Beyond the Democratic Dialogue, and Towards a Federalist One: Provincial Arguments and Supreme Court Responses in Charter Litigation

JEREMY A. CLARKE *Queen's University*

Introduction

Since 1997, the study of the *Canadian Charter of Rights and Freedoms* has been consumed by a debate over the existence and/or desirability of a "democratic dialogue" that begins with the judicial nullification of policy on Charter grounds, and continues with a response from the representative branches. Although this scholarly fixation has contributed a great deal to the understanding of Canadian democracy in a Charter context, it has also led to the neglect of an equally vital concern: How are the Charter's supposedly national standards to be reconciled with the diversity that Canadian federalism exists to protect? Where this question has been addressed, analysis has tended to proceed from the same judicial-centric approach made so popular by the dialogue metaphor, generally assuming that Charter interpretation is a task reserved first for judges, and then for legislators. This article suggests otherwise. Provincial governments also have a role to play in reconciling rights with federalism, a role recognized by the Supreme Court, and given expression in the form of a "federalist dialogue" (that is, a dialogue about federalism, not the merits of Quebec sovereignty) occurring alongside the democratic one.

After a brief review of the relevant literature, this article discusses the shortcomings of the traditional dialogue as a means of addressing the relationship between federalism and the Charter. It then suggests that these

Acknowledgments: A version of this paper was presented at the 2005 meeting of the Canadian Political Science Association. The author is grateful for the financial support of the Social Sciences and Humanities Research Council of Canada (Canada Graduate Scholarship Doctoral Scholarship), and wishes to thank Janet Hiebert, Keith Banting and the anonymous reviewers for their thoughtful comments on earlier drafts.

Jeremy A. Clarke, Department of Political Studies, Queen's University, Kingston, ON, K7L 3N6; 4jasc@qlink.queensu.ca

Canadian Journal of Political Science / Revue canadienne de science politique
39:2 (June/juin 2006) 293–314

failings can be remedied by the examination of: first, provincial government factums in Charter cases, looking specifically for evidence of Charter interpretations couched in the language of federalism; and second, Supreme Court decisions, looking for evidence of positive Supreme Court responses. The paper then proceeds with such an analysis of three Charter cases before the Supreme Court: *Jones* (1986), *Auton* (2004a) and *NAPE* (2004b). The latter two have been described elsewhere as deferential and risk-averse (Jamie Cameron, in Makin, 2005). But this depiction is the product of a myopic view of Charter interpretation, mired in the "democratic dialogue." When they are filtered through the method suggested here, each begins to look less like judicial capitulation to the elected branches, and more like responses to federalist interpretations of the Charter presented by the provinces. They look more like evidence of a federalist dialogue.

The paper concludes with an abbreviated examination of several more Charter cases and a brief discussion of some of the questions raised by its claims of a federalist dialogue. When the *democratic* dialogue first entered the lexicon (Hogg and Bushell, 1997), it failed in its own right to conclude the grand questions of post-Charter Canadian democracy. It did, however, generate one of the most vigorous debates in Canadian political science; our understanding of the Charter and parliamentary democracy is considerably better for it. This paper aspires to do something similar for our understanding of post-Charter federalism. Although the evidence it musters may not conclusively reconcile the Charter's national standards with federal diversity, it at least provokes fundamental questions neglected by the literature thus far.

The Literature to Date

Far from simply grafting a new pillar onto the constitutional structure (Canada, 1985: 277), the Charter effected a profound transformation of the existing ones: parliamentary democracy and federalism (Cairns, 1991: 97, 179; see also Banting and Simeon, 1983: 10). Of course, this was no accident. Underlying the Charter were two very deliberate political purposes, each related to one of these constitutional cornerstones. The first, the better protection of individual and minority rights, sought to undermine the tradition of parliamentary supremacy, or majority rule. The second, arguably more deliberate Charter purpose, was the reining in of the centrifugal forces of federalism that Trudeau believed were threatening to destroy the country. One way it might do so was by empowering judges to enforce the Charter's national standards in areas that would otherwise be the exclusive purview of provincial governments, restricting the growth of distinctive communities based on disparate conceptions of rights

Abstract. A vigorous debate surrounding the "democratic dialogue" has done much for the understanding of our post-Charter parliamentary democracy. At the same time, it has diverted valuable attention from the settlement of the Charter with Canada's other constitutional pillar: federalism. This paper argues that the reconciliation of the Charter's national standards with the provincial diversity recognized by our federal Constitution is given expression by a federalist dialogue, occurring alongside, and even before, its democratic counterpart. An examination of several recent cases before the Supreme Court in which provincial policies have been impugned by the Charter provides evidence that provincial governments and the principles of federalism have a role to play in Charter interpretation, and that this role is often conceded by the Supreme Court in response to provincial factums. This discussion does not conclude the grand questions of federalism in the Charter era, but it does raise some definitive questions to propel the debate.

Résumé. Le débat rigoureux concernant le « dialogue démocratique » a grandement contribué à la compréhension de notre démocratie parlementaire post-Charte. Au même moment, cependant, ce débat détourne de l'attention de la conciliation de la Charte avec l'autre pilier constitutionnel, le fédéralisme. Cet article défend que la réconciliation des standards nationaux de la Charte avec la diversité des provinces, reconnue par notre constitution fédérale, prend voix par le biais d'un dialogue portant sur les principes du fédéralisme qui se manifeste parallèlement, et même avant, son analogue démocratique. Une étude de plusieurs cas récents devant la Cour Suprême dans lesquels les politiques provinciales ont été contestées par la Charte démontre que les gouvernements provinciaux ainsi que les principes du fédéralisme ont un rôle à jouer dans l'interprétation de la Charte, et que ce rôle est souvent accordé à la Cour Suprême en réponse aux mémoires provinciaux. Par elle-même, cette discussion ne résolut pas les grandes questions du fédéralisme dans la Charte, mais elle soulève néanmoins des questions importantes qui relancent le débat.

(Russell, 1983: 31; LaSelva, 1996: 81–83; Morton and Knopff, 2000: 59–60). The inevitable tension between these two pillars of Canadian constitutionalism led Alan Cairns to write in 1992 that a "central task of our constitutional future thus becomes the finding of a rapprochement between a federalism discourse ... and the *Charter*" (1992: 4). By 1996, according to Samuel LaSelva, Cairns's advice had not been heeded, and we still lacked reconciliation between the Charter's recognition of our will to live together and our federalist desire to live apart (1996: 88).

Scholarly treatment of the Charter's purposes has focused instead on its relationship with parliamentary sovereignty. For the past decade in particular, this has assumed the form of a debate over the existence of a "democratic dialogue," according to which the representative branches may or may not, or should or should not, be capable of responding to judicial rulings of constitutional invalidity (see, for example, Hogg and Bushell, 1997; Manfredi and Kelly, 1999; Roach, 2001; Morton, 2001; Hiebert, 2002; Hennigar, 2004). While this brief description fails to reflect the complexity of the metaphor and its rejoinders, the point to be made is that contemporary Charter scholarship has focused on the effects of the Charter on democracy, and democracy on the Charter. The "democratic dialogue" has thus sparked an important debate about the nature of Canadian democracy and the relative merits of judicial and legislative determination of rights. But the intensity with which scholars have taken

to this task has diverted valuable attention from Cairns's imperative. Our understanding of federalism in a Charter context has suffered as a result.

James B. Kelly is one of only a handful of scholars to take up the task of filling this analytical gap. In a 2001 study dispelling the myth of centralization driven by a Charter-empowered Supreme Court, for instance, Kelly observes an explicit "federalism jurisprudence," according to which "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" (339). Kelly's is an important step toward a better understanding of the relationship between federalism and the Charter, but while it tells us much about the effects of the Charter on federalism, it tells us little of the effects of federalism on the Charter. This article explores one of those effects, suggesting that if and when judges allow for a differential application of the Charter's national standards, they are responding to federalist interpretations of the Charter contained in provincial factums before the Court: a federalist dialogue to supplement the democratic one.

From a Democratic to a Federalist Dialogue

Exploring a "federalist dialogue" requires two expansions of the metaphor as it is currently conceived. First, the traditional dialogue is concerned only with the relationship between the Charter and democratic decision making, ignoring the possibility of a role for federalism in Charter interpretation. Defining a "federalist interpretation" of the Charter, however, is not without its problems, particularly since the parliamentary sovereignty with which the democratic dialogue is so concerned is itself a device for the building of distinctive provinces (Cairns, 1983; Vipond, 1991). In this sense, the Charter's restriction of parliamentary sovereignty is the same as, or at least has the same effect as, its restriction of provincial diversity. But while there is much truth to this understanding of parliamentary sovereignty *qua* federalism, it tells us everything while telling us very little at all. If the definition of federalism in the Charter context is so restricted, then all that students of the Charter need to do to understand its relationship with federalism is turn to the latest conclusion drawn by the democratic dialogue about the relative strengths of courts and legislatures. If, on the other hand, federalism is truly a "condition," or an "affliction" with which Canadians have to perpetually deal, surely federalism *qua* federalism must find a place in our discussion of the Charter and its interpretation.

Rather than defining federalism as the parliamentary sovereignty that gives it expression, this paper will look to its justifications. What leads a

polity such as Canada to divide sovereignty between two (or more) levels of government? Arnold Koller tells us that an interest in federalism is driven, among other things, by:

> [t]he quest for political structures that are closer to the individual citizen, the wish for citizens to be more involved in political processes ... the creation of scope for cultural diversity within a country ... the limitation of state power and hence the preservation of civil liberties, regional equality, and better opportunities for grass-roots involvement in political processes ... [and] for the state's tasks to be devolved to the lowest possible level. (2003: 5)

Some of these will have greater resonance in the Canadian context than others, but all must be considered to a degree. The most obvious rationale for Canadian federalism is the protection of the distinctive laws, customs, institutions and languages of the provinces, primarily in the case of Quebec, but also to a lesser extent in the other provinces (Ajzenstat et al., 1999: 235; LaSelva, 1996: 8–9; Vipond, 1991: 18). Arguments resisting the Charter's homogenizing effects based on the protection of cultural diversity are, then, an obvious example of a "federalist" interpretation of the Charter. Less apparent may be the preference for local decision making. While more often considered a defining feature of American federalism, the merits of local government were often touted by key players in the provincial rights movement, particularly in the less culturally diverse English-speaking provinces (Vipond, 1991: 81). Discussion of the capacity, or incapacity, of a national court to determine the needs of local populations, therefore, may also be considered federalist interpretations of the Charter. Finally, Yash Ghai identifies several de facto asymmetries inherent in federations based not on their constitution, but on economic, demographic or geographic disparity (Ghai, 2001). In some cases, it may be argued that the national standards must give way to these naturally occurring differences between provinces. This is by no means an exhaustive list of the justifications for Canadian federalism, but it does establish broad parameters for the types of Charter interpretations that provincial governments might employ in defence of policy impugned by Charter challenge.

Having defined what constitutes a "federalist" interpretation of the Charter, it remains to discuss how those interpretations might find their way into the jurisprudence. Janet Hiebert, who sees the potential for federalist Charter interpretation (1996: 132), thinks it most likely to be realized in section 1, the "reasonable limits" clause. Specifically, Hiebert suggests that section 1 could be read in a manner that recognizes the reasonableness of provincial divergence from national standards, so long as these are not manifestly unfair. Such an approach would grant provinces the ability to experiment with policies more closely tailored to the needs and wishes of local populations (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 (1996: 78). If the Charter rests on a mistaken conception of Canadian federalism, and LaSelva thinks that it does, section 1 is one way it can be squared (1996: 65). A more overt expectation of a federalist interpretation of section 1 comes from Katherine Swinton, who believes that despite its precise text, "the language of section 1 ... seems to permit arguments based on diversity to be made as justifications for the limitations on rights" (1990: 342).

Defining "reasonable limits" is one place that federalist Charter interpretations might be anticipated, but it is, of course, only the second stage of a well-known Charter "two-step" (Knopff and Morton, 1992). Charter scrutiny first involves the determination of whether a *prima facie* breach is established. Only then is attention turned to the determination of the reasonableness of the violation. Hiebert and LaSelva suggest that federalism might play a role at this second stage, but might it have an effect on the first of the two Charter steps, *defining the scope or the content of the rights themselves*? Swinton implies as much. She claims 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" (1990: 341–42, 345, emphases added). This leaves the possibility that a federalist interpretation of Charter rights themselves may be contemplated.

Although she does not frame her discussion this way, Janet Hiebert allows for the possibility. Hiebert's approach "assumes that both parliament and courts have valid insights into how legislative objectives should reflect and respect the *Charter's* normative values" (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" (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 (2002: 65), but her allowance for the parliamentary definition of the scope of rights might, in a federal system, be dictated by federalism, or by the local cultures or needs of individual provinces.

These authors have all suggested that a federalist interpretation of the Charter's national standards appears legitimate, but only in theory. In fact, although Swinton has gone so far as to speculate that provinces actually would defend their policies against the Charter by appeal to federalism (1990: 341–42), not even she has addressed provincial arguments to determine if this actually is the case. To date, then, no one has looked to see if the governments of Canadian federalism actually do couch their defences in a federalist interpretation of the Charter. The method employed in this article fills this gap between theory and practice, and surveys provincial government factums in cases in which provincial policy has been

impugned, looking specifically for, first, federalist definitions of the scope of rights and, second, federalist justifications for limitations on rights as per section 1 of the Charter.

If this normative expansion of the dialogue to include federalism alongside democracy is workable, what of the second and more empirical expansion of the dialogue: gauging Supreme Court responses to governments' Charter interpretation? Dialogue, as it is generally understood, conceives of legislative responses to judicial decisions (Hogg and Bushell, 1997: 82). This paper suggests that the reverse might also be true. Where the Supreme Court's Charter jurisprudence is cognizant of federalism, this may be a response to provincial arguments. If, as the dialogue suggests, constitutional interpretation is an exercise in which both courts and legislatures play a role, then either partner should be capable not only of taking part in, but of initiating the discussion. In any case, as Matthew Hennigar suggests, it may simply be too difficult to determine the precise moment at which any particular dialogue begins:

> ... 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 (2004: 16–17).

While Hennigar is speaking of the relationship between courts and the federal parliament, the provincial-judicial relationship is no less complex (see, for example, Kelly, 2005; Mitchell, 1993; Funston, 1993). Most, if not all legislation has 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 apparent. The dialogue metaphor is not a wholly appropriate conceptualization of this more complex picture of the relationship between courts and legislatures, but it is a useful way to think of particular exchanges in an ongoing discussion. The traditional dialogue proceeds from one perspective, but it does not preclude the possibility that there are other exchanges worthy of observation, including the model used here.

On the one hand, then, scholars like Swinton seem to suggest that it is open to provinces to ground their Charter defences in appeals to fed-

eralism or diversity. On the other hand, Kelly finds that the Supreme Court has on occasion grounded its decisions in federalist terms. Thanks no doubt to the hegemony of the judicial-centric "democratic dialogue," lacking so far is any discussion of a connection between the two. Is Kelly's federalism jurisprudence a result of provinces heeding Swinton's guidance? Through the examination of several cases before the Supreme Court in which provincial policy has been impugned by the Charter, the remainder of this article provides evidence that provincial factums may include federalist interpretations of the Charter, and that the Supreme Court's Charter jurisprudence responds to those interpretations. Essentially, this paper provides evidence of a "federalism dialogue" occurring alongside, and in some senses before, the democratic one. Although it is an older precedent, given its mention by both Swinton and Kelly, *R. v. Jones* is a logical place to begin.

Case Studies

R. v. Jones (1986)

Swinton's conclusion that it is open to provinces to defend legislation on federalist grounds is largely based on the Court's decision in *R. v. Jones*, where she found the Court open to Charter interpretations grounded in diversity (1990: 346–47). Kelly would later label this "explicit" federalism jurisprudence, since it outlined at least two important federalist principles: first, "that it is reasonable and legitimate for the provinces to approach shared policy problems differently and [second] ... that flexibility must be accorded to the provinces in structuring their responses in different social contexts" (2001: 346). What remains to be determined is if the jurisprudential window that Swinton believes *Jones* opened for arguments based on federalism (Kelly's explicit federalism) was in fact opened by those very arguments.

The policy problem shared by the provinces at the centre of the dispute in *Jones* was how to certify private or home schools to ensure that children receive "efficient instruction" on par with the public system (SCC, 1986: 284). Section 142 of the *Alberta School Act* required that certification be performed by employees of the Department of Education. Jones, a fundamentalist pastor who wished to educate his children himself, contended that the Alberta regulation was a procedurally unfair deprivation of his section 7 liberty to educate his children as he pleased, particularly when compared with the practice in provinces where "unbiased" courts made such determinations (SCC, 1986: 285).

The Court disagreed. The fact that the certification scheme allowed compliance with provincial standards to be determined by public ser-

vants (as opposed to presumably disinterested judges in other jurisdictions) did not concern the majority on this question. While these authorities no doubt had a vested interest in the system, the Court felt it reasonable, or even necessary, that determination of "efficient instruction" be made by persons familiar with the system (304). More notably, the Court dismissed the proposition that the Alberta scheme was flawed simply because other provinces used courts to make this determination. While there may be some advantage associated with the judicial method, there may also be certain disadvantage. Provincial governments must, therefore, "be given room to make choices regarding the type of administrative structure that will suit their needs" (304).

It is this very declaration on which Kelly pins his claim that *Jones* is representative of explicit federalism jurisprudence (2001: 346). What Kelly does not examine (nor was it his intention), was the inspiration for this jurisprudence. As it turns out, more than simply paving the way for explicitly federalist defences of provincial policy against Charter challenge, as Swinton thought the decision had done, the precedent appears to have been elicited by those very arguments. Alberta's submission on the scope of section 7 in *Jones* was predicated on the explicitly federalist terms eventually adopted by the Court. Jones had charged that certification by Department of Education officials was potentially biased, and thus procedurally unfair. In its submission, Alberta directed the Court's attention to the fact that a number of different certification schemes existed in Canada's various jurisdictions, including several that were similar to Alberta's. By highlighting the fact that different provinces employ different procedures, Alberta espoused an interpretation of section 7's procedural fairness that explicitly rejected the creation of uniform national standards in the area of educational certification (judicial oversight), and allowed for provincial variation (AB, 1986: 9).

For Kelly, *Jones* is evidence of the Supreme Court's sensitivity to federalism. For Swinton, it legitimizes her hypothetical defences based on a federalist interpretation of the Charter. While both readings are correct, they fail to observe the connection between the two. By examining the case in light of Alberta's factum, this paper sees *Jones* for what it is—an early example of a federalist dialogue. Just four years after the introduction of the Charter, when the cries of the gang-of-eight could still be heard, Alberta presented, and the Supreme Court accepted, an interpretation of the Charter grounded in the language of provincial difference.

The remainder of the paper examines several more recent cases, and focuses on two in particular: *Auton* and *NAPE*. Elsewhere, these cases have been described as timid examples of judicial deference to the representative branches. When filtered through the methodology employed here, however, they appear less like deference to sovereign parliaments, and more like evidence of a federalist dialogue.

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

In 1988, the government of Newfoundland and Labrador (hereinafter Newfoundland) negotiated a pay equity agreement with the Newfoundland Association of Public and Private Employees (NAPE) that applied to several 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 a financial crisis it described as so severe that it threatened the well-being of every resident of the province (NL, 2004b: 2). This crisis prompted the government to pass the *Public Sector Restraint Act* (PSRA), revoking all pay increases that had been scheduled for public sector unions (NL, 2004b: 3–4). While the PSRA did not revoke the principle of pay equity *per se*, section 9(3) of the Act delayed its effective date to 1991, eliminating any retroactivity (NL, 2004b: 4). On behalf of several members, the appellant union alleged that the PSRA amounted to gender discrimination according to section 15(1) of the Charter. In response, Alberta, BC, Quebec and New Brunswick joined Newfoundland as interveners in defence of the legislation.

The first step in a search for evidence of a "federalism dialogue" is to establish whether the provinces have attempted to "define the content of the right" themselves, independent of section 1, in a federalist manner. None of the arguments submitted by the provinces on the application, or scope, of section 15(1) itself could properly be described as explicitly federalist. Rather, they relied on more general calls for deference to the elected branches. No province, Newfoundland included, suggested that anything particular to that province should provoke a differentiated application of section 15(1), only that the enactment and ability to repeal pay equity remains at the legislatures' discretion. Such was not the case at the second of the two Charter steps, where the provincial interpretation of the reasonableness of any perceived limitations on the right were explicitly expressed in federalist language.

When predicting what form such a section 1 defence might take, Swinton suggested that a province could argue that limited resources required it to balance its priorities against Charter rights in a manner that differs from approaches adopted by a more affluent province (1990: 342). This, in fact, was precisely the strategy employed by Newfoundland in *NAPE*, when it claimed that financial difficulties 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" (2004b: 13). In case these historical difficulties did not strike a sufficiently bleak note, Newfoundland claimed that

in 1991 the province was in unusually dire financial straits. The province's credit rating was in jeopardy, presenting the possibility that for the first time in its history, Newfoundland would be faced with the prospect of having a limitation placed on what it could borrow (2004b: 2, 17). The fiscal crisis was so severe that it threatened all bearers of rights, and to conclude that fiscal restraint did not constitute a pressing objective for the purpose of section 1's free and democratic society would have failed to recognize that "fiscal management is not an end in itself, but the means by which the government provides appropriate [social programmes]" (NL, 2004b: 19). The nature of a federal system, apparent in Newfoundland's historic and ongoing position of economic disadvantage within the Confederation was, therefore, not simply one among many factors behind the PSRA, but the "central component" of the province's justification for the Charter limitation (NL, 2004b: 14), which was spoken in the following 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. (2004b: 15)

But the rights in the Charter are not absolute. They are subject to such reasonable limits as can be demonstrably justified in a free, democratic and (according to Newfoundland) *federal* society.

The remaining provinces joined in this federalist defence,[1] though none argued specifically that they, like Newfoundland, should be freed from any existing pay equity agreements, only that they should have this latitude should finances dictate a need (QC, 2004b: 4). The "inherent flexibility" of section 1 allows legislation of a social or economic character to be based on the arbitration of competing demands on the state and, naturally, these demands will vary from province to province (QC, 2004b: 15; see also BC, 2004b: 11; and NB, 2004b: 4). The thrust of the other provincial arguments, then, was not that the revocation of pay equity agreements would be justifiable in all provinces, but that the financial position in which Newfoundland found itself, and the more general provincial prerogative to reconcile competing demands, produces a scenario in which Charter rights enjoy differential application given the necessities of a federal system. Taken together, the provincial submissions are 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" (2001: 346).

It remains only to determine how the Court responded and if this response amounts to what has been described here as a dialogue between federalism and the Charter. In terms of the scope of section 15(1) itself, a unanimous Court rejected the provinces' generalized arguments, though the implications for federal diversity are not entirely clear. The Court conceded that governments are not generally bound by past decisions, but noted that Newfoundland would have a difficult time arguing that revoking an agreement originally intended to correct an unequal situation would not lead to the recreation of that inequality (2004b: para. 39). This suggests that all provinces with existing pay equity agreements would be in *prima facie* violation by 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, simply because the Court did not "get to that issue" (2004b: para. 37). The Court's response to the provinces' section 1 claims, on the other hand, has a good deal more to say about the relationship between the Charter and federalism.

The Court began with the declaration that the use of budgetary constraints as justification for limiting Charter rights should be treated with scepticism, for "there are *always* budgetary constraints and there are *always* other pressing government priorities" (SCC, 2004b: 72). Yet the Court also found that Newfoundland was in a particularly difficult situation that could not be ignored. While the Court did not explicitly acknowledge Newfoundland's historical position of disadvantage, it recognized the situation as a "fiscal emergency," in which "the financial health of the province was at stake" (2004b: paras. 72, 75). During such periods of crisis, governments may be forced to juggle priorities, and since the $24 million in savings represented by the PSRA comprised upwards of ten per cent of Newfoundland's deficit that year, the Court thus found it difficult to conclude that in weighing a delay in the timetable for implementing pay equity against closing hundreds of hospital beds, Newfoundland was engaged in an exercise "whose sole purpose is financial" (SCC, 2004b: 72). The limitation was thus justified.

The Court went on to agree that the PSRA was rationally connected to this objective and that the impairment was minimal (SCC, 2004b: 77, 80). But, for present purposes, the most significant finding was that the specific needs of a particular province justify deviation from the uniform application of Charter rights—a finding that Newfoundland in particular, and the provinces in general, had asked the Court to declare. According to the decision, then, *NAPE* implies that while a province in the black may not be in a position to limit section 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).

Far from imposing a national standard, *NAPE* saw the Charter and its arbiters yield explicitly to the economic realities of Canadian federal-

ism. Therefore, the decision, on its own, provides further support for Kelly's finding that the Charter can be made sensitive to federalism. Moreover, an examination of the factums submitted by provincial governments supports Swinton's prediction that provincial defences of policy might be framed in appeals to federalism. Finally, viewing the decision and the factums in tandem provides evidence of a link between Kelly's thesis and Swinton's hypothesis. The Court's federalism jurisprudence appears to be a response to the provincial arguments—a "federalism dialogue" to complement the democratic one. Significantly, *NAPE* is but one recent example of this Charter phenomenon.

Auton (SCC, 2004a)

In BC, the *Medicare Protection Act* (MPA) provides funding for all "core" services as per the dictates of the *Canada Health Act* (CHA). It also provides funding for non-core services provided by individuals designated as "health care professionals" by the provincial Medical Services Commission. At the time of trial, BC had not designated providers of Applied Behavioural Analysis/Intensive Behavioural Intervention (ABA/IBI) therapy as such, and so this relatively new and somewhat controversial treatment for autism in young children went without 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 section 15(1), since non-disabled children received treatment for diseases with which they were afflicted.

Larger than the question of funding for ABA/IBI, however, were questions of if and when the Charter could compel provincial governments to provide treatment "outside the 'core' services administered by doctors and hospitals," or the extent of the "national standards" to which the provinces would be required to conform (SCC, 2004a: 2). Proceeding under the assumption that "judicial review systematically favours national norms," Christopher Manfredi and Antonia Maioni suggest that this might be occurring to a great extent, and that a Charter review of health care policy, such as *Auton*, has the potential to effect a 'meta' CHA (2002: 219). This paper, on the other hand, proceeds with the assumption that centralization is more apparent than real, since federalism itself might be capable of extracting a federalist Charter jurisprudence and hence greater provincial flexibility in the delivery of health care. These assumptions are lent considerable credence by the federalist dialogue that can be observed between provincial factums and the Supreme Court decision in *Auton*.

In terms of the scope of section 15(1) itself, BC argued that a finding of discriminatory treatment ignores "the host of non-discriminatory reasons" that explained the lack of funding for ABA/IBI (BC, 2004b:

23). While the most important of these reasons was the controversial nature of the treatment (BC, 2004b: 26), there were also factors unique to the province. BC claimed 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, an intervener, seconded this interpretation. 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, 2004a: 4).

It appeared fairly obvious to the provinces that in a federation as diverse as Canada, factors unique to each province may require unique provincial responses. Quantitative and qualitative variation in insured services is the inevitable result. While some provinces may think the controversial autism treatment is "necessary," given the availability of funds and the needs of their own geographically and demographically unique population, other provinces may not. The Charter should allow for this regional variation. Indeed, while several provinces did provide ABA/IBI at the time (though not necessarily through their ministries of health), these same provinces 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 need"[2] (ON, 2004: 3; see also AB, 2004a: 1–2; PE, 2004: 1).

The second stage of the provinces' Charter arguments, revolving around questions of "reasonable limits" in the event of a *prima facie* breach, consisted primarily of implicitly federalist language, or parliamentary-sovereignty-as-federalism, and 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 2004a: 33; see also, QC, 2004a: 20; NB, 2004a: 21; PE, 2004a: 16; AB, 2004a: 16; NL, 2004a: 19).

The Court's response to the provincial arguments provides further evidence of a federalist dialogue. Not only did the Court deny the peti-

tioners' claim and uphold BC's decision not to fund ABA/IBI, it did so in an explicitly federalist manner. First, the Court distinguished the case from *Eldridge*. In that case, it was held that BC was under an obligation to provide sign-language interpreters in hospitals in order that the deaf would have equal access to core health benefits. In *Auton*, by contrast, the petitioners were "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 Court framed the question as "whether the legislative scheme in fact provides anyone with all medically required treatment." Like many other medical services, while ABA/IBI may be considered "necessary," it falls outside the designation of "core" services required by the CHA (SCC, 2004a: 32). The legislative scheme, namely the CHA and the MPA, does not promise that every Canadian can receive funding for all medically required treatment. Instead, 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*" (SCC, 2004a: 33, emphasis added). Here, then, the Court can be found responding to, and agreeing with, provincial claims that while they are bound to certain standards by the CHA, health care is ultimately left to provincial discretion.

Definitive as this may sound, it did not end the inquiry. Because 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 programme "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 considered discriminatory (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 about a judicially managed CHA, 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*" (SCC, 2004a: 44, emphasis added). According to the Court, while certain national standards are imposed by the CHA (which none of the provinces disputed in any case), additional, non-core services may vary from province to province. Simply because Ontario and Alberta provide ABA/IBI, that does not mean it is a medically necessary benefit that other provinces should also be required to provide.

Like *NAPE*, *Auton* provides some evidence of a federalism dialogue with the Charter. The Court seems to have responded quite favourably to the provinces' federalism arguments. It relied on explicitly federalist grounds to uphold BC's decision not to fund ABA/IBI. An interesting contrast might be made between this dialogue and its absence in *Eldridge*, in which fewer provinces took part, and those that did relied only on arguments grounded in appeals to parliamentary sovereignty, or the "democratic" dialogue (see BC, 1997; MB, 1997; ON, 1997; NL, 1997). Given other facts that distinguish one case from the other, it would be premature to explain the provincial success in *Auton* and defeat in *Eldridge* solely by reference to the quantitatively and qualitatively different appeals to federalism. They may, however, be contributing factors. Further research, clustered in specific policy areas, should aim to determine both the efficacy of federalist arguments and the effect of provinces working as a team, ganging up, so to speak, to address a single issue.

Further Evidence?

Jones, *NAPE* and *Auton* all suggest a role for federalism in Charter interpretation, a role taken up by the provinces and accepted by the Supreme Court in what this paper calls a "federalist dialogue." Of course, federalism may not always play a role in Charter litigation, and if it does, its effects may not be felt in the same way as in those decisions discussed so far.

The Court may rule, for instance, in a province's favour without finding it necessary or appropriate to defer to its federalist interpretation of the Charter. Such was the case in both *RWDSU* (SCC, 1987) and *Electoral Boundaries* (SCC, 1991). In the former, Saskatchewan argued that finding a "right to strike" in the Charter would be problematic, in part because of the complexity of Canadian federalism. Since any existing right to strike had been a matter of disparate provincial statute law, the difficulty inherent in crafting a national right to strike would be prohibitive (SK, 1987: 25). In *Electoral Boundaries*, the provincial governments drew the Court's attention to Canadian federalism's historic overrepresentation of certain regions by way of defending their own overrepresentation of rural and Northern areas against a challenge that such distortion violated the Charter's "right to vote" (SK, 1991: 20; AB, 1991: 5; PE, 1991: 13; QC, 1991:10; BC, 1991: 11). In both cases, the Court found in favour of the provincial governments, upholding the impugned legislation. In neither case, however, was that decision made with reference to the federalist interpretations of the Charter advanced by the provinces.

At other times, the Court may ignore provincial appeals to federalism while striking down provincial policy on Charter grounds. In *Remuneration of Judges*, for instance, Prince Edward Island appealed to a

province-specific financial situation in much the same way as Newfoundland had in *NAPE* to explain a reduction in provincial court judges' salaries (PE, 1997: 57). The Court rejected these and other arguments, and ruled the claw-back a violation of section 11's guarantees of judicial independence (SCC, 1997). Aside from the questions that comparing *Remuneration of Judges* with *NAPE* raises about the constitutional protection that the judiciary offers its own salaries versus those of women, the decision, and others like it, might be cited as evidence that there is no true federalist dialogue.

Yet such a conclusion would be utterly premature. This article makes no claim that federalism will trump the Charter in all instances. Rapprochement, not "victory" for either the Charter or federalism, would be sufficient to prove the case. Just as federalism will sometimes affect the Charter's national standards, so too will those national standards sometimes prevail. But given the role the provinces play in Charter interpretation, as shown in this article, and the judicial recognition, if not always acceptance, of that role, claims of Charter centralization or standardization are overblown. Besides, even where the Court strikes down a piece of provincial legislation, the national standard it creates may still be mitigated by the federalist dialogue. In *Mahe*, for instance, the primary question was whether section 23 of the Charter conferred on Official Language Minorities (OLMs) the right to the "management and control" of the OLM education facilities provided at provincial expense. In an effort to retain maximum discretion over education policy, Alberta, Saskatchewan and Manitoba[3] all opposed a reading of section 23 that would have included such rights (AB, 1990: 14; SK, 1990: 3, MB, 1990: 9).

Ontario, one of Trudeau's two original provincial allies in the Charter project, objected to the prairie provinces' construction of section 23. However, it did not do so nearly to the extent as has been suggested elsewhere (Morton and Knopff, 2000; Manfredi, 1993). While Ontario maintained that the OLM groups 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 provincial 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 French language school board" (ON, 1990: 7–8). The province argued that 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, or national, application of section 23 than Alberta, for instance, it would be unfair 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. Most importantly, the Court responded favourably to Ontario's position. The subtleties in *Mahe* that Kelly cites as allowing for "maximum provincial flexibility" (2001: 332) might well be part of a federalist dialogue.

Solski (SCC, 2005) offers a similar and more recent example of how even in the wake of a provincial defeat, the federalist dialogue can mitigate against policy standardization, and protect provincial diversity. At bar was the method chosen by the province of Quebec to determine whether children of immigrant parents had received the "major part" of their education in English, and hence qualified for English language instruction at the public's expense. The claimant Solski argued that the mathematical approach to the "major part" requirement employed by the government was unnecessarily strict, in violation of the Charter's guarantees. Quebec, on the other hand, believed that any limitation on the right was justified by federalism: "the unique linguistic position of Quebec in Canada—the provincial majority language community is also the national minority language community—can serve as a justification" for the strict application of the "major part" provision (Attorney General of Quebec, as cited in SCC, 2005: para. 52). While the Court ultimately disagreed, finding the quantitative application of "major part" unconstitutional, it only found it necessary to "read down," and not overturn, the relevant sections. In doing so, the Court left itself some latitude to respond to Quebec's federalist interpretation of the Charter.

Although the Court avoided the necessity of a section 1 analysis (SCC, 2005: para. 52), its decision nevertheless included important *obiter* that make the decision a significant example of explicit federalism jurisprudence. After confirming the *Mahe* conclusion that language rights are to be construed broadly, and restating that section 23 is to be interpreted uniformly from province to province (SCC, 2005: paras. 20–21), the Court went on to say that this does not preclude provincial difference. On the contrary, "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" (SCC, 2005: para. 21, emphasis added). This may be the most succinct and forceful suggestion to date that the Court is willing to entertain "federalism," or provincial diversity, as a justification for deviation from national norms. In other words, Quebec's loss notwithstanding, *Solski* provides a notable example of federalist jurisprudence arising in response to provincial arguments. As a precedent, it might be expected to encourage the expansion of the federalist dialogue.

Conclusions

NAPE and *Auton*, the two cases with which this study was primarily concerned, have been criticized as decisions of a "risk-averse" Supreme Court that is "'reluctant, unwilling and afraid' to exercise its authority" (Jamie Cameron, in Makin, 2005). In other words, *NAPE* and *Auton* exemplify judicial deference to the representative branches. But this critique, and others like it, are grounded firmly in the debate surrounding the democratic dialogue, in an understanding of the Charter as an instrument designed primarily to limit the sovereignty of Canada's parliaments. When they are viewed through the lens of the "federalist dialogue," on the other hand, *NAPE* and *Auton* appear less like the decisions of a deferential judiciary bowing to the whims of sovereign parliaments, and more like judicial responses to federalism—to the need or desire of provincial communities to build or sustain themselves based on their own conceptions of rights.

But beyond simply establishing the existence of a federalist dialogue, this reassessment of Charter litigation begins a search for answers to questions at the heart of what federalism means within a Charter context. LaSelva tells us that the Charter is *capable* of representing both our will as Canadians to live together and our desire as members of provincial societies to live apart, but it offers no guidance as to how this is to be done. Where it has been thought about at all, given the strictures of the democratic dialogue debate, it has been assumed that we must rely on the judiciary for this reconciliation. The federalist dialogue says otherwise, suggesting that bridging the dichotomy is a job taken seriously by provincial governments and Supreme Court justices alike. It certainly raises some important questions. First among them, is it appropriate? LaSelva notwithstanding, if the Charter is supposed to represent what it is that we share in common, is it even appropriate for the Court to accept arguments that undermine those commonalities? While "unity" is not necessarily synonymous with "uniformity," surely there must be a minimum national standard. If so, where should that line be drawn? Or perhaps more importantly, who should draw it? In what contexts should a federalist interpretation of the Charter be taken as valid? Is there room for asymmetry in the federalist dialogue? In raising these and other questions, this article hopes to divert some attention from the current preoccupation with the democratic dialogue. In so doing, it aspires to do for the relationship between federalism and the Charter what the democratic dialogue has done for the relationship between courts and legislatures—provoke a debate that promotes understanding.

Notes

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

2 Ontario probably took this position because it was also facing related litigation (ON, 2004: 13).
3 Quebec also intervened in *Mahe*, but its factum is not available at the Supreme Court.

References

Ajzenstat, Janet et al., eds. 1999. *Canada's Founding Debates*. Toronto: Stoddart.
Alberta (AB). 1986. *Jones*, Factum of the Respondent, the Attorney General of Alberta.
AB. 1990. *Mahe*, Factum of the Respondent, the Attorney General of Alberta.
AB. 1991. *Electoral Boundaries*, Factum of the Intervener, the Attorney General of Alberta.
AB. 2004a. *Auton*, Factum of the Intervener, the Attorney General of Alberta.
AB. 2004b. *NAPE*, Factum of the Intervener, the Attorney General of Alberta.
Banting, Keith and Richard Simeon. 1983. "Federalism, Democracy and the Constitution." In *And No One Cheered: Federalism, Democracy and the Constitution Act*, eds. Keith Banting and Richard Simeon. Toronto: Methuen.
British Columbia (BC). 1991. *Electoral Boundaries*, Factum of the Intervener, the Attorney General of British Columbia.
BC. 1997. *Eldridge*, Factum of the Respondent, the Attorney General of British Columbia.
BC. 2004a. *Auton*, Factum of the Appellants [on cross-appeal], the Attorney General of British Columbia and the British Columbia Medical Services Commission.
BC. 2004b. *NAPE*, Factum of the Intervener, the Attorney General of British Columbia.
Cairns, Alan C. 1983. "The Politics of Constitutional Conservatism." In *And No One Cheered: Federalism, Democracy and the Constitution Act*, eds. Keith Banting and Richard Simeon. Toronto: Methuen.
Cairns, Alan C. 1991. *Disruptions: Constitutional Struggles from the Charter to Meech Lake*, ed. Douglas E. Williams. Toronto: McClelland & Stewart, Inc.
Cairns, Alan C. 1992. *The Charter Versus Federalism: The Dilemmas of Constitutional Reform*. Montreal and Kingston: McGill-Queen's University Press.
Cairns, Alan C. 1995. *Reconfigurations: Canadian Citizenship and Constitutional Change*, ed. Douglas E. Williams. Toronto: McClelland & Stewart, Inc.
Canada. Minister of Supply and Services. 1985. Royal Commission on the Economic Union and Development Prospects for Canada (Macdonald Commission). *Report: Volume 3*.
Funston, Bernard W. 1993. "The Impact of the Charter on Policy Development in the Northwest Territories." In *The Impact of the* Charter *on the Public Policy Process*, eds. Patrick Monahan and Marie Finklestein. North York: York University Centre for Public Law and Public Policy.
Ghai, Yash Pal. 2001. "Constitutional Asymmetries: Communal Representation, Federalism, and Cultural Autonomy." In *The Architecture of Democracy*, ed. Andrew Reynolds. Oxford: Oxford University Press.
Hennigar, Matthew A. 2004. "Expanding the 'Dialogue' Debate: Canadian Federal Government Responses to Lower Court Charter Decisions." *Canadian Journal of Political Science* 37 (1): 3–21.
Hiebert, Janet L. 1996. *Limiting Rights: The Dilemma of Judicial Review*. Montreal and Kingston: McGill-Queen's University Press.
Hiebert, Janet L. 2002. *Charter Conflicts: What is Parliament's Role?* Montreal and Kingston: McGill-Queen's University Press.
Hogg, Peter W. and Allison Bushell. 1997. "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)." *Osgoode Hall Law Journal* 35 (1): 75–124.
Kelly, James B. 2001. "Reconciling Rights and Freedoms during Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982–1999." *Canadian Journal of Political Science* 34 (2): 321–55.

Kelly, James B. 2005. *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent*. Vancouver: UBC Press.
Knopff, Rainer and F.L. Morton. 1985. "Nation-Building and the Canadian Charter of Rights and Freedoms." In *Constitutionalism, Citizenship and Society in Canada*, eds. Alan Cairns and Cynthia Williams. Toronto: University of Toronto Press.
Knopff, Rainer and F.L. Morton. 1992. *Charter Politics*. Scarborough: Nelson Canada.
Koller, Arnold. 2003. "Welcome Note." In *Federalism in a Changing World—Learning from Each Other: Scientific Background, Proceedings and Plenary Speeches of the International Conference on Federalism 2002*, eds. Raoul Blindenbacher and Arnold Koller. Montreal and Kingston: McGill-Queen's University Press.
LaSelva, Samuel V. 1996. *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood*. Montreal and Kingston: McGill-Queen's University Press.
Magnet, Joseph Eliot. 1995. *Official Languages of Canada: Perspectives from Law, Policy and the Future*. Cowansville, QC: Les Éditions Yvon Blais, Inc.
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.
Mandel, Michael. 1994. *The Charter of Rights and the Legalization of Politics in Canada*. Revised edition. Toronto: Thomson.
Manfredi, Christopher P. 1993. "Constitutional Rights and Interest Advocacy: Litigating Educational Reform in Canada and the United States." In *Equity and Community: The Charter, Interest Advocacy and Representation*, ed. F. Leslie Seidle. Montreal: Institute for Research on Public Policy.
Manfredi, Christopher P. and Antonia Maioni. 2002. "Courts and Health Policy: Judicial Policy Making and Publicly Funded Health Care in Canada." *Journal of Health Politics, Policy and Law* 27 (2): 213–40.
Manfredi, Christopher P. and James B. Kelly. 1999. "Six Degrees of Dialogue: A Response to Hogg and Bushell." *Osgoode Hall Law Journal* 37 (3): 513–27.
Manitoba (MB). 1990. *Mahe*, Factum of the Intervener, the Attorney General of Manitoba.
MB. 1997. *Eldridge*, Factum of the Respondent, the Attorney General of Manitoba.
Mitchell, Graeme G. 1993. "The Impact of the Charter on the Public Policy Process: The Attorney General [of Saskatchewan]." In *The Impact of the* Charter *on the Public Policy Process*, eds. Patrick Monahan and Marie Finklestein. North York: York University Centre for Public Law and Public Policy.
Morton, F.L. 1995. "The Effects of the Charter of Rights on Canadian Federalism." *Publius* 25 (3): 173.
Morton, F.L. 2001. "Dialogue or Monologue." In *Judicial Power and Canadian Democracy*, eds. Paul Howe and Peter H. Russell. Montreal and Kingston: McGill-Queen's University Press (IRPP).
Morton, F.L. and Avril Allen. 2001. "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada." *Canadian Journal of Political Science* 34 (1): 55–84.
Morton, F.L. and Rainer Knopff. 2000. *The Charter Revolution and the Court Party*. Peterborough: Broadview Press.
New Brunswick (NB). 1990. *Mahe*, Mémoire de l'intervenant, le procureur général du Nouveau-Brunswick.
NB. 2004a. *Auton*, Factum of the Intervener, the Attorney General of New Brunswick.
NB. 2004b. *NAPE*, Factum of the Intervener, the Attorney General of New Brunswick.
Newfoundland [and Labrador] (NL). 1997. *Eldridge*, Factum of the Intervener, the Attorney General of Newfoundland.
NL. 2004a. *Auton*, Factum of the Intervener, the Attorney General of Newfoundland and Labrador.

NL. 2004b. *NAPE*, Factum of the Respondent, the Attorney General of Newfoundland and Labrador.
Nova Scotia (NS). 2004a. *Auton*, Factum of the Intervener, the Attorney General of Nova Scotia.
Ontario (ON). 1990. *Mahe*, Factum of the Intervener, the Attorney General of Ontario.
ON. 1997. *Eldridge*, Factum of the Intervener, the Attorney General of Ontario.
ON. 2004. *Auton*, Factum of the Intervener, the Attorney General of Ontario.
Prince Edward Island (PE). 1991. *Electoral Boundaries*, Factum of the Intervener, the Attorney General of Prince Edward Island.
PE. 1997. *Remuneration of Judges*, Factum of the Respondent, the Attorney General of Prince Edward Island.
PE. 2004. *Auton*, Factum of the Intervener, the Attorney General of Prince Edward Island.
Quebec (QC). 1991. *Electoral Boundaries*, Mémoire de l'intervenant, le procureur general du Québec.
QC. 2004a. *Auton*, Mémoire de l'intervenant, le procureur general du Québec.
QC. 2004b. *NAPE*, Mémoire de l'intervenant, le procureur general du Québec.
Roach, Kent. 2001. *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?* Toronto: Irwin Law.
Russell, Peter H. 1983. "The Political Purposes of the Canadian Charter of Rights and Freedoms." *Canadian Bar Review* 61: 30–54.
Saskatchewan (SK). 1987. *RWDSU*, Factum of the Respondent, the Attorney General of Saskatchewan.
SK. 1990. *Mahe*, Factum of the Intervener, the Attorney General of Saskatchewan.
SK. 1991. *Electoral Boundaries*, Factum of the Respondent, the Attorney General of Saskatchewan.
SK. 1997. *Remuneration of Judges*, Factum of the Intervener, the Attorney General of Saskatchewan.
Smiley, Donald V. 1981. *The Canadian Charter of Rights and Freedoms*. Toronto: Ontario Economic Council.
Smiley, Donald V. 1987. *The Federal Condition in Canada*. Toronto: McGraw-Hill Ryerson Ltd.
Supreme Court of Canada (SCC). *Solski (Tutor of) v. Québec (Attorney General)* [2005] 1 S.C.R. 201.
SCC. *Auton (Guardian* ad litem *of) v. British Columbia (Attorney General)* [2004][a] 3 S.C.R. 657.
SCC. *Newfoundland (Treasury Board) v. N.A.P.E.* [2004][b] 3 S.C.R. 381.
SCC. *Eldridge v. British Columbia (Attorney General)* [1997][a] 3 S.C.R. 624.
SCC. *Reference re Remuneration of Judges of the Prov. Court of P.E.I.* [1997][b] 3 S.C.R. 3.
SCC. *Reference re Prov. Electoral Boundaries* [1991] 2 S.C.R. 158.
SCC. *Mahe v. Alberta* [1990] 1 S.C.R. 342.
SCC. *RWDSU v. Saskatchewan* [1987] 1 S.C.R. 460.
SCC. *R. v. Jones* [1986] 2 S.C.R. 284.
Swinton, Katherine E. 1990. *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years*. Toronto: Carswell.
Vipond, Robert. 1991. *Liberty and Community: Canadian Federalism and the Failure of the Canadian Constitution*. Albany, NY: State University of New York Press.