

**From a “Democratic” to a “Federalist” Dialogue:
Provincial Arguments and Supreme Court Responses in Charter Cases**

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ABSTRACT:

While neither the *Charter* nor federalism want for scholarly attention, the study of the way in which they interact has been piecemeal at best. Where it has been addressed, the relationship is too often assumed to be one-sided: the *Charter's* "uniform national standards" have run roughshod over federal diversity. James Kelly has begun to address this academic shortcoming with his recent finding that the Supreme Court of Canada has applied the *Charter* in such a way as to respect provincial diversity. But while this tells us a good deal about the effect of the *Charter* on federalism, it tells us little of federalism's effect on the *Charter*. For her part, Katherine Swinton suggests that it might be useful for provinces to resist the *Charter's* homogenizing tendencies by grounding their defences of *Charter*-impugned policy in the language of federalism. This paper attempts to bridge the gap between Kelly and Swinton. Through an examination of several recent Supreme Court decisions as well as provincial arguments therein, it finds: first, further evidence of Kelly's "federalism jurisprudence"; second, that provinces do indeed, at times, frame their defences in the federalist terms; and finally, that the federalism jurisprudence represents more than a simple judicial sensitivity to the needs of a federal system, but is itself a product of the federalist arguments made by provincial governments. In so doing, this paper hopes to promote a better understanding of federalism and the *Charter* by shifting scholarly attention away from its current preoccupation with the "democratic dialogue," and toward a "federalist dialogue."

The *Charter of Rights* is rightly described as "the most radical constitutional innovation since Confederation" (LaSelva: 64). Radical, because far from simply grafting a new "pillar" onto the constitutional order (Canada, 1985: 277), the *Charter* effected a "profound, wrenching transformation" of the existing ones: parliamentary democracy and federalism (Cairns, 1991: 97, 179; see also, Banting and Simeon, 1983: 10). This was no accident of course. Underlying the *Charter* were two very deliberate "political purposes," each related to one of these two constitutional cornerstones. The first, the better protection of individual and minority rights, sought to undermine the tradition of parliamentary supremacy, and the second, arguably more intended object, was the reigning-in of the centrifugal forces of federalism that Pierre Trudeau believed would destroy the country (Russell, 1983: 31; LaSelva, 1996: 81-83; Morton and Knopff, 2000: 59-60).

Since 1982, scholarly treatment of the success of these *Charter* "purposes" has focused overwhelmingly on the first: the document's relationship to parliamentary sovereignty, or its "better protection of individual rights" against majoritarian preferences. For the past decade in particular, this endeavour has assumed the form of a discussion of the potential for a "democratic dialogue," according to which charges of an unaccountable judicial usurpation of parliaments' democratic decision-making fail to take into account the ability of legislators to "respond" to the judicial nullification or amendment of a policy of the representative branches (see, for example, Hogg and Bushell, 1997; Supreme Court of Canada, 1998; Roach, 2001; Manfredi and Kelly, 1999; Morton, 2001; Hiebert, 2002; Hennigar, 2004). While this brief description fails to give proper credit to either the complexity of the metaphor or its rejoinders, the point to be made is that contemporary *Charter* scholarship has focused on the effects of the *Charter* on democracy, and of democracy on the *Charter*, to the relative exclusion of the *Charter's* other political purpose. Our understanding of the *Charter's* relationship with federalism has suffered as a result.

Of course, perhaps little remains to be understood. After all, the *Charter's* assault on federalism is very closely, perhaps even inextricably linked to its challenge to sovereign parliaments. The argument has been made, for instance, that the very way in which the *Charter* was to strengthen the national community was through the judicial imposition of “uniform national standards” on provincial parliaments in areas of jurisdiction “that would otherwise be the subject of provincial diversity” (Knopff and Morton, 1992: 374-84; LaSelva, 1996: 87; Swinton, 1990: 338). Others put greater distance between the *Charter's* national unity function and its restriction of majority decision making. Unity was to be forged not through a diminution of provincial jurisdiction, but through a *Charter*-sponsored “national discourse about human rights” around which “[n]ew national coalitions and identities would be created that would transcend and weaken the forces of regionalism and provincialism” (Greene, 1989: 38). Trudeau himself subscribed to this view, and denied that the *Charter* represented an assault on provincial autonomy.

The Charter was not intended to subordinate the provinces to the federal government through judicial interpretation of the document, but to act as an instrument of national unity by highlighting what we have in common, not by limiting how the provinces could act” (Pierre E. Trudeau, in Kelly, 2001: 354)

While there must be some truth to this conception of the *Charter's* unity function, it is hard to resist the normative assumptions of the “uniform national standards approach,” or what James B. Kelly calls the “centralization thesis,” especially since the *Charter* clearly did contemplate the judicial harmonization of at least some provincial policies (see, for instance, Cairns, 1995: 197-99; Smiley, 1987: 192-93). Take minority language education rights, for instance. While the relevant sections may constitute an “analytically separate” component of the *Charter's* unity strategy (Cairns, 1991: 98; see also, Smiley, 1981: chapter 4), it remains difficult to reconcile Trudeau’s attempt to distance himself from the “centralization thesis” with the Supreme Court’s finding that Québec’s language laws constituted precisely “the type of regime [the framers] wished to correct.” (SCC, 1984: 84; see also Magnet, 1995: 150-53).

In this sense then, given the quasi-unitary structure of the Canadian judicial hierarchy, the *Charter's* first political purpose, the restriction of parliamentary sovereignty, is the same as, or at least serves the same purpose as, its other political purpose, the restriction of federalism. “In the context of a federal system,” that is, the parliamentary sovereignty with which *Charter* scholarship has become so preoccupied, is itself “a formula for decentralized policy making” (Knopff and Morton, 1985: 137), and insofar as those concerned with federal diversity are concerned, “the language of parliamentary supremacy [is] a rhetorical device to protect province-building against the nationalizing philosophy of the Charter” (Cairns, 1983: 42; see also, Smiley, 1987: 192-93). Thus, federalism, at least in the *Charter* context, might best be simply clothed in the garb of parliamentary sovereignty (Swinton, 1990: 323).

As much truth as there is to parliamentary sovereignty *qua* federalism, the problem, simply put, is that it tells us everything about the relationship between federalism and the *Charter*, while telling us nothing at all. According to such an approach, that is, all that students of the *Charter* need to know about its relationship to federalism can be learned by reference to whatever the latest conclusion the “democratic dialogue” debate has reached about the relative strengths of courts and legislatures. But

if federalism is indeed a “condition,” an affliction with which Canada has to perpetually deal, then might federalism *qua* federalism not enter into our discussion of the *Charter*?

James B. Kelly believes so, and has begun the search for an alternative account of the relationship. In a 2001 study dispelling the myth of *Charter* centralization, Kelly found evidence of explicit and implicit “federalism jurisprudences” in the Supreme Court’s *Charter* decisions (Kelly: 2001). “Implicit federalism jurisprudence,” includes, among other things, those instances in which the Court upholds the constitutionality of impugned provincial legislation without articulating it in explicitly federalist terms (Kelly, 2001: 339). If, as the centralization thesis suggests, the judicial nullification of a provincial statute on *Charter* grounds reduces diversity, “then it seems appropriate to suggest that judicial validation of provincial statutes advances diversity and strengthens provincial autonomy” (Kelly, 2001: 339). Absolutely, but this suffers from the same deficiencies as a depiction of federalism as parliamentary sovereignty. But, more significantly, Kelly also found evidence of what he terms “explicit federalism jurisprudence,” whereby “the Court frames a *Charter* challenge within a federalism framework by deferring to the structural requirements of a federal system or dismissing a *Charter* challenge by invoking the importance of policy variation among provincial governments” (Kelly, 2001: 339).

Kelly’s is an important step toward a better understanding of the relationship between federalism and the *Charter* as something more than a debate about the restrictions *Charter* review places on the majoritarian preferences of sovereign parliaments. But while Kelly’s nomenclature and findings tell us much about the effect of the *Charter* on federalism, they tell us little of the effects of federalism on the *Charter*. How is it that we can explain the judicial sensitivity to federalism in the application of what are, in theory, national standards? Are we simply to assume that, despite former Chief Justice Laskin’s admonition that “the work of the [Supreme] Court has no regional...tie-in” (Laskin, in Canada, 1985: 319), the Court’s regional representation makes it sufficiently sensitive to the “structural requirements” of federalism. Perhaps, but what is federalism? What is it that the justices may or may not be sensitive to? If, for the purposes of *Charter* litigation, at least, the *Charter* is what the Court says it is, then surely federalism can be treated as what the provinces say *it* is. While endorsing Kelly’s finding of federalism jurisprudence, then, it is the purpose of this paper to determine the extent to which this jurisprudence might in fact have been compelled by federalism itself; compelled by provincial arguments before the Supreme Court of Canada.

In this sense, this paper represents an attempt to push *Charter* scholarship away from a preoccupation with the “democratic dialogue” between courts and legislatures towards a “federalism dialogue” according to which the *Charter* (what the Court says it is), might “respond” to federalism (what the provinces say *it* is). While dialogue, as conceived by Peter Hogg and Allison Bushell involves legislative responses to judicial decisions (Hogg and Bushell, 1997: 82), this paper is not the first to suggest that the reverse might also be true. In a recent contribution to the *democratic* dialogue, Matthew Hennigar suggested that dialogic research “should endeavour to enhance our understanding of substantive government litigation strategies, such as third-party intervention, where governments engage judges directly on issues of constitutional interpretation” (Hennigar, 2004: 17). Although Hennigar does not state it explicitly, the logic of his approach suggests that courts might in fact respond to legislatures. While at

first blush this seems unorthodox, there is no reason to assume that institutions may only converse in a unidirectional manner. If constitutional interpretation truly is an exercise in which both courts and legislatures, or alternatively, the *Charter* and federalism, play an equal role, then either partner might initiate the discussion. Indeed, some authors have suggested that parliaments *should* play a more active pre-emptive role through pre-litigation rights-vetting (Hiebert, 2002: 14-19). A demonstrable record of rights-based legislative scrutiny might affect judicial decisions, particularly when the court reached the level of section 1 analysis (Hiebert, 1996: 153-54). Other writers, while not passing normative judgment about the quality or rigour of legislative rights-review, have noted that the federal and provincial legislatures do engage in a *Charter*-proofing exercise that might affect the courts' decisions (Kelly, 1999; Funston, 1993; Mitchell, 1993).

If the conversation need not begin with the judicial nullification of a legislative decision, a more pragmatic rationale may justify Hogg and Bushell's ordering. It may simply be too difficult to determine the precise moment at which any particular dialogue begins. Hennigar sums up this conundrum nicely:

"...the federal department of justice now routinely reviews legislation for potential Charter violations, and recommends to the responsible minister or parliamentary committee whether such limitations may be "reasonable" and sustained under Section 1 analysis. If the "vetted" law subsequently comes under judicial review, the court's ruling would thus not be the first round...but rather a response to Parliament's initial assessment of the law's constitutionality (unless, of course, the new law was itself a response to a judicial ruling). That said, the government's Charter review process does not occur within a legal vacuum, but typically involves bureaucratic actors attempting to gauge the courts' likely response to legislation..." (Hennigar, 2004: 16-17).

It seems obvious then, that most, if not all legislation will have been marked by past judicial rulings, which themselves might have been influenced by earlier legislation, which might have been inspired by yet another judicial precedent, and so on and so on. It is not unlike standing between two mirrors, looking at a reflection of a reflection of a reflection, where what is original and what is reproduction is not so readily apparent. If the dialogue metaphor is not a wholly appropriate conceptualization of this more complex picture of the overall relationship between courts and legislatures, it is, at least, a useful way to conceptualize of particular exchanges of an ongoing discussion. Hogg and Bushell (and others) occupy one vantage point, but it does not preclude the possibility that there are other exchanges worthy of study, such as that suggested by Hennigar and that is employed here to determine the extent to which federalism affects the *Charter*.

Some might suggest the futility of such an endeavour. There is good reason to expect that provinces might refrain from framing their arguments in federalist terms, or in terms of the differential application of the *Charter* across provincial boundaries. Knopff and Morton, for instance, seem to believe that courts would not consider diversity as valid reasons for rejecting *Charter* claims against a province. To deviate from the uniform application of the *Charter's* national standards would run counter to the very purposes of the *Charter* project (Knopff and Morton, 1985: 170-71). According to this interpretation, it would be futile to wrap defences of provincial policy in the language of federalism, for they would, presumably, fall on deaf ears. This assumes, however, the reliability of the centralization thesis, which, as Kelly has shown, is more apparent than it is real. If Kelly is correct, arguments based on federalism might not only be legitimate, but effective.

Janet Hiebert appears to believe this to be the case. Hiebert writes that, “to conclude that federalism is now precluded by the *Charter*...diminishes the potential for a federalist interpretation” of the document (Hiebert, 1996: 132). She continues with the more explicit prescription that “an interpretation of section 1 [“reasonable limits”] that recognizes the legitimacy of provincial differences, where these are not manifestly unfair, would...allow provinces to experiment with how policies are designed and administered to better reflect the needs and wishes of provincial populations” (Hiebert, 1996: 138). Samuel LaSelva would agree. The reasonable limits clause is the means by which differing political values can be reconciled within a *Charter* framework (LaSelva, 1996: 78). If the *Charter* rests on a mistaken conception of Canadian federalism, and LaSelva thinks that it does, section 1 is the way it can be squared (LaSelva, 1996: 65). The most overt expectation of a federalist interpretation of the *Charter*, and of section 1 in particular, comes from Katherine Swinton who believes, despite the fact that “federalism” does not actually appear in s. 1, the language of that section “seems to permit arguments based on diversity to be made as justifications for the limitations on rights” (Swinton, 1990: 342). At the time then, Swinton thought it inevitable, or at least likely that, in *Charter* cases, provincial governments “would argue that diversity or the needs of a provincial (or even local) community are relevant, especially to the determination of the scope of section 1” (Swinton, 1990: 341-42).

The reasonable limits clause is one place that federalist defences of policy might be expected, but it is, of course, only the second stage of a *Charter* “two-step” (Knopff and Morton, 1992). *Charter* scrutiny involves, first, the determination of whether a *prima facie* breach has been established and only then, if the breach is a reasonable one. Several authors cited here suggest that federalism might play a role at this second stage, but might it have an effect at the first of the two *Charter* steps: the scope or the content of the rights themselves? Swinton implied as much. She claimed only that the requirements of a federal system might inform provincial arguments “*especially* to the determination of the scope of section 1,” and that federalism is “*most* likely to enter into the application of section 1 [emphases added]” (Swinton, 1990: 341-42, 345). This appears to leave open the possibility that a federalist interpretation of *Charter* rights themselves may be contemplated.

Though she does not frame her discussion as such, Janet Hiebert’s latest book suggests such an approach. The “relational approach” that Hiebert promotes “assumes that both parliament and courts have valid insights into how legislative objectives should reflect and respect the *Charter*’s normative values” (Hiebert, 2002: 50). If parliaments disagree with judicial interpretation, it might not be due to a lack of respect for rights, but a “different judgment about the priority that should be accorded to the conflicting rights and values in society” (Hiebert, 2002: 54). To be sure, Hiebert is contemplating a process for the parliamentary definition of rights which is very different from legal arguments before the Supreme Court, and even suggests the illegitimacy of government lawyers defining rights on the behalf of legislators (Hiebert, 2002: 65). However, Hiebert foresees the possibility for the parliamentary definition, or attempted definition of the scope of rights, which, in a federal system, might be dictated by federalism, or the local cultures or needs of individual provinces.

On the one hand, then, we have Swinton and Hiebert suggesting that it is open to provinces to ground their *Charter* defences in appeals to federalism or diversity. On the

other, we have Kelly's finding that the Supreme Court has, on occasion, grounded its decisions in federalist terms. Lacking so far is evidence of a connection between the two. Do provincial governments actually accept Swinton and Hiebert's advice? If so, is Kelly's federalism jurisprudence the result? Through a search for evidence of a "federalism dialogue," this paper seeks answers to both of these questions, beginning with *R. v. Jones* (SCC, 1986). Implicated as it is by both Swinton and Kelly, *Jones* is a particularly appropriate way to set the methodological stage for the ensuing search for evidence of a federalism dialogue in more recent cases.

***R. v. Jones* (SCC, 1986)**

Swinton's conclusion that it is open to provinces to defend legislation on federalist grounds is based, at least in part, on *Jones*, where she observed that the Court was "willing to consider arguments based on tradition, diversity, competing interests, and relative judicial competence" (Swinton, 1990: 346-47). Kelly would later call this "explicit" federalism jurisprudence, for it outlined at least two important principles: "that it is reasonable and legitimate for the provinces to approach shared policy problems differently and...that flexibility must be accorded to the provinces in structuring their responses in different social contexts" (Kelly, 2001: 346). What remains is to determine if the jurisprudential window that Swinton believed *Jones* opened for arguments based on federalism was in fact opened by those very arguments.

At issue in *Jones* was the constitutionality of s. 142(1) of the *Alberta School Act*. The legislation required children to attend a public school unless officials from the provincial Department of Education "certified" that the child was "receiving efficient instruction at home or elsewhere" (SCC, 1986: 284). *Jones* was a fundamentalist pastor who wished to educate his children himself, and who challenged the Alberta regulation as a breach of his *Charter* sections 2(a) (religious freedom) and 7 (life, liberty and security of person) rights because the certification requirement "contravened his religious belief that God, rather than the Government, had the final authority over the education of his children, and deprived him of his liberty to educate his children as he pleased" (SCC, 1986: 285).

Defining the content of the right(s):

The first step in a search for evidence of a "federalism dialogue" is to establish whether or not provinces have attempted to "define the content of the right(s)" in an explicitly federalist manner, or if they rely instead on the more "implicitly" federalist argument that sovereign parliaments equate to federalism.

Alberta's position on the content of religious freedom is best described as implicitly federalist. The province simply argued that neither the purpose nor the effect of the *School Act* was contrary to s. 2(a), according to which a breach is only established by legislation that infringes "a tenet or fundamental doctrine of a religion" (AB, 1986: 4-5). At its worst, the *Act* indirectly burdened *Jones*' religious freedom. But indirect effects are not sufficient to warrant nullification (AB, 1986: 5). In sum, Alberta's arguments were appeals to parliamentary sovereignty, and not directly to federalism.

But if Alberta's approach to 2(a) was only implicitly federalist, its submission on the scope of s. 7 was predicated on explicitly federalist terms. Section 7, according to the province did not apply to the substance of legislation, only the procedural fairness of its

application (AB, 1986: 9). In this case, the “procedure” under scrutiny was the method by which Alberta certified non-public educational facilities to ensure their conformity to provincial standards. Jones charged that certification by Department of Education officials was potentially biased, and thus procedurally unfair, particularly when compared with the practice in provinces where disinterested courts made such determinations. In its submission, Alberta directed the Court’s attention to the fact that a number of different certification schemes existed in Canada’s different jurisdictions, including several that were similar to Alberta’s. By highlighting the fact that different provinces employ different procedures, Alberta espoused an interpretation of s. 7’s procedural fairness that explicitly rejected the creation of uniform national standards in the area of educational certification (i.e. judicial oversight), and allowed for provincial variation (AB, 1986: 9).

Limiting Rights in Jones:

Mirroring the “*Charter* two-step,” the next stage in the search for a federalism dialogue is to determine if provinces frame their justification of *Charter* breaches in either explicitly or implicitly federalist terms.

In the event that the Court disagreed with its interpretations of ss. 2(a) and 7, Alberta included s. 1 justifications in its factum. As was common in early *Charter* cases, the province did not think it necessary to submit a particularly extensive justification. Brief as it was, however, Alberta’s defence was couched in explicitly federalist terms, as Swinton would have predicted. Alberta conceded that parents have a legitimate interest in the upbringing of their children, but held that this is secondary to society’s “overriding” interest “in seeking to ensure proper instruction is provided to children” (AB, 1986: 6-7). This interest is manifest in the mandatory certification of non-public education to ensure certain provincial standards are met. Alberta, that is, had a legitimate interest in curtailing parents’ rights because public education involves instilling children with the necessary faculties to become contributing members of the provincial society. Clearly, for Alberta, this involved more than simply literacy and numeracy, and extended to provincial identity as well. Public education standards are necessary because public education is, “the making of true subjects of all [the province’s] children” (AB, 1986: 6). Thus specifically provincial interests, it was submitted, justified any limitation of Jones’ rights.

The Justices Respond:

The final stage in the federalism dialogue is the response of the Supreme Court. If the provinces have indeed based their defences of policy in the language of federalism, do the justices respond with Kelly’s federalism jurisprudence?

The decision handed down in *Jones* was somewhat complex, comprised of three judicial blocs, organized around different majorities for each *Charter* question. On the question of Jones’ freedom of religion, the first majority agreed with Alberta’s implicitly federalist argument that s. 2(a) was not infringed. If anything, the *School Act* accommodated freedom of religion by assuming education in public schools, while permitting “the existence of schools...which have a religious orientation” (SCC, 1986: 312). The minority judgment on this question disagreed, finding that the *Act* did violate religious freedom, but only in a manner that was demonstrably justifiable in a free and democratic society (SCC, 1986: 299). So compelling is the interest in public education,

in fact, that the province “should require no further demonstration that it may, in advancing this interest, place reasonable limits on the freedom” of individuals such as Mr. Jones (SCC, 1986: 297). Further, this cluster of justices seems to have been swayed by Alberta’s assertion that the enforcement of educational standards has something to do with instilling provincial culture in its “subjects.” Citing the United States Supreme Court in *Brown v. Board of Education* (USSC, 1955), Laforest wrote that because education plays an important role in the inculcation of “cultural” values (a matter of provincial jurisdiction), provinces have a compelling interest therein (SCC, 1986: 297).

If this minority response to Alberta’s plea for an explicitly federalist justification for the limitation of *Charter* rights is a little ambiguous, the Court’s response to the federalist definition of the content of s. 7 is not. The fact that the certification scheme allowed compliance with provincial standards to be determined by public servants with a vested interest in the policy, as opposed to the disinterested judges used in other jurisdictions, did not concern the majority on this question: “Of course these authorities have a vested interest in the system, but it seems normal enough to refer a question of efficient instruction to [someone]...who is knowledgeable” of the *Act’s* requirements (SCC, 1986: 304). More notably, the Court adopted the position advanced by Alberta that the local system was not somehow flawed simply because other provinces use courts to make these determinations. While there might be some advantages to the judicial method, “there are disadvantages too.” Provincial governments must, therefore, “be given room to make choices regarding the type of administrative structure that will suit their needs” (SCC, 1986: 304). Not only does this strike a blow at claims about the judicialization of Canadian politics, but it suggests the existence of a federalism dialogue within which the Court responds to provincial demands for an interpretation of *Charter* rights and limitations on those rights that allows for deviation from otherwise pan-Canadian standards.

Discussion:

The Supreme Court’s declaration that the *Charter* allows for flexibility in the provincial choice of administrative structures is the same one on which Kelly pins his claim that *Jones* is representative of an explicit federalism jurisprudence (Kelly, 2001: 346). What Kelly does not examine (nor was it his intention), is the inspiration for this jurisprudence. The preceding suggests that it might have been the provinces themselves. The remainder of this project is dedicated to similar examinations of later cases to determine to what extent a “federalism dialogue” with the *Charter* might be responsible for the lack of evidence for the centralization thesis, and in so doing, develop our understanding of the relationship between federalism and the *Charter* as something more than that between Courts and legislatures.

This paper, however, is only a pilot study of sorts. But while conclusive findings could only be based on an examination of all cases in which provincial legislation and/or executive action has been impugned by a *Charter* challenge, preliminary evidence for a federalism dialogue has been found over the course of twelve cases examined thus far.¹ Of these, and for the purposes of developing the methodology, four, qualitative case-studies are included here, though others are referenced where appropriate. While the

¹ Branch; Mahe; Doucet; Jones; Edward Books; NAPE; Auton; Judges; Electoral Boundaries; RWDSU; Andrews; Eldridge.

number is limited, the following cases are among the most recent and representative of the larger case set.

Newfoundland v. N.A.P.E. (SCC, 2004b)

In 1988, the government of Newfoundland and Labrador (hereinafter Newfoundland) negotiated a pay equity² agreement with the Newfoundland Association of Public and Private Employees (NAPE) that applied to six health care collective agreements. Although the specifics were not worked out until 1990, the effective date of the scheme was 1988, and any payments were to be retroactively applied (NL, 2004b: 1). By 1991, however, Newfoundland was confronted with what it termed a financial crisis so severe that it “threatened all members of the public” (NL, 2004b: 2). In response, the government passed the *Public Sector Restraint Act* (PSRA), which “rolled back all scheduled [pay] increases previously negotiated” with public sector unions (NL, 2004b: 3-4). While the PSRA did not revoke the principle of pay equity *per se*, s. 9(3) of the *Act* delayed its effective date to 1991, eliminating the retroactivity (NL, 2004b: 4). On behalf of several of its members, the appellant union alleged that the PSRA amounted to gender discrimination according to s. 15(1) of the *Charter*. In response, Alberta, BC, Québec, and New Brunswick joined Newfoundland in its defence of the legislation.

Defining the Scope of the Right(s):

None of the arguments submitted by the provinces on the application or scope of s. 15(1) itself could properly be described as explicitly federalist. Rather, they took the form of “implied federalism;” or parliamentary sovereignty-as-federalism. First, the provinces claimed that “nothing in the PSRA creates a distinction that qualifies as discrimination” (NL, 2004b: 2). Instead, the *Act* merely restored a prior rate of pay, and NAPE had therefore misidentified the source of the potential *Charter* violation: “the original wage scales [NAPE] had negotiated on behalf of its members” (NL, 2004b: 2). Moreover, the PSRA merely delayed the implementation of pay equity, and since the “date of implementation [is] not an analogous ground” for s. 15 purposes, the union had no claim to discriminatory treatment (NB, 2004b: 3; QC, 2004b: 4).

These questions of timing forced the issue of whether the absence of pay equity itself violates s. 15(1). Clearly the provinces did not believe so. Even if NAPE had framed the issue “correctly,” nothing in s. 15(1) compelled the implementation of public sector pay equity agreements. Alberta, for instance, claimed that those affected by wage disparity were only differentiated “by virtue of a decision to accept particular work,” not by virtue of their gender (AB, 2004b: 10). For its part, BC argued that there is “no constitutional requirement for government to achieve pay equity,” particularly since s. 15(1) contains internal limitations, as distinct from s. 1 considerations, within which governments are allowed to balance competing claims on limited resources (BC, 2004b: 2-3).

Since s. 15(1) does not compel pay equity in the first place, nor, according to the provinces, does it prohibit the repeal of statutory instruments intended to achieve pay

² Pay equity, in this context, implies increases in the level of remuneration in certain classes of employment “designed to fill the “undervaluation gap” of the difference in pay between male dominated and female dominated jobs of the same value.” For a fuller discussion of the issues pay equity is intended to address, see, Gunderson and Lanoie, 2002.

equity. To find otherwise would be “inimical to democracy” (BC, 2004b: 6), for “neither the crown nor the crown and the courts together have power under our constitution to deprive the legislative assembly of its privilege of initiative in legislation” (AB, 2004b: 4; NL, 2004b: 8-9). To the extent that “federalism” was invoked by the provinces at this stage of *Charter* analysis, then, it was done so only implicitly, as a claim for parliamentary supremacy. None of the provinces, Newfoundland included, suggested that anything particular to that province should provoke a differentiated application of s. 15(1), only that the enactment and ability to repeal pay equity remains at the provinces’ discretion. Such was not the case at the second of the two *Charter* steps.

Limiting the Right(s):

In discussing the possibility of a federalist defence against *Charter* challenge, Swinton suggested that at the level of s. 1, a province might argue that “its resources are limited, requiring it to respond in one way to a problem when a more affluent province could respond in another” (Swinton, 1990: 342). In *NAPE*, this was precisely the explicit federalist strategy employed by Newfoundland.

Financial difficulties, claimed Newfoundland, are something to which that province is particularly vulnerable. Newfoundland’s “historical position of economic disadvantage within Confederation is widely recognized. It effects [sic] all aspects of public spending, including the ability of the province to implement equality programmes and to offer services at national levels” (NL, 2004: 13). Were this “historical position” not sufficiently bleak, by 1991 the province was in a particularly “dire financial state.” The province’s credit rating was in jeopardy, and “for the first time in history [Newfoundland was] faced with the prospect of having a limitation on what [it could] borrow” (NL, 2004: 2, 17). So severe was the fiscal crisis, according to Newfoundland, that it threatened all bearers of rights. To conclude that fiscal restraint does not constitute a pressing objective for the purpose of s. 1’s free and democratic society would fail to recognize that “fiscal management is not an end in itself, but the means by which the government provides appropriate [social programmes] (NL, 2004: 19). The fiscal crisis in Newfoundland thus forced the government to make difficult choices between competing interests and demands; the sustainability of the provincial economy as a whole justified the limitation of s. 15(1). Newfoundland’s historic and ongoing position of economic disadvantage within the Confederation was thus “a key factor in the introduction of the PSRA,” and the central component of its s. 1 justification (NL, 2004: 14), and Newfoundland’s explicit rejection of the centralization thesis was spoken in the following explicitly federalist terms:

The province submits that the imposition of uniform national standards or time frames for the implementation of equality schemes, with no reference to the Province’s economic position, would fail to take into consideration the reality of regional economic disparity and would assume that the rights contained in the *Charter* are absolute (NL, 2004b: 15).

But of course the rights in the *Charter* are not absolute, in that they are subject to such reasonable limits “as can be demonstrably justified in a free and democratic [and, according to Newfoundland, *federal*] society.”

The remaining provinces³ were partners in this federalism argument, though none argued specifically that they, like Newfoundland, should be freed from pay equity agreements—only that they should have this latitude should finances dictate (QC, 2004b: 4). The “inherent flexibility” of s. 1 allows legislation of a social or economic character to be based on the arbitration of competing demands on the state (QC, 2004b: 15, see also, BC, 2004b: 11; and NB, 2004b: 4). Naturally, these demands will vary from province to province. The thrust of the other provincial arguments, then, was not that the revocation of pay equity agreements would be justifiable in all provinces. They argued rather that the financial position in which Newfoundland found itself, and the more general provincial prerogative to reconcile competing demands on limited resources, produces a scenario in which *Charter* rights enjoy differential application given the necessities of a federal system. Cumulatively, the submissions of Newfoundland and the remaining provinces amount to an attempt to elicit Kelly’s explicit federalism jurisprudence according to which, “it is reasonable and legitimate for the provinces to approach shared policy programs differently and...that flexibility must be accorded to the provinces in structuring their responses in different social contexts” (Kelly, 2001: 346).

The Justices Respond:

In terms of the application s. 15(1) itself, the Court rejected the provinces’ arguments, though the implications for federal diversity are not entirely clear. The Court conceded that governments are not generally bound by past decisions, but given that the original agreement had as its intention the redress of gender discrimination, Newfoundland had “an uphill battle contesting an infringement of section 15(1)” (SCC, 2004; para. 39). On its face, then, this suggests that all provinces with pay equity agreements in place are equally prohibited by the *Charter* from revoking them; a national standard of sorts. Less clear is the extent to which provinces are constitutionally required to implement such agreements in the first instance, largely because the Court did not “get to that issue” (SCC, 2004b: para. 37).

Insofar as they are invoked as justifications for the limitation of *Charter* rights, according to the Supreme Court, budgetary constraints should be treated with scepticism (SCC, 2004b: 72). To do otherwise, “would devalue the *Charter* because there are *always* budgetary constraints and there are *always* other pressing government priorities” (SCC, 2004b:72). Nevertheless, the Court also found that Newfoundland was in a particularly difficult situation that it could not ignore. While the Court did not explicitly necessarily acknowledge Newfoundland’s “historical” position of disadvantage, it described the situation as a “fiscal emergency,” in which “the financial health of the province was at stake” (SCC, 2004b: paras. 72, 75). During such periods of crisis, “measures must be taken to juggle priorities to see a government through the crisis. It cannot be said that in weighing a delay in the timetable for implementing pay equity against the closing of hundreds of hospital beds, as here, a government is engaged in an exercise ‘whose sole purpose is financial’” (SCC, 2004b: 72). In the case of early 1990s Newfoundland, the potential savings of twenty-four million dollars “amounted to more than ten percent of the projected budgetary deficit for 1991-92,” thus justifying the limitation (SCC, 2004b: para. 72). The Court also agreed that the PSRA was rationally connected to this objective, and that the impairment was minimal (SCC, 2004b: 77, 80).

³ Alberta did not submit s. 1 arguments (see, AB, 2004b: 12).

But the most significant finding is that the specific needs of a particular province justify deviation from the uniform (or centralizing) application of *Charter* rights, a finding that the provinces themselves had asked the Court to declare. According to the decision, then, *NAPE* implies that while a province in the black, such as contemporary Alberta might not be in a position to limit s. 15(1) in this way, “the evidence establishes a substantial and pressing objective on the facts of this [i.e. Newfoundland’s] case” (SCC, 2004b: 76).

Discussion

Far from imposing a national standard, the *Charter* and its arbiters in *NAPE* yielded explicitly to the economic realities of Canadian federalism. *NAPE*, therefore, provides further support for Kelly’s debunking of the centralization thesis. Moreover, the examination of provincial factums in *NAPE* supports Swinton and Hiebert’s predictions that provincial defences of policy might be framed in appeals to federalism. Finally, *NAPE* provides evidence of a link between Kelly on the one hand, and Swinton and Hiebert on the other. The Court’s explicit federalism jurisprudence, that is, at least has the appearance of being a response to the provincial arguments: a “federalism dialogue” to complement the democratic one.

Auton (SCC, 2004a):

Even absent the *Charter*, the provision of health care, constitutionally a matter of exclusive provincial jurisdiction, is the subject of the “uniform national standards” of the *Canada Health Act* (CHA), assuming of course that provinces wish to receive the attached federal funding. According to Christopher Manfredi and Antonia Maioni, the *Charter* threatens to frustrate provincial discretion in this controversial policy area further still. Although Manfredi and Maioni do not unqualifiedly accept the “centralization thesis” (Manfredi and Maioni, 2002: 220), they proceed in their analysis of health care litigation with the propositions that “judicial review systematically favours national norms” and that *Charter* review of health care policy has the potential to effect a ‘meta’ Canada health act (Manfredi and Maioni, 2002: 219). This paper, on the other hand, while agreeing that health care cases are particularly illustrative “of the tension between rights-based litigation and federalism” (Manfredi and Maioni, 2002: 231-32), but proceeds with the assumptions that centralization is “more apparent than real,” and that federalism itself, defined as provincial arguments in *Charter* cases, might be capable of extracting a federalism jurisprudence on the part of the Supreme Court.

The Facts

In BC, the *Medicare Protection Act* (MPA) provides funding for all “core,” services as per the dictates of the *Canada Health Act*, as well as for non-core services provided by “health care professionals” who are designated by the provincial Medical Services Commission. At the time of trial, BC had not so-designated providers of Applied Behavioural Analysis/Intensive Behavioural Intervention (ABA/IBI) therapy, and so this relatively new and not uncontroversial treatment for autism in young children did not receive public funding. The petitioners, a collection of children suffering from the neurological disease, alleged that this amounted to discrimination on the basis of disability within the meaning of s. 15(1), since non-disabled children received treatment for diseases with which they were afflicted.

The Supreme Court confirmed Manfredi and Maioni's concern that health care litigation carries with it significant implications for the division of powers. Behind the immediate issue, "lies the larger issue of when, if ever, a province's public health plan under the...CHA is required to provide a particular health treatment outside the "core" services administered by doctors and hospitals" (SCC, 2004a: 2). Larger than the question of funding for ABA/IBI was the question of the extent of the "national standards" to which the provinces would be required to conform.

Defining the Scope of the Right(s)

In *Eldridge* (SCC, 1997), the Supreme Court had required BC to provide sign language interpreters in the province's hospitals because by virtue of their disability the deaf were denied equal access to a government benefit. While in some respects, *Auton* bears remarkable semblance to *Eldridge*, the provinces involved (all but Manitoba and Saskatchewan) were careful to distinguish the provision of treatment for autism from the provision of sign language interpretation. Whereas in *Eldridge*, "it was found that failure to provide hospital translators for the deaf failed to provide *accommodation*...the government was not required to provide 'extra' services [emphasis added]," as were requested in *Auton* (BC, 2004b: 16-17; see also ON, 2004b: 14; QC, 2004b: 15; NS, 2004b: 7; PE, 2004b: 7; NL, 2004b: 11). The issue in *Auton* was not about equal access to existing benefits, but access to an entirely new benefit. Nothing about BC's healthcare legislation was "comprehensive" in the sense that every person should receive every medical treatment they need. Rather, the legislation simply provided "core" services to all. The province retains the discretion to provide certain non-core services as well. It would be erroneous to interpret "universality as creating a right to **any** effective treatment [since] this overlooks the entire structure of the medicare system which funds [medical services]...on the basis of decisions which take into account many factors" (BC, 2004: 2). This is a complex task not suited for courts, who lack the "same breadth of information or perspective as is involved in the political decision making process" (NL, 2004b: 3), that is exemplified by the extent of the work performed by the Romanow Commission (NL, 2004b: 3; ON, 2004b: 6). But more than these "institutional impediments" to the judicial design of a healthcare system (AB, 2004b: 15), it would "represent an unhelpful and potentially unfair interference in the necessarily complex and difficult governmental task of allocating limited healthcare resources to relatively unlimited needs" (BC, 2004b: 2, 17-18).

While these arguments speak to an understanding of the relationship between federalism and the *Charter* in terms of parliamentary sovereignty, or "implicit federalism," the provinces in *Auton* also relied on explicitly federalist arguments. To conclude that the lack of funding for ABA/IBI constitutes discriminatory treatment, "ignores or distorts the host of non-discriminatory reasons...[that] explain the government's response" (BC, 2004b: 23). While the most important of these "non-discriminatory reasons" was the controversial, or at least novel nature of the treatment (BC, 2004: 26), they might also be factors unique to each province. BC claimed for instance, that the "complex reality of any government's health care budget needs to address and take into consideration many dynamic and inter-related factors including ones relating to: geography (BC is a vast province with a relatively small, yet widely dispersed population), [and] demographic characteristics (including the characteristics of

regional populations)” (BC, 2004b: 26). Newfoundland agreed with this assessment. While health care might be the largest expenditure in every province, “Newfoundland...must also contend with the higher cost of providing health and other services to a relatively small population spread out over a large geographic area. This results in provincial per capita health care spending among the highest in the country, despite being financially least able to cope with such costs” (NL, 2004b: 4).

There are, therefore, factors unique to each province that require unique provincial responses. Quantitative and qualitative variation of insured services is the inevitable result. While some provinces may think the controversial autism treatment “necessary,” given the availability of funds and the needs of their population, other provinces may not. The *Charter*, therefore, should allow for this regional variation. Indeed, several provinces did, at the time of trial, provide ABA/IBI, though not necessarily through their respective ministries of health. These same provinces, however, intervened to support BC’s prerogative to not provide the treatment. Ontario commented that, “notwithstanding Ontario’s policy decision to publicly fund an [ABA/IBI] program, Ontario intervenes in this case in support of the position of the Attorney General of BC because of the serious ramifications on the ability of the provincial governments to allocate finite resources where there is infinite need⁴” (ON, 2004b: 3; see also, AB, 2004b: 1; PE, 2004b: 1).

Several provinces then went on to make more general calls for explicit federalism jurisprudence and a rejection of any notion of a “meta Canada health act.” While the *Canada Health Act* does ensure a “significant degree of interprovincial consistency” with respect to the funding of “core” services, health care is nevertheless a provincial responsibility. “Government policy decision as to which health care services are to be funded, and under what conditions, limitations and in what amounts are determined at the provincial level” (ON, 2004b: 4; AB, 2004b: 2).

Limiting the Right(s)

At the second stage of *Charter* analysis, provincial arguments in *Auton* did not exhibit any explicitly federalist characteristics. BC for one, declared that while cost alone cannot justify a limit on a *Charter* right, “the objective of ‘providing reasonable access to health care’ cannot be divorced from the objective of ensuring that the scheme is fiscally sustainable. It is therefore clear that the government’s objective of limiting health care expenditures by focusing on the funding of core health care services is pressing and substantial” (BC, 2004b: 33; see also QC, 2004b: 20; NB, 2004b: 21; PE, 2004b: 16; AB, 2004b: 16; NL, 2004b: 19).

The Justices Respond

The Court responded favourably to the provinces’ arguments, not only in the sense that it denied the petitioners’ claim and upheld BC’s decision not to fund ABA/IBI therapy, but did so in an explicitly federalist manner.

First, the Court distinguished the case from *Eldridge*. In that case, the court had held that the province was under an obligation to provide translators to the deaf so that they could have equal access to core benefits. In *Auton*, by contrast, the petitioners were

⁴ Probably because, as Ontario pointed out, that province was facing litigation regarding the age limits on the treatment it provided (ON, 2004b: 13).

“concerned with access to a benefit that the law has not conferred. For this reason, *Eldridge* does not assist the petitioners” (SCC, 2004a: 38). Instead, the question was “whether the legislative scheme in fact provides anyone with all medically required treatment.” Like many medically services which have been proven necessary, though are not necessarily considered “core” services, IBI falls outside the designation of core services required by the *Canada Health Act* (SCC, 2004a: 32). The legislative scheme, namely the *CHA* and the *MPA*, does not promise that any Canadian will receive funding for all medically required treatment. All that is required by the province is core funding for services provided by medical practitioners, “with funding for non-core services *left to the province’s discretion* [emphasis added]” (SCC, 2004a: 33). So here, the Court can be found agreeing with, or responding to, provincial claims that while bound to certain standards by the *CHA*, ultimately, health care is ultimately left to the provincial discretion.

Yet this did not end the inquiry. As the legislation *did* provide *some* non-core services, it remained to be determined whether the denial of this particular non-core service amounted to the discriminatory treatment of autistic children (SCC, 2004a: 39). Governments, according to the Court, are free to legislate in areas of social welfare, so long as their conferral of benefits does not take place in a discriminatory manner. If, for instance, a benefit program “excludes a particular group in a way that undercuts the overall purpose of the program,” discrimination will likely be established. On the other hand, if “the exclusion is consistent with the overarching purpose and scheme of the legislation,” it is unlikely to be so (SCC, 2004a: 42). Since the “legislative scheme in [*Auton*]...does not have as its purpose the meeting of all medical needs...there is no discriminatory effect” (SCC, 2004a: 43). Finally, in a statement that should calm fears of judicially managed Canada health act, the Court declared that to find in favour of the autistic children would “effectively amend the medicare scheme and extend benefits beyond what it envisions—core physician provided benefits, plus non-core benefits *at the discretion of the province* [emphasis added]” (SCC, 2004a: 44). According to the Court then, while certain national standards are imposed by the *CHA* (which none of the provinces disputed in any case), additional, non-core services can vary from province to province. Simply because Ontario and Alberta provided ABA/IBI, does not mean that it is a medically necessary benefit that must be implemented in other provinces as well.

Discussion

Like *NAPE*, *Auton* provides some evidence of a federalism dialogue with the *Charter*, for the Court seems to have responded quite favourably to the provinces’ federalism arguments by upholding BC’s decision not to fund ABA/IBI on explicitly and implicitly federalist grounds. An interesting contrast might be made between this dialogue and the lack thereof in *Eldridge*, in which far fewer provinces took part, and those that did relied only on implicit federalism, or parliamentary sovereignty-as-federalism (see, BC, 1997; MB, 1997; ON, 1997; NL, 1997). Given the other facts that distinguish one case from the other, it would be premature to explain the nullification in *Eldridge* and the upholding in *Auton* by reference to the quantitative and qualitative differences in provincial appeals to federalism. They may, however, be contributing factors, and further research, particularly research clustered in specific policy areas, should aim to determine the

efficacy of federalist arguments, and the effect of provinces “ganging-up” over a single issue.

Doucet-Boudreau (SCC, 2003)

The Facts:

The appellants in *Doucet*, a collection of Francophone parents, applied to the Nova Scotia Supreme Court (a section 96 “Superior Court”) for an order directing the province to provide French-language secondary school programs pursuant to s. 23 of the *Charter*. The trial judge established a timeline according to which the province was to employ its “best efforts” to provide the necessary facilities, while he also “retained jurisdiction to hear reports on the status of those efforts” (SCC, 2003: Head notes), something that Dennis Baker has likened to the judicial “seizure” of the “sword” of executive power (Baker, 2004). At issue in *Doucet*, therefore, was not provincial education policy *per se*, but the “remedies available under s. 24(1) of the *Charter* for the *realization* of the minority language education rights [emphasis added]” (SCC, 2003: Head notes).

As is typical of official language minority (OLM) education cases, *Doucet* attracted a number of third-party interventions, including: Newfoundland, Ontario, and New Brunswick. Little has been said to date about Newfoundland’s participation in OLM education litigation. Ontario and New Brunswick, on the other hand have been credited in the past with support for the judicial oversight of s. 23 and hence, less provincial discretion over education policy. Morton and Knopff, for instance, write that Ontario and New Brunswick “have frequently intervened in language rights cases *against* other provinces [emphasis in original]” (Morton and Knopff, 2000: 61), and Christopher Manfredi observes that these two provinces support OLM groups in their attacks on provincial policy “by intervening in cases on their behalf” (Manfredi, 1993: 95, 111). Though it may seem counterintuitive that any province would yield its own jurisdiction to the *Charter*, and even inappropriate that it would support attempts to appropriate that of others, several explanations for Ontario and New Brunswick’s apparent complicity in the centralization thesis have been suggested. Morton and Knopff, for instance, attribute this behaviour to the fact that these two provinces were Trudeau’s original constitutional allies (Morton and Knopff, 2000: 61). In a related, but more sophisticated approach, Christopher Manfredi would link this support for the expansion of MLE rights, and rights more generally, to the strength of the provinces’ respective “*Charter-Canadian*” constituencies (Manfredi, 1993: 111). In any case, we should expect in *Doucet* less a federalism dialogue than a federalism cacophony, in which the provinces speak not with one, but two or more voices.

Defining the Scope of the Right(s):

New Brunswick’s arguments in *Doucet* appeared consistent with earlier characterizations when it asked “that the Court recognize the jurisdiction of a superior court to supervise or manage a remedy of a constitutional violation” (NB, 2003: 17). New Brunswick’s support for the judicial oversight of language rights was not unconditional, however. Such a remedy must be “necessitated by the facts,” of the case two of which stand out in particular. Judicial supervision was warranted in *Doucet* because, first, the object of s. 23 is not merely about the construction of schools, but of a country where each official language and its culture is allowed to flourish (NB, 2003: 12), and second, because of the

unique history of oppression visited upon the French Canadian minority in the Atlantic Provinces, a history of “tragic events followed by migration” (NB, 2003: 12). Regional context, then, is an important determinant of an appropriate remedy because the recognition of the two linguistic communities in different regions of the country “must be sensitive to the characteristics of the population” (NB, 2003: 12). So while New Brunswick did not preclude the possibility that “temporary special measures” might be justified elsewhere (NB, 2003: 6), regional characteristics must be considered when crafting an “appropriate and just” remedy as per s. 24(1).

In the end, New Brunswick’s position appears more or less consistent with past characterizations. The same cannot be said of Ontario. Far from advocating an expansive role for the judicial fulfillment of *Charter* rights, Ontario joined the remaining provinces in a collective denunciation of the trial court’s retention of jurisdiction. None of these provinces, however, couched their arguments in explicit appeals to federal diversity. Insofar as federalism is implicated, it is only implicitly so, by way of a petition for principles better associated with the “democratic dialogue,” such as: the separation of powers (ON, 2003: 1; NL, 2003: 2; NS, 2003: 33); relative institutional competencies (ON, 2003:1, 6; NL, 2003: 6-7; NS, 2003: 11); and *Functus Officio*, or the “traditional common law notion that a judge’s role ends with judgment” (Baker, 2004: 19; ON, 2003: 4, 12; NL, 2003: 1, 6; NS, 2003: 16, 34). In *Doucet*, then, and with the exception of New Brunswick’s Atlantic caveat, parliamentary-sovereignty-as-federalism better describes the relationship between federalism and the *Charter* than does any notion of an explicit federalism dialogue.

Limiting the Right(s):

Section 1 of the *Charter* played no part in *Doucet*.

The Justices Respond:

In a 5-4 decision, the Court upheld the trial judge’s retention of jurisdiction. A judicial majority rejected the arguments of the provincial majority, while accepting those of New Brunswick. In the eyes of the majority of justices, several characteristics present in *Doucet* made judicial supervision an appropriate and just remedy. First was the purpose of s. 23 itself, which is “to preserve and promote the two official languages of Canada and their respective cultures” (SCC, 2003: para. 26). Second was the “where numbers warrant” provision of s. 23 which leaves OLM education rights “particularly vulnerable to government delay or inaction,” because if OLM education is not offered, the numbers required to warrant it in the first place will decrease, rendering the right virtually meaningless (SCC, 2003: para. 29). Finally, the Supreme Court took note of Nova Scotia’s failure to give “due priority” to s. 23 rights in this case in particular, and over the long term more generally which, given the first two conditions, justified judicial oversight by the trial judge (SCC, 2003: paras. 3, 38). It was in this context of “ongoing cultural erosion that [the judge] crafted his remedy,” which was, “in no way inconsistent with the judicial function” of a superior court” (SCC, 2003: para. 74), nor was it a breach of *functus officio*, in that nothing undermined the province’s right of appeal (SCC, 2003: para. 80).

The dissenting justices responded much more favourably to the majority (NS, ON, NL) provincial view. While these judges agreed with their colleagues about the

need for “efficacy and imagination” when crafting constitutional remedies (SCC, 2003: para. 94), they believed that the retention of jurisdiction was in violation of the separation of powers (SCC, 2003: paras. 108-09). They also sided with the provincial majority in its assertion that the trial judge had breached the principle of *functus officio*, which risked the danger of “the trial process becoming...a ‘never closing revolving door’ through which litigants could come and go as they pleased” (SCC, 2003: para. 116).

Discussion:

OLM rights, and OLM education rights specifically, are at the centre of the debate over the centralization thesis, for they purportedly “sacrifice the rights of provincial majorities to determine language policy in educational settings in order to further a particular vision of the pan-Canadian community” (Cairns, 1992: 85). Kelly, however, finds evidence of “subtleties” in the Supreme Court’s language rights jurisprudence that mitigate against the tendency toward homogeneity. Nowhere is this clearer, writes Kelly, than in the Court’s approach to section 23 in *Mahe v. Alberta*, according to which, “maximum policy flexibility” was given to provincial governments to implement OLM educational policy (Kelly, 2001: 332; see also Urquhart, 1997: 41-42). But this was not *Mahe*, and the Court’s rejection of the majority provincial view in *Doucet* seems to offer incontrovertible confirmation of the centralization thesis.

On the other hand, it is not at all clear that *Doucet* prescribes any more of a national standard than *Mahe*. Nova Scotia did not dispute its obligations within the flexibility of the *Mahe* standard, only the timeframe within which it was to implement those obligations (NS, 2003: 2-3). But, as the Court observed, when it comes to the exercise of OLM education rights, time is of the essence. In a prescient passage, Joseph Eliot Magnet suggested that, given the time sensitive nature of the exercise of OLM education rights, “if provincial governments are recalcitrant...courts will be faced with a totally new situation in constitutional law...If confronted with persistent inaction...it would be reasonable for a court to...require [a] report to the Court on an urgent timetable” (Magnet, 1995: 171-72).

Yet even if one believes that *Doucet* specified actions as opposed to a time-line (Baker, 2004), this is a concern about “judicialization,” not centralization. In fact, since there is no indication that the ability to retain jurisdiction extends beyond the superior court level (Pilkington, 2004: 99) the result of *Doucet* should, according to the centralization thesis itself, tend toward greater diversity than if these claims were allowed to progress through the appellate structure. A good deal of the centralization thesis, that is, depends on the involvement of *final* courts of appeal (Shapiro, 1981: 24) which tend toward centralization because of (among other things) the influence of the central government’s monopoly of the appointment process and the political culture of the national capital region (Andre Bzdera, in Morton, 1995: 4). Were the determination of language rights and the supervision of their implementation left to local courts, as opposed to progressing through the appeal structure, these factors associated with centralization are either neutralized (with regard to “final courts” and their location), or mitigated (regarding the appointment processes of s. 96 and Supreme Court justices).

Yet it is less than evident that *Doucet* even represents as wide-reaching judicialization of politics as scholars alternatively lament (Baker, 2004) and celebrate (Roach, 2004). Implicit in Baker’s assessment, for instance, is the suggestion that

nothing limits the *Doucet* remedy to language rights, a sentiment echoed by Ontario, Nova Scotia, and Newfoundland. As robust as the Court's role appears, its remedies are chosen with reference to "the right at issue and the context of each case" (Lawrence, 2004: 131). In *Doucet*, as Sonia Lawrence observes, the court was "careful to point out some unique aspects of section 23 which may require flexibility with remedies," indicating that the court "is not willing to extend the reasoning beyond section 23" (Lawrence, 2004: 132; see also, McAllister, 2004: 61; Pilkington, 2004: 93-94). To the extent that *Doucet* represents the judicial taking of the sword of executive power, it is only for use on a very particular set of rights.

At this point, all that remains to be explored of the interplay between federalism and the *Charter* in *Doucet* is what appears to be a shift in Ontario's position in OLM education litigation. Given past depictions of a province in support of expanded *Charter* rights and judicial power, what can explain Ontario's place in the anti-centralization camp in *Doucet*? It is tempting to implicate what has, outside of the *Charter* context been described Ontario's changing place in Confederation. Whereas in the past Ontario was seen, and saw itself, as "sharing with the federal government the responsibility for keeping the country united," since 1995, it has shed this role "in favour of a narrower focus on its own self-interest, and a diminishing concern with the rest of the country." Ontario "no longer has its traditional interest in a strong and relatively centralized Canadian state" (Stevenson, 2003: 209; Courchene and Telmer, 1998: 7). These are primarily economic arguments, but it is possible that as Ontario withdraws from the pan-Canadianism of John A. Macdonald's National Policy, it is also withdrawing its earlier support of Trudeau's *Charter* pan-Canadianism. Were this true, it would have serious implications for the centralization thesis, for Ontario, it has been said, exercises considerable influence before the Supreme Court (Ho, 1995: 121-22). But while there is some preliminary evidence to suggest that Ontario has adopted an increasingly restrictive view of *Charter* rights, such a conclusion cannot be reached on the basis of *Doucet* alone in that Ontario's position in *Doucet* cannot be meaningfully distinguished from its earlier position on OLM education. Simply stated, Ontario has never been as complicit in the centralization thesis as past characterizations suggest.

Take *Mahe*, for instance, in which the primary question was whether s. 23 of the *Charter* conferred on OLM parents the right to the "management and control" of education facilities provided at provincial expense. In an effort to retain maximum discretion over education policy, Alberta, Saskatchewan, and Manitoba⁵ all opposed a broad reading of section 23 that would included rights to management and control (AB, 1990: 14; SK, 1990: 3, MB, 1990: 9).

To be sure, Ontario (and New Brunswick) objected to this construction of s. 23, but not nearly to the extent as has been suggested elsewhere. While Ontario maintained that the *Mahe* parents were owed some level of management and control, it also stressed that "the structure of an educational system is an enormously complex undertaking...[and] the *Charter* does not prescribe modalities." To optimize its, and other provinces' discretion, Ontario suggested the Court should not hold that "the *only* method of implementing *Charter* section 23 rights is by the establishment of a separate

⁵ Québec also intervened in *Mahe*, and while it is probably safe to assume that that province adopted a position similar to Alberta's, for instance, this cannot be said with certainty (for the moment), as the Attorney General of Québec's factum for that case is not on file at the Supreme Court.

French language school board” (ON, 1990: 7-8), for it is “neither practical nor desirable” to detail what would be required “in such varied situations” as exist in Canada (ON, 1990: 15). While management and control is guaranteed, it could not be the case that in every province, management and control would require the establishment of separate minority language school boards (ON, 1990: 16).

So while Ontario favoured a more uniform application of s. 23 than Alberta, for instance, it is not fair to label its position as either “against” other provinces (Morton and Knopff, 2000: 61) or “on behalf of” OLM interest groups (Manfredi, 1993: 111). Rather, Ontario’s position is more properly characterized as a compromise between national standards and provincial rights. More importantly for present purposes, the Court seems to have responded quite favourably to Ontario’s *Mahe* position, and the subtleties in that decision that Kelly says allow for maximum provincial flexibility, might well be part of a federalism dialogue.

In *Doucet* the connection is less clear. While the court did respond quite favourably to New Brunswick’s arguments, the subtleties in that case that might allow for a degree of provincial difference appears to be less a direct result of provincial calls for federalism jurisprudence than they are coincidental.

GOSSELIN (SCC, 2005a) and SOLSKI (SCC, 2005b):

During the final stages of the writing of this paper, the Supreme Court handed down a trilogy of language rights cases. While sufficient time was not available to retrieve the relevant factums, the Supreme Court does make a number of references to Québec’s arguments that may serve as temporary proxies for those factums. In any case, given the pertinence of at least two of these cases to any examination of the relationship between federalism and the *Charter*, this analysis would be remiss if it did not include at least a preliminary review of two of these cases.

The Facts

In *Gosselin* and *Solski*, the Court was forced to negotiate the “constitutional collision” (Magnet, 1995: 150-51) between the *Charter of Rights* and Québec’s *Charter of the French Language* (Bill 101). The appellants in *Gosselin* were French-speaking parents in Québec (i.e. majority language speakers) who wished their children to receive English language instruction, but were prevented from doing so by s. 73 of Bill 101 which provides such access only “to children who have received or are receiving English language instruction in Canada or whose parents studied in English in Canada at the primary level.” It was the *Gosselin* parents’ claim that s. 73 violated s. 15(1) of the *Charter of Rights* because it “discriminates between children who qualify and the majority of French-speaking Quebec children, who do not” (SCC, 2005a: para. 1). Access to English instruction as per s. 73 of *Bill 101* was also at issue in *Solski*, and more specifically, subsection 2, which provides children with English instruction, provided that his or her parents are Canadian citizens, and that the child has received the “major part” of his or her instruction to date in English in Canada (Québec, RSQ, c. C-11). The parents, Canadian citizens whose children had received some, though not necessarily a quantitative majority of their education in English, had applied to have their children educated in English pursuant to this section. The administrative body charged with

determining eligibility had then denied their request after applying a “strict mathematical approach” according to which the “major part” of a child’s education was determined by the number of months and years during which the child had been educated in English (SCC, 2005b). The parents subsequently alleged that s. 73(2) of *Bill 101* was inconsistent with s. 23(2) of the *Charter of Rights* which guarantees any child (or siblings of that child) “who has received or is receiving English or French instruction” the right to continued instruction in that language, “to the extent that it limited the category of persons eligible to receive minority language education” (SCC, 2005b).

Defining the Scope of the Right(s)

In a rare occurrence for a case addressing s. 23, neither *Gosselin* nor *Solski* provoked even a single third-party provincial intervention. This conspicuous absence may itself be interpreted as a federalist statement, as the remaining provinces may have recognized Québec’s unique interest in legislation designed to preserve its distinct language and culture (Magnet, 1995: 143-44).

In *Solski*,⁶ Québec adopted an explicitly federalist approach to section 23, whose purpose is simply “to guarantee instruction in the minority language to members of a particular language community.” Beyond this basic guarantee, it is up to “each provincial legislature” (Québec, in SCC, 2005b: para. 26) to establish the criteria to that determines if there is a “sufficient link” between a child and the OLM community to distinguish members of the minority language community from allophones and members of the majority language community (Québec, in SCC, 2005b: para 26). Québec, therefore, while not disputing the guarantees of s. 23, defended its ability to determine who was eligible to enjoy these rights, even if that was through a strict mathematical approach to the “major part” provisions of *Bill 101* in an explicitly federalist manner. Perhaps thinking of the Court’s stance on educational certification schemes in *Jones*, Québec seems to have been asking that the provinces be “given room to make choices regarding the type of administrative structure that will suit their needs” (SCC, 1986: 304).

Limiting the right(s):

In the event that the court found that s. 73 of *Bill 101* contravened s. 23 of the *Charter*, Québec also couched its section 1 defence in explicitly federalist terms. According to Québec, the “major part” requirements of s. 73 can be justified as a limit on an otherwise universal *Charter* right given “the unique linguistic position of Quebec in Canada” (SCC, para. 52). This sounds very much like former Québec Premier Robert Bourassa’s justification of the use of the s. 33 notwithstanding clause following the Supreme Court’s decision striking down Québec’s “signs law” (also part of *Bill 101*) in *Ford* (SCC, 1988):

“...I am the only head of government in North America who had the moral right to follow this course, because I am, in North America, the only political leader of a community which is a small minority. Who can better, and who has more of a duty to protect and promote the French culture if not the Premier of Québec?...I chose to do what seemed to me to be vital for the survival of our community” (Bourassa, in Hiebert, 1996: 140).

Clear parallels can be drawn between Bourassa’s explicitly federalist defence of his decision to use the controversial notwithstanding clause in 1988 with Québec’s more

⁶ Unfortunately, the Court made no reference to Québec’s factum in *Gosselin*.

contemporary attempt to justify a limiting of *Charter* rights in *Gosselin*. But how would the Court respond?

The Justices Respond

The Supreme Court summarily dismissed of the *Gosselin* appeal. Even if it is assumed that section 15(1) prohibits discrimination on linguistic grounds (and it was not clear to the court that it does so automatically (SCC, 2005a: para. 12)), the issue to be considered was “the *relationship* of equality rights in both the *Canadian Charter* and the *Quebec Charter* to the positive language guarantees” in s. 23 (SCC, 2005a: para. 12). The Court said “there is no hierarchy amongst constitutional provisions. Equality guarantees cannot therefore be used to invalidate other rights expressly conferred by the Constitution” (SCC, 2005a: head notes). To allow “free access” to minority language educational institutions would effectively undo the political compromise forged by s. 23. Allowing members of the majority community to attend minority language schools would make the schools themselves centres of assimilation, as is the case with immersion programs where the language used outside of the classroom is most often that of the majority (SCC, 2005a: para. 31). The Court then would become even more explicitly federalist. Québec, in particular faces added difficulty in that schools intended for the minority language community “should not operate to undermine the desire of the majority to protect and enhance French as the majority language in Quebec, knowing that it will remain the minority language in the broader context of Canada as a whole” (SCC, 2005a: para 31).

In *Solski*, the decision was more mixed, in that the Court did grant the parents the right to send their children to English language institutions, but in so doing, avoided the potentially volatile step of striking down sections of *Bill 101*. In the Court’s view, the constitutional violation was not with the legislation itself, but with the rigid, quantitative determination of the “major part” requirement. Such an approach is “underinclusive; it does not achieve the purpose of s. 23(2) and, therefore, cannot be said to complete it or to act as a valid substitute for it” (SCC, 2005b: para. 35). But rather than strike the section from the legislation, the Court concluded that if “the word ‘major’ is given a qualitative rather than a quantitative meaning,” the *Bill* could be considered permissible within the scope of s. 23 of the *Charter* (SCC, 2005b: paras. 35-36).

Even in reading down the Québec law, however, the Court seems to have allowed for provincial variation in the application of that law generally and greater latitude for Québec more specifically. Section 23 “must take into account the very real differences between the situation of the minority language community in Quebec and the minority language communities in the territories and other provinces” (SCC, 2005b: para. 44). Therefore, even though the previous English language instruction of the children in *Solski* could be expressed through a qualitative approach to the notion of what “major part” implies, the court conceived of certain hypothetical “educational experiences” that may qualify a child for minority language education in other provinces, does not mean that they would automatically qualify under *Bill 101*, because provincial minority language education schemes “are necessarily responsive to their own province’s unique historical and social context” (SCC, 2005b: 44). In this sense, the federalist jurisprudence in *Solski* is particularly asymmetrical.

The Court’s “response” to Québec did not end there. In finding that the legislation should be “read down,” rather than struck down, the Court avoided the

necessity for a section 1 analysis of “reasonable limits” (SCC, 2005b: para. 52), but it also discussed several related aspects that appear to be the most recent example of explicit federalism jurisprudence, at least in the sense that Swinton and Hiebert saw it. After confirming the *Mahe* conclusion that language rights are to be construed broadly (SCC, 2005b: para. 20), and restating that s. 23 is to be interpreted in a uniform manner from province to province (SCC, 2005b: para. 21), the Court went on to say that this is not meant to preclude provincial difference. Rather, “the unique historical and social context of each province...must be taken into account when provincial approaches to implementation are considered, *and in situations where there is need for justification under s. 1 of the Canadian Charter* [emphasis added]” (SCC, 2005b: para. 21). While this conclusion is reached by reference to other cases, such as *Ford v. Québec* (SCC, 1988), it may be the most succinct and most forceful suggestion to date that the Court is willing to entertain “federalism,” or provincial diversity, as a justification under s. 1 for deviation from national norms. In other words, *Solski* is an example of the federalist jurisprudence anticipated by Swinton and Hiebert.

Discussion

While it is difficult to assess the precise extent to which the Court’s explicit federalism jurisprudence was elicited by Québec without a careful examination of that province’s factums in these two cases, based on what the Court said about Québec’s submission on section 1, it seems safe to predict that it was, at least in part, a response to appeals to federalism. Yet while the Court upheld Québec’s restriction on majority language groups’ access to minority language instruction, it did not uphold its mechanistic determination of which English children were eligible. In this sense, the federalist jurisprudence might seem like somewhat hollow victory for advocates of provincial autonomy, and a confirmation of the centralization thesis.

On the other hand, provincial autonomists can probably take comfort in the fact that the precedential value may be worth more to the provinces than the short term loss of sovereignty. This can be shown in the distinction between what F. L. Morton and Avril Allen call the “law” on the one hand, and the “dispute” on the other (Allen and Morton, 2001). The outcome of the dispute is concerned with whether or not the litigant left court with the desired outcome. In this case, clearly Québec “lost” the dispute as the children involved were granted access to minority language education; but victory at the level of “law,” is achieved by securing a favourable judicial interpretation of the Constitution. While Allen and Morton are basically concerned with interest group litigation, it is no less true that securing a favourable precedent, “provides new legal resources” to provincial governments “with which to win future political battles” (Allen and Morton, 2001: 66). *Solski* in particular, not only provides further evidence of Kelly’s federalism jurisprudence, but the peculiarly asymmetrical availability of this “legal resource” seems to undercut the claims of those who champion a separate bill of rights for the province of Québec (LaForest, 1995: 191). More significantly for the purposes of this investigation, it provides further evidence of a federalism dialogue, according to which, provincial governments can frame their arguments in federalist terms, and in so doing, elicit an application of the *Charter* that recognizes provincial diversity.

CONCLUSIONS:

The results of this preliminary inquiry into the relationship between federalism (what the provinces say it is) and the *Charter* (what the Supreme Court says it is), can be summarized in three points. First, it has provided further evidence for Kelly's claim that there exists a "federalism jurisprudence" in *Charter* litigation. That is, while the normative assumptions of the "centralization thesis" may be sound, they remain empirically ambiguous at best. While some *Charter* decisions, such as *Eldridge*, will indeed generate a "uniform national standard" in an area of provincial jurisdiction, others such as *NAPE* allow for a good deal of federal diversity. Moreover, while in some cases this allowance may be made only implicitly, by way of deference to sovereign parliaments, in others, such as *Auton*, the deference may be more explicitly made to federalism itself. There is more to an understanding of the *Charter's* relationship with federalism than the dialogue debate as currently conceived is capable of telling us.

Second, this paper confirms Hiebert and Swinton's suspicions that it is *open* to provincial governments to defend their legislation against *Charter* attack with appeals to federalism itself. More significantly, it has found evidence that provinces actually do so. In some cases, to be sure, provincial governments will rely solely on appeals to institutional capacities or due regard for the separation of powers (parliamentary-sovereignty-as-federalism), but in still other cases, provinces will make more explicit appeals to the characteristics or requirements of a federal system. In some instances, this latter approach will take the form of a justification for the limitation on an otherwise universal right—as though s. 1 of the *Charter* read, "free and democratic *federal* society"—and in others, provinces may attempt to frame the application of the right itself in federalist terms. "Federalism-as-federalism" may not form the major part of a provincial defence, and it may even play a very minor role indeed, but there is nevertheless evidence that federalism does enter into provinces' *Charter* calculus.

Finally, and most importantly, this research has begun to establish a link between the previous two findings. Described here as a "federalism dialogue," it suggests that Kelly's federalism jurisprudence may, at least in part, be a judicial "response" to Swinton and Hiebert's federalist arguments. By suggesting that the provinces—federalism itself—might elicit a federalist interpretation of the *Charter*, this paper hopes to begin to develop a richer understanding of the relationship these two constitutional pillars than the "democratic dialogue" has offered to date.

But this is a pilot study, and, for this reason, begs more questions than it answers. To what extent do the Court's decisions hinge on these arguments? Would these outcomes have been different had the provinces placed greater or lesser emphases on explicit federalism? How effective, that is, are *Charter* defences based on federalism? Take *Auton* and *Eldridge*, for instance. Both cases dealt, broadly speaking with health care policy, but the way in which federalism found its way into provincial arguments was both quantitatively and qualitatively. Whereas in *Eldridge*, only four provincial governments took part, and relied on implicitly federalist arguments, in *Auton*, fully eight of ten provinces were involved and invoked explicitly federalist defences of the BC legislation. It is thus tempting to attribute the imposition of a national standard in *Eldridge* and the allowance for provincial diversity in *Auton* to one or both of these differences in provincial strategy. However, the cases presented herein are an insufficient base on which to rest such a conclusion. Rather, this has been an attempt to bring a qualitative assessment of a limited number of cases to bear on the thesis, to explore the

possibility that they *might* play a role, and to establish that this is an avenue worthy of further study. Only the longer term, more quantitative collection will allow for any confirmation of these arguments while also prompting even more and perhaps more interesting questions about the national standards/federal diversity dichotomy.

Should, for instance, federalism play a role in defining the scope of *Charter* rights? If the *Charter* is supposed to represent what it is we as Canadians share in common, is it appropriate to apply those rights differently depending on region? Further, if these arguments prove effective, why should that be the case? Former Chief Justice Laskin's admonition of regional considerations notwithstanding, an analysis of provincial factums is particularly useful in a determination of whether the region from which a justice has been drawn affects their position on an issue. That is, are judges from "the West" more likely to adopt the arguments of BC and the Prairie provinces? Preliminary evidence suggests not, but again, this can only be determined through the ongoing assessment over the long-term.

Finally, while the primary purpose of this work has been to shift focus away from the democratic dialogue toward a better understanding of the relationship between federalism and the *Charter*, if the preliminary evidence that political arguments are effective in *Charter* cases is correct, then this paper may have something to say to the democratic dialogue as well. That is, dialogue need not be conceived of only in terms of legislative responses to judicial decisions, but also in terms of an "inverted dialogue" whereby courts respond to legislatures. Future research into both the "democratic" and "federalism" dialogues, therefore, should heed Hennigar's advice and endeavour to understand direct governmental engagement of judges on issues of constitutional interpretation.

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