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Tugging at the Strands: Adverse Effects Discrimination and the Supreme Court Decision in *Fraser*

By: Jennifer Koshan and Jonnette Watson Hamilton

Case Commented On: *Fraser v Canada (Attorney General)*, [2020 SCC 28 \(CanLII\)](#)

On October 16, 2020, the Supreme Court of Canada released its long-awaited decision in *Fraser v Canada (Attorney General)*, [2020 SCC 28 \(CanLII\)](#). *Fraser* involved a claim of adverse effects discrimination by female RCMP members who lost their entitlement to full pension benefits when they entered temporary job-sharing arrangements. We blogged on the Federal Court of Appeal decision in *Fraser* [here](#), and – in the interests of disclosure – also participated in the Supreme Court intervention in *Fraser* by the Women’s Legal Education and Action Fund (LEAF) (for LEAF’s news release following the *Fraser* decision, see [here](#)).

Fraser is the first successful adverse effects claim under section 15 of the *Canadian Charter of Rights and Freedoms* in over 20 years and it is the first ever successful adverse effects claim under section 15 in a sex discrimination context. This post will focus on the typical challenges that have been faced in adverse effects claims and review how Justice Rosalie Abella’s majority decision in *Fraser* responded to these problem areas, which were also apparent in the lower court decisions in *Fraser*. Although Justice Abella wrote for the majority of the Court (Chief Justice Richard Wagner and Justices Michael Moldaver, Andromache Karakatsanis, Sheilah Martin and Nicholas Kasirer, as well as herself), we will refer to the judgment as hers because it appears to be the culmination of her life-long work on equality rights and may be her last judgment on this subject before her retirement in 2021.

We also review the two dissenting judgments in *Fraser*, written by Justices Russell Brown / Malcolm Rowe and Justice Suzanne Côté. Our title is inspired by Justice Abella’s allegation that the dissent “tug[s] at the strands of a prior decision they disagree with ... [to] unravel the precedent” (at para 133, referring to *Alliance*, one of the Court’s two 2018 pay equity decisions that we cite below). Interestingly, the same could be said of the majority judgement, which unravels the knots of a large body of section 15 jurisprudence that has made it difficult to prove adverse effects discrimination claims. It is these problem areas that we turn to next.

Adverse Effects Discrimination Challenges

Unlike direct discrimination, in which a law on its face expressly draws lines based on grounds prohibited under section 15, 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 prohibited ground. Prior to *Fraser*, only two adverse effects discrimination claims have been successful at the Supreme Court of Canada – *Eldridge v British Columbia (Attorney*

General), [1997 CanLII 327 \(SCC\)](#), [\[1997\] 3 SCR 624](#) and *Vriend v Alberta*, [1998 CanLII 816 \(SCC\)](#), [\[1998\] 1 SCR 493](#). This is so even though adverse effects discrimination was recognized as necessary to achieving substantive equality in 1989, in the Court's first section 15 decision. In *Andrews v Law Society of British Columbia*, [1989 CanLII 2 \(SCC\)](#), [\[1989\] 1 SCR 143](#), Justice William McIntyre wrote that identical treatment may produce serious inequality and that equality analysis must focus on the effects of a law as well as its purpose (at 164, 173–175).

Adverse effects discrimination is also incorporated into the most recent version of the test for a violation of section 15, as articulated in the two pay equity cases decided by the Supreme Court in May 2018 (see *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17 \(CanLII\)](#) (*Alliance*); and *Centrale des syndicats du Québec v. Quebec (Attorney General)*, [2018 SCC 18 \(CanLII\)](#)). The current test has two steps:

[1] Does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds?

[2] If so, does the law impose “burdens or den[y] a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating . . . disadvantage.” (*Alliance* at para 25, emphasis added)

In her reasons in *Fraser*, Justice Abella noted that although it is preferable to keep these two steps distinct, they may overlap in adverse effects cases and should not be treated as “two impermeable silos” (at para 82).

The challenges with proving adverse effects claims have also overlapped, so we do not break them down into the two steps of the test. And, since every adverse effects discrimination claim has failed at the Supreme Court since 1998, there have been many challenges, including:

- Causation
- Evidence
- Choice
- Comparators
- Link to a prohibited ground
- Positive rights / Obligations
- Arbitrariness
- Amelioration

The Challenges Confronted in *Fraser*

This section will review how the Federal Court of Appeal decision in *Fraser* reinforced these problem areas in finding that there was no discrimination, and how these issues were addressed by Justice Abella. We analyze the dissenting judgments in a separate section.

It is important to recognize at the outset that *Fraser* is a typical adverse effects discrimination case. The RCMP Pension Plan provided that full-time members who temporarily job-shared

were not eligible for full pension benefits because they were classified as part-time members, while other members – such as those working full-time or on temporary leave without pay – could receive full pensions (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 dated 5 December 1997; and the RCMP Administration Manual, II.10, 2003, s. F.1 (collectively “the Plan”). Those on temporary leave without pay can elect to contribute to the pension fund on their return to full-time service and, if they do so, they “buy back” pension benefits by paying both employee and employer contributions for the leave period into the pension fund. However, those classified as part-time workers (including job-sharers) were not entitled to buy back pension benefits to a full-time level when they returned to full-time service (RCMPSA, sections 6(a), 6.1). The Plan appears neutral on its face with respect to prohibited grounds, but when we consider evidence related to its impact, discussed below, it has a disproportionate impact on women with caregiving responsibilities.

However, the Federal Court of Appeal denied the claim at the first step of the test for discrimination, finding the claimants had not shown that the Plan created an adverse distinction based on an enumerated or analogous ground (see *Fraser v Canada (Attorney General)*, [2018 FCA 223 \(CanLII\)](#) (*Fraser FCA*)).

The claimants’ expert gave evidence that working women in Canada bear a disproportionate burden of child-rearing, and that these issues may be particularly acute for women in policing, especially those with limited access to child care ([Appellants’ Factum on Appeal](#) at paras 16, 63, 84). There was also evidence that in the early years of the job-sharing program, which began in 1997, 30 out of 34 RCMP members who job-shared were women, and nearly all, 32 out of 34, had small children. In snapshots in 2010 and 2014, all RCMP members who job-shared were women (appellants’ Factum at para 20).

Despite this evidence, the Court of Appeal found that for many RCMP members the reasons for job-sharing were unrelated to caregiving (*Fraser FCA* at para 18). The Court of Appeal also found there was no evidence that the option of leave without pay – which did include full pension entitlement – was unavailable to female RCMP members with young children, nor was there evidence to suggest that more men than women, or more childless individuals than those with children, had taken leaves without pay (*Fraser FCA* at para 52). This led to the Court’s conclusion that the claimants “were not denied [pension] buy-back rights based on their personal characteristics of being female RCMP members with young children, but rather because they elected to job-share as opposed to taking care and nurturing leave” (*Fraser FCA* at para 53, emphasis added). The Court of Appeal therefore found an insufficient link on the evidence between any adverse consequences of being unable to buy-back pension rights and the sex or family/parental status of job-sharing employees.

Given its finding on step one, the Court of Appeal did not deal with step 2 of the test for discrimination. Nevertheless, it did find that there was no adverse or negative treatment of job-sharing employees when considering their overall employment context, including the fact that they continued to earn an income while employees on leave without pay did not (*Fraser FCA* at para 50). In addition to raising comparator challenges, this finding also brings into play the

problematic idea from *Withler v Canada (Attorney General)*, [2011 SCC 12 \(CanLII\)](#) that courts should look at the larger benefit scheme and whether it is ameliorative as a factor relevant to determining whether there is discrimination. On the issue of positive rights / obligations, the Court of Appeal stated that it was up to Parliament to decide whether to provide the claimants with pension buy-back rights, not the courts (*Fraser* FCA at para 61).

Justice Abella refuted all of the underlying bases of these problematic conclusions, holding that there was an adverse distinction, that it was based on sex, and that it was discriminatory.

She identified two types of evidence that “will be especially helpful” in adverse effects cases – evidence about the claimant group’s situation, and evidence about the results of the law (*Fraser* at para 56). The first type of evidence “may come from the claimant, from expert witnesses, or through judicial notice” (at para 57). The second type of evidence might usefully include statistics, “especially if the pool of people adversely affected by a criterion or standard includes *both* members of a protected group *and* members of more advantaged groups” (at para 58, emphasis in original). A corollary to this point is that all members of a group do not need to be affected in the same way for a disparate impact to be accepted (at paras 72, 74), which goes to the nature of the link to prohibited grounds that is required. Statistics are not always necessary, particularly as some groups may be under-documented (at para 57). Nor is there a “universal measure for what level of statistical disparity is necessary to demonstrate that there is a disproportionate impact” on some members of the group (at para 59). While both qualitative evidence related to the group’s circumstances and quantitative evidence related to the statistical impact of the rule are ideal, at other times the disproportionate impact on a group “will be apparent and immediate” (at para 61, citing *Kahkewistahaw First Nation v Taypotat*, [2015 SCC 30 \(CanLII\)](#) at para 33).

The purpose of this evidence, as clarified by Justice Abella, is “to show that membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group” (at para 57). The claimants need not show why the law has a disproportionate negative effect on them, nor that the legislature intended to create a disparate impact, which would be too burdensome and is contrary to earlier equality rights decisions (at paras 63, 69, emphasis in original). What the claimants must show is an evidentiary link, connection, or association between their membership in a particular group and the disproportionate impact the law has on them, not that their characteristics caused this impact or that the state created the circumstances connected to the law’s impact (at paras 70-71, emphasis added).

Justice Abella did not mention the challenges associated with choice or comparators until the application stage of analysis, but she did make some general comments that are worthy of note. On the issue of choice, she asserted: “This Court has consistently held that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group” (at para 86). On the issue of comparators, she affirmed the caution from *Withler* that the search for one correct comparator – a mirror comparator – must be avoided in order to take a substantive rather than formal approach to equality (at paras 93-94).

Justice Abella also made it clear that the focus of the discrimination analysis at step 2 should be on groups that have faced historical disadvantage and whether the impugned law reinforces,

perpetuates, or exacerbates that disadvantage (at paras 77, 81). She also confirmed that claimants need not show that the distinction was an arbitrary or irrelevant one in order to prove discrimination; rather these are matters for the justification stage under section 1 of the *Charter* (at paras 79-80). Relying on the pay equity decisions, Justice Abella further confirmed that an ameliorative purpose does not “shield legislation from s. 15(1) scrutiny” (at para 69).

As for positive obligations, Justice Abella tackled this issue in her critique of the dissenting reasons of Justices Brown and Rowe, who raised concerns about the “chilling effect” the majority decision would have on the “incremental efforts” of legislatures to redress women’s inequality (at para 132, referencing the dissent at paras 207-208). Justice Abella’s response was to note that this reasoning – which Justices Brown and Rowe also relied on in the pay equity cases – was “squarely rejected by the majority” in those cases (at para 133). It is here that Justice Abella accused her colleagues of “tug[ging] at the strands of a prior decision they disagree with in search of the occasional phrase or paragraph by which they can unravel the precedent” (at para 133). She rebuked their “insistent attack” on substantive equality, calling their approach “formalistic”, “thin and impoverished” and “pre-*Charter*”, and decried how their approach would require litigants “with each new case, [to] stand ready to defend the exact gains that have been won multiple times in the past” (at para 134, citing 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 330 for the last quote). In contrast, Justice Abella recognized that section 15’s mandate is “ambitious but not utopian” and asserted that “inequality can be reduced one case at a time” (at para 136).

Before we move to a discussion of the majority’s application of these principles to the facts of the case, a few comments are in order. Justice Abella’s decision methodically unravels the knots that have made adverse effects claims difficult to prove, but it is remarkable to note the sources she relied on to do so – primarily, Canadian human rights case law, equality rights case law from other jurisdictions (notably *Griggs v Duke Power Co.*, 401 US 424 (1971), also cited in *Taypotat*), as well as a plethora of academic commentary from Canadian and other scholars on adverse effects discrimination. The fact that *Eldridge* and *Vriend* are the only section 15 *Charter* cases where a majority of the Court upheld adverse effects discrimination claims did not give Justice Abella much precedent to work with in *Fraser*, as we lamented [here](#).

A related observation is that some holdings in previous section 15 cases are glossed over in Justice Abella’s unravelling of previous knots – for example, the fact that a majority of the Court did not denounce choice-based reasoning until the 2014 decision in *Quebec (Attorney General) v A*, [2013 SCC 5 \(CanLII\)](#) (at para 316), the fact that the language of “arbitrary disadvantage” or “arbitrary discrimination” has been used in a long line of section 15 and human rights decisions (and as recently as 2015 in *Taypotat*), and the fact that *Withler* expanded the “ameliorative program” factor first introduced in *Law v Canada (Minister of Employment and Immigration)*, [1999 CanLII 675 \(SCC\)](#), [\[1999\] 1 SCR 497](#) to include consideration of the overall effects of a large benefit scheme on others as part of the discrimination analysis, and has not been overruled on this point. Indeed, this approach – where previous Supreme Court decisions based on points of law that are now considered wrong are not explicitly overruled – is a hallmark of section 15 jurisprudence. This approach provides some fodder for the dissenting judgments, as Kerri Froc

notes [here](#), and as we will describe more fully below. It may also allow the gains made in this case to be eroded in future cases as the composition of the Supreme Court changes.

Application of the Adverse Effects Discrimination Analysis in *Fraser*

Sex Discrimination

After doing away with most of the persistent adverse effects discrimination challenges, Justice Abella applied this approach to the facts of *Fraser*. At the outset, Justice Abella took on the Federal Court of Appeal’s conclusion that any adverse distinction between the claimants and others was a result of their “election” to job share (*Fraser* FCA at para 53). She cited human rights case law, dissenting and concurring section 15 opinions in other cases, and academic commentary (*Fraser* at paras 87-90) to bolster her point that “differential treatment can be discriminatory even if it is based on choices” (at para 86). In addition to her dismantling of the relevance of choice as a matter of law, Justice Abella recognized that “choice” may be factually absent: “For many women, the decision to work on a part-time basis, far from being an unencumbered choice, “often lies beyond the individual’s effective control”” (at para 91, citing *Miron v Trudel*, [1995 CanLII 97 \(SCC\)](#), [\[1995\] 2 SCR 418](#) at para 153).

She next turned to the question of comparators, critiquing the Court of Appeal’s decision to compare job-sharing members to those on leave without pay for its reliance on a formalistic mirror comparator group (at paras 93-94). As we argued in favour of in [our post](#) on *Fraser* in the Court of Appeal, Justice Abella found that another appropriate comparator was full-time members with full pension benefits. Seen in this light, pension buy-back rights are the means to gain “meaningful access” to a benefit enjoyed by a group of members who are primarily male (at para 95). This did not mean that a comparison with members who were on temporary leave with pay was irrelevant, but that a comparison to this group alone was insufficient. The 2018 pay equity cases provided support for this approach, as did the Supreme Court’s 2012 human rights decision in *Moore v British Columbia (Education)*, [2012 SCC 61 \(CanLII\)](#).

Justice Abella then focused more directly on the requirements of step 1 of the test for discrimination and found that the evidence established an adverse distinction based on protected grounds. The statistical evidence noted above showed that it was primarily women with young children who job shared (at para 97), and evidence as to the situation of this group showed the disadvantages they have faced over many decades, including in the police force (at paras 98-105, citing numerous reports, literature, case law, and international commitments). Justice Abella concluded that the evidence showed a “clear association” between gender and the adverse consequences of the pension rules – or put another way, “the RCMP’s use of a temporary reduction in working hours as a basis for imposing less favourable pension consequences has an adverse impact on women” (at para 106). Notably, there was no need for the claimants to prove that they were worse off than employees on leave without pay in the context of their overall employment benefits, which was the focus of the Federal Court decisions and the dissenting reasons of Justices Brown and Rowe.

At step 2, Justice Abella had “no doubt” that the adverse impact found at step 1 perpetuated a “long-standing source of disadvantage to women” – namely gender bias in pension plans (at para

108). Again, she cited a range of reports, literature, and international commentary establishing that women face disadvantage in pension coverage and benefit levels, which is connected to the feminization of poverty (at paras 109-113). Her conclusion repeated that the RCMP's Pension Plan "perpetuates a long-standing source of economic disadvantage for women" and thus step 2 of the test for discrimination had been satisfied by the claimants (at para 113).

Intersectionality

Based on the 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 (at para 114). Neither family status nor parental status have been recognized as analogous grounds under section 15 of the *Charter* by a majority of the Supreme Court, and Justice Abella held that this was not the right case to consider either, based on a lack of submissions and evidentiary record (at para 117-123). 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 only (at para 115). While Justice Abella did not cite *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999 CanLII 687 \(SCC\)](#), [\[1999\] 2 SCR 203](#), her reasoning is consistent with the point in that case that analogous grounds are constant markers of discrimination (*Corbiere* at paras 8, 10).

We were disappointed that Justice Abella did not take the opportunity to formally recognize the intersecting grounds of discrimination at play, given the obvious overlap between sex and family/parental status in this case. We thought that the combined impact of these grounds would help distinguish *Fraser* from *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, [2007 SCC 27 \(CanLII\)](#) (*BC Health Services*), although no mention of that case was made in any of the reasons in *Fraser*. *BC Health Services* involved a claim by non-clinical health care workers, predominantly women, that the government's interference with their collective bargaining rights had an adverse impact based on sex, contrary to section 15 of the *Charter*. A majority of the Supreme Court held that the adverse effects of the legislation on these workers related essentially to the type of work they did and not the people they were (*BC Health Services* at para 165). In *Fraser*, the intersection of grounds helps to illuminate that the claim was not just about more women than men being affected by the Plan, but that they were affected in connection with their family status in a way that produced unique harms. This ties back to causation and evidence and helps us understand the connection between the qualitative and quantitative impacts of the Plan.

Although Justice Abella did explicitly note the importance of intersectionality (at paras 77, 123), she stated that "a robust intersectional analysis of gender and parenting ... can be carried out under the enumerated ground of sex" (at para 116). While this feels like progress, especially as compared to her decision in *Taypotat* (see our critique of the failure to examine the intersection between age and Indigeneity [here](#)), the very premise of intersectionality is the need to recognize more than one axis of oppression and understand the qualitatively different experience of inequality that can exist at the intersection of grounds (for a recent analysis, see Grace Ajele and Jena McGill, [Intersectionality in Law and Legal Contexts](#) (Women's Legal Education and Action Fund, 2020)). Some of this analysis is brought out in Justice Abella's reasons in *Fraser*, but in an informal rather than grounds-centred way. And other intersections are only hinted at, such as

those “appreciative of the variations in intimate relationships” (at para 122). There is nothing said about the intersections between sex, race or Indigeneity, and different forms of family that may connect to systemic income inequality and poverty (though in fairness there was no evidence on these other intersections).

Justice Abella’s reference to the “uncertainty and controversy” about family status discrimination in the human rights arena, which she provided as another reason for avoiding this issue (at para 118), is also a disappointing rationale, given that the Court denied leave to appeal in a case where they had an opportunity to clarify this area (see *Brian Suen v Envirocon Environmental Services*, [2019 CanLII 73206 \(SCC\)](#)). This argument – which appears to be based on fears about the scope of the duty to accommodate in the human rights context – is accompanied by a concern about how a ruling in favour of family status would affect the equality claims of fathers (at para 120). Both are floodgates rationales and are not particularly persuasive.

On the other hand, there is something to be said for Justice Abella’s approach whereby the ground of sex does encompass intersecting inequalities based on family status for women, which leaves open possibilities to argue sex discrimination as it intersects with other, as yet unrecognized, grounds (such as poverty) in the future. Justice Côté did not agree that the ground of sex could do the job in *Fraser* though, as we will discuss below.

Section 1 and Remedy

On section 1, Justice Abella’s reasons were brief (at paras 125-129). She found that the government had offered no pressing and substantial objective for justifying the claimants’ lack of access to full pension benefits. Indeed, “this limitation is entirely detached from the purposes of both the job-sharing scheme and the buy-back provisions, which were intended to ameliorate the position of female RCMP members who take leave to care for their children” (at para 126) – also suggesting the Plan’s lack of rational connection to the overall objectives of allowing job-sharing. The appropriate remedy was a declaration that the government had violated the claimants’ section 15 rights, with the specific method for allowing a buy-back of pension benefits left to government with the stipulation that it be made retroactive “to give the claimants in this case and others in their position a meaningful remedy” (at para 138).

There was not much of an argument by the federal government on section 1, despite the fact they bore the burden of proof on justifying the breach. The entire justification argument took up only nine paragraphs in the [Respondent’s Factum on Appeal](#) (at paras 105-113). The only pressing and substantial objective identified was one for the Plan as a whole, i.e. “to provide retirement income and benefits for its members” (Respondent’s Factum at para 105). The challenged provisions are described but their exclusions are not justified. Perhaps the ease of the government’s wins on step 1 of the section 15 arguments in the Federal Court and the Federal Court of Appeal, buttressed by the lack of successful *Charter* adverse effects claims since the late 1990s, led to the government paying less attention to justifying a breach. But their thin justification argument does reinforce the perception that the government had no good reason for its discriminatory treatment of job-sharing RCMP members.

The very brief section 1 analysis by both Justice Abella and the federal government prompts us to note the points raised by Sonia Lawrence in “[Thinking about Fraser v. Canada \(Attorney General\), 2020 SCC 28](#)” (The Institute for Feminist Legal Studies at Osgoode, 2 Nov 2020). Although very few section 15 violations have been saved by section 1 to date, she queries whether an increase in successful adverse effects claims may well see a greater role for section 1 in the future. As we will discuss next, Justices Brown and Rowe complained that pushing the bulk of the analysis into section 1 means that courts will have to evaluate policy, something they suggested courts are ill-equipped to deal with (at para 223).

The Dissents

Justices Brown and Rowe

As we have already noted, it is far too common for tests, rules, principles, and holdings in previous Supreme Court section 15 decisions to be left standing rather than be explicitly overruled when the Court’s later decisions do overrule the law that the earlier cases relied upon. For example, it took lower courts and counsel at least two years after a new test for section 15 was set out in *R v Kapp*, [2008 SCC 41 \(CanLII\)](#) to stop using the previous test from *Law v Canada*. See our “[Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-Kapp](#)” (2010) 47(4) Alta L Rev 927.

The dissent of Justices Brown and Rowe takes full advantage of the mixed signals sent by this lack of forthrightness and explicitness – and goes further.

To begin, their dissent includes a phrase in the test for discrimination that adds “arbitrariness” back into the test used by Justice Abella and it does so by reverting to the articulation of the test set out in *Taypotat*. They explicitly add arbitrariness back in when they explain their notion of “substantive discrimination” (at paras 191, 192) and complain about Justice Abella removing arbitrariness (at para 195). At step 2, Justices Brown and Rowe ask whether the law fails “to respond to the actual capacities and needs of the group and instead impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating their disadvantage?” (at para 169, emphasis added to highlight the added phrase). This addition, rejected by the majority in *Alliance*, is what prompted Justice Abella to castigate her colleagues “who tug at the strands of a prior decision they disagree with in search of the occasional phrase or paragraph by which they can unravel the precedent” (at para 133) and to demand from them more respect for the decisions of the Court (at para 135).

On the issue of linking the adverse distinction to protected grounds, Justices Brown and Rowe agreed with the majority that the comparison between full-time RCMP officers and those in job-sharing arrangements showed a distinction based on sex (at para 185). However, moving to step 2, they found that this distinction was not discriminatory because it was not arbitrary or wrongful – it simply related to the hours worked by these different groups of workers (at paras 191-193, 198). The need for a claimant to prove that a distinction is arbitrary was implicitly overruled by Justice Abella in her articulation of the section 15 test in the pay equity cases and explicitly overruled in *Fraser*, as noted above (at para 80). Nevertheless, and reminiscent of *BC Health Services*, Justices Brown and Rowe seem to be saying that the only relevant distinction between

these workers, or the real basis for the lack of benefits, related to their employment status rather than sex. This analysis shows the problems with an arbitrariness requirement under section 15 – the government would never be called upon to explain why it could not extend full pension rights to job sharing employees, apparently at no cost to itself.

Furthermore, in language evoking *Symes v Canada*, [1993 CanLII 55 \(SCC\)](#), [1993] 4 SCR 695, Justices Brown and Rowe stated that “any disadvantage the appellants face is 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” (at para 215, emphasis added). In doing so, they seem to retreat from their earlier statement that “contribution” to disadvantage is the measure of causation (at paras 175, 180-181). It is unclear if they are in disagreement with Justice Abella or contradicting themselves on this point.

Like the Federal Court of Appeal, Justices Brown and Rowe also relied on the point made in *Withler* that courts should look at the larger benefit scheme and whether it is ameliorative as a factor relevant to whether there is discrimination (at paras 148, 151, 196). They even complained that Justice Abella was not being “faithful” to *Withler* because she did not examine the context of the entire pension scheme (at para 151). Justice Abella did not comment on this factor from *Withler* in her judgment – an admittedly odd omission in a pension case – but she did hold that an ameliorative purpose is not enough to protect a law from scrutiny under section 15 in both *Fraser* (at para 69) and the two pay equity cases (*Centrale* at paras 8 and 35; *Alliance* at paras 32-33).

The government’s ameliorative purpose plays a large role in the dissent of Justices Brown and Rowe. This is tied to the perspective they adopted throughout their judgment, which is never that of the claimants. It is also connected to their insistence that any amelioration, no matter how sufficient, is enough to decide that there is no breach of section 15 (at paras 168, 177). This approach is also consistent with their re-insertion of responding “to the actual capacities and needs of the group” into the test for a breach (at para 169), a clause that they relied on heavily in their analysis of step 2 (at paras 189, 198). As long as the government tries to be accommodating (for example, by adding job-sharing as an option for its members), that is enough (at para 228); section 1 with its burden of proof on the government is not needed. Indeed, Justices Brown and Rowe injected a number of section 1 considerations into section 15, not only regarding amelioration and the government’s purpose, but also in subtler ways – as with their talk of the “public good” (at para 178).

Not only is an ameliorative purpose enough avoid a breach of section 15 as far as this dissent is concerned, but as long as the government acts with benevolent intentions, it may do so incrementally (at para 177). That is because, for Justices Brown and Rowe, the government need not act at all; there is no positive obligation on the government to address systemic discrimination (at paras 177, 210, 212). Positive and negative rights had been thoroughly canvassed in the dissenting opinion in *Alliance* (Justices Côté, Brown and Rowe), where they asserted “*Charter* rights are fundamentally negative in that they preclude the state from acting in ways that would impair them” (*Alliance* at para 65).

However, it is the attack of Justices Brown and Rowe on substantive equality and the apparent desire to overturn all of the Court's section 15 decisions since the first – *Andrews* – in 1989 that is the most stunning feature of this dissent in *Fraser*. As Justice Abella notes:

And, above all, they continue their insistent attack on the foundational premise of this Court's s. 15 jurisprudence — substantive equality — in favour of a formalistic approach that embraces “a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation” (at para 134, citing *R v Turpin*, [1989 CanLII 98 \(SCC\)](#), [\[1989\] 1 SCR 1296](#) at 1332).

Once again we see, as we did in the pay equity cases, a different vision of the role of the state articulated by the majority and by Justices Brown and Rowe. Their dissenting vision is put forward more aggressively in *Fraser* (at para 181). Their understanding of *Charter* rights is a negative one, their conception of equality is one of formal equality, and they are content with an incremental approach to equality. Collectively, these are characteristic of a political ideology at odds with any vision of substantive equality.

This is made evident, for example, when Justices Brown and Rowe insist that the government which enacted the impugned law must be the cause of the claimants' disadvantage, an insistence that, if made law, would make it impossible to successfully advance claims to remedy systemic discrimination. In one of the most startling sentences in their dissent, they proclaim that imposing positive obligations on the state “would also represent an undisciplined judicial expansion of the scope of s. 15, which does not apply to private acts of discrimination, because it would render the state responsible for discrimination it has not caused” (at para 181, emphasis added; see also para 224).

In other words, in their opinion systemic and institutional discrimination is “just the way things are; some things will never change” (Bruce Hornsby, “[The Way It Is](#)”). It is not caused by the government and so the government need not do anything about it.

This desire to overturn a 31-year commitment to the goal of substantive equality is emphasized when Justices Brown and Rowe later talk about private property in their discussion of what they call “substantive discrimination” (at para 190). They note that our laws maintain gender inequalities in the ownership and control of private property. They fail to note these inequalities were caused in great part by the common law doctrines of coverture and marital unity that gave (some) men an 800-year head start in the accumulation of wealth (Timothy Stretton & Krista J Kesselring, *Married Women and the Law: Coverture in England and the Common Law World* (Montreal: McGill-Queen's University Press, 2013)) that ended only with statutes such as Alberta's *Married Women's Act*, [RSA 2000, c M-6](#) (which was only repealed in 2018). According to Justices Brown and Rowe, securities and property laws which treat men and women equally are fine – an indication of their commitment to formal equality (at para 190; see also para 152). But they later admit that, while incremental changes are enough when the inequality arises from factors in society, “where the government itself has caused the inequality, matters are ... somewhat different” (at para 207). How they are “somewhat different” is not discussed, perhaps because they do not see private property and gendered inequalities in wealth

through the accumulation of private property as an excellent example of the state causing the inequality.

The fractious tone adopted in the dissents in the pay equity cases – a tone that that we noted in [“Equality Rights and Pay Equity: Déjà Vu in the Supreme Court of Canada”](#) (2019) 15 JL & Equality 1 – continues in the dissent of Justices Brown and Rowe in *Fraser*, as Sonia Lawrence also discusses in [Thinking about Fraser](#).

Justice Côté

Justice Côté’s dissent is much shorter and narrower than that of Justices Brown and Rowe. She did not agree that the ground of sex was the relevant one in *Fraser*. Justice Côté reasoned that although it was predominantly women with children who job-shared, not only women have child-care responsibilities, so the key focus was caregiving, parental, or family status rather than sex (at paras 234-235, 242). She relied heavily on the language of “based on” in the test for discrimination and on the need for evidence demonstrating a causal or necessary link between the adverse distinction and the ground in question (at paras 235, 242-243). Finding that the disproportionate impact 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 an analogous ground under section 15, and would have dismissed the claim on that basis (at para 238).

This dissent is in many ways the opposite of Justice Abella’s judgment. By focusing on caregiving, parental or family status as the only relevant grounds, Justice Côté failed to see the intersection between caregiving and sex. She minimized the statistics showing the disproportionate number of women affected by the Plan, seeing this evidence as insufficient (at para 244), but then failed to attend to the broader systemic evidence cited by the majority drawing the link between women’s economic inequalities and their child-care responsibilities. She also failed to recognize the inextricable links between family status and sex given the social construction of caregiving. Justice Côté actually opens her judgment with the statement that “like race, sex is an innate and immutable characteristic” (at para 231), seemingly ignoring decades of research about the social constructions of these identities.

Justice Côté’s mention of fathers in same-sex relationships with caregiving responsibilities (at para 236) does take us out of the heteronormative familial context, but it reinforces the (hopefully formerly) persistent problem in adverse effects cases that all members of a group need to be treated the same in order to prove discrimination. Her use of pregnancy as a contrasting example of something that (unlike caregiving) happens only to women (at para 242) also fails to recognize that non-binary people and trans men can become pregnant, and exacerbates the “everyone in the group treated the same” problem.

Conclusion

Although it may become a landmark case in section 15 jurisprudence, *Fraser* was an easy case on its facts. There was no evidence that extending full pension benefits to job-sharing members through a buy-back option in which members contributed both the employee and employer’s

shares of pension contributions – the option that those on leave without pay had on their return to work – would cost the government anything. In addition, the number of RCMP members who would be affected was likely very small; in May of 2014, only 29 out of a total of 18,391 regular members across Canada were working part-time (Appellants’ Factum at para 20). Indeed, it is difficult to understand why the federal government fought this case all the way to the Supreme Court, especially a government that prides itself on being “feminist” and is committed to using a [Gender-Based Analysis Plus](#) (GBA+) to advance gender equality. Even if the government is only committed to “incremental change”, it has been over 30 years since job-sharing was introduced, which is more than a generation of RCMP members.

It will be important to track whether future cases with a price tag for government, or with different kinds of adverse effects discrimination at play, will pose more problems for the courts. It has been difficult for the courts to get section 15 right.

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