"GIVING REAL EFFECT TO EQUALITY:" *ELDRIDGE* v. *BRITISH COLUMBIA (ATTORNEY GENERAL)* AND *VRIEND* v. *ALBERTA*

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> The concept and principle of equality is almost intuitively understood and cherished by all. It is easy to praise these concepts as providing the foundation for a just society which permits every individual to live in dignity and in harmony with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain.
>
> Justice Cory in *Vriend*[1]

I. INTRODUCTION

Beginning with its decision in *Andrews* v. *Law Society of British Columbia*,[2] the Supreme Court of Canada has emphasized that section 15 of the *Canadian Charter of Rights and Freedoms*[3] guarantees substantive, and not merely formal equality. As Justice McLachlin explains:[4]

> The *Andrews* decision ... pointed out the potential vacuity of formalistic concepts of equality and emphasized the need to look at the reality of how differential treatment impacts on the lives of members of stigmatized groups. The purpose of the Charter guarantee of equality, the Court affirmed, was not to guarantee some abstract notion of similar treatment for the similarly situated ... [but] rather to better the situation of members of groups which had traditionally been subordinated and disadvantaged.

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1 *Vriend* v. *Alberta*, (1998) 156 D.L.R. (4th) 385 (S.C.C.) [hereinafter *Vriend*] at para. 68.

2 [1989] 1 S.C.R. 143 [hereinafter *Andrews*].

3 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. Section 15(1) provides that: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

4 B. McLachlin, J., "The Evolution of Equality" (1996) 54 Advocate 559 at 564.

In two recent decisions, *Eldridge* v. *British Columbia (Attorney General)*[5] and *Vriend* v. *Alberta*,[6] the Supreme Court has had occasion to apply this substantive conception of equality in situations where discriminatory legislative and policy choices were defended by governments on the basis that, on their face, the impugned laws treated everyone the same. In both cases a unanimous Court came to the conclusion that facially neutral laws offended section 15 because of their adverse effects on a disadvantaged group.

The *Eldridge* and *Vriend* decisions have been welcomed by the disability and gay and lesbian communities, as well as by other equality seeking groups and *Charter* observers, as a positive step towards "giving real effect to equality" in Canada. Taken together, the two cases give clear direction to Canadian courts on the meaning and scope of the equality rights guarantees enshrined under section 15 of the *Charter*. In the following comment I will first review the facts and lower court decisions, and outline the Supreme Court of Canada's reasons for finding equality rights violations, in *Eldridge* and *Vriend*. I will then identify several key issues which the Supreme Court has clarified in relation to adverse effects-based *Charter* claims. I will conclude by assessing the main criticism which has been made in media commentary and editorial coverage of the *Eldridge* and *Vriend* decisions: that, in rendering these judgments, the Supreme Court has usurped the role of elected governments and violated fundamental democratic values and principles. I will argue that this position reflects a flawed vision, not only of judicial review and the *Charter*, but of Canadian democracy also.

II. LOWER COURT DECISIONS

A. The *Eldridge* Decision

The appellants in the *Eldridge* case, Robin Eldridge and John and Linda Warren were deaf residents of British Columbia, who communicated by sign language. All had experienced problems within the provincial health care system because of their inability to communicate with health care providers in the absence of interpretation services. Mrs. Warren, for example, underwent an emergency delivery of her twin daughters without being able to communicate with the physician or nurses during or after the delivery, because sign language interpretation was not available in the hospital. Until 1990, free medical interpretation services had been provided in British Columbia by the Western

[5] [1998] 3 S.C.R. 624 [hereinafter *Eldridge*].
[6] *Vriend*, *supra* note 1.

Institute for the Deaf, a private non-profit agency. In 1990, the Institute discontinued the service due to lack of funds; the provincial health ministry having refused the Institute's request for financial assistance. In an application commenced in the British Columbia Supreme Court, the appellants claimed that the failure to provide sign language interpretation services under the provincial *Medical and Health Care Services Act*[7] and *Hospital Insurance Act*[8] violated their *Charter* right to equality without discrimination based on physical disability.

At trial,[9] Justice Tysoe characterized sign language interpretation as an "ancillary" rather than a medically required service which, like transportation to and from the doctor's office, was not included under the B.C. medical insurance scheme.[10] Justice Tysoe acknowledged that the government's failure to fund interpretation services limited the access of the Deaf to the medical system. However, in Justice Tysoe's view this limitation was not the direct or indirect result of provincial legislation, but rather existed independently of the *Act*.[11] As Justice Tysoe saw it:[12]

> ... the *Charter* does not place an affirmative obligation on the governments to implement programs to assist disabled persons ... if the government takes on an obligation and provides a benefit, section 15(1) of the *Charter* requires that it be done in a manner that provides equality to all people. But there is no requirement on the government to provide the benefit.

At the Court of Appeal,[13] Justice Hollinrake, writing for himself and for Justice Cumming, also took the view that the *Medical and Health Care Services Act* treated the Deaf and the hearing the same, inasmuch as "the legislation provides its benefit of making payment for medical services equally to the hearing and the deaf."[14] In Justice Hollinrake's opinion, any inequality which resulted from the fact that the Deaf remain responsible for the cost of interpretation services in order to receive equivalent medical services, "exists independently of the legislation and cannot be said in any way to be an effect of the legislation."[15] On

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7 S.B.C. 1992, c. 76 (now the *Medicare Protection Act*, R.S.B.C. 1996, c. 286).

8 R.S.B.C. 1979, c. 180 (now R.S.C.B. 1996, c. 204).

9 *Eldridge* v. *British Columbia (Attorney General)* (1992), 75 B.C.L.R. (2d) 68 (S.C.) [hereinafter *Eldridge* (B.C.S.C.)].

10 *Ibid.* at 87.

11 *Ibid.*

12 *Ibid.* at 89.

13 *Eldridge* v. *British Columbia (Attorney General)* (1995), 125 D.L.R. (4th) 323 (B.C.C.A.) [hereinafter *Eldridge* (B.C.C.A.)].

14 *Ibid.* at 339.

15 *Ibid.*

that basis, Justice Hollinrake concluded that there had been no violation of section 15.[16] In his dissenting opinion, Justice Lambert found that failure to provide sign language interpretation for the Deaf did violate section 15(1) because communication was an integral rather than ancillary component of health services.[17] Justice Lambert, however, took the view that this violation of the appellants rights could be justified under section 1 of the *Charter*, since decisions relating to the allocation of scarce health care resources were better left to the provincial legislature to make.[18]

B. The *Vriend* Decision

Delwin Vriend was hired as a laboratory coordinator in a private religious college in Edmonton, Alberta in 1987. In 1991 the college adopted a position statement against homosexuality, and requested that Vriend resign his position. Vriend refused to resign, and was subsequently fired because of his failure to comply with the college's anti-gay policy. Vriend attempted to file a complaint with the Alberta Human Rights Commission, on the grounds that he had been the subject of discrimination in employment based on his sexual orientation. The Commission refused to receive Vriend's complaint because sexual orientation was not included as a prohibited ground of discrimination under the Alberta *Individual's Rights Protection Act.*[19] Vriend, along with three gay and lesbian groups, applied to the Alberta Court of Queen's Bench for a declaration that the province's failure to include sexual orientation under the *IRPA* was a violation of the right to equality without discrimination based on sexual orientation, under section 15(1) of the *Charter*.

[16] *Ibid*. at 340.
[17] *Ibid*. at 344.
[18] *Ibid*. at 346-47.
[19] R.S.A. 1980, c I-2.

At trial,[20] Justice Russell held that the effect of the government's failure to provide homosexuals recognition under the *IRPA* was to reinforce negative stereotyping and prejudice, thereby perpetuating and implicitly condoning its occurrence.[21] In Justice Russell's view, when Vriend was fired because of the personal characteristic of his sexual orientation, he was denied a legal remedy available to members of other similarly disadvantaged groups under provincial human rights legislation.[22] This, Justice Russell concluded, was a violation of section 15 of the *Charter*[23] which could not be justified under section 1,[24] and which should be remedied by reading the ground of sexual orientation into the *IRPA*.[25]

On appeal,[26] Justice McClung held that the legislature's failure to include sexual orientation as a prohibited ground of discrimination under the *IRPA* did not amount to government action within the meaning of section 32(1) of the *Charter*.[27] Even if such an omission were subject to *Charter* review, Justice McClung argued, any inequality between homosexuals and heterosexuals existed independently of the legislation.[28] In his concurring opinion, Justice O'Leary found that because the *IRPA* was silent with respect to sexual orientation, the legislation could not be said to create a distinction which contravened section 15(1) of the *Charter*.[29] In her dissenting opinion, Justice Hunt agreed with the trial judge that the *Act* violated section 15(1)[30] and could not be justified under section 1 of the *Charter*,[31] but held that a declaration of constitutional invalidity (rather than reading sexual orientation into the *IRPA*) was the appropriate remedy.[32]

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20 *Vriend et al.* v. *Alberta* (1994), 152 A.R. 1 (Q.B.) [hereinafter *Vriend* (Alta. Q.B.)].
21 *Ibid.* at 13.
22 *Ibid.* at 13-14.
23 *Ibid.* at 14.
24 *Ibid.* at 16.
25 *Ibid.* at 19.
26 *Vriend et al.* v. *Alberta* (1996), 181 A.R. 16 (C.A.) [hereinafter *Vriend* (Alta C.A.)].
27 *Ibid.* at 27-28.
28 *Ibid.* at 29.
29 *Ibid.* at 42.
30 *Ibid.* at 61.
31 *Ibid.* at 65.
32 *Ibid.* at 69.

III. THE SUPREME COURT DECISION IN *ELDRIDGE*

In rendering a unanimous judgment for the Supreme Court in *Eldridge*,[33] Justice La Forest dealt first with the issue whether the failure to provide interpretation services for the Deaf within the publicly funded health care system was subject to review under the *Charter*.[34] Justice La Forest found that the *Medical and Health Care Services Act* and the *Hospital Insurance Act* were drafted permissively, neither requiring nor prohibiting the provision of interpretation services.[35] Consistent with Justice Lamer's reasoning in *Slaight Communications Inc.* v. *Davidson*,[36] Justice La Forest determined that the impugned legislation could not be said to infringe section 15(1).[37]

Because the power to decide what services should be funded was delegated by the *Medical and Health Care Services Act* to the province's Medical Services Board, and by the *Hospital Insurance Act* to individual hospitals, Justice La Forest held that it was the actions of these entities rather than the legislation which gave rise to the appellants' equality rights claim.[38] The Supreme Court's earlier decision in *Stoffman* v. *Vancouver General Hospital*[39] had established that hospitals were private entities which were not part of "government" within the meaning of section 32(1) of the *Charter*. Nevertheless, Justice La Forest found that, in implementing the government's program of providing publicly funded health care services to provincial residents, the hospitals' actions were subject to *Charter* scrutiny.[40] As a governmental delegate, the Medical Services Commission's exercise of its decision-making authority in respect of the funding of medical services was also subject to *Charter* review.[41]

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[33] *Eldridge*, *supra* note 5.

[34] Section 32(1) of the *Charter* provides that: "This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

[35] *Eldridge*, *supra* note 5 at para. 29.

[36] [1989] 1 S.C.R. 1038.

[37] *Eldridge*, *supra* note 5 at para. 28-33.

[38] *Ibid.* at para. 34.

[39] [1990] 3 S.C.R. 483.

[40] *Eldridge*, *supra* note 5 at paras. 49-51.

[41] *Ibid.* at para. 52.

On the question whether there had been a breach of section 15(1), Justice La Forest reiterated the two "distinct but related" purposes of the *Charter*'s equality guarantee:[42]

> First, it expresses a commitment — deeply ingrained in our social, political and legal culture — to the equal worth and human dignity of all persons ... Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups "suffering social, political and legal disadvantage in our society."

Justice La Forest pointed out that the Deaf belong to an enumerated group under section 15(1) — the physically disabled — whose history in Canada is "largely one of exclusion and marginalization."[43] In terms of the particular form of disadvantage experienced by the Deaf, Justice La Forest commented:[44]

> For many hearing persons, the dominant perception of deafness one of silence. This perception has perpetuated ignorance of the needs of deaf persons and has resulted in a society that is for the most part organized as though everyone can hear ... Not surprisingly, therefore, the disadvantage experienced by deaf persons derives largely from barriers to communication with the hearing population.

Justice La Forest then set out the two questions which must be answered in a section 15(1) analysis: first, whether a distinction has been made which denies the claimant "equal protection" or "equal benefit" of the law; and second, whether this denial constitutes discrimination based on an enumerated or analogous ground under section 15(1).[45]

Justice La Forest acknowledged that, on its face, the B.C. medicare system applied equally to the Deaf and hearing: all were entitled to receive certain medical services free of charge. Justice La Forest reiterated, however, that section 15(1) provides a remedy not only against intentional or direct discrimination, but also against the "adverse effects" of facially neutral laws or government policies.[46] In the case of health care benefits, Justice La Forest pointed out that in order to receive the same quality of care as the hearing, the Deaf must bear the burden of paying for the means to communicate with their health care providers, "despite the fact that the system is intended to make the

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[42] *Ibid.* at para. 54, referring to Justice McIntyre's judgment in *Andrews*, *supra* note 2 at 171, citing Justice Wilson's judgment in *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1333.

[43] *Ibid.* at paras. 55-56.

[44] *Ibid.* at para. 57.

[45] *Ibid.* at para. 58.

[46] *Ibid.* at para. 61.

ability to pay irrelevant."[47] Given the centrality of effective communication to the delivery of medical services, Justice La Forest concluded that failure to provide interpretation services denied the Deaf equal benefit of the law relative to the hearing, contrary to section 15(1).[48]

Turning to section 1 of the *Charter*, Justice La Forest held that the violation of the appellants' rights could not be justified pursuant to the criteria established in *R.* v. *Oakes*.[49] In particular, Justice La Forest held that the complete failure to provide interpretation services was not a "minimal impairment" of the equality rights of the Deaf, given that the projected cost of providing interpretation services for the Deaf was $150,000, as compared to a total provincial health care budget of over $6 billion.[50] Justice La Forest also dismissed the respondents' argument that providing interpretation services for the Deaf might generate similar demands from non-English speaking groups, or that recognizing the appellants' claim would have a ripple effect throughout the health care system "forcing governments to spend precious health care dollars accommodating the needs of myriad disadvantaged persons."[51] In Justice La Forest's view: "To deny the appellants' claim on such conjectural grounds ... would denude section 15(1) of its egalitarian promise and render the disabled's goal of a barrier-free society distressingly remote."[52] In terms of a remedy under section 24(1) of the *Charter*, Justice La Forest granted a declaration of constitutional invalidity, which he suspended for six months in order to allow the province time to determine how best to deliver the required services.[53]

IV. THE SUPREME COURT DECISION IN *VRIEND*

The Supreme Court's decision in *Vriend*[54] was delivered jointly by Justices Cory (on the issues of standing, application of the *Charter*, and section 15(1)) and Iacobucci (on the issues of section 1 and remedy).[55] At the outset of his section 15 analysis, Justice Cory referred to the "fundamental nature" of the

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47 *Ibid.* at para. 71.

48 *Ibid.* at para. 80.

49 [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

50 *Eldridge*, *supra* note 5 at para. 87.

51 *Ibid.* at paras. 90-91.

52 *Ibid.* at para. 92.

53 *Ibid.* at para. 95-96.

54 *Vriend*, *supra* note 1.

55 Justice Major agreed with the majority that failure to include sexual orientation under the *IRPA* violated section 15(1) of the *Charter*, but dissented on the issue of the appropriate remedy to be granted in the case; *ibid.* at para. 199.

rights enshrined in section 15(1), and their role within the Canada's broader social and political fabric:[56]

> When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of the provisions of section 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. That it has done so is not only praiseworthy but essential to achieving the magnificent goal of equal dignity for all.

Turning to the *IRPA*, Justice Cory dealt first with the question whether the *Act* created a distinction which deprived the appellants of equal protection or benefit of the law. Justice Cory rejected the respondents' argument that, because the *Act* merely omitted any reference to sexual orientation, it did not create an impermissible distinction. The relevant constitutional issue, Justice Cory emphasized, was not the form in which the impugned legislative provision was drafted, but rather its effects.[57]

Justice Cory pointed to two ways in which the under-inclusiveness of the *IRPA* created a distinction. First, the *IRPA* created a distinction between homosexuals, who were not protected under the *Act*, and the other groups which were. Second and more fundamentally, the *IRPA* created a distinction between homosexuals and heterosexuals. This second distinction was, Justice Cory suggested, more difficult to see because the *IRPA* afforded a measure of formal equality: like heterosexuals, gays and lesbians could complain of discrimination on any of grounds included under the *Act*.[58] In terms of its actual effects however, Justice Cory argued that the under-inclusiveness of the *IRPA* clearly had an adverse impact on gays and lesbians. While the *IRPA* protected heterosexuals against the forms of discrimination which they were most likely to experience, the type of discrimination to which gays and lesbians were most vulnerable — discrimination on the basis of their sexual orientation — was not included under the *Act*.[59] Justice Cory likened the situation in *Vriend* to the one in *Eldridge* in the sense that, like the failure of the B.C. medicare system to provide equal benefits to the Deaf, gays and lesbians were deprived of equal benefit of the human rights regime in Alberta.[60]

On the issue of whether the distinction drawn by the *IRPA* was discriminatory, Justice Cory held that the exclusion of sexual orientation from

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[56] *Ibid.* at para. 67.
[57] *Ibid.* at para. 76.
[58] *Ibid.* at para. 82.
[59] *Ibid.*
[60] *Ibid.* at para. 83.

the *Act* "sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation."[61] Justice Cory concluded that, together with the denial of effective legal recourse under the *IRPA*, such a message clearly constituted discrimination on the analogous ground of sexual orientation, contrary to section 15(1) the *Charter*.[62]

In deciding whether the violation of the appellants' equality rights could be justified under section 1, Justice Iacobucci held that it was important to examine the objective of the entire legislation as well as the objective of the impugned provision or omission.[63] In Justice Iacobucci's view, because the exclusion of sexual orientation was antithetical to the overall purposes of the *IRPA*, it could not be characterized as a "pressing and substantial" objective.[64] Nor was the exclusion rationally connected to the legislative objective.[65] In particular, Justice Iacobucci found that the under-inclusiveness of the *IRPA* did not meet the *Oakes* minimal impairment requirement, since the failure to include sexual orientation under the *Act* was not the result of the legislature's efforts to mediate between competing social claims, and since the exclusion of sexual orientation amounted to a total rather than minimal impairment of the appellants' rights.[66] Nor, Justice Iacobucci found, did the exclusion of gays and lesbians from protection under the *IRPA* have any salutary benefits which would outweigh the harm to the appellants' rights.[67] In sum, Justice Iacobucci held that the failure to prohibit discrimination based on sexual orientation under the *IRPA* failed at every stage of the *Oakes* analysis.[68]

In terms of remedy, Justice Iacobucci concluded that reading sexual orientation into the *IRPA* was the remedy most consistent with the "twin guiding principles" put forward by Chief Justice Lamer in *Schachter* v. *Canada*:[69] "respect for the role of the legislature and respect for the purposes of the *Charter*."[70] In Justice Iacobucci's view, striking down the *IRPA* would be a far more intrusive remedy than reading sexual orientation into the *IRPA*, since it

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[61] *Ibid.* at para. 101.
[62] *Ibid.* at para. 104.
[63] *Ibid.* at para. 55.
[64] *Ibid.* at para. 116.
[65] *Ibid.* at para. 119.
[66] *Ibid.* at para. 127.
[67] *Ibid.* at para. 128.
[68] *Ibid.*
[69] [1992] 2 S.C.R. 679.
[70] *Vriend*, *supra* note 1 at para. 148.

would deprive all Albertans of human rights protection.[71] In addition, Justice Iacobucci argued, the Alberta legislature had manifested a clear intent to defer to the Court on this issue.[72] In response to the argument that reading sexual orientation into the *IRPA* would amount to an undemocratic exercise of judicial power, Justice Iacobucci argued that the process by which the Alberta legislature decided to exclude sexual orientation from the *IRPA* was itself inconsistent with democratic principles. As Justice Iacobucci put it:[73]

> ... the concept of democracy means more than majority rule ... a democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make. Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial intervention is warranted to correct a democratic process that has acted improperly.

V. EQUALITY RIGHTS PRINCIPLES CLARIFIED IN THE *ELDRIDGE* AND *VRIEND* DECISIONS

With the *Eldridge* and *Vriend* decisions, the Supreme Court of Canada has provided much needed direction on several issues which have created considerable difficulty for equality rights claimants in the lower courts.[74] First, the Supreme Court has made it clear that identical treatment is not an answer to a section 15 challenge. Second, the Court has put into question the idea that state inaction is necessarily beyond the scope of *Charter* review. And third, the Court has rejected the idea that section 15 scrutiny can be avoided where governments can point to discrimination beyond the parameters of the impugned legislation. Each of these aspects of the *Eldridge* and *Vriend* decisions will be discussed in turn.

A. Rejection of The Identical Treatment Model

As suggested at the outset of the comment, the formal model of equality was rejected by the Supreme Court in *Andrews*.[75] In his decision in *Andrews*, Justice McIntyre pointed out that defining equality as identical treatment led to the

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[71] *Ibid.* at para. 150.

[72] *Ibid.* at para. 170-71.

[73] *Ibid.* at para. 176.

[74] See generally, J. Keene, "Claiming the Protection of the Court: Charter Litigation Arising from Government Restraint" (1998) 9 N.J.C.L. 97; M. Jackman, "Poor Rights: Using the Charter to Support Social Welfare Claims (1993) 19 Queen's L.J. 65; I. Morrison, "Poverty Law and the Charter: The Year in Review" (1990) 6 J.L. & Social Pol'y 1.

[75] *Supra* note 2 at 164.

outcome in *Bliss* v. *Attorney General of Canada*,[76] where more onerous unemployment insurance requirements for pregnant women were deemed to be acceptable because all pregnant workers were treated the same. In spite of the Court's clear recognition in *Andrews* that section 15 requires legislation to be scrutinized not only for its discriminatory form, but for its adverse effects, Canadian lower courts have continued to reject adverse effects-based claims on the grounds that everyone is being treated the same.[77] This approach to section 15 was put forward by the respondents and adopted by the lower courts in both *Eldridge* and *Vriend*.

In *Eldridge* the respondents argued that the health and hospital insurance regime in British Columbia was not in violation of section 15 of the *Charter* because the medicare system afforded the same treatment to the Deaf and hearing alike. While a majority of the B.C. Court of Appeal accepted the respondents' characterization of the provincial health insurance scheme as providing identical and, therefore, equal treatment, the Supreme Court did not. Justice La Forest reiterated Justice McIntyre's insistence in *Andrews* that "the main consideration must be the impact of the law on the individual or the group concerned."[78] He identified the inequality in *Eldridge* as the "failure to ensure that the Deaf benefit equally from a service offered to everyone."[79] In doing so, Justice La Forest endorsed Professor Diane Poithier's assertion that: "the unavailability of sign language interpretation is not ... the provision of universal health care but rather the provision of able-bodied health care."[80]

In *Vriend*, the respondents also defended the provincial human rights legislation on the basis that it treated everyone the same. The majority of the Alberta Court of Appeal agreed with the respondents that the *IRPA* was unimpeachable because it granted gays and lesbians the same protection available to others on any of the grounds already enumerated under the *Act*. As Justice Cory pointed out in rejecting the respondents' analysis, however, although the *IRPA* was neutral on its face, the *Act*, nevertheless, was discriminatory because of its disparate impact on gays and lesbians. While heterosexuals were afforded legislative recourse against the forms of discrimination which they were most likely to suffer, gays and lesbians were

[76] [1979] 1 S.C.R. 183.
[77] Jackman, "Poor Rights" *supra* note 74 at 79-80.
[78] *Eldridge*, *supra* note 5 at para. 62.
[79] *Ibid.* at para. 66.
[80] D. Poithier, "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (1996) 6 N.J.C.L. 295 at 338.

denied the same protection.[81] In other words, identical treatment was not equal treatment within the meaning of section 15.

The Supreme Court's decisions in *Eldridge* and *Vriend* give concrete expression to the substantive equality principles first put forward by the Court in *Andrews*. With these decisions it becomes impossible to sustain the argument that legislation or government policies which do not draw distinctions on their face are automatically beyond reproach. Rather, where a facially neutral law or policy can be shown to have a disparate, disadvantageous, impact on an enumerated or analogous group, it will be found in violation of section 15.

B. Government Inaction as The Source of *Charter* Violations

The Supreme Court's decisions in *Eldridge* and *Vriend* also put into question the idea that government inaction cannot form the basis of a section 15 claim. The respondents in *Vriend* argued that, because the case involved a legislative omission, the *Charter* did not apply. At the Court of Appeal, Justice McClung agreed with the respondents that the failure to include sexual orientation as a prohibited ground of discrimination under the *IRPA* did not amount to government action for the purposes of section 32(1) of the *Charter*. In Justice McClung's view:[82]

> ... the province, as it is allowed to do, has here positioned itself in a silent, disengaged and isolationist stance on the matter of the *IRPA* and "sexual orientation." When they choose silence provincial legislatures need not march to the *Charter* drum. In a constitutional sense they need not march at all.

Justice Cory rejected this approach to the issue of the applicability of section 15. In Justice Cory's view, there was no legal basis for drawing a distinction between positive government action and legislative omission in the context of *Charter*-based claims. As Justice Cory explained:[83]

> McClung J.A.'s position that judicial interference is inappropriate in this case is based on the assumption that the legislature's "silence" in this case is "neutral." Yet, questions which raise the issue of neutrality can only be dealt within the context of the section 15 analysis itself. Unless that analysis is undertaken, it is impossible to say whether the omission is indeed neutral or not. Neutrality cannot be assumed. To do so would remove the omission form the scope of judicial scrutiny under the *Charter*.

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[81] *Vriend*, *supra* note 1 at para. 86.
[82] *Vriend* (Alta.C.A.), *supra* note 26 at 25.
[83] *Vriend*, *supra* note 1 at para. 57.

Justice Cory argued that the language of section 32 did not support the "narrow view" that there must be some affirmative exercise of legislative authority in order to bring the government's decision within the purview of the *Charter*.[84] As he put it: "there is nothing in th[e wording of section 32] to suggest that a *positive act* encroaching on rights is required; rather the subsection speaks only of *matters within the authority of the legislature* ... The application of the Charter is not restricted to situations where the government actively encroaches on rights."[85] The issue whether the *Charter* imposes an affirmative obligation on Parliament and the legislatures to act remains, Justice Cory asserted, an open one.[86]

In this regard, Justice Cory referred to Justice Wilson's comment in *McKinney* v. *University of Guelph* that "[i]t is not self-evident to me that government could not be found to be in breach of the *Charter* for failing to act;"[87] and to Justice L'Heureux-Dubé's suggestion in *Haig* v. *Canada* that "in some situations, the *Charter* might impose affirmative duties on the government to take positive action."[88] Justice Cory also pointed to Justice La Forest's judgment in *Eldridge*, where the latter also concluded that the question whether the *Charter* "oblige[s] the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality" has yet to be decided.[89]

As Justice Cory argues in relation to the under-inclusiveness of the *IRPA* in *Vriend*, the distinction between government action and inaction is primarily one of form rather than of substance.[90] In the *Vriend* case itself, the Alberta government made a deliberate political choice not to amend the *IRPA* to address a clear instance of discrimination against gays and lesbians under provincial human rights law. As Justice Cory recognizes, to characterize such a decision as a mere legislative omission which should not be subjected to *Charter* review is to ignore the reality of the legislative and policy process and to dramatically circumscribe the remedial scope of section 15. The *Vriend* decision is particularly significant for its rejection of a formalistic distinction between state action and inaction for the purposes of *Charter* scrutiny. With its decision in *Vriend*, the Supreme Court has recognized that state inaction which results from

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[84] *Ibid.* at para. 59.
[85] *Ibid.* at para. 60.
[86] *Ibid.* at para. 64.
[87] [1990] 3 S.C.R. 229 at 412.
[88] [1993] 2 S.C.R. 995 at 1038.
[89] *Eldridge*, *supra* note 5 at para. 73.
[90] *Vriend*, *supra* note 1 at para. 61.

the discounting of, or wilful blindness to, the needs and rights of a disadvantaged group may be as offensive to equality rights principles as more overtly discriminatory government action.

C. The Exacerbation Of Pre-existing Discrimination

A third, significant, aspect of the *Eldridge* and *Vriend* decisions is the Supreme Court's rejection of government efforts to avoid *Charter* liability by pointing to broader social circumstances as the real source of the inequality or discrimination experienced by the equality rights claimant. In *Eldridge*, the B.C. Court of Appeal accepted the respondents' argument that any disadvantage suffered by the Deaf in British Columbia was owing, not to provincial health and hospital insurance legislation, but to their deafness. Rather than imposing a disadvantage, the respondents asserted, the provincial medicare scheme provided a benefit: access for all B.C. residents to medical and hospital services free of charge. The respondents went on to claim that benefit-conferring legislation should only be found discriminatory if it "widened the gap" between a disadvantaged group and others. The respondents insisted that since the Deaf were no worse off than before the introduction of universal medicare in B.C., no violation of section 15 had occurred.[91]

Justice La Forest rejected the respondents' and the Court of Appeal's reasoning that any inequality experienced by the Deaf within the provincial health care system existed independently of the government's actions.[92] As Justice La Forest explained: "the social disadvantage borne by the deaf is directly related to their inability to benefit equally from the service provided by the government."[93] Justice La Forest also dismissed the respondents' suggestion that benefit conferring legislation only offends section 15 where it exacerbates pre-existing disparities between a disadvantaged group and others. Justice La Forest characterized the respondents' position "that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits" as "a thin and impoverished vision of section 15(1)."[94]

Consistent with Justice La Forest's reasoning in *Eldridge*, Justice Cory also rejected the respondents' claim in *Vriend* that the distinction between

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[91] *Eldridge*, *supra* note 5 at para. 72.
[92] *Ibid.* at para. 69.
[93] *Ibid.* at para. 76.
[94] *Ibid.* at para. 69.

homosexuals and others was not created by law, but rather exists in society independently of the *IRPA*. It is the social reality of discrimination against gays and lesbians which, Justice Cory pointed out, renders the failure to provide them with equal protection of the *IRPA* so clearly discriminatory.[95] Drawing a parallel between the respondents' reasoning in *Vriend* and the approach taken in *Bliss* v. *Attorney General of Canada*,[96] Justice Cory asserted that: "it is not necessary to find that the legislation *creates* the discrimination in society in order to determine that it creates a potentially discriminatory distinction."[97]

The Supreme Court's analysis in *Eldridge* and *Vriend* makes it untenable for governments to continue to point to pre-existing discrimination or disadvantage as a defence to an equality rights claim. Laws, policies, or government programs which reflect, perpetuate or reinforce pre-existing discrimination will not be found acceptable under section 15 simply because they don't make things worse for the disadvantaged group, relative to others, than they were before the government intervened. The relevant issue under section 15, as the Supreme Court has stated clearly, is not whether discrimination can also be attributed to broader social factors, but rather whether the government's own actions are discriminatory in either their object or their effects.

VI. CONCLUSION

Notwithstanding the important and very positive contribution which *Eldridge* and *Vriend* have made to Canadian equality rights jurisprudence, the two decisions have not been well received by Canadian editorial and media commentators. "The Supreme Court deaf to reason" exclaimed the *Globe and Mail* editorial following the release of the *Eldridge* decision.[98] "Good fences would make good judges" declared one national commentator in response to *Vriend*.[99] "Alberta has the power to reverse the Vriend ruling" insisted another.[100] The essence of this critique of the *Eldridge* and *Vriend* decisions is that, in rendering these judgments, the Supreme Court of Canada has usurped the legitimate role of elected governments, thereby violating fundamental

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[95] *Ibid.* at para. 84.

[96] [1979] 1 S.C.R. 183.

[97] *Vriend*, *supra* note 1 at para. 85.

[98] "The Supreme Court deaf to reason" *The [Toronto] Globe and Mail* (14 October 1997) A22.

[99] G. Gibson, "Good fences would make good judges" *The [Toronto] Globe and Mail* (14 April 1998) A23.

[100] L. Gunther, "Alberta has the power to reverse Vriend ruling" *The Edmonton Journal* (4 April 1998) F8; see also J. Simpson, "Is Supreme Court bound to interpret Charter and laws as passed" *The [Toronto] Globe and Mail* (8 April 1998) A20.

democratic principles. In my view, like its scholarly variants,[101] this media criticism is seriously flawed. In particular, objections to the Supreme Court's decisions in *Eldridge* and *Vriend* are based on a number of faulty assumptions. These include the idea that government decision-making necessarily conforms to democratic principles; that judicial review necessarily undermines democratic values, and that *Charter* rights are necessarily antithetical to democracy.[102] The fundamental weakness of these premises become apparent upon a closer examination of the actual decisions at issue in *Eldridge* and *Vriend*.

The decision challenged by the appellants in *Eldridge* was the province's refusal to fund medical interpretation services for the Deaf, at a projected expense of some 0.0025 percent of the provincial health care budget.[103] The decision to refuse to fund interpretation services was not in the form of a statute enacted by the provincial legislature. Rather it was made by a committee within the Ministry of Health, to which the provincial health minister had delegated her power under provincial health and hospital insurance legislation, to make funding decisions.[104] The refusal to fund interpretation services was not an *Act* of the provincial legislature. Instead it was an informal policy decision made by a legislative sub-delegate.[105] Finally, the decision to refuse to fund interpretation services was not the result of a legislative process of deliberation. Rather the decision was made following a twenty minute review of a ministerial briefing note which had recommended that funding be provided. The decision was motivated by the committee's fear of creating a similar demand among non-English speaking groups for equivalent services. The decision was made in the

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[101] See for example E.A. Peacock, ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation and Theory* (Toronto: Oxford University Press, 1996); F.L. Morton, "Canada's Judge Bork: Has the Counter-revolution Begun?" (1996) 7 *Constitutional Forum* 121; F.L. Morton, "The Charter Revolution and the Court Party" (1992) 30 *Osgoode Hall L.J.* 627; R. Knopff and F.L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992).

[102] The argument that *Charter* review can enhance, rather than necessarily detract from, the quality of democratic decision-making is explored in greater depth in M. Jackman, "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the Charter" (1996) 34 *Osgoode Hall Law Journal* 661; and M.Jackman, "Rights and Participation: the Use of the Charter to Supervise the Regulatory Process" (1990) 4 *Canadian Journal of Administrative Law and Practice* 23; and see also W. Black, "*Vriend*, Rights and Democracy" (1996) 7 *Constitutional Forum* 126.

[103] *Eldridge*, *supra* note 5 at para. 4.

[104] *Eldridge* (B.C.S.C.), *supra* note 9 at 74-75.

[105] *Ibid.*

absence of any information as to whether provincial funding of interpretation services for the Deaf might actually be cost-effective, or whether such a decision would in fact create an unacceptable precedent.[106] In short, the *Eldridge* case involved neither a decision-making body, a form of decision, or a decision-making process warranting the type of judicial deference advocated for in the name of respect for Parliamentary democracy.

The decision challenged by the appellants in *Vriend* was the province's refusal to protect gays and lesbians against discrimination based on sexual orientation under provincial human rights law. The refusal to include sexual orientation under the *IRPA* was the product of a decision by the provincial Cabinet to ignore the recommendations of a legislatively-appointed human rights review panel that the *Act* should be amended.[107] The Cabinet's decision was motivated, if not by Cabinet members' own prejudices, by political calculations relating to the potential negative repercussions of extending legislative protection to gays and lesbians — a group which, as events following the *Vriend* decision have clearly shown, faces extreme social stigma and exclusion in Alberta.[108] The decision at issue in *Vriend* is exactly the type of majoritarian choice which constitutionally entrenched rights are designed to protect the members of disadvantaged minorities against. Such individual rights guarantees are necessary because, as Justice Wilson explained in *Andrews*, unpopular minority groups such as gays and lesbians are bound to have their interests overlooked and their needs and wishes ignored or discounted within the ordinary democratic process.[109]

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[106] Ibid.; 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 Canadian Association of the Deaf, Canadian Hearing Society and Council of Canadians With Disabilities 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].

[107] *Vriend*, *supra* note 1 at para. 170.

[108] "Joy and outrage over Vriend" *The [Toronto] Globe and Mail* (8 April 1998) A21.

[109] *Andrews*, *supra* note 2 at 151-52; citing J.S. Mill, *On Liberty and Considerations on Representative Government* (Oxford: B. Blackwell, 1946); and J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 145-70.

By suggesting that judicial deference is required in the context of the *Eldridge* and *Vriend* cases, critics are conflating our current executive-dominated form of Parliamentary government with democracy itself. What is more, the criticism that rights review in these cases has led to excessive interventionism by the Supreme Court ignores the potential of rights review as a mechanism for addressing malfunctioning within our current democratic system. Such malfunctioning includes the failure of legislatures to adequately supervise decision-making by its delegates and sub-delegates, even in matters of fundamental rights, as illustrated by the facts in *Eldridge*. Such malfunctioning is also manifest in legislative decision-making motivated by a willingness to ignore or infringe the rights, needs and concerns of groups which have little power or influence within the political system, as Justice Iacobucci underscored in *Vriend*.[110]

The Supreme Court held in *Eldridge* that the Deaf are entitled to full and equal benefit of the Canadian health and hospital insurance system — one of our most cherished social institutions. In *Vriend*, the Supreme Court found that gays and lesbians are entitled to full and equal benefit of statutory human rights guarantees, a reflection of basic domestic and international human rights norms, which are a further source of pride for Canadians. The *Eldridge* and *Vriend* decisions reinforce the fundamental principle that all members of Canadian society have the right to full and equal participation in our defining social institutions — a necessary precondition for equal participation in our democratic ones. In sum, the Supreme Court's decisions in *Eldridge* and *Vriend* illustrate the potential for the *Charter* to "give real effect to equality,"[111] not only in terms of individual rights, but of democracy also.

[110] *Vriend*, *supra* note 1 at paras. 174-76.
[111] *Ibid.* at para. 68.