

**The Charter of Rights and a Margin of Appreciation for Federalism:  
Lessons from Europe**

Jeremy A. Clarke  
Queen's University  
Kingston, ON  
4jasc@qlink.queensu.ca

For Presentation at:  
The Canadian Political Science Association  
York University  
Toronto, Ontario  
June 1, 2006  
(Panel L-3)

---

## Abstract

By empowering judges to establish national standards, the *Charter of Rights* limits the capacity of provincial governments to build distinctive communities. But, Samuel LaSelva reminds us, if the *Charter* is to be the “nation-saving” device it purports to be, we require a conception of *Charter* rights that not only acknowledges this will to live together, but recognizes our desire to live apart. Despite this imperative, scant judicial attention has been paid to developing a consistent model of rights in a federal context.

Such is not the case in the Council of Europe, where judges have gone to great lengths to articulate a conception of the *European Convention on Human Rights* that is cognizant of member states’ desire to maintain distinctive national communities. This recognizes the diverse cultural and legal experiences of the Member States as legitimate justification for the limitation of, or deviation from, otherwise pan-European standards. Despite important parallels with the Canadian context, however, the margin of appreciation has been virtually ignored by Canadian scholars and jurists alike.

This paper corrects this oversight, and explores the margin of appreciation in the Canadian context. Following some necessary background on “the margin,” as well as an exploration of the ultimately misguided application of the principle in Canada to date, it concludes that the margin of appreciation may, with necessary modification, be a particularly appropriate way of thinking about the relationship between federalism and the *Charter*.

---

## Introduction<sup>1</sup>

At its adoption, the *Charter of Rights* was opposed by provincial governments and scorned by academics for its failure to heed Canada’s federal foundations. Where guaranteed rights exist, a single national rule was expected to prevail, working towards the homogenization of once diverse provincial policies. In actual fact, however, the Supreme Court’s *Charter* jurisprudence has exhibited a considerable sensitivity to federalism (Kelly, 2001). That the critique persisted for as long as it did may be attributable to the Court’s failure to make these efforts explicit. The significance of the constitutional questions notwithstanding, Canada’s Supreme Court has completely avoided the development of a doctrine to govern the relationship between federalism and the *Charter*.

---

<sup>1</sup> I would like to acknowledge the generous financial support of the Social Sciences and Humanities Research Council in the form of a Canada Graduate Scholarship Doctoral Fellowship. I would also like to thank Holly Grinvalds and Emmett MacFarlane for their helpful comments on earlier drafts.

Such is not the case elsewhere. The European Court of Human Rights, for instance, has gone to considerable length to balance the *European Convention on Human Rights* with the diversity of European Member States, as well as to articulate and regularize that balance under the auspices of “margin of appreciation doctrine.” Stated briefly, the margin of appreciation is the explicit recognition, first, that given diverse legal and cultural contexts, the application or actualization of *Convention* rights may legitimately vary, and second, by virtue of their “direct and continuous contact” with those contexts, local authorities may be in a better position to determine the scope of, and need for limitations on rights than the international judge. Based on their diversity then, the European Court grants national authorities a certain leeway, or margin of appreciation, to deviate from or limit otherwise pan-European standards.

This paper explores the idea of this European jurisprudential principle in Canada. Following some general discussion of the need for a doctrine to govern the relationship between rights and diversity, it addresses the margin of appreciation more specifically. Because it is the first such treatment, however, it also involves some necessary background: what is “the margin” and how does it function in Europe? Subsequently, the paper will shift the focus to the Canadian context. In particular, it discusses the (misguided) application of the margin of appreciation to date; whether the comparison between Canada and Europe is even sufficiently tenable for its consideration; and how the margin might in fact contribute to the dialogue between the *Charter* and Canadian federalism. Ultimately, the paper concludes that the margin of appreciation is at least worthy of greater consideration by Canada’s scholars and jurists than it has been treated to so far.

### **The “centralization thesis” and its failure**

Since its adoption in 1982, the *Canadian Charter of Rights and Freedoms* has been subjected to numerous criticisms, not the least of which is the claim that it unduly restricts provincial autonomy. The substance of this “centralization thesis” is that the *Charter’s* supposedly national standards, applied by a centralized judicial hierarchy, will necessarily restrict policy choice in areas previously subject to provincial discretion (see, for instance, Hogg, 1989: 250; LaForest, 1995: 134). But this frustration of provincial ambitions ignores Canada’s “moral foundations,” and so far from fostering the national unity its champions had hoped for, the *Charter* actually breeds resentment and disunity. Accordingly, until and unless the *Charter* is meaningfully “reconciled” with federalism, Trudeau’s constitutional package stands a better chance of destroying the country than saving it (LaSelva, 1996: 64-98). Suggestions for reconciliation or rapprochement vary, but typically appeal for constitutional changes to ensure that the judicial interpretation and enforcement of rights is less “universal,” and more cognizant of the diverse legal, political and cultural traditions of Canadian federalism (LaSelva, 1996: 88; Cairns, 1995: 192-93; LaForest: 1995; Schneiderman, 1992: 258-60).

Yet despite all the concern, remarkably little has actually been done to test the facts of the *Charter’s* supposedly pervasive pan-Canadianism, and it was only recently that the facts of the centralization thesis were subjected to systematic and critical scrutiny. In a 2001 survey of *Charter* litigation, James B. Kelly demonstrated that, contrary to the sceptics’ predictions, the Supreme Court’s *Charter* jurisprudence has actually demonstrated considerable sensitivity to federalism. In fact, since the earliest

days of *Charter* litigation, when confronted with a *Charter* challenge to provincial law, the Supreme Court has exhibited a willingness to either defer to “the structural requirements of a federal system” or dismiss the challenge “by invoking the importance of policy variation among provincial governments” (Kelly, 2001: 339). Far from imposing a universal understanding of *Charter* rights on Canadian federalism, the Supreme Court has actually undertaken, with some success, the reconciliation so many have sought.

But if the Court’s *Charter* jurisprudence has been so sensitive to, or respectful of federalism, why was the “centralization thesis” able to establish such a toehold in the discourse, and why did it take twenty years of study to finally dispel it? For one thing, the Court has completely failed to articulate its efforts to balance universal rights with Canadian diversity. Although Kelly labels what he observes as “federalism jurisprudence,” this is his vocabulary, not the Court’s. Federalism may inform a *Charter* decision, or then again it may not. But there is no traceable pattern to determine if or when it might do so. Even when the Court does engage in the balancing of rights and federalism, it makes little effort to communicate those efforts, failing to make any explicit mention “federalism” at all (Clarke, 2006). Instead, the Supreme Court’s attempts to reconcile rights with federalism is very often merely “implied” (Kelly, 2001: 339). It is perhaps little surprise that those efforts have gone unnoticed.

### **The need for a federalism-*Charter* doctrine**

Constitutional doctrines comprise the rules and principles that guide judicial decision making in given circumstances and given areas of law. Doctrines may be gleaned from

the text of the constitution itself, but where the text is silent or vague the weight of precedent becomes their most important source. They offer predictability for and conditions the behaviour of legal actors, and more importantly, they legitimate courts and constitutional law. Development of and adherence to doctrine allows judicial decisions to be justified not merely by the outcome they produce, but “as a part of the fabric of the law” (Fried, 2004: 2). Doctrines demonstrate that judgments are not simply the political preferences of the justices, but are compelled by the force of logic as well as by the authority of what judgments before have concluded—conclusions that have won “acceptance and approval, and proved themselves if not wise, at least workable” (Fried, 2004: 6). Doctrines gives constitutional decisions, and the constitution itself, “the regularity and predictability they must have to make the Court’s exercise of power both be, and seem to be, lawlike and acceptable” (Fried, 2004: 5).

Is there any surprise, then, that the sceptics should be utterly unaware of the Supreme Court of Canada’s *Charter*-federalism jurisprudence? Where the text of a constitution is silent, as the *Charter* is when it comes to the tension it introduces to a federal system (LaSelva, 1996: 88), it is up to the Court to develop doctrine to govern cases in which that silence is implicated. Failure to do so allows for the perception that the constitution and constitutional law can simply mean whatever it is that the judges want it to mean at any given time, leading to perceptions of judicial and constitutional illegitimacy. The *Charter* may not in fact compel uniform provincial responses to its dictates, and the judges may not apply it as such. But the Supreme Court has not gone to any length to develop a doctrinal approach to the relationship. Indeed, there is rarely even an effort to acknowledge the obvious tension between rights and federalism. In the

absence of a consistent and coherent doctrine establishing the Court's efforts to reconcile federalism and the *Charter*, *Charter* centralization is always a possibility. Indeed, in the absence of a federalism-*Charter* doctrine, and given the plausibility of the centralization thesis—a single set of rights, applied by a federally appointed Supreme Court will tend toward a uniform application—is there any surprise it has enjoyed considerable traction despite the Court's efforts to reconcile federalism with the *Charter*? By making its efforts explicit, a doctrinal approach may deflect many of the critiques that the Court is insufficiently sensitive to federalism, and by effectively entrenching that fact into the cumulative weight of precedent, it could preclude the possibility that it ever may be.

In addition to addressing the concerns of the centralization sceptics, a federalism-*Charter* doctrine may indirectly deflect another set of critics—those who perceive the Court as unduly deferential. Take, for instance, two recent decisions of the Supreme Court upholding provincial policy in the face of *Charter* challenge. *NAPE* (2004) and *Auton* (2004), both of which were criticized as acts of timid examples of deference to legislative majorities (Jamie Cameron, in Makin, 2004: A4). Upon closer inspection, however, both prove to be deferrals not to the elected branches, but to the nature and requirements of a federal system (Clarke, 2006). The fact that commentators overlooked the distinction might be forgiven, since the Court made no effort to draw the distinction itself. Some may quarrel that this is merely splitting hairs. Whether the Court upholds a provincial policy for reasons of “democratic legitimacy” or for reasons of federalism, the outcome is the same: the restriction of a *Charter* right. This is too simplistic, for the exercise is actually quite different. There is a fundamental affinity between rights and federalism: both seek to protect minorities (LaSelva, 74). If the Court defers to a

legislature's democratic legitimacy or institutional capacity, it is subjecting minority rights to the interests or whims of a legislative majority. This is the ostensible concern of this set of critics. But when the Court defers to federalism, as it did in *NAPE* and *Auton*, it is engaging in a different exercise altogether. It is balancing one minority's right (the *Charter* claimant) against that of another (the provincial community whose rights are guaranteed against the national majority's conception of "the right"). Where it is the case that the Court's deferral is to federalism and not to parliamentary sovereignty, a federalism-*Charter* doctrine could make it clear that the critics' quarrel is not with the Court, but with federalism.

The primary concern of this paper, however, is the potential for doctrine to assist in the refutation of the centralization thesis—a potential that was not lost on early *Charter* scholars. In 1986, Graham Zellick wrote that Canada's courts would require "a coherent doctrine distinguishing those sensitive areas where Court imposed [*Charter*] standards will be articulated with respect for local variation [from] those where a uniform minimum across the country" is compelled (Zellick, 1986: 104). Zellick even had a particular approach in mind, suggesting that the Court consider a European doctrine for balancing rights and diversity known as the "margin of appreciation" (Zellick, 1986: 103). Two years later, noted constitutional scholar Peter Hogg made a similar recommendation. This "margin of appreciation," Hogg observed, provided the European Court with the latitude necessary "to reconcile the *Convention*...with the diversity of the European Member States." Obvious differences between Canada and Europe notwithstanding, Hogg deemed the margin of appreciation appropriate for the Canadian context because Canadian and European Courts shared at least one very important



challenge: “both...have to apply a single set of precepts to a variety of legal systems” (Hogg, 1990: 255). To Hogg and Zellick, the margin of appreciation appeared ideally suited to deal with the reconciliation of federalism with the *Charter*. Neither Hogg nor Zellick went on to develop their cases systematically (in both cases it merits little more than passing attention), and despite their endorsements, the margin of appreciation has been forgotten by Canadian scholars and courts alike. But the persistence of the centralization thesis suggests that the need for a doctrine is as acute today as it was twenty years ago. It may be time to revisit the idea of the margin of appreciation.

### **The margin of appreciation and the margin of appreciation *doctrine***

The challenges associated with balancing universal rights or norms with diverse populations are not particularly Canadian, but are experienced anywhere different cultures congregate. The challenge becomes exceptionally acute for judges where a bill of rights is imposed on a constitutional system that is also committed to the dispersal of political power (Himsworth, 2001: 161). This is true in Canada, of course, but it is no less true in Europe.

Following, and largely because of the Second World War, the newly minted Council of Europe implemented the *European Convention on Human Rights* to give expression to a number of basic European rights and values, and to socialize its Member States “into a pattern of behaviour towards their citizens based on these values” (Archer, 1990: 49-51). While the *Convention* was modeled, in many ways, after the *United Nations Declaration of Human Rights*, it was innovative in at least one important respect: it provided the machinery—the “Strasbourg organs,” including the European Court of

Human Rights—for individual Europeans to bring proceedings against their own state for violations of the *Convention*. To this court falls the task of interpreting and applying the necessarily vague language of rights in concrete circumstances. One difficulty in this is, of course, that in an organization comprised of culturally, linguistically, and historically diverse Member States, those circumstances will invariably differ, and considerably so (O'Donnell, 1982: 478). Member States may agree on a certain core meaning of *Convention* rights, but because of their “particular cultural and social conditions,” disagree how those rights should be actualized (Arai-Takahashi, 2002: 3). Member States may agree on the desirability and inalienability of democratic rights, for instance, but legitimately disagree on how those democratic rights are enjoyed through the use of different electoral systems, including different restrictions on the franchise. As in Canada, the *Convention* itself is silent on the reconciliation of rights with diversity, and so the task fell to the European Court to determine if and when it is more appropriate to force diverse circumstances to fit a uniform conception of *Convention* rights, or if it is more appropriate to allow a broad interpretation of *Convention* rights to fit diverse circumstances (Ostrovsky, 2005: 47; Yourrow, 1996: 4). Unlike its Canadian counterpart, the European Court made these efforts explicit and regular through the use of doctrine.

The “margin of appreciation” is the Court’s explicit acknowledgment of the tension between rights and diversity. It is the recognition that the meaning of rights can legitimately vary based on legal and cultural context. More importantly, perhaps, it is the recognition that national authorities are almost certainly better positioned than the international Court to appreciate those contexts (Petzold, 1993: 49). In light of these twin

recognitions—of diversity and of judicial subsidiarity—the margin of appreciation is the Court’s allowance of a leeway to Member States to choose the appropriate responses to matters affecting rights protection within their boundaries (Gross and Aoláin, 2001: 627). The margin is not infinite, however. The hundreds of cases in which the Court has found a violation of the *Convention* is testament enough to this (Moravscik, 218-19; Council of Europe, 2005). However, so long as the Court is convinced that the “core” of a *Convention* right has not been breached, the margin of appreciation says to Member States that it trusts the legitimacy of their conception of *Convention* rights. It allows for the enforcement of human rights norms while allowing the rights themselves to take on a “local flavour” (Ostrovsky, 2005: 47, 57).

Two seminal examples from the European case law are particularly instructive: *Lawless* (1960) and *Handyside* (1976). Article 15 of the *Convention* permits Member States to derogate from their *Convention* obligations “in times of war or other public emergency threatening the life of the nation” so long as that derogation is limited to that which is “strictly required by the exigencies of the situation” (Feingold, 1978: 91). The margin of appreciation made its first appearance in the determination of this threshold in *Lawless v. Ireland*. Following the outbreak of violence in Northern Ireland, the Irish government, in an effort to maintain the legitimacy of the Irish state (Maguire, 2004: 1), began interning suspected members of the Irish Republican Army without charge, claiming that the violence was a national emergency that justified derogation from the right to a fair trial (Art. 6). Mr. Lawless, one of the detained, argued that a national emergency did not in fact exist, that the Irish government therefore had no grounds for derogation, and was thus in violation of Article 6. The Strasbourg organs disagreed, and

noted that member States were in a better position to determine “whether there exists a public emergency which threatens the life of the nation.” They should, therefore, be granted “a certain margin of appreciation” (*Lawless*, as reported in Arai, 2002: 5).

The margin of appreciation was subsequently relied upon to determine the outcome of a number of other derogation cases, but the “decisive breakthrough” came in the 1976 *Handyside* decision (Arai-Takahashi, 2002: 7). At bar in *Handyside* was the decision of British authorities to prevent the distribution of an “obscene” publication: *The Little Red Schoolbook*. Mr. Handyside, who had secured the British publication rights for the book and had been charged with possession of the “obscene material,” alleged that the ban violated his Article 10 freedom of expression, a claim with which the Court agreed. However, subsection 2 of Article 10 (like subsections 2 of Arts. 8, 9 and 11) states that an individual’s freedom of expression is subject to such restrictions “as are necessary in a democratic society...for the protection of morals.” But what are “morals?” And what restrictions are necessary to protect them? Even if the Court believed it possible to define morality at all, it was impossible “to find in the domestic law of the various Contracting States a uniform European conception of morals.” Instead, a survey of European policy revealed that “the requirements of morals varies [sic] from time to time and from place to place” (*Handyside*, 1976: para. 48). The European experience was simply too diverse to articulate a common European standard. Given the distinctive British experience, then, and by reason of the State authorities’ direct contact with “the vital forces of their countries,” the British were in a better position than the international judge to give an opinion on the exact content of [the limitations required to protect

morals] as well as on the necessity of a restriction or penalty intended to meet them” (*Handyside*, 1976: para. 48; see also Hutchinson, 1999: 640).

That *Handyside* should be considered the “decisive breakthrough” for the margin of appreciation has less to do with the outcome of the case itself, than with the structure of the *Convention* right on which that outcome hinged (Arai-Takahashi, 2002: 8-9). Like Article 10 (freedom of expression), Articles 8 (privacy), 9 (thought, conscience, and religion), and 11 (association) also contain subsections that provide for their limitation, so long as that limitation can be considered necessary in a democratic society. The *Handyside* case is so significant because it effectively established diversity—and the quasi-federalist framework in which it thrives—as a legitimate justification for the limitation of Articles 8 through 11, where perception of *Convention* obligations is most likely to vary. Because legal and social cultures vary from one Member State to the next, and because local authorities are generally in a better position to understand those cultures, they should be granted some leeway to determine the need for limitations to be placed on rights. Although the margin of appreciation continues to operate with regard to most other sections of the *Convention*, its combination with the limitation of Articles 8-11 has become the Court’s primary vehicle for the reconciliation of rights with diversity—of the *European Convention* with the Member States of the Council of Europe (Arai-Takahashi, 2002: 1-2; Ostrovsky, 2005: 49).

To reiterate, the margin of appreciation is the leeway available to member states to deviate from core conceptions of *Convention* rights. But it tells little, on its own, about the width of that margin in given cases. This is the role of the margin of appreciation *doctrine*. It is the interpretational “tool” that the Court uses to determine the width or

availability of “the margin” (Ostrovsky, 2005: 48). So integral a part of the European jurisprudence has the margin of appreciation become, that is, that the case law reveals several discernable rules or patterns governing the width of the available leeway in any given case (O’Donnell, 1982: 495; Yourrow, 1996; Arai-Takahashi, 2002). There is, first of all, a “consensus standard.” When a European consensus on the meaning or need for limitations on particular rights is absent, as it was in *Handyside* for instance, the margin available to governments expands. Conversely, when consensus is present, it is taken to mean that the “core” meaning of the right is narrowly defined, and the margin to deviate will thus contract (Ostrovsky, 2005: 53-54). Secondly, the “importance” of the right in question will affect the available margin. “Importance” seems to be rooted in the history of the *Convention*, which was largely a response to the slide of several European States into totalitarianism prior to World War Two (McGoldrick, 2001: 939; O’Donnell, 1982: 484; Brems, 2003: 95). As a result, when it comes to limiting democratic rights, for instance, States can expect a very narrow margin of appreciation. Finally, “specific textual analysis” contributes to the predictability of the margin of appreciation (O’Donnell, 1982: 488). This is largely why, for instance, the margin of appreciation has come to play such a large role in Articles 8 through 11 of the *Convention*. The margin will obviously be wider where the rights themselves allow for limitations. There are other patterns that can aid the Court and other legal actors to a determination of the width of the margin of appreciation in a given circumstance (Brems, 2003: 94), but these three seem to be the most important. Some are sceptical of how bound the Court feels by these rules governing the margin of appreciation (Macdonald, 1993: 122), but at the very least,

they offer at least a level of predictability and transparency absent in the Canadian context.

These particular rules, however, were not the focus of Hogg and Zellick's recommendation to Canadian jurists. They are, of necessity, Euro-specific, and would require "suitable adaptations" for the Canadian context (Zellick, 1996: 104).<sup>2</sup> Hogg and Zellick would merely stress the margin of appreciation's explicit recognition that diversity may require diverse but legitimate constructions of rights, and in particular, justify the limitation on those rights. The latter may help explain why the margin of appreciation should have seemed so attractive to these scholars. Like the *European Convention*, the *Charter of Rights* provides for the explicit limitation of its guarantees. The *Charter's* "reasonable limits" clause has even be conceived of as something of a concession to federalism (Hiebert, 1996: 13-26) and its logic seems to allow for defences of provincial policy couched in the language of difference or diversity (Swinton, 1990: 342). In this light, and in light of the role that similar, and similarly phrased, limitations play in European Court's management of diversity, it comes as little surprise that Zellick and Hogg thought the European "margin of appreciation" should be at least considered by Canada's courts as a way of alleviating some of the tension between rights and federalism.

Yet the Supreme Court has failed to come to the same conclusion, and has instead rejected the margin of appreciation. Or to be more precise, the Supreme Court of Canada has rejected the margin of appreciation as a means of governing the relationship between

---

<sup>2</sup> The consensus standard, as it operates in the European Court would, in many cases, be inappropriate in Canada. While the degree of consensus among the majority English-speaking provinces may be suitable for judging the width of a margin of appreciation among those same provinces, it seems counterintuitive to hold Quebec to that same standard.

federalism and the *Charter*. Careful observers will observe that the term “margin of appreciation” has appeared in the Canadian jurisprudence. But aside from a limited number of lower court decisions, Canada’s courts and the Supreme Court in particular have applied it mistakenly. The margin of appreciation has not been used to accommodate federalism within a *Charter* framework.

### **The “margin of appreciation” in Canada to date**

In the 1980s, when Canadian precedent offered little in the way of helpful rights jurisprudence, it was not uncommon for Canada’s courts to turn to the international example (Schabas, 1996: 109). This was particularly true of Canada’s lower courts, who by virtue of the judicial hierarchy, were called upon to interpret *Charter* rights several years before the Supreme Court itself. In at least two of these early cases, Canada’s lower courts found it useful to address the margin of appreciation while balancing federalism with the *Charter*.

In *Black v. Law Society* (1986), the Alberta Court of Appeal was asked to rule on the compliance of provincial law society regulations with the *Charter’s* mobility rights. Justice Kerens found that the regulations, which prevented non-residents from forming a joint practice with an Alberta law firm, violated section 6, and turned to section 1 to determine if the violation was a reasonable one. At the time, however, the Supreme Court had yet to decide *R. v. Oakes* (1986). In the absence of guidance from Canada’s top court on how to approach the limitation of *Charter* rights, Kerens surveyed the “useful precedent” he found elsewhere. In particular, Kerens referred to *Handyside*, where he observed that the European Court of Human Rights acknowledges that state



authorities “are in a good position to appreciate the social circumstances and therefore the need for legislation violating rights, which it calls the...local “margin of appreciation” (*Black v. Law Society*, 1986: 283). Ultimately, Kerens rejected the doctrine as unduly deferential, but his was not the only lower court judgment to bring the concept to bear on the Canadian context.

In *Badger v. Manitoba* (1986), prisoners in that province challenged section 31(d) of the *Manitoba Elections Act*, which prohibited them from voting in provincial elections. Justice Scollin, of the Manitoba Court of Queen’s Bench, conceded that the legislation violated section 3 of the *Charter* (democratic rights), and proceeded to examine whether the violation could be considered a reasonable one. Unlike Justice Kerens in *Black*, Scollin had the benefit of the Supreme Court’s decision in *Oakes*. Nevertheless, Scollin thought it appropriate to look to the international context to guide his section 1 analysis. In the process, he incorporated the margin of appreciation into the *Oakes*-test. To determine if the “preservation of the currency of the franchise...and the stigmatization of those who deliberately breach their duty to society” (AG Manitoba, in *Badger*, 1986: 112) constituted a pressing need in a democratic society, Scollin turned to a *Handyside*-like consensus standard. He found that while some Canadian jurisdictions, like Manitoba, had chosen to disenfranchise prisoners, others, such as Newfoundland and Quebec had not. Did the fact that right to vote was not restricted in two provinces imply that the choice to do so elsewhere amounted to unconstitutional behaviour in a free and democratic society? In effect, did the *Charter* compel uniform behaviour from all provinces? Not according to Justice Scollin. The fact that certain “free and democratic

societies,” or provinces, do not limit this right in the same way, does not preclude diverse interpretations of what constitutes a reasonable limit.

“As to this sort of variation, a "margin of appreciation" exists and a course of action may be demonstrably justified in a free and democratic society without being adopted by every political unit within that society.... The Charter is not a tool to make Canada a monolith” (*Badger*, 1986: 113??).

Ultimately, Scollin would strike down the legislation because it failed the “rational connection” test. But it remains that his analysis included an enumeration of the margin of appreciation in its unadulterated European form as the explicit recognition that rights need not compel uniform behaviour among politically or culturally distinct populations.

The same clear statement of principle has not yet occurred in the Supreme Court, despite the fact that the top court has used of the term “margin of appreciation” on several occasions, beginning with *Irwin Toy v. Quebec* (1989). At bar was the constitutionality of Quebec legislation prohibiting advertising that targeted children under the age of thirteen. The appellant toy manufacturer charged that the legislation was an unreasonable violation of its section 2(b) freedom of expression. After finding that the legislation did indeed restrict the corporation’s “expression,” the Court moved on to section 1. The Court conceded that the legislature had a valid objective in protecting “a group which is particularly vulnerable to...manipulation in advertising” (*Irwin Toy*, 1989: 987), and turned to the question of whether the legislation impaired the right as minimally as possible. The Court inquired whether drawing the line at thirteen was required to meet the objective, when a younger age might be less restrictive, but as effective. Ultimately, the Court found it too problematic to determine the precise age at which susceptibility to advertising ceases to be a pressing concern. When the Court is faced with such circumstances, where the social scientific evidence is inconclusive, governments should

be afforded a “margin of appreciation” to decide how to meet their objectives (*Irwin Toy*, 1989: 990). But while the Court used the words, it did not use the principle behind them. The Supreme Court’s “margin” is motivated not by difference, but deference. This is not meant to suggest that the Court’s motives were unsound. It may be perfectly legitimate to extend some scope to these political decisions, or to defer to more “expert” opinion in some circumstances. But this is not properly characterized as a margin of appreciation: “it is something different” (McGoldrick, 2001: 940).

*Irwin Toy* may be the first time the Canadian Court uses the vocabulary, but it claims in that case to have borrowed the margin of appreciation from its earlier decision in *Ford v. Quebec* (1988; see *Irwin Toy*, at 990). Ironically, although the words never actually appear in *Ford*, the reasoning to which the Court is referring (pages 777-79 of *Ford*) is prototypical margin analysis. It is the recognition that diversity may allow for, or even compel different responses to *Charter* rights. The impugned legislation in *Ford* was Quebec’s well-known “sign law” requiring the use of the French language only for public signage and commercial advertising. The Quebec government argued that to the extent the law limited a Quebecer’s freedom of expression at all, it did so reasonably for the purposes of section 1. The Court disagreed, finding that a total ban on other-language advertising could not be construed as “minimal impairment.” In reaching this conclusion, however, the Court conceded that the purpose of the legislation—to assure the quality and influence of the French language in Quebec—was a valid one (*Ford*, 1988: 778). English had become so commonplace in the “visage linguistique” of the province that it “suggested to young and ambitious Francophones that the language of success was almost exclusively English [and] it confirmed to Anglophones that there was no great

need to learn [French]” (*Ford*, 1988: 778). Given this threat to the French language, although an outright ban was unreasonable, it would not be unreasonable to require “the predominant display of the French language, even its marked predominance” (*Ford*, 1988: 780). While relegating the use of minority languages to subordinate status would not stand up to Charter scrutiny where the “linguistic face” is secure (i.e. Canada outside of Quebec), given Quebec’s unique culture and circumstance, it would be considered constitutional. Although it never uses the term, the Court’s decision in *Ford* is an exemplary margin of appreciation exercise. It amounts to the judicial recognition that the diverse cultures, histories, and legal traditions of the provinces may require a departure from the universal application of *Charter* rights. Just one year later, however, beginning with *Irwin Toy* and continuing ever since, the Court has applied the margin of appreciation in very different, and ultimately flawed terms. In fact the Supreme Court’s use of “margin of appreciation” has not only been inconsistent with its European origins, but has also proven internally inconsistent.

Each of the next three cases in which “margin of appreciation” is called upon (*Butler* (1992), *RJR MacDonald* (1995), and *Sharpe* (2001)) involve federal (i.e. central government) legislation, and so it could hardly be expected that it would be used in the accommodation of diversity. Instead, in all three cases, a majority, dissenting, and concurring opinion, respectively, used the margin of appreciation to defer to legislative judgment in the absence of conclusive social scientific evidence (*Butler*: 503; *RJR*: para. 104; *Sharpe*: para. 160). As late as 2001 then, the *Irwin Toy* understanding of the margin of appreciation seemed firmly established. Since the *Sharpe* decision, however, the term has been variously used by majorities and minorities to justify deference not only where

social scientific evidence is inconclusive (*Sauvé*, 2002: para. 150; *Trociuk*, 2003: para. 36), but also where legislatures are faced with the complexities involved in the creation and distribution of social benefits (*NAPE*,<sup>3</sup> 2004: para. 84; *Chaoulli*, 2005: headnotes), regulatory regimes (*Harper v. Canada*, 2004: para. 90), and compensatory schemes (*Nova Scotia v. Nova Scotia Workers' Compensation Board*, 2003: para. 82). In one case, the rules governing the Supreme Court's use of the term had become so hollow that some of the judges seemed prepared to grant a margin of appreciation anytime a government was seeking a remedy for a pressing social objective, regardless of complexity or the lack of social scientific proof (*Lavoie*, 2002: para. 125). By 2005, the Supreme Court had used the term "margin of appreciation" in so many ways as to render it essentially meaningless. This confusion has been multiplied by the Court's failure to develop a consistent French-language equivalent. Margin of appreciation has been translated as: "margin of appreciation" (*Lavoie; Sauvé; Harper*), "degree of latitude" (*RJR Macdonald*), "certain latitude" (*Irwin; Butler; RJR Macdonald; Sharpe; Lavoie; Trociuk; NS Workers'*), and "margin of manoeuvrability" (*NAPE; Chaoulli*).

To the extent that the margin of appreciation can, in the Canadian context, be described as a "doctrine" at all, it is as an expression of deference to sovereign legislatures. This is not intended to question the importance or value of reasoned deference. In many cases, there may be compelling reasons to defer to the democratic legitimacy or institutional capacity of the representative branches. Many Canadians, regardless of their feelings on judicial review, would sympathize with the minority judgment in *Chaoulli*, for instance, which would have allowed the government of Quebec

---

<sup>3</sup> Although *NAPE* itself is, in fact, representative of the Court's efforts to balance federalism with the *Charter*, the Court's use of the term "margin of appreciation" is unrelated to those efforts.

a margin of appreciation in dealing with the complexities involved in the design of a public health care scheme. Courts may see fit to afford some scope to political decisions and defer to some degree to an expert opinion, but as desirable or appropriate as it may be seen to be, it is not properly characterized as the margin of appreciation, but is something quite different (McGoldrick, 2001: 940; Hovius, 1986: 52-53).

That the Supreme Court applied such a misinterpretation of the margin of appreciation is somewhat surprising. Not only did the Court have the benefit of lower court decisions such as *Badger* and *Black*, but it seems probable that in approaching section 1 of the *Charter*, the Supreme Court itself would have surveyed the same European rights-limitation jurisprudence that led the Alberta and Manitoba Courts to their proper interpretation of the margin of appreciation. Following a brief discussion of this likelihood, this paper will turn to a discussion about why the Supreme Court decided nevertheless to reject the margin of appreciation, and why it may be time to revisit the idea.

### **Was the Supreme Court aware of the margin of appreciation?**

The Oakes test—the Supreme Court’s doctrinal approach to section 1 analyses—has become such an essential and established part of Canadian jurisprudence that it has assumed the status of “holy writ” (Hogg, 1998: 710). Indeed, its origins are often portrayed as divine—as though the question of whether a limit placed on a right meets a pressing need and is proportional to the benefit has no foundation beyond the decision in *Oakes* itself (Hiebert, 1996: 60-61). Scholars might be forgiven for this portrayal, since the Court itself represents the procedure in this light, failing to attribute its famous test to

any other source. But the suggestion that the *Oakes* approach to limiting rights is a novel one is patently absurd. The doctrine has its roots in several pre-*Charter* jurisprudences, including the Canadian *Bill of Rights* jurisprudence (Morel, 1983; *R. v. Burnshine*, 1975; *Mackay v. The Queen*, 1980). International sources, however, would prove particularly important.

Generally speaking, the American Supreme Court is the Supreme Court of Canada's international jurisprudential source of choice. But where the limitation of *Charter* rights is concerned, the relevance of the American example is open to discussion. Although American courts have never suggested that the *Bill of Rights*' guarantees are absolute, limitations in the American context are said to be implied. There is no equivalent to the explicit limitations spelled out in section 1 of the *Charter*. While this distinction alone does not preclude the adoption of an American approach (Dickson, 1983: 8), it was believed that the American approach should be treated with some caution (Dickson, undated: 43-44; Zellilck, 1986: 97; Wilson, 1988: 6).

The European Court's limitation jurisprudence, on the other hand, was described by scholars and jurists alike as a particularly constructive example. As noted in the discussion of *Handyside*, the *European Convention* makes the limitation of its provisions explicit, and although the *Convention* attaches its limitations to particular clauses, unlike the section 1's general limitation of all *Charter* rights, each document's limitations clauses resemble the others'.<sup>4</sup> This is no accident of course. Both the idea for, and composition of section 1 owe a great deal to the *European Convention* (Morel, 1983: 84;

---

<sup>4</sup> The Canadian Charter guarantees its freedoms, "subject only to such reasonable limits as prescribed by law as can be demonstrably justifiable in a free and democratic society." Similarly, Article 9 of the *European Convention* guarantees the freedom of thought, conscience and religion, "subject only to such limitations as are prescribed by law and are necessary in a democratic society."

Mendes, 1982; Wilson, 1988: 4; Hogg, 1998: 696). As a result, so too does the jurisprudence. In the formative days of section 1 jurisprudence, Supreme Court judges can regularly be found citing the European Court's example. According to Bertha Wilson: "Canadian lawyers and judges could well benefit from a careful study of the jurisprudence arising from the interpretation of [the] right-limiting clauses" in the *European Convention* (Wilson, 1988: 6; see also, LaForest, in Schabas, 1996: 12; and Dickson, undated: 52-53). Given these endorsements, despite the fact that nowhere in *Oakes* does the Supreme Court actually attribute the test it develops to the European Court, it should come as little surprise to learn that the *Oakes*-test very closely resembles its European counterpart. In fact, each and every step of the *Oakes* test—the requirement of a pressing objective; minimal impairment; rational connection; and proportional effects—can be linked to a counterpart in the European limitation jurisprudence (Hovius, 1987: 39-40, Marx, 1982: 63).

Clearly the Court was not only cognizant of, but well versed in the European rights-limitation jurisprudence, a major component of which is, of course, the margin of appreciation. Therefore, while every feature of the *Oakes* test can be paired with its counterpart in the European jurisprudence, the reverse cannot also be said: not every step in the European rights-limitation jurisprudence finds its counterpart in the *Oakes* test. Conspicuous by its absence is the margin of appreciation, or the explicit recognition that diversity may necessarily and legitimately compel different interpretations of rights and the need for their limitation. Although the Supreme Court's silence on the international sources of its section 1 jurisprudence makes it difficult to determine precisely why it rejected the margin of appreciation, there are two likely reasons jurists might have been



sceptical: the tenability of the comparison; and the perceived inappropriateness of recognizing diversity as legitimate grounds for deviating from *Charter* rights.

### **Revisiting the comparison**

It seems most likely that the Supreme Court's rejection of the margin of appreciation was based upon a belief that a principle developed for the accommodation of European States was unsuitable for Canadian federalism. In 1988, for instance, Beverly McLachlin indirectly expressed this concern. The European rights limitation jurisprudence exemplified in *Handyside*, wrote McLachlin, was poorly suited for the Canadian environment because the *European Convention* is an "international instrument...designed to limit as little as possible the sovereignty of the nations that signed it" (McLachlin, J, in *Keegstra*, 820; See also, Schabas, 1996: 116-17; Hovius, 1987: 52-53). Since the chief, and perhaps the only, distinction between the European and Canadian Courts' limitation jurisprudence is the margin of appreciation's acknowledgement of diversity as a legitimate constraint, it must be the focus of McLachlin's objection. For the future Chief Justice, the doctrine, at least in its European sense, was considered unfit because the comparison between the Council of Europe and Canada is untenable. But is this the case? Although the analogies between Canadian federalism and the Council of Europe on the one hand, and the *Canadian Charter* and *European Convention* on the other, may not be perfect, they are closer than a decision to reject the margin of appreciation out of hand would suggest.

The comparison begins with the internal diversity and sovereignty of the two (Canadian and European) jurisdictions, since this seems to be the most obvious objection.

Strictly speaking, of course, McLachlin is correct. The Council of Europe is indeed a collection of sovereign states, and even though it may have begun life as a federative project (Winston Churchill once described his wish that the Council become “the United States of Europe”), its institutions were too weak, and its membership too diverse to sustain hopes of federation (Archer, 1990: 51-52; MacMullen, 2004 : 406). Canada, on the other hand, is not comprised of sovereign states, but is a federation whose provinces enjoy only certain constitutional rights and privileges. Perhaps the level of “decentralization,” or at least the failure of centralization, in Europe suggests a level of diversity that renders a margin of appreciation appropriate in a way that it is not in Canada.

But neither the strength of Canada’s central institutions, nor the homogeneity of its population should be overstated. It seems hardly worth mentioning, but since the Court seems to have forgotten: Canada is simply one of the most diverse federations in existence. Although the provinces may not be sovereign in the same sense as a European state, at least one regularly elects governments that claim it ought to be. Canadian federalism is not a “political federalism” existing primarily to keep government as close as possible to the population. Rather, the *raison d’être* of Canadian federalism is the protection of at least two very different societies (Kymlicka, 1995: 27-30). Even if Quebec is removed from consideration, Canada is on every measure, among the most, if not *the* most, decentralized federations in the world (Simeon and Papillon, 2006; Anderson, 2006: 461). The remaining provinces may not have the same moral claim to sovereignty, but they are bestowed with considerable powers, and have a capacity to build and maintain distinctive communities well beyond that of the constituent units of

almost any other federation. The comparison between the Council of Europe and Confederation is, therefore, closer than McLachlin's stark portrayal suggests. If the margin of appreciation is appropriate for the Council of Europe, then it deserves at least greater consideration than the Supreme Court appears willing to give it.

Sceptics of the margin of appreciation might also be wary of comparisons in the structure of the bills of rights themselves. In particular, they might point to important differences in terms of where the responsibility lies for the interpretation and enforcement of the *Canadian Charter* and the *European Convention*. In Canada, courts are given the lead role in *Charter* interpretation (Dickson, 1983: 8-12), and in a very real sense certain critics of judicial review are correct to observe that the *Charter* is 'what the judges say it is' (Morton and Knopff, 2000: 53-58). The *European Convention*, by contrast, declares that the primary responsibility for its enforcement lies with Member States: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms...of this Convention" (Art. I). By agreeing to the terms of the Convention, a Member State "agrees to interpret this set of rights for its own domestic society." In response, the European Court has assumed only a "subsidiary," or secondary role in *Convention* interpretation (Ostrovsky, 2005: 48; Hutchinson, 1999: 647; Petzold, 1993: 59). If the European Court's role is truly subsidiary to that of the national governments, and the Canadian Court's role is superior to the provinces, then perhaps the leeway granted by the margin of appreciation is applicable in Europe in a way that it is not in Canada. Yet neither the supremacy of Canada's courts nor the weakness of the European one should be overstated.

Although a strict reading of the Canadian Constitution suggests a subordinate role for both the provincial (and federal) governments in *Charter* interpretation, normative and empirical scholarship suggests otherwise. For nearly a decade now, a vigorous debate over the “democratic dialogue” has led many to conclude that legislatures do (Hogg and Bushell, 1997) or at least should (Hiebert, 2001) play a greater role in *Charter* interpretation. One of the most recent contributions to this debate suggests that provincial governments take this role very seriously (Kelly, 2005: 213-220). Despite their initial animosity toward the *Charter* project, there has since developed a considerable “rights culture” at the provincial level, where *Charter* values “permeate the policy process” (Kelly, 2005: 214). While the extent to which this phenomenon has been institutionalized may vary, provincial departments of justice have all been tasked with “reviewing legislative exercises for their relationship to the *Charter*” (Kelly, 2005: 214). Perhaps most significantly, there is now some evidence that this role for the provinces in *Charter* interpretation has been conceded by the courts. Matthew Hennigar asserts that judicial decisions are, to a certain extent, “responses to legislatures’ initial assessment of...constitutionality” (Hennigar, 2004: 16-17), if not thanks to Kelly’s vetting process (Kelly, 2005: 210-12), then through the arguments presented in defence of provincial legislation (Clarke, 2006). Canadian courts may not have not been relegated to a subsidiary—or secondary—status, as they might be considered in Europe. But it is too simplistic to portray the *Charter* “as what the judges say it is,” with the underlying assumption that there is no scope whatsoever for provincial legislative input. It may not be commensurate with the role granted to the European Member States, but Canadian

provinces have been conceded some role in *Charter* interpretation. The margin of appreciation may, therefore, be more appropriate than seems to have been assumed.

Not only is the Canadian experience more like the European than a strict reading of the texts would suggest. So too is the European experience more like the Canadian. While in theory, the European Court lacks the constitutional authority of its Canadian counterparts, in practice its experience is closer to the Canadian example than this depiction suggests. The European Court is by no means a stunted system of law or a minor player in European and international law. Since its inception, it has taken a relatively small docket, turned it into a teeming one, and in the process has developed such an extensive body of case law and jurisprudence (Helfer and Slaughter, 1998: 293), that the *Convention* regime is now described as the “best developed international human rights system to date” (Brems, 2003: 81). The Court’s impressive and growing reputation may also account for the authority the Court’s judgments enjoy in the Member States. Notwithstanding the fact that Member States are given primary responsibility for interpreting the *Convention*, the European Court has nevertheless managed to established itself as the “authoritative interpreter” of the Convention rights (Helfer and Slaughter, 1998: 294). Although the Court lacks any effective enforcement mechanism, the Member States have almost without exception responded to, and implemented the Court’s rulings. While some responses might be characterized as “questionable” or “luke-warm,” compliance with the Court’s decisions is so consistent that its judgments are now considered “as those of any domestic court” (Hovius, 1985: 220; Moravascik, 2000: 218).

### **Margin of appreciation, moral relativism, value pluralism and Charter federalism**

But even if one can be persuaded of the suitability of the comparison, consideration of the margin of appreciation by Canada's courts may still be considered inappropriate. A classical liberal approach, for instance, sees no room for differentiated rights within or among societies claiming to aspire to the protection of rights societies. For the classical liberal, the margin of appreciation is therefore, as inappropriate for the Council of Europe as it is for Canadian federalism. Indeed, the doctrine's recognition of diverse conceptions of the *European Convention* has not won universal acclaim, but has been subjected to precisely such a critique.

Some European scholars have characterized the margin of appreciation as an abdication of the Court's role, threatening the substantive protection of rights and international oversight (Gross and Aolain, 2001: 626). Reliance on the margin of appreciation, they charge, undermines the decision making power of the court, and impairs the ability of the *European Convention* to preserve and enhance human rights (Feingold, 1978: 105-06). Because the margin of appreciation is based on the notion that each society is entitled to some leeway to resolve rights conflicts on its own, in accordance with its own cultural and legal practices, the margin of appreciation is said to amount to little more than the "principled recognition of moral relativism" (Benvenisti, 1999: 843-44).

Moral, or ethical, relativism suggests that there are no universally valid moral principles. Rather, moral principles are valid *only* relative to context, either individual, or in this context, cultural (Audi, 1999: 790). Absent universal truths, it becomes impossible, or at least inappropriate to subject one cultural group to the same standards as

another. Were the margin of appreciation actually akin to the judicial recognition of moral relativism, it may give pause for concern about its adoption in Canada.

But upon closer inspection, the margin appreciation looks less like moral relativism, and more like the recognition of its philosophical counterpart, “value pluralism.” First articulated by Isaiah Berlin (1969), value pluralism is, above all, a “truth claim,” or a description of liberal democratic societies based on two principle tenets. First, value pluralism rejects the relativistic notion that there are no commonly shared and objectively defined rights standards. For value pluralists, “philosophical reflection supports what ordinary experience suggests—a nonarbitrary distinction between good and bad” (Galston, 1999: 770). This distinction provides the basis for defining an objective “floor of basic moral decency for individual lives and for societies” such as European States or Canadian provinces (Galston, 1999: 770). But lest value pluralism be confused with classical liberalism and its emphasis on universalism, value pluralism’s second central precept states that above this moral floor, or outside the core meaning of these values, there is “a multiplicity of genuine goods that are qualitatively heterogeneous and cannot be reduced to a common measure of value” (Galston, 1999: 770). There is, therefore, considerable scope for choice among competing values, “*guided by an assessment of particular circumstances, in the construction of...public policies [emphasis added]*” (Galston, 1999: 769).

Described in the language of political philosophy, then, the margin of appreciation is more accurately styled “value pluralism” than “moral relativism.” It is the judicial response to two observations of the *Convention* regime. First, the *Convention* represents a basic statement of core European rights and values that must, and generally

will be, adhered to. Second, the broadly worded guarantees in the *Convention* will inevitably assume distinctive forms when they are given concrete expression in the diverse legal and cultural contexts of the Member States (Ostrovsky, 2005). While universal rights may be sound in the abstract, “the actual application on a procedural level requires a more nuanced understanding of the rights” (Ostrovsky, 2005: 56). Given these observations of the *Convention* regime, the margin of appreciation allows the Court to say to the Member States that it trusts that their conception of *Convention* rights, unless there is a clear collision with the objectively defined pan-European standard (Ostrovsky, 2005: 57). The margin of appreciation is a jurisprudential principle, not a political philosophy. But if it is thought of in those terms, it is much better described as value pluralism than moral relativism.

Establishing the margin of appreciation as a judicial means of recognizing value pluralism sees it take on particular significance as a response to many of the *Charter’s* sceptics. Certainly, it would not be adequate for a critic opposed to the enumeration of the enforcement of pan-Canadian standards altogether. But this position is not unanimously held by those critical of the *Charter* and its judicial arbiters for their perceived insensitivity to federalism or its moral foundations. For those, who see entrenched rights as compatible with, or even required by Canadian federalism, the margin of appreciation as value pluralism may be congruent or even commensurate with their views.

Samuel LaSelva and Alan Cairns can be described as occupying his position. For both scholars, federalism represents Canada’s moral foundations, and the territorial identities it privileges and encourages can neither be denied nor ignored. But federalism,



while doing a good job of protecting Canadians' territorial identities, fails to give adequate expression to the multiple and proliferating identities that are not tied to a particular space. This is precisely why LaSelva, Cairns and others believe a bill of rights is not only acceptable in, but required by a modern federal state: "it gives to individuals and groups for whom federalism's privileging of territory is experienced as narrow and confining" (Cairns, 1995: 192; LaSelva, 1996: 80). Canadians' provincial identities are not exhaustive. The Charter gives recognition to these identities as "a set of common values, shared customs...and implicit understandings" (David Cameron, in LaSelva, 1996: 88). It expresses, in short, Canadians' will to live together. The problem, as LaSelva and Cairns see it, is that the *Charter* gives no direction as to how this will is to be reconciled with the equally important federalist impulse to live apart (LaSelva, 1996: 76-77, 96; Cairns, 1995: 189). The fear is that absent this direction, the balance tilts in the favour of the will to live together, giving insufficient consideration to federalism's local particularities. *Charter* rights must not be "not insulated from," but "blended with" the territorial communities of federalism." Required is some form of constitutional change to give expression to this "*Charter-federalism.*"

Cairns calls the changes he and LaSelva are looking for "Charter-federalism," but what they are looking for could equally be described as "value pluralism": the Charter as an expression of the shared core of Canadian values, the actualization of which can and does legitimately vary based on the particular contexts of the provincial societies that comprise Canadian federalism. Adopting the margin of appreciation would allow the Court to make it explicit that the *Charter* is not incompatible with federalism, but can be applied as core Canadian values that are allowed to legitimately take on a local flavour

given the unique cultural and legal experiences of Canadian federalism. Over time, as a uniquely Canadian margin of appreciation *doctrine* took shape, it would provide the guidance on precisely how the competing values are to be reconciled in particular circumstances.

## **Conclusions**

This paper began with the claim that the Supreme Court of Canada's failure to create an explicit and consistent approach—a doctrine—to govern the relationship between federalism and the *Charter* has had profound implications. It has left the *Charter* and the Court itself open to the normative charges of the “centralization thesis,” despite the fact that both have exhibited a remarkable sensitivity to the foundations of Canadian federalism. The Court's opacity has also made it vulnerable to charges of undue deference to the decisions of democratic majorities, when it is actually engaged in balancing federalism with the *Charter*. The distinction between deference to parliamentary sovereignty and deference to the requirements of federalism may be a fine one. But the Court's failure draw it at all, has led to critiques which, while ultimately unfair, are hardly unexpected.

In search an appropriate judicial rapprochement between *Charter* rights and federalism, the paper then brought the comparative example to bear on the Canadian context. In particular, it addressed the suitability of the European “margin of appreciation doctrine.” This “margin” is the judicial recognition that the diversity of European Member States may be legitimate justification for the deviation from, or limitation of the *European Convention*, so long as the core understanding of the right

involved is not breached. This is not the first paper to suggest that a similar margin may be appropriately granted to the Canadian provinces. At least two academics and one lower court judge also thought so as well. The paper is, however, the first to consider the “margin” in the Canadian context in some time, and it is the first to do so systematically. Ultimately, it concluded that the comparison is more tenable than the rejection of the margin to date suggests. What is more, having established the margin of appreciation as recognition of a “value pluralistic” reality, the paper concluded that it might be a particularly useful way of conceiving the relationship between federalism and the *Charter*, and addressing the sceptics’ concerns. At the very least, the margin of appreciation is at least worthy of greater scholarly and legal attention than it has garnered so far.

Since it is the first treatment of the margin of appreciation in the Canadian context, however, the paper perhaps raises more questions than it has answers for. The “margin of appreciation” is the recognition that otherwise universal rights or values can, depending on diverse circumstances, legitimately assume different forms and require different limits, so long as those forms or limits do not transgress the “core” meaning of those rights or values. But it does nothing on its own to establish either that core or the circumstances in which it is legitimate to deviate from that core. That is the job of the margin of appreciation *doctrine*. This doctrine, however, is currently conceived for the rights in the *European Convention* and the societies of the Council of Europe. Future normative and empirical research in Canada should endeavour to establish the parameters of a margin of appreciation doctrine in the Canadian context. Can any traceable patterns be discerned from the Supreme Court’s efforts to reconcile rights and federalism to date?

For which *Charter* sections is the Supreme Court most willing to allow interpretations to vary by province? Which areas of provincial policy are, or should be allowed the greatest variation on the basis of federalism? Which provinces currently benefit most from the Supreme Court's apparent sensitivity to federalism? Which provinces should enjoy the largest margin of appreciation? That is, is an asymmetrical margin of appreciation appropriate? Detailed examination of these and other questions might help to clarify the Court's federalism-*Charter* jurisprudence, and establish the foundations of a margin of appreciation, or some other federalism-*Charter* doctrine by another name. Through the framework of the margin of appreciation, answers to these and other questions which, considering the significance of the constitutional pillars involved might have been expected some time ago, might finally be forthcoming.

## REFERENCES

- Alberta Court of Appeal. 1986. *Black v. Law Society of Alberta*. 68 A.R. 259.
- Anderson, Cameron. 2006. "Economic Voting and Multilevel Governance: A Comparative Individual Level Analysis." In, *American Journal of Political Science* vol. 50, issue 2 (April). 449-63.
- Arai-Takahashi, Yutaka. 2002. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. Antwerpen: Intersentia.
- Archer, Clive. 1990. *Organizing Western Europe*. London: Arnold.
- Audi, Robert, ed. 1999. *The Cambridge Dictionary of Philosophy* 2<sup>nd</sup> ed. Cambridge: Cambridge University Press.
- Benvenisti, Eyal. 1999. "Margin of Appreciation, Consensus, and Universal Standards." In, *New York University Law Journal of International Law and Policy* 31 (1998-99). 853-855.
- Berlin, Isaiah. 1969. *Four Essays on Liberty*. Oxford: Oxford University Press.
- Brems, Eva. 2003. "The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity Within Europe." In, David P. Forsythe and Patrice C. McMahon, eds., *Human Rights and Diversity: Area Studies Revisited* (Omaha, Nebraska: University of Nebraska Press. 81-110.
- Brun, Henri. 1985. "The Canadian Charter of Rights and Freedoms as an Instrument of Social Development." Clare F. Beckton and A. Wayne Mackay, eds., *The Courts and the Charter*. Toronto: University of Toronto Press/Royal Commission on the Economic Union and Development Prospects for Canada (the Macdonald Commission), pp. 1-36.
- Cairns, Alan C. 1995. "The Case for Charter-Federalism." In Douglas E. Williams, ed. *Reconfigurations: Canadian Citizenship and Constitutional Change, Selected Essays by Alan C. Cairns*. Toronto: McClelland and Stewart. 186-93.
- Clarke, Jeremy A. 2006. "From a Democratic to a Federalist Dialogue: Provincial Arguments and Supreme Court Responses in Charter Litigation." In, *Canadian Journal of Political Science* 39:2. 1-22 (Forthcoming).
- Council of Europe. 2005. "European Court of Human Rights: Survey of Activities, 2005." Strasbourg. Available at: <http://www.echr.coe.int/NR/rdonlyres/4753F3E8-3AD0-42C5-B294-0F2A68507FC0/0/SurveyofActivities2005.pdf>.

- Dickson, Honourable Mr. Justice Brian. 1983. "The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms: An Address. September. (Provided by Eugene Meehan, Supreme Court Law.
- Dickson, the Right Honourable Brian. Undated. "The Canadian Charter of Rights and Freedoms." (provided by Eugene Meehan, Supreme Court Law)
- European Court of Human Rights. 1976. *Handyside v. United Kingdom*. 5493/72 [1976] ECHR 5.
- Feingold, Cora S. 1978. "Note: The Doctrine of Margin of Appreciation and the European Convention on Human Rights," in *53 Notre Dame L. 90*. 90-107.
- Fried, Charles. 2004. *Saying What the Law Is: The Constitution in the Supreme Court*. Cambridge, Massachusetts: Harvard University Press.
- Galston, William A. 1999. "Value Pluralism and Liberal Political Theory." In, *The American Political Science Review* vol. 93, no. 4 (December). 769-78.
- Gross, Oren and Fionnuala Ní Aoláin. 2001. "From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the ECHR," in, *Human Rights Quarterly* 23. 625-49.
- Helfer, Laurence R. and Anne-Marie Slaughter. 1998. "Toward and Theory of Effective Supranational Adjudication," *Yale Law Journal* 107. 273-392
- Hennigar, Matthew A. 2004. "Expanding the 'Dialogue Debate': Federal Government Responses to Lower Court Charter Decisions." In, *Canadian Journal of Political Science*. 37. 3-21.
- Hiebert, Janet L. 1996. *Limiting Rights: The Dilemma of Judicial Review*. Montreal & Kingston: McGill-Queen's University Press.
- Hiebert, Janet L. 2002. *Charter Conflicts: What is Parliament's Role?*. Montreal & Kingston: McGill-Queen's University Press.
- Himsworth, Chris. 2001. "Rights versus Devolution." In, Tom Campbell, K.D. Ewing, and Adam Tomkins, eds., *Sceptical Essays on Human Rights*. New York: Oxford University Press.
- Hogg, P.W. and A.A. Bushell. 1997. "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights isn't Such a Bad Thing After All)." In, *Osgoode Hall Law Journal* 35. 75.

- Hogg, Peter W. 1989. "Federalism Fights the Charter of Rights" In David Sugarman and Reg Whitaker, eds. *Federalism and Political Community: Essays in Honour of Donald Smiley*. Peterborough: Broadview Press.
- Hogg, Peter W. 1998. *Constitutional Law of Canada*, Student Ed. Scarborough: Carswell.
- Hovius, Berend. 1985. "The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter?" *Ottawa Law Review*, vol. 17. 213-61.
- Hovius, Berend. 1987. "The Limitations Clauses of the European Convention on Human Rights and Freedoms and Section 1 of the Canadian Charter of Rights and Freedoms: A Comparative Analysis. F.G. Jacobs, ed., *Yearbook of European Law* 6: 1986. Oxford: Clarendon Press. 1-54.
- Hutchinson, Michael. 1999. "The Margin of Appreciation Doctrine in the ECtHR," in *The International and Comparative Law Quarterly*, v. 48, no. 3 (July). 638-50.
- Kelly, James B. 2001. "Reconciling Rights and Federalism during Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982-1999." In, *Canadian Journal of Political Science* 34. 321-55.
- Kelly, James B. 2005. *Governing with the Charter: Legislative and Judicial Activism and the Intention of the Framers*. Vancouver: University of British Columbia Press.
- LaForest, Guy. 1995. *Trudeau and the End of a Canadian Dream*. Montreal & Kingston: McGill-Queen's University Press.
- LaSelva, Samuel V. 1996. *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood*. Montreal & Kingston: McGill-Queen's University Press.
- Macdonald, R. St. J. 1993. "The Margin of Appreciation." R. St. J. Macdonald, F. Matscher, and H. Petzold, eds., *The European System for the Protection of Human Rights*. Dordrecht: Martinus Nijhoff Publishers. 83-124.
- MacMullen, Andrew. 2004. "Intergovernmental Functionalism? The Council of Europe in European Integration." In, *Journal of European Integration* vol. 26, no. 4. 405-29.
- Makin, Kirk. 2005. "Supreme Court averse to risk, professor says; Bland judgments result of anemic debate, constitutional scholar tells conference." In, *The Globe and Mail* (Toronto), April 16, A4.

- Makin, Kirk. 2005. "Supreme Court averse to risk, professor says; Bland judgments result of anemic debate, constitutional scholar tells conference." *The Globe and Mail* (Toronto), April 16, A4.
- Maguire, John. 2004. "Internment, the IRA [Irish Republican Army] and the Lawless Case in Ireland: 1957-61." In, *Journal of the Oxford University Historical Society* 2 (Michaelmas). Available at: <http://users.ox.ac.uk/~jouhs/>.
- Manitoba Court of Queen's Bench. 1986. *Badger v. Manitoba (Attorney General)*. 30 D.L.R. (4<sup>th</sup>) 108.
- Marx, Herbert. 1982. "Entrenchment, Limitations and Non-Obstante." In, Walter S. Tarnopolsky and Gérald-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary*. Toronto: The Carswell Company Limited.
- Masterman, Roger. 2004. "Section 2(1) [of the UK Human Rights Act]: Binding Domestic Courts to Strasbourg." In *Public Law*. 725-35.
- McGoldrick, Dominic. 2001. "The UK's HRA 1998 in Theory and Practice," in *50 Int'l and Comp. Law Quarterly*. 901-54
- Mendes, Errol P. 1982. "Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights." *Alberta Law Review*, vol. XX, no. 3. 383-401.
- Moravscik, Andrew. 2000. "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe." In, *International Organization* vol. 54, no. 2 (spring). 217-52.
- Morel, André. 1983. La Clause Limitative de l' Article 1 de la Charte Canadienne des Droits et Liberties: Une Assurance Contre le Gouvernement des Juges." *La Revue du Barreau Canadien*, vol. 61, no. 1 (mars). 81-100.
- Morton, F.L. and Rainer Knopff. 2000. *The Charter Revolution and the Court Party*. Peterborough: Broadview Press.
- O'Donnell, Thomas A. 1982. "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights." In, *Human Rights Quarterly* vol. 4, no. 4 (Winter). 474-96.
- Ostrovsky, Aaron A. 2005. "What's so Funny about Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals." In *Hanse Law Journal*, 1:1. 47-64.



- Petzold, Herbert. 1993. "The [European] Convention and the Principle of Subsidiarity." R. St. J. Macdonald, F. Matscher, and H. Petzold, eds., *The European System for the Protection of Human Rights*. Dordrecht: Martinus Nijhoff Publishers. 41-62.
- Schabas, William A. 1996. *International Human Rights Law and the Canadian Charter*, 2 ed. Toronto: Carswell.
- David Schneiderman. 1992. "Dual(ing) Charters: The Harmonics of Rights in Canada and Quebec," *Ottawa Law Review* 24.
- Simson, Richard and Martin Papillon. 2006. "Canada." In Akhtar Majeed, Ronald L. Watts and Douglas M. Brown, eds., *A Global Dialogue on Federalism, Volume 2: Distribution of Powers and Responsibilities in Federal Countries*. Montreal & Kingston: McGill-Queen's University Press. 91-122.
- Supreme Court of Canada. 1986. *R. v. Oakes*. [1986] 1 S.C.R. 103.
- Supreme Court of Canada. 1988. *Ford v. Quebec (Attorney General)*. [1988] 2 S.C.R. 712.
- Supreme Court of Canada. 1989. *Irwin Toy v. Quebec (Attorney General)*. [1989] 1 S.C.R. 927.
- Supreme Court of Canada. 1990. *R. v. Keegstra*. [1995] 2 S.C.R. 381.
- Supreme Court of Canada. 1992. *R. v. Butler*. [1992] 1 S.C.R. 452.
- Supreme Court of Canada. 1995. *RJR-MacDonald Inc. v. Canada (Attorney General)*. [1995] 3 S.C.R. 199.
- Supreme Court of Canada. 2001. *R. v. Sharpe*. [2001] 1 S.C.R. 45.
- Supreme Court of Canada. 2002. *Lavoie v. Canada*. [2002] 1 S.C.R. 769.
- Supreme Court of Canada. 2002. *Sauvé v. Canada (Chief Electoral Officer)*. [2002] 1 S.C.R. 769.
- Supreme Court of Canada. 2003. *Toronto (City) v. C.U.P.E., Local 79*. [2003] 3 S.C.R. 77.
- Supreme Court of Canada. 2003. *Trociuk v. British Columbia (Attorney General)*. [2003] 1 S.C.R. 835.
- Supreme Court of Canada. 2004. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*. [2004] 3 S.C.R. 657.

- Supreme Court of Canada. 2004. *Harper v. Canada (Attorney General)*. [2004] 1 S.C.R. 827.
- Supreme Court of Canada. 2004. *Newfoundland (Treasury Board) v. N.A.P.E.* [2004] 3 S.C.R. 381.
- Supreme Court of Canada. 2005. *Chaoulli v. Quebec (Attorney General)*. [2005] 1 S.C.R. 791.
- Wilson, Madame Justice Bertha. 1985. "The Charter of Rights and Freedoms." University of Calgary Law School, March. (Provided by Eugene Meehan, Supreme Court Law)
- Wilson, Madame Justice Bertha. 1988. "The Making of a Constitution." Public Lecture on the Charter of Rights and Freedoms. Windsor Law School, April 12. (Provided by Eugene Meehan, Supreme Court Law).
- Yourrow, Howard Charles. 1996. *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*. The Hague: Kluwer Law International.
- Zellick, Graham. 1986. "The European Convention on Human Rights: Its Significance for Charter Litigation." In, Robert J. Sharpe, ed., *Charter Litigation*. Toronto: Butterworths. 97-130.