Law v. Canada (Minister of Employment and Immigration)

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Author's Note

Initially, I saw the exercise of writing a judgment in *Law v. Canada (Minister of Employment and Immigration)* merely as an opportunity to convert some previous academic work[1] into a more ''practical'' form, partly to test how well my theoretical ideas about equality worked in dealing with the intricacies of a concrete case. Unlike many others involved in this enterprise, I have no prior involvement with the case, and I had no strong views about the correct outcome when I started. If anything, I thought that the Supreme Court of Canada had probably gotten the right answer. I was mainly concerned that the abstract test devised was not particularly illuminating and, for this reason, was open to abuse and obfuscation. I was also concerned that the widespread condemnation of the dignity element of the test laid out in *Law* has been too hasty and leaves us with no constructive avenue for engagement with the jurisprudence. I wanted to take a stab at giving more content to the idea of human dignity in a manner consistent with the art of judicial decision making. (I am not sure I was entirely successful at this latter objective—I fear that you may be able to take the girl out of the academy, but you cannot entirely take the academy out of the girl.)

In a word, I thought this was going to be a breeze. It was anything but, and I have both gained greater appreciation for the judicial enterprise and, I think, made my own views about equality more precise in the effort to grapple with Law. Writing the judgment has been a profound learning experience—both my understanding of the issues in the case and aspects of my general account of equality changed in the process. Bringing together theory and application deepened my understanding of each. Above all, writing this judgment has illustrated to me once again the truth of the feminist claim that taking gender into account makes a difference in the analysis of legal issues. I initially did not have much sympathy for Nancy Law's claim. Yet, this being the Women's Court of Canada, it seemed appropriate to consider the equality
claim not only through the lens of age but also in light of the gender dynamics operating behind the scenes. For me, this transformed almost verything about the analysis of the concrete facts. I hope the demonstration f this transformation is evident to others.

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1. ''Discrimination and Dignity,'' reprinted in Fay Faraday *et al*., eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 123.

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The desire to deal with the gender implications of the age limitation on eligibility for the *Canada Pension Plan* survivor benefit introduces what some might think is an element of artificiality into the judgment. It means dealing with an argument that was never put to the lower courts and requires introducing new empirical material that was not before the courts. I have tried to mitigate the artificiality by drawing only on material that is publicly available through sources such as Statistics Canada. This raises a more profound issue, however. I do not know why counsel decided to argue the case exclusively on age grounds—perhaps way back in the early nineties they thought that the explicit use of an enumerated ground of discrimination was bound to be struck down. As it turned out, equality doctrine was a moving target all through the period during which the case moved through the system. Under these circumstances, it strikes me as unfair and unwise to stick closely to the original arguments when so much has changed in the interim. It also struck me as something of an abdication of responsibility not to go into the sex discrimination dimension of the case simply because the claim had not been seen in that light when the design of the survivor pension is so much bound up with the gendered conditions that govern women's financial security. So I have taken some license to allow the Women's Court of Canada to look more broadly at the issues raised by the case.

Given the symbolic status that Law has, both because the Supreme Court of Canada was intending to impose order on the doctrine and because of the influence of ''the *Law* test'' since 1999, many may read this Women's Court of Canada decision looking for either a critique or endorsement of this test. I did not approach the case either as an opportunity to lay down the law or as a vehicle for addressing all of the concerns and criticisms that have been voiced about the Supreme Court of Canada's decision. While I acknowledge the value of predictability in the law, I doubt that we are yet in a position to lay out a test for equality violations that is capable of dealing adequately with the range and complexity of the issues likely to arise. If this is true, the attempt to formulate a test risks unduly constraining the development of the law. So I have not framed my analysis as a direct response to the Supreme Court of Canada's approach but, rather, ''decided' the case as I would have done in the Supreme Court of Canada's place.