

## *Intersections and Roads Untravelled: Sex and Family Status in Fraser v Canada*

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### I. Introduction

It has been a long road to the judicial recognition of women's inequality under the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> The Supreme Court of Canada ruling in *Fraser v Canada* is significant for being the first decision where a majority of the Court found adverse effects discrimination based on sex under section 15,<sup>2</sup> and it was only two years prior that a claim of sex discrimination in favour of women was finally successful at the Court,<sup>3</sup>

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

2 *Fraser v Canada (Attorney General)*, 2020 SCC 28 [*Fraser*].

3 *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*Alliance*] (majority found sex discrimination under s 15 and rejected the government's justification argument under s 1 in the pay equity context). See also *Centrale des syndicats du Québec v Québec (Attorney General)*, 2018 SCC 18 [*Centrale*] (majority found violation of s 15 but accepted the government's s 1 argument, also in the pay equity context). For comments on these decisions see 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; Jonnette Watson Hamilton & Jennifer Koshan, "Equality Rights and Pay Equity: Déjà Vu in the Supreme Court of Canada" (2019) 15 JL & Equality 1. See also *British Columbia Teachers' Federation v British Columbia Public School Employers' Association*, 2014 SCC 70 (a one-paragraph decision restoring an arbitrator's award allowing a s 15 employment benefits claim by women); *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 (finding a violation of s 15 but accepting the government's s 1 argument, again in the pay equity context).

almost 30 years after their first section 15 decision in *Andrews v Law Society of British Columbia*.<sup>4</sup>

While these are key victories for women's equality rights, a majority of the Court has yet to formally decide a case based on sex discrimination as it intersects with other grounds.<sup>5</sup> In *Fraser*, all three sets of Justices who wrote reasons declined to consider discrimination based on family/parental status, either as it intersects with sex or on its own, even though the claim focused on women with caregiving responsibilities. For the majority, sex discrimination could incorporate inequalities related to caregiving, and this was not an appropriate case in which to recognize family/parental status as an analogous ground under section 15.<sup>6</sup> *Fraser* therefore fails to break the over 20-year drought since the Court last recognized any new analogous grounds under the *Charter*.<sup>7</sup>

It may appear to have been unnecessary for the Court to tackle a new analogous ground in *Fraser*, given the majority's decision that "a robust intersectional analysis of gender and parenting ... can be carried out under the enumerated ground of sex."<sup>8</sup> However, an argument can be made that recognition of family status would have provided more precise and nuanced protection for women caregivers at the intersection of gender and family in light of the particular inequalities this group faces. A lack of intersectional thinking can also result in essentialism — the tendency to see all members of a group as the same, and typically in a way dictated by dominant norms.<sup>9</sup> Acknowledgement of the multiple ways that caregiving can flow from and lead to inequality in diverse forms of family requires anti-essentialist thinking, and analysis of family status could have facilitated that approach as well. Beyond caregiving, the formal recognition and application of intersectionality and anti-essentialism is a crucially important step if the law is to meaningfully address the ways in which different groups experience inequalities at the intersections of sex, race, Indigeneity, disability, sexual or gender identity, poverty, family or marital status, and other grounds. To the extent that women's inequality has been recognized in Canadian law to date, these intersections have often been ignored or relegated to the shoulders.<sup>10</sup>

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4 [1989] 1 SCR 143, 56 DLR (4th) 1.

5 See Grace Ajele & Jena McGill, *Intersectionality in Law and Legal Contexts* (Toronto: Women's Legal Education and Action Fund, 2020) at 45 (noting the Court has not yet decided any cases based on multiple intersecting grounds).

6 *Fraser*, *supra* note 2 at paras 114-23 (Abella J for the majority, Wagner C.J. and Moldaver, Karakatsanis, Martin and Kasirer JJ concurring).

7 See *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 (recognizing off reserve residence/Aboriginality-residence as an analogous ground) [*Corbiere*].

8 *Fraser*, *supra* note 2 at para 116.

9 Ajele & McGill, *supra* note 5 at 42. See also Angela P Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42:3 Stan L Rev 581. "Family status" is more inclusive than "parental status" and I use the former term where possible. For a discussion see notes 84-86, *below*, and accompanying text.

10 For exceptions see *Thibaudeau v Canada*, [1995] 2 SCR 627, 124 DLR (4th) 449 (L'Heureux-Dubé J and McLachlin J, dissenting, recognizing the intersection between status as a custodial parent and sex) [*Thibaudeau*]; *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 177 DLR (4th) 124 (L'Heureux-Dubé J, concurring, recognizing the intersection between sex and single parenthood).

This article examines the implications of the Court's failure to recognize family status as an intersecting and independent ground of inequality in *Fraser*. After a brief discussion of their various sets of reasons on sex discrimination, I will review the Court's decision not to explore family/parental status as an analogous ground. Writing for the majority, Justice Rosalie Abella made two primary arguments. First, she indicated it was *inappropriate* to consider family/parental status, which raises questions about the scope of analogous grounds and concerns about the Court's approach to these grounds as a gatekeeper to section 15. Second, Justice Abella claimed it was *unnecessary* to examine family or parental status, which raises issues related to intersectionality, essentialism, and the scope of sex and/or family status discrimination. I explore both arguments and suggest that some of the historical problems with the Court's approach to discrimination under section 15 may be lurking in their analysis of analogous grounds. I conclude that *Fraser* was a missed opportunity for the Court to accept family status at the analogous grounds stage and to recognize its intersection with sex and its independent importance at the discrimination stage.

## II. Sex is (Sometimes) Good Enough

*Fraser* concerned a challenge to the RCMP Pension Plan, which provided that full-time RCMP members who temporarily job-shared were not eligible for full pension benefits, while other members — for example those working full-time or on temporary leave without pay — could receive full pensions.<sup>11</sup> Unlike members on temporary leave without pay, who could elect to “buy back” pension benefits when they returned to work full-time, those classified as part-time workers, including job-sharers, were not entitled to buy back pension benefits when they resumed full-time service.<sup>12</sup> The evidence showed that the vast majority of RCMP members who job-shared were women with small children.<sup>13</sup> Expert evidence further established that working women in Canada bear a disproportionate burden of child-rearing and that this burden may be particularly acute for women in policing, especially those living in areas with limited access to child care.<sup>14</sup>

Justice Abella held that the Pension Plan's treatment of job-sharing members resulted in discrimination based on sex, contrary to section 15 of the *Charter*.<sup>15</sup> She compared job-sharing RCMP members to full-time members with full pension benefits, noting that pension buy-back rights are the means to gain “meaningful access” to a benefit enjoyed by a group of members who are primarily male.<sup>16</sup> The evidence showed that it was mostly women with young children who job-shared and who faced social and economic disadvantages as a result, including in the police force.<sup>17</sup> This led Justice Abella to conclude that there was a “clear association”

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11 See *Royal Canadian Mounted Police Superannuation Act*, RSC 1985, c R-11 [RCMPSA]; *Royal Canadian Mounted Police Superannuation Regulations*, CRC, c 1393; *RCMP Bulletin regarding job-sharing*, 5 December 1997; and the RCMP Administration Manual, II.10, 2003, s F.1 (collectively “the Pension Plan”).

12 RCMPSA, *ibid*, ss 6(a), 6.1.

13 *Fraser v Canada (Attorney General)*, 2020 SCC 28 (Factum of the Appellant at para 20) [FOA].

14 *Ibid* at paras 16, 63, 84.

15 *Fraser*, *supra* note 2. Concurring with Justice Abella were Chief Justice Wagner and Justices Moldaver, Karakatsanis, Martin and Kasirer.

16 *Ibid* at para 95.

17 *Ibid* at paras 97-105 (citing numerous reports, literature, case law, and international commitments).

between gender and the adverse consequences of the pension rules, meeting the first step of the test for discrimination.<sup>18</sup> At the second step of the test, Justice Abella had “no doubt” that this adverse impact perpetuated a “long-standing source of disadvantage to women: gender biases within pension plans.”<sup>19</sup> She cited a range of reports, literature, and international commentary establishing that women face disadvantage in pension coverage and benefit levels, which is in turn connected to the feminization of poverty.<sup>20</sup> Based on her conclusion that the claimants had proved a violation of section 15 on the basis of sex, Justice Abella decided that it was unnecessary to consider the claimants’ alternate ground, family/parental status.<sup>21</sup>

In their dissenting reasons, Justices Russell Brown and Malcolm Rowe agreed with Justice Abella that the comparison between full-time RCMP members and those in job-sharing arrangements showed a distinction based on sex.<sup>22</sup> However, they found this distinction was not discriminatory because it was not arbitrary or wrongful — it simply related to the hours worked by these different groups of members.<sup>23</sup> Furthermore, any disadvantage the claimants faced was “caused not by the impugned provisions or any government action, but by the unequal division of household and family responsibilities and social circumstances such as the availability of quality childcare.”<sup>24</sup> Although their conclusion that there was no sex discrimination *did* make it necessary to analyze the alternative claim of family/parental status discrimination, Justices Brown and Rowe agreed with the majority that it was inappropriate to consider this issue due to insufficient evidence and submissions.<sup>25</sup>

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18 *Ibid* at para 106. The test for discrimination used by Justice Abella is whether “the impugned law or state action: [1] on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and [2] imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage” (*ibid* at para 27, citing *Alliance* and *Centrale*, *supra* note 3). For a discussion of the evolution of this test and its different articulation by Justices Brown and Rowe in *Fraser*, see Jennifer Koshan & Jonnette Watson Hamilton, “Tugging at the Strands: Adverse Effects Discrimination and the Supreme Court Decision in *Fraser*” (9 November 2020), online: *ABlawg* <[http://ablawg.ca/wp-content/uploads/2020/11/Blog\\_JK\\_JWH\\_Fraser.pdf](http://ablawg.ca/wp-content/uploads/2020/11/Blog_JK_JWH_Fraser.pdf)> [Tugging at the Strands].

19 *Fraser*, *supra* note 2 at para 108.

20 *Ibid* at paras 109-13.

21 *Ibid* at para 114. Abella J’s reasons will be explored in more detail in the next section.

22 *Ibid* at para 185.

23 *Ibid* at paras 191-93, 198. For a similar decision see *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 (majority finding that the government’s interference with the collective bargaining rights of non-clinical health care workers, who were predominantly women, related “essentially to the type of work they do, and not to the persons they are” (*ibid* at para 165)) [*Health Services*]. For a critique of the Court’s failure to see sex discrimination in *Health Services*, see Judy Fudge, “The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the Health Services and Support Case in Canada and Beyond” (2008) 37:1 *Indus LJ* 25 at 29. *Health Services* was not cited in *Fraser*.

24 *Fraser*, *supra* note 2 at para 215. This reasoning is similar to that of the majority in *Symes v Canada*, [1993] 4 SCR 695, 110 DLR (4th) 470 [*Symes*] (holding that while women disproportionately share the burden of child care in Canada, there was no evidence of their disproportionate payment of the “actual costs” of child care (*ibid* at 764-65)). For a feminist judgment rewriting *Symes*, see Melina Buckley, “*Symes v Canada*” (2006) 18:1 *CJWL* 27. See also Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law* (Vancouver: UBC Press 2002) [Taxing Choices].

25 *Fraser*, *supra* note 2 at para 183. For a critique of Brown and Rowe JJ’s claim that it was unnecessary to consider parental/family status despite finding no sex discrimination, see Joshua Sealy-Harrington, “The Alchemy of Equality Rights” (2021) 30:2 *Const Forum Const* 53 [Alchemy].

Also writing in dissent, Justice Suzanne Côté did not agree that the ground of sex was the relevant one in *Fraser*. She reasoned that although it was predominantly women with children who job-shared, the fact that it is not only women who have child-care responsibilities meant that the focus should have been on caregiving, parental, or family status rather than sex.<sup>26</sup> While she found that the disproportionate impact of the Pension Plan was based on the claimants' caregiver status, Justice Côté agreed with the majority that there was an insufficient record of evidence and submissions for this ground to be recognized as analogous under section 15, and would have dismissed the claim on that basis.<sup>27</sup>

### III. But What About Family?

It is useful to begin with Justice Abella's reasons for deciding that it was *inappropriate* to consider the claimants' argument of discrimination based on family/parental status. The implications of recognizing family status discrimination help us understand whether it was also *unnecessary* to do so given the finding of sex discrimination.

Justice Abella noted that neither family nor parental status have been recognized as analogous grounds under section 15 of the *Charter* by a majority of the Supreme Court, and held that this was not the right case to do so, based on a lack of submissions and evidentiary record.<sup>28</sup> This was so even though the federal government had conceded that parental status, a subset of family status, could be accepted as an analogous ground for the purposes of this claim.<sup>29</sup> While Justice Abella did not cite it, her reasoning on this point is consistent with *Corbiere*'s holding that grounds are constant markers of discrimination once they are recognized as analogous.<sup>30</sup>

It is true that family/parental status was not the focus of the claim in *Fraser*. The claimants originally identified parental status as the relevant analogous ground, but their argument at the Supreme Court relied on family status and Justice Abella described it as "brief."<sup>31</sup> She also noted that family/parental status was "largely unaddressed" in the arguments of the government and interveners and was "completely absent" from the decisions of the courts below.<sup>32</sup> During the oral hearing in *Fraser*, both the claimants and the intervener LEAF agreed that sex could do the work of incorporating a consideration of inequality related to caregiving responsibilities.<sup>33</sup> Justice Abella accepted this argument and buttressed it by referring to cases

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26 *Fraser*, *supra* note 2 at paras 234-35, 242.

27 *Ibid* at para 238.

28 *Ibid* at paras 117-23.

29 *Ibid* at para 115.

30 *Corbiere*, *supra* note 7 at paras 8, 10. *Corbiere* was cited by Brown and Rowe JJ (*Fraser*, *supra* note 2 at para 183).

31 *Fraser*, *ibid* at note 6; see also FOA, *supra* note 13 at paras 65-69 (citing Symes, *supra* note 24 and Thibaudeau, *supra* note 10 in support of this argument).

32 *Fraser*, *supra* note 2 at para 117, citing *Fraser v Canada (Attorney General)*, 2017 FC 557, 2018 FCA 223.

33 *Fraser*, *supra* note 2 at note 7. See also the webcast of the oral hearing in *Fraser*, "Webcast of the Hearing on 2019-12-12" online: Supreme Court of Canada, <<https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=38505&id=2019/2019-12-12--38505&date=2019-12-12>> [*Fraser*, oral hearing]. LEAF's factum argued that the Pension Plan's adverse effects "are based on the related protected grounds of sex and/or family status." (*Fraser v Canada (Attorney General)*, 2020 SCC 28 (Factum of Women's Legal Education and Action Fund at para 2)). The author was a member of LEAF's case committee in *Fraser*.



from other jurisdictions which “confirm that claims of parental discrimination can be brought as claims of adverse impact discrimination on the basis of sex.”<sup>34</sup> However, in these jurisdictions sex discrimination claims are the only option because family status discrimination is not prohibited.<sup>35</sup>

While consideration of family/parental status did not determine the outcome for the majority, the same cannot be said about the dissenting judgments. Because Justices Brown, Rowe, and Côté found that sex discrimination either could not be proved or was not the proper focus, their failure to consider discrimination based on family/parental status contributed to their conclusions that there was no violation of section 15.

The reliance in *Fraser* on the lack of argumentation and evidence on family/parental status raises the question of what is required for an analogous ground to be recognized. In *Corbiere*, the last case in which the Supreme Court considered this question at length, Justices McLachlin and Bastarache defined an analogous ground as “a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity” and as a characteristic “that the government has no legitimate interest in expecting us to change to receive equal treatment under the law.”<sup>36</sup> For Justice L’Heureux Dubé and the other concurring justices in *Corbiere*, immutability (actual or constructive) was only one amongst a list of non-exclusive and non-determinative factors, also including whether the characteristic: (1) is important to identity, personhood, or belonging; (2) aligns with a lack of political power, disadvantage, or vulnerability to disadvantage; or (3) is included in human rights legislation.<sup>37</sup>

The Court has previously taken judicial notice of constructive immutability and historical disadvantage as the basis for recognizing new analogous grounds such as sexual orientation and marital status.<sup>38</sup> In other cases it has not done so — such as *Taypotat*, where Justice Abella declined to accept “residence on a reserve” as an analogous ground despite its similarity to the ground accepted in *Corbiere*, residence off reserve.<sup>39</sup> The closest the Court has come to a recog-

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34 *Fraser*, *supra* note 2 at para 116, citing Sandra Fredman, *Discrimination Law*, 2nd ed (New York: Oxford University Press, 2011) at 181-82; Elizabeth Shilton, “Family Status Discrimination: Disruption and Great Mischief or Bridge over the Work-Family Divide?” (2018) 14 *JL & Equality* 33 at 36; *London Underground Ltd v Edwards* (No 2), [1999] ICR 494 (EWCA); *Phillips v Martin Marietta Corp*, 400 US 542 (1971); *Bostock v Clayton County, Georgia*, 140 S Ct 1731 (2020).

35 See Shilton, *supra* note 34 at 36.

36 *Corbiere*, *supra* note 7 at para 13.

37 *Ibid* at para 60 (citing *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693). The majority in *Corbiere* suggested historical disadvantage flows from immutability (at para 13).

38 Jonnette Watson Hamilton & Jennifer Koshan, “Kahkewistahaw First Nation v. Taypotat: An Arbitrary Approach to Discrimination” (2016), 76 *SCLR* (2d) 243 at 253-54 [Arbitrary Approach], citing *Egan v Canada*, [1995] 2 SCR 513 at 528, 124 DLR (4th) 609 [*Egan*] (La Forest, J, dissenting on s 15 but on a different point, recognizing sexual orientation as an analogous ground); see also Cory J, *ibid* at 509-603 (for the majority on s 15, relying on social context evidence to find sexual orientation as an analogous ground); *Miron v Trudel*, *supra* note 37 at para 152 (McLachlin J for the majority, accepting marital status as an analogous ground; see also L’Heureux Dubé J, concurring). The relevant justices do not explicitly state that they are taking judicial notice in these cases.

39 *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 [*Taypotat*]. The ground in *Corbiere* was also called “Aboriginality residence”, which would appear to include residence on reserve. For critiques of *Taypotat* see Watson Hamilton & Koshan, *Arbitrary Approach*, *supra* note 38; Jessica Eisen, “Grounding Equality in Social Relations: Suspect Classification, Analogous Grounds and Relational Theory” (2017) 42:2 *Queen’s*

inition of family/parental status under section 15 was in *Thibaudeau*, where Justices L’Heureux Dubé and McLachlin, in separate dissenting reasons, accepted the status of being a “separated or divorced custodial parent” as an analogous ground.<sup>40</sup> Their recognition of this ground — a combination of marital and parental status — relied on social context evidence and literature that established the social and economic disadvantage experienced by this group.<sup>41</sup> They also noted that a majority of the group were women, highlighting the interplay between sex, marital and parental status.<sup>42</sup>

Justice Abella’s reticence to take judicial notice of the qualities of family or parental status and their qualification as analogous grounds in *Fraser* is surprising given the similarity between these grounds and marital status. All are statuses related to family forms that are constructively immutable and can be associated with historical disadvantage.<sup>43</sup> Justice Abella also acknowledged that family status is a protected ground in human rights statutes in most Canadian jurisdictions, which was a relevant factor for the *Corbiere* minority.<sup>44</sup> Human rights case law elaborates on the nature of family status, which has been found to include absolute status, such as being a parent or child, as well as relative status, such as being the parent of a particular person, in addition to being a caregiver.<sup>45</sup> Being a caregiver is thus a recognized status for human rights purposes, with associated protections for the inequalities it encompasses.

Justice Abella’s restraint around analogous grounds in *Fraser* also stands in contrast to her discussion of the evidence that will help establish the claimant group’s contextual circumstances in the discrimination analysis, where she accepted the possibility of taking judicial notice.<sup>46</sup> Moreover, while Justice Abella refuted the relevance of choice on the discrimination issue in *Fraser*,<sup>47</sup> she noted in her earlier decision in *Quebec v A* that choice “may

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LJ 41 at 85-88. For a recent case where residence on reserve was found to be an analogous ground, but without analysis of the *Corbiere* tests, see *R v Turtle*, 2020 ONCJ 429.

40 *Thibaudeau*, *supra* note 10, was part of a trilogy of s 15 cases decided in 1995 (along with *Egan*, *supra* note 38 and *Miron v Trudel*, *supra* note 37), and Justice L’Heureux Dubé wrote her own reasons in all three cases, focusing on groups rather than grounds.

41 *Thibaudeau*, *supra* note 10 at 657-58 (L’Heureux Dubé J) and 722-725 (McLachlin, J). See also *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1 (where the government conceded discrimination based on parental status and the Supreme Court focused on remedy).

42 *Thibaudeau*, *supra* note 10 at 658, 724.

43 See the social context evidence and literature that Justice Abella cited in her discussion of *not* considering the family status issue (*Fraser*, *supra* note 2 at para 118).

44 *Fraser*, *ibid* at para 118; *Corbiere*, *supra* note 7 at para 60.

45 See e.g. *Brossard (Town) v Quebec (Commission des droits de la personne)*, [1988] 2 SCR 279, 53 DLR (4th) 609; *B v Ontario (Human Rights Commission)*, 2002 SCC 66; *Canada (Attorney General) v Johnstone*, 2014 FCA 110 [Johnstone].

46 *Fraser*, *supra* note 2 at para 57.

47 *Ibid* at paras 86-92, citing Sonia Lawrence, “Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on s. 15”, in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis, 2006) 115 [*Diminishing Returns*]; Margot Young, “Blissed Out: Section 15 at 20”, in *Diminishing Returns*, *ibid*, 45; 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, 2009) 209; Jonnette Watson Hamilton & Jennifer Koshan, “Adverse Impact: The Supreme Court’s Approach to Adverse Effects Discrimination Under Section 15 of the Charter” (2014) 19:2 Rev Const Stud 191 [Adverse Impact].

be an important factor in determining whether a ground of discrimination qualifies as an analogous ground.”<sup>48</sup> These apparent inconsistencies in the approach to section 15 must be read in light of *Corbiere*, where the Court emphasized that grounds and discrimination are separate stages of analysis. Recognition of an analogous ground, even as a “constant marker of suspect decision making or potential discrimination,” does not satisfy the discrimination inquiry.<sup>49</sup>

It could be argued, then, that analogous grounds should be subject to evidentiary proof and that choice should be considered in the context of immutability. However, the Court has not always taken such a strict approach to evidentiary requirements for new analogous grounds, and Justice Abella’s recognition in *Fraser* of the problems inherent in “choice” should arguably apply at the grounds stage of analysis as well as the discrimination stage. Her suggestion that the test for analogous grounds may need reworking — citing literature that criticizes the primacy of immutability in the current approach — supports the argument that analogous grounds should not be subject to unduly strict gatekeeping.<sup>50</sup> Justice Abella did express an openness to considering family status in a future case with better evidence and submissions, and it is imperative that her robust approach to discrimination in *Fraser* and helpful “brush-clearing” of problems at the discrimination stage should not be replaced by a narrow and equality-impeding approach to grounds.<sup>51</sup>

While Justice Abella adverted to the protection of family status in the human rights context, she referenced the “uncertainty and controversy” in this area as another reason for avoiding the analogous grounds issue under section 15 in *Fraser*.<sup>52</sup> This uncertainty stems from the two lines of authority on the proper test for family status discrimination in human rights cases involving child care responsibilities.<sup>53</sup> In the first, exemplified by the British Columbia Court of Appeal’s approach in *Health Sciences Assoc of BC v Campbell River and North Island Transition Society*, discrimination based on family status requires proof of “a serious interference with a substantial parental or other family duty or obligation of the employee.”<sup>54</sup> The second line of authority, represented by the Federal Court of Appeal in *Canada v Johnstone*, states that the test for family status discrimination “should be substantially the same as that which applies

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48 *Quebec (Attorney General) v A*, 2013 SCC 5 at para 343. Justice Abella wrote for the majority on s 15 in this case, which involved marital status discrimination in the context of family property legislation. She did critique a choice-based approach to discrimination in *Quebec v A* even while recognizing its relevance to grounds. *Ibid* at paras 334-42.

49 *Corbiere*, *supra* note 7 at para 8.

50 *Fraser*, *supra* note 2 at para 121, citing Joshua Sealy-Harrington, “Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach” (2013) 10 JL & Equality 37 [Assessing Analogous Grounds] (advocating a multi-variable approach to grounds); Eisen, *supra* note 39 (advocating a relational approach to grounds).

51 See *Fraser*, *supra* note 2 at para 123. For a discussion of brush-clearing see Jonnette Watson Hamilton, “Cautious Optimism: *Fraser v Canada (Attorney General)*” (2021) 30:2 Const Forum Const 1 at 5-7 [Cautious Optimism]. On the test for discrimination as subterfuge, see Joshua Sealy-Harrington, *Alchemy*, *supra* note 25.

52 *Fraser*, *supra* note 2 at para 118.

53 For discussion of this test see Shilton, *supra* note 34 at 40-48 (also noting its application in cases involving elder care responsibilities).

54 *Health Sciences Assoc of BC v Campbell River and North Island Transition Society*, 2004 BCCA 260 at para 39 [*Campbell River*].



to the other enumerated grounds of discrimination.”<sup>55</sup> However, the *Johnstone* Court framed the test as equally if not more burdensome than that in *Campbell River*, requiring family status claimants to prove self-accommodation and lack of choice.<sup>56</sup> The Supreme Court recently denied leave to appeal in a human rights family status case where they had an opportunity to clarify this area, so it is disappointing to see Justice Abella rely on its “uncertainty and controversy” in *Fraser*.<sup>57</sup>

The diverging case law in this area is based on concerns about the scope of the duty to accommodate family responsibilities and about who can claim family status discrimination and in what circumstances. These are floodgates and slippery slope rationales that are not persuasive — the accommodations required by marginalized groups, and the question of when/ by whom such accommodations can be claimed, are the very stuff of anti-discrimination law.<sup>58</sup> More importantly, the first concern belongs under the justification stage of analysis rather than the stage of determining whether there is a *prima facie* case of discrimination.<sup>59</sup> As a matter of first principles, the burden should fall on respondents to show why they could not accommodate claimants with caregiving responsibilities, rather than on the claimants.<sup>60</sup> Justice Abella did recognize the importance of these first principles in some areas of her judgment in *Fraser* — for example, in rejecting Justices Brown and Rowe’s argument that discrimination must be arbitrary or wrongful in order to violate section 15 and instead, placing that consideration squarely under section 1.<sup>61</sup> However, she gave credence to these concerns in some of her reasons for declining to consider family status as an analogous ground. To reiterate, the grounds stage should not become the new dumping ground for equality-impeding reasoning now that the discrimination stage has been cleaned up.

As to the concern about who can claim family status discrimination, Justice Abella noted that there was no evidence as to the disadvantages experienced by men with caregiving responsibilities, nor on “the possible impact of recognizing a new analogous ground on fathers’ relationships with a co-parent.”<sup>62</sup> It is not entirely clear what she meant by this last point, but

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55 *Johnstone*, *supra* note 45 at para 81.

56 *Ibid* at para 93. See also Shilton, *supra* note 34 at 47. Claimants in human rights cases typically need only prove that they were adversely treated in connection with protected grounds. See *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33 [Moore].

57 See *Envirocon Environmental Services, ULC v Suen*, 2019 BCCA 46 (dismissing without a full hearing a claim of family status discrimination in employment brought by a father), leave to appeal to SCC refused [Suen].

58 See also Eisen, *supra* note 39 at 44 (noting “the spectre... of variously labelled “groups” clamouring for inclusion”).

59 *Moore*, *supra* note 56 at para 33 (noting the claimant’s burden to prove a *prima facie* case of discrimination, after which the burden shifts to the respondent to provide a justification, normally centring on the duty to accommodate). The notion of a *prima facie* case is not a feature of *Charter* jurisprudence, but Justice Abella does use that language when describing the test for discrimination under s 15 in *Fraser*, *supra* note 2 at para 27.

60 Shilton, *supra* note 34 at 47-48; Denise Réaume, “Defending the Human Rights Codes from the Charter” (2012) 9 JL & Equality 67 at 69; Jennifer Koshan, “Under the Influence: Discrimination Under Human Rights Legislation and Section 15 of the Charter” (2014) 3:1 Can J Human Rights 115.

61 *Fraser*, *supra* note 2 at para 80. For a discussion see Koshan & Watson Hamilton, Tugging at the Strands, *supra* note 18.

62 See *Fraser*, *supra* note 2 at para 120.

Justice Abella may have been thinking about *Trociuk v British Columbia*, a much-criticized *Charter* case where the Court found sex discrimination against men in the context of limits on unmarried fathers' rights to name their children against mothers' wishes.<sup>63</sup> However, family status claims by male caregivers might help to challenge systemic gender inequality by disrupting socially constructed gender roles and workplace rules.<sup>64</sup> This argument leads to a consideration of whether it was *unnecessary* to consider family status discrimination in *Fraser* in light of the principles of intersectionality and anti-essentialism.

#### IV. Sex Equals Family, Sex Plus Family, or Family Plus?

Justice Abella's stance that it was unnecessary to consider family status in *Fraser* was based on her claim that sex can include an intersectional analysis of caregiving. Intersectionality is now well known as the term coined by Kimberlé Crenshaw to signify the idea of multiple grounds of identity or forms of oppression intersecting to form unique experiences of inequality and discrimination.<sup>65</sup> In contrast to intersectionality, a focus on a single axis of discrimination can avoid the complexities of lived experiences of discrimination and ignore structural inequalities, making it difficult to fully see and respond to some forms of discrimination.<sup>66</sup> As noted earlier, intersectionality is also related to anti-essentialism and the importance of seeing the members of particular groups (such as women) in light of diverse identities and forms of oppression.<sup>67</sup>

Justice Abella did informally recognize the intersection between sex and family status in her discussion of the inequalities faced by women as caregivers.<sup>68</sup> This feels like progress compared to her decision in *Taypotat*, an adverse effects claim brought by an elderly First Nations man who was prevented from running for Band Council because he lacked the education required. In that case, she failed to examine the intersections between age, residence on reserve, and status as a survivor of residential schools.<sup>69</sup>

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63 *Trociuk v British Columbia (Attorney General)*, 2003 SCC 34. For a critique see Hester Lessard, "Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and *Trociuk v British Columbia (Attorney General)*" (2004) 16:1 CJWL 165. The human rights family status case in which the Court recently denied leave to appeal also involved a male claimant. See *Suen*, *supra* note 57.

64 Shilton, *supra* note 34 at 53. See also Deborah A Widiss, "Equalizing Parental Leave" 105 Minn L Rev [forthcoming in 2021] (evaluating various forms of parental leave, including those that must be taken by men, and their implications for women's equality). A full exploration of this argument is beyond my scope, but analysis of claims by fathers or men with other caregiving responsibilities should always remain squarely focused on whether they enhance substantive equality, as is the case for *all* equality claims.

65 Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" [1989] 1989 U Chicago Legal F 139 [Demarginalizing]; Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stan L Rev 1241 [Mapping].

66 Ajele & McGill, *supra* note 5 at 42-43.

67 *Ibid* at 42. For a discussion of the interplay between intersectionality and essentialism see Devon W Carbado & Cheryl I Harris, "Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory" (2019) 132 Harv L Rev 2193.

68 *Fraser*, *supra* note 2 at paras 77, 116, 123.

69 For a critique of the Court's failure to apply an intersectional analysis in *Taypotat*, see Arbitrary Approach, *supra* note 38 at 256-57.

However, the very premise of intersectionality is the need to analyze claims based on more than one axis or ground of oppression to understand the qualitatively different experiences of inequality that can exist at the intersection of grounds. A fully intersectional approach in *Fraser* would have considered family status as a ground that intersected with sex to produce a unique form of discrimination for women caregivers, focusing on the ways in which the status of caregiver is gendered and the ways in which women experience subordination as caregivers, both flowing from and entrenching social and economic inequalities. A full discussion would also have included recognition of the racialized and class-based aspects of caregiving, though these arguments were not before the Court.<sup>70</sup> Justice Abella did acknowledge that “recognizing multiple, interactive grounds of discrimination can allow for a fuller appreciation of the discrimination involved in particular cases” but pointed to the gap in evidence and submissions on family/parental status as her reason for not wholly embracing the dictates of intersectionality in *Fraser*.<sup>71</sup>

A recognition of family status as an analogous ground intersecting with sex or with independent importance would also have forced the hands of the dissenting justices in *Fraser*. As noted above, Justices Brown and Rowe’s failure to find sex discrimination did make it necessary for them to consider family status, but they were too easily able to tag on to Justice Abella’s reasons for avoiding this ground. This point is not meant to give credence to their arguments on sex discrimination, which other authors in this volume critically dismantle.<sup>72</sup> Rather, it is to say that Justices Brown and Rowe should have given more serious consideration to family status as an alternative ground to sex.

Justice Côté’s dissent presents different issues. Although she acknowledged women’s “prolonged fight for equal treatment under the law” and their historical and current disadvantage,<sup>73</sup> she found that caregiving, parental, or family status were the only relevant grounds at play, failing to see that caregivers are most often women and that specific inequalities lie at the intersection of family status and sex. Justice Côté minimized the statistically disproportionate number of women affected by the Pension Plan, viewing this evidence as insufficient, and then failed to attend to the broader systemic evidence cited by Justice Abella which drew the link between women’s economic inequalities and child-care responsibilities.<sup>74</sup> Justice Côté also failed to recognize the links between family status and sex given the social constructions of caregiving and gender. Her statement that “like race, sex is an innate and immutable characteristic” ignores the social constructions of these grounds and is cause for concern.<sup>75</sup>

Justice Côté used men in same-sex relationships with caregiving responsibilities as an illustration of why *Fraser* is not a case about sex.<sup>76</sup> This example does take us out of the heteronormative familial context that implicitly prevails in this case, which is another conse-

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70 See e.g. bell hooks, *Where We Stand: Class Matters* (New York: Routledge, 2000) at 101-10; Mapping, *supra* note 65 at 1245. See also Taxing Choices, *supra* note 24 (noting the tensions between gender, class and race in Symes, *supra* note 24).

71 *Fraser*, *supra* note 2 at 123.

72 See e.g. Alchemy, *supra* note 25.

73 *Fraser*, *supra* note 2 at para 231.

74 *Ibid* at para 244; see also Justice Abella’s reasons at paras 98-106.

75 *Ibid* at para 231. For a discussion see Assessing Analogous Grounds, *supra* note 50.

76 *Fraser*, *supra* note 2 at para 236.

quence of Justice Abella's reluctance to accept family status as an analogous ground, one that was relevant both on its own and in intersection with sex. Recognition of family status as an independent ground would have facilitated anti-essentialist thinking about the category "family."<sup>77</sup> However, Justice Côté's use of this example also reinforces a persistent problem in adverse effects cases — that all members of a group need to be the same in order to prove discrimination, which can also be seen as an essentialism problem (in this case, in relation to sex).<sup>78</sup> In addition, Justice Côté's invocation of pregnancy as a contrasting example of something that — unlike caregiving — happens only to women, fails to recognize that trans men and non-binary folks can become pregnant.<sup>79</sup> Pregnancy is factually incorrect as an analogy and the argument is normatively unpersuasive given its essentialism. Courts should be careful not to reify dominant norms related to identity in this fashion. This is especially true in *Fraser*, where the point that not only women can become pregnant was made by counsel at the oral hearing.<sup>80</sup>

Justice Abella did dispel the notion that all members of a group need to be the same or be affected in the same way in order to prove adverse effects discrimination. Citing Dianne Pothier's classic article on grounds, she noted that different groups of women can be differently affected or experience sex discrimination differently and still prove discrimination.<sup>81</sup> She also acknowledged that people can be a member of more than one socially disadvantaged group at a time.<sup>82</sup> While both points should seem obvious, they have created barriers in adverse effects discrimination cases,<sup>83</sup> and their acknowledgement by Justice Abella indicates an acceptance of intersectionality and anti-essentialism that is at least a positive first step.

Other intersections and group dynamics were only hinted at in Justice Abella's judgment, such as those "appreciative of the variations in intimate relationships."<sup>84</sup> There was nothing said about the intersections between sex, race, Indigeneity, and caregiving, nor about the different forms of family and caregiving that may be connected to systemic income inequality and poverty.<sup>85</sup> For these reasons, "family status" would have been the better ground to argue and consider, as parental status is limited to a fairly narrow set of familial relationships that may be linked to dominant norms and structures. Justice Abella did recognize this concern with her point that parental status "is ... not a distinct category" and in her note about the urgency of issues presented by eldercare.<sup>86</sup>

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77 See Elaine Craig, "Family as Status in *Doe v. Canada: Constituting Family Under Section 15 of the Charter*" (2007) 20 NJCL 197 (arguing that family status can be a preferable (or additional) ground to sexual orientation in some cases for its potential to queer notions of family and to avoid heterosexist and essentialist assumptions about sexual identity).

78 Adverse Impact, *supra* note 47.

79 *Fraser*, *supra* note 2 at para 242, citing *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, 59 DLR (4th) 321.

80 *Fraser*, oral hearing, *supra* note 33.

81 *Fraser*, *supra* note 2 at para 74, citing Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13:1 CJWL 37.

82 *Fraser*, *supra* note 2 at para 77, citing Colleen Sheppard, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001) 80:3 Can Bar Rev 893 at 896.

83 See Adverse Impact, *supra* note 47; see also Cautious Optimism, *supra* note 51.

84 *Fraser*, *supra* note 2 at para 122, citing Craig, *supra* note 77.

85 For example, Widiss, *supra* note 64, notes how some parental leave laws can adversely impact women who are single mothers, a group which is disproportionately made up of poor and working-class women of colour.

86 *Fraser*, *supra* note 2 at paras 115, 122.

Although I believe a full intersectional analysis of sex and family status would have been preferable, the argument can be made that inequalities related to caregiving are so interwoven with women's subordination that sex was a sufficient lens in *Fraser*.<sup>87</sup> On this view, family status was unnecessary to the majority's discrimination analysis — though this stance does not account for anti-essentialism regarding family status as an independent ground, nor does it consider race, Indigeneity, and class as they intersect with sex in the context of caregiving. On a more practical level, Justice Abella's approach reveals possibilities for claiming sex discrimination as it intersects with other, as yet unrecognized, grounds. Poverty in particular is a ground that often intersects with sex, but the Supreme Court has not yet accepted it as an analogous ground, despite having had the opportunity to do so.<sup>88</sup>

Justice Abella's approach of including inequalities related to caregiver status under the umbrella of sex might also be useful in combatting the burdensome approach to family status discrimination in the human rights context.<sup>89</sup> However, human rights claims tend to result in individual accommodations for relatively privileged workers rather than systemic change to workplace rules and the norms surrounding the social reproduction of labour.<sup>90</sup> This too is an insight that intersectionality theory can bring to an analysis of *Fraser* — namely, that we should not assume a victory for privileged women will have universal impact for all women (or all caregivers).<sup>91</sup> Justice Abella's comment that "inequality can be reduced one case at a time" may unfortunately reinforce the individualizing tendencies of equality litigation, a legal strategy that is often out of reach for the most oppressed members of society.<sup>92</sup> Our commitment to substantive equality should entail recognition and redress of structural inequalities, but whether individual or group claims under the *Charter* or human rights legislation can accomplish such systemic change is a question *Fraser* leaves open.

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87 I am indebted to Joshua Sealy-Harrington for pushing me on this issue.

88 *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852, leave to appeal to SCC rejected. Receipt of social assistance was recognized as an analogous ground in *Falkiner v Ontario (Minister of Community and Social Services)* (2002), 59 OR (3d) 481, 212 DLR (4th) 633 (ON CA) (also recognizing discrimination based on sex and marital status), leave to appeal to SCC discontinued. See also Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the Charter" (2013) 2 Can J Poverty L 1; Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the Charter, and the Legacy of Gosselin" (2019) 39 NJCL 85; Sealy-Harrington, Assessing Analogous Grounds, *supra* note 50 at 51-52, 66-67. For a recent decision in the international human rights context recognizing intersecting inequalities based on gender, poverty, race, and age, see *Case of the Workers of the Fireworks Factory of Santo Antônio De Jesus and Their Families v Brazil* (2020), Inter-Am Ct HR (Ser C) No 407 at paras 191-98, online: <[https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_407\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_407_ing.pdf)>.

89 See however Shilton's discussion of a case where the *Johnstone* test was found to apply whether sex or family status discrimination was argued (*supra* note 34 at note 94, referencing *Flatt v Treasury Board*, 2014 PSLRB 2, aff'd 2015 FCA 250, leave to appeal to SCC refused).

90 Shilton, *supra* note 34 at 57-58.

91 See Mapping, *supra* note 65 at 1260. See also Krista James, *Human Rights and Accommodation of Family Responsibilities in the Workplace: Obligation, Choice, and Invisible Caregivers* (Vancouver: Continuing Legal Education Society of British Columbia, 2017) at 2.1.27-29 (noting that few family status discrimination claims are brought by workers who are in precarious or low wage employment, and that there are few cases involving caregivers with disabilities, who are Indigenous, whose caregiving is linked to culture or ethnicity, or who are in multiple-parent or chosen, non-biological family relationships).

92 *Fraser*, *supra* note 2 at para 136. I am grateful to Jonnette Watson Hamilton for pointing out the significance of this quote for my analysis.



## V. Conclusion

Justice Abella's decision in *Fraser* accomplishes a great deal of important work on the road to women's equality. It recognizes sex discrimination in the adverse effects context and accepts that women's inequality is sometimes intimately connected to caregiving responsibilities. It also refutes some of the arguments that have made it difficult for women to prove adverse effects or discrimination claims more broadly, such as those related to evidentiary hurdles, choice, and the makeup of groups. Nevertheless, it would have been beneficial for the Supreme Court to accept family status as an analogous ground, to undertake a full intersectional analysis of sex and family status, and to consider family status as an independent ground from an anti-essentialist standpoint. A majority of the Court has never formally recognized intersecting grounds under section 15 of the *Charter*, and as long as we continue to rely on the courts to advance equality, it is time they took this road untravelled. Parties and interveners are encouraged to continue making arguments involving multiple grounds of discrimination to push decision-makers towards a formal uptake of intersectionality theory, which is fundamental to achieving substantive equality.<sup>93</sup> Advocates should also strive to ensure that the analogous grounds stage of analysis does not become too formidable a sentry for section 15 claims, especially now that the discrimination stage of analysis has more fully embraced substantive equality principles. Finally, the Court should ensure that cases raising issues of intersecting and systemic inequalities are prioritized for hearing. Although courts alone cannot fully redress systemic inequality, they remain an important site for holding governments to account.

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93 For insights on making intersectionality arguments, see Ajele & McGill, *supra* note 5 at 49-58.