

## **In the Case of *Federalism v. Charter*: The Processes and Outcomes of a Federalist Dialogue**

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[See table of contents](#)

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Article abstract

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***In the Case of Federalism v. Charter:  
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**Abstract**

*The Charter of Rights has long been criticized for the supposed failure of its processes and outcomes to comply with Canadian federalism. This paper challenges those suppositions. The examination of five Supreme Court cases [Ford (1988); Lavigne (1991); Advance Cutting (2001a); Dunmore (2001b); and Solski (2005a)] through the lens of a “federalist dialogue” reveals a process of Charter interpretation in which provinces, far from being excluded, actually play a central role. Furthermore, this dialogue has the potential to generate an outcome—Charter-federalism—that is consistent with Canada’s moral foundations.*

**Résumé**

*On reproche depuis longtemps à la Charte des droits la présumée impossibilité de rendre ses processus et ses résultats conformes au fédéralisme canadien. Ce document conteste ces suppositions. L’examen de cinq arrêts de la Cour suprême (Ford (1988), Lavigne (1990), Advance Cutting (2001a), Dunmore (2001b) et Solski (2005s)) sous l’angle d’un « dialogue fédéraliste » révèle un processus d’interprétation de la Charte dans lequel les provinces, loin d’être exclues, jouent un rôle central. En outre, ce dialogue peut produire un résultat — le fédéralisme axé sur la Charte — qui est conforme aux bases morales du Canada.*

**Introduction**

For twenty-five years, scholars and governments have predicted that the *Charter of Rights* would run roughshod over provincial diversity. Yet the Supreme Court’s interpretation of the *Charter’s* pan-Canadian values seems to have exhibited considerable sensitivity to federalism (Kelly 2001; 2005). To help explain this jurisprudence, I have described a “federalist dialogue” (Clarke 2006), occurring alongside its better known “democratic” counterpart (Hogg and Bushell 1997; Roach 2001). According to this federalist dialogue, the Supreme Court’s federalism jurisprudence can be considered a “response” to provinces’ own *Charter* interpretation. A survey of provincial arguments (factums) in *Charter* cases reveals that provinces often couch defences of their policy in appeals to federalism. A subsequent reading of Supreme Court decisions reveals

enough consistency to conclude that provinces have exerted considerable influence over the Court's *Charter* interpretation, helping to shape its federalism jurisprudence.

This paper proceeds in the same framework. But where the earlier inquiry was merely descriptive (Do provinces ground their arguments in the language of federalism? Does the Court respond?), this paper contemplates the wider significance of the federalist dialogue. Specifically, it considers the capacity of this dialogue to address concerns that the *outcomes* and *processes* of *Charter* interpretation are poorly suited, even inimical to Canadian federalism. The paper begins with an account of these critiques and the suggestion that considerable gaps in our understanding persist. The paper then proceeds with two separate discussions of *Charter* litigation through the lens of the federalist dialogue.

The first discussion involves three related cases: *Lavigne* (1991), *Advance Cutting* (2001a), and *Dunmore* (2001b). Alone, each case revolved around a section 2(d) (freedom of association) challenge to provincial labour relations policy. Taken together, however, they provide compelling evidence of an ongoing dialogue about federalism and section 1 of the *Charter*, in addition to allowing provinces to place limits on pan-Canadian *Charter* rights, but it allows them to place *different* limits on those rights. The second discussion involves two cases [*Ford* (1988); and *Solski* (2005a)] that appear unrelated, but are united by provincial differences that extend beyond the limitation of *Charter* rights, and to their very definition. Yet while conventional understandings of judicial interpretation encourage a uniform interpretation of rights, the federalist dialogue appears capable of eliciting a dualist interpretation of the *Charter*, where provincial context demands it. Taken together—and with similar findings elsewhere (Clarke 2006)—these cases exhibit processes and outcomes of *Charter* interpretation that are consistent with Canadian federalism.

### **The *Charter* and Federalism: Flawed Outcomes?**

Since its adoption, the *Charter of Rights* has been chided for failing to comply with Canada's federal foundations. The details of these charges are varied and complex, but generally fall into one of two camps: *processes* and *outcomes*. Neither critique has gone unchallenged, of course, but both have been the subject of considerable debate. Yet the rejoinders have failed in important respects, and concern for federalism in a *Charter* context endures. Beginning with "outcomes," the following paragraphs trace these debates, exposing their failings before discussing how the federalist dialogue helps in their remedy.

Outcome-based objections are grounded in the assumptions of the "centralization thesis" (Kelly 2001), which holds that the *Charter's*

supposedly national standards, enforced by a centralized judiciary, will effect a standardizing trend in areas of policy previously subject to provincial discretion (see, for instance, Hogg 1989, 250; LaForest, 1995, 134). If the *Charter* prohibits or compels a particular behaviour of one province, so the thesis goes, then it must also prohibit or compel the same behaviour in all provinces. Such an outcome is, however, contrary to Canadian federalism's *raison d'être*: the protection of distinctive communities—or at least the capacity to build distinctive communities—in Quebec and elsewhere (Ajzenstat et al. 1999, 235; LaSelva 1996, 8–9; Vipond 1991, 18). Far, then, from fostering the unity for which its champions hoped (Trudeau 1968, 52–60), *Charter* outcomes can only breed resentment and disunity. If the *Charter* is to be somehow prevented from destroying the country, then, these uniform outcomes must be prevented by “reconciling” the *Charter* with federalism (LaSelva 1996, 64–98). Prescriptions for rapprochement vary, but typically suggest some form of constitutional amendment to ensure that the outcomes of *Charter* disputes are less pan-Canadian, and more cognizant of the provinces' diverse legal, political and cultural traditions in general, and of Quebec's distinctiveness in particular (see, for instance, LaSelva 1996, 88–89; Cairns 1995, 192–93; LaForest 1995; Schneiderman 1992, 258–60; Taylor 1993, 181–84. 198–200).

It comes as something of a surprise that scholars would insist that, absent constitutional change, *Charter* outcomes are impervious to Canadian federalism. After all, federalism has long been considered the most, or at least among the most important independent variables in Canadian political science—capable of re-casting publics, governments, and institutions (Simeon 2002, 36–37). On the eve of its adoption, Donald Smiley assumed that the *Charter's* pan-Canadianism would be no less vulnerable to federalism, querying “what *are* the capacities of the *Charter* to resist [the] provincializing currents in the Canadian political culture?” (Smiley 1981, 61) Yet despite this prediction from the foremost student of Canadian federalism, and despite the division of powers' ubiquity as an independent variable, when it comes to the *Charter*, federalism is roundly considered dependent: affected by, but never affecting the *Charter*. Absent constitutional amendment, federalism is seen as incapable of exacting *Charter* outcomes that are consistent with its moral foundations.

But why should the *Charter* be so immovable? Even constitutions, perhaps especially constitutions, are capable of informal change. Students of the Canadian Constitution are well-acquainted with Lord Sankey's “living tree,” portraying the Constitution as organic, changing with society itself (JCPC 1930). Sankey wrote of the *British North America Act*, of course, but his metaphor has since been used to describe how the judicial interpretation of the *Charter* amounts to “micro-constitutional amendment” (Manfredi 1997, 113–14), distinct from the “macro-constitutional” politics of Meech Lake, for instance (Russell 1993). It is a given

among political scientists that, quite apart from formal amendment, the *Charter* can, and has come to, represent something very different than a strict or prior reading of its provisions suggests.

Perhaps this informal constitutional change is what Smiley anticipated when he wrote that the *Charter* would be shaped and altered by federalism. If federalism can account for changes in other institutions' capacity "to recognize and accommodate regional ... elements of Canadian diversity" (Simeon 2002, 37), it must also be capable of overcoming any failure of the *Charter* to represent those same "regional elements". Formal change might make a sceptic's preferred outcome more obvious, or even more certain, but it does not preclude the *Charter*'s reconciliation with federalism by other means, including informal, micro-constitutional change. The Court itself has described federalism as an "underlying principle" to be considered alongside individual and minority rights (SCC 1998, 49), and several scholars have recorded the balancing of rights with federalism in the *Charter* context specifically. Building on the work of Janet Hiebert (1996) and Katherine Swinton (1990; 1995), James Kelly has found evidence that fears of homogenizing *Charter* outcomes have been greatly exaggerated (2001; 2005, chapter 6). Not only have fewer provincial statutes fallen to *Charter* review than might have been expected, but more significantly, the Supreme Court's jurisprudence includes a *Charter* interpretation that respects diversity and provincial autonomy (Kelly 2005, 181).

Kelly's is an important contribution. However, while he describes the Court's federalism jurisprudence as the much-needed "reconciliation," it is not immediately evident that this is the case. What Kelly describes is a compromise: neither provincial relativism nor pervasive pan-Canadianism has triumphed over the other. But "reconcile" suggests that this compromise conforms to some normative ideal, consistent with Canada's "moral foundations." Alan Cairns, Samuel LaSelva, Charles Taylor and others have told us that nothing short of constitutional amendment would suffice. And while Kelly shows that federalism has informed *Charter* interpretation absent of such formal change, he does not demonstrate that this compromise is consistent with what is normatively compelled. In fact, the only ideal against which Kelly measures his "reconciliation" is the intent of the *Charter*'s framers—a group from which he specifically exempts the provinces (Kelly 2005, 87).

Furthermore, regardless of the sufficiency of this compromise, our understanding of how it is reached is wanting. While the Court acknowledged the need for balance between rights and federalism in the *Secession Reference*, in the same decision it declared itself responsible for the articulation of that balance (Monahan 1999, 182). As there is an expectation that a national institution applying supposedly national standards will tend towards homogeneity (Shapiro 1981; Bzdera 1993),

how can we account for the federalist sensitivity in the Court's *Charter* jurisprudence?

One explanation might lie with the judges themselves. There is, for instance, the constitutional convention of regional composition on the bench. But the appointment of judges from Canada's four regions is largely symbolic, and is held by the judges themselves not to colour their constitutional interpretation (Laskin, in Canada 1985, 319). Then there is the justices' legal environment. Prior to the *Charter*, the division of powers was the bread and butter of constitutional law, and a legal education in such issues must shape interpretation of other constitutional provisions. However, post-1982, federalism has taken a backseat to the *Charter* in the classroom, the literature, and the docket (see, for instance, Macdonald 2007, 76–77; Epp 1998, 172–76). Familiarity with an increasingly marginalized body of constitutional law cannot wholly explain a sustained sensitivity to federalism in the face of the dominant discourse of pan-Canadian rights.

For his part, Kelly credits the judicial sensitivity to the institutionalization of rights-vetting in provincial departments of justice (Kelly 2005, 215–19). This may help explain declining rates of nullification. As provinces incorporate rights-scrutiny into the policy process, the resulting policy should be less susceptible to *Charter* challenge. But even if questions about the actual effects of this exercise are ignored,<sup>2</sup> *Charter* vetting is less persuasive as an explanation of the federalism *jurisprudence*—the federalist interpretation—that is so central to Kelly's "reconciliation". Since vetting takes place in the provincial executive, there is no record of the considerations that informed provincial interpretations of their *Charter* obligations (Hiebert 2002, 15), including whether or not federalism plays a role. Any link between provincial vetting and the Court's federalism jurisprudence is, therefore, tenuous.

Not only, then, do we lack an understanding of the extent to which *Charter* outcomes are reconcilable with the normative foundations of Canadian federalism, we lack an understanding of how those outcomes are reached, and the extent to which they conform to the provinces' own interpretation. This concern, however, is better suited to a discussion of the second federalist critique of the *Charter*: the *process* of its interpretation.

### **The *Charter* and Federalism: Flawed Processes?**

For some, regardless of the outcome, the process by which *Charter* disputes are resolved is illegitimate in a federal society. By allowing aggrieved individuals or minorities to engage courts in an "end-run" around unsympathetic provincial majorities, the *Charter* is described as undermining federalism's preference for local decision-making (Morton and Knopff 2000, 60–63; MacIvor 2005, 222). Scholarly unease with the

processes of *Charter* interpretation has, however, been registered largely in isolation of federalism. Since the *Charter*'s first days, where scholars have questioned the legitimacy of judicial review, their concern has not been for the relationship between courts and federalism, but between courts and legislatures (LaSelva 1983, 383–84). Still, while its preoccupation may not be federalism, *per se*, this literature's relevancy is not diminished. Most of the legislatures for which these scholars are concerned are, after all, representative of provincial populations.

The critique of the process of *Charter* interpretation is many-faceted. But disagreement is limited primarily to questions about who derives the most benefit from those processes, and there is broad agreement at the core. Scholars on the left and the right echo variants of a common refrain: because the *Charter* turns matters of public policy into questions for judicial resolution, it is "deeply and fundamentally undemocratic, not just in the simple and obvious sense of being anti-majoritarian, but also in the more serious sense of eroding the habits and temperament of representative democracy" (Morton and Knopff 2000, 149; see also Manfredi 2001; Brodie 2002; Hutchinson 1995; Mandel 1994).

In response has emerged a body of work seeking to reconcile the processes of *Charter* review with Canadian democracy. For the past decade in particular, this endeavour has assumed the form of a discussion about the potential for legislatures to engage in their own *Charter* interpretation. To dispel the notion that Canada's legislatures are helpless *Charter* actors, entirely subject to judicial whim, Peter Hogg and Alison Bushell depict the *Charter* process as a "democratic dialogue" that may begin with courts, but can continue with legislatures. Following a judicial declaration of invalidity, the *Charter*'s structure allows the elected branches to "reply" with legislation "that accomplishes the same objectives" but is less impairing of (section 1), or operates notwithstanding (section 33) *Charter* rights (Hogg and Bushell 1997, 75; See also Roach 2001).

This democratic dialogue has itself been subject to much criticism. Some are dubious, for instance, of the latitude that is actually available to respond to an adverse judicial ruling (Morton 2001; Manfredi and Kelly 1999). But even someone willing to concede some capacity for response might not be persuaded. The problem lies with the dialogue's "presumption in favour of judicial supremacy of constitutional *interpretation*" (Manfredi 2004, 148; 2001, 178–79). Whatever room there is to reply, with the notwithstanding clause, for instance, sceptics note that it is not considered reasonable for legislatures to question the judiciary's interpretation of what the *Charter* means in the first instance (Manfredi 2004, 148). Nor is this judicial monopoly limited to the definition of the *Charter*'s substantive provisions (what is "free expression," for instance?), it inhibits the "main engine" for legislative participation: section 1. While section 1 may, in theory, allow government to enact "reasonable" limits on judicially defined *Charter*

rights where they are “demonstrably justified,” this capacity is severely restricted by the fact that the judiciary defines what is “reasonable” and when a limit has been “justified” (Baccigalupo 1991, 133–34). As this uneven division of institutional labour is not disputed by the dialogue’s staunchest proponents (Roach 2001, 13), process sceptics appear justified to question the sincerity of the metaphor. “Dialogue” hardly captures a process of *Charter* interpretation where one party is precluded from contributing to that interpretation, and is able to reply only by either expressly disagreeing with the *Charter*’s “meaning” or by legislating according to what the Court deems reasonable (Hiebert 2002, 50–51).

However, if the dialogists’ problem is the prescription that *Charter* interpretation should be free from government influence after the fact, their critics’ problem is their presumption that judicial interpretation is free from that influence to begin with. Critics of the dialogue and the process of *Charter* interpretation more generally, uncritically assume that judicial interpretation is the product of court-centric factors alone, and fail to consider extra-legal stimuli. To be sure, judges are somewhat sheltered from the external environment and intrinsic influences must be considered important. The attitudinal model, for instance, stresses the importance of the judges themselves, and the personal and professional values they bring to the bench (Ostberg and Wetstein 2007). In a similarly court-centric paradigm, legal positivism holds that, “the law” itself (constitutional text, legal rules, and doctrine), directs judicial decision-making (Beatty 1995; Choudhry and Howse 2000, 151–54). But, important as they are, such court-centric factors cannot explain judicial interpretation *in toto*. Judicial attitudes and legal rules channel and constrain, but they do not define constitutional interpretation (Baier 2006, 163; Epstein and Kobyłka 1992, 12–13).

Lee Epstein and Joseph Kobyłka conclude that the most profound influence on judicial interpretation of the American Constitution is had by the legal actors who present courts with their own constitutional impressions in the form of legal argument. And while Epstein and Kobyłka have not tested their theory in the Canadian context, Christopher Manfredi has. In a recent study of the Women’s Legal Education and Action Fund (LEAF), Manfredi verified the assumption that “it is the law and legal arguments as framed by legal actors that most clearly influence the content and direction of legal change” (Manfredi 2004, xix). Manfredi found sufficient correlation between the language in LEAF’s factums and the Supreme Court’s decisions to conclude that the women’s group has exerted considerable influence on prevailing constitutional interpretation (Manfredi 2004, 69–73, 125). But governments—and specifically provincial governments—are no less “legal actors” who tender arguments before the Supreme Court. Governments possess all of the characteristics of the most successful interest group litigants (Galanter 1974) and are described in Canada as the “real repeat players” of constitutional litigation



(Roach 2001, 145). If provinces were to enjoy a LEAF-like influence—if they are not merely the passive recipients of, but active participants in judicial interpretation—then perhaps concerns about *Charter* processes and federalism are exaggerated.

A number of scholars seem at least open to the suggestion that governments might influence judicial interpretation, if by less direct means. Matthew Hennigar suggests that judicial decisions may be considered “responses” to a legislature’s initial assessment of constitutionality (Hennigar 2004, 16–17); Janet Hiebert has argued that a demonstrable record of rights-based *legislative* scrutiny could affect judicial decisions (Hiebert 1996, 153–54); and of course James Kelly intimates that bureaucratic *Charter* scrutiny explains decreasing rates of judicial nullification (Kelly 2005, 209–13). Yet for all this speculation, little has actually been done to measure the impact of governments as legal actors, aside, that is, from an earlier discussion of the “federalist dialogue” (Clarke 2006). According to *this* dialogue, the Supreme Court’s jurisprudence, and its federalism-*Charter* jurisprudence in particular, can be thought of as a “response” to provincial governments’ own interpretations of the *Charter*. Provincial factums reveal that provinces will often couch their defences in *Charter* interpretations that have been coloured by federalism and diversity. This may seem like counter-intuitive behaviour. Since the text of the *Charter* does not seem to permit arguments based on diversity, it may not seem like the most effective use of legal resources (Knopff and Morton 1985, 170–71). Nevertheless, the reading of the judicial decisions reveals sufficient consistency with these provincial arguments to conclude that provinces themselves have exerted considerable influence over the Court’s own jurisprudence. To date, the federalist dialogue has only been traced over several section 15(1) equality challenges. But if it is characteristic of other *Charter* litigation, then perhaps *Charter* processes are not as inconsistent with federalism as the sceptics insist.

The remainder of this paper is dedicated to an examination of several more instances of *Charter* litigation through the framework of the federalist dialogue, and brings those findings to bear on our understanding of *Charter* processes and *Charter* outcomes. Before proceeding, however, a brief note on case selection is warranted.

### **A Note on Case Selection**

Federalism does not always factor into the defence of provincial policy against *Charter* challenge. But where it does, it takes one of two forms. Most often, provinces will appeal to section 1 of the *Charter*, and the need for a distinctive limitation of otherwise pan-Canadian rights. At times, however, provinces will appeal to a federalist, or province-specific interpretation of the *Charter*’s substantive provisions themselves. To

appreciate both sides of the federalist dialogue, therefore, this paper will examine cases from each category—two of the former and three of the latter. Ideally, a sweeping examination of all provincial *Charter* litigation might be preferred. But quite aside from practical considerations, there is good reason to curb the present discussion.

Political scientist Carl Baar once lamented the Canadian discipline's tendency to shy away from small-n analyses of judicial decision-making, which were dismissed as too descriptive—nice journalism, but not good social science (Baar 1986, 57). But, Baar suggests, if we are to explain a process as complex as constitutional interpretation, a more qualitative approach is required. With the arrival of the *Charter* and the increasing importance of judicial processes it heralded, Baar hoped his Canadian colleagues would follow the lead of their American counterparts, where “the most complex and illuminating picture of judicial decision-making may come from the examination of a single case or related set of cases” (Baar 1986, 58). One of the goals of this paper is to promote understanding of the processes of constitutional interpretation. Taking Baar's advice seriously, rather than attempt a sweeping quantitative analysis of *Charter* litigation it engages in a more modest, but thorough qualitative examination of five cases. The federalist dialogue that emerges from the examination of these and other cases (Clarke 2006) is not determinative of the outcome of all *Charter* litigation. Nor is it the only influence on the process of *Charter* interpretation. But it is an important and unappreciated side of both.

### **The Federalist Dialogue and Section 1: *Lavigne, Advance Cutting, and Dunmore***

At issue in *R. v. Advance Cutting* (SCC 2001a) was the Quebec *Construction Act*, which required workers in the province's construction industry to hold a “competency certificate”. To obtain this certificate, workers were required to choose one of five unions to serve as their bargaining agent for industry-wide collective agreements. *Advance Cutting Ltd.*, a construction firm that had been charged with hiring uncertified workers, alleged that requiring workers to join a union violated *Charter* section 2(d), which they claimed includes the right *not* to associate. Nor, they said, could this violation be considered “reasonable” for section 1 purposes. Although the legislative objective—stable labour relations in the construction industry—may have been pressing, the measures taken toward that objective were excessive, a point the company underscored by comparison with practices elsewhere in Canada. Other provinces also sought stable industrial relations, but did not see the need to force construction workers to join a sector-wide union simply to enter the industry. Rather, they left labour relations in the construction industry to the same firm-level practice as in other private sector industries (SCC 2001a, 108).

Quebec presented a much different interpretation of the meaning of the *Charter* right in this case. The positive freedom to associate carried no corollary freedom *not to*. Were the Court to disagree, Quebec argued that the negative freedom could only be construed as to protect against forced association that sought to impose ideological conformity (QC 2001, 18). The *Construction Act* sought only to encourage workers to engage in a democratic process. Neither the purpose nor the effect, therefore, imposed the ideological conformity necessary to establish a violation of the hypothetical negative freedom (QC 2001, 24).

More noteworthy for our purposes was Quebec's interpretation of section 1, which was included in case the Court found a *prima facie* violation. Quebec acknowledged that other provinces sought the same objective by less restrictive measures. However, when considering the *Charter*, one "must be circumspect about the experience in other jurisdictions." Specifically, comparisons with other jurisdictions should not be raised "without accounting for social, cultural, historical and political particularities" (QC 2001, 31). Other provinces may have employed less restrictive measures, but only because the context there did not compel more restrictive ones. In Quebec, they did. Quebec provided the Court with an extensive history of industrial relations in the Quebec construction industry. A product of Quebec's distinctive political history, the role of the Catholic Church and scandals surrounding the construction of 1976 Olympic venues, labour relations in the Quebec construction industry had been unusually tumultuous (QC 2001, 3). This context, exceptional among Canadian provinces, led successive governments to take exceptional measures, including those impugned in *Advance Cutting*. For Quebec, a proper interpretation of what the *Charter* requires, and what can be considered a "reasonable limit" allows must not, therefore, ignore provincial context.

Different judges responded in different ways. Only one (L'Heureux-Dubé) agreed entirely, including that 2(d) does not include the right not to associate. The remaining eight found this negative right, but accepted the qualification that it exists only to protect against forced ideological conformity. These eight split, however, on whether the *Construction Act* imposed coercion. Five<sup>3</sup> believed that it did: to conclude otherwise would be to "ignore the history of the union movement itself" (SCC 2001a, 17). Of these, four also rejected Quebec's federalist section 1 interpretation. A pre-1982 context where *Charter* values were not at play did not justify a post-1982 limitation of *Charter* rights (SCC 2001a, 45). Justice Iacobucci disagreed on this point, and would uphold the law as a reasonable limit.

Justice LeBel, speaking for the remaining three judges, found a right not to associate, but agreed with Quebec that neither the purpose nor the effect of the impugned provisions imparted any ideological conformity (SCC 2001a, 218–23). When combined with Justices L'Heureux-Dubé (no

violation) and Iacobucci (a violation, but a reasonable one), these three produce a majority of five who would have upheld the law. There was, therefore, no compulsion for LeBel to proceed with a section 1 analysis. LeBel did so nevertheless, going out of his (and his colleagues') way to agree with Quebec's federalist interpretation of the *Charter's* reasonable limitations clause.

Since no party had disputed the legislative objective (stable industrial relations), the primary section 1 issue was the minimal impairment test. On that point, the LeBel group of judges outright rejected the comparisons drawn with other provinces, embracing instead Quebec's federalist interpretation. The *Charter* does not call for uniform outcomes, as feared by the sceptics. Rather, it more modestly "expresses shared values, which may be achieved differently in different [provincial] settings" (SCC 2001a, 275). Interpretation and application of section 1 must, therefore, pay "close attention to the *context and factual background* that led to the adoption of the impugned legislation [emphasis added]" (276). When the *Construction Act* was viewed in its proper context—in the context "of the particular historical experience of Quebec's labour relations"—it passed the minimal impairment test (277).

*Advance Cutting* exhibits all of the characteristics of a "federalist dialogue". Quebec's factum provided the Court with: a vision of section 1 where provincial context matters; important information about that context; and its own interpretation of how the *Charter's* "shared values" should be achieved in that "setting". A majority of the Court<sup>4</sup> responded by incorporating Quebec's interpretation into their own, now prevailing interpretation. But the federalist dialogue shaping section 1 and labour law does not end with *Advance Cutting*. Nor does it begin there. Quebec's was not the first interpretation of the *Charter*, as it applies to labour legislation, which posits that jurisdictional contexts matter. Rather, Quebec borrowed this piece of constitutional reasoning from an earlier decision, moulding it for its own ends.

When Quebec argued in *Advance Cutting* that section 1 must account for and allow for social, cultural, and political traditions, it specifically cited (at 31), but adapted the Supreme Court's own reasons in *Lavigne* (SCC 1991). In that case, a collective agreement between the Ontario Public Sector Union and a community college was challenged by an employee to which the agreement applied, but who chose not to join the union. Specifically, Mr. Lavigne challenged the "Rand Formula," which allowed the union to collect monies equivalent to union dues from non-union employees. The issues were, therefore, not unlike those in *Advance Cutting*. Lavigne alleged that the compulsion to pay dues to a union to which he did not wish to belong, as well as the union's use of those funds for political activities, violated his freedom *not* to associate. To bolster his claim, Lavigne invoked examples from the United States. According to Lavigne, American

*jurisprudence* supported a finding that 2(d) included the freedom not to associate. Moreover, for section 1 purposes, American *legislation* provided evidence of collective agreements that were less restrictive of that freedom, allowing employees to opt out of payments that were used for political purposes (SCC 1991, 255–56, 298).

Four of the seven justices rejected the relevance of these comparisons. When considering the scope of 2(d), and whether it includes a right not to associate, “this court must exercise caution in adopting any decision, however compelling, of a foreign jurisdiction.” *Charter* rights in general and 2(d) in particular may express similar sentiments to their American counterparts. But given “the distinctive structure of the *Charter*”, and the “specific features of the Canadian cultural, historical, social and political tradition,” they should not be treated as carbon copies (SCC 1991, 257). A similar logic informed their response to comparisons with “less restrictive” American *legislation*. The Court thought it best to approach American labour legislation with trepidation, because “the development of law in different cultures with different political, historical, and social traditions may not be easily transferred into the Canadian context” (SCC 1991, 298). For instance, even though Canadian labour law had historically been modeled after the American, unions had since come to play a more vital role in Canada, at least relatively speaking. Since the Court found that “opt-out” provisions had a tendency to undermine American unions, to uncritically accept the comparison, and find that Canadian law unreasonably impairs any right not to associate, would be to ignore the distinctive Canadian context and, specifically, the relative importance of unions therein.

Stated simply, the *Lavigne* ruling suggests the following message: “jurisdictional context matters.” Canadians and Americans are both committed to free association in the abstract. But divergent political, cultural, and historical traditions require that the precise meaning of the right, and the need for its limitation, take on distinctive meaning in practice. This message may, on its own, have little relevance for federalism, but ten years later, in *Advance Cutting*, Quebec “federalized” this legal reasoning into a federalist interpretation of the *Charter* to shield its own legislation from similar comparison, but with other provinces. If international differences should be factored into *Charter* scrutiny of labour law, then so too should provincial ones. Moreover, the *Advance Cutting* Court was persuaded by this re-construction, stating categorically that the *Charter* does not call for provincial uniformity, but “expresses shared values which may be achieved differently in different [provincial] settings” (SCC 2001a, 275). Compelling as it is, however, this dialogue should not be taken to imply that provincial differences should or will always justify a differential approach to the *Charter*. Indeed *Dunmore*, handed down just months after *Advance Cutting*, confirms that they will not.

In 1994, the NDP government in Ontario extended legislative protections for collective bargaining to workers in the agriculture sector, which had traditionally been excluded from the *Labour Relations Act (LRA)*. One year later, a newly elected Conservative government revoked those same protections. In *Dunmore v. Ontario*, a number of agricultural workers challenged that decision, alleging that the (again) under-inclusion left them vulnerable to employer reprisals, and unable to exercise their 2(d) freedom to associate. Ontario submitted that there was no violation because the *Charter* does not compel government action to assist the exercise of its guarantees (ON 2001, 26). Should the Court disagree and find a *prima facie* breach, Ontario argued that the legislative exclusion of agriculture was a reasonable limitation of free association, for two reasons. First, given the unpredictability of agriculture (harvest times, weather, etc.) the industry's viability is particularly vulnerable to collective bargaining and the threat of strike action. Second, much of the agriculture industry is composed of family-run operations, which, given the family dynamic, are particularly inappropriate for unionization. Any violation of 2(d) was, therefore, justified to protect the Ontario industry in general, and the family farm in particular (ON 2001, 37).

The workers argued that even if these were valid objectives for section 1 purposes, the means chosen to achieve them were excessive. For instance, eight other provinces had extended legislative protections to their agriculture sectors, and yet protected family farms by carving them out of that regime. Like Quebec had in *Advance Cutting*, Ontario rejected these comparisons with other provinces. The province contended that to understand the rationale behind the exclusion in Ontario required an understanding of the unique characteristics of the Ontario industry (ON 2001, 6). When those characteristics are taken into account, "profound differences between the agriculture sector of Ontario and that of other provinces" emerge. Interprovincial comparison is, therefore, "of no real value" (ON 2001, 23). For one thing, the sheer size, complexity and labour intensiveness of the Ontario agriculture sector—unique among Canadian provinces—make it singularly vulnerable to the detrimental effects of unionization (ON 2001, 20–23). Furthermore, Ontario argued that its industry was so dominated by family farms that collective bargaining would be inappropriate in a way that it may not be elsewhere (ON 2001, 14, 37).

Of the Court, only Justice Major agreed with Ontario (SCC 2001b, 208). The remainder of the Court rejected the province on almost every count. On the applicability of section 2(d), the Court conceded that the *Charter* does not generally impose positive obligations on governments. However, under certain circumstances, "legislation that is under-inclusive may... impact the exercise of a fundamental freedom" (SCC 2001b, 35). If the purpose or the effect of the exclusion did so here, it could be construed as a violation. Citing anti-union rhetoric from the Conservative cabinet, L'Heureux-Dubé

believed that the *purpose* of the law was to infringe workers' rights (SCC 2001b, 123). The remaining group of seven was not convinced that the legislation's purpose was so deliberate, but found that it had a sufficiently chilling *effect* on workers' ability to act collectively as to violate section 2(d) (SCC 2001b, 48).

These eight justices (all but Major) also rejected Ontario's federalist section 1 justification. They accepted that the protection of family farms was a laudable objective (SCC 2001b, 194). But this did not justify a blanket exclusion of all agriculture workers. To underline this point, attention was drawn to the practice in other provinces. In New Brunswick and Quebec, for instance, protecting family farms was also a pressing concern. But rather than exclude all agricultural workers, these provinces extended the legislative protections, while carving family farms out of the scheme (SCC 2001b, 64, 201–02). When compared to the practice elsewhere, then, Ontario's *total* exclusion could hardly be considered minimal impairment. What is more, unlike *Advance Cutting*, where the Court accepted the contention that Quebec's construction industry was sufficiently unique as to require more restrictive measures than elsewhere, the Court in *Dunmore* rejected similar arguments from Ontario. A trend towards agri-business and factory farming, where collective bargaining was more appropriate, was occurring in all provinces, including Ontario (SCC 2001b, 62). The Ontario industry was not, therefore, so unique as to compel a more restrictive restriction of section 2(d).

The inter-institutional give and take over the course of *Lavigne*, *Advance Cutting*, and *Dunmore* conforms to the expectations of the federalist dialogue: provinces defend their legislation with interpretations of section 1 couched in the language of federalism, to which the Court may (*Advance Cutting*) or may not (*Dunmore*) respond with a federalism jurisprudence of its own. But section 1 is only the second of two *Charter* "steps," and it is not the only focus of provincial efforts to cast the *Charter* in federal terms. Provinces seek to not only put different limits on *Charter* rights. They seek different interpretations of those rights in the first place.

### **Where Section 1 is not Enough: *Ford* (1988)**

*Ford v. Quebec* remains one of the most (in)famous *Charter* decisions. The nullification of Quebec's sign law, which had banned commercial advertising in a language other than French, prompted the National Assembly to take the rather extraordinary step of shielding its legislative response with the section 33 notwithstanding clause. Yet despite this assault on provincial efforts to protect Quebec's distinctive "visage linguistique," *Ford* is simultaneously considered as evidence of section 1's capacity to accommodate federalism. Although the Court concluded a total ban on other-language advertising could not be considered a reasonable limitation of free expression, it accepted that the protection of the French

language was a pressing objective and suggested that a less-restrictive partial ban might be reasonable. Perhaps Quebec's legislative response banning the use of other languages outdoors, but allowing it indoors, would have survived further review (Hiebert 1996, 144). Dialogue theorists describe the use of section 33 as constitutional overkill, the product of an impoverished understanding of *Charter* interpretation and the democratic dialogue (Roach 2001, 189–91).

Nevertheless, Quebec's new law was shielded from further review, and it remains a matter for some speculation as to whether or not it would in fact have survived further judicial scrutiny. But either way, this case actually does little to further the capacity of section 1 to accommodate federalism in a *Charter* framework. The provincial difference that led Quebec to enact the law in the first place, and that the province sought to reconcile with the *Charter* in *Ford*, went well beyond the need to limit free expression. It went to the understanding of that freedom itself. Any impoverishment was not, therefore, with Quebec's understanding of "dialogue," but with the dialogists' understanding of Canadian federalism.

At the time *Ford* was argued, the broad parameters of *Charter* interpretation remained largely indeterminate, and it was by no means obvious that the Quebec law was a *prima facie* violation of "free expression." The province of Quebec did not, therefore, limit its argument to the "reasonableness" of an advertising ban. The province presented the Court with an interpretation of section 2(b) according to which there was no violation. "Freedom of expression," according to Quebec, should not be interpreted as protecting either the right to express oneself in the language of one's choosing or as extending constitutional protection to commercial advertising (QC 1987, 20–37). This differs considerably from the interpretation of free expression promoted by Quebec's federal counterparts. The federal government intervened to promote an interpretation of section 2(b) that included constitutional protection not only for linguistic choice, but for commercial advertising (Canada 1987, 10–14). Ultimately, and in remarkably similar language, the Court adopted Ottawa's interpretation. This rejection of Quebec is not a minor point, but it is one that is overlooked by those who suggest the use of section 33 was not necessary to accommodate Quebec's distinctiveness in a *Charter* framework. The difference between Quebec's interpretation of free expression and the interpretation endorsed by the federal government and Supreme Court reflects a deep philosophical divide that cannot be overcome by recourse to section 1 alone.

Ramsay Cook might explain the difference as the product of a different commitment to liberalism and individual rights. Where the English Canadian public philosophy is concerned primarily with the individual, French Canadians, as a "conquered people and a minority" are generally more concerned with group rights (Cook 1966, 146–47). Claude Galipeau



would describe the difference in similar terms. Quebecers may be increasingly liberal, but remain “less staunchly liberal [than] their English partners in Confederation” (Galipeau 1992, 75). When it comes to the French language in particular, the Québécois are “more willing to accept prohibitions” on individual rights such as free expression (Galipeau 1992, 75). If Cook and Galipeau are correct about the nature of the differences between Quebec and the English Canada, then section 1 may indeed have been capable of accommodating the differences at work in *Ford*. If the real difference between Quebec and Canada outside of Quebec can be reduced to their respective commitment to individual rights, section 1 can accommodate Canadian federalism by allowing “less liberal” Quebec to place restrictions on free expression that “more liberal” English Canada might not. But the difference between Quebec and the rest of the country that was manifest in *Ford* is not reducible to such simple terms.

For Charles Taylor it does not make sense to classify Quebec and Canada outside of Quebec (COQ) along a continuum of liberalism, where it is possible to be more or less committed to a single ideal. The important difference is not a matter of degree, but of *kind* (Taylor 1993). Quebec is not less committed to liberal values of individual rights than COQ. It is equally committed to a different brand of liberalism. According to Taylor, Canada outside of Quebec chooses to live according to something approaching “procedural liberalism,” so-called because it does not promote any substantive vision of the good life. Instead, the society is united around “strong procedural commitments to treat people with equal respect” so that they may pursue their own conception of those ends (Taylor 1993, 173). Such is not the case in Quebec, where the protection of the French language, and the generation of French-speaking people is axiomatically considered to be a common good; an end in itself (Taylor 1993, 175–76). In such a society, therefore, language is a matter for public policy, not a claim that individuals can make against the common. But this does not imply that Quebec is somehow “less liberal”. There are different ideas of a liberal society, and a society with a collective goal may still be considered liberal based upon “the way in which it treats its minorities; including those who do not share public definitions of the good; and by the rights it accords to all its members” (Taylor 1993, 176). But Taylor argues we must distinguish between “fundamental liberties” and “privileges and immunities”. In a procedurally liberal society, the right to advertise in the language of one’s choosing might appropriately be considered a fundamental liberty. But there is something inflated about insisting that it must be considered so fundamental in all liberal societies.

Read in the context of Charles Taylor’s political philosophy, the arguments in *Ford* suggest that some of the differences of Canadian federalism cannot be accommodated within section 1 of the *Charter*. Section 1 may allow a provincial government to put a unique provincial

limit on otherwise pan-Canadian rights, but it cannot transform the definition of those rights. If a province like Quebec wishes to live according to a different interpretation of *Charter* rights, it cannot do so by way of section 1. But the experience of *Ford* notwithstanding, recent litigation suggests that the Court may be persuaded by a dualist interpretation of *Charter* rights themselves.

### **The Federalist Dialogue and the Scope of *Charter* Rights: *Solski* (2005a)**

In *Solski v. Quebec*, the Court was forced to negotiate the collision between the *Charter of Rights* and official language minority education in Québec. At issue was Quebec law, which provides children with English instruction, provided that his or her parents are Canadian citizens, and that the child has received the “major part” of his or her instruction to date in English in Canada. The *Solski* parents, Canadian citizens whose children had received some, but not a strict majority of their education in English, applied to have their children educated in English. The parents’ request was denied when the body charged with determining eligibility applied a “strict mathematical approach” to the law, according to which the “major part” of a child’s education was determined only by reference to the number of months and years a child had been educated in English (SCC 2005a). The parents subsequently alleged that the “major part” criteria was a violation of section 23(2) of the *Charter* that guarantees any child “who has received or is receiving English or French instruction” the right to continued instruction in that language.

In response, Quebec mounted an explicitly federalist *Charter* defence. The province did not, however, argue that the legislation was a reasonable limit on an otherwise pan-Canadian right. Rather, it suggested that there was no violation because section 23 should be interpreted less rigidly in Quebec than elsewhere. Section 23, according to the province, does not enjoy universal understanding. Rather, it must “be interpreted in accordance with the particular linguistic situation of each province” (SCC 2005a, para. 31). Anglophones may be a minority deserving of *Charter* protections in Quebec. But so too is the Francophone majority in Quebec itself a minority on a national scale, deserving of the protection offered by federalism that grants Quebec the responsibility to exercise legislative powers to protect and promote its distinct culture and language (SCC 2005a, para. 28). Given this particular linguistic dynamic, Quebec argued that section 23 should be interpreted as offering fewer protections to the Anglophone minority in Quebec than it offers to the Francophone population in other provinces.

The Court’s response was mixed. It did grant the parents the right to send their children to English language institutions, but avoided the potentially volatile step of striking down the law. In the Court’s view, the constitutional

violation was not with the legislation itself, but with the rigid, quantitative determination of the “major part” requirement. Such an approach is “underinclusive; it does not achieve the purpose of s. 23(2) and, therefore, cannot be said to complete it or to act as a valid substitute for it” (SCC 2005a, para. 35). But rather than strike the section from the legislation, the Court concluded that if “the word ‘major’ is given a qualitative rather than a quantitative meaning,” the *Bill* could be considered permissible within the scope of s. 23 of the *Charter* (SCC 2005a, paras. 35–36).

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

The cases confirm earlier suggestions (Clarke 2006) that it is useful to consider *Charter* litigation through the lens of the federalist dialogue. In defence of their policy, provinces are prone to propose *Charter* interpretations couched in the language of federalism. They will not always do so, and even when they do, the Court is not guaranteed to respond favourably. But the federalist dialogue is a very real part of *Charter* interpretation that has so far gone unappreciated. But how, if at all, do these dialogues around the *Charter*’s substantive provisions and the reasonable limits clause promote our understanding of Canadian constitutionalism? Specifically, what do they have to say to the critics of *Charter* processes and outcomes for Canadian federalism? The following discusses these implications, dealing first with the processes at work.

### **The “Processes” of the Federalist Dialogue**

Sceptics of the *Charter*’s processes—from a federalist or a democratic perspective—object to the *Charter* because it empowers a centralized, unelected judiciary at the expense of democratically-elected and accountable representatives of local populations. And while these sceptics may be willing to concede some capacity for legislatures to respond to judicial rulings, they remain critical of what they perceive to be a judicial

monopoly on the interpretation of the *Charter* itself. But when *Charter* interpretation is viewed as a federalist dialogue, this monopoly disappears.

The primary limitation with the sceptics' position is their underestimation of extra-judicial influences on judicial interpretation. Intrinsic factors (judges' attitudes, precedent, etc. ) may constrain interpretation, but they do not define it (Epstein and Kobylka 1992; Baier 2006). Equally important to understanding judicial interpretation, is an appreciation for the legal actors who bring their own interpretations to bear on *Charter* litigation. In the Canadian context, this influence has so far been traced mainly to advocacy groups (Manfredi 2004). But the federalist dialogue observed here and elsewhere (Clarke 2006) suggests that governments, and specifically provincial governments, have enjoyed some capacity to etch their own *Charter* interpretations into micro-constitutional law.

Yet while the federalist dialogue should at least mitigate concern that provinces have been shut out of *Charter* interpretation, several objections spring to mind. First, it might be suggested that the interpretations that emerged from *Advance Cutting* and *Solski* were not "responses" to provincial governments, but mere coincidence. Such scepticism is fairly easy to dismiss in *Solski*, where the Court referred specifically to Quebec's arguments in support of its own interpretation (SCC 2005a, para. 24). More explanation, however, is required to firmly establish the *Advance Cutting* decision as a "response" to government interpretation of section 1.

Process sceptics might argue that Quebec's efforts did not actually influence the interpretation of section 1 that emerged from *Advance Cutting*. Once the Court concluded in *Lavigne* that the international context matters, that is, the only logical next step for the Court to take was to conclude that the same is true for provincial context (*Advance Cutting*). Henri Brun would certainly agree. In 1985, Brun wrote that if the interpretation of the then new *Charter* should draw on the American example, this should not occur without reference to distinctive Canadian values. Brun then went on to declare that "what holds true for the cultural relationship between Canada and the U.S. should hold even more true for the cultural relationship between Quebec and Canada" (Brun 1985, 10). If Brun's perspective is correct, then the government of Quebec did not contribute to, but was shut out of *Charter* interpretation, as the sceptics fear. To the extent that the decision agreed with Quebec, this was coincidence, not receptivity. The Court's *Advance Cutting* jurisprudence might have been cognizant of federalism, but it was simply a product of the court-centric process the sceptics deride.

But the *Advance Cutting* jurisprudence is not so obviously compelled by the Court's *Lavigne* decision alone. For one thing, the *Lavigne* conclusion that American jurisprudence should be treated with scepticism was derived, in part, from differences in the structure and content of the bills of

rights themselves. Both countries might have committed themselves to free association, but the instruments with which they did so (the *Charter* and the *Bill of Rights*) differ considerably. This distinction cannot be made between provinces, to which the *Charter* has the appearance, at least, of applying equally. This could easily lead to the conclusion that while international context should matter, provincial ones should not—as the “centralization thesis” supposes, after all. But in *Advance Cutting*, Quebec’s interpretation pushed the Court in another direction, federalizing the *Lavigne* precedent. But in any case, if the Court’s federalism jurisprudence was simply a product of its own precedent, the Court should be expected to have referred to *Lavigne* at the relevant sections of *Advance Cutting*. Yet nowhere among the *Advance Cutting* statements on federalism, is there any mention of *Lavigne* (SCC 2001a, 266–79).

At most then, court-centric considerations constrained the way Quebec’s federalist interpretation could be articulated. Factors beyond its control forced the province to frame a federalist interpretation in the language available that the Court would understand. This does not, however, diminish Quebec’s role. Rather, it is entirely consistent with a genuine understanding of *Charter* interpretation as a dialogue, or shared responsibility. Court-centric considerations matter, and matter dearly. Precedent, judicial attitudes, and doctrine each affect judicial interpretation and should also be taken seriously by provinces as they craft their own. But purely legal factors are not determinative. They do not preclude provincial contributions, which should be, and according *Advance Cutting* are, taken equally seriously by the Court.

A second challenge to the conclusion that provinces play a role in the process of *Charter* interpretation might be mounted on the bases of those cases where the Court rejected provincial arguments. The Supreme Court’s rejection of Ontario in *Dunmore*, for instance, might be portrayed as suggesting that the Court does in fact retain its monopoly. But it would be an impoverished definition of “dialogue” that finds a monopoly simply because the Court does not reach the same conclusion in every instance. If dialogue is about shared interpretational responsibility, it would be no more appropriate for the Court to capitulate entirely to (provincial) governments than it would be to assume a lock on *Charter* interpretation. Courts and legislatures bring distinct and important perspectives to the *Charter*. The goal, therefore, should not be that one or the other prevails, but that each takes the other seriously (Hiebert 2002, 52). *Dunmore* could, therefore, be taken as a rejection of the federalist dialogue only if the Court failed to take Ontario’s arguments seriously. There is no evidence of this. As in *Advance Cutting*, in *Dunmore* a provincial government presented the Court with its own, federalist interpretation. In the former, the Court was persuaded. In the latter it was not. But consistent with notions of shared responsibility, or

dialogue, the Court dedicated considerable time addressing those arguments in each.

The process of *Charter* interpretation at work in *Ford*, however, is not so easy to reconcile with federalism and its preference for local decision-making. The Court not only rejected Quebec's assertion that free expression does not protect a right to advertise in a language of choice. It did so without taking that interpretation seriously. Quebec had argued, for instance, that 2(b) does not extend to commercial expression. The Court concluded that it did. But its decision is remarkable for the "dearth of argument" to support this conclusion (de Montigny 1992, 40). Rather than develop an argument as to why commercial expression should be protected, the Court chose instead to rather casually declare that there was no good reason it should not be (SCC 1988, 59). Perhaps there is no good reason. But dodging the philosophical and historical context of commercial expression in Canada is hardly consistent with the "purposive approach" to rights on which the decision is said to rest (see de Montigny 1992, 38–41). And dodging the philosophical and historical context of expression in Quebec is hardly consistent with a federalist approach to *Charter* interpretation.

However, regarding the scepticism around the processes of *Charter* interpretation more generally, and its relationship with democracy (as opposed to federalism), it merits recollection that the *Ford* interpretation was the product of a dialogue between a government—though not a provincial government—and the Court. To date, that is, the decision in *Ford* to extend constitutional protection to commercial expression has been considered emblematic of the problems associated with a judicial monopoly over *Charter* interpretation. It has been characterized as the worst examples of judicial loose-cannonry (Kelly 2005, 142; Hiebert 2002, 90), the worst excesses of an unaccountable judiciary interpreting *Charter* rights by reference to personal preference and economic class (Mandel 1994, 159–63). But on closer inspection, this judicial monopoly is more apparent than real. The Court may have rejected Quebec's interpretation of section 2(b). But the interpretation the Court adopted exhibits unreserved agreement with the federal government (Canada 1987, 10–15).

From a federalism perspective, therefore, the problem with the *Charter* process in *Ford* is not so much that governments were shut out of that process. Rather, the problem from a federalism perspective was that the Court seemed incapable or unwilling to respond to more than one government, accepting Ottawa's interpretation and rejecting Quebec's. On the one hand, this is to be expected. The tradition of *stare decisis* expects a uniform interpretation of the law (Brun 1985, 9), and so it is perhaps not surprising that to the extent the Court is persuaded by government, it is persuaded only by one government. However, the more recent experience of the *Solski* decision suggests that the Court is willing, or at least capable of retreat from this approach to the scope of *Charter* rights. In *Solski*, the Court

quite readily accepted Quebec's premise that *Charter* rights can and must be interpreted differently depending on the province in which they are to be applied.

The federalist dialogue over the course of these five cases should relieve some concern that *Charter* processes are inimical to federalism. In fact, the influence that governments (both federal and provincial) have exerted over the Supreme Court's interpretation of section 1 and of the *Charter's* substantive provisions in these cases, and those explored elsewhere, should relieve some of the concern sceptics have expressed about the implications of the processes of judicial review for Canadian democracy. But what about *Charter* outcomes? As the following describes, where the processes of the federalist dialogue are at work, *Charter* outcomes need not be less consistent with Canada's constitutional foundations.

### **The "Outcome" of the Federalist Dialogue**

The dialogue that began with the Court's decision in *Lavigne* established, first, that when it comes to labour law, section 1 interpretation should treat *international* comparison with scepticism. In *Advance Cutting*, Quebec tailored this precedent to the context of federalism, and the Court laid down the following interpretation of section 1 in response:

In a system of divided legislative authority, where the members of the federation differ in their cultural and historical experiences, the principle of federalism means that the application of the *Charter* in fields of provincial jurisdiction does not amount to a call for legislative uniformity. It expresses shared values, which may be achieved differently, in different settings (275).

A similar *Charter* philosophy emerges from the *Solski* dialogue, except that it involves the first of the two *Charter* steps: the interpretation of a *Charter* right itself. Although the Court was reluctant to adopt such an approach in *Ford*, at Quebec's urging in *Solski*, the judges accepted that *Charter* rights can and must be interpreted according to provincial, and not only national, realities.

Put succinctly, the outcome of these federalist dialogues is that when it comes to definition and limitation of *Charter* rights "provincial context matters". This outcome exhibits remarkable similarity to the philosophical notion of "value pluralism," which rests on two principal tenets. First, it rejects the relativistic notion that there are no commonly shared and objectively defined standards. Instead, "philosophical reflection supports what ordinary experience suggests—a non-arbitrary distinction between good and bad." This distinction provides the basis for defining a "floor of basic moral decency for individual lives and for [liberal democratic] societies" (Galston 1999, 770). But lest the rejection of relativism be confused with a support for universalism, value pluralism's second precept

holds that above this floor, is “a multiplicity of genuine goods that are qualitatively heterogeneous and cannot be reduced to a common measure of value” (Galston 1999, 770). Abstractly, certain objective values are enforceable in all liberal democratic societies, but as these values are given concrete expression in public policy, there must be scope for choice, “guided by an assessment of particular circumstances [emphasis added]” (Galston 1999, 769). This same interpretation emerges from *Solski* and the *Lavigne-Advance Cutting* sequence. Quebecers share with other Canadians a commitment to the rights and freedoms enumerated in the *Charter*. But when Quebec argued, and the Supreme Court accepted, that the actualization and limitation of those freedoms in public policy must depend to some extent on context—on the particularities of Quebec politics, history and culture—the federalist dialogue generated a value pluralistic approach to the *Charter* interpretation.

The outcome of *Dunmore*, where the Ontario context did not justify a different approach to 2(d), might be taken as undermining this description. But value pluralism does not imply that any and all contextual variation will compel or justify a different actualization of otherwise shared values. Rather, it simply holds that concrete realizations of shared values should be considered appropriate where the cultural differences are consequential. “Context matters.” But it must actually matter. If a context is not meaningfully different from elsewhere, then it does not compel or justify a differential approach to rights. This outcome of *Dunmore* can, therefore, also be thought of in value pluralistic terms. The Court was not convinced that the Ontario industry was so exceptional among provinces as to justify the total exclusion of agriculture workers from the scheme of legislative protections for collective bargaining. Rather, the Ontario industry was not distinct, at least in terms of the presence and proliferation of factory-like conditions, where workers require assistance to exercise their 2(d) rights. The Ontario context did not, therefore, compel a limitation that was any different from provinces who sought to protect the industry and the family farm while extending protection to workers in “agri-business”.

The outcome of the federalist dialogue in *Ford* is less easily reconciled with federalism. There are compelling reasons to insist that Quebecers be left to live under a different model of free expression—and of a liberal society—than elsewhere in Canada (Taylor 1993). However, while the federalist dialogue could not elicit a value pluralistic outcome, more conventional understanding of dialogue did produce this result. Through the use of the notwithstanding mechanism in the wake of *Ford*, Quebec was able to reject—if only temporarily—the Court’s endorsement of the English-Canadian definition of “free expression”. To be sure, given the political fallout (both in and out of Quebec), and given the convention of disuse into which the clause seems to have fallen, the accommodation of Quebec’s distinctiveness would have rested better on the judicial recognition of divergent interpretations in the first place. Still, this may be



less important for those sections of the *Charter* for which section 33 is available to provincial governments than for those where it is not. This might explain the Court's willingness to adopt a value pluralist interpretation of *Charter* rights where section 33 is unavailable for provincial response (*Solski* and s. 23) than where it is [*Ford* and s. 2(b)].

All in all then, "value pluralism" works as an account of the outcome of the federalist dialogue. But it might be better to portray it in more native terms. I suggest "*Charter-federalism*," where the *Charter's* guarantees are the "values" that take on distinctive meanings according to the "pluralism" of Canadian federalism. Here then, "*Charter-federalism*" is used as an empirical description of the outcome of the federalist dialogue. Elsewhere, Alan Cairns has used the same term as a normative depiction of what is required for constitutional reconciliation (Cairns 1995). Yet even though Cairns' term is not grounded in the same value pluralistic roots, the empirical *Charter-federalism*—the outcome of the federalist dialogue—seems to capture what is called for by its normative counterpart.

*Charter-federalism* would not be adequate for those who find any enumeration of pan-Canadian values to be inconsistent with federalism, since the value-pluralism on which it rests relies on some common standards. But this position is not unanimously held by *Charter* sceptics. For many, a charter, if not *the Charter*, is not necessarily incompatible with, but maybe even compelled by, Canadian federalism. And for those who are only sceptical of the *Charter* as enacted, *Charter-federalism* may be sufficient. Samuel LaSelva, Alan Cairns, and even Charles Taylor might be described as occupying this position. For this group, federalism represents Canada's moral foundations, and the territorial identities it privileges and encourages cannot be ignored. But federalism, while capable of protecting territorial identity, fails to give adequate expression to the multiple and proliferating identities that are not tied to a particular place. This is precisely why LaSelva and Cairns in particular believe a bill of rights is not only acceptable in, but required by modern Canada to protect "individuals and groups for whom federalism's privileging of territory is experienced as narrow and confining" (Cairns 1995, 192; LaSelva 1996, 80; Taylor 1993, 181–82). Provincial identities are not exhaustive. The *Charter* gives recognition to these identities as "a set of common values, shared customs... and implicit understandings" (David Cameron in LaSelva 1996, 88). It expresses, in short, the Canadian will to live together. The problem, as LaSelva and Cairns see it, is that the *Charter* gives no direction as to how this will is to be reconciled with the equally important federalist impulse to live apart (LaSelva 1996, 76–77, 96; Cairns 1995, 189; Taylor 1993, 182–83).

Specific direction out of this *Charter*–federalism paradox is varied, and often vague. At its most basic, however, a federalist theory of the *Charter*

must recognize both the will to live together and the will to live apart (LaSelva 1996, 29). It must involve a “positive relationship” where rights are “blended” with federalism, and Canadians’ multiple (i.e. *Charter* and federal) identities are recognized and protected simultaneously (Cairns 1995, 189, 214; 1992, 62). But the most important directive may be that the blending of *Charter* identities with their federal ones should not be symmetrical. There are important value differences between the English-speaking provinces that should remain protected from any centralizing tendencies (Vengroff and Morton 2000, 381–82; Wiseman 1996). Yet many believe that English Canadians are by now at least as concerned with *Charter* identities as with their provincial ones (Morton and Knopff 2000, 60; Morton 1995) and if the differences between English-speaking provinces appear profound, it is often because they have been exaggerated to dilute the significance of the more meaningful differences between Quebec and Canada outside of that province (Latouche 1990, 116). It is therefore consistent with Canadian federalism to hold the English-speaking provinces relatively uniform standard—relative, that is, to Quebec, where a singularly distinctive provincial context compels a singularly distinctive understanding of rights (McRoberts 1997, 110–16; Cairns 1995; LaSelva 1996; LaForest 1995). To reconcile Quebec with the *Charter* requires a form of “deep diversity.” If the *Charter* helps define what it means to be Canadian, it must recognize that what it means to be Canadian is different in Quebec than elsewhere (Taylor 1993).

This sketch of the normative *Charter*-federalism establishes that in a modern Canada, provincial societies should be held accountable for a certain level of protection for pan-Canadian identities. But it also requires assurances that *Charter* outcomes are, in turn, sensitive to differences in provincial context, particularly Quebec. This is nothing new, of course. The mega-constitutional politics of Meech Lake were intended to achieve just this. The Accord included provision for provincial input into Supreme Court appointments to ensure *Charter* outcomes were sensitive to federalism generally, and a distinct society clause to make them sensitive to Quebec in particular.

What is new is a claim that, in the absence of formal amendment, the federalist dialogue generates an *empirical Charter*-federalism consistent with its *normative* counterpart. It involves a “positive relationship,” reinforcing the idea that Canadians share certain values, while simultaneously stressing the importance of provincial societies by encouraging those common values to take on distinct local meanings. Furthermore, the *Charter*-federalism of the federalist dialogue reinforces the notion that the *Charter* must be applied asymmetrically if it is to conform to Canada’s constitutional foundations. It may not carry the symbolic weight of a “distinct society” clause, but the effect of *Charter*-federalism is the same. If the realization of rights is made dependent on provincial context, and if the Quebec context is distinct from

the relatively homogenous English provinces, then the *Charter* will necessarily take on a distinct meaning in Quebec. Indeed, this is the outcome of the dialogues here. At the level of section 1, for instance, the Ontario context in *Dunmore* was not sufficiently different to require a different limitation of *Charter* rights, unlike the Quebec context in *Advance Cutting*.

This asymmetry is even more obvious in the case of the *Charter*-federalism emerging from *Solski*. The right to minority language education may be an important part of what it means to “belong” to Canadian society. But given Quebec’s particular linguistic dynamic, this right means something different in that province than elsewhere, and that difference is “deeper” than the need for greater limitations. The difference extends to the very understanding of what the right to minority language education means. The Court’s acceptance of Quebec’s interpretation of section 23 in *Solski*—the outcome of the federalist dialogue—is recognition of a deeper diversity allowing Quebecers to live according to a different understanding of Canadian society, and should address the sceptics’ concerns.

## Conclusions

To date, explanations of *Lavigne*, *Advance Cutting*, and *Dunmore*, in particular, have been centred in traditional (i.e. non-federal) notions of *Charter* processes and outcomes. Jamie Cameron asks, for instance, whether *Advance Cutting* and *Dunmore* should be understood as expressions of “judicial sympathy” for labour, or as well-defined “principles of *Charter* interpretation” (Cameron 2002, 69). Cameron’s question reveals an understanding of *Charter* interpretation as a court-centric process. Either judicial attitudes or the law itself define *Charter* interpretation, but not external factors, such as the provinces’ own conceptions. A similarly non-federal perspective informs Cameron’s impressions of the outcomes, as they are concerned merely with their policy implications.

This paper is not meant to discount the relevance of these traditional concerns. On the contrary, from a process perspective, the interpretational jump from *Lavigne* to *Advance Cutting* reveals the importance of court-centric influences. In the absence of *Lavigne*, Quebec would have had neither the footing nor the language to construct its own *Advance Cutting* interpretation. Nor should a concern for policy-related outcomes be dismissed. Prior to *Advance Cutting* and *Dunmore*, *Charter* jurisprudence could best be described as anti-labour (Mandel 1994; Hutchinson 1995; Hutchinson and Petter 1988). But each of these cases represents something of a victory for labour, and so their significance for industrial relations cannot be disregarded (Monahan 2002, 5).

However, this conventional focus has also led scholars to overlook the significance of these cases for federalism. Seen here, these labour law cases along with *Ford* and *Solski* show that the *Charter* is more consistent with Canadian federalism than the sceptics would have us believe. For one thing, the outcome of these disputes—described here as *Charter*-federalism—largely conforms to what is needed for the *Charter*'s reconciliation with federalism. The *Charter*'s pan-Canadian values, through section 1 and the interpretation of *Charter* rights themselves, have been encouraged to take on asymmetrically particular meaning depending on provincial context.

What is more, whereas *Charter* sceptics have assumed that reconciliation could only take place via constitutional change, *Charter*-federalism has emerged by way of a less formal process. Indeed, *Charter*-federalism cannot be understood without reference to the federalist dialogue. Courts and provinces are uniquely situated vis-à-vis federalism and the *Charter*. Courts, isolated from the political imperatives of provincial politics, bring a particular perspective to *Charter* interpretation. Provinces, by contrast, seem better positioned to appreciate local context. This does not suggest that provinces cannot make impartial judgments about rights or that courts are incapable of appreciating provincial context, only that each partner must take their own, and the other's role seriously. Such is not always the case. *Ford* is a good example, as are certain cases pertaining to the compliance of the public health care system with the *Charter*.<sup>5</sup> But when the provinces and the Court do take the federalist dialogue seriously, as they did in *Advance Cutting*, *Solski* and elsewhere—including *other* health care litigation<sup>6</sup>—it can lead to a process of *Charter* interpretation in which provinces play an important role, alleviating concerns of judicial monopoly. When that process is taken seriously, at least, both it and the outcome it can generate are more consistent with Canada's constitutional foundations than typically portrayed.

## Notes

1. I would like to acknowledge the financial support of SSHRC, and thank Janet Hiebert, Emmett Macfarlane and the anonymous reviewers for their thoughtful comments on earlier drafts. Any errors or omissions are my own.
2. Some scholars have suggested that this exercise endeavours simply to "*Charter*-proof" legislation by anticipating what the judiciary will say. It may simply be, then, that the rates of judicial nullification have decreased because legislatures have been self-censoring before the judiciary has the opportunity (Gagnon and Iacovino, 2007: 41)
3. McLachlin, Bastarache, Binne, Iacobucci, and Major.
4. Arbour and Gonthier concurred with LeBel in full. L'Heureux-Dubé and Iacobucci concurred on the importance of provincial context in a section 1 analysis.
5. The *Chaoulli* (SCC, 2005b) and *Eldridge* (SCC, 1997) decisions—striking down Quebec's ban on private health care insurance and forcing BC to provide sign

language interpreters in the provinces hospitals, respectively—have been cited as examples of the Supreme Court's insensitivity to federalism, although it should be noted that the former was technically decided on the basis of the Quebec *Charter of Human Rights* and not the Canadian *Charter*.

6. The *Auton* (SCC, 2004) decision upholding BC's decision not to fund a particular treatment for autism in young children has been explained as a product of the federalist dialogue (Clarke, 2006).

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