

## Court of Appeal for British Columbia

Before: The Honourable Madam Justice Newbury  
The Honourable Mr. Justice Braidwood  
The Honourable Madam Justice Levine

BETWEEN: LILY ELAINE BURNETT RESPONDENT  
(PETITIONER)

AND: WORKERS' COMPENSATION BOARD APPELLANT  
(RESPONDENT)

Counsel for the Appellant,  
Workers' Compensation Board

S. Nielsen and L. Courtenay

Counsel for the Respondent

P. Willcock and J. Currie

Counsel for the Intervenor,  
Attorney General of British Columbia

N. Brown

Place and Date of Hearing:

Vancouver, British Columbia  
April 1, 2003

Place and Date of Judgment:

Vancouver, British Columbia  
July 2, 2003

Written Reasons by:

The Honourable Madam Justice Levine

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Braidwood

### **Reasons for Judgment of the Honourable Madam Justice Levine: Introduction**

- [1] The issue in this appeal is whether legislation that provides disadvantageous economic treatment to younger, as compared with older, widowed spouses, when their children cease to be dependent, amounts to "discrimination" on the ground of age for the purposes of s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The question comes down to whether the "human dignity and freedom" of the younger spouses are violated, within the meaning of those words as used by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 and subsequent decisions.

- [2] This case challenges provisions of the *Workers' Compensation Act*, R.S.B.C. 1996, c. 492, that are similar to the provisions of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*") considered in *Law*. In this case, the respondent had a dependent child when her spouse died in a work-related accident. She received a monthly pension. When her son ceased to be dependent, she received a lump sum payment and was no longer entitled to a monthly pension, because she was then under 40 years of age. Had she been age 40 or older when her child ceased to be dependent, she would have been entitled to the monthly pension for the rest of her life.
- [3] In *Law*, the Supreme Court considered provisions of the *CPP* that provided a pro-rated pension to able-bodied surviving spouses without dependent children starting at age 35, increasing to a full pension by age 45. The appellant was a 30 year old surviving spouse without dependent children. The Supreme Court of Canada held that the age distinctions in the legislation did not amount to discrimination against younger spouses, as there was no violation of their human dignity.
- [4] Distinguishing *Law*, a Supreme Court justice decided the age distinctions in the *Act* violated s. 15(1) of the *Charter*. He found that the "essential dignity" of the group of under age 40 surviving spouses, who had dependent children at a young age, was violated. (The reasons for judgment of the chambers judge are reported at (2002), 6 B.C.L.R. (4th) 121 (S.C.)).
- [5] The Workers' Compensation Board claims the legislative provisions in question promote, rather than undermine, the human dignity of younger widowed spouses and therefore do not "discriminate" within the meaning of s. 15(1) of the *Charter*.
- [6] In my view, the legislative scheme has a significant, disadvantageous, economic impact on younger spouses. I conclude, however, that the differential treatment does not amount to "discrimination" or a violation of s. 15(1) of the *Charter*.

## **The Statutory Scheme**

### **Compensation of Dependants**

- [7] Section 17 of the *Act* sets out a scheme for compensating surviving dependants of deceased workers. The relevant portions of s. 17 are reproduced in the attached Appendix.
- [8] Sections 17(3)(a) through (e) provide for the payment of compensation to surviving spouses and children. The type of benefit (monthly pension or lump sum) and the amount of the benefit are assessed based on the spouse's age, capacity (whether an "invalid" or not) and number of dependent children, if any, at the date of the worker's death.
- [9] This appeal concerns the benefit payable to a surviving spouse, when his or her children, who were dependent at the date of the worker's death, cease to be dependent. A child ceases to be dependent when he or she becomes 18 years old or, if the child is regularly attending an academic, technical or vocational place of education, becomes 21 years old (s. 17(1)).
- [10] A surviving spouse who has dependent children at the date of the worker's death is entitled to a monthly pension (ss. 17(3)(a) and (b)). The amount of the pension will vary depending on the number of dependent children.

- [11] A surviving spouse who is under the age of 40 and has no dependent children at the date of death of the worker is not entitled to a monthly pension, but to payment of a “capital sum” (s. 17(3)(d)). At June 30, 2002, the capital sum was \$40,583.21.
- [12] When a surviving spouse who had dependent children at the date of the worker’s death no longer has dependent children, or the number of dependent children is reduced, the spouse’s entitlement to benefits is reassessed. The spouse is then entitled to the same category of benefits as would have been payable if the death of the worker had occurred on the date that the child or children cease to be dependent (s. 17(4)).
- [13] Thus, a surviving spouse who is under the age of 40 when his or her child or children cease to be dependent loses entitlement to the monthly pension, and instead becomes entitled (by the application of s. 17(4) and 17(3)(d)) to the payment of a “capital sum”.
- [14] By contrast, a surviving spouse who is 40 years of age or over when his or her children cease to be dependent continues to receive the monthly pension. The amount of the monthly pension payable depends on the earnings of the worker at the date of death, subject to a minimum amount. At June 30, 2002, the minimum monthly pension payable to a spouse age 50 or over was \$852.12 (s. 17(3)(c)). The amount payable is reduced on a prorated basis where the spouse is between 40 and 49 years of age (s. 17(3)(e)). The monthly pension continues for life.
- [15] The chambers judge found (at para. 14) that the purpose of this compensation scheme:

... is to provide those who generally have the poorer prospects for employment and long-term income replacement after the death of their spouse with the greater benefits. The varying entitlements and gradations are based on “informed generalizations” as to employment and income replacement prospects. [Appeal Division Decision, paragraphs 31 and 69; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 104.]

- [16] The chambers judge commented (at para. 19):

Given average life expectancies it would appear that the present value of a pension benefit payable to those aged 40 or older when their child’s dependency ends will be many multiples of the capital amount paid to those under the age of 40.

and found (at para. 49):

The impact of the loss of the lifetime pension to the petitioner is very substantial.

## Vocational Rehabilitation

- [17] Section 16(2) of the *Act* authorizes the Board to provide vocational training benefits to a surviving spouse:

### Vocational rehabilitation

**16 (2)** Where compensation is payable under this Part as a result of the death of a worker, the board may make provisions and expenditures for the training or retraining of a surviving dependent spouse, regardless of the date of death.

- [18] The Board has established policies with respect to rehabilitation matters, which are set out in the "Rehabilitation Services and Claims Manual". Section #91.00 of the Manual sets out the policies for "Vocational Assistance for Surviving Spouses and Dependants of Deceased Workers".
- [19] Sections #91.10 to #91.13 describe the Board's policies regarding training for surviving dependent spouses. The Board may offer training assistance "where the training is designed to improve the spouse's earning capacity or effectiveness in the labour market generally." Spouses who receive periodic pensions and those who receive capital sums are eligible for assistance. A spouse's eligibility for training may be considered regardless of the date of the worker's death, but normally decisions are expected to be made within a year of the death. "Any request received after that time would not necessarily be denied, but the Board would be less likely to conclude that the training was needed because of the death."
- [20] "Guidelines" state that assistance is not limited to any particular kind of training, but "this would not involve support of a university program on an indefinite basis."
- [21] Sponsorship of a formal training program will normally include payment of tuition fees, books, travel and subsistence expenses and homemaker allowances, including child care. An additional living allowance may be paid to a surviving spouse who is eligible for a capital sum; the spouse "should not be expected to use that sum for maintenance while undertaking a program of training needed as a result of the worker's death." On the other hand, a dependent spouse is expected to use the monthly pension (and other sources of benefits, such as Canada Pension Plan benefits) "to meet ordinary living expenses while completing a training program." If the spouse's monthly income from such sources falls below the "minimum weekly level determined by the Board, the Vocational Rehabilitation Consultant will normally authorize the payment of a training allowance sufficient to raise the spouse's income to the minimum." The Vocational Rehabilitation Consultant may also "supplement the income of the spouse when the actual expenses incurred during the course of the program exceed what is covered by the above items."
- [22] The Board argued strenuously on the appeal that spouses who are entitled to receive payment of a capital sum instead of a monthly pension are eligible for "enhanced" or "preferential" vocational rehabilitation benefits, compared to the benefits provided to spouses who continue to receive monthly pensions. The Board's position is that the spouses entitled to receive a capital sum include both those who are under the age of 40 without dependent children at the date of death of the worker, and those who are under age 40 when his or her children cease to be dependent.

[23] There is nothing in the Manual that expressly addresses the latter group. One wonders about the effect on a surviving spouse whose children cease to be dependent many years after the death of the worker, of the statement in the Manual that where a request for training is received more than one year after the death of the spouse, “the Board would be less likely to conclude that the training was needed because of the death.”

[24] The chambers judge commented (at para. 48):

The evidence is not entirely complete in this regard but it appears that surviving spouses, whether over or under age 40, whose children have ceased dependency, are entitled to receive vocational rehabilitation benefits. Those under age 40 receive an enhanced form of rehabilitation benefit. I accept that any enhanced vocational rehabilitation benefit, whether provided by Board policy or legislation, would be of minimal value in comparison to the significant financial gap created by the petitioner being removed from a lifetime monthly pension that the age 40 and over spouses receive.

[25] The Board took no issue with this finding of fact, and provided no additional evidence or explanation of the value of the “enhanced” benefit. Counsel expressly declined to explain the difference between the “additional living allowance” that a spouse who is eligible for a capital sum may receive, and the “training allowance” that may be paid to a spouse receiving a monthly pension and other benefits that are less than “the minimum weekly level determined by the Board”.

[26] Furthermore, while counsel argued on the appeal that the policies of the Board are binding on it, it is clear from s. 16(2) and the policies set out in the Manual that the provision of vocational rehabilitation benefits to surviving spouses is at the complete discretion of the Board. An eligible spouse has no claim to any vocational rehabilitation benefit of any kind, form or amount.

### **The Purpose and Effect of the Statutory Scheme**

[27] Sections 16 and 17 of the *Act*, read together, support the Board’s position that the purpose of the statutory scheme is to link the type and amount of compensation provided to surviving spouses with their varying prospects for employment and income replacement, based on age, capacity and parenting responsibilities. While vocational rehabilitation benefits, including any “enhanced” benefits, are discretionary, the express provision for them in the *Act* makes it clear that employment prospects and compensation are linked.

[28] There can be no question, however, that the economic effect of the statutory scheme is to provide compensation of significantly lesser value to surviving spouses who are under the age of 40 when their children cease to be dependent than that provided to spouses who are age 40 or older when their children cease to be dependent. The so-called “enhanced” vocational rehabilitation benefits do not in any way compensate for the economic difference between the “capital sum” and a monthly pension for life.

## The Respondent

- [29] When the respondent's spouse was killed in a work-related accident in 1980, she was 32 years old and her son was 15. The respondent received a monthly pension. When the respondent's son ceased to be dependent on September 30, 1985, he was 20 and the respondent was 37.
- [30] The respondent's monthly pension was first terminated when she remarried in 1981. It was retroactively reinstated when the legislation terminating the pension on remarriage was found to violate s. 15 of the *Charter* in *Grigg v. British Columbia*, (1996), 138 D.L.R. (4th) 548 (B.C.S.C.).
- [31] In March 1997, the respondent received a payment from the Board of \$90,895.89. The payment included the monthly pension which was reinstated from April 17, 1985 (the date s. 15 of the *Charter* took effect) to September 30, 1985 (the date her son ceased to be dependent), a "capital sum" of \$25,851.33, and interest.
- [32] The respondent appealed to the Workers' Compensation Review Board, which denied her appeal on April 28, 1999, and from there to the Workers' Compensation Appeal Division, which denied her appeal on March 30, 2000. She applied to the Supreme Court for judicial review of the decision of the Appeal Division. The chambers judge decided the provisions that terminated her monthly pension and provided a capital sum violated s. 15(1). That is the decision from which the Board appeals to this Court. In accordance with the agreement of the parties, the chambers judge deferred consideration of s. 1 of the *Charter*.

## Section 15(1) and the Law Test

- [33] Section 15(1) provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

- [34] As stated by Deschamps J. in *Trociuk v. British Columbia (Attorney General)*, [2003] S.C.J. No. 32; 2003 SCC 34 (at para. 9):

Applications of s. 15(1) are now guided by the test set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. In the present case, the first two elements of that test are clearly satisfied. The impugned provisions explicitly draw a distinction on an enumerated ground, and the claimant was subject to differential treatment on the basis of that ground (paras. 39).

- [35] The chambers judge found, and I agree, that the *Act* provides compensation of significantly lesser economic value to spouses whose children cease to be dependent when they are under age 40, as compared with spouses who are then 40 and older. That finding satisfies the first two of the three inquiries required to determine if the impugned provisions violate s. 15(1) of the *Charter*. They subject the respondent to differential treatment on the enumerated ground of age.

[36] The question in issue is whether the significant economic disadvantage suffered by the respondent and the group of younger spouses of which she is a member is “discrimination” within the meaning of s. 15(1).

[37] Literally thousands of words have been written by many learned judges concerning the meaning of “discrimination” for the purposes of s. 15(1). The focus of the analysis is the protection of human dignity. In *Law*, Iacobucci J. for the Court expressed the purpose of s. 15(1) (at para. 51):

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

[38] See also: *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at para. 20, *per* McLachlin C.J.C., and *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at para. 54.

[39] In describing what is meant by human dignity for the purposes of s. 15(1), Iacobucci J. (in *Law* at para. 53) used phrases such as “the realization of personal autonomy and self-determination”; “self-respect and self-worth”; and “physical and psychological integrity and empowerment”. He said:

Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

[40] As pointed out in *Trociuk* and in *Gosselin* at para. 18, *Law* provides the “governing standard” for the analysis of s. 15(1). *Law* mandated a “contextual inquiry”, comprising four factors, to determine whether a distinction is discriminatory. The four contextual factors are (as summarized by McLachlin C.J.C. in *Gosselin* at para. 25):

. . . (1) pre-existing disadvantage; (2) correspondence between the ground of distinction and the actual needs and circumstances of the affected group; (3) the ameliorative purpose or effect of the impugned measure for a more disadvantaged group; and (4) the nature and scope of the interests affected.

[41] In *Gosselin* (at para. 25) McLachlin C.J.C. held that the issue addressed by the contextual inquiry is:

. . . whether “a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity” having regard to the individual’s or group’s traits, history, and circumstances: *Law*, at para. 60, followed in *Lovelace, supra*, at para. 55.

## Age Discrimination: Law and Gosselin

[42] Both *Law* and *Gosselin* considered legislation that provided benefits of differing economic value to individuals based on their age. In both cases, the Supreme Court of Canada rejected the arguments that younger people suffered from discrimination because they were entitled to benefits of lesser economic value than the benefits older persons were entitled to receive. The Supreme Court found that, despite the economic discrepancy, the legislation was consonant with the human dignity and freedom of younger people. Central to the Court's conclusion in both cases was the finding that younger people do not suffer any pre-existing disadvantage and are advantaged over older people in finding employment.

[43] In *Law*, Iacobucci J. for the Court summarized his conclusion of the analysis of the contextual factors (at para. 108):

In these circumstances, recalling the purposes of s. 15(1), I am at a loss to locate any violation of human dignity. The impugned distinctions in the present case do not stigmatize young persons, nor can they be said to perpetuate the view that surviving spouses under age 45 are less deserving of concern, respect or consideration than any others. Nor do they withhold a government benefit on the basis of stereotypical assumptions about the demographic group of which the appellant happens to be a member. I must conclude that, when considered in the social, political and legal context of the claim, the age distinctions in ss. 44(1)(d) and 58 of the CPP are not discriminatory.

[44] In *Gosselin*, the 30 year old appellant challenged the validity of the social assistance scheme adopted by the Quebec government in 1984 that provided a lower base amount to individuals under age 30 than that payable to those age 30 and over. Recipients of social assistance under age 30 could increase the amount they received to an amount comparable with that received by older recipients by participating in a designated work program or education program. Again, the Supreme Court held that the economic distinction did not amount to discrimination within the meaning of s. 15(1).

[45] McLachlin C.J.C. summarized the conclusions, central to both cases, that younger people do not suffer from pre-existing disadvantage and are advantaged over older people in finding employment: (at paras. 33-4):

Both as a general matter, and based on the evidence and our understanding of society, young adults as a class simply do not seem especially vulnerable or undervalued. There is no reason to believe that individuals between ages 18 and 30 in Quebec are or were particularly susceptible to negative preconceptions. No evidence was adduced to this effect, and I am unable to take judicial notice of such a counter-intuitive proposition. Indeed, the opposite conclusion seems more plausible, particularly as the programs participation component of the social assistance scheme was premised on a view of the greater long-term employability of under-30s, as compared to their older counterparts. Neither the nature of the distinction at issue nor the evidence suggests that the affected group of young adults constitutes a group that historically has suffered disadvantage, or that is at a particular risk of experiencing adverse differential treatment based on the attribution of presumed negative characteristics: see *Lovelace*, supra, at para. 69.

With regard to this contextual factor, Ms. Gosselin is in the same position as Mrs. Law. In *Law*, Iacobucci J. stated (at para. 95):

Relatively speaking, adults under the age of 45 have not been consistently and routinely subjected to the sorts of discrimination faced by some of Canada's discrete and insular minorities. For this reason, it will be more difficult as a practical matter for this Court to reason, from facts of which the Court may appropriately take judicial notice, that the legislative distinction at issue violates the human dignity of the appellant.

If anything, people under 30 appear to be advantaged over older people in finding employment. As Iacobucci J. also stated in *Law*, with respect to adults under 45 (at para. 101):

It seems to me that the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice. Indeed, this Court has often recognized age as a factor in the context of labour force attachment and detachment. For example, writing for the majority in *McKinney*, [[1990] 3 S.C.R. 229], LaForest J. stated as follows, at p. 299:

Barring specific skills, it is generally known that persons over 45 have more difficulty finding work than others. They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills.

Iacobucci J. went on to note that “[s]imilar thoughts were expressed in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at pp. 998–99, per Iacobucci J., and at pp. 1008–9, per McLachlin J. [and] *Moge v. Moge*, [1992] 3 S.C.R. 813, at pp. 881–83, per McLachlin J.”

[Underlining in original.]

- [46] The question is whether the added factor of the surviving spouses having had dependent children, which distinguishes this case from *Law* on its facts, also distinguishes it from both *Law* and *Gosselin* in principle. In my view, it does not.

### **Age and Dependent Children**

- [47] The class of persons who are disadvantaged by the *Act* are not simply younger than the comparator group (see *Law* at paras. 56–8); that is, under 40 as compared with age 40 or older. The younger spouses are parents who, when their youngest child ceases to be dependent, are likely between the ages of 35 and 40.
- [48] A surviving spouse whose child or children cease to be dependent when he or she is under the age of 40 had to have become a parent at an early age. The respondent was 17 when her son was born.

- [49] In my view, it is a matter of which the Court can take judicial notice that it is unlikely there will be many surviving spouses who had children earlier than age 15. Thus a parent will be, at the youngest, 33 years old when his or her child ceases to be dependent. It is more likely, however, that the group of younger spouses will be at least 35 years of age when their youngest child ceases to be dependent. Those parents who are ages 35 through 39 when their youngest child ceases to be dependent will have had that child between the ages of 17 and 22.
- [50] That demographic fact raises two issues for the purposes of this analysis. The first is that the class of younger spouses is only marginally younger than the older spouses. The second is that the younger spouses became parents at an age when young people generally are completing their secondary education, obtaining post-secondary education and training, and starting their careers. I am of the view that the Court can again take judicial notice, this time of the fact that participation of young parents in those types of activities will be restricted, and their long-term participation in the work-force will be affected as a result.
- [51] As a result of these two factors, the chambers judge reasoned (at paras. 63–66 and 68) that the provisions of the *Act*, as they apply to the group of younger spouses, did not adequately take into account their actual needs and circumstances. He found (at para. 60) that “[t]he broad generalization that younger persons have better job prospects than older persons cannot support the distinction created by the impugned legislation . . .”. He reasoned (at para. 64) that “[t]he economic vulnerability to the long term effects of the death of a spouse caring for dependent children, as noted in *Law v. Canada, supra*, at para. 103, is not age related.” He noted that younger spouses are excluded “although their age will not be significantly less than 40 and the legacy of disadvantage arising during single parenthood will not vary.” He pointed out (at para. 65) that younger spouses may have a “worthier case” for long-term benefit assistance because of the very young age at which they started families.
- [52] The chambers judge, in effect, distinguished *Law* on all four of the contextual factors: pre-existing disadvantage; the nature and scope of the interests affected; the ameliorative purpose or effect of the impugned measure for a more disadvantaged group; and the correspondence between the ground of distinction and the actual needs and circumstances of the affected group.
- [53] He found that the presumption that younger people are generally advantaged compared to older people because they are more employable does not apply to younger spouses. He was of the opinion that younger parents suffer pre-existing disadvantage or vulnerability from the “accumulated detriments” of their early parenting responsibilities which may have limited their education, vocational training and job experience. He concluded that, in scope, the legislation affected a small sub-group of spouses who were not significantly younger than the older spouses. He suggested that younger spouses may be the more disadvantaged group and require more long-term assistance than older spouses, because, he assumed, the younger spouses became parents at a younger age. Finally, as noted above, he held that the legislation did not adequately take into account the actual needs and circumstances of the affected group.
- [54] The chambers judge concluded (at para. 69):

The petitioner’s self-respect and self-worth inherent in her dignity as a person is lessened by the failure of the [legislation] . . . to reflect concern, respect and consideration to the under 40 sub-set group of which she is a member, compared to that accorded the remaining members of the cohort of spouses with dependent children at the date of the worker spouse’s death.

[55] Thus, the chambers judge held that the disadvantageous economic effect of the legislation on younger spouses violated their human dignity and therefore their equality rights under s. 15(1) of the *Charter*.

## Analysis

[56] With great respect to the chambers judge, in my opinion, in distinguishing *Law*, he overly narrowed the application of the contextual factors in considering the circumstances of younger spouses. As a result, he failed to draw a logical connection between his analysis of the effect of the legislation and the conclusion that the human dignity of the younger spouses was violated.

[57] Taking a broad view of *Law* and subsequent decisions, the Supreme Court of Canada has been at pains to limit the application of s. 15(1) to cases where the individuals affected by the impugned legislation suffer more than economic detriment or disadvantage. Something more is required to find that economic disadvantage is constitutionally significant.

[58] As explained by L'Heureux-Dubé J. in *Egan v. Canada*, [1995] 2 S.C.R. 513 at paras. 63–4 (referred to in *Law* at para. 74 and *Lovelace* at para. 88):

As I noted earlier, the *Charter* is not a document of economic rights and freedoms. Rather, it only protects “economic rights” when such protection is necessarily incidental to protection of the worth and dignity of the human person (i.e. necessary to the protection of a “human right”). Nonetheless, the nature, quantum and context of an economic prejudice or denial of such a benefit are important factors in determining whether the distinction from which the differing economic consequences flow is one which is discriminatory. If all other things are equal, the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*.

Although a search for economic prejudice may be a convenient means to begin a s. 15 inquiry, a conscientious inquiry must not stop here. The discriminatory calibre of a particular distinction cannot be fully appreciated without also evaluating the constitutional and societal significance of the interest(s) adversely affected. Other important considerations involve determining whether the distinction somehow restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society (e.g. voting, mobility). Finally, does the distinction constitute a complete non-recognition of a particular group? It stands to reason that a group’s interests will be more adversely affected in cases involving complete exclusion or non-recognition than in cases where the legislative distinction does recognize or accommodate the group, but does so in a manner that is simply more restrictive than some would like.

[59] In *Law* (at para. 83), Iacobucci J. stated:

In every case, though, a court's central concern will be with whether a violation of human dignity has been established, in light of the historical, social, political, and legal context of the claim.

[60] Neither party identified any historical, social, political or legal context for the claim of economic disadvantage advanced in this case, nor am I able to discern any. Nor, in my view, is any affront to human dignity revealed by a proper analysis of the four contextual factors.

[61] Younger spouses do not suffer from a "pre-existing disadvantage", within the meaning of s. 15(1), because of previous child-care responsibilities. Their disadvantage is economic, and has no roots in stereotypes, prejudices or systemic vulnerability.

[62] Nor, in my view, do the impugned provisions fail to adequately take into account the actual needs and circumstances of younger spouses, to the extent they are revealed in the evidence or by judicial notice of certain facts. The application of the "broad generalization that younger persons have better job prospects than older persons" is not completely displaced by the fact that the employability of younger spouses has been impacted by their years of child-care responsibilities – its application is modified. The needs of younger spouses are not excluded or unrecognized. Rather, their different needs at different ages are provided for differently. The *Act* acknowledges and provides for the impact on employability of becoming a parent at a young age by providing a monthly pension when the child is dependent and a capital sum when the child is no longer dependent. As Iacobucci J. stated in *Law* (at para. 106):

. . . the fact that the legislation is premised upon informed generalizations which may not correspond perfectly with the long-term financial need of all surviving spouses does not affect the ultimate conclusion that the legislation is consonant with the human dignity and freedom of the appellant.

[63] In assessing the ameliorative purpose or effect of the legislation for older spouses, the assumption applies once again: as a group, older spouses are less employable than younger spouses. Whether the "cut-off" is age 35, as in *Law*, age 30, as in *Gosselin*, age 45, as discussed in *McKinney*, or age 40, as in this case, that assumption is the consistent principle underlying the Supreme Court of Canada's analysis of age-based economic discrimination. In this respect, this case is indistinguishable from *Law*. Iacobucci J. found (at para. 103) that the legislative purpose of allocating greater benefits to those with greater need, on the basis of age, accorded with the purpose of s. 15(1).

[64] In suggesting that younger spouses may have a "worthier case" for long-term benefits, the chambers judge wrongly assumed, in my view, that they became parents at a younger age than the older spouses. The change in benefits under the *Act*, from monthly pension to capital sum, occurs when the youngest child of a surviving spouse ceases to be dependent. An older spouse who had more than one child may have had a child or children when he or she was very young. The older child or children may have ceased to be dependent when the parent was under the age of 40. The impugned provisions are relevant only when the youngest child, born when the parent was relatively older, ceases to be dependent. Thus, older spouses may have become parents at the same early age as the younger spouses. The difference is that they are older when their children cease to be dependent.

[65] The final factor is the nature and scope of the interest affected. The fact is that the legislation affects a small sub-group of younger spouses, those 35 through 39 years of age. The younger spouses are not significantly younger than the older spouses, who receive a significantly larger benefit. The arbitrariness of the cut-off, however, is the inevitable consequence of all age-based legislative distinctions (see *Gosselin* at para. 57).

[66] The question is whether the human dignity of those in the sub-group is, in the larger context, violated. The significance of the distinction in this case is solely economic. Applying the principles articulated in *Law* and *Gosselin*, I am unable to link the nature and scope of the economic interest of younger spouses with a violation of human dignity.

[67] In summary, I cannot do better than to paraphrase Iacobucci J.'s concluding remarks in *Law* (at para. 108):

In these circumstances, recalling the purposes of s. 15(1), I am at a loss to locate any violation of human dignity. The impugned distinctions in the present case do not stigmatize [younger spouses], nor can they be said to perpetuate the view that [younger spouses] are less deserving of concern, respect or consideration than any others. Nor do they withhold a government benefit on the basis of stereotypical assumptions about the demographic group of which the [respondent] happens to be a member. I must conclude that, when considered in the social, political and legal context of the claim, the age distinction in [ss. 17(4) and 17(3)(d) of the *Act*] are not discriminatory.

[68] I am not unsympathetic to the position of the respondent. It is not clear that ss. 17(4) and 17(3)(d) were intended to have such a significant economic effect on those parents who are (realistically) between ages 35 and 40. In *Law*, the "cut-off" was age 35. Legislative consistency suggests that the "cut-off" at age 40 in the *Act* might be reappraised.

[69] Having said that, for all of the reasons I have given, I am of the opinion that the legislation does not result in a violation of s. 15(1) of the *Charter*.

[70] I would allow the appeal.

The Honourable Madam Justice Levine

