



LITIGATING EQUALITY IN CANADA - Friday May 26, 2023

SYMPOSIUM AGENDA

Time (EDT)	Panel	Speakers	Notes
8:30 – 9:00am	Light breakfast and Registration for in-person attendees		
9:00 – 9:10am	Opening remarks: Cheryl Milne and Sophia Moreau		
9:10 – 10:30am	Intervening for Equality	<ul style="list-style-type: none"> • Pam Hrick • Raji Mangat • Jessica Orkin • Adriel Weaver Moderator: Kat Owens	The panelists will discuss the impact that interventions have had in equality litigation and the tensions that exist in respect of the role of interveners viz-à-viz the court and each other.
10:30 – 10:45am	Break		
10:45 – 11:45am	Breaking through the Barriers	<ul style="list-style-type: none"> • Mary Eberts • Fay Faraday • Cheryl Milne • Caitlin Salvino Moderator: Kim Stanton	The panelists will discuss litigation strategies and practical recommendations to overcome the hurdles faced by equality seeking claimants including the doctrine, evidentiary burdens and judicial reluctance.
11:45am – 12:45pm	Seeking Transformation	<ul style="list-style-type: none"> • Jennifer Koshan • Kerri Froc • Margot Young Moderator: Cheryl Milne	The panelists will discuss the possibilities and impossibilities of litigation seeking transformative substantive equality in the face of ideological disagreements, “zombie concepts” and status quo thinking within the revolving equality jurisprudence.
12:45-1:30pm	Lunch		
1:30 – 2:30pm	Risks of Erasure	<ul style="list-style-type: none"> • Colleen Sheppard • Amit Singh • Benjamin Neil Perryman Moderator: Sophia Moreau	This Panel will consider what our current frameworks —both in discrimination law and under s.15— risk erasing or making invisible: the structural dimension of inequality; intentional “discrete interaction” discrimination; and the role of the judiciary in sustaining evidentiary barriers.

2:30 – 3:30pm	Case Comments panel: Lessons learned and Models for the Future	<ul style="list-style-type: none"> • Abdalla Barqawi • Marion Sandilands • Anthony Sangiuliano • Jonathan Thompson Moderator: Cheryl Milne	This panel will examine a number of recent judgments, including: a class action case that demonstrates the multiple overlapping sources of evidence used to prove discrimination; Justice Miller's Dissent in <i>Sharma</i> and its implications for the future; and, <i>Fraser</i> , seen as a model for future Crown prosecutions.
3:30 – 3:45pm	Break		
3:45 – 4:45pm	Assessing the Past, Shaping the Future	<ul style="list-style-type: none"> • Hon. Justice Kathryn Feldman • Hon. Justice Lynn Smith • Cheryl Milne Moderator: Justice Feldman (Sophia Moreau to introduce)	Justice Feldman moderating a conversation with Hon. Lynn Smith and Asper Centre Executive Director, Cheryl Milne reflecting on the status and future of equality rights litigation in Canada.
4:45 - 5:00pm	Closing remarks: Cheryl Milne and Sophia Moreau		

SPEAKERS' BIOS & ABSTRACTS

INTERVENING FOR EQUALITY PANEL (9:10 to 10:30am in J140)

Pam Hrick & Kat Owens

Advancing Equality Outside the Four Corners of Section 15

Despite the centrality of s. 15 of the Canadian Charter of Rights and Freedoms to equality litigation in Canada, cases regularly arise with significant equality rights dimensions, but no s. 15 claim. In some cases, the government may rely on the notwithstanding clause under s. 33 of the Charter to override Charter rights, including equality rights under s. 15. In others, a litigant may make a strategic choice not to pursue a s. 15 claim, and instead focus on a different Charter provision. Finally, the case may simply not arise under the Charter. It may instead address questions of statutory interpretation, evidence, or judicial discretion. This paper provides three case studies of LEAF interventions arising in these circumstances. Each case study looks at the context for the case, why s. 15 was not directly engaged, and the strategy LEAF pursued to advance substantive equality in the absence of a direct challenge under s. 15. Where the Court has rendered a decision, the case study also assesses the overall success of LEAF's approach. Through these case studies, we hope to illustrate potential strategies for equality rights litigation outside of s. 15 claims and raise questions for future consideration.

Pam Hrick is the Executive Director & General Counsel of the Women's Legal Education and Action Fund (LEAF). She provides leadership, expertise, support, and direction to LEAF's work on litigation, law reform, and public education to advance the substantive equality of women, girls, trans, and non-binary people. Pam joined LEAF from Stockwoods LLP, where she practiced law for several years. She previously clerked for the Hon. Justice Thomas A. Cromwell at the Supreme Court of Canada and the Hon. Justice David Stratas at the Federal Court of Appeal. Before commencing her legal career, Pam also served as the Legislative Advisor and Issues Manager to the Attorney General of Ontario. Pam has been an active volunteer in the legal community and broader community, including serving as the Chair of the Board of Management of The 519, a city organization that advocates for the inclusion of 2SLGBTQ+ communities.

Kat Owens is the project director for LEAF's Reproductive Justice Project. Her work focuses on using law reform to advance reproductive justice in Canada, particularly through LEAF's branches. She also contributes to the development and management of LEAF litigation. Prior to joining LEAF, Kat worked as a staff lawyer at the Long-Term Care Homes Public Inquiry, and as an Assistant Crown Attorney at College Park. She holds law degrees from the University of Toronto and New York University.

Raji Mangat

Appellate Court Interventions Experience

The test for obtaining intervener status in cases raising questions of public interest has largely remained unchanged for many decades, across jurisdictions and courts. The role of the intervener is widely understood to be bounded, as appropriate; interveners must have something useful to contribute to the adjudication of the issues before the court, without being duplicative of the parties' or one another's submissions, and without expanding the *lis* between the parties. At appellate courts, where the vast majority of interventions take place, an intervener is expected to be a respectful and responsible camper: tread lightly and keep your supplies to a minimum, bring in only what you need and can use, and don't leave anything behind. Keep your campsite tidy and you may be invited to return.

While the test for intervener status and its underlying principles have remained somewhat constant, interveners proposing to intervene to provide insight on how equality interests are engaged – directly or indirectly - are occasionally on shaky ground in the application of those principles. Intervenors raising equality arguments are rightly called upon to adhere to the bounds of the role but are doing so in contexts that can raise unique challenges. Situating legal analysis of substantive equality rights in understanding lived and living experiences of inequities is leaving yourself open to being characterized as initiating a “commission of inquiry”. This is so even as challenged laws, policies and government actions are increasingly shaped by – and in turn themselves shape – complex and evolving social realities.

This paper will examine the experience of raising equality arguments in interventions before provincial courts of appeal, drawing on experiences at the BC Court of Appeal, Federal Court of Appeal and the Ontario Court of Appeal. The experience of organizations advancing equality arguments has been inconsistent as of late. This raises important questions to grapple with, including how courts understand the role of interveners and the “public interest”, courts' acceptance and understanding of legislative fact evidence, and an evolving appreciation of what impact interventions can have in this context.

Raji Mangat (she/her) is the executive director of West Coast LEAF, a legal non-profit organization based on unceded homelands of the Musqueam, Squamish and Tseil-Waututh Nations (Vancouver). Raji's recent work has focused on access to justice for survivors of gender-based violence, reform to the child welfare / family policing system, and the impacts of carceral systems on women, trans people of all genders and gender non-binary people. Raji holds a law degree from the University of Victoria. She is called to the bar in Ontario, New York State and British Columbia. In her spare time, she is an aspiring potter and serves on the boards of the Vancouver Public Library and Health Justice.

Jessica Orkin & Adriel Weaver

Abstract forthcoming (paper focused on Asper Centre & LEAF's Intervention in R v Sharma)

Jessica Orkin is a partner at Goldblatt Partners LLP in Toronto and leads the firm's Aboriginal law practice. She has a broad litigation practice including criminal, civil and administrative law matters, with an emphasis on constitutional, Aboriginal rights and access to information law matters. In her Aboriginal law practice, Jessica provides legal and strategic advice and advocacy to Indigenous governments, communities, organizations and individuals to advance and protect their rights and interests in interactions with governments, industry, the justice system and civil society. Jessica has particular expertise in relation to expressive and protest rights, including those of Indigenous individuals in the context of land and resource disputes. She also has a particular interest in systemic issues relating to the overrepresentation of Indigenous individuals within the criminal justice and carceral systems. Jessica appears at all levels of court, including the Court of Appeal for Ontario and the Supreme Court of Canada.

She has been recognized by Best Lawyers in Canada in the categories of Aboriginal law and Administrative & Public Law, and by Lexpert in the category of Aboriginal law. Jessica was the Asper Centre Constitutional-Litigator-in-Residence for fall 2022, and was co-counsel with Adriel Weaver for Asper Centre and LEAF, Interveners in *R v Sharma*.

Adriel Weaver is a public law litigator at Goldblatt Partners LLP. Her clients include criminal accused, prisoners, immigration detainees, constitutional and human rights claimants, and community and public interest organizations. Much of her work focuses on defending and advancing prisoners' rights and seeking to address various forms of systemic discrimination in the criminal legal system. Adriel also represents unions and professional associations in the education and health care sectors, and while she's not sure she'll ever get used to making submissions sitting down, she is enjoying her growing labour arbitration practice. Since 2016, Adriel has been an adjunct professor at the Centre for Criminology and Sociolegal Studies at the University of Toronto, where she teaches a variety of courses including Criminal Law, Indigenous Law, National Security and Criminal Justice, Prosecution Process, and Punishment: Theory and Practice (undergraduate) and Indigenous Peoples, Law and Gladue (graduate). She also serves as the Chair of the Board of PASAN, a member of the Board and Chair of the Law Program Committee of LEAF, and a member of the Board of the Wellesley Institute. Adriel was co-counsel with Jessica Orkin for Asper Centre and LEAF, Interveners in *R v Sharma*.

BREAKING THROUGH THE BARRIERS PANEL (10:45 to 11:45am in J140)

Mary Eberts & Kim Stanton

Abstract forthcoming.

Mary Eberts was involved in the framing of the language of section 15 and is a co-founder of LEAF (Women's Legal & Education Action Fund). She has litigated cases involving section 15 and other Charter provisions before the SCC and other appellate courts in Canada.

Dr. Kim Stanton is a lawyer, a former legal director of the Women's Legal Education and Action Fund (LEAF), and a senior fellow of Massey College at the University of Toronto. Her legal practice has focused on equality, constitutional and Aboriginal law, and gender-based violence. Her book *Reconciling Truths: Reimagining Public Inquiries in Canada* (UBC Press, 2022) was shortlisted for the Writers' Trust Balsillie Prize for Public Policy. She was a Commissioner on the Mass Casualty Commission (the joint federal/provincial inquiry into the April 2020 Nova Scotia mass casualty), which issued its final report in March 2023.

Fay Faraday

This is Not a Test: A Reality Check on Equality

It is not possible to find coherence in the s. 15 jurisprudence because it's not about the s.15 test. It has never been about the s. 15 test. The challenge for equality litigation is to focus on reality. But Charter claimants, respondents, and adjudicators for the most part live in distinct hermetically sealed realities. As a result, every equality case litigated requires claimants to excavate suppressed histories of oppression and challenge received public truths that inequality is aberrant. Beyond, this, to ensure that s. 15 remains viable and relevant for future generations, it is urgent to centre the intellectual lineage of those silenced under white supremacy.

Fay Faraday is an Associate Professor at Osgoode Hall Law School and a labour, human rights and constitutional lawyer based in Toronto. She is the founder of FARADAY LAW. Fay has litigated many leading human rights and constitutional cases at the Supreme Court of Canada and has published extensively on substantive equality. For three decades, she has supported community organizing for migrant worker rights, equality rights and racial justice. Fay's teaching and research focus on social and economic rights, labour, human rights, migrant worker rights, constitutional law, intersectional feminism, gender and racial justice, poverty law and movement building.

Cheryl Milne & Caitlin Salvino

Analysing the Treatment of Competing Charter Claims at Courts of First Instance: Judicial Restraint and the Curious Case of Section 15

In *Canadian Council for Refugees v Canada*, a case challenging the constitutionality of Canada's Safe Third Country Agreement with the United States, a Federal Court judge declined to rule on the section 15 equality rights claim after finding that the impugned provisions unjustifiably infringed section 7 of the Charter. On appeal, the Federal Court of Appeal overturned the lower court's finding on section 7 and declined to rule on section 15 because there were no findings of fact at the court of first instance. Using the Federal Court's decision in *Canadian Council for Refugees* as a starting point, this article analyses the larger jurisprudential issue of judicial restraint in the context of multiple Charter claims. Our analysis centres on cases at the Supreme Court of Canada and courts of first instance where section 15 is raised in conjunction with one or multiple other Charter rights claims. After conducting a systematic review of such cases between 2012 and 2022, we argue that courts of first instance should rule on all Charter claims that are raised and supported by an extensive evidentiary record. Our argument builds on and adds nuance to the existing principle of judicial restraint that currently provides no jurisprudential guidance on intra-Charter rights claims. Our argument is three-fold. First, the principle of judicial restraint should not constrain a lower court from addressing Charter claims placed before it. Second, a purposive interpretation of both the Charter and section 15 requires the courts of first instance to rule on raised equality rights claims. Third, interests of judicial economy require courts of first instance to fulfil their fact-finding role and make rulings on all Charter rights raised by the parties. Finally, these arguments also resonate when analysing the impact of the Supreme Court of Canada's approach to declining to consider equality rights claims.

Cheryl Milne is the Executive Director of the Asper Centre, and teaches a clinical course in constitutional advocacy, and Children, Youth and the Law at the University of Toronto, Faculty of Law. Prior to coming to the Centre, Ms. Milne was a legal advocate for children with the legal clinic Justice for Children and Youth where she led the clinic's Charter litigation. She was the Chair of the Ontario Bar Association's Constitutional, Civil Liberties and Human Rights section, and the Chair of the Canadian Coalition for the Rights of Children and Justice Children and Youth. She is a member of the Steering Committee of the National Association for Women and the Law (NAWL) and the Child and Youth Law Section Executive of the Canadian Bar Association. In 2018 she received the Law Society Medal from the Law Society of Ontario for her contributions to the profession through her child rights advocacy and legal education.

Caitlin Salvino is an incoming third-year law student at the University of Toronto and Junior Fellow at Massey College. After completing a B.A. in Human Rights and Transnational Law at Carleton University, she completed an MPhil and PhD (DPhil) in Law at the University of Oxford, where she studied as a Rhodes Scholar (Ontario, 2018). Her graduate research, supervised by Professor Kate O'Regan, focused on developing a new interpretative approach to Canada's notwithstanding clause. In recognition of her national advocacy work on gender equity and disability rights, she received the 2022 Governor General's Award in Commemoration of the Persons Case and the 2023 Right Honourable Adrienne Clarkson Laureateship for Public Service.

SEEKING TRANSFORMATION PANEL (11:45am to 12:45pm in J140)

Jennifer Koshan & Jonnette Watson Hamilton

"Clarifications" or "Wholesale Revisions"? The Last Five Years of Equality Jurisprudence at the Supreme Court of Canada

Over the past five years, the Supreme Court of Canada's equality jurisprudence under the Canadian Charter of Rights and Freedoms has revealed deep disagreements within the Court. This paper will review the six decisions that comprise that jurisprudence, drawing out the major points of contention on the role of substantive equality, the test for section 15(1), adverse effects discrimination, causation, positive obligations, and contextualization. Our argument is that while the section 15 majorities in the first three decisions – Alliance, Centrale, and Fraser –

attempted to respond to the critiques of equality-seeking groups, these decisions could not paper over the profoundly ideological disagreements embedded in equality rights jurisprudence, particularly in cases of systemic discrimination. In light of the recent push-back by a significant proportion of the Court in *R v CP* and a majority in *Sharma*, we also discuss the implications of the six decisions for equality-promoting litigation strategies going forward.

Jennifer Koshan is a Professor in the Faculty of Law, University of Calgary, Canada. Her research and teaching focus on equality, human rights, legal responses to interpersonal violence, and access to justice. She has written, or co-authored with Jonnette Watson Hamilton, over a dozen papers on equality rights, several of which have been cited by the Supreme Court of Canada (most recently in *Fraser and Sharma*). She is also a founding member of the Women's Court of Canada, a shadow court that rewrites equality rights judgements from feminist perspectives. Jennifer also works with the Women's Legal Education and Action Fund (LEAF) and National Association of Women and the Law (NAWL) on equality rights and gender-based violence litigation and law reform.

Jonnette Watson Hamilton is a Professor Emerita, Law at the University of Calgary, Canada. Her research continues to focus on equality, residential tenancies, disability, and access to justice. She has published seventeen papers on equality rights, most of them co-authored with Jennifer Koshan and some of them cited by the Supreme Court of Canada.

Kerri Froc

Are You Serious? Litigating Section 28 to Defeat the Notwithstanding Clause

Until recently, judges perceived the invocation of section 28 of the Canadian Charter of Rights and Freedoms in a litigant's pleadings as a marker of a lack of serious argumentation. Conventional wisdom was that section 28 was a token of political compromise and did not have any real work to do in Charter cases. Accordingly, feminist interveners dared to reference section 28 only as a "twin" to section 15, adding emphasis to a claim of sex discrimination under the latter but leaving the former without any distinct role in the constitutional analysis.

Various judicial and scholarly commentators noted in passing throughout the post-patriation years that section 28 likely prohibited the use of section 33 "notwithstanding clause" where the effect would be to permit a law that perpetuated sex discrimination or otherwise resulted in unequal rights between "male and female persons" to continue to operate. This purposive interpretation was supported by section 28's clear text ("notwithstanding anything") as well as its legislative history in which the framers and ratifiers very intentionally excluded it from the sections to which section 33 applied. These commentators' statements went unchallenged. Possibly this was due to the fact that no case ever squarely raised the issue. However, an alternate explanation was that the argument regarding section 28's effect on section 33 shielded courts from criticism for driving a written, entrenched constitutional provision into complete desuetude. Such criticism would, nevertheless, be warranted. A number of cases represent lost opportunities where section 28 was relevant and a muscular interpretation could have been called upon in service of women's equality, including *Newfoundland (Attorney General) v. N.A.P.E.*

With the invocation of section 33 in Quebec's 2019 "religious symbols" law (Bill 21) and the more frequent proposed and actual applications of the clause by populist governments across Canada, the notion that section 28 could effectively "block" the use of the notwithstanding clause has come under increased scrutiny. The Quebec Court of Appeal has reserved its decision in *Hak v Quebec*, the case challenging Bill 21 on the basis (among other things) that it denies Muslim women equal rights to freedom of religion contrary to section 28. Also, in response to my recent arguments regarding section 28's effect on section 33, a few other scholars have dismissed the idea that section 28 could have anything but symbolic significance. This paper addresses these critics and demonstrates that they rely on a misinterpretation of section 28 and section 33, as well as a misunderstanding of my argument regarding the role of history in constitutional interpretation. A principled interpretation of section 28 means that legislatures may not invoke section 33 to permit the continued operation of laws violating women's equal rights. Such argumentation is entirely serious, and litigators should fearlessly present it in the same way as other equality arguments that challenge "status quo" thinking that permits systems of oppression to remain intact.

Kerri Froc is an Associate Professor at the University of New Brunswick Faculty of Law, as well as a Trudeau and Vanier Scholar. She has taught courses at Carleton University, Queen's University and University of Ottawa on feminist legal theory and various aspects of public law, among others. Kerri received her PhD from Queen's University in 2016 and holds a Master of Laws from the University of Ottawa, a Bachelor of Laws from Osgoode Hall

Law School and a Bachelor of Arts from the University of Regina. Before completing her doctorate, she spent 18 years as a lawyer, as a civil litigator in Regina, a staff lawyer for the Women’s Legal Education and Action Fund (LEAF), and as a staff lawyer in the areas of law reform and equality at the Canadian Bar Association. She is a member of the Saskatchewan and New Brunswick bars.

Margot Young

The Haunting of Equality Law

The 2020 decision in *Fraser v Canada* was a welcome addition to equality rights jurisprudence: the arguments of female claimants and feminist legal scholars held centre stage for a solid judicial majority. Perhaps, many hoped, *Fraser* ushered in a new era of equality rights. Celebration, however, was fleeting; two years later with the 2022 release of *R v Sharma*, section 15 analysis was soundly off course again. Of course, what became the majority analysis in *Sharma* had been fermenting in the dissenting judgments of Justices Brown and Rowe in the most recent tranche of equality cases. But in *Sharma*, these two were joined by Wagner CJ, Moldaver and Côté JJ, converting a rump offensive into a significant majority victory, returning equality analysis to the dark ages of self-righteous formal equality and judicial politics masquerading as institutional restraint. Most offensively, this turnabout takes place in a case where the equality harms the claimant, an Indigenous woman, faces could not be starker: a toxic mix of racism, sexism, and the legacy of settler colonialism.

This paper engages with both the surface reasons of the majority judgment in *Sharma* and the underlying political concerns that animate the majority’s doctrinal turns. I identify a number of concepts—for example, acontextual equality, negative obligation, causation, merit, arbitrariness—that have long been condemned as destructive of substantive equality analysis. In *Sharma*, these concepts are yet again unearthed. These are the zombie concepts of equality law—notions that refuse to die. My analysis takes up ideas about “the disruptive paradox of zombii” as tactic for examining how these concepts—well and solidly condemned by judges and commentators alike—continue to stalk judicial text. The purpose of this examination is both to lambast, yet again, the Court for an equality analysis gone bad and, as well, to engage realistically with what we can, at best, expect from constitutional equality rights. The seeds of the majority judgment in *Sharma*, of the return of these zombie concepts, are well-planted in past equality cases, including *Fraser*. That they once again rise so strongly in a case where the equality harm at issue is so obvious—both individually and systemically—is not merely ironic. It is also deeply revealing of the challenges, maybe even the impossibility—of seeking transformative social justice through equality rights.

Margot Young is Professor in the Allard School of Law, University of British Columbia. She teaches and writes in the areas of constitutional law, equality law, and social justice issues such as housing rights and income inequality. She is currently Director of the Centre for Feminist Legal Studies at Allard Law. She is also Chair of the Board of Directors for the Suzuki Foundation and an active member of Justice for Girls. Professor Young is an International Visiting Professor in the School of Business, Economics and Law at the University of Gothenburg, Sweden.

RISKS OF ERASURE PANEL (1:30 to 2:30pm in P120)

Colleen Sheppard

Litigating Structural Inequality: Micro, Meso, & Macro Dynamics

Equality rights litigation, which often arises in response to specific individual claims, occurs within broader institutional and societal contexts of inequality. As such, while not a panacea for structural and intergenerational inequalities, equality cases have the potential to illuminate the individual, institutional, and societal -- or micro, meso, and macro dynamics of structural injustices. A multi-layered template for conceptualizing inequality provides a useful tool for understanding the dynamics of systemic discrimination and the harms of substantive inequality. It also provides a framework for examining both the strengths and the limits of equality rights litigation. In this regard, one recurrent shortcoming of the litigation process is the risk of erasure of the structural dimensions of inequality, and the resulting persistence of formal equality in the interpretation and application of equality rights. A commitment to substantive equality mitigates against this risk, to the extent that it informs the meaning of equality rights with a robust and contextual understanding of structural inequality and disparities of power. So too does an expansive definition of discrimination to include adverse impact and systemic discrimination. Finally, remedies aimed at

transforming the underlying causes of discrimination rather than simply its symptoms are also critical to redressing structural inequality. Drawing on recent Supreme Court case law, this paper examines some of the challenges and complexities of litigating structural inequality. While constrained by conceptual and juridical obstacles, I conclude that litigating structural inequality remains an important dimension of advancing social justice.

Colleen Sheppard is Professor of Law at the Faculty of Law, McGill University. She recently completed a term as Director of the McGill Centre for Human Rights and Legal Pluralism. She has an honours BA and LLB from the University of Toronto, an LL.M. from Harvard University and is a member of the Law Society of Upper Canada. Her teaching and research focus on systemic discrimination, equality rights, mental health in the workplace, Canadian and comparative constitutional law and feminist legal theory. A former law clerk to Chief Justice Brian Dickson, she has also been a visiting professor at Dalhousie Law School, the University of Maine School of Law, and the Institute of Comparative Law, Université Lyon III. In addition to her teaching and research, she has been active in public interest work. She served as a Commissioner on the Quebec Human Rights and Youth Rights Commission from 1991-1996 and has worked with the federal Department of Justice, the National Judicial Institute, the Canadian Human Rights Commission, the Truth and Reconciliation Commission of Canada, the Ontario Métis Aboriginal Association and the International Labour Organization. She was also on the Board of Directors of Equitas – International Centre for Human Rights Education, from 2006-2012. Professor Sheppard was elected a Fellow of the Royal Society of Canada's Academy of Social Sciences in September 2016.

Amit Singh

Intentional Discrimination after Etobicoke and O'Malley

Decades ago, the Supreme Court of Canada adopted a single, two-step test for all discrimination complaints under the human rights codes. This test no longer requires that the respondent acted on the basis of a discriminatory intention to be held liable. I call this the “conventional analysis.” In this paper, I argue that the conventional analysis cannot capture the distinctive logic of a class of cases that I call “discrete interactions.” In such cases, the complainant has a single, often brief interaction with the respondent. The complainant subsequently alleges that the interaction reveals an unspoken discriminatory intention. For example, the unsuccessful job candidate who is subjected to a subtly racist remark by her interviewer may be alerted to the possibility that race was a factor in the hiring process. In such cases, the complainant does not impugn any formal policy, practice, or rule. Deciding the respondent’s liability instead turns on whether the respondent had a discriminatory intention. This subtle form of discrimination remains commonplace today, though overt discrimination no longer is. The conventional analysis, however, makes the existence of a discriminatory intention unnecessary to holding the defendant liable. Moreover, no “bona fide requirement” defence is conceptually possible in discrete interaction cases. In toto, the conventional analysis is thus toothless to combat discrete interaction discrimination. Discrete interaction cases thus warrant a bespoke legal framework of their own. This paper sketches that framework, combining both existing jurisprudential resources and novel ideas to do so.

Amit Singh is an associate attorney at New York City commercial litigation boutique Holwell, Shuster & Goldberg LLP, Adjunct Professor at the Lincoln Alexander School of Law at the Toronto Metropolitan University, where he teaches in the 1L curriculum, and a Research Associate at the University of British Columbia’s Centre for Constitutional Law and Legal Studies. He maintains a robust pro bono practice focusing on employment discrimination in the airline industry, migrant rights, and criminal appeals. Amit is a J.D. graduate of the University of Toronto Faculty of Law, where he served as Editor-in-Chief of both the *Journal of Law & Equality* and the *Indigenous Law Journal* and won the Dean’s Cecil A. Wright Key, Justice Michael J. Moldaver Prize, and Private Law Writing Prize, amongst other honours. Before law school, Amit completed graduate and undergraduate degrees in philosophy. Amit’s published work appears in the *Canadian Journal of Law & Jurisprudence*, *McGill Law Journal*, *Osgoode Hall Law Journal*, *Oxford University Commonwealth Law Journal*, and more. He has presented his academic research at law schools in Australia, Belgium, Canada, Israel, UK, and US, including forums such as the Tel Aviv University Workshop for Junior Scholars in Law and the Cambridge Legal Theory Discussion Group.

Benjamin Neil Perryman

Proving Discrimination: Evidentiary Barriers and Section 15(1) of the Charter

Proving discrimination under section 15(1) of the Charter is increasingly challenging because of evidentiary barriers that are unique to such claims. This paper discusses three such evidentiary barriers: (1) the elevated and elusive test for discrimination, (2) the challenge of confronting causal comparison, and (3) the problem of filling evidentiary vacuums. These barriers have been elevated by the majority of the Supreme Court of Canada's recent decision in *R v Sharma*. The main claim of the paper is that these evidentiary barriers are judicially created and function to make proving discrimination claims more challenging than any other Charter right. As a result, litigants with the fewest resources face the biggest challenges to proving their claims and vindicating their equality rights. This raises serious questions about how the judiciary understands its role in promoting equality and about the potential for s. 15(1) of the Charter to deliver on its promise of substantive equality.

Benjamin Perryman is an Assistant Professor at the University of New Brunswick Faculty of Law. He holds an LLM (Yale), JD (Osgoode Hall), MDE (Development Economics) (Dalhousie), and BSc (UBC). He is a doctoral candidate at Yale Law School, where he was a Fulbright Scholar and Trudeau Scholar. His research focuses on the science of happiness and its contributions to constitutional adjudication in different countries. He also writes about law and politics. Before joining the Faculty of Law, Benjamin taught at the Schulich School of Law and Saint Mary's University, practised in the area of human rights law, and clerked at the Federal Court (Canada) and Supreme Court of Nova Scotia. Benjamin is a human rights adjudicator and is called to the bars of Ontario and Nova Scotia.

CASE COMMENTS PANEL (2:30-3:30pm in P120)

Marion Sandilands, Thomas Conway, Abdalla Barqawi, Joseph Rucci & Sarah Nixon

Litigating Equality in Ottawa's Taxi Industry: Metro Taxi et al v City of Ottawa

The taxi industry has undergone a seismic shift with the advent of app-based services. Participants in the taxi industry (drivers and taxi plate owners) are predominantly racialized and immigrants. Does this give rise to s. 15 obligations on the part of those who regulate the industry? In order to operate a taxi in Ottawa, one needs a city-issued taxi plate. Because the City issued only a limited number of taxi plates, taxi plates have a market value. In 2014, Uber began operating in Ottawa, and in 2016, the City changed its by-law to legalize Uber. That same year, taxi plate owners and brokers in the city of Ottawa brought a class action against the City. The class action was certified in 2018. The trial occurred in January and February 2023. The trial decision is pending. The plaintiffs brought evidence that taxi plate owners are disproportionately from racialized and immigrant groups that face a systemic disadvantage, and that these plate owners were harmed by the City's regulatory action. The paper canvases the arguments and evidence brought by the plaintiffs regarding the s. 15 claim.

Thomas Conway, Marion Sandilands, Abdalla Barqawi, and Joseph Rucci are lawyers at Conway Litigation, and were counsel for the plaintiff class. Sarah Nixon is a student at Conway Litigation.

Marion Sandilands is a partner at Conway Litigation. She is a graduate of McGill University and a former clerk at the Supreme Court of Canada. Her practice focuses on public, administrative and constitutional law. She appeared on the Asper Centre's "Charter a Course" podcast Season 2, Episode 2.

Thomas G. Conway is a founding partner at Conway Litigation. He is a former Treasurer of the Law Society of Ontario and President of the Federation of Law Societies of Canada. He is the lead counsel for the plaintiffs in this class action.

Abdalla Barqawi is an associate at Conway Litigation. He is a graduate of Osgoode Hall law school, where he was the recipient of numerous prizes. He is a former clerk at the Supreme Court of Canada.

Joseph Rucci is an associate at Conway Litigation. He is a graduate of McGill University, where he received the J.S.D. Tory Writing Award for excellence in legal writing and research. He was called to the Ontario bar in 2022.

Sarah Nixon is a recent graduate of McGill University Faculty of Law. In 2023, she will begin a judicial clerkship at the Court of Appeal for Ontario.

Anthony Sangiuliano

Finding Fault under Section 15 of the Charter: Justice Miller's Court of Appeal Dissent in Sharma

This comment will explain how Justice Miller's dissenting opinion for the Ontario Court of Appeal in *R. v. Sharma* develops an account of the purpose of section 15 of the Charter that supports a "demanding" view of the test for a violation of section 15. On this view, a Charter claimant must meet strict evidentiary standards and explain why a law is discriminatory notwithstanding the reasonableness of the legislative policy behind it. For Justice Miller, I suggest, this is the only way for a claimant to prove that the government has committed the wrong of discrimination that section 15 prohibits. I go on to suggest that, if we reject the assumption that section 15 aims to prohibit wrongful discrimination, we can endorse a "generous" view of the section 15 test that imposes fewer burdens on a Charter claimant.

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Jonathan Thompson

Prosecuting in the Public Interest After Fraser

Canadian constitutional jurisprudence is slowly beginning to reflect and adopt some of the foundational premises of critical race scholarship, including the proposition that purportedly neutral systems can nonetheless operate to produce and reproduce racial inequality. On the contrary, Canadian criminal law, being one such purportedly neutral system, has traditionally resisted the infiltration of Section 15 equality jurisprudence into its workings and has largely relegated considerations of equality to two discrete areas of criminal litigation: allegations of discriminatory police conduct, and attacks on the constitutionality of particular sentencing regimes. I argue that the Supreme Court of Canada's judgement in *Fraser v. Canada (Attorney General)*, read across the body of jurisprudence governing Crown conduct, has clearly created an enforceable imperative for prosecutors to recognize, consider and combat systemic racism in the criminal justice system.¹ Prosecutors are bound to discharge their duties in a manner consistent with the Charter. Prior to *Fraser* prosecutors were able to rely on the premise of formal, rather than substantive equality to ignore the downstream effects of racialized sentencing disparities and carceral overrepresentation. Yet the unrealized potential of Section 15 in the post-*Fraser* legal landscape lies in its untapped power to compel prosecutors to address adverse impact discrimination in their charge-screening decisions. Although the decision to prosecute remains a Crown prerogative, the legal recognition that prosecutors must exercise that prerogative in service of substantive equality represents a transformative shift towards achieving racial justice in Canada.

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The Honourable Lynn Smith, K.C.

Lynn Smith, B.A. (University of Calgary), LL.B. (University of British Columbia), LL.D. (Hon.) (Simon Fraser University) was appointed to the Supreme Court of British Columbia in 1998. She served as a Justice of that Court until her retirement in September 2012. Prior to her appointment as a judge, she practiced law at Shrum, Liddle and Heberton (now McCarthy Tétrault), specializing in civil litigation. She taught law at the University of British Columbia 1981-97 in areas including Constitutional Law, Evidence, Civil Litigation, and Real Property. She has published books and articles in the fields of Charter equality rights, civil litigation and evidence, human rights, administrative law, and women's equality. She was Dean of the U.B.C. Law Faculty 1991-97. At various times, she served on the Boards of the B.C. Civil Liberties Association, the Women's Legal Education and Action Fund and West Coast LEAF, the Vancouver Community Legal Assistance Society, the Law Foundation of British Columbia (for a term as its Chair), the Vancouver Foundation, B.C. Women's Hospital and Health Centre (as Chair), and Science World. In 2005-06, Lynn Smith was Executive Director of the National Judicial Institute, on secondment from the Court. She is a Judicial Associate of the National Judicial Institute and serves on the faculty of the Charter and Evidence Workshops as well as the New Federally Appointed Judges Program. She has been involved in international judicial education exchanges with China, Scotland, Ghana and Viet Nam. She is an Honorary Professor at the U.B.C. Faculty of Law.

The Honourable Kathryn N. Feldman

Justice Feldman received her B.A. from the University of Toronto in 1970 and her LL.B. from the University of Toronto, Faculty of Law in 1973, where she was co-editor of the University of Toronto Faculty of Law Review and recipient of the Dean's Key. Before her appointment, she was a partner at the law firm of Blake, Cassels & Graydon (now Blakes LL.P.) where she practiced in the areas of civil litigation and administrative law. Justice Feldman was appointed as a Justice of the Superior Court of Ontario on December 24, 1990, and sat on the Commercial List as well as on criminal and civil matters. She was appointed to the Court of Appeal for Ontario on June 11, 1998. Since her appointment to the Bench, Justice Feldman has participated in and chaired numerous continuing legal education programs for law students, lawyers and judges on a number of areas including bankruptcy, arbitration, employment law and appellate advocacy. In January 2001 she became the first recipient of the Canadian Superior Court Judges Association President's Award. As an alumna of the University of Toronto, she served on the Moss Scholarship Selection Committee for six years, three years as Chair, and is a recipient of the University of Toronto Arbor Award. In 2015, she was one of 50 women featured in the book, *Leading the Way: Canadian Women in the Law*, Julie Soloway and Emma Costante, 2015 Lexis-Nexis. In 2016 she was named by University College as an Alumna of Influence. She is currently a director of the Canadian Chapter of the International Women Judges Association.