CANADIAN CONSTITUTIONAL LAW IN A NUTSHELL

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This article examines two recent Supreme Court of Canada decisions and provides an analysis of the reasons employed by the court. The author argues that the two cases illustrate the inadequate and subjective reasoning employed by the court to reach what they consider to be a just decision. This "results oriented" approach is criticized by the author and used to examine how cases with similar legal principles can be decided in diametrically opposed ways so as to reach the desired result. While the author does not disagree with the results reached in the two cases, he does take exception to the reasoning used. Using the Hydro-Québec *case the author argues the correct legal decision could have been reached without invoking new subjective tests of constitutionality. Specifically, he argues that the use of the provincial inability test could have led to the same result. Further, he asserts that the reasoning invoked in the decisions reinstates the old rigid categories that have long been discarded. These categories, he feels, can be used to allow judges to make purely subjective decisions more easily. He argues, jurisprudentially, that* Hydro-Québec *establishes a dangerous precedent, one that could threaten the rule of law and our federal structure. The* Eldridge *case, according to the author, also makes false distinctions and categorizations in order to reach the results desired by the court. The author criticizes this as leading to legal decisions based on the personal and political views of the individual judges. Further, he argues that the judges ignored their own pronouncements and precedent in reaching their decision. The author asserts that new categorical distinctions were used merely as a means to an end. He concludes that although the reasoning employed in the cases is flawed, they still prove that the law and justice can coincide. Finally, the author asserts that just and equitable decisions can be reached by an impartial judiciary using sound legal principles and reasoning.*

Le présent article examine deux décisions récentes de la Cour suprême et propose une analyse des raisons utilisées par la Cour. L'auteur soutient que les deux cas illustrent le raisonnement inadéquat et subjectif sur lequel s'appuie la Cour pour parvenir à une décision qu'elle estime juste. Cette approche « axée sur les résultats » est critiquée par l'auteur et sert à examiner comment les causes fondées sur des principes de droit similaires peuvent être tranchées de façons diamétralement opposées pour arriver au résultat voulu. Bien que l'auteur ne soit pas contre les résultats atteints dans ces deux cas, il remet en question le raisonnement sur lequel ils se fondent. Invoquant l'arrêt Hydro-Québec, *il estime que la cour aurait pu parvenir à la décision judiciaire correcte sans invoquer les nouveaux critères subjectifs de constitutionnalité. Plus précisément, il soutient que le recours au test d'incapacité provincial aurait pu aboutir à la même issue. Il affirme de plus que le raisonnement invoqué restaure les anciennes catégories rigides rejetées depuis longtemps. Ces catégories peuvent, selon lui, servir à autoriser les juges à prendre plus aisément des décisions purement subjectives. Il est d'avis que, sur le plan jurisprudentiel, l'arrêt* Hydro-Québec *établit un dangereux précédent, qui est de nature à menacer la primauté du droit et notre structure fédérale. Selon lui, l'arrêt* Eldridge *établit aussi des distinctions et des catégorisations fausses pour atteindre les résultats souhaités par la cour. L'auteur critique les décisions fondées sur les points de vue personnels et politiques des juges en question. Il déclare, de surcroît, qu'ils sont parvenus à leur décision en passant outre leurs propres prononcés et précédents. L'auteur affirme que de nouvelles distinctions catégoriques ont été employées dans le seul but de justifier la fin. Il conclut que, bien que le raisonnement utilisé dans ces deux cas soit erroné, il prouve que le droit et la justice peuvent coïncider. L'auteur soutient qu'un ordre judiciaire impartial peut encore prendre des décisions justes et équitables en utilisant un raisonnement et des principes juridiques solides.*

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I. INTRODUCTION

The fall term in the 1997-98 academic year was a constitutional law teacher's dream. Within the space of three short weeks the Supreme Court of Canada handed down two highly publicized judgments, touching two of the most politically charged issues of our time — environmental protection and the rights of the disabled — which together raised almost every important issue in constitutional law. The first case *R.* v. *Hydro-Québec* was a federalism — or division of powers – case in which, by a slim 5:4 majority the Court ruled that the federal (national) government had the constitutional authority to enact the *Canadian Environmental Protection Act* (*C.E.P.A.*) and in particular a complex and detailed set of regulations controlling the emission of toxic substances.[1] The second case, *Eldridge* v. *British Columbia*, was a *Charter of Rights* case in which a unanimous Court ruled that the government of British Columbia had a constitutional duty to pay for sign language interpreters for people whose hearing was impaired where it was necessary for the effective communication and delivery of medical services provided under its health care scheme.[2]

Even though the political issues and constitutional questions that were at stake in the two cases were radically different, the decisions have a lot in common. Both illustrate very powerfully why, although the Supreme Court consistently scores very highly in public opinion polls, among those who study and watch the Court their rating and reputation is at an all time low. Even though most law teachers and commentators would share the public's enthusiasm for the results in the two cases, many will think the reasoning the judges invoked to support their rulings to be shockingly inadequate.

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1 (1997), 151 D.L.R. (4th) 32 (S.C.C.) [hereinafter *Hydro-Québec*]. *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 [hereinafter *C.E.P.A.*].

2 (1997), 151 D.L.R. (4th) 577 (S.C.C.) [hereinafter *Eldridge*].

The judgment of the Court in both cases was written by Gérard La Forest and both reflect a highly subjective and historically outmoded style of reasoning that many will find objectionable. First, both mirror the idea that a constitution is — as one Chief Justice of the United States once famously remarked — "what the judges say it is" and that each judge has considerable discretion in defining what the rules of a constitution will be and how they will be applied. Second, and within this highly personal and political understanding of the law, both judgments invoke a classical and much discredited image of constitutional law as a set of very discrete and separate categories or rules — "watertight compartments in a ship of state"[3] has been the reigning metaphor — that dominated the thinking of the Privy Council more than half a century ago.

Hydro-Québec and *Eldridge* are wonderful teaching tools because they demonstrate so dramatically the gulf that can, but need not, exist between reasoning and results. From the very first case most students read in constitutional law — in which it was held that women qualified as "persons" and so were eligible to sit in the Canadian Senate[4] — the lesson is taught that all too frequently courts reach a conclusion which appears to be politically correct without offering reasons that are credible in law. *Hydro-Québec* and *Eldridge* provide an ideal opportunity for students to learn what legal reasoning is all about — what thinking like a lawyer really means — on issues that touch most of them in very immediate and personal ways.

II. A SUBJECTIVE THEORY OF CONSTITUTIONAL LAW

Conventionally, law students in Canada take constitutional law in the first year of their studies and the first cases they read, after the "Persons" case, concern the division of powers between the federal and provincial governments. Environmental regulation would normally be covered in the second half of the first semester and by that time most students have little difficulty seeing that the reasoning the majority followed to uphold the *C.E.P.A.* in *Hydro-Québec* was entirely subjective and without any foundation or support in the law. When they read the decision it is apparent that, to come to the conclusion that it was within Ottawa's jurisdiction to enact the *C.E.P.A.*, La Forest and his supporters effectively assumed an unfettered authority to rewrite the rules regulating the division of powers according to their own personal views about what mix of federal and provincial environmental laws would work best for the country's environment.

La Forest's judgment broke new ground and redefined the rules of constitutional law in at least two different ways. First, grounding the federal government's control over the environment squarely in s. 91(27) of the old *British North America Act* was quite unprecedented. The Court had never invoked the federal government's power over criminal law in this way before. In previous cases, in which it had reflected on the powers of the federal government (and the provinces) over the environment, the Court had relied either on more directly related heads of power like fisheries and navigable

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3 *Reference Re Employment and Social Insurance Act, 1935 (Canada)* (1937), 1 D.L.R. 673 at 684 (J.C.P.C.).

4 *Re Section 24 of the B.N.A. Act* (1930), 1 D.L.R. 98 (J.C.P.C.).

rivers or on its residual power to make laws for "the peace, order and good government" of the country (POGG). Indeed, *Hydro-Québec* itself had been argued primarily on the basis of the federal government's POGG power.

Not only did the majority look to a new source of authority for the federal government's jurisdiction in the field of environmental protection, in the course of its judgment it also effectively redefined the scope of the federal government's power to enact criminal laws. The definition of the federal government's powers over criminal law had been settled by the caselaw for almost fifty years and consisted, in the words of Peter Hogg, of a "requirement of form as well as a typically criminal objective."[5] According to a long and unbroken line of cases, criminal laws characteristically took the shape of a prohibition and penalty. On this definition, public welfare offenses like those in C.E.P.A that are part of complex regulatory regimes that rely on administrative rulings and discretionary powers, are not regarded as true crimes and cannot, therefore, be grounded in s. 91(27).

La Forest did refer to the two part — formal and substantive — definition of the federal government's criminal law powers but then he simply ignored the first part.[6] Like conjurers, La Forest and his supporters made the requirement that the criminal law be drafted in the form of a prohibition backed by a penalty just disappear into thin air. For La Forest, there was only one limitation on the federal government's power to enact criminal laws which is that it cannot be used illicitly — that is for an improper or 'colourable' purpose.[7] Without ever saying so explicitly, the majority simply turned its back on the Court's prior rulings and substituted a new, one dimensional, open-ended test of the public welfare and the prevention of socially harmful behaviour that effectively imposed no restrictions on what the federal government could or could not do.

The fact the four dissenting judges (Lamer, Sopinka, Iacobucci and Major) devoted almost all of their judgment to a discussion of how *C.E.P.A.* failed the formal part of the test made no impression on La Forest and his colleagues. At no point did they challenge the minority's reading of the Court's earlier precedents or the standards and tests that s. 91(27) required the federal government to meet. They simply declared they did not share the minority's concern that the prohibitions originated in regulations and administrative rulings rather than in the substantive sections of the Act.[8] For them, the pressing nature of environmental protection was enough to validate the law.

III. A CATEGORICAL THEORY OF CONSTITUTIONAL LAW

Not only did La Forest's definition of the federal government's power over criminal law rewrite a test that had been accepted for almost half a century, it simultaneously

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5 P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1996) at 443 [hereinafter *Constitutional Law*].

6 *Hydro-Québec*, *supra* note 1 at 97.

7 *Ibid.* at 97-98.

8 *Ibid.* at 111.

resurrected the old and discredited conception of a constitution being made up of a number of very sharply defined categories or rules. On this "classical" view, each of the heads of powers listed in sections 91 and 92 are discrete and independent grants of law making authority, each with its own standards and tests. In *Hydro-Québec*, the majority played a variation on this theme by drawing a sharp distinction between the federal government's residual (POGG) and criminal law (s. 91(27)) powers and the principles or rules they contain, and then arguing that considerations of provincial autonomy and the balance between federal and provincial powers that were relevant under the former, were not germane to its analysis under the latter.[9] On their definition of s. 91(27), the only concern of the Court is the legitimacy of the ends or purposes that the law seeks to achieve. Consideration of the means chosen by the government to pursue its goals, such as how deeply they impinge on provincial jurisdiction, or how effectively provincial authorities might regulate the mission of toxic substances into the environment — which were central to the Court's analysis and La Forest's own earlier rulings in *Crown Zellerbach*[10] and *Oldman River*[11] on the scope of the federal government's ability to enact environmental legislation under its residual (POGG) and other enumerated heads of power — simply drop out of sight.

Here again the four dissenting judges tried to press the majority to address the impact this legislation would have on the principle that environmental protection was a matter of concurrent, overlapping, shared jurisdiction that earlier cases like *Crown Zellerbach* and *Oldman River* had articulated, but to no avail.[12] Their objections to the "striking breadth"[13] of the "wholesale regulation .... of any and all substances which may harm any aspect of the environment"[14] were said to be "overstated."[15] They were told that issues respecting the federal structure of the constitution "do not arise with anything like the same intensity in relation to the criminal law power[16] as they do inside the residual (POGG) clause. Rather than having their arguments addressed directly on their merits, they were met with a judgment of dismissal and denial.

When one finishes reading the two lengthy judgments that were written in the case, it is hard not to experience the feeling that Canadian federalism law has returned to the same sorry state that it has been in for most of its existence. Generations of constitutional law scholars have taught that artificial categories and rigid rules lead to arbitrary distinctions and inconsistent decisions[17] and yet the Court is at it again. Although there was a brief moment during Brian Dickson's tenure as Chief Justice

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9 *Hydro-Québec*, *supra* note 1 at 93, 96, 102.

10 (1988), 49 D.L.R. (4th) 161 (S.C.C.) [hereinafter *Zellerbach*].

11 *Friends of the Oldman River Society* v. *Canada (Ministry of Transport)* (1992), 88 D.L.R. (4th) 1 (S.C.C.).

12 *Hydro-Québec*, *supra* note 1 at 69.

13 *Ibid.* at 68.

14 *Ibid.* at 59.

15 *Ibid.* at 104.

16 *Ibid.* at 93.

17 See *e.g.* P. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 U.T.L.J. 307; P. Monahan, "At Doctrines' Twilight: The Structure of Canadian Federalism" (1984) 34 U.T.L.J. 47.

when an effort was made to find common principles and tests in the large grants of power to the federal government in POGG and s. 91(2) (trade & commerce), [18] that insight now seems to have been lost. It is as if we are back at the beginning: no lessons learned; no progress made; the living tree once again threatened with ossification.

Building different tests of constitutional validity into the different heads of power in s. 91 fits hand and glove with a subjective theory of law. Making each section a separate and distinct category gives each judge a discretion as to which part of the constitution will govern a case and so effectively control which rules of constitutional law will apply. Without any obligation to explain or justify why a law like *C.E.P.A.* is evaluated under one head of power rather than another, each judge is able to choose the category and the constitutional test that will allow them to come to the conclusion that is most consistent with their own personal and political views about the case.

IV. A PRINCIPLED THEORY OF CONSTITUTIONAL LAW

The sense of frustration and disappointment that many will feel when they reflect on the reasoning the majority gave for its conclusion that Canada's *Environmental Protection Act* is constitutional will be heightened when they think about other ways the Court might have validated such an important piece of social policy. It turns out that not only did the Court not have to turn the clock back and repeat the mistakes of the past, it missed an opportunity to clarify and refine the principles it had used to reconcile federal/provincial powers over the environment in its earlier, landmark rulings in *Crown Zellerbach* and *Oldman River*. Had the Court respected its earlier precedents and assessed the constitutionality of *C.E.P.A.* under POGG, not only could it have validated the federal government's objective of establishing minimum national standards against toxic pollution, it could have demonstrated and elaborated how the principle of provincial inability (or subsidiarity as it is known in other parts of the world[19]), that the federal government is required to meet when it acts under the authority of the residual clause, establishes an objective and normatively attractive standard for coordinating federal and provincial initiatives on this or indeed any other matter of common concern.

Although the four dissenting judges did consider whether the Act and the regulations could be justified as a valid exercise of the federal government's powers under POGG and in particular the 'national concern' doctrine that it had elaborated in *Crown Zellerbach*,[20] they never turned their minds specifically to the provincial inability test and considered whether it could be satisfied in this case. They said *C.E.P.A.* could not meet the test of 'singleness and indivisibility' that the Court had established in *Crown*

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[18] See *e.g. Zellerbach, supra* note 10 at 161; *General Motors of Canada Ltd.* v. *City National Leasing* (1989), 58 D.L.R. (4th) 255 [hereinafter *General Motors of Canada*]; D. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 34-35 [hereinafter *Constitutional Law in Theory and Pratice*].

[19] See *e.g.* P.W. Hogg, "Subsidiarity and the Division of Powers in Canada" (1993) 3 N.J.C.L. 341; R. Howse, "Subsidiarity in all but name: Evolving Concepts of Federalism in Canadian Constitutional Law" in P. Glenn, ed., *Droit Contemporain* (Québec: Yvon Blais, 1994).

[20] *Zellerbach, supra* note 10 at 177-88.

Zellerbach and therefore it was unnecessary for them to consider whether the provinces could effectively deal with the emission of toxic substances into the environment.[21] Had they treated the question of provincial ability as part of the singleness and indivisibility test — as the Court had defined it in *Crown Zellerbach* — it is hard to imagine that the four dissenting judges would not have seen the logic (necessity) of minimum national standards governing the emission of toxic substances into the environment and the corresponding risk of allowing each province to establish its own standard.

There was a lot of evidence before the Court to support a finding of provincial inability to effectively control the spread of toxic substances. First, there was an extensive body of scientific evidence that showed that toxic substances are generally very mobile and that their polluting effects are highly diffuse and extend beyond provincial borders.[22] The "extra" or "inter" provincial character of toxic pollution means that only the federal government has the capacity to deal effectively with the problem. Moreover, the Court has long recognized that, in circumstances of this kind, the federal government can also regulate related matters of purely internal or "intra" provincial concern where it is necessary to ensure the integrity of its regulation of the "extra" provincial aspect of the matter. That was the position the Court implicitly adopted in its endorsement of federal control of all aspects of Canada's wheat trade[23] and explicitly embraced in *General Motors*[24] where it held that federal regulation of competition rules extended to purely local, intraprovincial trade.

In addition to the scientific evidence which the Court could have relied on to satisfy the provincial inability (or subsidiarity) test, there was also evidence that suggested that even if the provinces were constitutionally authorized to control the emissions of toxic substances, in this case they had demonstrated they lacked the political will to do so. The idea that "unwillingness" could constitute "inability" had some recognition in the cases[25] and the reflections of commentators[26] and was suggested in this case by the fact that Quebec had not taken advantage of the provisions in *C.E.P.A.*, that allowed it to enact its own "equivalent" regulations controlling the emission of toxic substances into the environment. On this definition, unless and until the Quebec government took some initiative to protect its own environment from the polluting effects of toxic substances, the federal government could legitimately argue that it was necessary and therefore justified in enforcing its own regulations.

Because the outcome of the case is so congenial with most people's political instincts, it is easy to overlook or forgive the fact that, jurisprudentially, *Hydro-Québec* poses a serious threat both to the integrity of the country's federal structure and to the

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21 *Hydro-Québec*, *supra* note 1 at 76.

22 *Ibid.* at 117-18.

23 *R.* v. *Klassen* (1960), 20 D.L.R. (2d) 406 (Man. C.A.) leave to appeal to S.C.C. denied.

24 *General Motors of Canada*, *supra* note 18.

25 *Munro* v. *National Capital Commission*, [1966] S.C.R. 663.

26 See *e.g.* K. Swinton, "Federalism Under Fire: The Role of the Supreme Court of Canada" (1992) 55 Law Cont. Probl. 121, 131-37. See also H. Brun & G. Tremblay, eds., *Droit Constitutionel*, 2d ed. (Québec: Yvon Blais, 1990) at 490-94.

rule of law. The decision of the majority puts the federal principle and the idea that both levels of government have a role to play protecting the environment at serious risk. If Parliament can justify everything it does under its power to make criminal law, provincial authority over even local aspects of the environment will depend on the sufferance of federal officials. Such a sweeping authorization of law making authority, combined with a paramountcy rule that gives precedence to federal enactments whenever they conflict with parallel provincial laws,[27] would effectively allow the federal government to dictate to the provinces what their environmental protection policies would be. As a practical matter it would reverse the Court's earlier rulings on the environment and give the federal government exclusive jurisdiction in the field.

In addition to the damage it inflicts on the federal structure of the constitution, La Forest's judgment strips the law of the objectivity and determinacy on which its integrity depends. Premised on the idea that constitutional law consists of a series of separate categories and rules, each with its own standards and tests that the judges are free to choose from in evaluating the laws they are asked to review, it defines law in terms of the politics and personal predilections of each judge. We know from the huge swings in the jurisprudence of the Privy Council, this highly subjective, categorical conception of judicial review leads to a jurisprudential wasteland. It generates a body of caselaw in which the principles and doctrines 'march in pairs,' to recall Paul Weiler's characterization of the Court's work twenty-five years ago.[28] Conceiving of constitutional review as judges choosing which categories and rules to apply in any particular case leads to a jurisprudence with deep fault lines that produce very arbitrary and inconsistent results.

V. POLITICS AND THE LAW

For some, the criticism that La Forest and his supporters built their case on an understanding of law that was too personal and political might seem a bit unfair. After all, the idea that in hard, close cases judges must — indeed should — have reliance on their own judgment as to what is in the country's best interests has had a long and distinguished history in Canadian constitutional law. Bill Lederman, one of the country's most distinguished legal academics, for example, thought that, at its core, the judicial function in federalism cases was "beyond the aid of logic." He argued that in cases where both levels of government had an interest in an issue of public policy, like the environment, judges must decide on the basis of whether they think "it is better for the people that this thing be done on a national level, or on a provincial level." On this view, it is impossible for judges not to identify with their own convictions and all that can be asked in balancing the competing values and interests that are at stake, "is straight thinking, industry, good faith and a capacity to discount their own prejudices."[29]

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[27] *Constitutional Law of Canada*, *supra* note 5 at c. 16.

[28] Weiler, *supra* note 17 at 364.

[29] W.R. Lederman, "Classification of Laws and the British North America Act" in W.R. Lederman, ed., *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) at 236-45.

Many students, scholars and judges have found Lederman's theory of constitutional law to be a balanced and realistic account of the role of judges in resolving disputes between different levels of government in a federal state. Since the entrenchment of the *Charter*, however, it is apparent that it cannot provide a coherent account of the practice of constitutional review *writ large*. Whatever its appeal when it was written, we know now, after 15 years of *Charter* jurisprudence, that such a subjective and highly political theory about how judges should decide cases cannot be right.

The Court itself provided dramatic confirmation that constitutional law and legal reasoning cannot be reduced to an act of political judgment just three weeks after its decision in *Hydro-Québec*, when it handed down its unanimous ruling in *Eldridge* that the provincial government in British Columbia was obliged to provide people whose hearing is impaired with sign language interpreters where it is necessary for effective communication in the delivery of medical services covered in its health care plan. Robin Eldridge's claim puts the theory that constitutional review entails judges weighing the competing interests and values that are at stake in a case, on the basis of what they think is in the best interests of all concerned, to its most challenging test. Eldridge was asking nine unelected and unaccountable judges to tell the people and their elected representatives what services had to be provided in the province's health care plan. For her claim to succeed the judges had to take control of the public purse and tell the Government how much money it had to spend.

In *Eldridge*, the question of what role the courts and the rule of law play in the way we govern ourselves was centre stage. *Eldridge* was, at its core, about the principle of separation of powers between the judiciary and the two elected branches of government and how it should be defined. The legitimacy and integrity of their unanimous opinion depended on their ability to explain that it was the necessary conclusion — a logical entailment — of the constitution and the principles it contains rather than the product of their personal (political) beliefs. No one could justify substituting La Forest's opinion for the government's simply on the basis that he thought, all things considered, he knew what was best.

Even though La Forest wrote a judgment of almost 50 pages explaining his reasoning few who read it will find it convincing. The political character of the decision is so blatant it was picked up immediately by the popular press. Within days of the Court's releasing its judgment the editorial board at the *Globe & Mail*, Canada's national newspaper, accused the judges of being 'Deaf to Reason' and 'taking leave of their senses.' It was, they said, the Court even more than the hearing impaired, who was in need of an interpreter. "Which constitution have they been reading?" the editors mocked. If the Court can order sign language interpreters where they are necessary for effective communication in the delivery of health care services, what about requiring them in all government services or requiring interpretation services for everyone who is unable to communicate in either of the country's two official languages, the *Globe* pressed. How is it, the editors wondered, that the Supreme Court is managing the country's hospitals and deciding how our tax revenues should be spent. The Court's

decision, they concluded, "calls into question who exactly runs the country: our elected Parliament, or an appointed Supreme Court."[30]

Even though, as we shall see, the rhetoric of the *Globe* was badly overstated and ultimately way wide of the mark, it is hard not to have some sympathy with its frustration and disillusionment. The truth is, one must look very hard for answers to the concerns the editors raised and on some issues that search will be in vain. Even those who are inclined to be sympathetic to the Court's method and understanding of constitutional law will find it difficult to defend the Court's reasoning in *Eldridge*. Almost a third of the judgment is given over to redrawing and refining a doctrinal boundary that was not, in the end, critical to the outcome of the case. Even worse, in the last half of its judgment, the Court essentially disregarded and evaded two major rules that were embedded in its earlier caselaw that should, if applied, have meant the end of the case.

Eldridge was a more complicated case than *Hydro-Québec* which posed only one legal issue and one legal principle (subsidiarity) for the Court's consideration. In *Eldridge*, by contrast, the Court had three legal hurdles to clear. First, it had to explain why, even though the government had not actually done anything to Robin Eldridge, — her complaint was its failure to act — the *Charter* still applied nonetheless. Next, it had to analyze its equality rights jurisprudence to demonstrate the discrimination she and other people whose hearing is impaired had suffered as a result. At the end of its judgment, the Court turned its attention to some of the concerns that were raised by the *Globe* in its editorial and considered whether the justifications that the Government offered for its failure to provide funding for sign language interpreters in its health care system met the tests of rationality and proportionality that the Court had established in its landmark ruling of *Regina* v. *Oakes*.[31]

On all three issues, the Court's reasoning can be sharply criticized. The parallels with its decision in *Hydro-Québec* are striking. In *Eldridge* all nine judges embraced La Forest's subjective, classical conception of constitutional law as being made up of a number of sharply defined categories or rules that each judge is more or less free to use as he or she sees fit. Following the same methodology that carried the day in *Hydro-Québec*, the Court continues to manipulate and disregard its own precedents to achieve what it believes is the politically or morally correct result.

VI. STATE RESPONSIBILITY

On the first issue, of whether the *Charter* even applied to Eldridge's case, two features of the Court's analysis stand out. Undoubtedly the most striking is its length. It takes up almost a third of the Court's judgment even though La Forest could have and indeed did establish the *Charter*'s applicability and the state's responsibility to fund a sign language translation service in a single paragraph. In addition to its prolixity, the Court's treatment of how the *Charter* applied to the facts of Robin Eldridge's case

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30 "The Supreme Court, deaf to reason" *The Globe & Mail* (14 October 1997) A16.

31 *R.* v. *Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.) [hereinafter *Oakes*].

embraces the same "classical" understanding of law that prevailed in *Hydro-Québec*. In this part of its judgment, sharply defined rules and very discrete categories dominate the analysis once again.

In earlier decisions, the Court had drawn and (notwithstanding extensive criticism) maintained a sharp distinction between the public and private spheres. Common law rules (of contract, property and tort) governing the relations of private individuals, corporations, and even public institutions like universities were said to be beyond the reach of the *Charter* and immune from constitutional review. Indeed in one case — *Stoffman* v. *Vancouver General Hospital*[32] — the Court had actually held that decisions made by the Vancouver General Hospital were not covered by the *Charter* because, "the provision of a public service, even if it is one as important as health care, is not the kind of function that qualifies as a governmental function under s. 32 [of the *Charter*]."[33]

To succeed in her case, Robin Eldridge had to overcome the Court's earlier ruling in *Stoffman* and establish that her case fell on the right side of the public/private divide. Because of the way British Columbia's medical care system was set up, this turned out to be a relatively easy thing to do. She could — and indeed did — establish the Government's responsibility for refusing to pay for someone who could "sign" for her by pointing to the decision of the province's Medical Services Commission not to include such "auxiliary" services in the benefits and medically required services that were covered in the province's health plan.

In effect, the politicians and the Government had delegated the job of deciding which services would be covered by the province's health plan to the Medical Services Commission rather than listing them directly in the relevant statutes and accompanying regulations. In one of its earlier decisions the Court had already held that administrators who exercise discretionary powers delegated to them by statute or regulation are covered by the *Charter* and do not have any authority to make decisions and issue rulings that interfere with people's constitutional rights.[34] Governments are forbidden from doing indirectly what the *Charter* would invalidate if it were attempted directly in the enactment of a statute or some other regulatory instrument.

Although the Court accepted the logic of its earlier decision in *Slaight Communications* in a single paragraph in its judgment,[35] incredibly La Forest spent an additional thirty two paragraphs explaining why the hospitals' involvement in the delivery of health care in the province also implicated the state and the application of the *Charter* to the circumstances of Ms. Eldridge's case. Even though it was completely superfluous in establishing the government's responsibility for the discriminatory treatment about which Ms. Eldridge was complaining, the Court felt compelled to go

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32 *Stoffman* v. *Vancouver General Hospital* (1991), 76 D.L.R. (4th) 700 (S.C.C.).

33 Cited with approval in *Eldridge*, *supra* note 2 at 609.

34 *Slaight Communications Inc.* v. *Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.).

35 *Eldridge*, *supra* note 2 at 611.

on at length to explain why its earlier ruling in *Stoffman*, that Vancouver General Hospital was not subject to the *Charter*, was not applicable in this case.[36]

To reconcile the apparently inconsistent results in the two cases, the Court fell back on its classical understanding of law as a series of discrete and sharply defined rules and invoked yet another categorical distinction. *Stoffman*, said the Court, was different because it involved the constitutionality of the hospital's mandatory retirement rules and they were a matter of 'internal hospital management' and so not subject to scrutiny under the *Charter*.[37] In *Eldridge*, by contrast, the hospital was said to be carrying out an "inherently governmental action" in providing the treatments and services specified by the Medical Services Commission.

Although the distinction the Court drew between the two cases has a superficial appeal, on closer inspection, like so many of the bright lines and categorical constructions that deface the Court's jurisprudence, it turns out to be empty and false. The distinction has no basis in logic or in law. It is entirely of the Court's own making and leads to very arbitrary results.

From the perspective of the workers whose employment they affect, mandatory retirement rules are as much about the delivery of the province's health care system as the decisions of the Medical Services Commission settling which services will be provided to patients. If the constitution governs which hospital services must be provided to patients, why wouldn't it also apply to the decision as to who should actually deliver them? If patients are entitled to be free from discrimination by hospitals in the way they provide health care, why aren't the people who work for them? Drawing a distinction between those who provide and those who receive medical services in hospitals reflects a strong bias against the interests of working men and women which runs through much of the Court's earlier jurisprudence and has been sharply criticized in the past.[38]

In the end, of course, it did not matter how the Court ruled on the question of whether the hospitals' decision not to provide sign interpreters could be characterized as 'state action' and attributed to the provincial government. Although it purports to add a new category or rule to the analytical framework the Court uses to distinguish the public from the private, on the facts of Robin Eldridge's case, all of the Court's musing on this issue was "obiter." As noted, just past the midpoint in its judgment the Court

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[36] For purposes of granting Robin Eldridge the relief she requested, the activities of the Medical Services Commission were enough to establish the Government's responsibility and, as the Court ordered at the end of its judgment, its duty to provide sign language interpreters whenever they are "necessary for effective communication in the delivery of medical services." It adds nothing to the results of the case to characterize the hospitals' involvement in the delivery of medical services as another dimension of state action. Even if, contrary to the facts, hospitals were not part of government, hearing impaired people like Robin Eldridge would still have a constitutional right to the services of a sign language interpreter in hospitals whenever it was "necessary for effective communication in the delivery of medical services" (Eldridge, *ibid.* at 632).

[37] *Ibid.* at 609, 611.

[38] See D. Beatty, "Labouring Outside the *Charter*" (1991) 29 Osgoode Hall L.J. 839.

eventually took notice of the role of the Medical Services Commission in designating which services would be covered by the plan and in one brief paragraph concluded that the question of state action and government responsibility was not an issue in this case.

VII. THE ANTIDISCRIMINATION RULE

When the Court turned its attention from the question of whether the *Charter* applied to the circumstances of Eldridge's case to consider her claim on its merits, it continued to manifest its inclination of spending relatively little time on the most pertinent parts of the case. Even though Eldridge faced two substantial doctrinal hurdles that were potentially fatal to her case, La Forest spent most of the last half of his judgment avoiding them and subjecting them, in the end, only to a very superficial analysis. Having devoted more than a third of its opinion to redrawing a part of the boundary between the public and private sectors which did not affect the outcome of the case, the Court dismissed two serious objections which went to the very heart of the case with little more than the stroke of its pen.

The first obstacle the Court faced was a string of recent equality cases in which it had begun to develop a new, much more demanding test of proving discrimination under s. 15 of the *Charter*.[39] In addition to considering whether a law or administrative ruling drew a distinction that disadvantaged some people more than others, in these cases the Court had said the question of the relevance of the distinction to the goals of the legislature (or administrator) was also a factor to be considered. Indeed four of the judges, once again led by Gérard La Forest, made it a rule that, in order to establish that a distinction is discriminatory, it has to be shown to be based on a personal characteristic that is irrelevant to the objectives that the law, of which it is a part, was designed to promote.

In *Eldridge*, the Court dealt with the relevance test in two brief paragraphs in the middle of its judgment. Indeed in two sparse sentences the Court simply declared, 'ex cathedra', that there was "no question that the distinction here is based on a personal characteristic that is irrelevant to the functional values underlying the health care system," and that "there could be no personal characteristic less relevant to these values than an individual's disability.[40] Paralleling the way the majority had evaded the accepted definition of the federal government's criminal law powers in *Hydro-Québec*, in *Eldridge* the whole Court got over a serious roadblock in the jurisprudence by just driving through it and then moving on.

Had the Court taken the relevance test seriously it would have been impossible for Robin Eldridge and her co-claimants to succeed. Notwithstanding the Court's bold assertions to the contrary, physical disability is centrally relevant to the functional

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[39] *Egan* v. *Canada* (1995), 124 D.L.R. (4th) 609 (S.C.C.); *Miron* v. *Trudel* (1995), 124 D.L.R. (4th) 693 (S.C.C.); *Thibodeau* v. *Canada* (1995), 124 D.L.R. (4th) 449 (S.C.C.); *Adler* v. *Ontario*, 140 D.L.R. (4th) 385 (S.C.C.); *Eaton* v. *Brant County Board of Education* (1997), 142 D.L.R. (4th) 385 (S.C.C.); *Benner* v. *Canada* (1997), 143 D.L.R. (4th) 577 (S.C.C.).

[40] *Eldridge*, *supra* note 2 at 614-15.

values that underlie a publicly funded health care system. Indeed, along with consideration of costs, the nature of a person's physical condition is the determining factor in whether and what kind of services he or she will be entitled to receive.

No public health care plan can cover every disease and disability and those that are included only receive such treatment as the people and their elected representatives decide they can afford. The B.C. plan, for example, did not provide for speech therapists, dentists or clinical psychologists. Nor did it pay for prosthetic devices or wheel chairs or cosmetic surgery and established only limited funding for prescription drugs. Some treatments that are associated with particular ailments, like renal dialysis, are chronically in short supply. By contrast, disabilities and illnesses that many people suffer and are not costly to treat, are able to make much stronger claims on health care budgets. Far from being "the least relevant distinction" for a publicly funded medical care scheme, the nature of a person's disability is, along with the question of available resources, the *only* relevant criterion on which decisions about the operation of such plans can be based.

VIII. THE PRINCIPLE OF DEFERENCE

The second doctrinal landmine that stood in Robin Eldridge's way was the deference principle that the Court had grafted onto its s. 1 jurisprudence and its application of the *Oakes* test. In another long line of precedents, the Court had ruled that "where the legislation...involves the balancing of competing interests and matters of social policy, the *Oakes* test should be applied flexibility and not formally or mechanistically."[41] "Deference" should be shown and a "wide latitude" given to the elected branches of government especially when the Court is asked to review a decision that requires governments to allocate scarce resources between different groups. Applied to the Court's evaluation of the province's decision not to fund a sign interpreting service, this would mean that, rather than having to prove that its decision impaired the rights and freedoms of those it affected as little as possible (which is what the second proportionality principle in *Oakes* would normally require), the government only had to establish that it had a "reasonable basis" for the decision it made.

At least one of the judges on the B.C. Court of Appeal thought that the province had easily met that attenuated test. Lambert J.A. recognized that B.C.'s *Medical Services Act* did not provide comprehensive health care coverage and that difficult choices, involving scarce financial resources, had to be made which, under the relaxed *Oakes*' test, the courts ought to respect. The Supreme Court took a different view but only because, in the same way that it ignored the 'relevance' test when it ruled the government's decision was discriminatory and an infringement of s. 15, here the deference principle simply dropped out of sight when the judges considered whether the failure to provide sign language interpreters could satisfy the principles of proportionality that it had established in *Oakes*.

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[41] *Ibid.* at 626.

There was no flexibility in the way the Court applied the minimal impairment test. Less drastic action such as partial or interim funding, said La Forest, were either not considered, or if they were they were rejected. The province's concern that funding sign language interpreters would impose a severe strain on provincial resources because it would mean it would have to pay for interpreters for others who could not communicate in either official language was dismissed as "purely speculative." It was "by no means clear," said the Court, what the constitutional requirements or potential cost of providing oral language medical interpretation would be.

Again, had the Court remained faithful to its established doctrine, and relaxed its application of the minimal impairment test in *Oakes*, it is hard to imagine how it could have disagreed with Lampert J.A.'s conclusions. Once it is accepted that the plan need not be comprehensive and that public revenues are limited and scarce, how can it be said that the decision not to fund speech therapists, or dentists, or wheelchairs and artificial limbs or transportation services — as the Act does — is reasonable but the failure to provide sign interpreters is not? For some people, transportation services will be as essential for the effective delivery of the medical services covered by the plan as sign language interpreters are for the hearing impaired. If, as it seems, the Court has no quarrel with the province's refusal to fund the former, it seems very arbitrary and inconsistent to hold it has no reasonable basis to exclude the latter.

IX. THE MEANING OF CONSTITUTIONAL SUPREMACY

In terms of precedent and doctrinal consistency, *Eldridge* is a much harder case than *Hydro-Québec*. In the latter, it will be recalled, the most relevant cases provided a clear legal principle (subsidiarity) by which the constitutional validity of Canada's *Environmental Protection Act* could have been confirmed. In *Eldridge*, by contrast, the Court's most recent pronouncements on the meaning of s. 15 and the flexible way the *Oakes* test should be applied, stood as obstacles to the result that all nine judges thought was right.

In *Eldridge* the Court faced a very stark choice. To vindicate the rights of the disabled — and in particular the hearing impaired — the Court either had to ignore or overrule the caselaw on section 15 and section 1 that stood in its way. As we have seen, the Court opted for expediency over integrity and in so doing earned the condemnation of the press. Even worse, for lawyers, not only did it fail to provide an adequate explanation for the conclusion it reached, it left important principles and doctrinal rulings open to future manipulation and abuse.

Psychologically it is not difficult to understand the attractiveness of a strategy of avoidance and denial. It is never easy to have to confront mistakes one has made in the past and admit the error of one's ways. To ask a Court to re-examine its position, on some of the most basic and hotly contested issues in constitutional law, from first principles, would seem to require a judiciary of Herculean proportions. Surprisingly, as heroic as the expectation might seem to be, it would not have been very difficult for the Court. Had the judges returned to the roots of the *Charter*, and begun their analysis from first principles, they could have done as much to enhance the integrity and

credibility of their own jurisprudence as they did to right the wrong that had been done to people, like Robin Eldridge, whose hearing is impaired.

The fault lines that scar the Court's jurisprudence on the reach of the *Charter*, the meaning of equality, and the rigour with which the proportionality principles that are embedded in section 1 should be applied are well known and have been subject to extensive critiques by the commentators. At the bar of reason, the Court's seminal definitions of what constitutes state action, discrimination and justification have not withstood close analysis. In terms of first principles, it is a simple matter to show that the Court's current approach to sections 32, 15 and 1 has no grounding in the *Charter* and generates outcomes that are arbitrary and unjust.

A. THE PUBLIC-PRIVATE DIVIDE

State action was not, as we have seen, really an issue for the Court in this case. The responsibility of the provincial government for the failure to fund a sign language interpretation service could be linked directly to its decision to delegate the task of defining what medical services would be covered by its health care plan to the Medical Services Commission. However, even though the state's responsibility could be — and indeed was — established in a single paragraph, *Eldridge* actually provided the Court an appropriate opportunity to re-assess its seminal ruling in *Dolphin Delivery* and indeed the whole question of the public-private divide. There is much in this part of the Court's judgment which, had it been followed in *Dolphin Delivery*, would have led to exactly the opposite conclusion to the one it reached in that case.

The Court's decision in *Dolphin Delivery*, that common law (judge made) rules governing the relations of individuals and groups lies outside the reach of the *Charter*, has attracted as much or more criticism as any judgment it has handed down in the fifteen years since the *Charter* was entrenched. The idea that parts of our legal system are immune from review is simply incoherent. It is fundamentally inconsistent with the rule of constitutional supremacy which has been explicitly entrenched in s. 52 of the *Constitution Act of 1982*. The rule of constitutional supremacy means that constitutions and the principles they contain sit at the apex of the legal order, tolerating no rivals or exceptions to their authority. It entails that all legal rules that are backed with the coercive power of the state are part of our system of government and must conform to the requirements of the constitution. From the perspective of the constitutional order *all law is public*, including the law designed by judges to organize the relations of individuals and groups in their personal and private affairs. Against the rule of constitutional supremacy, the categorical distinction between public and private law is false and cannot be sustained.

Peter Hogg told the Court that its common law rules of property, contract and tort were subject to the *Charter* even before *Dolphin Delivery* made it to Ottawa.[42] After the judgment was handed down numerous commentators said the same thing in many

[42] P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 678.

different ways.[43] In Europe, it is widely recognized that all legal rules, whatever their source, are subordinate and must conform to the constitution and in South Africa, when the Constitutional Court made the mistake of relying on *Dolphin Delivery* to support a categorical distinction between public and private law, the final constitution was amended to make it absolutely clear that no legal rule that is backed with the coercive authority of the state can stand above or be immune to constitutional review.[44]

Had the Court revisited *Dolphin Delivery* in *Eldridge*, there is a lot of language to suggest that it might well have been receptive to the critiques that have been levelled at its "state action" jurisprudence. In its extensive (and as we have seen ultimately superfluous) discussion of how the hospitals' involvement in the delivery of the province's health care programme was also subject to review under the *Charter*, the Court highlighted the "inherently governmental"[45] nature of the hospitals' role. Regardless of whether hospitals were public or private institutions, (or something in between) in the Court's mind they were carrying out a specific governmental objective or activity. They were just one of the "vehicles"[46] (the Medical Services Commission was another) through which the government had chosen to deliver its health care programme.

If the Court had used the language of institutions and officials that perform 'inherently governmental actions' in *Dolphin Delivery*, it is hard to imagine it would have treated courts and judges differently than the way it characterized hospitals and other public officials in *Eldridge*. Even for those who think the only legitimate role for government is being a 'night watchman,' conflict resolution would be one of the most fundamental activities of the state. If it is the 'nature of the activity' which determines whether the *Charter* applies, judges and the courts should be caught. Like the hospitals in British Columbia, judges and courts are the vehicles the legislature has chosen to deliver its system of dispute resolution. Like the hospitals in *Eldridge*, courts have been delegated the task of defining, as well as applying, the rules that regulate how disputes in the community will be resolved.

Rethinking *Dolphin Delivery* from first principles would have taken the court less time than it spent trying to justify the categorical distinction it drew between this case and its earlier ruling in *Stoffman*. With equal facility it could have undertaken parallel root and branch resuscitations of section 15 and section 1. Commentators have exposed glaring mistakes in the Court's analysis of both sections and in each case at least some of the judges have expressed doubts about the legitimacy of building a relevance test

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[43] Many of these comments are collected and summarized in my *Constitutional Law in Theory and Practice*, *supra* note 18 at 85-87.

[44] An excellent review of how the public/private issue has been treated by various courts around the world is provided by Aharon Barak, "Constitutional Human Rights and Private Law" (1996) 3 Rev. Constit. Studies 218. The South African decision in which the Constitutional Court followed the reasoning employed in *Dolphin Delivery* is *DuPlessis* v. *De Klerk* (1996), C.C.T. 8.95. The application of the Bill of Rights to the judiciary and the common law is entrenched in what is now Article 8 of the final constitution.

[45] *Eldridge*, *supra* note 2 at 606.

[46] *Ibid.* at 610.

into s. 15 and designating certain categories of law that will be strictly scrutinized by the Court in their section 1 analysis and others that will not.

B. MULTIPLE STANDARDS OF REVIEW

There are two basic flaws in trying to draw a distinction between laws that are strictly held to the requirements of the proportionality principles and those that are not, and they are the same ones that undermine the public-private divide that the Court tried to defend in *Dolphin Delivery*. Here again, the most fundamental problem with the deference principle and the idea of the multiple levels or tiers of review is that it flies in the face of the overarching supremacy of the constitution. When the rules of constitutional law are applied partially or deferentially laws can and have been upheld that would have been struck down if the constitution and the principles of proportionality that are embedded in s. 1 were acknowledged to be supreme. As the Court's rulings on collective bargaining,[47] mandatory retirement,[48] compulsory union dues,[49] and assisted suicide[50] show, whenever the Court waters down or dilutes the principles it established in *Oakes* it runs the risk of upholding laws that restrict people's freedom gratuitously and in ways that are out of proportion to the way other people's freedom has been limited in the past.[51] Deference offends the principle of constitutional supremacy because it allows gratuitous (unnecessary) restrictions to be imposed on people's rights and freedoms which could never be regarded as 'reasonable' limits in societies which claim to be 'democratic and free.'

In addition to its conceptual incoherence, the idea that there are different rules of constitutional validation depending on what kind of law is involved invokes the same kind of categorical distinction that the Court drew between public and private law and is just as vulnerable to manipulation and the generation of very arbitrary results. The line the Court has tried to draw between social and economic policies, that attract a more relaxed and attenuated standard of review on the one hand, and criminal laws, which are subject to strict scrutiny on the other, is a false and meaningless one. The fact is that most, if not all of our criminal laws involve the balancing and compromise of competing interests just like any piece of social or economic policy. Abortion, pornography, impaired driving, rape shield laws, to list only a few of the cases that have been litigated so far, illustrate dramatically the plural interests that are reconciled throughout our criminal laws. Not surprisingly, the fact that the categorical distinction which marks the Court's section one jurisprudence is badly overdrawn has meant that the Court can and has done pretty much what it pleases. In some areas of social and economic policy — like the regulation of the professions — the Court has insisted the principles in *Oakes* be applied in a strict and rigorous way. By contrast in several high profile cases dealing with gun control, extradition, pornography and assisted suicide, the Court assumed a posture of deference and gave a wide "margin of appreciation" to

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47 *Reference Re Public Service Employee Relations Act* (1987), 38 D.L.R. (4th) 161 (S.C.C.).

48 *McKinney* v. *University of Guelph* (1991), 76 D.L.R. (4th) 545 (S.C.C.) [hereinafter *McKinney*].

49 *Lavigne* v. *Opseu* (1991), 81 D.L.R. (4th) 545 (S.C.C.).

50 *Rodriguez* v. *British Columbia* (1993), 107 D.L.R. (4th) 342 (S.C.C.).

51 See *Constitutional Law in Theory and Practice*, *supra* note 18 at 91-92.

the elected branches of government even though the laws in issue were of a criminal or quasi criminal nature.[52]

C. THE RULE OF FORMAL EQUALITY

The failure of the Court's equality jurisprudence is of a piece with its rulings on the scope of the *Charter* and multiple standards of review. Over the dozen short years s. 15 has been in effect, the critiques of the commentators have been unremitting. Many said it got off to a terrible start in its seminal decision in *Andrews* and others say it has gone from bad to worse.[53] Critics crawled over the Court's rejection of the similarly situated test in *Andrews* and even fellow judges lectured them on the mistake they had made.[54] Here again, building sharp, categorical distinctions into their reading of the *Charter* had the effect of substantially reducing the protection s. 15 could provide.

The Court's most recent line of cases — making claimants prove that the distinction about which they are complaining is irrelevant to the purposes of the law of which it is a part would, if taken seriously, practically read s. 15 right out of the constitution. On this definition of discrimination, it is necessary for claimants to prove a government acted irrationally, viz. non sensically. Only when politicians and their officials "took leave of their senses" and tried to implement planks in their political platforms with policy instruments that were irrelevant to their objectives could they be challenged under s. 15. As a practical matter, if relevance became the litmus test in section 15, it would mean no violation would ever be found where the government could establish its ends and objectives were benign. Noble ends would justify any means no matter how extreme.

Defining discrimination to require proof that a distinction or classification is irrelevant is also fatally inconsistent with the principle of constitutional supremacy. Effectively, it eliminates the last two prongs of the proportionality test in *Oakes*. Essentially, it takes the rational connection test out of its section 1 framework, incorporates it into the definitional requirements of section 15, and in so doing, makes it the exclusive criterion of what is constitutional and what is not. It makes relevance rather than necessity and proportionality the operative test in all cases alleging a violation of s. 15. It would, for example, validate laws that impose height and weight restrictions on candidates for jobs, like police or prison guards, where physical size and strength are relevant even though they are not necessary and discriminate against people who can perform all of the duties of the job notwithstanding their inability to meet the formal requirements. Rules that mandate the retirement of workers at a specified age suffer the same inequity and have already been affirmed by the Court.[55]

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52 *Ibid.* at 82-84.

53 See D. Beatty, "The Canadian Conception of Equality" (1996) 46 U.T.L.J. 349.

54 See Tarnopolsky, J.A. in *Catholic Children's Aid Society* v. *S.(T).* (1990), 69 O.R. (2d) 189 at 205-206 (C.A.).

55 *McKinney*, *supra* note 48.

To defeat a claim, all a government has to do is show some connection between the disputed classification and the public purposes the law was designed to achieve. Governments have rarely run afoul of the rational connection test when it has been applied as part of the Court's section 1 analysis and there is no reason the results should be any different when the test is invoked to determine whether a person's section 15 rights have been infringed.

If it had been so inclined, it would not have taken the Court many paragraphs of its judgment to correct its earlier mistakes. Freed of the doctrinal obstacles that were entirely of its own making, the Court would have been in a position to analyze the case from first principles and write a judgment that everyone including the editors of the *Globe & Mail* could have understood. Once it is acknowledged that the formal principle of equality — or, as it is more commonly described in constitutional discourse, the similarly situated test — lies at the heart of s. 15, it is easy to explain why, on the merits of the case, Robin Eldridge was entitled to succeed. Formal equality, like subsidiarity, is an objective, determinative and normatively attractive rule of constitutional legitimacy which would have led the Court directly to the right result.

In law, the formal rule of equality applies even if governments act with the best of intentions and even when, as in Eldridge's case, they fail or refuse to provide a benefit. In law it is accepted that denying benefits to individuals and groups can be as arbitrary and harmful as deliberately subjecting them to special burdens or disadvantages.[56] A Government that allows its hospitals to remain physically inaccessible to people who cannot walk or climb stairs acts just as discriminatorily as the Government that orders its hospitals not to treat people who have no legs.

The formal rule of equality requires that people who are similar be treated the same and people who are different be treated differently in proportion to their differences. To identify who is the same and what differences count, one looks to the purposes or objectives of the law in which the impugned distinction or classification appears. In Robin Eldridge's case this means evaluating her position against all other people who receive the various medical services that are provided in the province's health care plan.

When Robin Eldridge's position is compared to virtually everyone else who is covered by B.C.'s health care plan it is impossible to say she enjoys the "equal benefit or protection" of the law. Because deaf patients cannot communicate effectively with their doctors, it cannot be said they receive the same quality of medical care as people who can hear. As a simple factual, empirical matter the benefits she receives are just not the same as those that most people enjoy.

Those whose hearing is impaired receive a qualitatively inferior service compared to those who can communicate effectively. The frightening experience Linda Warren (one of Eldridge's co-claimants) endured during the premature birth of her twin daughters puts the lie to any suggestion that medical services that are not effectively

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[56] *Schacter* v. *Canada* (1992), 93 D.L.R. (4th) 1 (S.C.C.).

communicated are the same as those that are.[57] Because their disability makes them different from people who can hear and communicate effectively, the formal rule of equality requires they be provided with someone who can communicate for them. To respect their right to the equal benefit of B.C.'s medical care plan requires the provision of this additional "auxiliary" service. To ensure everyone enjoys the same quality of health care, governments must do more for those whose disabilities prevent them from being able to fully benefit from the services provided in their health care plans.

Some people may concede that those who suffer a hearing impairment like Robin Eldridge do receive qualitatively inferior services but resist the conclusion that this is the responsibility of the state. This, in fact, was the position of the other two judges on the B.C. Court of Appeal who threw out her claim.[58] They said the province did provide the benefit of free medical service equally to everyone and that was all they were constitutionally obliged to do. The government had done its duty by relieving both hearing and deaf persons of the responsibility of paying their physicians and hospitals for the services they receive. On this view, any inequalities that still exist are independent and not the responsibility of government.

The argument is one many students initially find very attractive. It is, nonetheless, one that shows a basic misunderstanding of how the formal principle of equality works. Just because the state is not responsible for Robin Eldridge's disability doesn't mean it can't be held accountable when it treats people who cannot hear less favourably than those who can. The constitution guarantees "equal benefit" of the law. The fact the government pays everyone's medical bills doesn't alter the fact that the quality of service hearing impaired patients receive is radically inferior to what the general population enjoy. In deciding whether the operation of the province's health care programme was constitutional or not, it is the inequalities in the services that are received which is determinative and which requires a finding that Robin Eldridge was denied her constitutional right to the equal benefit of that law.

X. JUSTIFYING DISCRIMINATION

The fact that Robin Eldridge has a legitimate claim of discrimination against the provincial government, doesn't mean she is automatically entitled to succeed. Constitutional cases are two way conversations between individuals and groups and the state and government is entitled to an opportunity to respond. According to the Court's landmark ruling in *Regina* v. *Oakes*,[59] Governments can restrict people's rights if they are promoting the general welfare of society and if they are doing so in a way that satisfies two basic tests of proportionality.

In Eldridge's case, the Government defended its decision strictly on the basis of cost. The Ministry turned down the request to take over the funding of a sign language interpretation service because it thought that it "would create a precedent for the

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[57] *Eldridge*, *supra* note 2 at 589.

[58] *Ibid.* at 618-21.

[59] *Oakes*, *supra* note 31.

funding of similar services for the non-English speaking immigrant community" and, as a result, "strain available resources." Indeed some say that once special provisions are made for one group it is impossible to resist the claims of numerous other individuals and groups. If people with hearing disabilities have a right to sign language interpreters when they receive health care, what about when they receive other government services or what about those who need wheelchairs or those who need transportation to get the medical services they require? The editors of the *Globe & Mail* found the prospect of judges ruling on these and similar cases so inherently at odds with the democratic character of our government that, however sympathetic Eldridge's plight, they said the Court should have ruled it was not within its competence to redress.

The strength of all of these "slippery slope" arguments depends on the accuracy of the comparisons they draw.[60] Cumulatively, they argue that so many individuals and groups have claims that are virtually identical to Robin Eldridge's that the cost of attending to everyone's needs would "strain [the] available resources" of the province. When they are examined individually, however, it can be seen that some of the comparisons are a lot weaker than others and some are not credible at all.

For example, providing sign language interpreters for people like Robin Eldridge whose hearing is impaired is not the same and can not be equated with a claim to have some additional service or device that is not currently funded brought within the scope of the plan. Providing the former does not logically entail funding the latter. As La Forest pointed out, this (slippery slope) argument ignores the difference between claims for services and benefits that are not covered by the Act — such as wheelchairs or speech therapy — from those, like Robin Eldridge's, which ask only that the services and benefits that the province does provide be made equally available to all. Acknowledging the legitimacy of Eldridge's case would not, as a matter of equality at least, commit the government to having to pay for every available medical service or device. At most it would oblige the government to pay for other "ancillary" services — such as transportation — that are, like sign language interpreters, necessary for the effective delivery of benefits and services that are covered by the Act.

Nor does it follow that requiring the government to support a sign language interpretation service mean it must set up parallel units for everyone else who cannot communicate in either of the country's official languages. Once again, it all depends on the facts and whether the circumstances of the hearing impaired and those who speak neither official language are the same. If they are not similarly situated in terms of the purposes of the province's health care scheme, section 15 would allow — and perhaps even require — differential treatment of the two groups.

From the perspective of the province's health care scheme, the circumstances of the hearing impaired do seem unique at least in the degree of difficulty they face in being able to communicate effectively in one of the country's two official languages. There was evidence before the Court that the barriers to effective communication that are

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[60] F. Schauer, "Slippery Slopes" (1985) 99 Harv. L. Rev. 361.

faced by those who are deaf are especially difficult to surmount. As the Court pointed out at the end of its judgment, many hearing impaired people have an extremely difficult time becoming proficient in any oral language and also face special problems finding someone in their family or circle of friends who knows sign language and can make themselves available to interpret for them. Assuming the circumstances of the hearing impaired are especially acute in these ways then, in a tax supported programme, where funds are not unlimited, it is neither irrational nor inequitable for those responsible for its operation to direct their resources to services that attend to needs that are especially urgent and whose costs are so insignificant as to be practically irrelevant.

Analyzing the circumstances of other possible claimants on a case by case basis makes it plain that the fear of upholding Robin Eldridge's claim will lead either to provincial bankruptcy or to the Court's managing the hospitals and ultimately running the government is groundless and without foundation. In deciding which cases are analogous to Robin Eldridge's claim the Court is engaged in the same close examination of factual detail and following the same method of reasoning that it has used for centuries in developing the common law. Insisting that governments act consistently and with a sense of proportion about the relative magnitude of the relevant interests that are at stake is a far cry from taking over the reigns of government and is hardly likely to bankrupt the provinces.

Some of the analogies — like requiring sign language interpretation services to be available in other government departments, or providing transportation services for those who do not have any public or private means of getting to and from their doctors' offices or a hospital — do seem compelling. As the Court noted in its judgment, human rights tribunals have already required governments to pay for the services of sign language interpreters for people with hearing impairments who are attending university as well as for those who are caught up in quasi-judicial proceedings.[61] It is not clear from the facts of the case whether the cost of such services would be of the same order of magnitude as the cost of providing sign language interpreters where it is necessary for the effective communication of the medical services that are covered in B.C.'s medical care plan, but if they were the analogies would seem to hold and their additional cost would have to be taken into account.

Even allowing for the additional costs of funding those services that are truly analogous to those that Robin Eldridge claimed, it seems highly unlikely they will be so extensive as to constitute a substantial drain on provincial resources. The cost of providing a sign language interpretation service as part of B.C.'s medical care plan was $150,000 or .0025 per cent of the provincial health care budget. Even if the cost of funding analogous services increased this number by a factor of 3 or 4, it seems a stretch to say it would justify refusing to fund any of them.

Failing to provide services to people that cost very little and which are essential for the effective delivery of an important government programme cannot satisfy the third principle of proportionality that the Court established in *Oakes*. On the one hand, a

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[61] *Eldridge*, *supra* note 2 at 623.

service like sign language interpretation is nothing less than a precondition to the effective delivery of medical care to people whose hearing is impaired. On the other, the increase in cost to the province's health care budget would raise people's taxes by a matter of pennies. On any metric, the relative importance of such services to people whose hearing is impaired transcends the minuscule impact they will have on individual taxpayers. The enhancement of the position of people who suffer hearing disabilities is out of all proportion to the burden they impose on the state.

XI. LEGAL REASONING AND JUST RESULTS

If, as it appears on the facts of the case, the province cannot justify its refusal to fund a sign language service as part of its medical care programme on the basis of cost, *Eldridge* repeats and reinforces one final lesson that it shares with *Hydro-Québec* which is that law and justice do coincide. Had the Court followed the logic of its own first principles, it would have come to what most people (including the editors at *The Globe & Mail*) instinctively feel is the morally correct outcome in both cases in a much more straightforward, less roundabout way. Both cases teach students that thinking like a lawyer does lead to just and socially beneficial results. Careful analysis of the competing interests at stake in the two cases challenges the wisdom of those who lecture that thinking like a lawyer means talking fast and teach others to believe that whether a decision is legally correct has nothing to do with whether it is fair.

Putting the cases side by side shows students that the rules of constitutional law under the *Charter* and the old *B.N.A. Act* share a common logical method and structure. Principles of proportionality are prominent in both. Reading *Eldridge* alongside *Hydro-Québec* proves there is nothing special about social-economic or positive rights. The same principles focus the analysis whether federal-provincial conflicts over environmental protection or the rights of the disabled are at stake. The analysis is the same whether the claim is the state has gone too far or not far enough. Evaluating proportionalities can point to the right answer in either case. Judged impartially, the stakes for the provinces in the two cases were nowhere near as high as they were for the federal government in *Hydro-Québec* or for the hearing impaired in *Eldridge*.

Of course, legal reasoning and the rules of constitutional law are dependent upon those who are appointed to the Bench judging with integrity and good faith.[62] Principles like subsidiarity (necessity) and proportionality (equality) are not amenable to mechanical application. They do not dispense justice like slot machines. They require impartiality and sensitivity to work.

They are also dependent on those who have been trained in the law, and for whom making judgments is a way of life, using their learning to contribute to the welfare of the communities in which they live. For professionals, *Hydro-Québec* and *Eldridge* are just two examples of how law can be enlisted in the cause of moral integrity and social justice. After graduation, law students are uniquely positioned to counsel others who have been excluded from the centers of political power on how constitutional review

[62] S. Burton, *Judging in Good Faith* (Cambridge: Cambridge University Press, 1992).

and the rule of law can work for them as well. *Hydro-Québec* and *Eldridge* both teach how, at their core, constitutions — and the rules they contain — allow everyone who has a special interest or expertise in an issue to insist on receiving an audience with their governors and getting answers to their concerns. Courts and judges provide a forum in which politics can be practiced in a dialogue of pure principle and sound judgment and where even the most marginal, least influential people will be guaranteed the attention and the respect they deserve.