experience is different.

This passive language continues even in Abella J's ruling in *Fraser*. For example, in describing how facially neutral laws may not produce equality for disadvantaged groups, she writes: "Membership in such groups often brings with it a unique constellation of physical, economic and social barriers."[74] However, it is not the membership in the group that produces the social barriers. Rather, social barriers are created through systemic discrimination, which is normalized in attitudes, institutions, practices, and laws — by and to the benefit of those with more power — that target the particular group in ways that create, perpetuate, reinforce, or exacerbate disadvantage. Precise language reinforces the decision-maker's focus on the systemic discrimination lens while making explicit how the systemic dynamics operate.

More problematic examples arise in even some of the most powerful equality rights precedents. The Supreme Court's 1987 ruling in *Action Travail*,[75] rightly relied on in *Fraser,* was one of the first rulings to elaborate on the concept of systemic discrimination. It remains the leading case on systemic human rights remedies. Despite this, *Action Travail* describes the operation of systemic discrimination in passive terms which erase how discrimination is operationalized and why it has such staying power. The Court refers to the harm arising from systemic discrimination as "the accidental by-product of innocently motivated practices or systems" and as resulting "from the simple operation of established procedures … none of which is necessarily designed to promote discrimination."[76] While these statements are true as far as they go, they are also significantly incomplete. They mask the fact that, while individuals operating within a system may not have a personal intent to discriminate, the *systems* in operation have been created and retain staying power precisely because they are designed for the benefit of dominant social, political, and economic groups and are the mechanisms by which the privileges of those groups are institutionalized and perpetuated. As stated by Shelagh Day and Gwen Brodsky, and adopted by the Supreme Court in 1999:

> The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, ablebodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image …[77]

The task at this stage in the jurisprudence is to make those dynamics explicit so that decision-makers can better understand the reality of those who experience discrimination.

Finally, many critical concepts in equality jurisprudence are expressed in incomplete ways that leave key connections implicit. Abella J's reasons in *Fraser* provide a thorough analysis of adverse effects discrimination. But the relationship between adverse effects discrimination and systemic discrimination remains implicit, which facilitates the dissents' slide into the real-

74 *Fraser, supra* note 4 at paras 34, 57, per Abella J.

75 *Canadian National Railway Co v Canada (Canadian Human Rights Commission),* [1987] 1 SCR 1114, 40 DLR (4th) 193 [*Action Travail* cited to SCR].

76 *Ibid* at 1138-39.

77 *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 41, 176 DLR (4th) 1 quoting Shelagh Day & Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75:3 Can Bar Rev 433 at 462

ity gap. Adverse effects discrimination describes the moment of impact and harmful effect that individuals experience when they run up against an existing dynamic of systemic discrimination. That moment of impact and the resulting harm, however, do not describe how systemic discrimination is institutionalized, in what multiple intersecting ways, through what mechanisms and norms, and to whose benefit. That more textured reality is the one that those in positions of privilege need to step into to close the reality gap. How we refine the substantive equality analysis must now provide the explicit guidance that enables decision makers to stay focused as they travel that path.

V. Concluding Comments: Cleaning Up after the Elephant and the Burning Straw Men

The Supreme Court's equality analysis in *Fraser* builds on the positive steps in *Quebec v Alliance* and demonstrates a deepening of the Court's substantive equality and systemic discrimination analysis. But, because the analysis does not yet address the elephant in the room, it allows the dissenting judges to remain comfortably set apart by the reality gap, lighting straw men on fire. Meanwhile, the "ongoing repetition in dissenting reasons of rejected arguments" and their "insistent attack on the foundational premise of … s[ection] 15 jurisprudence — substantive equality" [78] — damages trust in the courts and increases the burden of litigation on equality claimants. It also feeds a corrosive public narrative that denies the very existence of systemic discrimination. For marginalized communities, continually fighting for their histories and lived experiences to be recognized, the repeated and casual denial of systemic discrimination by public authorities is a form of gaslighting that imposes emotional and psychological trauma individually and collectively. This reality gap cannot be closed, and the systemic harm cannot be stopped simply by appointing a more diverse judiciary.[79] A deeper structural and analytical change is needed. Unless our jurisprudence can speak explicitly about the construction of inequality, it will not shift out of the dominant frame into deep critique. It will leave untouched the structures that operationalize systemic discrimination. Fixing this is the job required now in a maturing jurisprudence on substantive equality.

78 *Fraser, supra* note 4 at paras 134-35 per Abella J; Faraday, *supra* note 5 at 330.

79 That Canada's judiciary remains disproportionately male, Caucasian and economically privileged is well documented: Sabrina Lyon & Lorne Sossin, "Diversity and Data in the Canadian Justice Community" (2014) 11 JL & Equality 85; Samreen Beg & Lorne Sossin "Diversity, Transparency and Inclusion in Canada's Judiciary," in Graham Gee & Erika Rackley, eds, *Debating Judicial Appointments in an Age of Diversity* (New York: Routledge, 2017) 118. A more diverse judiciary can contribute in an incremental way to different understandings of how the world works. However, the extent to which diverse representation yields different legal outcomes is not linear and is the subject of a much broader body of scholarship which is beyond the scope of this paper. See e.g. Rosemary Hunter, "More than Just a Different Face? Judicial Diversity and Decision-making" (2015) 68:1 Current Leg Probs 119; Sonia Lawrence "Reflections: On Judicial Diversity and Judicial Independence" in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law 2010) 193; Madame Justice Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28:3 Osgoode Hall LJ 507.