Reconciling Rights and Federalism during Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982 to 1999[1]

JAMES B. KELLY *Brock University*

Introduction

The centralization thesis associated with the Canadian Charter of Rights and Freedoms found a wide audience during the first wave of Charter analysis. Peter Hogg suggested that the Charter's natural momentum was towards centralization because "where guaranteed rights exist, there must be a single national rule."[2] Guy Laforest echoed a similar reservation by concluding that "the Charter would work towards the unification of the nation by homogenizing policies across the country."[3] However, few studies have considered empirically whether the nation-building intentions of the Charter have reduced federal diversity in Canada and, as a result, much of the centralization thesis is based pri-

1 This article is a revised version of a paper presented at the annual meeting of the Canadian Political Science Association, Sherbrooke, 1999. I thank Richard J. Schultz, Christopher P. Manfredi, Hudson Meadwell, Robert Young, Claudia Wright, Vincent Lemieux and the JOURNAL's anonymous reviewers for excellent comments on an earlier version of this article. I also thank Michèle Friel for the French-language abstract.

2 Peter Hogg, "Federalism Fights the Charter," in David Shugarman and Reg Whitaker, eds., *Federalism and Political Community* (Peterborough: Broadview Press, 1989), 250.

3 Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal: McGill-Queen's University Press, 1995), 134.

James B. Kelly, Department of Political Science, Brock University, St. Catharines, Ontario L2S 3A1; jkelly@spartan.ac.brocku.ca

Canadian Journal of Political Science / Revue canadienne de science politique
XXXIV:2 (June/juin 2001) 321-355

marily on normative assumptions that federalism and rights are incompatible in a liberal state.

As a way to ensure that Charter review does not limit federal diversity, Alan Cairns has suggested an asymmetrical application of the Charter. Specifically, the Charter would apply to the English-speaking provinces and Quebec's Charter of Human Rights and Freedoms would be the only rights document that functioned in Quebec.[4] This approach has also been endorsed by Guy Laforest, who has articulated the conditions necessary for a genuine partnership between Quebec and Canada: " . . . Quebec must establish on its territory the primacy of its own charter of rights, interpreted by judges appointed by its own governmental and legislative authorities. The Supreme Court of Canada should not have any authority on the territory of Quebec."[5] Similarly, David Schneiderman has argued that multiple charters in Canada are not problematic because of the great similarities between the Canadian and Quebec charters.[6] In fact, Schneiderman contends that the Canadian Charter holds Quebec legislation to a *less rigorous standard* than the Quebec Charter, suggesting that the centralization thesis may be more apparent than real.[7] For Cairns, Laforest and Schneiderman, then, rights and federalism could be reconciled by giving expression to the two-nations theory of Canadian federalism, where the Canadian and Quebec charters would be co-ordinate and independent rights documents in the Canadian federation.

The purpose of this article is to examine the relationship between federalism and rights and to consider whether the Supreme Court of Canada has reduced federal diversity by applying national standards in provincial areas during Charter review. In effect, has the Supreme Court of Canada's Charter jurisprudence confirmed the centralization thesis advanced by Charter critics such as Cairns, Morton, Knopff and Laforest and, further, should Canada consider multiple charters and asymmetrical rights documents as a way to reconcile rights and federalism during Charter review? This is a very important question because Canada's protracted national unity crisis has been suggested to be, in part, the result

---

4 Alan Cairns, "Constitutional Change and the Three Equalities," in Douglas E. Williams, ed., *Reconfigurations* (Toronto: McClelland and Stewart, 1995), 218-19, 225-28.

5 Laforest, *Trudeau and the End of a Canadian Dream*, 191.

6 David Schneiderman, "Dual(ing) *Charters*: The Harmonics of Rights in Canada and Quebec," *Ottawa Law Review* 24 (1992), 258-60.

7 David Schneiderman, "Human Rights, Fundamental Differences? Multiple Charters in a Partnership Frame," in Roger Gibbins and Guy Laforest, eds., *Beyond the Impasse—Toward Reconciliation* (Montreal: Institute for Research on Public Policy, 1998), 155-57.

Abstract. This article considers the relationship between rights and federalism in the Supreme Court of Canada's review of cases invoking the Canadian Charter of Rights and Freedoms. It considers whether the Supreme Court of Canada has compromised provincial autonomy by establishing Canada-wide standards in provincial areas of jurisdiction. It suggests that the centralization thesis associated with judicial review on Charter grounds is inconclusive, and combining several processes under the rubric of centralization, it misrepresents the Charter's effect on Canadian federalism and provincial autonomy. Further, the centralization thesis has lost much momentum during the course of Charter review, and, as a result, is a limited approach to understanding the relationship between rights and federalism in Canada. Specifically, the Supreme Court of Canada has demonstrated sensitivity to federalism in its Charter jurisprudence, most evident in a complex jurisprudence that has served to offset the centralization thesis and its implications for provincial autonomy. This three-part federalism jurisprudence is federalism as gatekeeper, an explicit federalism jurisprudence and an implicit federalism jurisprudence, which is most evident in the relationship between criminal rights and provincial responsibility for the administration of justice. This article demonstrates that the Court's approach to Charter review has seen a reconciliation between rights and federalism, most evident in the declining importance of the centralization thesis and the growing importance of the three-part federalism jurisprudence during Charter review. This sensitivity to federalism has existed since the beginning of the Court's Charter jurisprudence but has largely been overshadowed by the dominance of the centralization thesis in the Charter debate.

Résumé. Cet article étudie la relation entre les droits garantis par la Charte canadienne des droits et libertés et le fédéralisme afin de vérifier si les normes pan-canadiennes imposées par la Cour suprême du Canada dans des champs de juridiction des provinces compromettent l'autonomie de ces dernières. Il soutient que la thèse selon laquelle le contrôle de la constitutionnalité des lois sur la base des principes de la Charte a un effet centralisateur n'est pas concluante, puisqu'elle amalgame plusieurs processus différents et dénature l'impact de la Charte sur le fédéralisme canadien et l'autonomie des provinces. Il montre, en outre, que l'évaluation de la conformité des lois avec les principes constitutionnels de la Charte a affaiblit l'influence de cette thèse et révélé que son explication de la relation entre les droits et le fédéralisme, au Canada, était limitée et insuffisante. Plus concrètement, il indique que les décisions rendues par la Cour Suprême du Canada ont démontré que cette institution était sensible au fédéralisme et que la Charte n'entravait pas l'autonomie des provinces comme le prétend la thèse sur la centralisation. Cette jurisprudence peut être subdivisée en trois parties : une défense du fédéralisme en tant que gardien du partage des compétences, une défense explicite du fédéralisme et une défense implicite du fédéralisme, qui est surtout évidente au niveau de la relation entre les droits des criminels et la responsabilité des provinces en matière d'administration de la justice. Cet article démontre que, dans ses jugements sur le respect de la Charte, la Cour suprême a privilégié une approche qui réconcilie les droits fondamentaux et le fédéralisme, ce dont témoignent le déclin de la thèse sur la centralisation et l'importance grandissante de la jurisprudence tripartite dans le domaine du contrôle de l'application des principes de la Charte. Cette sensibilité de la Cour suprême au fédéralisme s'est manifestée dès le début du processus de revision de la constitutionnalité des lois en regard de la Charte, mais elle a été largement occultée par la prédominance de la thèse sur la centralisation dans les débats sur les effets de la Charte.

of the fragmenting nature of rights litigation and the symbolism of Charter imperialism.[8]

8 F. L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party*

Despite the questions raised by the proponents of the centralization thesis, this article contends that multiple charters should not be adopted in Canada. There is a serious limitation in the prescriptions offered by Cairns, Laforest and Schneiderman that is the focus of this article. Specifically, the centralization thesis has been overstated and the Supreme Court of Canada's Charter jurisprudence has not had the detrimental effects on Canadian federalism that the critics contended. While the normative assumptions of the centralization thesis appear to be sound, the empirical evidence is less convincing, and thus the symbolism of centralization has greatly outstripped the reality of judicial review of the Canadian Charter of Rights and Freedoms by the Supreme Court. Perhaps more damaging for the centralization thesis, a reconciliation between rights and federalism has existed since the beginning of Charter review by the Supreme Court. This development has taken place against the backdrop of a pan-Canadian application of the Charter, thus casting doubt on the desirability of multiple charters and the necessity of asymmetrical rights documents in Canada. Simply stated, Charter review by the Supreme Court of Canada has advanced federal diversity because the Court has demonstrated a sensitivity to policy variation by the provinces and the structural requirements of a federal system.

This sensitivity to federal diversity is the result of three interrelated dimensions of judicial review that have tempered the universalistic nature of the Charter and have ensured that a national statement on rights and freedoms has not unduly undermined provincial autonomy. First, the complexity of the Charter as a document and important clauses that allow the universalistic nature of rights to co-exist with the particularistic needs of provincial societies. For instance, the notwithstanding clause (s.33) allows legislatures to override certain unfavourable judicial decisions and can advance federal diversity because it allows elected officials to assert the reasonableness of legislation found to violate pan-Canadian rights and freedoms. Similarly, the reasonable limits clause (s.1) allows governments to justify infringements on rights and freedoms as reasonable in a free and democratic society.[9] Finally, the less-than-complete application of section 23 of the Charter to the province of Quebec has tempered the pan-Canadian nature of minority-language education rights, thus ensuring an asymmetrical application of the Charter in the one province that has yet to

---

(Peterborough: Broadview Press, 2000), 61-3; and Alan Cairns, "The Charter: A Political Science Perspective," *Osgoode Hall Law Journal* 30 (1992), 623-25.

9 Janet L. Hiebert, *Limiting Rights* (Montreal: McGill-Queen's University Press, 1996), 137-38; and Katherine E. Swinton, *The Supreme Court and Canadian Federalism* (Toronto: Carswell, 1990), 345-46.

accede to the *Constitution Act, 1982* that includes the Charter.[10] A second compelling reason to question the centralization thesis is the emergence of Charter dialogue between legislatures and the courts, where political actors can introduce legislative sequels in response to judicial nullification of statutes and regulations.[11] Collectively, these clauses and Charter dialogue advance federal diversity because the pan-Canadian application of the Charter can be tempered by the complexity of the text and the policy manoeuverability available to the provincial legislatures through legislative re-enactment of statutes nullified on Charter grounds.

Beyond these important structural and institutional features, there is a more important dimension of Charter politics that complements and advances federal diversity. Ironically, it is the least understood aspect of this document and its relationship to Canadian federalism and the wider constitutional system. There is a three-part federalism jurisprudence in the Supreme Court's Charter jurisprudence that gives substance to the institutional features of the document that advance federal diversity. Taken together, the complexity of the Charter as a document and the presence of a dynamic federalism jurisprudence within the Court's Charter jurisprudence call into question the validity of the centralization thesis and suggest that rights and federalism have co-existed since the Charter's introduction in 1982. In effect, the multidimensional nature of Charter review has made multiple charters and asymmetrical rights documents redundant and unnecessary in the context of Canada and Quebec, though a separate Aboriginal charter of rights may be desirable and necessary to reconcile this community with the liberal orientation of the Canadian federation.[12]

In summary, this article advances two important objectives: first, to demonstrate that the centralization thesis is more apparent than real and, secondly, to highlight a sensitivity to federalism in the Supreme Court of Canada's jurisprudence on the Charter. This article is divided into three sections. The first section outlines the normative assumptions of the centralization thesis and the arguments advanced by the most important critics of the Charter. The second section evaluates the evidence presented by the critics to demonstrate that Charter review by

---

10 Peter H. Russell, "The Political Purposes of the Charter: Have They been fulfilled?" in P. Bryden, S. Davis and J. Russell, eds., *Protecting Rights and Freedoms* (Toronto: University of Toronto Press, 1994), 37.

11 Peter W. Hogg and Allison A. Bushell, "The *Charter* Dialogue between Courts and Legislatures," *Osgoode Hall Law Journal* 35 (1997), 75-124; and Christopher P. Manfredi and James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell," *Osgoode Hall Law Journal* 37 (1999), 513-27.

12 Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism* (Montreal: McGill-Queen's University Press, 1996), 137-54.

the Supreme Court has, in fact, compromised provincial autonomy and reduced federal diversity. This section makes the claim that the empirical evidence is not conclusive and combines several processes under the rubric of centralization. By relying on judicial activism in cases where the Court has upheld the original language and education guarantees in the *Constitution Act, 1867,* the *Manitoba Act, 1890* and the *Saskatchewan Act, 1905*, proponents of the centralization thesis have collapsed the process of federalization into centralization and, thus, have misrepresented the impact of the Charter on Canadian federalism.

The final section analyzes trends in the Court's approach to Charter review that have advanced the reconciliation between rights and federalism and led to a rebalancing of liberal constitutionalism in Canada.[13] This section builds on the work of Janet Hiebert and Katherine Swinton who first detected the Supreme Court's sensitivity to federal diversity in decisions where the Court upheld provincial variation in the application of federal laws.[14] It considers the emerging federalism jurisprudence by the Supreme Court in Charter cases, and argues that there are three dimensions to it: federalism as gatekeeper;[15] an explicit federalism jurisprudence; and, finally, an implicit federalism jurisprudence. To illustrate this sensitivity to federal diversity in Charter decisions, 43 cases are presented to highlight a three-dimensional federalism jurisprudence by the Supreme Court between 1982 and 1999. While this federalism jurisprudence has existed since the beginning of the Court's Charter jurisprudence, it is the least understood element of Charter review—thus explaining the dominance of the centralization thesis in the Charter debate.

1. Charter Review and the Centralization Thesis

The primary assumption of the centralization thesis is that the nullification of provincial statutes during Charter review reduces provincial autonomy by validating Canadian values and imposing national standards in provincial jurisdiction.[16] Critics view the nation-building intentions of the Charter as an attempt by Prime Minister Pierre Elliott

---

13 James B. Kelly, "The *Charter of Rights and Freedoms* and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997," *Osgoode Hall Law Journal* 37 (1999), 625-95.

14 Hiebert, *Limiting Rights*, 126-49.

15 Swinton, *The Supreme Court and Canadian Federalism*, 342-43.

16 Rainer Knopff and F. L. Morton, "Nation Building and the Canadian Charter of Rights and Freedoms," in Alan Cairns and Cynthia Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985), 147.

Trudeau to transfer citizen loyalty to the national community and to reduce provincial diversity by requiring the provinces to conform to the pan-Canadian values in the Charter.[17] Indeed, the explicit exemption of minority-language education rights (s. 23) from the scope of the notwithstanding clause confirms the centralizing intention of the document to Charter critics and especially to Quebec intellectuals.[18] In surveying the impact of section 23 on Quebec language and education policy, Yves de Montigny expressed a widely held belief among Quebec intellectuals that "the Charter has destroyed whole sections of the language regime gradually adopted by the province over the years."[19] This sentiment is shared by Guy Laforest, who concludes that the Charter has injected pan-Canadian standards into Quebec's language and cultural policies. [20]

There is a strong institutional dimension to the centralization thesis because a number of conditions must exist for Charter review to reduce provincial autonomy and federal diversity. Of paramount importance is an activist judiciary that challenges the policy autonomy of democratic actors through Charter review, as it is through judicial nullification of provincial statutes that national values are confirmed and provincial diversity is reduced. [21] Related to the institutional requirement of judicial activism is a corresponding transformation of the politics of organized interests in Canada, where provincial policies that depart from the Canadian values protected in the Charter are challenged in the judicial arena by organized interests. Cairns has referred to this phenomenon as the creation of "Charter Canadians" who focus on the citizens' constitution and this reduces the relative status of the governments' constitution in the political order. F. L. Morton and Rainer Knopff have expressed a related concern—that interest-group politics organized around the Charter reduces federal diversity—but in a different way than that suggested by Cairns. In particular, Cairns focuses on the centralizing effect of Charter Canadians at the macro-constitutional level by preventing constitutional change in favour of provincialism, whereas Morton and Knopff focus on micro-constitutional politics where a so-called "Court Party" advances centralization through litigation.

---

17 Alain Gagnon and Guy Laforest, "The Future of Federalism: Lessons from Canada and Quebec," *International Journal* 28 (1993), 477-78.

18 F. L. Morton, "The Effects of the Charter of Rights on Canadian Federalism," *Publius* 25 (1995), 179-80.

19 Yves de Montigny, "The Impact (Real or Apprehended) of the Canadian Charter of Rights and Freedoms on the Legislative Authority of Quebec," in David Schneiderman and Kate Sutherland, eds., *Charting the Consequences* (Toronto: University of Toronto Press, 1997), 9-10.

20 Laforest, *Trudeau and the End of a Canadian Dream*, 134.

21 Cairns, "The Charter," 618.

The Court Party, it is argued, facilitates the judicialization of politics because it is organized around specific sections of the Charter and advances its reformist agenda through litigation. Perhaps what is most damaging for Morton and Knopff is the relationship between the Court Party and the federal government. Many of the interest groups that fall within the Court Party are funded by the federal government and are encouraged to pursue litigation strategies that challenge provincial legislation as inconsistent with the Charter.[22] A central issue for the Court Party is minority-language education rights, and the federally funded Alliance Quebec has successfully used litigation to challenge Quebec's language restrictions on commercial signs in *R. v. Ford* and limitations on access to English-language schools in *Attorney General of Quebec v. Protestant School Boards*.[23] Morton has written that the Court Party advances centralization and federal interests because the "Charter has thus allowed the federal government to achieve indirectly what it could not have achieved directly."[24] Thus, judicial activism is doubly problematic for federal diversity because it imposes national values when it strikes down provincial legislation and has given rise to litigation strategies that indirectly advance Ottawa's agenda. In the end, the proponents of the centralization thesis present a compelling position that asks whether the Charter and federalism are compatible, and whether the Supreme Court of Canada has added to this tension through an activist approach to the Canadian Charter of Rights and Freedoms.

2. Evaluating the Centralization Thesis

What evidence do proponents of the centralization thesis offer to support the contention that the Charter has reduced the diversity of Canadian federalism by imposing national standards in provincial jurisdictions? Table 1 outlines provincial nullifications on Charter and non-Charter grounds between 1982 and 1999. The primary evidence offered is the impact of the Charter on Quebec's language and education policy. Indeed, Morton has described Quebec as the largest Charter "loser" because it has suffered the most nullifications of any province, and the nullifications have occurred in vital areas of Quebec's language and cultural policies.[25] In *Protestant School Boards,* the Supreme Court of

---

22 Morton and Knopff, *The Charter Revolution and the Court Party*, 87-105; and Leslie A. Pal, *Interests of State* (Montreal: McGill-Queen's University Press, 1993).

23 *Quebec v. Ford*, [1988] 2 S.C.R. 712; and *Attorney General of Quebec v. Protestant School Boards,* [1984] 2 S.C.R. 66.

24 Morton, "The Effects of the Charter of Rights on Canadian Federalism," 181.

25 F. L. Morton, "Judicial Politics Canadian Style: The Supreme Court's Contribution

Canada invalidated sections of the Charter of the French Language (Bill 101, 1977) that limited educational opportunities in English in Quebec. Similarly, in *Ford*, the Court invalidated sections regarding commercial signage as an infringement of freedom of expression (s.2b), and ruled that the infringement could not be considered a reasonable limitation under section 1 of the Canadian Charter of Rights and Freedoms because the exclusive use of French on commercial signs was not proportionate to the valid objective sought—the preservation of Quebec's *visage linguistic*.

While the Court has been activist in striking down sections of Quebec's language and education policy on Charter grounds, the impact has been offset by the structure of the Charter itself. In the case of *Ford,* the Quebec Liberal government of Robert Bourassa used the notwithstanding clause to override judicial nullification of the sign law.[26] Thus, a section of the Charter was used to enhance the autonomy of Quebec within a core area of provincial jurisdiction—albeit a rare occurrence, but an important illustration of the structural features of the Charter that can advance federal diversity and protect provincial autonomy when legislatures decide to act in response to Charter decisions. Similarly, what has been overlooked in the aftermath of *Protestant School Boards* is that this decision has not interfered with the policy objective of limiting access to English-language schools in Quebec—addressing the demographic decline of francophones in Quebec. This legitimate policy is much broader than simply limiting access to educational instruction in English, but also sees Quebec, with the assistance of the federal government, aggressively attracting French-speaking immigrants from outside Canada to Quebec.

In terms of the structure of section 23 and its relationship to this comprehensive policy objective, the Charter has not undermined the autonomy of Quebec. This position is contrary to that advanced by Guy Laforest, who contends that the Charter has established pan-Canadian language and education standards and, as such, has curtailed the legislative prerogatives of Quebec's National Assembly.[27] Indeed, Peter Russell has commented that "section 23 of the Charter even provides for Quebec's distinctiveness by leaving discretion over the language regime for the schooling of Quebec immigrants to the government and legislature of Quebec."[28] In particular, section 23 applies to citizens of Canada whose first language is either French or English,

---

to the Constitutional Crisis of 1992," in Curtis Cook, ed., *Constitutional Predicament* (Montreal: McGill-Queen's University Press, 1994), 139.

26 Peter H. Russell, "Standing Up for Notwithstanding," *Alberta Law Review* 29 (1991), 304.

27 Laforest, *Trudeau and the End of a Canadian Dream*, 134-35, 147-48.

28 Russell, "The Political Purposes of the Charter," 37.

TABLE 1

Provincial Statutes Nullified by the Supreme Court of Canada, 1982-1999 (27 cases)

Statute	Right	Case Name[a]
1. Canadian Charter of Rights and Freedoms		
1. *Charte de la Langue Francais* ch. VIII	s.23	*Quebec (A.G.) v. Protestant School Boards* (+)
2. *Motor Vehicle Act s.94(2)*	s.7	*B.C. Motor Vehicles Reference* (-)
3. *Charte de la Langue Francais* ss. 58, 69	s.2(b)	*Quebec (A.G.) v. Ford* (+)
4. *Charte de la Langue Francais* ss. 59-61	s.2(b)	*Devine v. Quebec* (+)
5. *Summary Convictions Act,* s.75	s.11(b)	*Thibault v. Corp. Professionel Médecins du Québec* (-)
6. *Barristers and Solicitors Act*, s.42	s.15(1)	*Andrews v. Law Society (B.C.)* (-)
7. *Legal Profession Act Rules* 75B, 145	ss. 2(d), 6(2)(b)	*Black v. Law Society (Alberta)* (-)
8. *Alberta Judicature Act*, s.30(1)(2)	s.2(b)	*Edmonton Journal v. Alberta (A.G.)*(-)
9. *Alberta School Act* (*Regulation 490/82*)	s.23	*Mahé v. Alberta* (-)
10. *Regulation 447* of *R.S.O* 1980, s.37(39)	s.2(b)	*Rocket v. Royal College of Dental Surgeons* (+)
11. *Public Schools Act, R.S.M.* 1987, s.79(3,4,7)	s.23	*Ref. Re: Public Schools Act (Manitoba)* (+)
12. *Prov. Court Judges Act, S.A*, 1981, s.13(1)(a)(b), 17(1)	s.11(d)	*R. v. Campbell (+)*
13. *Prov. Court Act, R.S.P.E.I.*, 1988, C-P.25, s.3(3)	s.11(d)	*Ref. Re: Remuneration of the Judges of the of the Prov. of PEI*, (+)
14. *Referendum Act, R.S.Q.*, C. C-64.1, ss. 402-404, 406, para 3, 413, 414, 416, 417 of Appendix Two	s.2(b)(d)	*Libman v. Quebec* (+)

15. *Labour Relations Code, S.B.C.* 1992, c. 82, ss. 1(1), 65,67	s.2(b)	*U.F.C.W., Local 518 v. Kmart (-)*
16. *Family Law Act, R.S.O.* 1990, c. F.3, s.29	s.15(1)	*M. v. H.*, (-)
2. Constitutional protections		
17. *A Summary Offences Procedure*	s.16[b]	*Mercure v. Saskatchewan (A.G.)*
18. *Act Respecting the Operation of s.23* of the *Manitoba Act*	s.133, s.23[c]	*Reference re: Manitoba Language Rights*
19. *Summary Convictions Act,* (Highway Traffic)	s.23[c]	*Bilodeau v. Manitoba (A.G.)*
20. *Act to Amend the Education Act*	s.93	*Quebec (A.G.) v. Greater Hull School Board*
21. *Act re remuneration in the public and private sector*	s.133	*Quebec (A.G.) v. Brunet*
22. *Act re conditions of employment in the public sector*	s.133	*Quebec (A.G.) v. Brunet*
23. *Wildlife Act, S.A.* 1984, c. W-9.1, s.26(1)	s.35(1)	*R. v. Badger*
24. *B.C. Fishery (General) Regs.,* SOR/84-248, s.4(1)	s.35(1)	*R. V. Nikal*
25. *Quebec Fisheries Regs., C.R.C.*,c. 852, s. 4(1)	s.35(1)	*R. v. Adams*
26. *Quebec Fisheries Regs., C.R.C.*, c. 852, s. 4(1)	s.35(1)	*R. v. Côté*
27. *Parks Regs., 1991, R.R.S.*c. P-1.1, Reg. 6, s.41(2)(j)	s.35(1)	*R. v. Sundown*

a Only positive (+) and negative (-) legislative sequels for Charter cases are considered.
b *Saskatchewan Act, 1905.*
c *Manitoba Act, 1870.*

thus, the decision in *Protestant School Boards* would only advantage anglophones immigrating to Quebec who have been educated in English in Canada. Given provincial immigration patterns in Canada, this is unlikely to affect significantly the broader policy objective of Bill 101 and its attempt to preserve the demographic stability of francophones in the province.

Thus there are subtleties in the Charter and its relationship to provincial autonomy which can marginalize the creation of national standards in provincial jurisdictions. These subtleties are lost on Cairns and others who conclude that minority-language rights "sacrifice the rights of provincial majorities to determine language policy in educational settings in order to further a particular vision of the pan-Canadian community."[29] Nowhere is this more apparent than in the Court's construction of the sliding scale approach to section 23 in *Mahé v. Alberta*, involving French-language education, where demographic considerations and not judicial pronouncements determined the content of section 23.[30] Added to this has been the Court's reluctance to nullify provincial education acts successfully challenged on section 23 grounds, preferring instead to rule on the content of section 23 and the obligations it places on provincial governments. This is an approach the Court adopted in *Mahé* and has applied in several important minority-language rights cases, such as *Reference Re Public Schools Act (Manitoba)*.[31] As Ian Urquhart contends, the Charter provides a national sliding scale in minority-language education rights, with maximum policy flexibility accorded to provincial governments.[32]

The symbolism of national standards imposed during Charter review informs a large part of the centralization thesis. Clearly, the preceding discussion of the relationship between Charter review and section 23 demonstrates how the symbolism of centralization in a vital area of provincial jurisdiction, in actuality, yields limited evidence to sustain assumptions of the centralization thesis. In addition to the structure of the Charter, that has limited the force of centralization, critics have neglected an important dynamic that can further marginalize the negative implications of Charter review for provincial autonomy: legislative sequels that advance Charter dialogue between the judicial and legislative branches of government.[33] Peter Hogg and

---

29 Alan Cairns, *The Charter Versus Federalism* (Montreal: McGill-Queen's University Press, 1992), 85.

30 *Mahé v. Alberta*, [1990] 1 S.C.R. 342.

31 *Reference Re Public Schools Act (Manitoba)*, [1993] 1 S.C.R. 839.

32 Ian Urquhart, "Infertile Soil? Sowing the Charter in Alberta," in Schneiderman and Sutherland, eds., *Charting the Consequences*, 39, 41-2.

33 Hogg and Bushell, "The *Charter* Dialogue between Courts and Legislatures," 82.

Allison Bushell developed the original Charter dialogue concept and have suggested that dialogue exists when legislative sequels follow judicial nullifications of statutes and regulations, a practice suggested to exist in two-thirds of nullified statutes.[34]

This dialogue metaphor has been challenged by Christopher Manfredi and James Kelly, who suggest that not all legislative sequels are evidence of Charter dialogue. Instead, they argue that positive action by Parliament and the provincial legislatures is essential to advance dialogue and, secondly, that legislative sequels must constitute minor amendments of existing statutes and regulations.[35] For instance, simply repealing and replacing offending sections of statutes or entire acts does not advance dialogue but is simply legislative compliance with Charter decisions. These caveats aside, Charter dialogue has seen positive legislative sequels in 50 per cent (8/16) of provincial statutes and regulations nullified by the Supreme Court between 1982 and 1999. This is a significant feature of Charter review, because it suggest that, even when judicial activism has struck down provincial statutes and advanced national values in provincial jurisdictions, positive legislative responses can re-assert the constitutionality of statutes and regulations that advance particular features of provincial societies against pan-Canadian rights and freedoms. Table 1 reveals that positive legislative sequels have taken place in cases such as *Protestant School Boards*, *Ford, Devine* and *Libman*—cases, incidentally, suggested to demonstrate the anti-federal nature of Charter review by the Supreme Court and evidence of the centralization thesis.[36]

Are all provincial nullifications equal? F. L. Morton posed a related question when he asked how many procedural nullifications of the Criminal Code does it take to equal nullifications of Quebec's language and education policy.[37] This line of analysis is useful because it demonstrates the subtleties between federal and provincial nullifications that Morton and Knopff have used to suggest the Charter has had a disproportionate impact on provincial autonomy. Reflecting on other provincial nullifications that have established country-wide standards in the 1982 to 1999 period, what is striking is the limited importance of provincial legislation that has fallen during Charter review. Indeed, provincial nullifications established national standards in appeal procedures in *Thibault v. Corp Professionel Médicins du Québec,* and in

34 Ibid.

35 Manfredi and Kelly, "Six Degrees of Dialogue," 520-21.

36 Shannon Ishiyama Smithey, "The Effects of the Canadian Supreme Court's Charter Interpretation on Regional and Intergovernmental Tensions in Canada," *Publius* 26 (1996), 90-1; and Joseé Legault, "How To Deny Quebec's Right to Self-determination," *The Globe and Mail* (Toronto), August 21, 1998.

37 Morton, "The Effect of the Charter of Rights on Canadian Federalism," 176.

Edmonton Journal v. Alberta the Court removed publication restrictions in cases involving matrimonial disputes and in pre-trial civil proceedings. Further, in *Andrews v. Law Society (B.C.)* the Court struck down the citizenship requirements in the *Barristers and Solicitors Act (B.C.)* as violating section 15(1), and in *Black v. Law Society (Alberta)* it nullified sections of the *Legal Profession Act Rules* that prohibited the operation of interprovincial law firms.[38]

Undoubtedly, these cases do reduce provincial autonomy, but given the limited importance of the statutes nullified, they cannot be said to limit the ability of provinces to achieve substantive elements of their legislative agendas. Peter Russell reminds us that "with the exception of Quebec's language policy, social and economic policies of central importance to elected governments have not been significantly affected by the Charter."[39] This conclusion remains true despite the creation of national standards in several provincial jurisdictions (see Table 1). Specifically, the standardizing effect of the Charter is largely in relation to the legal profession and the administration of justice, which is not an unforeseen outcome in a rights document where the Supreme Court has largely focused on legal rights and criminal procedure.[40]

There are other methods of judicial review besides the nullification of statutes that have the potential to impose pan-Canadian standards in the provinces. For instance, in *Vriend v. Alberta,* the Court did not strike down Alberta's *Individual Rights Protection Act* after concluding that the failure to include sexual orientation violated the Charter's equality rights protections, but read sexual orientation into the offending section of the Act. In a related case, the Supreme Court suspended its judgment for six months in *M v. H.* to provide the Ontario legislature with the opportunity to respond to the decision.[41] *Vriend* is a controversial decision in the sense that sexual orientation was explicitly excluded as an enumerated category for equality rights protections by the framers of the Charter and, secondly, because there is arguably no consensus on what constitutes discrimination with respect to the treatment of gays and lesbians.[42]

---

38 *Thibault v. Corp. Professionel Médicins du Québec*, [1988] 1 S.C.R. 1033; *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1326; *Andrews v. Law Society (B.C.)*; and, *Black v. Law Society (Alberta)*, [1989] 1 S.C.R. 591.

39 Peter H. Russell, "Canadian Constraints on Judicialization from Without," *International Political Science Review* 15 (1994), 173.

40 Kelly, "The *Charter of Rights and Freedoms*," 646-47.

41 *Vriend v. Alberta*, [1998] 1 S.C.R. 493; and *M. v. H.*, [1999] 2 S.C.R. 3.

42 Morton and Knopff, *The Charter Revolution and the Court Party*, 43. For an alternative interpretation of *Vriend* see Donna Greschner, "The Right to Belong: The Promise of *Vriend*," *National Journal of Constitutional Law* 9 (1999), 417-40.

The implications of *Vriend* for Canadian federalism and provincial autonomy are profound, as this decision illustrates both the tension between rights and federalism and the question of local preferences over local affairs. In this sense, *Vriend* has been criticized as an example of pan-Canadian values threatening provincial autonomy and the distinct policy choices reflective of the values of provincial societies. The strong disagreement with the Supreme Court's decision in this case saw Alberta Premier Ralph Klein's government enter a debate over whether to use the notwithstanding clause to overrule the Court's decision and thus assert the primacy of provincial values.[43] In the end, it did not invoke the notwithstanding clause and it allowed the Court's decision to stand, despite opposition from rural Alberta and a significant number of Conservative government caucus members.[44]

More than simply highlighting these tensions, this decision illustrates the structural features of the Charter that allow a reconciliation between rights and federalism: section 33 and the Charter dialogue between government and society in Alberta. The debate over whether to invoke the notwithstanding clause allowed the government and the people of Alberta to discuss whether Charter review had undermined essential provincial values. In essence, the outcome was a rights discourse in Alberta that supported the extension of the provincial Act to include gays and lesbians, as the Klein government consulted different sectors of society before deciding how to react to the *Vriend* decision.[45]

Morton and Knopff conclude that the Court's decision narrowed the manoeuverability of the Klein government and required it to abandon its preference for the policy status quo.[46] As such, local preferences over local values were undermined by a pan-Canadian application of the Charter by the Supreme Court. However, the conclusion drawn by Morton and Knopff is debatable, as the extensive Charter dialogue engaged in by the Klein government, both within its caucus and with Albertans, suggests that had the Klein government used the notwithstanding clause, it would have been the Alberta government, and not the *Vriend* decision, that thwarted local preferences over local affairs. Indeed, a poll in the *Edmonton Journal* nearly a year after the *Vriend* decision demonstrates that local preferences had triumphed in this instance, as 76 per cent of Albertans supported the Court's decision and its extension of the *Individual rights Protection Act* to protect

---

43 Steve Chase, "Notwithstanding Clause: Klein Ponders Overruling Courts on Gay Rights," *Calgary Herald*, April 7, 1998, A1.

44 Brian Laghi, "Alberta to Let Court Ruling on Gay Rights to Stand," *Globe and Mail* (Toronto), April 10, 1998, A5.

45 Brian Laghi, "Debate on Gay Rights Polarizes Albertans," *Globe and Mail* (Toronto), April 2, 1998, A12.

46 Morton and Knopff, *The Charter Revolution and the Court Party*, 165-66.

gays and lesbians.[47] The *Vriend* decision and its outcome indicates that the relationship between rights and federalism is complex. The flexibility within the Charter and the rights discourse in response to Charter decisions can allow federal diversity despite the initial indication that pan-Canadian values undermined provincial autonomy.

The evident tension between Charter symbolism and the establishment of pan-Canadian standards for the centralization thesis is further revealed in *Eldridge v. British Columbia (A.G.)*,[48] where the Court found that the absence of sign-language interpreters for the hearing-impaired in the *Hospital Insurance Act* violated section 15(1) of the Charter. Manfredi and Antonia Maioni suggest that this case establishes a "Mega Canada Health Act" that constrains the autonomy of the provinces by establishing national standards in health care policy.[49] However, in terms of the substantive obligations placed on provincial governments, there is nothing within the Court's decision that requires British Columbia, or any other province, to provide translation services for the hearing-impaired because the Act stands, despite the section 15(1) violation. The Court did not nullify or judicially amend the offending sections of the *Hospital Insurance Act*, but simply determined the obligation on provincial governments to ensure equal access to health care for the hearing-impaired. Perhaps more importantly, this approach is consistent with Charter cases involving important areas of provincial jurisdiction such as education and health care policy. In these cases, the Court did not rule on the constitutionality of challenged legislation but simply placed an obligation on government to provide better protection for rights and freedoms. This pattern exists in *Mahé, Reference Re Public Schools Act (Manitoba)* and *Eldridge* and, thus, without effective mechanisms to ensure compliance, country-wide standards exist at the convenience of provincial governments.

In evaluating the centralization thesis between 1982 and 1999, this analysis has focused on Charter cases that have nullified provincial statutes and regulations. This is a departure from previous assessments that have included Aboriginal rights, as well as language and education guarantees protected in the *Constitution Act*, the *Manitoba Act* and the *Saskatchewan Act*.[50] Dividing the two types of rights-based litigation reveals that a significant amount of the evidence used to demonstrate centralization is not generated by the Charter establishing national standards in core provincial jurisdictions. Instead, consti-

---

47 *Edmonton Journal*, March 30, 1999, A1.

48 *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624.

49 Christopher P. Manfredi and Antonia Maioni, "Cure or Complication: Judicial Management of Health Care Policy in the Provinces," paper presented to the annual meeting of the Canadian Political Science Association, Ottawa, 1998.

50 Morton, "The Effects of the Charter of Rights on Canadian Federalism," 173-88.

tutional challenges in relation to the original language and education protection in the *Constitution Act*, the *Manitoba Act* and the *Saskatchewan Act*, represent a significant amount (6/27) of successful litigation between 1982 and 1999.[51]

These sections represent the original federal bargains at the time of Confederation and when other provinces entered Canada.[52] Indeed, if Charter victories lead to centralization by establishing country-wide standards in the provinces, then victories in non-Charter cases lead to a process of federalization because they reinforce the original understanding of language and education rights in Canadian federalism. It is clear that present legislative majorities failed to honour the constitutional rules established for minority-language education protection when provinces entered Confederation. Charter critics have concluded that this activism allows "the federal government to achieve, indirectly via sponsored litigation, policy outcomes that would otherwise be beyond its jurisdictional reach."[53] The context of this activism, however, redirects the analysis away from centralization towards federalization; the net effect has been to require provincial governments to legislate policy outcomes within their jurisdictional reach, as mandated by the *Constitution Act, 1867.*

In summary, the centralization thesis was developed in a period of sustained judicial activism, where the Court was disposed to support Charter challenges against legislation and the conduct of public officials.[54] The evidence in support of the centralization thesis does confirm the establishment of pan-Canadian standards, but only in minor areas of provincial responsibilities. Indeed, in core areas such as language and education, it is debatable whether the Charter has homogenized public policy and reduced federal diversity. The evidence is questionable because it does not separate the process of centralization from federalization; nor does it consider the importance of Charter dialogue to reconcile rights and federalism. As a result, the centralization thesis is not an accurate depiction of the Supreme Court of Canada's Charter review and its effect on Canadian federalism.

---

51 The number of non-Charter victories increases to eleven when the five successful Aboriginal rights cases involving nullifications are factored in. Thus, the empirical evidence for the centralization thesis is reduced from 27 to 16 cases when non-Charter victories are separated from Charter victories, significantly reducing the potential for national standards in provincial areas.

52 James Mallory, "The Continuing Evolution of Canadian Constitutionalism," in Cairns and Williams, eds., *Constitutionalism, Citizenship and Society*, 94.

53 Morton, "The Effect of the Charter of Rights on Canadian Federalism," 188.

54 F. L. Morton, Peter H. Russell and Troy Riddell, "The *Canadian Charter of Rights and Freedoms*: A Descriptive Analysis of the First Decade, 1982-1992," *National Journal of Constitutional Law* 5 (1994), 5.

3. Federalism, Rights and the Supreme Court of Canada

There are several trends in the 1982-1999 period that reduced the tension between federal diversity and the uniform application of rights in a liberal state. Perhaps most importantly, the focus of Charter review has shifted from primarily involving statutes and regulations in the 1982-1989 period towards the conduct of public officials after 1990. In addition to this changed focus by the Supreme Court of Canada, provincial statutes constitute an increasingly smaller proportion of successful Charter challenges.[55] This is significant because the declining proportion of provincial statutes nullified on Charter grounds greatly reduces the potential for the establishment of national standards in provincial jurisdictions.

There are also significant time lags between provincial nullifications that are not evident in federal statutes invalidated on Charter grounds. Federal statutes have been nullified in every year since 1984 except 1989 and 1996, whereas significant periods exist between each provincial nullification. Indeed, the time lag between the nullifications in the *B.C. Motor Vehicle Reference* and *Thibault* is three years (1985 to 1988), and a similar period exists between *Rocket* (1990) and *Reference Re Public Schools Act (Manitoba), 1993*. Further, over four years elapsed before the next provincial statute was nullified on Charter grounds in the *Reference Re Remuneration of Judges of the Provincial Court of P.E.I.*[56] in 1997. Morton and others emphasize that provincial nullifications result in country-wide standards and the homogenization of public policy at the provincial level. However, without a consistent basis of nullification and with extended periods when the Charter does not affect provincial autonomy, the centralization thesis comes to rest on few cases that take on the appearance of isolated incidents within judicial review. This suggests, therefore, that the centralization thesis does not accurately characterize the relationship between Charter review and federalism in the Canadian context, thus challenging the conclusion drawn by Martin Shapiro that high courts are "devices of centralized policy-making" in federal states.[57]

---

55 Kelly, "The *Charter of Rights and Freedoms*," 654-55.

56 *Reference Re Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 S.C.R. 4.

57 Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 20.

A Three-Part Federalism Jurisprudence by the Supreme Court of Canada

The relationship between Charter review and Canadian federalism is complex, and it is most clearly evident in the federalism jurisprudence by the Supreme Court of Canada that has reduced much of the tension between federalism and rights in Canada. The first dimension is federalism as a gatekeeper, where the Court uses the division of powers to dispose of Charter challenges against provincial statutes.[58] Secondly, there is an explicit federalism jurisprudence, where 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. Finally, there exists an implicit federalism jurisprudence because of the hidden relationship between federalism and legal rights in Canada. Indeed, the implicit federalism discourse is hidden within the Court's legal rights jurisprudence and escapes notice because criminal law is a federal responsibility—thus giving the illusion that a large element of the Court's Charter jurisprudence avoids the question of provincial autonomy. The *Constitution Act, 1867* gives the federal government responsibility for criminal law and procedure, yet it assigns the provinces responsibility for the administration of justice. In effect, criminal policy in Canada is a concurrent jurisdiction in the guise of a divided responsibility between the two levels of government. The broader question that follows from this relationship is whether the Supreme Court's focus on legal rights has established pan-Canadian standards in the administration of justice at the provincial level. At the time of writing, this scenario has not unfolded because the Court has largely refused to place substantive constitutional obligations on provincial governments in situations where the Court has supported the Charter claimant in legal rights cases.

This implicit federalism jurisprudence also includes decisions where the Court upholds the constitutionality of challenged provincial statutes. Indeed, if provincial nullifications reduce diversity, then it seems appropriate to suggest that judicial validation of provincial statutes advances diversity and strengthens provincial autonomy. While the Court does not articulate the upholding of provincial statutes as an exercise that advances federalism, this is the outcome of such an exercise. Several important provincial statutes and responsibilities survived Charter scrutiny, such as section 13(1) of the *Official Languages Act of New Brunswick Act* in *Société des Acadiens*[59] which involved the use of English or French in court proceedings. Further,

---

58 Swinton, *The Supreme Court and Canadian Federalism*, 342-43.

59 *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549.

the Court upheld as constitutional the creation of linguistic school boards in Quebec in *Reference Re Public Education Act (Quebec)* and a section of Ontario's *Education Act* dealing with special education for disabled children in *Eaton v. Brant County Board of Education*. As well, the Court concluded that the right to vote was not infringed in *Reference Re Provincial Electoral Boundaries (Sask.)*, despite the discrepancies in size between urban and rural ridings, as well as the *Elections Finances Act (Manitoba)* in *McKay v. Manitoba*. Other important provincial and territorial statutes upheld by the Court include the *Child Welfare Act (Ontario)*, the *Public Service Act (NWT)*, the *Public Service Employee Relations Act (Alberta)*, the *Worker's Compensation Act (Nfld.)* and the *Highway Traffic Act (Ontario)*.

Federalism as Gatekeeper

The Court has used this strategy in five cases to dispose of Charter challenges and to uphold provincial autonomy in the process. Perhaps more importantly, a majority of cases (3/5) where the Court has employed this strategy have involved a vital area of provincial jurisdiction, education policy. For instance, in *Reference Re Bill 30, An Act to Amend the Education Act (Ontario)*, the Court considered whether the Ontario government's decision to extend full funding for Catholic schools was consistent with denominational school rights protected in section 93 of the *Constitution Act, 1867*. Further, the Supreme Court of Canada considered whether Bill 30 was subject to Charter review through freedom of religion (s.2[a]) and equality rights (s.15). The Court dismissed both questions and upheld the constitutionality of full funding for Catholic education by emphasizing that the Charter could not be used to undermine existing constitutional protections. Justice Estey's judgment was clearest on this point, and illustrates federalism as gatekeeper in the Court's Charter jurisprudence. Justice Estey based his decision on the equal status of constitutional documents, thus rejecting a hierarchical relationship between the Charter and the *Constitution Act*, where the Charter could be used to invalidate constitutional protections that existed before 1982.[60] In this sense, the Supreme Court has considered the Charter as part of the constitutional system that must co-exist with the division of powers. In doing so, it has preserved diversity in one of the most important areas of provincial jurisdiction and reduced the centralizing potential of the Charter as a result.

This important strategy continued in *Ontario Home Builders' Association v. York Regional Board of Education*, where the creation of a common educational development fund was challenged as preju-

60 *Reference Re Bill 30, An Act to Amend the Education Act (Ontario)*, [1987] 1 S.C.R. 1149 at 1207 (Estey).

TABLE 2

Three Dimensions of the Supreme Court of Canada's Federalism Jurisprudence, 1982-1999 (43 Cases)

Case	Right	Result	Significance
1. Federalism as Gatekeeper			
1. *Ref. Re Bill 30, An Act to Amend the Education Act (Ont)*	ss.2(a), 15(1) s. 29	Loss	Charter cannot be used to alter denominational school rights in *Constitution Act, 1867*
2. *New Brunswick Broadcasting Co. v. Nova Scotia*	ss.2(b), 32(1)	Loss	Charter does not apply to "inherent privileges" of members of Legislatures
3. *Haig v. Canada*	ss.3, 2(b) s.15(1)	Loss	The federal *Referendum Act* cannot apply to disenfranchised voters in Quebec Referendum
4. *Ontario Home Builders' Association v. York Regional Board of Education*	s.93(1) ss.2(a), 15(1)	Loss	S.93(1) is immune from Charter challenges
5. *Addler v. Ontario*	s.93(1), ss.2(a), 15(1)	Loss	Non-funding of Jewish schools is constitutional and immune from Charter challenges
2. Explicit Federalism Jurisprudence			
6. *R. v. Jones*	ss.2(a), 7	Loss	Provinces must possess adequate discretion in education policy
7. *R. v. Edwards Books and Art Ltd.*	ss.2(a),7 15(1)	Loss	Common day of rest a reasonable limitation on freedom of religion
8. *R. v. Lyons*	ss.7, 9	Loss	Provincial variation in the application of the *Criminal Code* desirable in a federal country
9. *R. v. Turpin*	s.11(f), 15(1)	Loss	Provincial variation in trial procedures consistent with protected rights and freedoms
10. *R. v. S.(S.)*	s.15(1)	Loss	Differential applications of federal laws by the provinces advance diversity

11. *R. v. Askov*	s.11(d)	Win	Four part *Askov* test designed to allow flexibility in the administration of justice. See *Morin*
12. *McKinney v. University of Guelph*	s.15(1)	Loss	Mandatory retirement policies are a reasonable limitation on s.15(1)
13. *Stoffman v. Vancouver General Hospital*	s.15(1)	Loss	See *McKinney*
14. *Haig v. Canada*	ss.2(b), 3, 15(1)	Loss	Provincial differences do not automatically cause a presumption of discrimination
3. Implicit Federalism Jurisprudence			
15. *R. v. Morgentaler*	s.7	Win	Nullification of Criminal Code sections facilitates diversity in providing abortion services
16. *R. v. Brydges*	ss.10(b), 24(2)	Win	Access to free duty counsel determined by what exists in each separate province
17. *R. v. Morin*	s.11(d)	Loss	*Askov* test redesigned to place primary emphasis on prejudice experienced by the accused
18. *R. V. Bartle*	ss.10(b), 24(2)	Win	Information component of s.10(b) based on on preliminary legal counsel available in province
19. *R. v. Prosper*	ss.10(b), 24(2)	Win	No constitutional obligation to provide free and immediate legal advice under S. 10(b)
20. *R. v. Pozniak*	ss.10(b), 24(2)	Win	See *Bartle*
21. *R. v. Matheson*	ss.10(b), 24(2)	Loss	Absence of 24-hour duty counsel in in PEI cannot result in s.10(b) violation
22. *R. v. Cobham*	ss.10(b), 24(2)	Win	See *Bartle*
23. *R. v. Latimer*	ss.9, 10(a)(b)	Loss	Absence of a toll-free number for duty counsel in Sask. not a s.10(b) violation

3.1. Provincial statutes found to be constitutional

24. *Société des Acadiens v. Association of Parents*	ss. 14, 16, 19, ss.20, 27	Loss	S.19 Charter rights have the same scope as s.133 of *Constitution Act, 1867*
25. *Reference Re Public Service Employees Relations Act (Alta)*	s.2(d)	Loss	Right to strike not protected by freedom of association
26. *RWDSU v. Saskatchewan*	s.2(d)	Loss	See *Public Service Employees Relations Act*
27. *R. v. Hufsky*	s.9	Loss	Random roadside checks a reasonable limitation
28. *Ref. Re Workers' Compensation Act*	s.15(1)	Loss	Workers not an analogous ground covered by s.15(1)
29. *McKay v. Manitoba*	s.2(b)	Loss	Act does not prohibit political expression
30. *R. v. Ladouceur*	ss.7, 8, 9	Loss	See *Hufsky*
31. *PIPS v. North West Territories*	s.2(d)	Loss	Collective bargaining is not protected by section 2(d)
32. *Lavigne v. OPSEU*	s.2(d)	Loss	Mandatory check off dues infringe s.2(d) but are a reasonable limitation
33. *Ref. Re Provincial Electoral Boundaries*	s.3	Loss	Discrepancies between ridings justified by community and geographic interests
34. *R. v. Goltz*	s.12	Loss	Mandatory minimum licence suspension not cruel and unusual punishment
35. *Ref. Re Public Education Act (PQ)*	s.93(1)	Loss	Linguistic school boards do not prejudicially affect denominational school rights
36. *R. v. Colarusso*	s.8	Loss	Blood sample seizure under the *Coroners Act* does not undermine s.8
37. *Comité Paritaire de l'industrie de la Chemise v. Potash*	s.8	Loss	Power of inspection in the Act consistent with s.8

38. *B.(R.) v. Children's Aid Society*	ss.2(b), 7	Loss	Temporarily suspending parents' ability to choose medical treatment for child does not violate freedom of religion or the principles of fundamental justice
39. *B.C. Securities Commission v. Branch*	s.7	Loss	Compelling company officers to testify and produce documents consistent with s.7
40. *Walker v. PEI*	ss.2(b),6,7	Loss	Provincial restriction on public accountants from outside province constitutional
41. *Ruffo v. Conseil De La Magistrature*	s.7	Loss	Chief Justice's ability to file complaint against judge does not compromise s.7 or judicial independence
42. *Harvey v. New Brunswick*	ss.3,12	Loss	Expelling sitting member for election violation upheld as a reasonable limitation
43. *Easton v. Brant County Board of Education*	*s.*15(1)	Loss	Tribunal determining that the best interest of disabled child is in special education constitutional without parental consent

dicially affecting denominational school rights in Ontario and, thus, contrary to section 93(1) of the *Constitution Act, 1867*. Further, the common fund was argued to infringe the Charter's guarantee of freedom of religion (s.2[a]) and equality rights protected in section 15(1). In a unanimous decision, the Court disposed of the constitutional challenge solely on the section 93(1) issue, as Justice Iacobucci ruled that the common fund did not prejudicially affect denominational school rights because the public and separate school boards had equal access to the funds generated by the Educational Development Charges. However, the most significant aspect of this decision for provincial autonomy, and evidence of the Court using federalism as a gatekeeper, is found in Justice Iacobucci's justification for not addressing the Charter issues raised in the appeal, that is, because the Court framed the constitutional issue as falling within the scope of section 93(1), the legislation in question was "immune from Charter scrutiny."[61] In essence, the original federal bargain of 1867 protected Ontario's *Education Act* from Charter review—and the policy discretion of all provincial governments in a core area of their jurisdiction. Similarly, in *Addler v. Ontario* the Court dismissed an attempt by Jewish organizations to expand the meaning of denominational school rights in section 93(1) to include public funding for Jewish schools. The Court did not accept that the denial of funding violated either the Charter's equality rights protections or freedom of religion because "given that the appellants cannot bring themselves within the terms of s.93 guarantees, they have no claim to public funding for their schools."[62]

An additional example of the Court using federalism as a gatekeeper is *New Brunswick Broadcasting Company v. Nova Scotia*,[63] in which the decision by the Speaker to ban televised proceedings of the House of Assembly was challenged as a violation of freedom of expression (s.2b). The Court rejected this submission and dismissed the Charter challenge by concluding that the inherent privileges of members of the Legislative Assembly were protected by the preamble in the *Constitution Act, 1867*, which states that Canada would have a constitution similar in principle to that of the United Kingdom. The federalism dimension of this case is not important, as it allows provincial legislatures to determine whether or not to televise legislative proceedings. However, the case is important in that it reveals that federalism as a gatekeeper exhibits two distinct dimensions that can advance provincial autonomy. First, the written constitution and the division of powers as a gatekeeper strategy in Bill 30, *Ontario Builders' Associa-*

---

61 *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929 at 941 (Iacobucci).

62 *Addler v. Ontario*, [1996] 3 S.C.R. 609 at 642 (Iacobucci).

63 *New Brunswick Broadcasting Company v. Nova Scotia*, [1993] 1 S.C.R. 319.

tion and *Addler*, and, second, the unwritten constitution and the importance of conventions in *New Brunswick Broadcasting Company* to repel Charter challenges. While this particular federalism jurisprudence by the Supreme Court has been employed in a limited number of cases, it is potentially the most expansive of all the federalism jurisprudences because it allows both the written and the unwritten elements of the constitution to protect provincial autonomy and to marginalize the centralizing elements of the Canadian Charter of Rights and Freedoms.

An Explicit Federalism Jurisprudence

The ability of the provinces to approach similar problems differently has informed the Court's federalism discourse from 1982 to 1999. In *R. v. Jones*, the appellant contended that section 142(1) of the *Alberta School Act*, which required that home instructors hold a certificate of efficient instruction issued by the local school board, infringed both freedom of religion (s.2[a]) and the principles of fundamental justice (s.7). In this decision, a majority of justices found that section 142(1) infringed freedom of religion but represented a reasonable limitation on this protected right. The significance of this decision for provincial autonomy, however, is found in Justice Laforest's analysis of the relationship between section 142(1) and the principles of fundamental justice in which he stated that the provinces must be provided with sufficient flexibility in choosing administrative structures to advance their distinctive policy objectives. Indeed, Justice Laforest contended that provincial policies would be consistent with section 7 as long as legislative schemes were not so manifestly unfair as to undermine the principles of fundamental justice.[64] Thus, the Court articulated several important principles in this decision that informed its federalism jurisprudence: first, that it is reasonable and legitimate for the provinces to approach shared policy problems differently and, secondly, that flexibility must be accorded to the provinces in structuring their responses in different social contexts.

These principles clearly emerged in *R. v. Edwards Books and Art Ltd.*, where the Court considered whether mandatory Sunday closings in the *Retail Business Holiday Act (Ontario)* infringed freedom of religion (s.2[a]), right to liberty (s.7) and equality rights (s.15) of Saturday sabbatarians. The majority judgments (4/7) by Chief Justice Dickson and Justice Laforest concluded that the Act had infringed freedom of religion, but this was simply the effect of the Act, as the purpose was to create a common day of rest. In concluding that the infringement on freedom of religion was reasonable through section 1 of the

64 *R. v. Jones*,[1986] 2 S.C.R. 285 at 304 (Laforest).

Charter, the majority judgment adopted a flexible approach to this issue by engaging in a comparative assessment of Sunday closing policies in Canada. In particular, both Dickson and Laforest analyzed various provincial regulations intended to create a common day of rest, and refrained from establishing a uniform standard that must be met to satisfy the reasonable limits clause (s.1). Instead, the Court allowed a range of different provincial responses to satisfy section 1, illustrated most clearly by Justice Laforest's comparative analysis of provincial legislation: "the simple fact is that what may work effectively in one province (or part of it) may simply not work in another without unduly interfering with the legislative scheme. And a compromise adopted at a particular time may not be possible at another. . . . "[65] In both *Jones* and *Edwards Books*, the Court demonstrated sensitivity to the different social contexts that structured provincial policies, and in doing so, advanced an explicit federalist jurisprudence that acknowledged diversity and protected provincial autonomy.

Charter challenges in *R. v. S.(S.), R. v. Turpin* and *R. v. Lyons* involved the different application of federal statutes by the provinces in the Criminal Code and the *Young Offenders Act (YOA)*, of which *R. v. S.(S.)* is the most important for its explicit statement on federal diversity and Charter review.[66] In *R. v. S.(S.)*, sections of the federal *YOA* that allowed provinces to design alternative measures to trial procedures when dealing with young offenders were challenged as a violation of equality rights because Ontario had failed to establish alternative measures, thus causing variation in the treatment of young offenders by the provinces.[67] In a unanimous judgment, Justice Lamer offered an analysis of the relationship between federal diversity and judicial review that the Charter ushered in, particularly regarding equality rights:

> Obviously, the federal system of governance demands that the values underlying s.15(1) cannot be given unlimited scope. The division of powers not only permits differential treatment based on province of residence, it mandates and encourages geographic distinction. There can be no question, then, that unequal treatment which stems solely from the exercise, by provincial legislatures, of their legitimate jurisdictional powers cannot be subject to a s.15(1) challenge on the basis that it creates distinctions based on province of residence. . . . To find otherwise would be to completely undermine the value of diversity which is at the foundation of the division of powers.[68]

---

65 *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 802 (Laforest).

66 For similar analysis of these cases, see Hiebert, *Limiting Rights*, 133-34.

67 *R. v. S.(S.)*,[1990] 2 S.C.R. 254 at 255-56.

68 Ibid., 288 (Lamer).

Justice Lamer concluded that there was no Charter violation because "it is necessary to bear in mind that differential application of federal law can be a legitimate means of forwarding the values of a federal system."[69] The principles of Charter review that developed from these cases are significant because the issues clearly illustrate the tension between uniformity and diversity that is at the heart of the rights and federalism debate in Canada. By accepting provincial variation in the application of federal laws, the Court did a great service to provincial autonomy and federal diversity. Specifically, the Court recognized the tension between competing notions of community and attempted to balance them in a federalist jurisprudence designed to minimize the centralizing potential of Charter review.

These principles were further expanded in two cases in 1990 that challenged mandatory retirement policies in universities and hospitals as age-based discrimination, and thus inconsistent with equality rights protections in section 15(1) of the Charter. In both *McKinney v. University of Guelph*[70] and *Stoffman v. Vancouver General Hospital*,[71] the Court found that if the Charter applied to hospitals and universities, mandatory retirement provisions would violate section 15(1) but would be saved by section 1 of the Charter.[72] In addition to the constitutionality of mandatory retirement policies in *McKinney*, section 9(a) of the *Human Rights Code* was also challenged because it limited protection against age-based discrimination to those less than 65 years of age. The majority decision (5/7) written by Justice Laforest accepted that section 9(a) of the *Human Rights Code* was a reasonable limitation on equality rights because the province had attempted to balance complex interests in the legislation by attempting to address youth unemployment through mandatory retirement policies.

The most poignant illustration of this explicit federalist jurisprudence is captured in Justice Laforest's analysis of different human rights codes at the provincial level: "the fact that other jurisdictions have taken a different view proves only that the legislature there adopted a different balance to a complex set of competing values."[73] Further, his justification for the reasonableness of the infringement is identical to his judgment in *Edwards Books*, where he argued for the majority opinion, the reality and necessity of policy variation in a federal system. By upholding diverse provincial responses to a shared policy problem, the Court advanced federal diversity by sanctioning differ-

---

69 Ibid., 289 (Lamer).

70 *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

71 *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483.

72 In *McKinney*, only Justice Wilson found that mandatory retirement policies did not constitute a reasonable limitation on section 15(1).

73 *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 314 (Laforest).

ence as an acceptable principle in Charter review related to provincial legislation.

The Court's most explicit statement on the value of diversity in a federal system and the importance of provincial autonomy occurred in *Haig v. Canada*, three years after the Court upheld provincial mandatory retirement policies.[74] At issue in *Haig* was the federal *Referendum Act* enacted for the Charlottetown Accord and whether the inability of the Act to accommodate disenfranchised voters in the Quebec referendum violated the right to vote (s.3), freedom of expression (s.2b) and equality rights (s.15). *Haig* is an interesting case because the Court combined two dimensions of its federalist jurisprudence to illustrate the constitutionality of the *Referendum Act*, and to prevent its application to disenfranchised voters in Quebec: federalism as gatekeeper and an explicit statement on federal diversity. The majority decision (7/9) written by Justice L'Heureux-Dubé relied heavily on the institutional requirements of a federal system to overturn the challenge to the Act. For instance, Justice L'Heureux-Dubé concluded that allowing the participation of those who had resided in Quebec for less than six months in the federal referendum would "require enumerators to operate extraterritorially in a province for which no federal referendum writ was issued."[75] The Court recognized that this would violate the jurisdictional integrity of Quebec and be inconsistent with the federal character of Canada.[76]

The Court dismissed the Charter challenges against the federal *Referendum Act* by concluding that the right to vote was not violated because it pertained to elections and did not extend to referendums, nor was freedom of expression violated because the federal referendum did not take place in Quebec. Finally, the Court found that section 15(1) was not breached because individuals who did not qualify as Quebec residents could not be considered analogous to the Charter's enumerated equality protections.[77] In dispensing the section 15(1) challenge against the Act, the Court expanded the approach developed in *Lyons* and *Turpin* that federal legislation did not have to be uniformly applied to the provinces to be consistent with section 15(1). The Court concluded that different provincial approaches to similar policy problems could not be a basis for discrimination: "clearly, in a federal system, province-based distinctions do not automatically give rise to a presumption of discrimination. Section 15(1) of the Charter,

---

74 *Haig v. Canada*, [1993] 2 S.C.R. 995.
75 Ibid., 1023 (L'Heureux-Dubé).
76 Ibid., 1024 (L'Heureux-Dubé).
77 Ibid., 1044 (L'Heureux-Dubé).

while prohibiting discrimination, does not alter the division of powers between governments."[78]

The Court's decision in *R. v. Askov* articulated a clear federalist jurisprudence in the test created by Justice Cory for section 11(b), the right to a trial within a reasonable time.[79] The lower courts never applied the complex test developed by Justice Cory but instead focused on the six to eight month rule for an acceptable delay which, paradoxically, lead to uniformity in the administration of justice by the provinces.[80] However, an analysis of *Askov* and the federal implications established in this decision must include a discussion of *R. v. Morin*.[81] In *Morin*, the Court restructured the *Askov* test to place primary importance on the accused demonstrating that the prejudice experienced by the delay, and not the length of the delay, had resulted in the section 11(b) breach.[82] Since the *Morin* decision the average length of delay upheld by the Supreme Court as reasonable has been 17 months, nearly three times the period suggested by Justice Cory as reasonable. The evolution of the *Askov* test does not explicitly speak to federalism, but the practical effect of this shift has been to provide provincial governments with greater flexibility in prosecuting criminals in a policy environment more respectful of provincial finances. As the emphasis of section 11(b) shifted from the length of delay to the effect of the delay on the accused, the pressure on provincial governments with inelastic budgets to meet the demands created as a result of *Askov*, that resulted in uniformity in the trial process, decreased. In this sense, the Court's restructuring of the *Askov* test in *Morin* has allowed the original intention of Justice Cory's test to emerge but through an implicit federalism jurisprudence.

An Implicit Federalism Jurisprudence

Christopher Manfredi and Ian Urquhart identified an early example of this type of the Court's federalist jurisprudence in *R. v. Morgentaler*,[83] where the consequence of striking down sections of the Criminal Code regulating abortion services was to facilitate greater policy diversity

78 Ibid., 1046 (L'Heureux-Dubé).

79 *R. v. Askov*, [1990] 2 S.C.R. 1199 at 1224 (Cory). The four-part test to determine whether a trial had been held within a reasonable time balanced the following factors: the length of the trial delay, the reasons for the delay, whether the accused waived his rights and the level of prejudice experienced by the accused as a result of the delay.

80 Christopher P. Manfredi, *Judicial Power and the Charter* (Toronto: McClelland and Stewart, 1993), 111.

81 *R. v. Morin*, [1992] 1 S.C.R. 771.

82 Ibid., 803 (Sopinka).

83 *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

because the provinces were able to determine the level of services in the absence of a national abortion policy.[84] There is, however, a more implicit, or hidden, federalism jurisprudence involving the conduct of public officials. One of the ironies here is that a Charter claimant can win against the conduct of public officials and advance an implicit federalism discourse at the same time.

What emerges from an analysis of the Court's approach to legal rights are constitutional standards that the police must comply with during criminal investigations and, for the most part, an absence of substantive obligations on provincial governments in the administration of justice.[85] This facilitates provincial variation in the administration of justice, or an asymmetrical application of legal rights, because many of the constitutional obligations placed on the police by the Supreme Court do not establish national standards because the constitutional obligations are directly related to the services in each province. In essence, the Court has allowed the provinces to retain paramountcy in criminal policy that is concerned with the administration of justice, but has given the federal government paramountcy in the area of criminal procedure. The Court's approach to criminal policy, where it has layered paramountcy in this functionally concurrent power, explains how a Charter victory against the conduct of public officials can also advance an implicit federalist jurisprudence.

In a number of cases involving the informational component of section 10(b) of the Charter, the right to retain and instruct counsel without delay, the Court has established standards that the police must comply with when an individual is taken into custody. In *R. v. Brydges,*, the Court ruled unanimously that failure to inform the accused of legal aid resources in Manitoba violated section 10(b). The effect of this decision was to require the police in all jurisdictions to update the information component of section 10(b) to include reference to legal aid services available to those who cannot afford a lawyer.[86] However, the Court advanced an implicit federalist jurisprudence in this decision because it accepted that the information component of section 10(b) was determined by what legal aid services existed in specific jurisdictions. Moreover, the Court recognized and accepted that provincial variation existed in legal aid plans and, thus, the outcome in *Brydges* did not set a country-wide standard in the provision of legal

---

84 Manfredi, *Judicial Power and the Charter*, 119, 163; and Ian T. Urquhart, "Federalism, Ideology, and Charter Review: Alberta's Response to *Morgentaler*," *Canadian Journal of Law and Society* 4 (1989), 160-61.

85 The exception to this statement would be *R. v. Feeney*, where provincial warrants requirements were affected by the Court's ruling.

86 *R. v. Brydges*, [1990] 1 S.C.R. 190 at 216-17 (Lamer for the Court).

aid plans but simply placed a procedural requirement on the police under section 10(b) to inform of existing services.[87]

The principle that the police must inform detainees of the availability of specific legal aid resources as part of section 10(b) informed the Court's decision in *R. v. Wozniak, R. v. Bartle* and *R. v. Cobham*, of which *Wozniak* is representative of this set of cases.[88] In *Wozniak*, Ontario had established a toll-free number that detainees could use outside normal working hours to access free legal advice. The police informed the accused of the availability of legal aid in Ontario but did not refer to the toll-free number, an inaction which the Court concluded had violated section 10(b).[89] The outcome of *Wozniak* was to expand the information component of section 10(b) to include "whatever system for free and immediate, preliminary legal advice exists in the jurisdiction at the time of detention and how such advice can be accessed."[90] Similar to *Brydges*, the win for the Charter claimant contained an implicit federalism jurisprudence because the Court structured the content of section 10(b) to reflect the legal aid plan in existence in specific jurisdictions. Because Ontario had established a toll-free number, the police were obligated to include reference to this when dispensing their section 10(b) requirements. However, the support for the Charter claimant in this case did not lead to conformity in provincial legal aid plans, because the provinces were not required to establish toll-free numbers outside of normal working hours for free legal advice.

The ability of the provinces to determine independently the content of legal aid plans and, thus, the right to counsel, was clarified in *R. v. Prosper*, where the Court denied that a substantive constitutional obligation on the provinces to provide free and immediate preliminary legal advice existed under section 10(b).[91] The majority decision (5/4) did not impose a constitutional obligation on the provinces because of, in part, the financial burden that such an obligation would place on provincial governments: "the fact that such an obligation would almost certainly interfere with governments' allocation of limited resources by requiring them to expend public funds on the provision of a service is, I might add, a further consideration which weighs against this interpretation."[92] In this case, Chief Justice Lamer commented that "an effective duty counsel does not need to be an elaborate one.

---

87 Ibid., 212 (Lamer).

88 *R. v. Bartle*, [1994] 3 S.C.R. 173; *R. v. Wozniak*, [1994] 3 S.C.R. 310; and, *R. v. Cobham*, [1994] 3 S.C.R. 360.

89 *R. v. Wozniak*, [1994] 3 S.C.R. 310 at 319 (Lamer).

90 Ibid., 319 (Lamer).

91 *R. v. Prosper*, [1994] 3 S.C.R. 236.

92 Ibid., 267 (Lamer).

For instance, it need not consist of anything more than a basic service accessed by dialing a 1-800 number."[93] However, the content and the existence of a duty counsel system were left to the discretion of provincials governments, despite the Court's support for the Charter claimants in *Wozniak, Bartle, Prosper* and *Cobham*.

The Court addressed whether the absence of a system of duty counsel undermined section 10(b) in *R. v. Matheson* and *R. v. Latimer*.[94] Consistent with its approach in *Wozniak* et al., it concluded that the information component was determined by the services in each province. In *Matheson*, the Court addressed whether the absence of a system of duty counsel in Prince Edward Island violated section 10(b), whereas in *Latimer,* the absence of a 24-hour toll free number to access free duty counsel informed the section 10(b) issue before the Court. Chief Justice Lamer concluded in *Latimer*: "the proposition which emerges from these cases is that the nature of the information provided pursuant to s.10b depends on the actual services available in a jurisdiction."[95] In each case, the Court found that section 10(b) was not infringed because the police had properly dispensed the information component of section 10(b) as it existed in Saskatchewan and Prince Edward Island. The Court's approach to section 10(b) is significant, because it recognizes that provincial variation in the provision of legal aid exists, and such services are at the discretion of provincial governments and are not constitutionally mandated. While the Court did establish a constitutional obligation on the police to inform detainees of the availability of legal aid resources, the content of this component could vary across provinces. By approaching Charter review in legal rights cases in such a fashion, the Court has advanced an implicit federalist jurisprudence because provincial autonomy in the administration of justice has not been compromised by Charter victories in section 10(b) cases.

Conclusion

Much has been attributed to the Canadian Charter of Rights and Freedoms as Pierre Elliott Trudeau's apparent masterstroke for subordinating the provinces to Canadian values and centralizing the federation. In the beginning, the assumptions of the centralization thesis appeared sound, as this was the prime minister who introduced the National Energy Program, aggressively used the spending power to ensure that Ottawa's priorities in health and education were attained and passed

93 Ibid., 265 (Lamer).
94 *R. v. Matheson*, [1994] 3 S.C.R. 328; *R. v. Latimer,* [1997] 1 S.C.R. 217.
95 *R. v. Latimer,* [1997] 1 S.C.R. 217 at 236-37 (Lamer).

the *Canada Health Act* in 1983 to withhold transfer payments to provinces who charged user-fees for health services. This was also the prime minister who threatened unilateral patriation of the constitution and, finally, patriated the constitution without the consent of Quebec. In essence, the Canadian Charter of Rights and Freedoms emerged during a sustained period of an assertive federal government in which the Trudeau government attempted to address the decentralist tendencies of the Canadian federation through a mixture of constitutional change and an assertive use of the federal spending power.

This article questioned both the normative and the empirical foundations of the centralization thesis, and the necessity of multiple charters in Canada as a way to reconcile rights and federalism, and, thus, supports Pierre Elliott Trudeau's analysis of the relationship between the Charter and Canadian federalism: "People use the term 'centralization' in an ambiguous way, collapsing the Charter's national unity function into it. The Charter was not intended to subordinate the provinces to the federal government through judicial interpretation of the document, but to act as an instrument of national unity by highlighting what Canadians have in common, not by limiting how the provinces could act."[96] In essence, the centralization thesis is not an accurate characterization of the relationship between Charter review and federal diversity, as the number of cases where the Court has nullified provincial statutes are few and far between, and, more importantly, the nullifications have not taken place in core areas of provincial responsibilities. A reconciliation between rights and federalism has been an enduring feature of Charter review by the Supreme Court of Canada since the introduction of the document in 1982. It was argued that the compatibility between rights and federalism occurred despite a pan-Canadian application of the Charter, thus questioning the suggestion by Cairns, Schneiderman and Laforest that such a scenario would be destructive to provincial autonomy. The compatibility between pan-Canadian rights and provincial autonomy is largely a result of the complexity of the Charter as a document and the presence of important clauses within the text that allow federal diversity and pan-Canadian rights to co-exist without significantly affecting the federal character of Canada. In many regards, the particular structure of the Charter, such as the reasonable limits clause (s.1), the notwithstanding clause (s.33) and minority-language education rights (s.23) can advance provincial autonomy by allowing an asymmetrical application of pan-Canadian rights and freedoms. This occurs in those situations where legislatures succeed in justifying the limitations as necessary to

96 Interview with the Right Honourable Pierre Elliott Trudeau, P.C., Q.C., Montreal, September 5, 1997.

advance important features of provincial societies, or simply pass resolutions upholding invalidated statutes notwithstanding the judgment of the courts.

In contrast to the element of provincial frailty associated with the centralization thesis is the presence of a robust federalism jurisprudence that has facilitated provincial diversity in mandatory retirement policies at the provincial level in *McKinney* and *Stoffman*. Further, the Court has sided with the provinces in a number of important cases dealing with changes to the educational system, such as *Reference Re Public Education Act, (PQ)* and *Eaton*. The complexity of this federalist jurisprudence and its acceptance of diversity in important areas of provincial jurisdiction balances the establishment of national standards in provincial responsibilities and has allowed a reconciliation between rights and federalism in Canada. Thus the normative assumptions of the centralization thesis are questionable in light of the Court's approach to Charter review.