Constitutional forum constitutionnel

Comment on Fraser v Canada (AG): The More Things Change

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I. Introduction

Very early in my academic career I wrote two pieces about section 15.[1] The first was written in 1987, before the Supreme Court of Canada had heard any section 15 cases,[2] and the second in 1989 was a comment on *Andrews v Law Society of British Columbia*, the first of the Court's section 15 decisions.[3] When I re-read these pieces recently it struck me that with a few minor updates they could be read as comments on the Court's recent decision in *Fraser v Canada (Attorney General)*.[4] The same issues and tensions that were there at the beginning of section 15 are still there. They are built into the concept of constructive/effects discrimination and are not about to disappear. Shamelessly, I have reconstituted these two earlier pieces into a comment, of sorts, on the *Fraser* case. Other contributors in this special issue of the *Constitutional Forum* have set out the facts of the *Fraser* case and so I have not done so here.

Despite the enthusiasm with which it has been received, the Court's decision in *Fraser* settles nothing. In each of its section 15 decisions, beginning with *Andrews v Law Society*

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

2 Richard Moon, "Discrimination and Its Justification: Coping with Equality Rights under the Charter" (1988) 26:4 Osgoode Hall LJ 673.

3 Richard Moon, "A Discrete and Insular Right to Equality: Comment on Andrews v. Law Society of British Columbia"(1989) 21:3 Ottawa L Rev 563.

4 2020 SCC 28 [*Fraser*].

of British Columbia[5] and continuing through *Law v Canada (Minister of Employment and Immigration)*,[6] *R v Kapp*,[7] *Withler v Canada (Attorney General)*,[8] *Quebec (Attorney General) v A*,[9] and now *Fraser*, the Court has struggled to fit a broadly defined equality right into a structure of constitutional adjudication that "is designed to deal with discrete wrongs (violations of a defined right)."[10] The compromise between substance and structure — between the public commitment to substantive equality and the adjudicative framework — is embodied in the concept of constructive discrimination, a concept that is necessarily unstable and fluid, and that stretches the boundaries of adjudication.

II. Intentional Discrimination and the Inevitable Shift from Effects as Evidence of the Wrong to Effects as the Basis of the Wrong

When section 15 came into force in 1985, it was expected that the courts would adopt a broad, egalitarian reading of the right — a reading that focussed on the effects of law and not simply on the intention behind it.

> The history and language of section 15 lend some support to the view that a violation of the right to equality occurs when a law has a disproportionate impact on the members of a particular group, and the reason for the differential impact is trivial in comparison to the disadvantage it brings. This interpretation of section 15 is suggested by the inclusion of a right to the equal benefit of the law and the specific mention of age and [disability] as grounds of discrimination.[11]

> The right to equality, interpreted as a prohibition of prejudice-based decision making, involves the exclusion of certain reasons for action. The wrong proscribed is an intentional act. It is wrong to intend to treat an individual as less than a full member of the human community. If the state decides to allocate certain benefits or burdens, it cannot distribute them differently among individuals because it considers some individuals to be intrinsically less worthy than others. No positive duties fall upon the state as a consequence of the prohibition of prejudice-based decision making. The state is not required to take any particular action, nor is it prevented from acting provided it does so for proper reasons.[12]

> [However, t]here are difficulties with an interpretation of the equality right [that] requires . . . the courts [to] determine whether an act of the state has been motivated by prejudice. … Intention to discriminate is difficult to discover and difficult to prove.[13]

> Generally, the intention to discriminate must be constructed by the courts from social circumstances. Review for intentional discrimination involves the courts in an examination of the means and ends of a law to determine whether the law reflects an intention to discriminate. The step from examination of effects as a test for intentional discrimination to examination of effects as the standard of equality is difficult to avert because of problems surrounding the concept of intention and because the right to equality is understood to have implications for the outcome of laws.[14]

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5 [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews*].
6 [1999] 1 SCR 497, 170 DLR (4th) 1.
7 2008 SCC 41.
8 2011 SCC 12.
9 2013 SCC 5.
10 Moon, *supra* note 2 at 699.
11 *Ibid* at 692.
12 *Ibid* at 693.
13 *Ibid* at 687.
14 *Ibid* at 679.

> The "exercise" of prejudice (discrimination) seldom involves carefully thought out actions which are performed with the specific intention of disadvantaging a particular group. Generally, discrimination involves a failure to take adequate account of a group's interests rather than a conscious effort to disadvantage the group's members and is the result of a reliance on inaccurate and simplistic generalizations about the group's members. The adoption by an individual of an inaccurate and unfair stereotype concerning a particular group is usually no more than an unreflective internalization of a generally held view, a larger cultural assumption about other groups, and acceptable ways of living and behaving.[15]
>
> Once it is recognized that discrimination is not simply the product of the autonomous will of an individual but stems rather from larger cultural attitudes, it becomes necessary to look at social context in order to identify discrimination and recognize its harmful character, and it becomes clearer that discrimination is pervasive in the community and not simply a discrete and aberrant act.[16]

Because discriminatory intention is difficult to discover or to prove and because it is often expressed in social practices and habits, it was almost certain that the Court would interpret section 15 as a ban on effects discrimination.

III. The Ban on Constructive/Effects Discrimination as a Limited and Unstable Response to Systemic Inequality

In the *Andrews* decision, the Court adopted this broader reading of section 15:

> McIntyre J … [in *Andrews*] does not see discrimination as a discrete intentional wrong. In his view, the right to equality is concerned not with the reasons for legislative action but rather with the effect of such action on the comparative position of different members of the community.[17]
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> "Constructive" discrimination occurs when an act of the state adds to the disadvantage of an already disadvantaged group. According to this interpretation of section 15, if a law has a disproportionate impact on a disadvantaged group, it will *prima facie* violate the *Charter.* Once a *prima facie* violation is found, the court must then consider whether the reasons for the law are significant enough to justify its disadvantageous effect on the group's members. It is not enough that the law is supported by a legitimate reason; that reason must be substantial enough to justify the law's detrimental impact on some individuals. A violation of the *Charter* will be found when the reason for excluding some individuals from the law's benefit is insignificant when compared to the disadvantage they suffer by exclusion.[18]
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> [T]he right to equality is concerned not with the reasons for legislative action but rather with the effect of such action on the comparative position of different members of the community. A violation of the right to equality occurs when a state act contributes to the general position of inequality or disadvantage of a group in the community. Comparative social disadvantage is central to the wrong of discrimination since a law violates the section only when it adds to this condition of inequality.[19]
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> "Equality" is then a goal of law and not simply a principle governing the motives of legislators and the reasons for legislative action.[20]

15 *Ibid* at 692.
16 *Ibid* at 693.
17 Moon, *supra* note 3 at 572.
18 Moon, *supra* note 2 at 697.
19 Moon, *supra* note 3 at 572.
20 Moon, *supra* note 2 at 694.

[The difficulty with such an approach, though, is that] the adjudicative model is designed to deal with issues of corrective justice and limits the courts' ability to engage in the kind of systemic review and correction called for by this idea of equality.[21]

Review for constructive discrimination focuses on the effect of particular laws and the fate of particular groups and does not attempt to restructure the overall distribution of benefits in the community. The focus on state action means that emphasis is placed on the removal of laws which add to the unfairness of the distribution of social benefits rather than on the direct (re)distribution of resources by an interventionist state.[22]

Courts are limited in their ability to judge the legal system's conformity with the complex goal of systemic equality, to assess the various legal alternatives the state might choose to advance the common good and to decide which alternative might be the most effective and the most equitable. As well, they are limited in their ability to effect the changes necessary to bring the legal order closer to the ideal of equality of result. The courts are unable to assess the give and take of different laws and to make the systemic adjustments that best advance the goal of equality while respecting other values and concerns.[23]

Since the focus of review is on particular laws and not on the entire system of laws and the distribution it generates, the courts are not free to structure the system as they see fit, and thus cannot ensure that important rights and goals are pursued in the most fair and equal manner. A court must look at the law before it and decide whether that law should be struck down. Equality is pursued interstitially, and so, in general, the only way the courts can recognize and provide for values and interests other than equality is to uphold the law under review and permit some disadvantageous effect. Although the courts may on occasion make positive orders (extending the benefit of a particular law to a larger group), it is unlikely that they will be in a position to uphold a law and order compensatory benefits for those who are excluded from that law's distribution.[24]

Limited in these ways, review for constructive discrimination appears to be a slight extension of the prejudice-based view of equality.[25]

[T]he disagreement among the judges concerning the application of the test … may … reflect the inevitable fluidity of a judicially enforced right to equality of result. The effort to protect systemic equality through the adjudicative process requires the courts to rely on vague and general standards which reflect an unstable compromise between, on the one hand, concern for equality of result in the community and, on the other hand, the institutional position and competence of the courts. The result is a conception of equality which at times appears to be concerned with distributive justice (achieving a balanced distribution of benefits and burdens in the community) and, at other times, with corrective justice (correcting wrongful state acts).[26]

This partial protection of equality of result will not fit comfortably within the structures of constitutional adjudication. The courts may simply have to "muddle through," striking a difficult balance between the assertion of social justice and the maintenance of a judicial role which is consistent with their position in the Canadian constitutional system.[27]

Review for constructive discrimination places a strain on the adjudicative process and the political legitimacy of judicial review.[28]

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21 Moon, *supra* note 3 at 574.
22 Moon, *supra* note 2 at 699.
23 Moon, *supra* note 3 at 574.
24 *Ibid* at 574-75.
25 Moon, *supra* note 2 at 700.
26 Moon, *supra* note 3 at 564.
27 Moon, *supra* note 2 at 680.
28 *Ibid* at 700.

> The prohibition is concerned with equality of result but limits the scope of its protection to the interests of certain historically disadvantaged groups. Because this interpretation is a middle ground (a compromise), it will be subject to a variety of pressures. In reviewing legislation for constructive discrimination, the courts may feel that they are doing too little, that considerable inequality remains untouched by their limited review, or they may feel that they are becoming too deeply involved in legislative decision-making, that the role expected of them is not one they should perform. In any event, the courts will find it difficult to define the limits of their review, particularly because of the synthetic character of concepts such as state action. Since the focus of review is on particular laws and not on the entire system of laws and the distribution it generates, the courts are not free to structure the system as they see fit, and thus cannot ensure that important rights and goals are pursued in the most fair and equal manner..[29]

IV. What Counts as Discriminatory State Action?

The Court had in its early *Charter* decisions held that the *Charter* applies only to government action. In *Fraser*, the majority and dissenting judgments disagree about whether the state has *acted* in a way that can be described as discriminatory. This has been a recurring issue in the section 15 cases. I noted the potential for this problem emerging in this way:

> The state action doctrine holds that a constitutional wrong only occurs when the state has taken action — either an act of law-making or an administrative act. The state does not violate a constitutional right if it simply declines to take action, as when it fails to prohibit private discrimination. The courts are not free to embark upon a general assessment of the social order, correcting omissions in the law and excesses in private sector activity. Before the courts may intervene, there must be some act by the state which can be attacked as contrary to the right to equality.[30]

> But if the right to equality is concerned with the position or status of individuals or groups in our society (their welfare and their development), then a determination that inequality exists in our community can only be made after the court has considered the effect of the entire legal order on the relative position of the community's members. A violation of the right occurs not as a discrete act but as a general position or status of inequality or disadvantage in society. … The disadvantaged position of groups and individuals is not the result of any one particular law. The distribution of social benefits occurs in a variety of ways, as required and permitted by the law. An imbalance or unfairness in the distribution of social benefits is the product of the general social order.[31]

> Even if the issue of constructive discrimination arises in the context of a legal action which involves a limited number of parties and focuses on the legitimacy of a particular law, the investigation of the court inevitably takes it beyond a simple examination of the provisions of the particular law and the effect of that law on the particular parties. The courts must assess the position of the group in society: is the group "discrete and insular" or generally in a disadvantaged position in relation to the rest of the community? A decision on this will require the courts to examine the wider social system and the overall distribution of social benefits. A particular law triggers review, but judicial consideration must extend to the general system of laws.[32]

> [Section 15, though, as a Charter right] places no obligations upon private (non-state) actors to treat others fairly and equally or to make efforts to equalize the social position of disadvantaged individuals or groups within the community. Nor does it require the state to take positive action to correct inequality in the community. … [S]ection 15 only restricts state discrimination. The section is

29 *Ibid* at 710-11.
30 *Ibid* at 703.
31 *Ibid* at 702-03.
32 *Ibid* at 703.

> concerned with equality of result, but its force is limited to a prohibition of state acts which contribute to systemic inequality or, more particularly, to the disadvantaged position of a "discrete and insular" group in the community. However, it is difficult to see how the state-action doctrine is to constrain the right to equality. … [The Court's] view that the state-action doctrine represents an important limit on the scope of the constitutional right to equality seems to rest on a mistaken assumption that private activity (the market) is somehow natural and pre-political and is thus regulated, but not created, by state action.[33]

> [I]f subsection 15(1) is concerned with comparative inequality in socio-economic standing, it is difficult to see how the state-action doctrine can be a significant limit on review by the courts. … In some sense, all [social-economic] inequality … is the result of a particular law or, more often, a combination of laws or the entire legal order — for example, the laws which create and protect private property and the market system. The distinction between state action and state inaction (or the distinction between, on the one hand, the obligation of the state not to act in a way that contributes to socio-economic inequality and, on the other hand, a positive obligation on the state to correct inequality) loses significance once it is recognized that all inequality in the community can be traced to state action. As well, once the focus of review is on the systemic effects rather than on the purpose of a particular law, the distinction between private and public spheres of action underlying the state-action doctrine begins to dissolve. Although the action of the private property owner may not be subject to judicial review, the state act which gives that owner power may come under review since it can be seen as contributing to inequality in the community.[34]

Because a state act will only breach section 15 if it contributes to the systemic disadvantage of a particular group (because the wrong addressed by section 15 is systemic inequality), the line between state and private action or between state action and social-economic context will sometimes be difficult to draw. The difficulty in fixing the boundary between acts of the state and private discrimination was apparent in *Vriend v Alberta*.[35] The Court, in that case, held that the omission of sexual orientation as a ground of discrimination in the *Alberta Individual Rights Protection Act* amounted to an act of state discrimination by the Alberta government contrary to section 15. The Court felt able to treat the omission as a state act, first because the inclusion of sexual orientation had become the norm in Canadian human rights codes, and second because the legislative record showed that the government had very consciously decided not to include this ground. But what if the Alberta government had decided to include only two grounds of discrimination in its code, such as race and religion, but not others? What if it had decided to repeal the Act entirely? At what point can we say that the failure to prohibit private sector discrimination is an act of state discrimination contrary to section 15?

The main point of disagreement between the majority judgment of Abella J and the dissent of Brown and Rowe JJ in *Fraser* is whether the state (the RCMP) is *acting* in a discriminatory way when it *denies* employees, who participate temporarily in a job-share arrangement, the opportunity to buy back full-time pension credit when they return to full-time work. Justice Abella notes that, for reasons of child-care, women are more likely than men to participate in such an arrangement. She concludes that the RCMP's pension buy-back rules have a disparate impact on women and so breach section 15.

For the dissent, though, there is no obvious point of comparison or contrast between the benefits available to men and women and so there is no identifiable state act that has a disparate

33 Moon, *supra* note 3 at 571.
34 *Ibid* at 572-73.
35 [1998] 1 SCR 493, 156 DLR (4th) 385.

impact on women relative to men. The dissent notes that part-time employees cannot acquire full-time pension credits if they move from part-time to full-time work. The dissent also notes that while full-time employees, who take temporary leave without pay, can buy-back full-time pension benefits (and so are treated differently than employees who work part-time or job share), it is likely that most of the employees who take leave are women (although no evidence on this was provided to the Court). They note that while it is true that full-time employees receive greater pension benefits than do employees who job-share or work part-time, this difference cannot be described as discriminatory since it is neither unfair nor arbitrary and is based on the difference in hours worked. The dissent, then, believes that the pension rules do not add to or aggravate the disadvantaged position of the job-sharing women. The problem or concern, in Brown and Rowe JJ's view, is that because women continue to carry most of the responsibility for child-care, they are more likely to work part-time or to leave the workforce for an extended period. This has consequences for their work-life including their accumulation of pension credit. In the view of the dissenting judges, the claimants are asking the Court to compensate for this social circumstance and the systemic inequality that arises from it, and not simply to correct a law that has a disadvantaging impact on women or that adds to their disadvantaged position in society.

The disagreement between the majority and the dissent is about how closely the disadvantage or wrong must be tied to a particular law. If the central concern of section 15 is systemic inequality, then the distinction between state action and inaction — between the state's duty not to add to systemic inequality and the state's failure to address, or take account of, systemic inequality — becomes unclear and contestable. This distinction becomes even more difficult to draw when the focus of review is not on a particular law but rather on a body of related (pension) rules that apply to different situations and make a variety of distinctions that on the surface (independent of systemic context) appear to be reasonable. As the scope of review expands to encompass a body of rules (comparing the relative effect of these rules on a disadvantaged group), the Court becomes more entangled in complex social-economic matters and engaged in a form of distributive justice rather than simply in the correction of a discrete wrong by the state.

Brown and Rowe JJ complain that finding the pension rules to be discriminatory "would render the state responsible for discrimination it has not caused."[36] They continue:

> But even were we to take our colleague's recasting of the s. 15(1) analysis as legitimate, her open-ended approach leaves much to be desired as a matter of logic. For example, if, as she says, it is discriminatory towards the appellants to tie pension benefits and other compensation to hours worked, why stop at allowing part-time and job-sharing members to "buy back" additional pension benefits? After all, full-time members do not have to "buy back" their pensions. On our colleague's logic, if hours worked are not relevant, then part-time and job-sharing members should receive a fulltime 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. Taking our colleague's argument to its natural conclusion shows the vast implications of her position. One searches 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.[37]

36 *Fraser*, *supra* note 4 at para 181.

37 *Ibid* at para 199.

The dissent goes on to lament:

> Where a legal test lacks defined bounds, courts applying it exercise truly arbitrary powers of review. And that is the point at which we have arrived with "substantive equality." It has become an unbounded, rhetorical vehicle by which the judiciary's policy preferences and personal ideologies are imposed piecemeal upon individual cases.[38]

The answer to their concern, however unsatisfying, is simply this: There is no logical or rational stopping point. Once the dissenters agree that section 15 prohibits effects discrimination (despite their occasional references to the irrationality or arbitrariness of discrimination), they must live with this uncertainty as well. They may draw the line in a different place, but the line they draw will be no less contestable, and no less based on a policy choice.

V. Disadvantaged Groups

Section 15 prohibits discrimination on several listed and "analogous" grounds. However, in effects discrimination cases, the focus is more directly on the position of particular *groups* that are systemically disadvantaged:

> Disadvantage is usually generalized in some way and so the Court seeks to identify and remedy disadvantage by examining the relative position of groups in the community and preventing the state from aggravating the position of disadvantaged groups. As well, the courts are not in a position to make the adjustments necessary to bring about a complex form of equality of result, ensuring that all individuals are provided with an equal share of the benefits and burdens of the community. … [T]he courts [then] take a general approach and focus not on "individual" instances of unequal treatment but rather on groups that have occupied, and continue to occupy, a position of relative disadvantage.[39]

> The limited goal of review, then, is the rough equalization of the relative position of different groups in the community rather than the equalization of individual positions. … At best, the goal of "equality among groups" represents an imperfect form of equality of result. This form of judicial review will be more or less significant depending on the courts' methods for identifying disadvantaged groups.[40]

> The poor may be regarded as a "discrete and insular" group, once it is accepted that the purpose of judicial review is to [address] disadvantage and subordination in the community. However, there may be some reluctance to recognize the poor as a protected group because such a recognition would require the courts to engage in an explicit review of the community's socio-economic organization. [Other groups, such as women or recent immigrants] have been victims of prejudice and the courts are able to trade on the community's sense that review in support of these groups involves either the correction of (or compensation for) past "wrongs" (understood as discrete acts of prejudice rather than simply a position of socio-economic disadvantage) or … the removal of arbitrary barriers to equal opportunities. A limited focus on groups that historically have been the victims of prejudice, and a refusal to see the core of the wrong as socioeconomic subordination will allow the courts to avoid reviewing the situation of all disadvantaged individuals or groups, and will mean that section 15 is satisfied by a redefinition of the underclass.[41]

38 *Ibid* at para 219.
39 Moon, *supra* note 3 at 576-77.
40 *Ibid* at 577.
41 *Ibid* at 578.

> [I]f the courts choose to see socio-economic subordination as the wrong with which section 15 is concerned, and to consider the poor to be a disadvantaged group, all social and economic legislation could come under review. The depth of judicial intervention into the socio-economic organization of the community would then depend on the threshold the courts set for disparate impact.[42]

VI. Disparate Impact

> Any law, when subjected to close scrutiny, might be seen as having a disparate impact on a … "disadvantaged" group, in the sense that it might exclude from its benefit a higher percentage of disadvantaged group members than members of the general population. However, should every instance of disparate impact on a disadvantaged group … be considered a violation of subsection 15(1), thus requiring the state to justify the law under the terms of section 1? If 55 percent of a disadvantaged group are excluded from the benefit of a particular law, while only 50 percent of the general population are excluded, should the courts find such a differential sufficient to support a claim of discrimination?[43]

> By setting a low threshold [for] disparate impact (and a high threshold for justification under section 1), the courts could emphasize the legislature's obligation to correct systemic inequality. The legislature would be prevented from advancing a particular goal if doing so would add to the relative disadvantage of a "discrete and insular" group. Before the legislature could enact a law which has a disparate impact, it would have to ensure that the position of the affected group was improved in some way. The legislature's hands would be tied until it acted to end disadvantage and subordination. Such an approach to section 15 would involve a clear recognition that the wrong at issue is not the law under review but rather the subordinate position of certain members of the community. A court's power may be limited to striking down the particular law before it, but its aim [would be] to bring an end to systemic inequality.[44]

> Given the complexity of equality and given the political and institutional restrictions on the courts, it may be appropriate for the courts to set a high threshold for disparate impact and to focus only on those groups that are clearly disadvantaged (whether due to a history of prejudice and discrimination or to some other cause) because they have a smaller share of the benefits of the community and fewer opportunities and options than the rest of the population. A high standard for intervention would mean that the courts strike at only the clearest instances of inequality — at laws that add significantly to the disadvantage of an already disadvantaged group. This approach would allow the courts to advance a crude form of equality of result, without unduly interfering with the judgments and experiments of the legislature and without striking down a law which, when viewed from a wider perspective than is available to the courts, might be seen as advancing an important goal in a way that does not unnecessarily sacrifice the interests of a particular group.[45]

At one point in *Fraser*, Justice Abella says that: "There is no universal measure for what level of statistical disparity is necessary to demonstrate that there is a disproportionate impact, and the Court should not, in my view, craft rigid rules on this issue."[46] But this measure matters. Along with the measures for state action, disadvantaged group status, and justification of limits under section 1, the measure for disparate impact determines the extent to which the court involves itself in complex issues of social-economic inequality.

42 *Ibid*.
43 *Ibid* at 578-79.
44 *Ibid* at 579.
45 *Ibid*.
46 *Fraser*, *supra* note 4 at para 59.

VII. Section 1 and the Justification of Limits

There is no role for section 1 in intentional discrimination cases, since there can be no justification for a law that is motivated by prejudice. However, in effects discrimination cases, where discrimination is found, section 1 has a necessary but complicated and unpredictable role to play.

> Section 1 has a role to play in section 15 adjudication because of the political and structural constraints placed on the courts in their pursuit of equality of result.[47]

> Since the focus of judicial review for violations of the right to equality is on particular laws and not on the entire system of distribution, the courts are not free to structure the system as they see fit, ensuring that certain rights and goals in addition to equality are protected. The courts must look at the law before them and decide whether or not it should be struck down. If a law which adds to a group's existing disadvantage is [viewed as] necessary to the achievement of an important social end, it will be upheld, despite its adverse effect and despite the failure of the state to improve, in some other way, the lot of the disadvantaged group.[48]

> The courts … are not in a position to alleviate the situation of a disadvantaged group by ensuring that other benefits are provided — adjusting other laws to ensure some compensation for the disadvantageous effect of the law in question (for example, providing special transportation facilities for the blind). Generally, the courts are limited to two choices. They can strike down the law in question, or they can uphold it [and perhaps also enlarge its application by including excluded groups]. Because equality is pursued interstitially — focusing on particular laws rather than on the system of laws — the only way for the courts to provide for interests and values other than equality is to uphold the law and permit some disadvantageous effect. … [T]he courts must balance [the law's contribution to in]equality (the wrong of additional social and economic disadvantage) against other values and interests represented by the disadvantageous law.[49]

VIII. Conclusion

The long and winding road taken by the courts in their adjudication of section 15 claims was predictable from the beginning. And what was predicted is evident in the *Fraser* decision — the issues and tensions built into effects discrimination continue there. To conclude, I provide an excerpt from my comment on the *Andrews* decision in 1989 disagreement between the majority and dissent in Fraser reflects the tension that is built into the concept of effects discrimination. This tension was apparent in the *Andrews* decision and will continue to surface in future section 15 decisions.:

> [The Court] has avoided a narrow and mechanical approach to [section 15] and has adopted instead a broad, egalitarian view of the [right to] equality. . . . The [Court's] task, though, is difficult because while the focus of review is on a law which disadvantages a particular group, the foundation of the wrong is the disadvantaged or unequal position of the group in the community. The pursuit of systemic equality is constrained by the adjudicative process and perhaps also by the Court's reluctance to recognize the full implications of the conception of equality underlying the prohibition of effects discrimination. The Court is caught between two views of equality and state obligation: one view emphasizes the correction of harmful state action through the adjudicative process; the other emphasizes distributive justice and places an obligation on the state to correct socio-economic

47 Moon, *supra* note 2 at 707.
48 *Ibid* at 706.
49 *Ibid* at 707.

inequality in the community. The focus in future cases will be on the standards used for determining whether a group is "disadvantaged", whether a law's impact is "disparate" and whether the "limit" on the right under section 1 is "reasonable". The standards adopted by the Court will determine the depth of judicial intervention into the socio-economic organization of society. Future cases may give greater substance and clarity to these tests. However, inasmuch as they represent a compromise between two visions of equality and state obligation, these standards are certain to remain unstable. The scope of the right to equality will remain open, flexible and controversial, with no clear lines or easy tests for fixing the limits of judicial intervention into the social and economic order.[50]

50 Moon, *supra* note 3 at 583.