Protecting Rights and Promoting Democracy: Judicial Review under Section 1 of the Charter

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Abstract
The author argues that, under section 1 of the Charter, the courts must weigh carefully the democratic potential of rights guarantees against the democratic quality of government decisions which undermine those rights. The article points to the Egan and Eldridge cases as examples of decisions in which the willingness to uphold rights violations under section 1, in the name of deference to the legislature, actually undermines democratic values. The article examines the RIR-MacDonald decision as a starting point for a section 1 analysis which identifies the characteristics of government decisionmaking that must be present if rights violations are to be justified under section 1, understood in terms of the Charter's combined objectives of protecting rights and of promoting democracy.
PROTECTING RIGHTS AND
PROMOTING DEMOCRACY:
JUDICIAL REVIEW UNDER
SECTION 1 OF THE CHARTER®

BY MARTHA JACKMAN*

The author argues that, under section 1 of the Charter, the courts must weigh carefully the democratic potential of rights guarantees against the democratic quality of government decisions which undermine those rights. The article points to the Egan and Eldridge cases as examples of decisions in which the willingness to uphold rights violations under section 1, in the name of deference to the legislature, actually undermines democratic values. The article examines the RJR-MacDonald decision as a starting point for a section 1 analysis which identifies the characteristics of government decisionmaking that must be present if rights violations are to be justified under section 1, understood in terms of the Charter's combined objectives of protecting rights and of promoting democracy.

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I. INTRODUCTION

In his landmark decision in R. v. Oakes, former Chief Justice Dickson prefaced his review of the specific elements of a section 1 analysis under the Canadian Charter of Rights and Freedoms with an important reminder of the fundamental purpose for which the Charter was entrenched in the Canadian Constitution: "Inclusion of [the] words 'free and democratic society' ... as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic."

Dickson C.J.'s reference to the dual purpose for which the Charter was enacted: to protect individual rights and to promote democracy, regretfully, has been largely ignored in subsequent commentary and case law. Critics of the Charter depict judicial review on Charter grounds as profoundly anti-democratic: pitting individual rights against Parliamentary democracy. In interpreting and enforcing individual rights, Canadian judges have also often failed to recognize or to give life to the Charter's potential for improving the democratic tenor of decisionmaking at all levels of government.

The failure to see substantive rights review as a mechanism for

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2 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Charter]. Section 1 provides: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

3 Oakes, supra note 1 at 136.


5 Consider, for example, the Supreme Court of Canada's narrow interpretation of the obligations imposed on government by the freedom of expression guarantee under section 2(b) of the Charter in Native Women's Association of Canada v. Canada, [1994] 3 S.C.R. 627.
enhancing democracy is equally true of the courts’ approach to section 1 of the *Charter*. Notwithstanding Dickson C.J.’s point of departure in *Oakes*, judicial analyses under section 1 have proceeded on the basis that individual rights and democracy are inherently at odds. In applying section 1, the courts have rarely focused on the extent to which justification of a particular rights violation would either promote or undermine fundamental democratic principles and values. Where democratic considerations have been factored into the section 1 analysis, this has often been done in an unprincipled and *ad hoc* way.

In the discussion that follows, I will argue that, if the *Charter* is to fulfil its initial promise—not only to protect individual rights, but to promote a more truly democratic society—the courts must be more attuned to the *Charter*’s democracy-related objectives. In other words, government decisions which violate individual rights should not automatically be assumed to be legitimate and defensible in democratic terms. At the same time, individual rights should not be perceived simply as barriers surrounding individuals, protecting them from government and from community, but rather as affirmative mechanisms for ensuring that individuals can participate fully in Canadian society and its democratic institutions.6 With regard to section 1 in particular, I will argue that the courts must carefully weigh the democratic potential of individual rights guarantees against the democratic quality of the government decisions which undermine those rights, before coming to a decision whether the requisite section 1 standard of justification has been met.

In order to support this claim, the discussion will proceed in three parts. First, I will examine Sopinka J.’s opinion in *Egan v. Canada*7 and Lambert J.A.’s opinion in *Eldridge v. British Columbia (A.G.)*8 as examples of decisions in which the willingness to uphold individual rights violations under section 1 of the *Charter*, under guise of deference to the legislature, actually undermines democratic values. Second, I will consider La Forest J.’s and McLachlin J.’s judgments in *RIR-MacDonald Inc. v. Canada (A.G.)*9 as a starting point for a section 1 analysis which takes proper account of democratic considerations in assessing

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8 (1995), 7 B.C.L.R. (3d) 156 (C.A.) [hereinafter *Eldridge*]. An appeal from the decision was heard by the Supreme Court of Canada on 24 April 1997.

infringements of individual rights. I conclude by summarizing the
characteristics of government decisionmaking which, in my view, must be
present if rights violations are to be justified under section 1. Such
characteristics are understood in terms of the Charter's combined
objectives of protecting individual rights and of promoting a more
vibrant Canadian democracy.

II. CONFOUNDING DEFERENCE AND DEMOCRACY:
THE EGAN AND ELDRIDGE DECISIONS

The Egan case involved a section 15 challenge, before the
Supreme Court of Canada, to the exclusion of same-sex partners from
eligibility for spousal benefits under the federal Old Age Security Act.\textsuperscript{10}
The Eldridge\textsuperscript{11} case involved a section 15 challenge, before the British
Columbia Court of Appeal, to the provincial government's failure to
provide funding for medical interpretation services for the Deaf within
the publicly funded health care system. Sopinka J.'s section 1 analysis in
Egan and Lambert J.A.'s section 1 analysis in Eldridge will be discussed
in turn.

A. Sopinka J.'s Analysis in the Egan Case

In Egan, Sopinka J. agreed with the dissenting justices that the
appellants' right to equality without discrimination on the basis of sexual
orientation was violated by the disparate treatment of heterosexual and
same sex spouses under section 2 of the OASA. Sopinka J. joined with the
majority, however, on the question of whether this infringement could be
justified under section 1 of the Charter.\textsuperscript{12}

Sopinka J. began his section 1 review of the OASA by stating that
"[i]t is not realistic for the Court to assume that there are unlimited
funds to address the needs of all,"\textsuperscript{13} and by warning that a proactive
judicial approach to Charter review of social benefit schemes will make
governments reluctant to create new programs for fear of expanded

\textsuperscript{10} R.S.C. 1985, c. O-9 [hereinafter OASA].
\textsuperscript{11} Supra note 8.
\textsuperscript{12} Egan, supra note 7 at 572.
\textsuperscript{13} Ibid.
future liability. Sopinka J. then invoked La Forest J.'s reasoning in *McKinney v. University of Guelph* as a basis for finding that the federal government's decision to exclude same-sex spouses from the old age security regime was justifiable. In terms of the proper section 1 approach to be adopted in the *Egan* case, Sopinka J. stated that, similar to the situation in *McKinney*:

> the legislation in question represents the kind of socio-economic question in respect of which the government is required to mediate between competing groups rather than being the protagonist of an individual. In these circumstances the Court will be more reluctant to second-guess the choice which Parliament has made.

Sopinka J. concluded his very cursory section 1 analysis of the *OASA* by commenting on the government's delay in remedying discrimination on the basis of sexual orientation under federal legislation. He suggested that, in view of the novelty of the concept of same-sex spousal relationships, the government's inaction did not disentitle it from relying on section 1 of the *Charter*.

Throughout his section 1 analysis, Sopinka J. showed extreme deference to the government and its legislative choices. He characterized the exclusion of same-sex spouses from the *OASA* as the result of a measured, incremental, legislative approach to the problem of alleviating poverty among elderly spouses, and as a careful balancing of competing social interests and the demands of competing groups. In coming to this conclusion, however, Sopinka J. misapplied La Forest J.'s analysis in the *McKinney* decision and mischaracterized both the governmental decision-making process and the interests at stake in the *Egan* case.

La Forest J.'s analysis of section 1 in the *McKinney* case related primarily to section 9(a) of the Ontario *Human Rights Code*, which, by limiting protection against age-related discrimination in employment to those under age sixty-five, was held to infringe section 15 of the *Charter*. The crucial question posed by La Forest J. at the section 1 stage in *McKinney* was whether, given the complexity of the mandatory retirement issue and the competing social and economic interests involved, "the government had a reasonable basis for concluding that the

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14 Ibid. at 572-73.
16 *Egan, supra* note 7 at 575-76.
17 Ibid. at 576.
18 S.O. 1981, c. 53 (now R.S.O. 1990, c. H.19, s. 10(1)(a)).
legislation impaired the relevant right as little as possible given the
government's pressing and substantial objectives."\[^{19}\]

There was considerable evidence in *McKinney* that the provincial
legislature had devoted significant attention to the issue of whether the
Ontario *Human Rights Code* should continue to deny protection against
mandatory retirement at age sixty-five. La Forest J. quoted extensively
from the relevant legislative debates, including statements by the
Minister of Labour during second reading of the Bill and at the
committee stage. The Minister's comments in the legislature and before
the committee made it clear that the government had carefully weighed
the interests of those seeking an increase in the age of mandatory
retirement against the interests of employees who might be adversely
affected by a delay in the retirement age or benefits, the interests of
younger persons attempting to enter the workforce, and related labour
market adjustment issues.\[^{20}\] La Forest J. summarized the Ontario
legislature's deliberations as follows: "What comes out clearly from the
debates is the anguish of the members in the face of a measure, which
for reasons they viewed as overriding, they felt could not be extended to
the protection of the elderly ...."\[^{21}\]

In *McKinney*, deference to the government's legislative choice at
the minimal impairment stage of the *Oakes* analysis was warranted on
several grounds. First, the legislature itself made the impugned decision.
Second, it did so after considering carefully the competing social and
economic issues and interests involved. And, third, the decision to limit
the rights of one group was in fact taken in order to promote the rights
of others: older workers who would be adversely affected by a change in
the mandatory retirement age and younger workers facing serious
obstacles to labour market entry.

In contrast to the *McKinney* case, deference to the legislature,
either on grounds of institutional competence or democratic legitimacy,
is not warranted in the *Egan* case. In justifying the *OASA*\[^{22}\] under section
1, Sopinka J. did not refer to any convincing evidence presented by the
federal government as part of its section 1 defence that the decision to
provide same-sex benefits under the *OASA* raised unduly complex
socio-economic issues which the legislative branch is better able to
address. Nor was any evidence provided by the federal government, or

\[^{19}\] *McKinney*, *supra* note 15 at 309 [emphasis in original].
\[^{21}\] *Ibid.* at 301.
\[^{22}\] *Supra* note 10.
relied upon by Sopinka J., that Parliament had turned its attention directly to this issue, or that it had been forced to exclude same-sex spouses from the legislation in order to meet the equally compelling rights of a competing group.

In other words, while Sopinka J.’s judgment was couched in terms of deference to the legislature, the *Egan* decision does not in fact reflect or reinforce democratic principles or values. The fundamental reason that federal legislation continues to discriminate against gays and lesbians—that is, their social and political marginalization—was not acknowledged by Sopinka J. as a relevant factor under section 1. Nor did he take account of the extent to which recognition of the equal rights of same-sex couples would improve the ability of gays and lesbians to participate as equal members in Canadian social and political life. By characterizing the need to address discrimination against same-sex relationships in social benefits legislation as a novel problem, Sopinka J. sanctioned Parliament’s continuing unwillingness to recognize gays and lesbians as citizens of equal merit and worth. And by ignoring the predictable impact, in terms of Parliament’s legislative agenda, of the under-representation of gays and lesbians and their concerns within the legislative process, he tacitly reinforced this malfunctioning within our democratic system.

B. Lambert J.A.’s Analysis in the *Eldridge* Case

In his judgment in the *Eldridge* case, Lambert J.A. dissented from the majority opinion of the Court of Appeal and found that British Columbia’s failure to provide medical interpretation services for the Deaf within the publicly funded health care system violated section 15 of the *Charter*. However, he went on to find that this violation of the equality rights of the Deaf can be justified under section 1 of the *Charter*. Like Sopinka J. in *Egan*, Lambert J.A. prefaced his discussion of section 1 by referring to the current fiscal climate:

There is a national debate underway at the moment about the reduction of funds to be transferred from Canada to the provinces ... . There is a debate underway in each province about the expenditure priorities for the reduced funds. In the allocation of scarce financial resources, each province will be required to make choices about spending priorities.24

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23 Supra note 8 at 178.

24 Ibid. at 180.
In this context, he determined, the courts cannot become involved in decisions about the allocation of health care resources. Even where constitutional rights are at issue, he maintained, courts have neither the knowledge nor the mandate to interfere:

How can we say, in those circumstances, that expenditure of scarce resources on services that remedy infringed constitutional rights under s. 15 ... are more desirable than expenditures of scarce resources on things that cure people without affecting constitutional rights ... . And, indeed, how can we prefer the allocation of scarce resources to services that remedy the infringed constitutional rights of one disadvantaged group over ... services that remedy the infringed constitutional rights of a different disadvantaged group.\(^{25}\)

In view of the multiplicity of choices facing the legislature, Lambert J.A. held that any discrimination resulting from health care resource allocation decisions “should be rectified, if at all, by legislative or administrative action and not by judicial action.”\(^{26}\) This is a case, Lambert J.A. concluded, for “judicial restraint and for deference under the Constitution and under s. 1 of the Charter to legislative policy and administrative expertise.”\(^{27}\)

In coming to this decision, Lambert J.A. failed to subject the government’s section 15 violation to careful scrutiny, in keeping with the analytical framework established by the Supreme Court of Canada in \textit{Oakes} and subsequent decisions. In terms even more explicit than Sopinka J. in \textit{Egan}, Lambert J.A. bypassed a conventional section 1 analysis, and instead concluded that the court should defer to the government’s choice to violate the equality rights of the Deaf because of the legislature’s greater institutional competence and democratic legitimacy. As in \textit{Egan}, however, the decision-making process which resulted in the violation of the equality rights of the Deaf in \textit{Eldridge} did not warrant the judicial deference which Lambert J.A. accorded to it.

At the outset of his section 1 analysis, Lambert J.A. referred to the policy debate taking place at the national and provincial levels in terms of the allocation of shrinking health care resources. He suggested that, within each province, complex factors will have to be weighed and difficult choices made.\(^{28}\) As in \textit{Egan}, however, there was no evidence that the decision to infringe the equality rights of the Deaf in \textit{Eldridge} was in fact the product of a careful or informed legislative choice. The

\(^{25}\) \textit{Ibid.}.

\(^{26}\) \textit{Ibid.}.

\(^{27}\) \textit{Ibid.} at 181.

\(^{28}\) \textit{Ibid.} at 180.
decision to deny funding for medical interpretation services for the Deaf was not made by the legislature, following deliberations of the type which occurred in the *McKinney* case. Rather, the decision was made at an informal policy level, by a legislative sub-delegate within the provincial health ministry.\(^{29}\) As many commentators have pointed out, this type of delegated decisionmaking, while a pervasive feature of current Canadian government, is not subject to any significant degree of legislative oversight or control.\(^{30}\)

Nor, in contrast to the situation in *McKinney*, was the decision in *Eldridge* the result of a careful weighing of available evidence, or of a careful balancing of competing interests. Evidence accepted at trial showed that the annual cost to the provincial government of providing medical interpretation services for the Deaf was in the order of $150,000, as against an annual provincial health care budget of $6 billion.\(^{31}\) Aside from the modest amount at stake, the government made no effort to rebut the claim that funding interpretation services for the Deaf might actually reduce, rather than increase, provincial health care spending by leading to more effective and efficient delivery of health care services to the Deaf.

Furthermore, contrary to *McKinney*, there was no evidence in *Eldridge* that the government’s refusal to provide the requisite funding was dictated by a need to protect the competing interests or rights of another group. Rather, the decision to deny funding for interpretation services for the Deaf was made by health ministry officials in an attempt to forestall potential future demands for interpretation services by non-English speaking groups.\(^{32}\) As in *Egan*, the motivation for the choice was, at best, systemically discriminatory. And, as in *Egan*, the only competing interest was a general desire to limit government spending.

A refusal by the court to justify the violation of the equality rights of the Deaf under section 1 would, quite apart from its merits in

\(^{29}\) *Ibid.* at 163-64.


\(^{31}\) *Eldridge*, supra note 8 at 163-64.

\(^{32}\) *Ibid.* at 164.
individual rights terms, clearly have been a preferable outcome from a democratic point of view. At issue in *Eldridge* is the ability of a historically disadvantaged group to benefit equally from a program which is widely characterized as a defining element of the Canadian state, and as a fundamental right of social citizenship. Excluding the Deaf from equal benefit of the health care system speaks loudly to their social and political marginalization and to their corresponding invisibility within the policy and legislative process. Recognition that a health care system which fails to provide interpretation services is not, as Diane Poithier has put it, "universal health care but rather the provision of able-bodied health care," is an important step towards recognition of the Deaf as full and equal participants in Canadian society. It is also an important step towards a better understanding of the measures which are required for the Deaf to participate on an equal footing in our democratic institutions.

A review of the actual circumstances of the *Eldridge* case makes it clear that judicial deference is neither warranted nor deserved. By concluding that the violation of the equality rights of the Deaf is justified under section 1, Lambert J.A. confounds an exercise of discretion by a legislative delegate with Parliamentary democracy itself.

III. RIGHTS AND DEMOCRACY: THE *RJR-MacDONALD* DECISION

At issue in the *RJR-MacDonald* case was whether the violation of tobacco manufacturers' right to freedom of expression under section 2(b) of the *Charter*, resulting from restrictions on tobacco advertising and promotion under the federal *Tobacco Products Control Act*, could be justified under section 1 of the *Charter*. In her judgment for a majority of the Court, McLachlin J. decided that the impugned


provisions of the Act could not survive section 1 scrutiny. In his dissenting opinion, La Forest J. departed from the majority in finding that the TPCA should be upheld under section 1. La Forest J.'s and McLachlin J.'s decisions in relation to section 1 will be discussed in turn.

A. La Forest J.'s Analysis

La Forest J. began his discussion of section 1 by summarizing the criteria established by the Supreme Court of Canada in Oakes, and then by emphasizing that these principles must be applied flexibly, taking into account the specific factual and social context of each case. The nature of the impugned legislation was, he stressed, "highly relevant to a proper application of the s. 1 analysis." In the case of the TPCA, La Forest J. concluded, Parliament was faced with the problem of meeting its legislative mandate to protect public health in a context in which a total ban on smoking was not a realistic policy option. In designing a legislative solution, he suggested, Parliament sought to balance the competing interests of smokers, non-smokers, and tobacco manufacturers. The adoption of the TPCA was, La Forest J. pointed out, the culmination of a lengthy and arduous process of legislative deliberation. As he described it:

In drafting this legislation, Parliament took into account the views of Canadians from many different sectors of society, representing many different interests. Indeed, the legislative committee responsible for drafting ... the Act, heard from 104 organizations during hearings in 1988 representing a variety of interests, including medicine, transport, advertising, smokers' rights, non-smokers' rights, and tobacco production.

This was, La Forest J. suggested, a situation in which the

36 La Forest J. summarized the Oakes test, supra note 1, in BHR-MacDonald, supra note 9 at 268, as follows:

In Oakes, this Court set out two broad criteria as a framework to guide courts in determining whether a limitation is demonstrably justified in a free and democratic society. The first is that the objective the limit is designed to achieve must be of sufficient importance to warrant overriding the constitutionally protected right or freedom. The second is that the measures chosen to achieve the objective must be proportional to the objective. The proportionality requirements has three aspects: the measures chosen must be rationally connected to the objective; they must impair the guaranteed right or freedom as little as possible; and there must be proportionality between the deleterious effects of the measures and their salutary effects.

37 Ibid. at 270.

38 Ibid. at 272.

39 Ibid. at 278.
considerations set out in *McKinney* were directly applicable and where a more flexible application of the proportionality analysis under section 1 was warranted. Referring to his judgment in *McKinney*, La Forest J. explained:

> [I]t is clear that the Act is the very type of legislation to which this Court has generally accorded a high degree of deference. In drafting this legislation, which is directed toward a laudable social goal and is designed to protect vulnerable groups, Parliament was required to compile and assess complex social science evidence and to mediate between competing social interests. Decisions such as these are properly assigned to our elected representatives, who have at their disposal the necessary resources to undertake them, and who are ultimately accountable to the electorate.\(^4\)

Having examined the nature of the legislation, La Forest J. went on to apply the three elements of the proportionality criteria set out in *Oakes*. Reviewing the evidence put forward by the federal government in support of the *TPCA*, he found that there was a rational connection between the legislative objective of reducing smoking and the ban on tobacco advertising and promotion;\(^4\) that the choice of a full, rather than a partial ban, was a reasonable approach which met the minimal impairment criteria;\(^4\) and that the deleterious effect of limiting the free speech of tobacco advertisers does not outweigh the legislation's beneficial effects in terms of reducing smoking and its ill-effects.\(^4\) On the basis of these findings, La Forest J. concluded that the impugned provisions of the *TPCA* were reasonable and demonstrably justifiable within the meaning of section 1.\(^4\)

**B. McLachlin J.'s Analysis**

In her majority opinion in the *RJR*-*MacDonald* case, McLachlin J. accepted La Forest J.'s assertion that legislative context is an important factor to be considered in determining whether a rights violation can be justified under section 1. She stressed, however, that while a contextual approach is important at the section 1 stage in determining the legislative objective and in applying the proportionality criteria, "it cannot be carried to the extreme of treating the challenged law as a

\(^{40}\) *Ibid.* at 279.

\(^{41}\) *Ibid.* at 303.

\(^{42}\) *Ibid.* at 306.


\(^{44}\) *Ibid.* at 325.
unique socio-economic phenomenon, of which Parliament is deemed the best judge."\textsuperscript{45} Otherwise, McLachlin J. warned, Parliament's obligation to justify the limitations it places on Charter rights would be undercut through the substitution of ad hoc judicial discretion for the reasoned analysis required by section 1.

McLachlin J. also agreed that the degree of deference which the courts should grant to Parliament may vary in accordance with the context of each case.\textsuperscript{46} Referring to La Forest J.'s suggestion that greater deference might be appropriate where a law is concerned with competing rights between different sectors of society, rather than where the state is acting as the "singular antagonist of the individual,"\textsuperscript{47} however, McLachlin J. cautioned that this distinction is not easy to apply. She pointed to the TPCA itself as being an example of criminal legislation that pits the state against the individual offender but which, at the same time, is designed to balance competing social interests. McLachlin J. insisted that, although the difficulty of devising legislative solutions to complex problems may affect the degree of deference the courts accord to Parliament or the legislatures:

As with context, ... care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable.\textsuperscript{48}

While Parliament has the role of choosing the appropriate legislative response to social problems, in the event of a Charter challenge, the courts must determine whether the choice Parliament has made is constitutional. As McLachlin J. put it, "the courts are no more permitted to abdicate their responsibility than is Parliament."\textsuperscript{49} She summarized the starting point of her analysis as follows:

While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning.\textsuperscript{50}

\textsuperscript{45} Ibid. at 331.
\textsuperscript{46} Ibid. at 330-31.
\textsuperscript{47} Ibid. at 277.
\textsuperscript{48} Ibid. at 332.
\textsuperscript{49} Ibid.
\textsuperscript{50} Ibid. at 329.
With these introductory observations, McLachlin J. went on to assess whether the TPcA was justifiable under section 1. In terms of Parliament's objectives in enacting the legislation, McLachlin J. agreed with La Forest J. that the goal of reducing tobacco consumption was sufficiently important to warrant overriding the right to freedom of expression. She disagreed with La Forest J., however, at the proportionality stage of the Oakes analysis. In particular, she found that the legislative ban on tobacco advertising and promotion, and the packaging requirements imposed by the Act, did not meet the minimal impairment requirement of the Oakes test. On that basis she concluded that the legislation must be struck down.

C. Assessing the Democratic Legitimacy of Rights Violations

Taken together, La Forest J.'s and McLachlin J.'s analysis of section 1 in the RIR-MacDonald case offer important insights in terms of conducting a section 1 review of individual rights violations that is genuinely sensitive to democracy-related concerns. Throughout her judgment in the RJR-MacDonald case, McLachlin J. emphasized the overriding importance of a careful and principled judicial application of each element of the section 1 analysis in every case in which an individual rights violation has occurred. McLachlin J. rejected the argument that a differing level of section 1 scrutiny should be applied according to whether the impugned legislation is classified as "criminal" or "social" in character. As she pointed out, this distinction cannot be sustained in practice since, in all Charter cases, there will be a conflict between the state and the victim of the rights violation, and the state will be pursuing some broader social purpose.

McLachlin J. recognized that legislative context must be taken into account by the Court, both in assessing the legislature's objectives, and in determining whether the proportionality criteria have been met. However, she insisted that a complex legislative problem or context does not vitiate the need for a high level of section 1 scrutiny, and that the judiciary cannot abdicate its supervisory role in the name of judicial deference to the institutional competence or legitimacy of the legislature. In a constitutional democracy, McLachlin J. emphasized, the legislatures and the courts each have their respective roles and responsibilities: the legislatures must enact and implement social policy;

51 Ibid. at 336.
52 Ibid. at 349-50.
the courts must subject such policy to stringent review where it infringes constitutional rights and principles.

In terms of an approach that sees the potential for enhancing democracy through Charter review, McLachlin J.'s interpretive framework has the merit of requiring judges to take seriously the task of scrutinizing government decisionmaking. McLachlin J.'s analysis requires a rigorous and principled application of section 1, in keeping with the criteria established in the Oakes decision, without prejudgment as to whether any particular degree of judicial deference is owing to any particular form of legislation. McLachlin J. recognizes that judicial failure to apply section 1 properly, under guise of deference to the legislature, is inappropriate and unwarranted within our constitutional democracy. On that basis, McLachlin J.'s judgment in RJR-MacDonald is fundamentally at odds with Sopinka J.'s reasoning in Egan, and with Lambert J.A.'s approach in Eldridge.

As discussed in Part II, above, in Egan, Sopinka J. applied a highly attenuated level of section 1 scrutiny to the OASA based on a presumption about the legislative category to which the Act belongs: social benefits legislation with which the courts should not interfere. In the Eldridge case, Lambert J.A. failed altogether to subject the province's discriminatory health care regime to section 1 review in accordance with the Oakes principles. While Sopinka J.'s and Lambert J.A.'s decisions are couched in terms of deference to democratic principles, they amount to a clear abdication of judicial responsibility of the type McLachlin J. criticized in RJR-MacDonald.

The value of La Forest J.'s approach in the RJR-MacDonald case lies in its insistence on the need to engage in a careful and contextual examination of the legislation that infringes a Charter right. La Forest J.'s emphasis on legislative context makes it impossible to engage in the type of cursory section 1 analysis which characterizes Sopinka J.'s and Lambert J.A.'s decisions in the Egan and Eldridge cases. First, La Forest J.'s approach draws attention to the nature of the decisionmaker; second, it focuses on the actual form of the decision; and third, it examines the specific process through which a decision infringing a Charter right is made.

In terms of the decisionmaker, the government entity responsible for the Charter violation in the RJR-MacDonald case was the legislature itself. The action by Parliament in adopting the advertising ban and packaging requirements contained in the TPCA, rather than the actions of a legislative delegate or sub-delegate, were the target of review. In

53 Supra note 1.
terms of the form of the decision, the *RJR-MacDonald* case involved a challenge to legislation, rather than to regulation, rule, policy or practice. In terms of the decision-making process, as in the *McKinney* case, the offending provisions of the *TPCA* were enacted by Parliament after a lengthy period of in-depth legislative study and debate. These deliberations took place both in the House of Commons and at the parliamentary committee stage, where numerous witnesses appeared to present competing points of view as to the merits of the legislation.54 In particular, the tobacco industry had ample opportunity to participate in the legislative process, not only in appearances before the committee by individual tobacco manufacturers, distributors, retailers, advertisers, and tobacco industry sponsored sports and arts groups, but in related and well-financed lobbying before and during Parliamentary committee study of the Bill.55

As La Forest J. pointed out in his judgment, considerable evidence was presented by the federal government to demonstrate that Parliament engaged in a careful weighing of competing interests and concerns in coming to its decision to adopt the restrictions contained in the *TPCA*.56 After assessing the information brought forward by the various interests involved, including evidence as to the negative economic effects the legislation would have for the tobacco, sports, and cultural industries, Parliament decided to restrict tobacco manufacturers' *Charter* right to commercial free speech in order to protect and promote the health of Canadians.

In terms of the nature of the decisionmaker, the form of the decision, and the decision-making process, the *Eldridge* and *Egan* cases are far removed from the *RJR-MacDonald* situation. As discussed in Part II(B), above, the decisionmaker in *Eldridge* was not the legislature, but rather a legislative sub-delegate within the provincial health ministry. The decision under challenge was not the enactment of provincial

54 Canada, House of Commons, Legislative Committee on Bill C-204, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-204, an Act to regulate smoking in the federal workplace and Bill C-51, an Act to prohibit the advertising and promotion and repecting the labelling and monitoring of tobacco products, 2d Sess., 33d Parl., 1986-1987 (Chair: K.A. James) Issue no. 15 (1 December 1987); Issue no. 16 (10 December 1987) at 16:9; Issue no. 17 (15 December 1987); Issue no. 18 (17 December 1987); and Issue no. 19 (18 January 1988). See also Canada, House of Commons, Debates, 2d. Sess., 33d Parl., vol. IX (23 November 1987) at 11042-57; vol. X (4 February 1988) at 12607; and vol. XIII (31 May 1988) at 15949-65.


56 *RJR-MacDonald*, supra note 9 at 242-43 and 278.
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hospital and medical insurance legislation. Rather, the Charter violation in Eldridge resulted from the interpretation and application of that legislation by the Executive Committee of the Ministry of Health: the body to whom the Health Minister delegated the responsibility granted to her by the legislature for making decisions about programs and funding. It was the exercise of discretion by the Executive Committee to deny funding for interpretation services for the Deaf, not the actions of the legislature itself, which created the equality rights violation being challenged.

Finally, the decision-making process in Eldridge was in no way analogous to the one approved by La Forest J. in RIR-MacDonald. The decision at issue in Eldridge was made in response to a request by a volunteer agency, the Western Institute for the Deaf, which was unable to continue providing interpretation services free of charge to the Deaf without government assistance. A briefing note on the medical interpretation issue was prepared by a senior health ministry official for consideration by the Executive Committee. The Committee spent only twenty minutes reviewing the briefing note before deciding to refuse funding. The explanation given for the Committee’s decision was that “it was felt [that] to fund this particular request would set a precedent that might be followed up by further requests from the ethnic communities where the language barrier might also be a factor.”

The Committee made its decision in the absence of any information as to whether or not providing interpretation services for the Deaf would be cost-efficient; whether funding such services would in fact set a precedent for non-English speaking groups; and what the actual cost of providing interpretation for non-English speaking patients might be.

In sharp contrast to the decision-making process in the RIR-MacDonald case, the decision in the Eldridge case was made in an informal and ad hoc way, based on insufficient information, and with no meaningful effort to consider whether it was necessary to violate the equality rights of the Deaf in order to protect the competing rights or interests of another group, or to respond to some other compelling social concern. In short, neither the decisionmaker, the form of the

57 Eldridge, supra note 8 at 164. See also Factum of the Appellants in the Supreme Court of Canada on Appeal from the Court of Appeal for British Columbia between Robin Susan Eldridge, John Henry Warren and Linda Jane Warren, Appellants and Attorney General of British Columbia, Attorney General of Canada and Medical Services Commission, Respondents, Court File No. 24896 [unpublished]; and Factum of the Interveners in the Supreme Court of Canada, Canadian Association of The Deaf, Canadian Hearing Society and Council of Canadians with Disabilities, Court File No. 24896 [unpublished].

58 Ibid.
decision, nor the decision-making process in *Eldridge* warranted a level of deference equivalent to what La Forest J. deemed appropriate in relation to Parliament's choice in the *RIR-MacDonald* case.

While Parliament adopted the impugned measure in the *Egan* case, the decision-making process in that case is likewise far different from the process through which the freedom of expression of tobacco manufacturers was abridged in *RIR-MacDonald*. In 1975, Parliament introduced the spousal allowance and included a definition of spouse in the *OASA* that was limited to heterosexual couples.\(^59\) In his testimony before the parliamentary committee studying the legislation at the time, the federal Minister of Health and Welfare indicated that the government's purpose in establishing the spousal allowance scheme was to alleviate poverty amongst elderly couples.\(^60\) He made no mention of the exclusion of same-sex couples. Changes to the eligibility rules for spousal allowances were made in 1977, 1979, 1984, and 1985, and on each occasion the legislative changes were prefaced by consideration in committee.\(^61\) While there was much parliamentary discussion of whether single, separated, divorced, or widowed persons should be able to claim a spousal allowance, the needs of same-sex couples were not addressed or even raised for consideration.\(^62\) These parliamentary discussions of the old age spousal allowance occurred before the development of any jurisprudence under the equality rights provisions of the *Charter*, at a time when same-sex family forms received far less social

\(^59\) An Act to amend the Old Age Security Act, to repeal the Old Age Assistance Act and to amend other Acts in consequence thereof, S.C. 1974-75-76, c. 58, s. 1(2).


\(^62\) See the committee debates cited supra note 61; and Canada, House of Commons, *Debates*, 1st Sess., 33d Par., vol. II (4 February 1985) at 1941-55.
It is not surprising, then, that the government in *Egan* provided no evidence that Parliament was engaged, or saw itself as being engaged in any balancing of competing rights or concerns when it limited benefits under the *Act* to heterosexual couples. Thus, in assessing the discriminatory provisions of the *OASA* under section 1 of the *Charter*, neither considerations relating to the institutional competence of Parliament, nor those relating to its democratic legitimacy, should come into play. Contrary to the situation discussed by La Forest J. in *RJR-MacDonald*, nothing in the legislative context of the *Egan* case gives cause to question why the ordinary level of section 1 scrutiny should not apply.

IV. CONCLUSION

At the outset of this article, I argued that the courts must pay more attention to democracy-related considerations in their review of *Charter* violations. In particular, I suggested that, in determining whether individual rights violations should be upheld under section 1 of the *Charter*, judges should pay careful attention to the democratic quality of government decisions that infringe individual rights. Judges have frequently justified rights violations on democratic principles; arguing that the courts should defer to the greater institutional competence and democratic legitimacy of the legislature, particularly in the social policy field. On closer inspection, however, judges are often deferring to decisionmakers, decisions, and decision-making processes which are "legislative" only in the most formalistic sense. I pointed to *Egan* and *Eldridge* as examples of cases where, in the name of deference to the legislature, judicial failure to subject government action to proper section 1 scrutiny produced a democratically deficient outcome.

In answer to this tendency towards excessive judicial deference under section 1, I pointed to McLachlin J.’s and La Forest J.s’ judgments in the *RJR-MacDonald* case. For her part, McLachlin J. insisted upon a rigorous section 1 analysis of any government action that infringes individual rights, however the action is characterized. La Forest J.’s approach to section 1 review, with its strong emphasis on legislative context, forces judges to actually examine the form and process of government decision-making before deciding whether *Charter* violations are justifiable. Read together, McLachlin J.’s and La Forest J.’s approaches to section 1 promote a more accurate and proactive review of the democratic legitimacy of individual-rights violations.
Thus, where it can be shown, in a rigorous and contextualized process of section 1 review, that the legislature has come to a decision to infringe a Charter right through a careful balancing of competing rights and concerns, a degree of deference to that decision at the minimal impairment stage of section 1 analysis may be warranted. However, where a decision that infringes a Charter right is made not by the legislature, but by a legislative delegate or sub-delegate; where a decision is made by regulation, rule, policy, or practice, rather than by law; or where a decision is the result of an uninformed, unreasoned, or otherwise deficient decision-making process, no attenuation of the ordinary standard of section 1 review is justifiable.

In other words, a decision that infringes a Charter right should not be assumed automatically to be democratically legitimate because, in strict legal terms, the legislature is ultimately responsible for the decision. In place of unprincipled deference, the courts should insist that governments demonstrate, on the facts of each case, how the violation of individual rights promotes rather than undermines democratic principles. As discussed in Part II, above, in relation to the Egan and Eldridge cases, Charter review provides a crucial opportunity to hold legislatures to account for decisions which result from majoritarian biases and other forms of malfunctioning within the political process. Only by abandoning their current legalistic and potentially anti-democratic vision of our Parliamentary democracy, and by applying section 1 in a contextualized and rigorous way, will the courts ensure that the Charter fulfils its “immeasurably richer role” of protecting rights and of promoting democracy.

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