Constitutional forum constitutionnel

table of contents

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Special Issue
Fraser v Canada (AG): Visions on Equality

Constitutional forum constitutionnel

Introduction

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

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

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

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1 Professor, Centre for Feminist Legal Studies, Peter A. Allard School of Law, University of British Columbia "*Fraser v Canada: (20/20* SCC): Vision on Equality?" (30 October 2020), online (video): <https://ubc.zoom.us/rec/play/aV2hcz8czxDVG0G8szx6vjF_MwaHZlXCZ4UypKncxVunXgo6K7GJJTTM_56ow_CKyGBz3WUwhKIRCOsy.NPggAPapXrC9ceXl?continueMode=true>.

2 2020 SCC 28.

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

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

In "Cautious Optimism,"[3] Jonnette Watson Hamilton gives readers a careful review of the facts in *Fraser*, which she points out is not only the first successful adverse effects claim based on the enumerated ground of sex, but also only the second section 15(1) claim won by women on the ground of sex in 35 years[4]. There is much to celebrate in the decision she says: it simplifies the analytical approach to section 15(1) which has seen four different tests (and subsets of those tests) used to determine a breach of equality rights. The case brings a welcome clarity to equality rights jurisprudence, and makes it ostensibly easier for claimants to know the case they have to meet to prove a breach.[5]

Watson Hamilton notes eight potentially positive aspects of the decision, including Justice Abella's thorough discussion of adverse effects discrimination, and clarifications on what claimants need not prove to establish a breach.[6] But she presents several cautions, notably regarding ambiguities in *Fraser* itself [7], and concern that the dissents may create confusion about which test should be used going forward, as Justices Brown and Rowe use their version of the test (an older version) and rely on the resurrected need to prove arbitrariness, as well as a focus on the ameliorative purpose of the law to say, in effect, that as long as the state has tried to be accommodating, it doesn't matter if the policy reinforces, perpetuates, or exacerbates disadvantage.[8] Lastly, in her description of the first lower court decision in which the *Fraser* decision has been applied, Watson Hamilton shows just how confusing the current state of section 15(1) jurisprudence can be.[9] That decision, along with the other issues she raises in this article, leave her only cautiously optimistic about *Fraser's* legacy, especially given the Court's "…abysmal track record in dealing with adverse effects discrimination".[10]

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

3 Jonnette Watson Hamilton, "Cautious Optimism: *Fraser v Canada (Attorney General)"* (2021) 30:2 Const Forum Const 1.
4 *Ibid* at 2.
5 *Ibid* at 3-5.
6 *Ibid* at 6-7.
7 *Ibid* at 13.
8 *Ibid* at 9.
9 *Ibid* at 10-13.
10 *Ibid* at 10.
11 Fay Faraday, "The Elephant in the Room and Straw Men on Fire" (2021) 30:2 Const Forum Const 15.

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

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

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

12 *Ibid* at 16.
13 *Ibid* at 19.
14 *Ibid* at 19.
15 *Ibid* at 22-23.
16 *Ibid* at 24.
17 *Ibid* at 25.
18 *Ibid* at 26.
19 *Ibid* at 28.
20 Jennifer Koshan, "Intersections and Roads Untravelled: Sex and Family Status in *Fraser* v *Canada* (2021) 30:2 Const Forum Const 29.
21 *Ibid* at 30.

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

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

In her article, "Critical Reflections on *Fraser*," Sonia Lawrence[27] looks critically and broadly at what *Fraser* does *not* do — not so much for the claimants, but for equality generally — and she wonders whether the decision has meaningfully improved conditions for the most vulnerable and economically compromised women in Canada. *Fraser* as victory, she says, is myth creation.[28] She notes, for example, that though Justice Abella, "throws everything at the wall on section 15 … in this decision, it … is not a case about social benefits and redistribution but about salary and benefits"[29] — about providing equality to the claimants rather than dealing with broader socio-economic conditions that perpetuate inequality. In part, this failure to confront the societal bases of inequality she says, may be a matter of lacking a stable and clear legal framework for doing so. As Lawrence notes, the history of section 15 is one of "shifting and changing doctrines; of complexity, confusion, and struggle over the meaning and scope of constitutional equality."[30] And clarity, she says (and others in this volume clearly concur), has never been "hallmark of this doctrine" in any of its iterations.[31]

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

22 *Ibid* at 36.
23 *Ibid* at 37.
24 *Ibid* at 36.
25 *Ibid* at 30.
26 *Ibid* at 42.
27 Sonia Lawrence, "Critical Reflections on *Fraser:* What Equality Are We Seeking:" (2021) 30:2 Const Forum Const 43
28 *Ibid* at 51.
29 *Ibid* at 47.
30 *Ibid* at 43-44.
31 *Ibid* at 44.

playing a larger role in future cases. When cases fail the two-step discrimination analysis, then section 1 can become "peripheral" or "irrelevant," but this will likely change if cases are more successful at the section 15 stage. Given that claims can be blocked in a number of ways, Lawrence suggests that judges need to be conscious of their roles in this process. She wonders too whether there might be a "moral mismatch" to finding discrimination, and then justifying the state's actions against a minority using section 1.[32] Either way, in the wake of *Fraser,* more attention will have to be paid to that balance going forward. Despite her recognition of the welcome "brush-clearing" in *Fraser,* Lawrence's article expresses a deep disappointment that the decision does not, and cannot, address the growing disparities in wealth, and the racial inequality — the systemic inequality in which we as a society are embedded. She points to the urgent need to look at the limits of law and litigation in the interest of creating a vision that promotes human flourishing.[33]

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

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

Despite the Court's commitment to promoting substantive equality, it is time, says Sealy-Harrington, to leave the formal/substantive dichotomy[40] behind and engage with a new "vocabulary" of equality — one that recognizes its flexibility, malleability, and alchemy, and that meaningfully addresses the vast structural inequalities in Canadian society. He urges advocates to present a more critical perspective on equality rights, for the courts to recognize

32 *Ibid* at 49-50.
33 *Ibid* at 51.
34 Joshua Sealy-Harrington, "The Alchemy of Equality Rights" (2021) 30:2 Const Forum Const 53.
35 Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge, Mass: Harvard University Press, 1991).
36 *Ibid* at 59.
37 *Supra,* note 34 at 66.
38 *Ibid* at 55.
39 *Ibid* at 82.
40 *Ibid* at 54, 69.

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

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

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

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

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

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41 *Ibid* at 83.
42 Richard Moon, "Comment on *Fraser v Canada (AG):* The More Things Change" (2021) 30:2 Const Forum Const 85.
43 Sealy-Harrington, *supra* note 34 at 82.
44 Moon, *supra* note 42 at 86.
45 *Ibid* at 88.
46 *Ibid*.
47 *Ibid* at 90.
48 *Ibid* at 87-89.
49 *Ibid* at 93.
50 *Ibid* at 94.

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

Constitutional forum constitutionnel

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

Jonnette Watson Hamilton*

I. Introduction

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

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

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

2 2020 SCC 28 [*Fraser*].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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11 2020 ONSC 6465 [*Simpson*].

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

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

14 *Ibid* at para 48.

15 2018 SCC 18 [*CSQ*].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 *Ibid* at para 169.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

70 *Ibid* at paras 216-27.

71 *Ibid* at para 209-10.

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

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

III. Application of *Fraser* in *Simpson*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

85 See text accompanying notes 35-36.

86 See text accompanying notes 16-23.

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

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

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

90 *Ibid* at para 268.

91 *Ibid* at para 299-300.

92 *Ibid* at para 290.

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

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

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

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

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

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

IV. Conclusion

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

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

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

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

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

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

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

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

Constitutional forum constitutionnel

The Elephant in the Room and Straw Men on Fire

Fay Faraday*

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.

Constitutional forum constitutionnel

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

Jennifer Koshan*

I. Introduction

It has been a long road to the judicial recognition of women's inequality under the *Canadian Charter of Rights and Freedoms*.[1] 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,[2] and it was only two years prior that a claim of sex discrimination in favour of women was finally successful at the Court,[3]

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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 Quebec (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*.[4]

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.[5] 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.[6] *Fraser* therefore fails to break the over 20-year drought since the Court last recognized any new analogous grounds under the *Charter*.[7]

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."[8] 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.[9] 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.[10]

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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.[11] 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.[12] The evidence showed that the vast majority of RCMP members who job-shared were women with small children.[13] 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.[14]

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*.[15] 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.[16] 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.[17] This led Justice Abella to conclude that there was a "clear association"

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.[18] 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."[19] 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.[20] 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.[21]

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.[22] 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.[23] 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."[24] 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.[25]

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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> [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.[26] 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.[27]

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.[28] 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.[29] 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.[30]

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."[31] 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.[32] 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.[33] Justice Abella accepted this argument and buttressed it by referring to cases

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."[34] However, in these jurisdictions sex discrimination claims are the only option because family status discrimination is not prohibited.[35]

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."[36] 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.[37]

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.[38] 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.[39] The closest the Court has come to a recog-

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

nition 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.[40] 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.[41] They also noted that a majority of the group were women, highlighting the interplay between sex, marital and parental status.[42]

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.[43] 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.[44] 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.[45] 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.[46] Moreover, while Justice Abella refuted the relevance of choice on the discrimination issue in *Fraser*,[47] 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."[48] 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.[49]

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.[50] 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.[51]

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*.[52] 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.[53] 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."[54] 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

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."[55] 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.[56] 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*.[57]

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.[58] 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.[59] 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.[60] 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.[61] 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."[62] It is not entirely clear what she meant by this last point, but

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.[63] However, family status claims by male caregivers might help to challenge systemic gender inequality by disrupting socially constructed gender roles and workplace rules.[64] 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.[65] 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.[66] 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.[67]

Justice Abella did informally recognize the intersection between sex and family status in her discussion of the inequalities faced by women as caregivers.[68] 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.[69]

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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.[70] 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*.[71]

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.[72] 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,[73] 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.[74] 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.[75]

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

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."[77] 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).[78] 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.[79] 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.[80]

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.[81] She also acknowledged that people can be a member of more than one socially disadvantaged group at a time.[82] While both points should seem obvious, they have created barriers in adverse effects discrimination cases,[83] 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."[84] 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.[85] 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.[86]

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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*.[87] 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.[88]

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.[89] 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.[90] 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).[91] 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.[92] 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>.

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.[93] 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.

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

Constitutional forum constitutionnel

Critical Reflections on Fraser: *What Equality Are We Seeking?*

Sonia Lawrence*

I. Introduction

In this brief comment, I contextualise and complicate the conventional reading of *Fraser v Canada* as a victory for equality seeking groups.[1] Instead, or at least alongside that reading, I want to suggest some other stories about the trajectory of equality in Canada since the *Charter*[2] era began, and about what future doctrinal developments *Fraser* might lead us to predict.

The history of section 15 — as the meticulous work of Jennifer Koshan and Jonnette Watson-Hamilton[3] in this volume and elsewhere clearly shows — is a history of shifting and

* Associate Professor at Osgoode Hall Law School. Thank you to Professor Debra Parkes, Director of the Centre for Feminist Legal Studies at U.B.C. Allard School of Law for the invitation to speak about *Fraser* in a November 2020 online panel entitled "*Fraser v Canada (2020 SCC)*: 20/20 Vision on Equality?", online: <https://allard.ubc.ca/about-us/blog/2020/recording-fraser-v-canada-2020-scc-2020-vision-equality>. November 2020. My thinking was advanced by the work of my wonderful co-panelists whose work is available in this volume. They are all people whose work constantly provides inspiration and insight. All errors are mine.

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

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

3 Here is a small sample of their more recent work: Jonnette Watson Hamilton & Jennifer Koshan, "Equality Rights and Pay Equity: Déjá Vu in the Supreme Court of Canada" (2019) 15:1 JL & Equality 1; 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; Jonnette Watson Hamilton & Jennifer Koshan, "*Kahkewistahaw First Nation v. Taypotat* — Whither Section 25 of the *Charter*?" 2016 52:2 Const Forum Const 39; Jonnette Watson Hamilton & Jennifer Koshan, "*Kahkewistahaw First Nation v. Taypotat*: An Arbitrary Approach To Discrimination" (2016) 76 SCLR (2d) 219; Jonnette Watson Hamilton & Jennifer Koshan, "The Continual Reinvention of Section 15 of the *Charter*" (2013) 64 UNBLJ 19.

changing doctrines; of complexity, confusion, and struggle over the meaning and scope of constitutional equality. Some themes repeatedly surface and then are again submerged in the Supreme Court's decisions, but clarity has never been a hallmark of this doctrine — in any of its iterations. With this history in mind, I wonder whether *Fraser* serves to take us forward into new futures. In particular, I wonder whether *Fraser* suggests any role for section 15 in addressing the growing gap in Canada between haves and have nots, a gap that has significantly grown in the *Charter* era. Will *Fraser* enable use of section 15 to combat the many areas of criminal justice in which communities of colour and especially Black and Indigenous peoples are disproportionately targeted, tried, convicted, and punished? Unfortunately, clarifying the way that *Fraser* fits into our political economy and our constitutional jurisprudence makes these more progressive futures for section 15 recede.[4]

For feminists in particular, many of whom (including me) engaged in some celebration of *Fraser*, the issue of limits and impacts needs careful consideration. Will this version of section 15 improve outcomes for equality seeking groups? Does *Fraser* work to help women who aren't already pension-earning professionals? Does a case like *Fraser* further universal benefit programs, including childcare programs? How can we think through the ways that *Fraser* will echo not just as a brush-clearing exercise in terms of section 15 doctrine, but as a decision that can meaningfully improve things for the most vulnerable, most economically compromised women in Canada?

I am not suggesting that Canada's failures in respect to diminishing inequality and improving life for the women on the bottom of these various social scales should be laid at the feet of the *Fraser* claimants, nor those who celebrate this victory. That is not my point. But I do think it matters that we recognize the serious limits of this case as a model for improving the financial equality and security of women. More generally we need to carefully assess theories which suggest that there will be a sort of "trickle down" effect — in other words, that successful equality claims by relatively more advantaged groups will ultimately have a positive impact on less advantaged groups. In addition, I think more focus on the broader contexts in which equality victories are won against the state might induce us to pay less attention to the minute details of the ways that the doctrine is set out, and more to the situations in which judges are willing to make the doctrine more capacious versus those in which the route to section 15 victory is cut off.

In this short note, I first address the meaning of equality in the particular factual context of this case: what did the claimants win? I then place that equality into the Canadian socio-economic context, before turning back to the question of section 15 doctrine to ask where the "victory" in *Fraser* might lead in judicial interpretations of both section 15 and section 1.

4 I acknowledge that these futures recede and have always been more distant than others because of section 15 doctrine. My point here is slightly different, more to indicate why *Fraser* might have been an easier call for the Supreme Court, might have at least not posed some of the challenges which might bring down other claims.

II. The Prize Secured: Equality, Depending on your Vantage Point

Fraser involved three retired members of the RCMP challenging the rules which governed their pension contributions while they were working. All three had worked less than full-time when they had young children. They argued for pension contribution parity with other members of the force. The claimants were women working in a largely male workforce, and the Supreme Court upheld the claim on the ground of sex, as described by other authors in this volume. [5]This gave the claimants a level of pension equality with the men they worked alongside with. In doing so, the Court brought some women "up" to the level of their coworkers. This is relatively clear.[6] But what happens when we set *Fraser* into the context of "pension equality" in Canada more generally?

At this juncture in Canada, more women are covered by pension plans than men, a statistic probably attributable to the sectors in which many women work.[7] However, immigrants in general have lower pension coverage.[8] Low income workers also have significantly less pension coverage.[9] My point is that pension equality itself is a goal that can be considered at many different levels of focus: within a particular workplace, profession, or province, along lines of gender, race, or immigration status, *inter alia*. When we look at a particular job, we may see disparities in pension earning around gender and traceable to caregiving or age of first employment for example. But once we zoom out of that particular view, pension disparity also appears based on job categories, unionization, employment sector, and many other factors. The disparities and gaps in pensions earnings and coverage map onto many other forms of inequality and disadvantage. The doctrinal logic of *Fraser* (and broader *Charter* interpretation) only allows arguments in favour of more pension equality in a particular workplace. In doing so it may also exacerbate gaps between, for example, unionized and non-unionized workers, public and private sector workers, or lower and higher income workers. One may think of this as obvious and not an equality issue, but I would argue that it is important to keep in mind in recognizing the clear limits and potential impacts of *Fraser*'s logic.

5 For a fuller description on the facts, readers can turn to other authors in this volume, including: Jonnette Watson-Hamilton, "Cautious Optimism: *Fraser v Canada (Attorney General)"* (2021) 30:2 Const Forum Const 1 at 2; Jennifer Koshan, "Intersections and Roads Untravelled: Sex and Family Status in *Fraser v Canada*" (2021) 30:2 Const Forum Const 29 at 31. The facts are set out by the majority (See *Fraser*, *supra* note 1 at paras 2-32) with the dissent of Justices Brown and Rowe offering some additions at paras 148-162.

6 Here and more generally in my discussion, I am setting aside the debate about how, precisely, gender was engaged on the facts and evidence. This was a significant issue for Justice Côté in dissent.

7 This statistic should not obscure the fact that more women than men live in poverty post-retirement (see Dan Fox & Melissa Moyser, "The Economic Well-Being of Women in Canada" in *Women in Canada: A Gender-based Statistical Report*, 7th ed (Statistics Canada, 2018) or that women's pensions when they have them may be lower than those held by men for reasons including lower wages when working, fewer hours worked, and interruptions in full time work related to childbearing and care work.

8 See "Table 6 Pension coverage by immigration status, age, gender and pension type, 2012" in Marie Drolet & René Morissette, "New facts on pension coverage in Canada" in *Insights on Canadian Society* (Statistics Canada, 2014).

9 See "Table 7: Pension coverage by gender, wage decile and pension type, 2012" and accompanying discussion in Drolet & Morissette, *ibid*.

Even on its own terms, *Fraser* can be seen as having limited impact. The claim in *Fraser* is about a pension scheme for RCMP retirees. It is thus a benefit scheme, but it is fundamentally an *employment* benefit scheme, one subject to the *Charter* by virtue of the fact that the state employs the members of the RCMP. It is not a universal benefit scheme nor a social benefit. In addition, while the full implications about the costs and who will pay them are a bit unclear, it seems very important that the right won in *Fraser* is the right of the women to be able to make pension contributions despite working part time. That is, they are granted the right to use their *own* income to purchase pension coverage.

Parallels can be drawn here, albeit limited ones, with the criticisms that were levelled at *M v H*, a 1999 equality decision of the Supreme Court.[10] *M v H* extended the obligation for spousal support in Ontario family law to same-sex spouses. It is, and was, widely seen as a victory against discrimination for same-sex relationships and LGBTQ+ persons. At the same time, as Brenda Cossman has argued:

> [T]he Court itself placed considerable emphasis on the goal of "reducing the strain on the public purse" by "shifting the financial burden away from the government and on to those partners with the capacity to provide support for dependent spouses." The ruling is consistent with the agenda of fiscal responsibility — of expanding the private support obligations of individual family members, and thereby reducing the demands on the state. It is no coincidence that the very first same sex relationship victory is one that fits within the agenda of fiscal conservatism, the privatization of support obligations, and the demise of the welfare state.[11]

The Court in *Fraser* made no overt comments about the public purse at all. But like *M v H*, *Fraser* does not really involve a claim to public funds or benefits. Like *M v H*, the decision in *Fraser* might actually serve to limit calls on public funds, as the women in *Fraser* would be better off financially post-retirement (just as lower income former spouses in same-sex relationships are better provided for through *M v H* after the breakdown of their relationships). Might claims which would somehow expand access to public benefits, or otherwise involve very significant claims on the public purse, evoke more concern from the Court, leading members of the Court to restrict rather than expand the ambit of section 15? Perhaps Justice Abella would have taken the same position on section 15 regardless of these aspects of the claim. But the arguments raised by the dissent, which are significantly about the slippery slope of section 15 adverse impact claims, illustrate the kinds of arguments which might have carried more weight in a case which was not so peculiarly private, for a public law case.

Arguments about the privatization agenda discernable in "victories" like *M v H* and *Fraser* may lead us back to scholar Nancy Fraser's ideas about recognition versus redistribution in the context of Western approaches to equality.[12] In her work, Fraser has developed arguments illustrating the shift of equality concerns from thoseabout redistribution to concerns about recognition, as the West has become more deeply committed to neoliberal models.

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10 *M v H*, [1999] 2 SCR 3, 171 DLR (4th) 577.

11 Brenda Cossman, "Canadian Same Sex Relationship Recognition Struggles and the Contradictory Nature of Legal Victories" (2000) 48:1 Clev St L Rev 49 at 56 [citations omitted].

12 Nancy Fraser, "From Redistribution to Recognition: Dilemmas of Justice in a 'Post-Socialist' Age" (1995) 212 New Left Rev 68.

Despite the material significance of the claimants' victory, the *Fraser* judgment does not fit easily into the space of "redistribution." It must be at least relevant that the funds themselves, the funds with which the pension coverage will be provided or "bought," are not public funds but the claimants' own earnings.

Let me take a moment to try to clarify. The women of the RCMP matter to me as humans deserving of rights, as Canadians deserving of equality rights, as parents deserving of attention to their care duties, and as women burdened by social expectations and realities in ways most of their male colleagues are not. The point of this commentary is not to label them as the problem, nor to fault the strategizing behind this case. It is to say that it surely must matter for us to recognize that this case, in which Justice Abella has thrown everything at the wall on section 15, is not a case about social benefits and redistribution but about salary and benefits. What is public about this case is public in a very different way than cases challenging, for instance, lack of (access to) housing or medical care. At this particular moment in time, this case does not seem to strike a major blow. Instead, it follows a more market-based and strictly narrow comparative logic in bringing "equality" to the claimants.[13]

III. The Balloon Effect: Shifting the Pressure from Section 15 to Section 1

In addition to the way that changing the scope of our view of *Fraser* may make it look less like a victory, I think this case raises critical questions about the ways that section 1 and section 15 are linked in the structure and doctrine of Canadian *Charter* equality. These thoughts lead me to concerns that the victory in *Fraser* will yield new challenges for future claimants. I have written elsewhere that "equality advocates" need to recognize a line of reasoning in Canadian jurisprudence calling for limits to the scope of section 15. The logic behind these arguments is that a very broad section 15 puts too much pressure on section 1 to "save" the violations lest governments' ability to regulate be strangled by the *Charter*.[14] In *Fraser*, this argument is reflected in the Brown and Rowe JJ (dissenting) suggestion that section 15 is being overloaded by the kind of adverse effect analysis undertaken by the majority in *Fraser*.[15] I would briefly paraphrase this kind of argument as follows: if we are too open at section 15, particularly with respect to adverse effect discrimination, there will be an enormous number of situations in which we can make a finding of discriminatory adverse effects (since that will require only statistical evidence of adverse impact on a group already recognized in the jurisprudence). In the area of race, for instance, a zone in which we have almost no cases, I think we could expect acceptance of statistical evidence of adverse effects would produce many findings of adverse effect discrimination. If all of these cases require remedies, the financial and policy impact will be enormous. Governments will have to make transformational changes in more than one

13 The dissent is highly critical of how comparison plays out in this case, but my point is merely that the basic logic is that workers who move to part time work for childcare reasons should have the same opportunity for contribution as full time workers in the same job.

14 Sonia Lawrence, "Equality and Anti-discrimination: The Relationship between Government Goals and Finding Discrimination in Section 15" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 815.

15 See, in particular, *Fraser*, *supra* note 1 at paras 206-27 under the heading "Practical Implications" (Brown and Rowe JJ, dissenting).

sector. Courts should not put governments in this position. Therefore, there must be a section 1 solution in these cases.

The implications of a broad interpretation of section 15 have long been part of the discussion in Canada. Before *Andrews*, early thinking about section 15 involved many speculating about where the line would be drawn. Some suggested that the bar could be set very low, perhaps just at differentiation, with all the work to be done in section 1. Peter Hogg, for example, speculated that the threshold for "discrimination" could be quite low, and then the bulk of the "work" would be done at section 1.[16] In response, Richard Moon pointed to the kinds of concerns I raise here:

> [I]f the Canadian courts do adopt the view that section 15 of the *Charter* involves a prohibition of effects discrimination, they will have a difficult time defining the scope of the right and enforcing it in a way that does not undermine their institutional legitimacy.[17]

But in *Andrews*, the first section 15 case decided by the Supreme Court, Justice McIntyre's majority decision chose a more robust section 15 test. Without such a robust test, he wrote, "courts would be obliged to look for and find section 1 justification for most legislation, the alternative being 'anarchy.'"[18] Thus, Justice McIntyre favoured both a robust section 15 test *and* a very deferential application of the *Oakes* test, referencing the way that legislatures must make many distinctions between individuals in order to perform basic functions. However, Justice Wilson, writing for herself, the Chief Justice, Justice L'Heureux-Dubé, and Justice LaForest called for a section 1 test with more bite, and they prevailed on this point:

> Given that s[ection] 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.[19]

Contrary to Peter Hogg's initial suggestion, then, the Supreme Court from the outset has set the bar for discrimination under section 15 quite high. As a result, in most of the cases there is little to see at section 1. Cases either fail at section 15, or they sail through a rather cursory section 1 analysis.[20]

However, there is a small group of cases in which the contour of the tension between section 15 and section 1 is more visible. One of these is a 2002 case, *Lavoie v Canada*,[21] a challenge to a federal civil service rule of preference for citizens in open hiring competitions. The claim ultimately fails. But between the four sets of reasons, some interesting conversations happen. Of most interest for my purposes are the reasons of Justice Arbour who (perhaps surprisingly)

16 Peter W Hogg, *Constitutional Law of Canada*, 2d ed, (Toronto: Carswell, 1985) at 800-01.

17 Richard Moon, "Discrimination and Its Justification: Coping with Equality Rights under the Charter" (1988) 26:4 Osgoode Hall LJ 673 at 679 [citations omitted].

18 *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143 at 180, 56 DLR (4th) 1 [*Andrews*] per Justice McIntyre citing Hugessen JA in *Smith, Kline & French Laboratories v Canada (Attorney General)*, [1987] 2 FC 359 at 367-69, 34 DLR (4th) 584.

19 *Andrews, supra* note 18 at 154 per Justice Wilson (for the majority on this point).

20 Of particular interest, perhaps, since Justice Martin's elevation to the Supreme Court, is the discussion of these cases in Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80:1/2 Can Bar Rev 299.

21 *Lavoie v Canada*, 2002 SCC 23 [*Lavoie*].

wrote a forceful opinion saying that there was no violation at all. She kept section 15 narrow, refused to find discrimination, and argued that she was moved to do so because of her concern about what would start to happen at section 1.[22] She, like Justice McIntyre in *Andrews*, described a narrower role for section 15 in the name of saving it. Referring to what she called the "perfunctory" or broad approach to section 15, she wrote:

> Under this approach equality rights, once found, will not be at the mercy of a s[ection] 1 analysis that would otherwise, of necessity, be too deferential to the legislative process and hence too heedless of the importance of s[ection] 15(1) rights. Freed of the need to guard the integrity of the legislative process against too-easy findings of s[ection] 15(1) infringements, the justificatory analysis under s[ection] 1 will then be conducted with the uncompromising rigour that I believe it was intended to have. No longer will keeping the legislatures functional necessitate tolerating violations of *Charter* rights, the embodiments of our freedom and of this society's most cherished values, in favour of less valued state objectives such as the one at issue in this case.[23]

Justice Arbour here urges her fellow judges to consider issues *across* the wall between sections 15 and 1, arguing that our equality rights cannot be understood without attention to the realities of governance and the institutional competence of courts versus legislatures. But not even one of her colleagues stood with her on this point.[24]

What is unique about Justice Arbour's reasons in *Lavoie* in particular, is the openness with which the dilemma I concentrate on in this article is expressed. While judges often point to institutional competence issues, they rarely acknowledge the choices they have in terms of how, precisely, to limit their own role. I offer *Lavoie* as an illustration of the dilemma that confronts judges in crafting their opinions in section 15 cases, a dilemma which is produced by the two-step procedure required in Canadian law — first, the discrimination analysis at section 15, and then, should the claimant succeed, the government's chance to justify the violation of section 15 through section 1. The claim can be blocked in many different ways. Some of these ways produce a justified violation, some would mean no violation. More generally, though, *Lavoie* and other cases in which the outcome has been "justified discrimination" — like *NAPE*,[25] *Quebec v A*,[26] and *Centrale des Syndicats*[27] — serve to illustrate that while much section 15 scholarship and strategizing treats section 1 as merely peripheral or irrelevant, the more successful we are at section 15, the less safe this assumption may be.

It may be that section 15 has some unique features that render it more resistant to limitation at section 1, at a conceptual level. The first is that compared to sections 2(a) and 2(b), for example, the test for section 15 is onerous. It sets a high bar, and thus section 1 is rarely called on in section 15 cases. This might be important even if we assume that all of the work that the claimant must do under section 15 doctrine is entirely appropriate (that is, even if we assume that section 1 concerns haven't already been imported into section 15 doctrine). But there may also be a moral mismatch between what discrimination connotes and the idea that we

22 *Ibid* at paras 73-124, especially paras 90-92 per Arbour J.

23 *Ibid* at para 91 (per Arbour J).

24 Only Justice Lebel agreed that there was no violation of section 15, in separate reasons. Justices Gonthier, Iacobucci, Major, and Bastarache found a violation saved by section 1, and Chief Justice McLachlin, Justice L'Heureux-Dubé and Justice Binnie found a violation of section 15 not saved by section 1.

25 *Newfoundland (Treasury Board) v NAPE,* 2004 SCC 66 [*NAPE*].

26 *Quebec (Attorney General) v A,* 2013 SCC 5.

27 *Centrale des syndicats du Québec v Quebec (Attorney General),* 2018 SCC 18 [*Centrale*].

can justify it.[28] Is discrimination against a minority by a democratic majority something particularly odious? Is the idea of justifying that discrimination because it is in fact proportionate to harm the minority for the good of the majority in some particular case, simply too difficult to reconcile with the status of equality as a core *Charter* value? Perhaps we — and judges too, as Justice Arbour's *Lavoie* reasons seem to suggest — appropriately balk at using arguments about a democratic society to justify something once we have labelled it discrimination. One way through that dilemma is just not to build the right so broadly. If institutional competence constraints, or anxieties about anarchy, are going to leave judges feeling "forced" to haul back the potential of section 15 at section 1, why build the right so broadly in the first place? And in fact, section 15 cases denying any right has been infringed are far, far more common than the small number of section 1 justified violations.

Thus, the very success of the claim in *Fraser* must lead us to recognize that there is no particular reason to assume that section 1 will not soon start to play a larger role in our section 15 jurisprudence. Throughout the years in which section 15 claims were repeatedly rejected by the Supreme Court, section 1 considerations tended to recede. The development of a particular jurisprudence about how section 1 ought to apply in the context of section 15 did not happen. But there are reasons to assume that it is precisely cases like *Fraser* which will prompt this response from some judges. Justices Brown and Rowe focus on the immense significance of moving arbitrariness and unfairness considerations into section 1.[29] Justice Côté complains that this is a "green light" to section 1.[30] These are, in my view, amongst the burning straw men described by Justice Abella — but the flames do provide some illumination about how concern regarding an immensely capacious section 15 will probably just shift some battles over to section 1. In *Centrale*, for all the disagreement over how section 15 should operate, former Chief Justice McLachlin was the only one of the full panel who was prepared to hold that the government had not met its burden at section 1.[31] All the others, Justice Abella included, found that section 1 could justify the infringement of section 15.

The relationship of section 1 to section 15 now requires more careful attention from both scholars and litigators — perhaps particularly from those of us who think we are scholars of section 15 and who have argued for a long time that some considerations which we kept finding in section 15 are more appropriately dealt with under section 1. In some ways, this is a consequence of success. The broader section 15 becomes, the more pressure will of course be exerted on and felt by judges to impose section 1 limits.

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28 In many cases the gap between what is protected by section 15 and what is protected by sections 2(a) and 2(b) is can seem very narrow (take for example, *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37). Recognizing this does not, however, change my general sense that doctrine in these areas has developed, including which cases have been brought and the rhetoric used in decisions, such that there is a deeper and different trepidation about limiting section 15 rights via section 1 than there is about limiting section 2(a) or section 2(b) rights.

29 See *Fraser*, *supra* note 1 at para 223, per Brown and Rowe JJ, dissenting ("The failure to properly define the scope of s 15(1) also has the practical effect of pushing the bulk of the analysis to s.1" [citations omitted]).

30 See *ibid* at para 244, per Côté J, dissenting ("Worse yet, if statistical disparities alone were sufficient, the s. 15(1) analysis would, in effect, be replaced with a green light to s. 1, where the burden is reversed and placed on the government.").

31 *Centrale*, *supra* note 26 per McLachlin CJ at paras 154-59.

IV. Conclusion: Resisting myth making

Fraser, is in some ways, a clear victory for a vision of section 15 which covers adverse impact discrimination. The efforts of the majority to clarify the current test are useful and helpful, if not enough (as many other contributors to this volume have noted) to end the confusion wrought by the Court's many doctrinal restatements (without repudiations) over the years. However, *Fraser* also offers an opportunity to ask what work section 15 is actually doing and what kind of more equal society section 15 might create. These questions are urgent, given the rise in material inequalities in our society since section 15 came into force. I am not suggesting that rights litigation is a causal mechanism in this shift, but rather indicating that we must at least attend to the concurrency of these developments.[32] It is as urgent as ever that we commit to thinking and arguing about the limits of law and litigation at the same time, in the same conversations where we are debating which doctrinal strictures are, are not, and should be part of section 15 analysis. This ought to lead us to more critical thinking about the relevance of these piecemeal litigation victories (and losses) to larger, often conflicting, visions of how states should promote human flourishing.

To some, my comments and concerns may seem uninteresting. For many, it may not prompt concern that constitutional equality rights guarantees exist in states, like Canada, where material inequality has been rising for decades. Others might think it normal that equality rights guarantees exist in states, like Canada, where severe racial disparities are easily discerned in the operation of all aspects of criminal justice. But for those who see material inequality (by which I mean a growing gap in terms of wealth, and the presence of both extreme wealth and poverty) and rampant racial inequality (especially in criminal justice) as equality problems which a constitutional guarantee ought to somehow address, *Fraser* offers some food for thought. Within a tightly bound doctrinal context, it is a win for those who want a robust interpretation of constitutional equality guarantees. It confirms that adverse impacts can be used to illustrate equality violations. But set against the fuller context of Canadian section 15 litigation and a few crude measures of equality between Canadians, *Fraser* may seem a far more limited victory.

Painting *Fraser* as a major victory is myth creation. The myth, the vision on the horizon, tempts, lures, cements us into the belief that constitutional litigation can provide meaningful equality in this country. I do not think this is useful. At best, I hope that *Fraser* will serve to help sharpen discussions about what constitutional equality can or should accomplish in terms of social change, and about precisely what we mean when we claim to be "equality advocates."

32 For such arguments in the zone of international human rights, see e.g. Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, Mass: Harvard University Press, 2018); Radha D'Souza, *What's wrong with rights? Social movements, law and liberal imaginations* (London, UK: Pluto Press, 2018).

Constitutional forum constitutionnel

The Alchemy of Equality Rights*

Joshua Sealy-Harrington**

I. Introduction

A clear legal test for equality is impossible, as it should be. Indeed were the test clear, it could not be *for equality*. It would have to be for something other than equality — in effect, *for inequality*.

The abstract character of equality is not a new idea. In fact, the Supreme Court of Canada's first decision under section 15 of the *Canadian Charter of Rights and Freedoms*[1] recognized equality as "an elusive concept" that "lacks precise definition."[2] Why, then, do judges continue to demand such definition over thirty years later? The answer, at times, is politics. On the surface, judges duel with doctrines and precedents; they trade barbs about whose burning "straw

* The title of this article intentionally riffs on the book: Patricia J Williams, *The Alchemy of Race and Rights* (*below* note 25) [*Alchemy*]. This is, in large part, due to the article's significant reliance on Williams' insights in analyzing the present moment in Canadian equality law.

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

2 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 164, 56 DLR (4th) 1 [*Andrews*].

man" is least illuminating.[3] But, on closer examination, such rhetoric of *methodology* (the *path* of one's legal analysis) can conceal disagreement in *ideology* (the *destination* of one's legal analysis, which is inextricable from one's "beliefs, experience, ideals, and values"[4]). The more Canadian jurists assert that the politics and law of equality *diverge*, the more they obscure how politics and law actually *converge*.

The Supreme Court's latest equality decision in *Fraser v Canada*[5] provides an instructive opportunity to reflect on these dynamics of ideology and methodology — and, specifically, an opportunity to explore what may be described as the *alchemy* of constitutional equality law under section 15 of the *Charter*.[6] By equality law's alchemy, I mean the ways in which section 15 governs "a process of changing a thing into something better."[7] Whether a particular circumstance is unequal under section 15 — and thus, should be changed for the better — is a contextual inquiry. This contextuality of equality analysis has two consequences: (1) ideology is especially hard to avoid in equality analysis; and (2) a focus on methodology is especially likely to obscure that ideology. Given these consequences, the language we use to discuss equality should be more transparent with respect to ideological motivations. Specifically, the formal vs. substantive equality framing so often used when discussing equality law[8] should be supplemented. The distinction effectively captures different methods of analysis (that is, formal equality concerning *similar* treatment and substantive equality concerning *subordinating* treatment[9]). Yet, with the Court now clearly committed to promoting substantive equality[10] and opposing systemic discrimination[11] the formal/substantive dichotomy is insufficient for the next era of the legal struggle for equality.

To be clear, my point is not that methodology is irrelevant to equality analysis. Various methodological hurdles have limited section 15's substantive promise. Accordingly, rejecting those hurdles in equality methodology is essential to furthering substantive equality, as other scholars have rightly pointed out.[12] More specifically, arguments about method have led, now unequivocally, to the inclusion of systemic discrimination within the scope of section 15 of

3 *Fraser v Canada*, 2020 SCC 28 at para 133 (per Abella J.). See also, *ibid* at para 225 (per Brown and Rowe JJ.) [*Fraser*].

4 Michel Bastarache, "Decision-Making in the Supreme Court of Canada" (2007) 56 UNBLJ 328 at 329.

5 *Fraser*, *supra* note 3.

6 *Charter*, *supra* note 1.

7 *Collins English Dictionary*, online: <https://www.collinsdictionary.com/us/dictionary/english/alchemy> sub verbo "alchemy". See also Martha Minow, "Making All the Difference: Three Lessons in Equality, Neutrality, and Tolerance" (1989) 39:1 DePaul L Rev 1 at 5-6 ("Equality is a process which requires the continual re-examination of the treatment we accord to people.")

8 See e.g. *Fraser*, *supra* note 3 at paras 44, 88 (per Abella J.). See also, *ibid* at paras 146, 217, 225, 227 (per Brown and Rowe JJ.).

9 See e.g. Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Rev Const Stud 191 at 194-95 [Adverse Impact].

10 *Fraser*, *supra* note 3 at paras 40-49 (per Abella J.).

11 *Ibid* at para 29 ("[h]ow adverse impact or systemic discrimination is applied has received extensive academic consideration", that is, implicitly constructing "adverse impact" and "systemic" discrimination as overlapping). See also, *ibid* at para 47 ("[t]here is no doubt, therefore, that adverse impact discrimination 'violate[s] the norm of substantive equality'").

12 See e.g. Adverse Impact, *supra* note 9.

the *Charter*[13] — a significant accomplishment, which I in no way seek to diminish. Rather, my intervention is a more specific critique: the invocation of method to carve out zones where section 15 analysis should fail can operate as a conservative strategy for narrowing section 15's substantive force. In this way, the rhetoric of methodology can act as a smokescreen for conservative posturing — a performance of the "neutral and apolitical" — by rhetorically obscuring "social domination from … vision."[14] Viewed as such, fixation on methodology is its own ideology, a "process theory" that is "more accurately understood as the cultural ideology" through which social dominance — "white, male, and economically secure" — is reified in law.[15]

With the above in mind, this article is, primarily, a critique of certain modes of argument in the prevailing conservative analysis of equality. Recent calls by conservative jurists for "analytical discipline"[16] and "neutral principles"[17] in this area of law are futile: equality analysis simply cannot be severed from the ideological commitment that grounds it. Such jurists reach vainly for an equality law that will rise above a certain threshold of *clarity* — or, relatedly, fall below a certain threshold of *context* — weakening the ability for section 15 to respond to most experiences of inequality in society. These jurists would better recognize that "discrimination" is a fluid mischief predicated on social context and hierarchy.[18] In this way, calls for clarity can effectively dilute aspirations for substantive equality. Indeed, when substantive equality requires nuanced interrogation of where power exists in society, to oppose such interrogation — for greater clarity — is indivisible from opposing substantive equality itself (or, at least, is indivisible from opposing the capacity of courts to analyze substantive equality). As such, the push for clarity has an ideological valence — whether or not this is one's intent — and calls to restrict analysis of "policy" can function as a covert means of advancing one's own policy agenda beneath a veneer of judicial restraint.

The impulse to clarity is understandable. Clarity serves important ends, such as predictability. But equality — with the complexity that the concept innately entails — remains a constitutional guarantee.[19] So we must deal with it. Equality's uncertainty will always persist. And ironically, that uncertainty is, in important ways, a virtue, not a vice. It speaks to a continuing belief that there is a role for courts in the fight for substantive equality. We should prioritize substance over clarity and choose justice over simplicity.

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13 *Charter*, *supra* note 1.

14 Gary Peller, "Neutral Principles in the 1950's" (1988) 21:4 U Mich JL Ref 561 at 612.

15 *Ibid* at 621.

16 *Fraser*, *supra* note 3 at para 224 (per Brown and Rowe JJ., dissenting).

17 Mark Mancini, "Neutrality in Legal Interpretation" (12 November 2020), online (blog): *Double Aspect* <https://doubleaspect.blog/2020/11/12/neutrality-in-legal-interpretation/>.

18 See e.g. Sandra Fredman, "Substantive Equality Revisited" (2016) 14:3 Intl J Constitutional L 712 at 713 ("the right to equality should be located in the social context, responsive to those who are disadvantaged, demeaned, excluded, or ignored"); Catharine A MacKinnon, "Substantive Equality Revisited: A Reply to Sandra Fredman" (2016) 14:3 Intl J Constitutional L 739 at 740 ("Social hierarchy is [substantive equality's] identifying principle"); Sandra Fredman, "Substantive Equality Revisited: A Rejoinder to Catharine MacKinnon" (2016) 14:3 Intl J Constitutional L 747 at 747 ("to characterize substantive equality solely in terms of hierarchy obscures the multi-faceted ways in which inequality manifests").

19 *Charter*, *supra* note 1, s 15(1).

This article is, secondarily, a critique of certain modes of argument in the liberal analysis of equality. Liberal jurists properly reject a "formalistic approach"[20] to equality, but fall short of acknowledging the ideological currents that shape Canadian equality jurisprudence.[21] The failure by liberal jurists to engage explicitly with ideology is significant, in at least two ways (or, more precisely, in at least two directions from the political position liberal jurists occupy on a crude ideological spectrum of judges). First, it is significant to *the political right* of liberal jurists. As between conservative and liberal jurists, core ideological disagreements are elided by failing to grapple with political divergence within the Court concerning social hierarchies. Simply put, conservative jurists see less social hierarchy than liberal jurists, and that influences disparate interpretations of "the law" by these groups — an explanation overlooked by a liberal analytical frame. Second, the failure to grapple with ideology is significant *to the political left* of liberal jurists. As between liberal jurists and jurists with more critical ideological positions, the Court's participation in the maintenance of social hierarchy is obscured through legalistic rhetoric. Ultimately, the scope of equality law in Canada is contingent on whatever inequality the Court is willing to "see."[22] And that conversation turns not on the dichotomy of formal conservatives and substantive liberals (that is, on the question of whether we should do *anything* about substantive inequality), but more importantly, on the dichotomy of substantive liberals and substantive criticals (that is, on the question of whether we "do *enough*"[23] for it).

To elaborate on the above points, this article juxtaposes the three sets of reasons from the Court's decision in *Fraser* by viewing them through the lens of Critical Race Theory: "an intellectual movement, a body of scholarship, and an analytical toolset for interrogating the relationship between law and racial inequality."[24] Specifically, this article uses Patricia Williams' *The Alchemy of Race and Rights*[25] as a foil for dissecting the *Fraser* opinions. This foil facilitates insight into *Fraser*. It helps to explain why Justice Abella's majority opinion properly leaves judges with the discretion needed to meaningfully scrutinize constitutional inequality, despite the seeming tension this creates with the "rule of law." Further, it distills the material basis for the spectrum of findings across three opinions purporting to apply the same two-part test for section 15: namely, political disagreement on the past and present of gender hierarchy (that is, disagreement on substantive inequality linked to gender). Attention to these ideological divides is, in my view, crucial for the realization of the *Charter*'s substantive promise. We now have a test that *can* promote substantive equality, but *will* it? Only, in my view, if a more critical perspective on equality rights is advanced by advocates and recognized by the Court.

II. Background: The Three Visions of Equality in *Fraser*

Fraser v Canada is the Court's latest decision concerning constitutional equality under section 15 of the *Charter*. The appeal explored whether the RCMP's pension plan (the "Plan") dis-

20 *Fraser*, *supra* note 3 at para 134.

21 Though I acknowledge the institutional constraints judges are under within a society that sustains the fiction of an apolitical judiciary.

22 See Adverse Impact, *supra* note 9 at 193.

23 *Fraser*, *supra* note 3 at para 143 (per Browne and Rowe JJ., concurring) [emphasis added].

24 Khiara M Bridges, *Critical Race Theory: A Primer* (New York: Foundation Press, 2019) at 7.

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

criminated based on sex or parental/family status by *permitting* employees who are suspended or on unpaid leave to "buy back" pension benefits, but *prohibiting* employees who job share — overwhelmingly, women caring for children — from doing the same.[26] (The irony of one of Canada's most progressive judgments on substantive equality benefitting members of one of Canada's most notoriously racist institutions — the RCMP[27] — is not lost on the author.)

In *Fraser*, the Court released three opinions: majority reasons by Justice Abella (concurred with by Chief Justice Wagner and Justices Moldaver, Karakatsanis, Martin, and Kasirer) and two dissents (the first co-authored by Justices Brown and Rowe and the second authored by Justice Côté). I first briefly summarize all three opinions before analyzing them through the lens of Critical Race Theory, and, more specifically, by using the frame of Williams' *The Alchemy of Race and Rights*.

Each of the three *Fraser* opinions adopts a distinct vision of equality, and as one progresses through the judgments — that is, from the majority to the dissents — one finds increasingly narrow visions of equality.

A. Majority by Justice Abella: Broad Substantive Equality

Justice Abella explicitly recognizes "substantive equality" as the "philosophical premise" underlying section 15 of the *Charter*,[28] and applies it relatively broadly.[29] She therefore finds that the RCMP's adverse treatment of employees who job share — mostly women with children[30] — constitutes sex discrimination contrary to section 15(1) of the *Charter*.[31] Further, she finds that this discrimination could not be justified under section 1 due to the lack of a compelling objective for such adverse treatment.[32] Because she believes this claim can be resolved by analyzing sex alone, Justice Abella considers it unnecessary to assess the propriety of "parental/family status" as an analogous ground of discrimination.[33]

B. Dissent by Justices Brown and Rowe: Narrow Substantive Equality

In the first of two dissenting opinions in *Fraser*, Justices Brown and Rowe criticize the lack of definition governing "substantive equality."[34] Nevertheless, they identify "substantive discrimination"[35] as the mischief targeted by section 15 of the *Charter*. And, by inter-

26 *Fraser*, *supra* note 3 at paras 3-4. I acknowledge the incomplete record on this point: see *ibid* at para 25 (per Abella J.). See also, *ibid* at paras 161, 187 (per Brown and Rowe JJ.). But I also note that the respondent's statements "during the hearing" (*ibid* at para 161) are not evidence.

27 See e.g. Brandi Morin, "As the RCMP deny systemic racism, here's the real history" (11 June 2020), online: *Toronto Star* <https://www.thestar.com/opinion/contributors/2020/06/11/rcmp-deputy-commissioners-words-on-racism-fly-in-face-of-150-years-of-history-and-pain-for-indigenous-peoples.html>; Robyn Maynard, "Police Abolition/Black Revolt" (2020) 41 Can J Cultural Studies 70 at 72.

28 *Fraser*, *supra* note 3 at para 40.

29 To be clear: I say that Justice Abella applies substantive equality "relatively broadly", not because I think she applies it more broadly than *substantive equality requires*, but rather, more broadly than *Justices Brown and Rowe*, who likewise claim to apply substantive equality in their reasoning.

30 *Ibid* at para 21.

31 *Ibid* at para 113.

32 *Ibid* at para 129.

33 *Ibid* at para 114.

34 *Ibid* at para 146.

35 *Ibid* at para 191.

preting substantive equality/discrimination relatively narrowly,[36] Justices Brown and Rowe find that the RCMP's adverse treatment of job sharing does not violate section 15(1) of the *Charter*.[37]

Justices Brown and Rowe also reason that "because this case can be resolved on the basis of the enumerated ground of sex, it is … unnecessary and unwise to consider parental or family status."[38] This reasoning is confusing. Justice Abella, who *finds sex discrimination*, can logically abstain from considering discrimination on other grounds to resolve the appeal; Justices Brown and Rowe, who *do not find sex discrimination*, cannot — it is a distinct constitutional question material to their resolution of the appeal. In this way, it was, rather, "necessary" for them to address this question in their analysis.[39]

C. Dissent by Justice Côté: Licence to Discriminate

The word "substantive" is conspicuously absent from Justice Côté's sole-authored dissent. She claims to endorse the same general test as the other opinions, that is, grounds-based distinction and disadvantage. And she even tacitly concedes that "adverse effect discrimination" — a species of substantive inequality[40] — is legally cognizable.[41] But, in refusing to acknowledge that a policy disparately impacting women with children *disparately impacts women*,[42] Justice Côté jettisons substantive equality as the overarching framework in her analysis. Indeed, as I explain below, even formal equality is largely irrelevant to her approach.

Like the other dissenting judges, Justice Côté relies on Justice Abella's "compelling reasons" for not recognizing "caregiving, parental, or family status" as an analogous ground.[43] Again, this is confusing — having *not* found discrimination based on sex,[44] Justice Côté cannot rely on Justice Abella's reasons. Indeed, Justice Abella holds that "a robust intersectional analysis of gender and parenting … can be carried out under the enumerated ground of sex."[45] Justice Côté, in stark contrast, views sex as constitutionally unrelated to gender and parenting: "an

36 To be clear: I say that Justices Brown and Rowe apply substantive equality "relatively narrowly" because they apply it more narrowly than Justice Abella. Some may argue that Justices Brown and Rowe do not apply substantive equality *at all* — that their analysis is really just disguised formal equality analysis. But I do not think that is quite right. Their desire to carve out circumstances where substantive equality should fail — for example, where it involves "a matter of policy" (see *ibid* at para 143) — is a formalistic impulse. But they nevertheless acknowledge how section 15 extends to systemic discrimination (see *ibid* at para 169). And so, in that sense, I consider it incomplete to label their analysis as simply formal equality reasoning, a characterization they, too, dispute (see *ibid* at para 218).

37 *Ibid* at para 205.

38 *Ibid* at para 183.

39 *Ibid*.

40 Adverse Impact, *supra* note 9 at 192.

41 *Fraser*, *supra* note 3 at para 232. Though Justice Côté later casts doubt on the legitimacy of adverse effects discrimination: "Setting aside for now the doctrinal proposition that disproportionate impact is sufficient to meet step one" (*ibid* at para 242).

42 *Ibid* at paras 234-35.

43 *Ibid* at para 238.

44 *Ibid* at para 233.

45 *Ibid* at para 116. For a critique of Justice Abella's intersectional analysis, see Jennifer Koshan's essay in this collection: Jennifer Koshan, "Intersections and Roads Untravelled: Sex and Family Status in *Fraser v Canada*" (2021) 30:2 Const Forum Const 29.

innate and immutable characteristic"[46] detached from gender roles and parental obligations.[47] How she then cites Justice Abella's reasons for this point is difficult to understand.

III. Critical Race Analysis: The Faith, Simplicity, and Ideology in *Fraser*

In *The Alchemy of Race and Rights*, Patricia Williams — an American legal scholar and founding critical race thinker[48] — describes the "immense alchemical fire" required for "the making of something out of nothing."[49] Specifically, she outlines the social construction of both the law and those it regulates. Her insights about American law are timeless, and they are applicable to equality under the Canadian *Charter*, despite differences between our constitutional texts,[50] schemes,[51] and paradigms.[52] Her critical interrogation of "Anglo-American jurisprudence"[53] instructively applies to many Canadian legal norms, and in particular, helps in dissecting the Supreme Court's latest equality decision in *Fraser*.

In this article, there are three key points that I draw from Williams' text and which I apply to *Fraser*:

(1) Faith: that the legitimacy of our legal system is maintained by faith in our courts, which can be informed by — but is not coterminous with — scrutiny of their reasoning;

(2) Simplicity: that courts routinely deploy oversimplified heuristics that belie a complex reality;

(3) Ideology: that courts' application of these heuristics is guided by ideology.

I discuss these key points separately, but acknowledge that they are mutually informing. Indeed, the *faith* that sustains the legitimacy of legal institutions is strengthened by the *simplicity* with which those institutions misrepresent complex human disputes, and the ways in which that simplicity obscures the *ideology* inherent in such adjudication. In any event, for my purposes, here, the analytical separation of these three points provides guidance on how each operates in Canadian equality law.

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46 *Fraser*, *ibid* at para 231.

47 See e.g. *ibid* at para 234 ("The effect of the impugned provisions of the pension plan is to create a distinction not on the basis of being a *woman*, but being a woman *with children*. In other words, a distinction exists not because one is a *woman*, but because one has *caregiving* responsibilities." [emphasis in original])

48 Derrick A Bell, "Who's Afraid of Critical Race Theory" [1995] 1995:4 U Ill L Rev 893 at 898, n 16.

49 *Alchemy*, *supra* note 25 at 163. This alchemical formulation of equality is even more forceful in the context of Canadian equality law given the "expansive wording of section 15" (Jennifer Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19 at 22), which was "an attempt to remedy some of the the shortcomings of the right to equality in the *Canadian Bill of Rights*" (*Andrews, supra* note 2 at 170).

50 That is, "equal protection of the laws" (section 1 of America's Fourteenth Amendment) vs. equality "before and under the law" and "right to the equal protection and equal benefit of the law" (section 15 of the Canadian *Charter*).

51 That is, section 1 of the Canadian *Charter*, which permits "reasonable limits" of rights.

52 That is, *formal* equality in America (see e.g., *Washington v Davis*, 426 US 229 (1976) at 239) and *substantive* equality in Canada (see e.g., *Fraser*, *supra* note 3 at para 42).

53 *Alchemy*, *supra* note 25 at 8.

To avoid confusion, Williams' is not unique in advancing these critiques of legal systems and reasoning. Indeed, many of the points she makes participate in a long tradition of critical legal inquiry in scholarship (and, in particular, critical inquiry by Canadian feminist scholars, many of whom were cited throughout Justice Abella's reasons and join me in this special edition of the *Constitutional Forum*). However, I nevertheless frame my analysis in the context of her particular critique to illustrate how — *thirty years later* — so many of her observations about techniques in legal analysis persist in their relevance and explanatory value.

A. Faith: Whom We Trust

1. Williams on Faith

The Alchemy of Race and Rights opens with a single-page allegory elucidating the extent to which legal systems are principally predicated on *faith*, which can be informed by, but differs from, *reason*. Specifically, Williams describes a "society of priests" (lawyers) "who built a Celestial City" (the state) "with gates secured by word-combination locks" (rights) and where "ascending levels of power … became accessible to those who could learn ascendingly intricate levels of Word Magic" (law).[54] Further, she allegorically describes an apex court:

> At the very top level, the priests became gods; and because they then had nothing left to seek, they engaged in games with which to pass the long hours of eternity. In particular, they liked to ride their strong, sure-footed steeds around and around the perimeter of heaven: now jumping word hurdles, now playing polo with concepts of the moon and the stars, now reaching up to touch that pinnacle, that splinter of Refined Understanding called Superstanding, which was the brass ring of their merry-go-round.[55]

Williams' allegory can be read as a narrative elaboration on Justice Jackson's oft-cited aphorism regarding the Supreme Court of the United States: "We are not final because we are infallible, but we are infallible only because we are final."[56] Consequently, we defer to our apex court out of trust, not *necessarily* out of any agreement with its holdings in relation to some objective measure called "the law." In this sense, where controversy arises, it is, principally, faith — that is, a persisting belief in the system as a whole — that maintains the integrity of our legal order (an order where, due to social necessity, *someone* must have the final say).

Of course, the *reasons* that a court provides can test our faith. For example, failure to provide defensible reasons undermines the extent to which a holding endures future challenge — that is, such a failure informs a judge's reputation and credibility and subsequent judicial treatment of their holding (both on appeal and as a matter of precedent).[57] But this does not reveal law's objectivity, but rather, a "game of legality."[58] Specifically, judging implicates a complex bargaining process with legal and political capital. A judge's *legal* capital consists in the recognized sources of "law" they can draw from to articulate a line of reasoning, whereas a judge's *political* capital consists in the extra-legal sources (for example, the popularity of their holding) that can compensate for deficiencies in their legal capital in any given case.

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54 *Ibid* at Prologue.
55 *Ibid* at Prologue.
56 *Brown v Allen,* 344 US 443 (1953) at 540 (Jackson J concurring in the result).
57 Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36:4 J Leg Educ 518 at 527-28.
58 *Ibid* at 522.

Reference to an objective, ascertainable "law" subtly obscures the dynamic bargaining process outlined above. And, in particular, it obscures how this process can, at times, involve "the work of creating something out of nothing"[59] — that is, alchemy. Simply put, when "law" is understood as the product of various bargains *in law* and *in politics*, the foundational element of faith embedded in our judicial apparatus becomes clear. In Lon Fuller's words: "we inevitably see that [law] is compounded of reason and fiat, of order discovered and order imposed, and that to attempt to eliminate either of these aspects of the law is to denature and falsify it."[60] "[F]iat" — or "order imposed" — is where faith in law necessarily persists, and where law's alchemical character resides: making *something* (legal obligation) out of *nothing* (bare imposition).

2. Faith in Fraser

Justice Abella describes section 15(1) as reflecting "a profound commitment to promote equality and prevent discrimination against disadvantaged groups."[61] The three key phrases implicated here — "promot[ing] equality," "prevent[ing] discrimination," and "disadvantaged groups" — do not have rigid meaning, and leave important questions hanging. What is enough promotion? What qualifies as discrimination, requiring prevention? Which groups are disadvantaged, and in comparison with whom? Fundamentally, tasking courts with such inquiries demands faith — reason, alone, cannot resolve them.[62]

That is not to say that structure is unhelpful. A two-part test (distinction and disadvantage)[63] and a definition for adverse impact discrimination (facially neutral norms with disparate effects)[64] help to guide lawyers and judges navigating equality analysis. In particular, such structure guides analysis in a manner that facilitates some predictability (my point is not that law is *only* politics). But, ultimately, the judgment calls that must be made in relation to the questions listed above cannot be fully anticipated by prescriptive frameworks.

In this sense, I resist Justice Abella's characterization of Justice Brown and Rowe's dissenting reasons as being "based on conjecture not reality."[65] Their criticisms should be discarded not because they are *incorrect*, but, rather, because they are *misguided* and *self-defeating*. Justice Abella's analysis *does* leave judges with significant leeway in terms of how they identify inequality, and this demands faith in our judiciary and acknowledgment of its unavoidably ideological role. Assessment of, for example, what level of "participation" by marginalized

59 *Ibid* at 528.

60 Lon L Fuller, "Reason and Fiat in Case Law" 59:3 (1946) Harv L Rev 376 at 382.

61 *Fraser*, *supra* note 3 at para 27.

62 Of course, reason alone cannot resolve *any* area of law, given the innate uncertainty of language, and "the concurrent jurisdiction of language and law." See Kendall Thomas, "Reading Charles Black Writing: The Lawfulness of the Segregation Decisions Revisited" (2011) 1:1 Columbia J Race & L 1 at 2. But reason is *particularly* limited when seeking to resolve equality law because "equality" as a legal and constitutional signifier is so deeply contested — indeed, what some call equality, others call inequality (for example, affirmative action). My point, in other words, is not that equality is unique in *the fact* of its requiring faith in the judiciary, but rather, in *the degree* of faith that it demands.

63 *Fraser*, *supra* note 3 at para 27.

64 *Ibid* at para 30.

65 *Ibid* at para 133.

groups in society qualifies as "full and fair"[66] — let alone what it *means* to "participate" in society — is amorphous. But, as I explain below, Justice Brown and Rowe's criticism of the political cast of Justice Abella's analysis[67] is nevertheless misguided (because equality analysis is invariably political) and self-defeating (because *their* analysis of equality is equally political — that is, they too invoke "Word Magic"[68]).

My faith-based critique of Justice Côté's analysis differs. Her approach to equality analysis is, in a sense, more certain than the other two opinions. This has the benefit — for those who trust the legislature over the judiciary — of narrowing judicial discretion and thus facilitating judicial restraint.[69] But this greater certainty is achieved by dramatically narrowing the state's constitutional obligation to equality. Indeed, Justice Côté's opinion reflects Williams' apt observation that "being ruled by the cool formality of language is surely as bad as being ruled solely by one's emotions."[70]

Specifically, section 15 is essentially read out of the *Charter* by Justice Côté's analysis. She accomplishes this in two related ways — or, more precisely, with two distinct *modes of rearticulation*.

First, Justice Côté eviscerates section 15 through *rearticulation by addition*. She reasons that asserted grounds lose protection when something — a characteristic, attribute, or condition — is appended to them. On this basis, the RCMP's Plan does not discriminate against women because it, rather, discriminates against women "with children." This is astonishing reasoning. Indeed, I struggle to think of a form of discrimination that cannot, through this logic, be rearticulated outside the scope of section 15: literacy tests discriminated against *uneducated* Black people, not all Black people; the head tax discriminated against *some* Chinese immigrants, not all Chinese immigrants (for example, merchants); marital rape laws discriminated against *married* women, not all women. Simply put, this logic constitutes an infinite regress into our "infinite variety"[71] and an elective escape from any equality analysis.

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66 *Ibid* at para 1.

67 *Ibid* at paras 146, 219, 227.

68 *Alchemy*, *supra* note 25 at Prologue.

69 By "judicial restraint", I mean the idea that a judge "is obligated to apply the law as he understands it to be rather than as he thinks it ought to be." See John Paul Stevens, "Judicial Restraint" (1985) 22:2/3 San Diego L Rev 437 at 446. I consider the dichotomy of what the law *is* or *should be* often misleading (see generally, Kennedy, *supra* note 57). But I appreciate concerns about the weaponization of discretionary constitutional principles. For a critique of Williams' *The Alchemy of Race and Rights* from the standpoint of how rights discourse can *undermine* systemic equality, see Wendy Brown, "The Power of Rights" (1993), online: *Boston Review* <https://bostonreview.net/archives/BR18.3/brown.html>. And for a recent discussion of the conservative valence of judicial power — in the American context — see Daniel Denvir, "SCOTUS, Politics, and the Law" (9 October 2020), online: *The Dig Podcast* <https://www.thedigradio.com/podcast/scotus-politics-and-the-law/>. To be clear: I am sympathetic to concerns raised by some scholars about including apex courts in social change strategies (see generally: Ryan D Doerfler & Samuel Moyn, "Democratizing the Supreme Court" 109 Cal L Rev [forthcoming in 2021]). But where equality is a constitutional right, it is unclear to me where these concerns lead in terms of how equality should be legally negotiated, especially when left-wing inattention to constitutional norms leaves a strategic vacuum to be filled by right-wing interests.

70 *Alchemy*, *supra* note 25 at 141.

71 *Andrews, supra* note 2 at 165.

Second — and relatedly — Justice Côté eviscerates section 15 through *rearticulation by substitution*. She reasons that asserted grounds lose protection when they are indirectly targeted by the state. With respect to this framing, one passage from Justice Côté's (not even) formal equality analysis stands out. At one point, she explains that the Plan in *Fraser* evades sex discrimination because "the distinction in this case exists not on the basis of being a woman, but on the basis of needing to take care of someone"[72] (judicially severing gender and gender role). Again, this reasoning permits unlimited rearticulation of discrimination outside the scope of section 15 protection. Why? Because Justice Côté substitutes the *setting* of discrimination with its *victim*. On her logic, discussion of child-rearing responsibilities changes the discrimination from being *sex*-based to *caregiving*-based.[73] And to implicate sex-based discrimination, she reasons, the case must involve a "singularly sex-based issue."[74] Yet this is simply not how the phenomenon of discrimination functions, especially in a contemporary context. Returning to the examples above, literacy, immigration, and intimate relations are settings where certain raced and gendered people are victimized. Identifying these settings does not *detract* from the fact of discrimination, but rather, *explains* how it operates.[75]

Viewed in this way, Justice Côté's faith, rather than being in the courts, resides entirely in the legislature and executive — to whom she assigns virtual licence to discriminate. I hardly need to elaborate on how such a narrow vision of equality flatly contradicts decades of jurisprudence,[76] or how that vision reduces Justice Côté's analysis — not Justice Abella's, as she claims — to a "mere rubber stamp."[77]

B. Simplicity: Abstraction, Tests, and Incoherence

1. Williams on Simplicity

A running theme throughout *The Alchemy of Race and Rights* is how "legal language flattens and confines in absolutes the complexity of meaning inherent in any given problem."[78] Williams observes multiple — and related — ways in which our legal vocabulary routinely (over) simplifies: abstraction, tests, and incoherence.[79]

First, the law simplifies by deploying *strategic abstractions*. Specifically, it places heavy reliance on "[f]loating signifiers,"[80] that is, terms which we associate with fixed and universal

72 *Fraser*, *supra* note 3 at para 235.
73 *Ibid* at para 234.
74 *Ibid* at para 251.
75 Of course, caregivers, too, are subordinated by the Plan. But that does not *detract from* sex discrimination, but rather, *complements* it.
76 This makes Justice Côté's concerns about doctrinal precarity particularly meta (see e.g. *Fraser, supra* note 3 at para 253).
77 *Ibid* at para 244.
78 *Alchemy*, *supra* note 25 at 6.
79 I note that these three techniques — like Williams' three key points I use in this essay (faith, simplicity, and ideology) — are not conceptually siloed. For example, a test may invoke abstractions. And incoherence will often result from the ways in which abstractions are held out as mutually exclusive yet contain overlap. Still, discussing each separately provides an instructive overview about how these distinct techniques may be deployed.
80 *Alchemy*, *supra* note 25 at 7.

meaning,[81] but which are actually fluid and contingent. That contingency is why Williams' analysis looks beyond "the four corners of a document" and draws insights from "psychology, sociology, history, criticism, and philosophy" — because, by rejecting the supposedly "transcendent, acontextual, universal legal truths"[82] upon which law implicitly rests, she "highlights factors that would otherwise go unremarked."[83]

Second, the law simplifies by articulating *rigid tests*, despite society's undeniable fluidity and complexity. In Williams' words:

> The hypostatization of exclusive categories and definitional polarities, the drawing of bright lines and clear taxonomies that purport to make life simpler in the face of life's complication: rights/needs, moral/immoral, public/private, white/black.[84]

Third, the law simplifies by *rationalizing incoherence* — for example, "the degree to which much of what we call 'freedom' is either contradictory or meaningless."[85] Consider "free" expression. The *Charter* lists "freedom of expression" as a "fundamental freedom" despite there being myriad examples of what is unquestionably "expression" not being "free" at all.[86] We say expression *is* free. Then we call various forms of expression *not* expression (from violence[87] to keeping a bawdy house[88]). This maintains the illusion of expression's legal freedom in the midst of its obvious political restriction. My point, of course, is not that violence *should* be free, but that expression is *not*. Yet we say it is, thus rationalizing incoherence. And Williams explains why: because "the great paradox of democratic freedom is that it involves some measure of enforced equality for all."[89] Put differently, equality and freedom invariably conflict, despite both being constitutionally "guaranteed" — a contradiction baked directly into our constitutional architecture. It follows that bare reference to "equality" or "freedom" is merely a rhetorical technique for obscuring the necessarily political compromises courts are routinely called upon to negotiate.

The three techniques of (over)simplification described above are not inconsequential. To the contrary, as Williams observes, these techniques are inseverable from the law's relationship with justice:

> That life is complicated is a fact of great analytic importance. Law too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths.

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81 Stuart Hall, "What is the 'Black' in Black Popular Culture?" (1993) 20:1/2 Soc Justice 104 at 111.

82 *Alchemy*, *supra* note 25 at 8.

83 *Ibid* at 7.

84 *Ibid* at 8.

85 *Ibid* at 29.

86 Joshua Sealy-Harrington, "Twelve Angry (White) Men: The Constitutionality of the Statement of Principles" (2020) 51:1 Ottawa L Rev 195 at 230-31. To be clear, I do not mean that much expression is not free from state restraint simply because it may be limited under section 1 of the *Charter*. Rather, much *factual* expression does not qualify as *constitutionally protected* expression because, simply put, such a characterization would be *politically* untenable. See Thomas I Emerson, "Towards a General Theory of the First Amendment" (1963) 72 Yale LJ 877 at 914.

87 *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927 at 970, 58 DLR (4th) 577.

88 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123 at 1206, 68 Man R (2d) 1.

89 *Alchemy*, *supra* note 25 at 101.

> Acknowledging, challenging, playing with these *as* rhetorical gestures is, it seems to me, necessary for any conception of justice.[90]

As is evident in the above passage, Williams is not unequivocally opposed to the use of categories in law per se.[91] Rather, she "acknowledge[s] the utility of such categorizations for certain purposes and the necessity of their breakdown on other occasions."[92] They are, in other words, not stable placeholders, but "rhetorical event[s]."[93] As such, "[c]ategorizing is not the sin; the problem is the lack of desire to examine the categorizations that are made."[94] Indeed, "[w]hen . . . society … grants obeisance to words alone, law becomes sterile and formalistic; [law] is applied without [justice] and is therefore unjust."[95] In sum, we should *use categories* to better understand law and society, not let categories *use us*.

2. Simplicity in Fraser

Other than some differences in phrasing, the Court was unanimous on the two-part test for section 15(1): whether the impugned law (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."[96] Where, then, does the divergence in reasoning across all three opinions arise? How far does this "test" *really* take us? Or, put differently: is its simplicity helping, or harming?

Justices Brown and Rowe criticize Justice Abella's equality analysis as indeterminate — that is, for lacking the *simplicity* of their analysis. But, as noted at the outset, some uncertainty is an unavoidable consequence of committing to equality, itself a value that cannot be effectively promoted once restrained. When substantive equality demands a non-prescriptive intermingling of history, context, and power, its analysis is necessarily indefinite. Justices Brown and Rowe, thus, are "seek[ing] out a level of clarity that isn't appropriate to the inquiry that they are being constitutionally granted."[97] More importantly, though, Justice Brown and Rowe's indeterminacy critique overlooks its application to their own analysis. Williams' three ideas related to simplicity — strategic abstraction, rigid tests, and rationalized incoherence — all help to navigate these issues in the *Fraser* opinion.

(a) Strategic Abstraction in *Fraser*

First, let us consider strategic abstraction, or "[f]loating signifiers."[98] Justices Brown and Rowe are correct about the indeterminacy of Justice Abella's analysis insofar as she deploys various

90 *Ibid* at 10.

91 Nor am I opposed to the use of categories in law. Indeed, my own argument deploys categories — for example, methodology and ideology — to argue about where material controversies should lie in relation to substantive equality. This is not because I think the methodology/ideology dichotomy is universally clear, but rather, contingently instructive in this context with respect to the divided opinions in *Fraser*.

92 *Alchemy*, *supra* note 25 at 11.

93 *Ibid* at 11.

94 *Ibid* at 102.

95 *Ibid* at 138-39.

96 *Fraser, supra* note 3 at para 27 (per Abella J.). See also *ibid* at para 169 (per Brown and Rowe JJ.) and *ibid* at para 232 (per Côté J.).

97 "Joshua Sealy-Harrington on Jury Selection, Diversity and Equality" (23 October 2020) at 00h:49m:00s, online (podcast): *StereoDecisis* <https://blubrry.com/stereodecisis/69362374/joshua-sealy-harrington-on-jury-selection-diversity-and-equality/> [StereoDecisis].

98 *Alchemy*, *supra* note 25 at 7.

imprecise terms to capture her vision of equality: for example, "full and fair participation,"[99] "equitable,"[100] "difficulties,"[101] and "illogical and unfair."[102] Further, while Justice Abella is right that "physical, social, cultural, [and] other barriers"[103] must be considered when assessing substantive inequality, this is no straightforward task. This is, in a sense, an alternate phrasing of the "psychology, sociology, history, criticism, and philosophy" that Williams considers critical to the project of situating law in our lived reality.[104] A complex, yet crucial, task.

Justice Abella acknowledges the complexity of her analysis. When she observes that "the Court should not … craft rigid rules" for step 1 (distinction),[105] that there is no "rigid template" for step 2 (disadvantage),[106] and that, indeed, the entire analysis raises "the impossibility of rigid categorizations,"[107] Justice Abella is recognizing equality's alchemy. And when she notes concerns about judicial decisions based on a "web of instinct,"[108] she is simultaneously acknowledging the limits of substantive equality analysis. These are not simply passages of *uncertainty*; they are moments of *transparency* — that is, admissions of equality's malleability.

Justices Brown and Rowe, in contrast, elide this acknowledgment of complexity, despite it being unavoidable in their analysis. They recognize "substantive equality" — the central abstraction in Canadian equality law — as section 15's animating norm.[109] But they simultaneously castigate substantive equality for failing to have the simplicity of formal equality.[110] As such, Justice Brown and Rowe do not avoid imprecision, but rather, overlook it.

(b) Rigid Tests in *Fraser*

Next, let us consider rigid tests. When Williams critiqued Anglo-American jurisprudence for "the drawing of bright lines and clear taxonomies that purport to make life simpler in the face of life's complication,"[111] she laid a theoretical groundwork consonant with Justice Abella's contextual inquiry. Specifically, Justice Abella holds that a finding of discrimination under section 15(1) does not *require* discriminatory intent,[112] causation (either for a law's impact,[113] or the conditions giving rise to that impact[114]), exhaustion (that is, that all members of the group experience the impugned discrimination),[115] stereotyping,[116] arbitrariness,[117] or involuntari-

99 *Fraser*, *supra* note 3 at para 1.
100 *Ibid* at para 2.
101 *Ibid* at para 7.
102 *Ibid* at para 17.
103 *Ibid* at para 57. See also *ibid* at para 76.
104 *Alchemy*, *supra* note 25 at 8.
105 *Fraser*, *supra* note 3 at para 59.
106 *Ibid* at para 76.
107 *Ibid* at para 82.
108 *Ibid* at para 60.
109 *Ibid* at para 218.
110 *Ibid* at para 146.
111 *Alchemy*, *supra* note 25 at 8.
112 *Fraser*, *supra* note 3 at para 69.
113 *Ibid* at para 70.
114 *Ibid* at para 71.
115 *Ibid* at para 72.
116 *Ibid* at para 78.
117 *Ibid* at paras 79-80.

ness (that is, a circumstance the claimants are forced into, rather than one they chose).[118] In so doing, her test has the flexibility needed to meet the task to which it is assigned: responding to discrimination, an inextricably value-laden mischief.

In particular, Justice Abella's rejection of "choice" logics to immunize inequality from scrutiny[119] can be read as a reverberation of Williams' analysis of "choice" thirty years earlier:

> In our legal and political system, words like "freedom" and "choice" are forms of currency. They function as the mediators by which we make all things equal, interchangeable. It is, therefore, not just what "freedom" means, but the relation it signals between each individual and the world. It is a word that levels difference.[120]

In contrast, the dissenting opinions articulate frameworks for equality either too easily avoided by competent governments (because those frameworks invoke "bright lines" that overlook equality's "complication"[121]) or, contradictorily, which are just as indeterminate as Justice Abella's analysis. Specifically, Justices Brown and Rowe reason — and Justice Côté occasionally concurs — that government initiatives are immune from *Charter* scrutiny, seemingly, if they do *any* of the following: (1) intend to ameliorate; (2) involve policy; (3) take incremental steps; (4) target "private" rather than "public" discrimination; (5) lack demonstrated causation; or (6) lack the evils of "arbitrariness," "unfairness," or "wrongful[ness]." I elaborate on these six immunities, below.

Justices Brown and Rowe state that their section 15 analysis is "contextual, not formalistic."[122] Despite this, they outline various immunities to section 15 scrutiny. For example, central to their analysis is how the RCMP's job-sharing initiative had an *ameliorative intent*:

> Through its job-sharing policy and the [leave without pay] provisions, the RCMP has sought to provide flexible working arrangements in recognition of the burden women face in pursuing a career due to the unequal distribution of childcare responsibilities in society … The Plan and the RCMP's policy on job-sharing are not anathema to the vision of equality that underlies s[ection] 15 of the *Canadian Charter of Rights and Freedoms*, but instead represent an attempt to *accommodate* employees in light of their particular circumstances.[123]

Justices Brown and Rowe's language is telling. The position they take here is not even that the RCMP's job-sharing program must be found constitutional because it *effectively* (or even minimally) ameliorated working conditions for women, but rather, that it "sought to";[124] that it was "an attempt to"[125] ameliorate those conditions; and, later in their opinion, that the government made "efforts."[126] The simplicity is tempting: why punish a government in its attempt to promote equality? But only *trying* for equality is an impoverished view of the constitutional *duties* of Canadian governments. Moreover, Justices Brown and Rowe's view that the Plan's

118 *Ibid* at para 86.
119 *Ibid* at paras 86-92.
120 *Alchemy*, *supra* note 25 at 31.
121 *Ibid* at 8.
122 *Fraser*, *supra* note 3 at para 173.
123 *Ibid* at para 142 [emphasis in original].
124 *Ibid*.
125 *Ibid*.
126 *Ibid* at para 145. See also *ibid* at para 146: "this case is an instance of that inherent malleability being deployed so as to strike down a scheme which was, after all, *designed to be* ameliorative" [emphasis added].

intent as "ameliorative" is dispositive of its constitutionality[127] belies the contextual analysis they otherwise repeatedly endorse,[128] as well as their admission that "discrimination need not be intentional"[129] and the fact that this supposed ameliorative shield to constitutional scrutiny was clearly rejected by a majority of the Supreme Court just two years earlier, in a context arguably even more sympathetic to their claim.[130] Lastly, all this discussion of ameliorative intent overlooks how a scheme that *gives* women certain accommodations but *takes* their pension benefits hardly qualifies as genuinely ameliorative.

As a response to the analysis above, Justices Brown and Rowe have another seductive government immunity: *policy analysis* — that is, if courts can scrutinize more than whether governments *try* to promote equality, then they must scrutinize government initiatives based on whether they "*do enough*" [131] to promote equality, which will impermissibly interfere with "a matter of policy."[132] They call this an "extraordinary" step engaging "profoundly complex matters of public policy that no Canadian court is institutionally competent to deal with."[133] Similarly, Justice Côté holds that certain policy critiques of the Plan fall outside the Court's ambit because "it is not this Court's role to constitutionalize normative judgments."[134]

I have three responses to this classic line of conservative (in)equality reasoning.

First, Justices Brown and Rowe turn what is fair criticism of Justice Abella's reasoning into a slippery slope. To elaborate on their concern, Justices Brown and Rowe explain the supposed heights to which Justice Abella's reasoning takes us:

> [I]s not the next extension of our colleague's line of reasoning that governments (federal and provincial) have a positive duty under s[ection] 15(1) to initiate measures that will remove all effects of historic [sic] disadvantage, *and* that they are constitutionally barred from repealing or even amending such measures?[135]

But this "next extension" is, of course, contingent on whether courts eventually find that "do[ing] enough" requires the eradication of all social hierarchy — an astounding proposition] (particularly given that interim extensions of providing Indigenous people with, say, clean drinking water or, perhaps, shelter during winter, would surely precede judicially mandated emancipation from racial hierarchy). *This* case does not involve any claim of "positive duty," or a bar against "repealing or even amending" certain measures, but rather, the scrutiny of existing legislation which singled out a program predominantly used by women for prejudicial treatment — indeed, Justices Brown and Rowe concede that Justice Abella does not build the glass house

127 *Ibid* at para 210.

128 *Ibid* at paras 173, 184, 188, 191, 201, 203, 226.

129 *Ibid* at para 193.

130 *Ibid* at para 132, n 10 referring to *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*Alliance*].

131 *Fraser, ibid* at para 143 [emphasis added].

132 *Ibid* at para 143.

133 *Ibid* at para 144. See also *ibid* at para 213. Though they, at least, acknowledge that courts routinely conduct such policy analysis under section 1 of the *Charter* (*ibid* at para 223).

134 *Ibid* at para 252. Though the policy critique she identifies as inappropriate for judicial review — rationality — is, interestingly, part of the equality analysis conducted by Justices Brown and Rowe, that is, arbitrariness (see *ibid* at para 191).

135 *Ibid* at para 144 [emphasis in original]. Again, this argument is a repetition of the reasoning advanced — and rejected — by a majority of the Court in *Alliance*, *supra* note 130. See *Fraser*, *supra* note 3 at para 132, n 11.

at which they are casting stones, but only its "groundwork."[136] Further, Justice Abella never holds that any government failure to "*eradicate* disadvantage"[137] (Justices Brown and Rowe's emphasis) is discriminatory, or that the government is "expected to remove *all* inequalities for *all* groups on *every* occasion it act[s]"[138] (my emphases). Rather, she holds[139] — and Justices Brown and Rowe agree[140] — that governments must adequately account for the social reality in which government policy operates. Williams specifically cautioned against such exaggerations in argument: "Enlargement of the Stakes … [is] an ancient tactic of irresponsibility."[141] To demand *something*, according to the logic of Justices Brown and Rowe, is to demand *everything*.

Second, Justices Brown and Rowe object to the fact that "[t]he appellants are … asking to be put in a *better* position than everyone else under the Plan," a "vital point," they argue, that "undermines" Justice Abella's analysis.[142] Leaving aside their questionable characterization that women accessing job sharing as a means of sustaining some work/life balance under patriarchy are in a "*better* position" than men, Justices Brown and Rowe are here simply rejecting substantive equality itself.[143] Even if women *were* being put in a better position, that is precisely what substantive equality may demand: a corollary of how "identical treatment may frequently produce serious inequality."[144] To be fair, Justices Brown and Rowe at least acknowledge how "adverse-impact discrimination" can violate section 15.[145] But the *kinds* of adverse impacts that they would recognize as doing so are far narrower than Justice Abella. This is, fundamentally, an ideological disagreement, as I explain further below.[146] And it is an ideological disagreement, moreover, that is concealed by simplicity (namely, the Court's continued reliance on formal/substantive equality rhetoric[147] to describe what is, more precisely, an emerging liberal/critical divide).

Third, Justices Brown and Rowe are correct that "do[ing] enough" is a matter of policy. However, this critique only persuades if there is a blanket prohibition on courts considering

136 *Ibid* at para 145.

137 *Ibid* at para 145. See also *ibid* at para 212.

138 *Ibid* at para 207 [emphasis added]. These exaggerations are, to borrow from Kendall Thomas, "rhetorical excesses." See Kendall Thomas, "The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick" (1993) 79:7 Va L Rev 1805 at 1817 [Eclipse of Reason].

139 *Fraser*, *supra* note 3 at para 34.

140 *Ibid* at para 211.

141 *Alchemy*, *supra* note 25 at 141.

142 *Fraser*, *supra* note 3 at para 160 [emphasis in original].

143 And, in particular, Justices Brown and Rowe appear, here, to be revitalizing "equality with a vengeance", a concept rejected long ago by the Supreme Court. See *Schachter v Canada*, [1992] 2 SCR 679 at 702, 93 DLR (4th) 1. Simply put, substantive equality *encourages*, rather than *forbids*, preferential treatment of subordinated groups.

144 *Andrews*, *supra* note 2 at 164. In response, Justices Brown and Rowe would seemingly argue that, viewed substantively, job sharers are being *too* favoured — that there is, in other words, a privilege to accessing job sharing with an equivalent pension, and that this privilege should be accounted for in our substantive analysis. But, even if this were true, such an argument would isolate the particular circumstance of women in the program from the broader societal context of women in the labour market, where they are, unquestionably, disadvantaged, thereby justifying such ameliorative interventions. I am indebted to a peer reviewer's comment for this specific line of analysis.

145 *Fraser*, *supra* note 3 at para 170.

146 *Below* at 77-81.

147 See e.g. *Fraser supra* note 3 at paras 44, 88 (per Abella J.). See also *ibid* at paras 146, 217, 225, 227 (per Brown and Rowe JJ.).

"policy." And, as explained above, the adjudicative review of substantive inequality is unavoidably policy-focussed.[148] Justices Brown and Rowe try to circumvent this fact with additional rigid tests. They, for example, distinguish vetting "whether the Plan respects the bounds of the constitutional obligations imposed on the state" (*legal* analysis) from vetting "good or bad policy" (*policy* analysis).[149] But this tidy law/policy dichotomy elides how legal analysis of equality *demands* policy analysis — and, in particular, the extent to which the naming of "discrimination" is inextricably political.[150] In this way, law/policy heuristics mislead more than they clarify.[151] And for that reason, we need a broader equality vocabulary — specifically, a vocabulary that admits and grapples with the *policy of equality*. Again, a liberal/critical vocabulary would, I think, be more helpful here.

In any event, Justices Brown and Rowe do not avoid policy in their analysis; rather, they simply use distinct, and narrower, vocabulary to describe *their own policy preferences* (a further instance where simplicity obscures ideology). There are four examples of this, that is, the four remaining immunities enumerated above and detailed below.[152]

Example #1 — Taking Incremental Steps: Justices Brown and Rowe reason that Justice Abella's analysis does not let governments act incrementally in addressing inequality.[153] Yet it does. Justice Abella simply scrutinizes the constitutional adequacy of a particular increment.[154] As such, her disagreement with Justices Brown and Rowe is, properly framed, about whether *the increment chosen here* — that is, a policy which, viewed systemically, provides a worse pension to women raising kids than it does to officers suspended for misconduct — was sufficient.[155] Justices Brown and Rowe held that it was sufficient. But that is simply *their* policy preference.

Ultimately, Justices Brown and Rowe hang their hat on how the RCMP "sought to provide flexible working arrangements" to its employees.[156] But what if job sharing, given its flexibility — and the logistical burden this placed on the RCMP — compensated for that burden with not

148 *Above* at 61-62.

149 *Fraser*, *supra* note 3 at para 164.

150 Indeed, this is the implicit point made by Justices Brown and Rowe when they describe discrimination as "a form of wrongful behaviour." *Ibid* at para 193.

151 Critical race theorist Gary Peller observed a similar "analytic loop" in the context of American equality jurisprudence: "[T]he judiciary had to defer to legislative value judgments because the judiciary was unelected and therefore incompetent vis-à-vis the legislature to make value choices, but the democratic character of the legislature, the ground for the deference, could never be determined by the courts because it depended on the resolution of issues of value that were beyond the judicial competence." See Peller, *supra* note 14 at 613.

152 *Below* at 70-72. The concealing of judicial ideology by reference to notions of neutrality is an age-old technique of conservative legal reasoning unveiled by critical race scholarship. See e.g., Neil Gotanda "A Critique of Our Constitution is Color-Blind" (1991) 44:1 Stan L Rev 1 at 53-54 n 207.

153 *Fraser*, *supra* note 3 at para 145. See also *ibid* at paras 168, 177, 209.

154 Drawing on doctrine, Justices Brown and Rowe emphasize how, in *Alliance*, the Court held that states can "act incrementally in addressing systemic inequality." However, this overlooks the very next sentence: "But section 15 does require the state to ensure that whatever actions it *does* take do not have a discriminatory impact" (*ibid* at para 177 citing *Alliance*, *supra* note 129 at para 42 [emphasis in original]).

155 As noted earlier, I acknowledge the incomplete record on this point: see *Fraser, ibid* at para 25 (per Abella J.). See also *ibid* at paras 161, 187 (per Brown and Rowe JJ.). But I also note that the respondent's statements "during the hearing" (*ibid* at para 161) are not evidence.

156 *Ibid* at para 142.

only worse pension benefits, but a 5% pay cut? Would *that* be discriminatory, or would it still "narrow"[157] the gap? What about a 10% pay cut? 25%? 50%? At what point does an incremental shift, as the increment shifts, become *detrimental*, and thus, under Justices Brown and Rowe's test, properly subject to constitutional scrutiny? Such tinkering reveals the deceit inherent in categorically immunizing "incremental" policies from constitutional review. Simply put, social hierarchy does not exist on a linear spectrum in terms conducive to Justices Brown and Rowe's rigid analysis. Indeed, inverting Justices Brown and Rowe's critique of Justice Abella reveals this. They write that, under her substantive equality analysis, "[o]ne searches in vain for a logical or rational stopping point," when the government has done *enough*.[158] But the impossibility of clearly demarcating the boundary between incremental/detrimental extends this same critique to their own analysis, as one searches in vain for when the point when government has done *too little*.

Example #2 — Private vs. Public Discrimination: Justices Brown and Rowe reason that section 15 only concerns *public* discrimination (that is, discrimination which is "state-imposed"), not *private* discrimination.[159] But this "public/private" dichotomy — one of the misleading binaries Williams identifies[160] — obscures the interplay between "public" and "private" spaces and phenomena. Indeed, a "public" pension plan that disfavours an employment arrangement that women are "privately" pressured towards is the very collision of what we tend to call public and private. In any event, Justices Brown and Rowe's position supports the principle that state abdication of responsibility in relation to "private" harm — assuming, for the sake of argument, that harms may be neatly categorized as such[161] — falls beyond constitutional scrutiny. Yet this contradicts Supreme Court precedent troubling the public/private dichotomy.[162]

Further, this line of reasoning leads to absurd consequences. Would a province's wholesale repeal of its human rights code, for example, *really* not be subject to *any* constitutional scrutiny, simply on account of that code gratuitously addressing "private" discrimination? This is, as Williams astutely notes, "the tyranny of what we call the private."[163] And, again, these are coded policy preferences embedded in the reasons of Justices Brown and Rowe. If significant existing inequality can be linked to the violent inertia of colonialism, racism, and state-influ-

157 *Ibid* at para 177.

158 *Ibid* at para 199.

159 *Ibid* at para 165. See also *ibid* at paras 181, 224. Technically, Justices Brown and Rowe do not preserve the Plan based on it implicating private discrimination ("the Plan represents neither a public nor private source of ongoing systemic disadvantage"), but rather, on account of it being ameliorative (see *ibid* at para 168). For my response to this amelioration analysis see above at 67-68.

160 *Alchemy*, *supra* note 25 at 8. Likewise, critical race scholar Neil Gotanda has deconstructed the public/private dichotomy. Specifically, he notes how the dichotomy is both *normative* ("[t]o the extent that distinguishing between public and private realms places some social relations beyond the reach of government regulation, the distinction has normative consequences") and *strategic* ("[t]he familiarity of the public-private distinction obscures the contingent and political character of the initial designation, and subsequent challenges to the subordinating effects of such a 'neutral' distinction are then criticized as 'political'"). See Gotanda, *supra* note 152 at 12-13.

161 They cannot.

162 See e.g. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577; *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385.

163 *Alchemy*, *supra* note 25 at 43.

enced cultural norms,[164] then Williams has a complete answer to Justices Brown and Rowe's exclusion of such inequality from constitutional analysis: "It seems an extraordinarily narrow use of equality, when it excludes from consideration so much clear inequality."[165]

Example #3 — Demonstrated Causation: Justices Brown and Rowe reason that section 15 requires causation between state conduct and disadvantage.[166] This portion of their analysis is curious. The Plan, here, *does cause* disadvantage to women insofar as they are, for well-documented social reasons, overwhelmingly represented in job sharing, which has inferior pension entitlements. Justices Brown and Rowe raise concerns about reliance on *mere* correlation[167] or *mere* anecdote[168] for proof of causation. But Justice Abella does not license such reliance; rather, she observes that "evidence of statistical disparity and of broader group disadvantage may demonstrate disproportionate impact … and their significance will vary depending on the case."[169] She is, therefore, simply leaving space for the contextual inquiry equality innately demands. Justices Brown and Rowe's desire for there to be less space in the contextual inquiry is, again, their policy preference. And the same can be said of Justice Côté, who thinks, for example, that the Plan does not "create" women's subordination in relation to caregiving[170] while acknowledging — as elaborated below[171] — that aptitude tests created Black people's subordination in relation to education (despite both representing clear causal chains between social hierarchy and government policy).

Example #4 — Arbitrariness, Unfairness, and Wrongfulness: Justices Brown and Rowe reason that substantive inequality requires "an element of arbitrariness or unfairness"[172] — or, as they later describe it, "wrongful behaviour."[173] At this point, Justices Brown and Rowe cross the Rubicon. The first abstraction mentioned by Justices Brown and Rowe — arbitrariness — is illogical as a requirement for discrimination.[174] As Justice Abella notes[175] (and as Jonnette Watson Hamilton and Jennifer Koshan have persuasively explained[176]) arbitrariness is already addressed in the section 1 analysis. But, more importantly, the other two abstractions mentioned above — unfairness and wrongfulness — are at least as indeterminate as substantive

164 It can.
165 *Alchemy*, *supra* note 25 at 106.
166 *Fraser*, *supra* note 3 at para 181.
167 *Ibid* at para 180.
168 *Ibid* at para 178.
169 *Ibid* at para 67.
170 *Ibid* at para 251.
171 *Below* at 75.
172 *Fraser, supra* note 3 at para 191.
173 *Ibid* at para 193.
174 I note, parenthetically, that Justice Côté effectively labels the Plan arbitrary in her reasons, arguably complicating Justice Brown and Rowe's analysis on its own terms. See *ibid* at para 252: "To be sure, the impugned provisions may very well not be rational — there may indeed be no logical reason to deprive job-sharers of full pension benefits that are guaranteed to full-time members and members on leave without pay." See also *ibid* at para 255: "It therefore falls to the legislature, not the courts, to remedy any under-inclusiveness in this legislation, which was purportedly meant to assist with caregiving responsibilities in the first place."
175 *Ibid* at para 80.
176 Jonnette Watson Hamilton & Jennifer Koshan, "Kahkewistahaw First Nation v. Taypotat: An Arbitrary Approach to Discrimination" (2016) 76 SCLR (2d) 243 at 259-60.

inequality (if not more), making this argument self-defeating. Justices Brown and Rowe object to courts "fiddl[ing] with the complex mechanics of legislative schemes."[177] Yet few articulations of inequality are as abstract as their notions of "whether the lines drawn are generally appropriate"[178] having "regard to all the circumstances."[179]

In light of the above, the critiques exchanged between Justice Abella and Justices Brown and Rowe are misleading. Justice Abella criticizes Justices Brown and Rowe for formalism[180] and they criticize her for indeterminacy,[181] when, more instructively, their material disagreement is *ideological*. Crudely distilled, Justice Abella thinks it is "unfair" to systemically depreciate women's pensions,[182] whereas Justices Brown and Rowe think it is "fair" to do so.[183] And so, while there is undoubtedly some doctrinal disagreement between their two opinions, I think this fundamental point — their *ideological* divergence on sexism — is in many ways the key disagreement, albeit one obscured by legal rhetoric.[184] That said, this divergence is hinted at in the temporality of their articulations of sexism: Justice Abella invokes the present tense ("entrenched assumptions about the role of women in a family [*continue*] *to leave* [*their*] *mark* on what happens in the workplace"[185]); Justices Brown and Rowe invoke the past tense ("[i]t is indisputable that women *have historically been* disadvantaged in the workplace"[186]), and indeed, repeatedly criticize Justice Abella's reasoning for excessively weighing the past.[187] This, more than any methodological disagreement, is what drives their ultimate divergence in this case.

As Williams notes, it is not the *acceptance* but the *rejection* of substantive equality that invokes "rhetorical devices" for the narrow construction of equality.[188] Justices Brown and Rowe pose questions like "How can a legislature know what any given court will determine to be *sufficiently* remedial?" as if sliding scales — reasonableness, proportionality, foreseeability — are completely foreign to the judicial process. Simply put, we need a constitutional vocabulary that can reckon with the politics inherent in the legal adjudication of equality to properly understand and critique legal institutions. To the extent that legal analysis is invariably political, its critique *as such* is uninformative (at best) or disingenuous (at worst).

(c) Rationalized Incoherence in *Fraser*

The analysis above leads me, finally, to Justices Brown and Rowe's rationalized incoherence. This rationalization of incoherence is evident, for example, when Justices Brown and Rowe

177 *Fraser*, *supra* note 3 at para 214.
178 *Ibid* at para 203 citing *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 67.
179 *Fraser*, *supra* note 3 at para 204.
180 *Ibid*.
181 *Ibid* at para 216.
182 *Ibid* at para 17.
183 *Ibid* at para 191.
184 An example of Kendall Thomas' keen insight that "a judicial decision is a complex combination of rules *and* rhetoric that cannot be understood without rigorous attention to its discursive dimensions." See Eclipse of Reason, *supra* note 137 at 1812.
185 *Fraser*, *supra* note 3 at para 1 [emphasis added].
186 *Ibid* at para 166 [emphasis added].
187 *Ibid* at paras 190, 194. To be fair, they also gesture at contemporary sexism, but in more qualified terms, for example, as a claim at first instance about which "evidence" was "presented" and "accepted" by the application judge (*ibid* at para 166).
188 *Alchemy*, *supra* note 25 at 105.

nostalgically lament how substantive equality has "*become* so vague"[189] without ever identifying a time at which it was clear. It is also evident when they critique substantive *inequality* for indeterminacy,[190] yet invoke substantive *discrimination* as their guiding principle.[191] They, accordingly, rationalize incoherence in their reasons. What are the clear boundaries that emerge from the substitution of "discrimination" for "inequality"? That substantive discrimination forbids "unfairness"[192] and "wrongful behaviour."[193] These are, to be blunt, abstractions that are just as (if not more) lacking in intelligibility and principle,[194] just as unknowable in advance,[195] and thus, just as corrosive to the rule of law[196] as Justice Abella's substantive equality.

And, of course, the "rule of law" itself engages rationalized incoherence given the alchemy not of *equality*, but of *sovereignty*.[197] Justices Brown and Rowe call the rule of law a "concept" with "interlocking components,"[198] and they identify one of those components as the prescription that "Canadians should be governed by rules, stated and knowable in advance, that enable them to guide their conduct."[199] An admirable goal, no doubt. But a goal which their own articulation of substantive discrimination — unfairness and wrongfulness — falls short of. The "two considerations" they close their opinion with to purportedly reinvigorate the "analytical discipline"[200] of substantive equality — that section 15 cannot guarantee equality "throughout society" and that equality is "inherently comparative"[201] — are uncontroversial, are shared by Justice Abella,[202] and fail to disrupt the ambiguity their own analysis generates. Accordingly, their objection to Justice Abella's failure to "explain what 'substantive equality' means"[203] is, ironically, a meta critique.

Justice Côté, too, rationalizes incoherence in her analysis in a number of ways. Indeed this is how she sustains the misleading simplicity of her equality framework.

First, Justice Côté rationalizes the Court's pregnancy discrimination decision in *Brooks*.[204] She finds the Plan non-discriminatory because it creates "a distinction not on the basis of

189 *Fraser*, *supra* note 3 at para 221.
190 *Ibid* at para 216.
191 *Ibid* at para 191.
192 *Ibid*.
193 *Ibid* at para 193.
194 *Ibid* at para 216.
195 *Ibid* at para 218.
196 *Ibid* at para 220.
197 John Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37:3 Osgoode Hall LJ 537 at 581-84. Though the references to "alchemy" by me and Borrows differ. He invokes alchemy to refer to the transmutation of "Aboriginal possession" to "Crown title" (*ibid* at 558). In contrast, I invoke alchemy similar to how Williams does, that is, in relation to the prolonged struggle by disenfranchised groups for the "marker[s] of our citizenship" (*Alchemy*, *supra* note 25 at 163-64).
198 *Fraser*, *supra* note 3 at para 220.
199 *Ibid*.
200 *Ibid* at para 224.
201 *Ibid* at para 224 [emphasis omitted].
202 *Ibid* at para 133, n 11 (regarding section 15 not eradicating societal inequality) and *ibid* at para 95 (regarding section 15 implicating a comparative analysis).
203 *Ibid* at para 227.
204 *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, 59 DLR (4th) 321.

being a woman, but being a woman *with children*."[205] Does it not follow, then, that pregnancy discrimination creates a distinction not on the basis of being a woman, but being a woman *with child*? On her logic,[206] she cannot claim that "an insurance plan that discriminated against pregnant employees *necessarily* discriminated against women";[207] rather, it discriminated against *pregnant* women, a subset of women, just as women *with children* are a subset of women disparately impacted by the Plan.

Second, Justice Côté rationalizes the Supreme Court of the United States' racial discrimination decision in *Griggs*.[208] She reasons that high school education requirements and aptitude tests "effectively served as a proxy for race," and therefore qualified as racial discrimination.[209] But proxies are imprecise substitutes, which is exactly what Justice Côté rejects in the context of women's subordination. *Not all* Black people, and *some* white people, failed those aptitude and educational requirements, just as *not all* women, *some* men, and other gender identities, are primary caregivers. Yet both policies — in these admittedly distinct social and historical contexts — are indirect vehicles through which racial and gender subordination have been perpetuated by the state. As such, Justice Côté's "proxy" analysis contradicts her earlier pronouncement that discrimination based on a ground must happen, "by definition,"[210] only to those who occupy the ground. Some men care for children, and some white people failed educational requirements which perpetuated discrimination against Black people in the United States. Neither fact would insulate discrimination mediated through caregiving or education/aptitude from Canadian constitutional scrutiny.

The analysis above illustrates the virtue in Justice Abella's lack of simplicity: she — like Justices Brown and Rowe — starts from the *strategic abstraction* of "substantive equality." But by avoiding the *rigid tests* adopted by the dissenting judgments, she leaves courts with the flexibility needed to properly assess substantive inequality and, in turn, she avoids any need for *rationalized incoherence* to sustain the logic of her analysis. The ambiguity of equality itself is reflected in the ambiguity of the framework she designs — a necessary correspondence for bridging law, society, and equality.

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205 *Fraser*, *supra* note 3 at para 234.

206 I say "on her logic", in part, because trans men and non-binary people can *also* become pregnant, a fact overlooked by her framing. The lynchpin of Justice Côté's analysis is that "there is a meaningful distinction between pregnancy and sex, on the one hand, and caregiving status and sex, on the other" (*ibid* at para 242). This "meaningful distinction", however, is nothing more than an instance of where "[l]aws become described and enforced in the spirit of our prejudices" (*Alchemy*, *supra* note 25 at 67). Justice Côté reasons that pregnancy *only* affects women, whereas caregiving *may* affect men. But this limits gender hierarchy to a flawed and cisnormative misconception of "biology." Simply put, women's subordination is not solely biological, such that their inequality cannot be limited to biological traits which Justice Côté wrongly believes are unique to women. For instance, distinctions based on voice pitch or height would also be based on sex, whether or not they are *solely* sex-based (see e.g. *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1). Further, "pregnancy" does not *only* affect "women" — itself, a contested category (see Judith Roof, *What Gender Is, What Gender Does* (Minneapolis: University of Minnesota Press, 2016) at 8-9). Pregnancy, for example, affects trans men as well (Syrus Marcus Ware, "Confessions of a Black Pregnant Dad" in Julia Chinyere Oparah & Alicia D Bonaparte, eds, *Birthing Justice: Black Women, Pregnancy and Childbirth* (London, UK: Routledge, 2015)).

207 *Ibid* at para 242.

208 *Griggs v Duke Power Co*, 401 US 424 (1971).

209 *Fraser*, *supra* note 3 at para 246.

210 *Ibid* at para 242.

C. Ideology: Obscuring Subjectivity, Society, and the State

1. Williams on Ideology

A final motif relevant to my analysis from *The Alchemy of Race and Rights* is the fiction of neutrality in legal reasoning — an ideological commitment to the performance of non-ideology. Insofar as it signifies the obscuring of subjectivity, state, and society and not merely even-handedness, neutrality functions as "a suppression, an institutionalization of psychic taboos."[211] In other words, "neutrality" functions as an intellectual posture whereby power is left unsaid. This, in particular, is how neutrality institutionalizes taboos: at the *societal level*, equality claims are viewed with skepticism (for example, as "playing the race card"[212]), and correspondingly, at the *adjudicative level*, equality reasoning is castigated as improper (for example, as "judicial activism" or "results-oriented reasoning").[213] Let us explore how gestures at neutrality can strategically obscure three settings of power, and thus, function ideologically.

First, the fiction of neutrality is sustained by *obscuring subjectivity*. By acknowledging law's contingency, Williams more candidly engages with the silent forces shaping the law, including the "temporal," the "historical," and the "socially constructed."[214] Such forces are overlooked by belief in "[t]he existence of objective, 'unmediated' voices."[215] But "much of what is spoken in so-called objective, unmediated voices is in fact mired in hidden subjectivities and unexamined claims."[216] The omission of these subjectivities is no accident. Rather, "it is an extremely common device by which not just subject positioning is obscured, but by which agency and responsibility are hopelessly befuddled."[217] As such, the law functions as a "shield behind which to avoid responsibility for the human repercussions of either governmental or publicly harmful private activity."[218] On this point, Williams powerfully invokes metaphor to unpack how "standards" (objective) are "nothing more than structured preferences" (subjective).[219] As she writes:

> Standards are like paths picked through fields of equanimity, worn into hard wide roads over time, used always because of collective habit, expectation, and convenience. The pleasures and perils of picking one's own path through the field are soon forgotten; the logic or illogic of the course of the road is soon rationalized by the mere fact of the road.[220]

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211 *Alchemy*, *supra* note 25 at 119.

212 Derrick Bell described this as "the special discounting of black views". See Derrick Bell, *Faces At the Bottom of the Well: the Permanence of Racism* (New York: Basic Books, 1992) at 111.

213 See e.g. Emmett Macfarlane, "What we're talking about when we talk about 'judicial activism'" (23 February 2015), online: *Maclean's* <https://www.macleans.ca/politics/what-were-talking-about-when-we-talk-about-judicial-activism/> (where Macfarlane notes cases critiqued as reflecting "judicial activism", all of which, I would argue, involve equity-seeking groups).

214 *Alchemy*, *supra* note 25 at 9.

215 *Ibid*.

216 *Ibid* at 11.

217 *Ibid*. For a recent critique of the strategic deployment of neutrality in the Canadian legal academy, see Joshua Sealy-Harrington, "Show Not Tell: Why I Am Declining to Participate in a Runnymede Society Debate" (31 August 2020), online: *Slaw* <http://www.slaw.ca/2020/08/31/show-not-tell-why-i-am-declining-to-participate-in-a-runnymede-society-debate/>.

218 *Alchemy*, *supra* note 25 at 140.

219 *Ibid* at 103.

220 *Ibid* at 99.

Second, the fiction of neutrality is sustained by *obscuring the state*. When courts back away from intervening in "the way things are" they routinely disregard how the state made things that way through various forms of intervention — active or passive, direct or indirect.[221] This "renders invisible the force of the state."[222] Only by ignoring the state's architectural role — this "fiction," this "half truth"[223] — can courts so often claim a severance between human suffering and government design.

Third, the fiction of neutrality is sustained by *obscuring society*. Specifically, the "blind application of principles," without reference to the context and history in which those principles are being applied, leaves "old habits of cultural bias" intact.[224] As Williams writes:

> Law and legal writing aspire to formalized, color-blind, liberal ideals. Neutrality is the standard for assuring these ideals; yet the adherence to it is often determined by reference to an aesthetic of uniformity, in which difference is simply omitted.[225]

The final clause above — "in which difference is simply omitted" — is especially crucial to the interrogation of equality. A constitutional analysis that elides social hierarchy renders marginalized groups "the objects of a constitutional omission that has been incorporated into a theory of neutrality."[226] Viewed in this way, "omission becomes a form of expression."[227] Again, Williams' analysis is apposite:

> [B]y describing zones of vulnerability, by setting up regions of conversational taboo and fences of rigidified politeness, the unintentional exile of individuals … may be quietly accomplished and avoided indefinitely.[228]

Critical scholars — for example, feminist,[229] queer,[230] race,[231] and disability[232] scholars — have been *loudly* resisting the "quiet" accomplishment of such inequality on these very terms. Indeed, such scholars have been targeting "zones of vulnerability" (for example, the home, the family, the market, and the state) for decades. No matter the site of subordination, addressing inequality is first of all a naming process — a process of "seeing" that is as textured as our society.[233] For this reason, equality analysis is invariably ideological: "a fundamentally contex-

221 See e.g. 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 at 310.
222 *Alchemy*, *supra* note 25 at 34.
223 *Ibid*.
224 *Ibid* at 48.
225 *Ibid*.
226 *Ibid* at 121.
227 *Ibid*.
228 *Ibid* at 65.
229 See e.g. Jonnette Watson Hamilton & Jennifer Koshan, "Equality Rights and Pay Equity: Deja Vu in the Supreme Court of Canada" (2019) 15 JL & Equality 1.
230 See e.g. Brenda Cossman, "Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms" (2002) 40:3 Osgoode Hall LJ 223.
231 See e.g. Sherene H Razack, "Making Canada White: Law and the Policing of Bodies of Colour in the 1990s" (1999) 14:1 CJLS 159.
232 See e.g. Ravi Malhotra, "The Impact of the Convention on the Rights of Persons with Disabilities on Canadian Jurisprudence: The Case of Leobrera v. Canada" (2017) 54:3 Alta L Rev 637.
233 *Alchemy, supra* note 25 at 130.

tual question."[234] It follows that equality analysis is indivisible from the norms that mediate inequality. And, where dominant norms prevail, "[l]aws become described and enforced in the spirit of our prejudices"[235] — which is antithetical to our constitutional commitment to resisting prejudice and furthering substantive equality.

2. Ideology in Fraser

Analyzing ideology in *Fraser* reveals "the 'unconscious' of the text"[236] — that is, the unstated ideological divergence concealed in the justices' methodological rhetoric, as they "ride their strong, sure-footed steeds around and around the perimeter"[237] of section 15. Again, this ideological divergence is subtle; it manifests, not through overt political commitments, but rather the covert obfuscation of subjectivity, state, and society, each of which is discussed below.

First, *subjectivity*. Justice Abella concludes her overview with the claim that the Plan is a "clear" violation of women's equality[238] and later observes that there is "no doubt" that the Plan perpetuates women's disadvantage.[239] To clarify, I agree with the majority's holding in *Fraser*. But, in my view, that agreement is informed by my ideological agreement with Justice Abella on the ways in which caregiving[240] and pension plans[241] operate as sites of women's subordination, and that the Plan at issue in *Fraser* unconstitutionally perpetuated that subordination (that is, we agree in this instance on what should be named as "unequal" and "unconstitutional"). In this way, I also agree with Justices Brown and Rowe's reasons when they observe that their "disagreement is about the *meaning and requirements of* substantive equality."[242] Justice Abella and I view caregiving and pension plans as a site of women's subordination in society, whereas Justices Brown and Rowe view remediation of such subordination as a "new financial obligation" that "the public is now burdened with."[243] More explicit engagement with this ideological divide in Justice Abella's reasons would help to create a more transparent political climate at the Court.

That said, Justice Abella does outline the ingredients necessary for identifying how silent subjectivities shape the law. For example, she notes how "discrimination" can result from "continuing to do things 'the way they have always been done.'"[244] As such, she is sensitive to Williams' metaphor of the well-trodden path: where "the logic or illogic of the course of the road is soon rationalized by the mere fact of the road."[245] In contrast, Justices Brown and Rowe (who insist on an onerous threshold of causation) and Justice Côté (who refuses to even concede

234 StereoDecisis, *supra* note 97 at 00h:48m:30s.
235 *Alchemy*, *supra* note 25 at 67. Likewise, see *Minow, supra* note 7 at 1: "In law, problems of distinction, or 'line-drawing,' unfortunately converge with the legacies of prejudice and status conflict in our society."
236 Eclipse of Reason, *supra* note 137 at 1813.
237 *Alchemy*, *supra* note 25 at Prologue.
238 *Fraser*, *supra* note 3 at para 5.
239 *Ibid* at para 108.
240 *Ibid* at paras 97-106.
241 *Ibid* at para 108.
242 *Ibid* at para 218 [emphasis in original].
243 *Ibid* at para 228.
244 *Ibid* at para 31 citing Faraday, *supra* note 220 at 310.
245 *Alchemy*, *supra* note 25 at 99.

that social norms about caregiving implicate sex discrimination) derive their legal positions from their own ideological commitments, or rather, their ideological abdications — in Williams's words, their "subjective willingness not to look past a certain point."[246]

Second, one may detect ideological divergence in the justices' framings of *the state*. Justice Abella notes how "governments must be 'particularly vigilant about the effects of their own policies' on members of disadvantaged groups."[247] While the public nexus is apparent here (in a case concerning a state pension plan), this doctrinal point is critical. The state was historically — and is currently — entangled in social hierarchies. Courts, therefore, must be attuned to how existing inequality that seems *private* in nature is, in reality, a product of *public* acts and omissions for which the state should be held responsibile. Indeed, Williams reminds us that "the rhetoric of increased privatization" can function as "the rationalizing agent of public unaccountability and, ultimately, irresponsibility."[248]

For example, where a state refuses to fund equitable childcare or abortion access, is persisting gendered inequality in relation to such services — an absolutely foreseeable consequence — *really* just a private matter? In this sense, Justices Brown and Rowe's concern about the state being held "responsible for discrimination it has not caused"[249] is a smokescreen: social hierarchies are rarely, if ever, severable from the state. In this regard, Justices Brown and Rowe concede that "where the government itself has created the inequality, matters are … somewhat different"[250] in terms of the state's constitutional obligations. And they admit that "the availability of quality childcare" is a cause of women's inequality here.[251] But they still find the Plan constitutional.[252] Simply put, state "causation" cannot be limited to its overt, active, and inequality-exacerbating interventions if a meaningful conception of equality is to be realized. Indeed, ubiquitous inequality — linked to "social attitudes and institutions"[253] — can be traced to historical and contemporary government policy, making "causation" defences deceptive and misleading.

True, governments must have some "latitude" to set priorities.[254] But how that latitude is exercised must be subject to constitutional scrutiny. Justices Brown and Rowe raise the spectre of a "chilling effect"[255] resulting from substantive constitutional review. Yet such review is inextricable from Canada's constitutional architecture.[256] It follows that "restricting the government's ability to incrementally address disadvantage" is not a "peculiar way to promote equality" (as Justices Brown and Rowe reason), but rather, a necessary corollary of the state's extant obligations to its most vulnerable citizens.[257]

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246 *Ibid*.
247 *Fraser*, *supra* note 3 at para 31 citing Faraday, *supra* note 220 at 310.
248 *Alchemy*, *supra* note 25 at 47.
249 *Fraser*, *supra* note 3 at para 181.
250 *Ibid* at para 207.
251 *Ibid* at para 215.
252 *Ibid* at para 147.
253 *Ibid* at para 224.
254 *Ibid* at para 207.
255 *Ibid* at para 208.
256 *Charter*, *supra* note 1, ss 1, 15, 32; *Fraser*, *supra* note 3 at para 132, n 8.
257 In any event, I would hope that public figures are motivated, not only by the threat of being held accountable to the constitution (thereby choosing the supposedly "safer route" of legislative "inaction" (*Fraser*, *ibid* at

This leads me to a third point of ideological divergence: on the justices' conceptualizations of *society*. Justice Abella understands that critical examination of "systems" and "structures" is prerequisite to any meaningful conception of equality. And, more concretely, she notes that "accounting for" the "unique constellation of physical, economic and social barriers" that confront particular groups[258] — their particular "need or vulnerability"[259] as well as their "systemic or historical disadvantages"[260] — is required for a meaningful understanding of discrimination. Indeed, Justice Abella recognizes how addressing adverse effects discrimination can be among "the most powerful legal measures available to disadvantaged groups in society to assert their claim to justice."[261] These doctrinal commitments foreground her application of equality law in this case. She observes that "[n]early all of the participants in the job-sharing program are women and most of them reduced their hours of work because of child care."[262] Further, she describes the applicants' expert evidence concerning "the disadvantages women with children face in the labour force."[263] In other words, she observes how the Plan not only disadvantages women, but does so in well-established sites of women's subordination (the workforce and, relatedly, the home and the family).

The dissenters, in stark contrast, obscure gender hierarchy. And, critically, their disregard of society and existing social hierarchy is not "[n]eutrality," but rather the "suppression" of relevant social context and the attempted "institutionalization" of their own ideology.[264] In this regard, many critical passages in Justices Brown and Rowe's opinion strategically obscure gender hierarchy, beginning with their opening line: "At one level, this appeal presents the simple question: is tying pension benefits to hours worked discriminatory?"[265] Likewise, they describe this case as merely raising different "options that may be valuable to members at different points in their lives and careers"[266] and as implicating a government that simply "tried to be accommodating in their employment options."[267] These are paradigmatic expositions of Williams' "aesthetic of uniformity, in which difference is simply omitted."[268] Also on this "level" — that is, the level of needless abstraction — *Brown v Board of Education*[269] (the US Supreme Court's judgment on racial segregation in public schools) simply concerned whether equal facilities could somehow be unequal[270] and *Bowers v Hardwick*[271] (on the criminalization of "homosexual sodomy") sim-

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para 228, per Brown and Rowe JJ.)), but also, by the genuine public good promoted by responding to the needs of marginalized people.

258 *Ibid* at para 34.

259 *Ibid* at para 75 citing *Quebec (Attorney General) v A*, 2013 SCC 5 at para 354.

260 *Fraser*, *supra* note 3 at para 76.

261 *Ibid* at para 35 citing Hugh Collins & Tarunabh Khaitan, "Indirect Discrimination Law: Controversies and Critical Questions" in Hugh Collins and Tarunabh Khaitan, eds, *Foundations of Indirect Discrimination Law* (London, UK: Hart Publishing, 2018) 1 at 30.

262 *Fraser*, *supra* note 3 at para 3.

263 *Ibid* at para 21.

264 *Alchemy*, *supra* note 25 at 119.

265 *Fraser*, *supra* note 3 at para 140.

266 *Ibid* at para 203.

267 *Ibid* at para 228.

268 *Alchemy*, *supra* note 25 at 48.

269 347 US 483 (1954) [*Brown*].

270 Rather, *Brown* concerned whether "a massive intentional disadvantaging of the Negro race … by state law" violates the equal protection clause, which forbids such disadvantaging. See Charles L Black Jr, "The Lawfulness of the Segregation Decisions" (1960) 69:3 Yale LJ 421 at 421.

271 478 US 186 (1986) [*Hardwick*].

ply concerned whether the state may regulate immoral conduct.[272] *Everything is equal when the context of inequality is erased.* Who could reasonably object to the proposition that "employers must be able to compensate employees based on hours worked"?[273] This is a rhetorical sleight of hand, again, anticipated by Williams:

> There is something seductive about this stone cool algebra of rich life stories. There is something soothing about its static neutrality, its emotionless purity. It is a choice luxuriantly free of consequence.[274]

Justice Côté obscures gender hierarchy even more. Justices Brown and Rowe at least acknowledge that, given women's disproportionate representation in job sharing, the adverse treatment at issue constitutes a distinction based on sex.[275] In contrast, Justice Côté — as detailed above — claims that this distinction is merely based on "caregiving,"[276] thereby immunizing virtually all social discrimination from her purview of constitutional inequality — hence why she views the case as "relatively straightforward."[277] In this way, she erases caregiving as a notable "zone of vulnerability"[278] for women's oppression by overlooking the "systems"[279] — here, patriarchy — that contribute to women's subordination. To be fair, her concerns about "statistics-based litigation"[280] are understandable. But knowledge of society is indispensable to the meaningful adjudication of substantive inequality.[281] Accordingly, her objection to such litigation is not a commitment *to* neutrality, but rather, *against* it — an entrenchment of status quo hierarchies,[282] contradicting her claimed opposition to constitutionalizing "normative judgments."[283]

IV. Conclusion

The Alchemy of Race and Rights is a superb foil for the dynamics of methodology and ideology that run throughout the three opinions in *Fraser*. Indeed, Justices Brown and Rowe critique Justice Abella's reasons in a manner specifically anticipated by Williams. They raise the "fundamental concern" of Justice Abella's failure in defining substantive equality "except by refer-

272 Rather, *Hardwick* concerned, doctrinally, "the constitutionality of a statutorily codified homophobia", and rhetorically, "the discursive construction and ideological consolidation of a certain 'heterosexual' identity." See Eclipse of Reason *supra* note 138 at 1813, 1828.

273 *Fraser*, *supra* note 3 at para 200. Of course, this characterization of the issue is misleading because compensation *is not* linked to hours worked: Under the RCMP pension plan, those on leave without pay can buy back pension credits whereas those who job share — overwhelmingly, women with children — cannot. *Ibid* at para 3.

274 *Alchemy*, *supra* note 25 at 98.

275 *Fraser*, *supra* note 3 at paras 185, 188.

276 *Ibid* at para 234.

277 *Ibid* at para 239.

278 *Alchemy*, *supra* note 25 at 65.

279 *Fraser*, *supra* note 3 at para 31.

280 *Ibid* at para 245.

281 *Ibid* at paras 56-67.

282 As Charles Black explained, in his defence of the lawfulness of *Brown v Board of Education*: "it would be *the most unneutral of principles*, improvised *ad hoc,* to require that a court faced with [racially segregated public schools] refuse to note a plain fact about the society of the United States — the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority — or the other equally plain fact that such treatment is hurtful to human beings." See Black Jr, *supra* note 270 at 427 [emphasis added].

283 *Fraser*, *supra* note 3 at para 252.

ence to what it is *not*."[284] But as Williams writes, such analysis simply reflects critical theory, which infuses Justice Abella's contextual framework. To quote Williams, critical theory:

> … is often attributed to a "nihilistic" interpretive stance ("I don't know what it is, but I do know what it isn't"). A better way of describing this last category may be as interpretive discourse that explores the limits of meaning, gives meaning by knowing its bounds. (I think, by the way, that an accurate understanding of critical theory requires recognition of the way in which the concept of indeterminacy questions the authority of definitional cages; it is not "nihilism" but a challenge to contextualize, because it empowers community standards and the democratization of interpretation.)[285]

Fraser is a doctrinal victory for progressives, though I share the cautious optimism of my fellow contributors to this special issue. who also joined me on the initial panel inspiring it. *Fraser*'s analysis — particularly the clear incorporation of systemic discrimination within the ambit of section 15[286] — is worthy of celebration. But this victory must now be translated into further victories against broader systems of inequality. To apply section 15 analysis to these systems is not "utopian," but rather, integral to its "ambitious" project.[287] A project, of course, that could not — and should not — rest solely with courts. But a project in which courts can nonetheless play an influential role.

How can we ensure that, post-*Fraser*, courts bring a systemic lens to their analysis of equality? Acknowledgment of equality's alchemy — as a fluid process for transmutation from unjust to just — is crucial to this task. The three opinions in *Fraser* — viewed through Williams' critical lens — highlight how equality is fundamentally contextual, how ideology is an unavoidable dimension of equality analysis, and how methodology can be invoked to obscure ideology. In light of these dynamics, particularly but not uniquely present in equality law, the formal/substantive equality dichotomy should be supplemented. On this front, we need an equality vocabulary that maintains the flexibility secured by Justice Abella's majority opinion in *Fraser*, but which directs section 15 more critically towards targeting pervasive systemic inequalities throughout society. The formal/substantive heuristic partially explains why Justice Abella promotes substantive equality, while the dissents do not. But a liberal/critical heuristic can explain why the Court has, to date, abjectly failed to respond to the vast majority of structural inequalities throughout Canadian society, grappling with issues like "positive obligations" and "redistribution of resources and benefits"[288] — substantive equality issues which are, in my view, on the immediate horizon.

The alchemy of substantive equality requires courage and vision, and it will only manifest if we come to grips with the "word-combination locks" that the law represents, and the "gates" that the law reveals.[289] Homelessness?[290] Abortion access?[291] Withdrawal of financial

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284 *Fraser*, *supra* note 3 at para 146 [emphasis in original].
285 *Alchemy*, *supra* note 25 at 109.
286 Adverse Impact, *supra* note 9.
287 *Fraser*, *supra* note 3 at para 136.
288 Adverse Impact, *supra* note 9 at 195.
289 *Alchemy*, *supra* note 25 at Prologue.
290 Joshua Sealy-Harrington, "Can the Homeless Find Shelter in the Courts?" (2 April 2015), online: *ABlawg* <https://ablawg.ca/2015/04/02/can-the-homeless-find-shelter-in-the-courts/>.
291 Jacques Poitras, "New Brunswick being sued over abortion access" (7 January 2021), online: *CBC News* <https://www.cbc.ca/news/canada/new-brunswick/abortion-new-brunswick-lawsuit-civil-liberties-association-medicare-1.5864555>.

assistance?[292] Drinking water-advisories on First Nations reserves?[293] There is no neutral position about how section 15 informs state (in)action on these issues — only differing "vision[s] of the good society",[294] and the courage it will take to get there. Courage which, I would argue, requires disrupting the needs/rights dichotomy that Williams critiqued three decades ago,[295] and which continues to maintain pervasive substantive inequality across Canada to this day.

292 See e.g. Andrea Huncar, "Pro bono constitutional challenge reveals gaps in access to justice, say legal experts" (21 May 2020), online: *CBC News* <https://www.cbc.ca/news/canada/edmonton/pro-bono-constitutional-challenge-alberta-government-support-program-1.5578387>.

293 Kristin Annable, "'Change to seek justice' after First Nations' water advisories lawsuit certified as class action" (17 July 2020), online: *CBC News* <https://www.cbc.ca/news/canada/manitoba/lawsuit-class-action-first-nations-water-1.5652581>.

294 *Andrews, supra* note 2 at 164 citing John H. Schaar, "Equality of Opportunity and Beyond", in *Nomos IX: Equality*, eds. J. Roland Pennock and John W. Chapman (1967) at 228.

295 *Alchemy*, *supra* note 25 at 8.

Constitutional forum constitutionnel

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

Richard Moon*

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]
>
> "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]
>
> [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]
>
> "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.