

2007

Reply to Charter Dialogue Revisited

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Citation of this paper:

Hogg, Peter W.; Thornton, Allison A. Bushell; and Wright, Wade K.. "A Reply on "Charter Dialogue Revisited"." Osgoode Hall Law Journal 45.1 (2007) : 193-202. <http://digitalcommons.osgoode.yorku.ca/ohlj/vol45/iss1/9>

A REPLY ON “*CHARTER* DIALOGUE REVISITED”[©]

PETER W. HOGG, ALLISON A. BUSHELL THORNTON & WADE K. WRIGHT

I. OUR OPPORTUNITY TO REPLY

We have been given an opportunity to make a brief reply to the six commentaries on our “*Charter* Dialogue Revisited” article.¹ This seemed like a good idea, before we had actually seen the commentaries and discovered the extent of the thoughtful and wide-ranging ideas. There is no way to “reply” in a summary way to the many interesting points that are made in the commentaries, some in disagreement, and others more in the way of elaboration. All we will try to do in this reply is to identify points that are central to our thesis² and discuss the commentaries on those points.

II. THE “DIALOGUE” THESIS

The thesis of the original 1997 article, “*Charter* Dialogue,”³ which we reaffirmed in “*Charter* Dialogue Revisited,” is that the

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¹ Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, “*Charter* Dialogue Revisited—Or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall L.J. 1 [“*Charter* Dialogue Revisited”].

² For example, most of the commentaries deal with the legitimacy of judicial review, which was understandable since we raised the issue in the “*Charter* Dialogue Revisited” article. However, since dialogue theory is not part of the justification of judicial review, it is not central to our concerns, and we will not add to the mountain of literature on this highly contested topic of constitutional theory. As another example, several of the comments deal with the idea that legislatures should have a coordinate power of interpretation of the *Charter*. That is a topic we covered at length in the “*Charter* Dialogue Revisited” article, and we have nothing to add to that treatment.

³ Peter W. Hogg & Allison A. Bushell, “The *Charter* Dialogue Between Courts And Legislatures (Or Perhaps The *Charter of Rights* Isn’t Such A Bad Thing After All)” (1997) 35 Osgoode Hall L.J. 75 [“*Charter* Dialogue”].

structure of the *Charter*⁴ (and especially section 1) generally leaves room for the competent legislative body to respond to a court decision striking down a law on *Charter* grounds by enacting a new law that accomplishes the legislative purpose by other means. This thesis emerged from our analysis of the legislative sequels to all the cases in which laws had been struck down on *Charter* grounds since the adoption of the *Charter* in 1982. We found that in most cases the competent legislative body had replaced the invalid law with a new law that accomplished the same policy purposes as the invalid law, albeit often with some new civil libertarian safeguards. We were surprised by the fact that the legislative body typically had the last word. We used the word “dialogue” to describe the phenomenon of legislative sequels, and we concluded that Canada had a weaker form of judicial review than had been assumed by commentators on the *Charter*. In “*Charter* Dialogue Revisited,” we researched the sequels to the cases that had been decided since the 1997 article and found that the same pattern had continued: decisions striking down laws were usually followed by a new law that accomplished essentially the same legislative objective. The dialogue that we had identified in 1997 was still alive and well.

III. EFFECT OF DIALOGUE ON JUDICIAL REVIEW

Of the six commentators, Grant Huscroft and Andrew Petter have the most radical concerns with the dialogue thesis. They take the view that dialogue theory liberates courts to become more activist in their application of the *Charter*, and that this is a bad thing.⁵ We agree that this would be a bad thing. On the other hand, it is impossible not to feel flattered by the attribution of such influence to our writing, which would normally be of little interest outside legal academic circles. However, we must set our egos aside, and confess that there is no credible danger that the courts have used or will use dialogue theory to expand their role of judicial review.

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

⁵ Grant Huscroft, “Constitutionalism from the Top Down,” (2007) 45 *Osgoode Hall L.J.* 91 (at passim, by implication); Andrew Petter, “Taking Dialogue Theory Much Too Seriously (Or Perhaps Charter Dialogue Isn’t Such A Good Thing After All)” (2007) 45 *Osgoode Hall L.J.* 147 at 150, n. 6 (“dialogue theory can encourage courts to become more activist”).

One problem with the view that dialogue theory encourages activist judicial review is that dialogue theory cannot explain the decisions of the Court that were described in the 1997 article, "*Charter Dialogue*," because, of course, they were rendered before the article was written. And that was a period of extraordinary judicial activism. We counted no less than sixty-six laws (forty-three federal and twenty-three provincial) that had been struck down from 1982 to 1995. Many of the laws that were struck down were very important, dealing with, for example, abortion, film censorship, election expenditures, language of signs in Quebec, Sunday closing, religious education in schools, refugee determination, qualifications for unemployment insurance, the definition of murder, the defence of drunkenness, "rape-shield" restrictions on cross-examination, disposition of persons acquitted on account of insanity, search warrant procedures, and reverse onus clauses in the *Criminal Code*,⁶ to name just a few.

In contrast to that period of activism, the period since the publication of the 1997 article has seen a decline in the rate of laws being struck down.⁷ As Kent Roach notes in his commentary, this decline may simply mean that laws enacted in the *Charter* era have been subject to *Charter* vetting before their enactment, but, as he also points out, it may also signal increased deference on the part of the Court.⁸ There are, in fact, indications of increased deference. For example, the Court has introduced restrictions on the equality guarantee, which make it difficult for equality claimants to succeed.⁹ The Court has stopped using the cruel and unusual punishment clause to strike down minimum mandatory sentences.¹⁰ The Court's application of the speedy trial guarantee has gone from frequent to rare.¹¹ The Court has stopped using section 7 of the *Charter* (and the Court's notion of "stigma") to

⁶ R.S.C. 1985, c. C-46.

⁷ In the 1997 article, we reported sixty-six cases in which laws were struck down. In the "*Charter Dialogue Revisited*" article, we reported twenty-three cases. Despite the shorter period of comparison, this is a lower rate of striking down.

⁸ Kent Roach, "Sharpening the Dialogue Debate: The Next Decade of Scholarship" (2007) 45 *Osgoode Hall L.J.* 169 at 189-190.

⁹ *Law v. Canada*, [1999] 1 S.C.R. 497 (introducing a new requirement of an impairment of human dignity, which few equality claimants are able to establish).

¹⁰ Contrast *R. v. Smith*, [1987] 1 S.C.R. 1045, with *R. v. Latimer*, [2001] 1 S.C.R. 3.

¹¹ Contrast *R. v. Askov*, [1990] 2 S.C.R. 1199, with *R. v. Dutra*, [2001] 1 S.C.R. 759.

prescribe the mental element of crimes.¹² It is also interesting to compare the use of section 7 of the *Charter* in the forthright 1988 decision of *Morgentaler*,¹³ where a 5:2 majority of the Court struck down, with immediate effect, the provisions of the *Criminal Code* that risked the life and health of women by delaying access to abortion, with the judicial hand-wringing in the 2005 decision of *Chaoulli*,¹⁴ where the Court divided evenly on the question of whether section 7 condemned the state-induced waiting lists that risked life and health by delaying access to other health care procedures. In the latter case, the tie was broken by one judge (Justice Deschamps), who relied on the Quebec *Charter*¹⁵ to strike down the impugned law. The ultimate majority still gave the province of Quebec a year to comply with the decision. We conclude that the 1997 article certainly did not usher in a new period of active judicial review. It almost certainly had no effect on the willingness of the courts to strike down legislation. And no doubt, if the courts really are as attentive to our writing as our critics seem to think, our attempt in the “*Charter* Dialogue Revisited” article to reiterate and clarify our thesis will further dampen any tendency to rely on the dialogue thesis as a reason for striking down (or upholding) a law.

The reason why “*Charter* Dialogue” almost certainly had no effect on the willingness of the courts to strike down legislation is that it did not address that issue. The dialogue phenomenon that we reported concerned the action taken by legislative bodies *after* judicial decisions were rendered. It did not speak to how the judicial decisions *should* be rendered in the first place. This is clearly articulated in the commentary by Richard Haigh and Michael Sobkin, who say: “Dialogue is thus the consequence of a decision striking down legislation, not an independent reason for striking it down.”¹⁶ And, in their comprehensive survey of all the judicial dicta using the dreaded term, they demonstrate that it is in this sense that courts have usually understood the metaphor. They criticize those few instances where the courts have used dialogue in a

¹² The complex case law is discussed in P.W. Hogg, *Constitutional Law of Canada*, 5th ed., supplemented (Toronto: Carswell, 2007), ss. 44.11-44.14 [Hogg, *Constitutional Law of Canada*].

¹³ *R. v. Morgentaler* (No. 2), [1988] 1 S.C.R. 30 [*Morgentaler*].

¹⁴ *Chaoulli v. Quebec*, [2005] 1 S.C.R. 791 [*Chaoulli*].

¹⁵ *Charter of human rights and freedoms*, R.S.Q. c. C-12.

¹⁶ Richard Haigh & Michael Sobkin, “Does the Observer Have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada’s Courts” (2007) 45 *Osgoode Hall L.J.* 67 at 79.

prescriptive sense, as a justification for judicial review of a law, including cases where the metaphor is used to justify a suspended declaration of invalidity.¹⁷

The most that could be said about "*Charter Dialogue*" as an influence on judicial review is that a judge might be emboldened to strike down a law in the knowledge that, in the past, legislative bodies have often succeeded in re-enacting the substance of a law struck down by judicial decision. But the existence of legislative sequels to other decisions is simply an empirical fact that exists independently of the 1997 article. Even if we had refused to publish the article, and somehow managed to suppress our findings of legislative sequels (or at least shield them from the eyes of judges), the news of the phenomenon could hardly remain secret indefinitely in an open society. Indeed, the impulse for "*Charter Dialogue*" were the media accounts regarding the amount of parliamentary time that was devoted to re-enacting laws struck down by the Court. Obviously, judges might have noticed the same thing at the same time. Although we found the phenomenon surprising, that does not mean that others were similarly surprised. Both of our most severe critics assert that there is nothing surprising about the phenomenon of legislative sequels to decisions striking down laws on *Charter* grounds.¹⁸ Our reporting of the phenomenon could hardly be a watershed event in the history of judicial review in Canada.

A similar misunderstanding of our dialogue thesis underlies Christopher Manfredi's claim ("The Day the Dialogue Died"¹⁹) that the *Sauvé* case²⁰ has "effectively brought an end to the short history of the dialogue metaphor as a useful guide to judicial decision making."²¹ As we tried to point out in "*Charter Dialogue Revisited*," the dialogue metaphor was never a useful guide to judicial decision making. In *Sauvé No. 2*, it will be recalled, Chief Justice McLachlin, for the majority of the Court, struck down a law that denied the right to vote to penitentiary

¹⁷ *Ibid.* at 89-90. In "*Charter Dialogue Revisited*," we took the view that this was one judicial function to which the idea of dialogue could be helpful.

¹⁸ Huscroft, *supra* note 5 at 93 ("should come as no surprise"); Petter, *supra* note 5 at 166 ("unremarkable insight," "banality").

¹⁹ Christopher Manfredi, "The Day the Dialogue Died: A Comment on *Sauvé v. Canada*" (2007) 45 Osgoode Hall L.J. 105.

²⁰ *Sauvé v. Canada*, [2002] 3 S.C.R. 519 [*Sauvé No. 2*].

²¹ *Supra* note 19 at 106.

inmates serving sentences of two years or more. This was a “second look” case, because the Court had previously struck down a law that denied the vote to all prison inmates.²² In striking down the second law, Chief Justice McLachlin rejected the argument that the Court should automatically defer to Parliament’s second look, and she remarked that dialogue should not be debased to a rule of “if at first you don’t succeed, try, try again.”²³ The fact is that after *Sauvé No. 1*, Parliament was left with little latitude to craft a new law, because section 3 of the *Charter* confers an unqualified right to vote on citizens of Canada, and section 3 is one of the few rights that is not subject to the section 33 override. A limitation of the right under section 1 is theoretically possible, but the limiting law would have to serve an important public purpose. For the majority of the Court (although not the dissenting minority), no sufficiently important purpose emerged in the parliamentary debate on the sequel legislation.

Sauvé No. 2 is an interesting case, because, as Huscroft notes,²⁴ the legislative desire to disenfranchise prisoners is probably impossible to accomplish. This is one of the exceptional situations where no legislative sequel can be designed, and therefore no dialogue can take place. Manfredi and Huscroft are quite right to single the case out for this reason. But the point to bear in mind is that the right to vote was deliberately made exceptionally strong by the framers of the *Charter*, and its foundational nature makes it hard to articulate a rational basis for denying the right to prisoners. With respect to rights other than the right to vote, nothing said or decided by the Court in *Sauvé* can change the fact that, after a law is struck down for breach of the *Charter*, a government will *usually* be successful in finding a way to enact a new law that keeps the legislative purpose alive. The statistics in both “*Charter Dialogue*” and “*Charter Dialogue Revisited*” demonstrate that. And since many of us, including Petter,²⁵ rightly distrust a merely “quantitative analysis,” the appendices to the two articles²⁶ describe each case and each sequel, enabling the reader to make his or her own

²² *Sauvé v. Canada*, [1993] 2 S.C.R. 438 [*Sauvé No. 1*].

²³ *Supra* note 20 at 538.

²⁴ Huscroft, *supra* note 5 at 93.

²⁵ Petter, *supra* note 5 at 152-57.

²⁶ *Supra* note 3 at 107-24; *Supra* note 1 at 55-65.

"qualitative" evaluation of the degree to which the sequel legislation in each case achieves the policy objectives of the law struck down.

IV. WEAK OR STRONG JUDICIAL REVIEW

Our critics are intrigued by the question of whether Canada has a "weak" or a "strong" form of judicial review. These are comparative terms upon which reasonable people will differ. Carissima Mathen argues that Canada has a strong form of judicial review because of the range of remedies available to the Court, and she says that "the fact that the legislature can respond—by changing the law or enacting a new one—does not diminish the court's powers."²⁷ Huscroft is also in the strong camp, and he is right to point out that the statutory bills of rights of New Zealand and the United Kingdom are weaker than the *Charter* because they do not authorize the judicial invalidation of legislation.²⁸ We do not argue that Canada has the weakest possible form of judicial review. Our position is simply that the legislature's normal option of a new law diminishes the dominance of judicial review over democratic law-making. We agree that Canada's judicial review is still stronger than that of New Zealand and the United Kingdom, where the courts cannot strike down the law in the first place. (The analogy to their statutory bills of rights is our old Canadian Bill of Rights.) However, we have no doubt that Canada's judicial review is weaker than that in the United States. That is the conclusion of Kent Roach, who has contrasted the difficulty of overcoming constitutional decisions in the United States with the greater ease with which that can be done in Canada.²⁹

The features of the *Charter* that are not present in the American Bill of Rights are the limitation clause of section 1 and the override clause of section 33. It is true that, despite the absence of these two provisions, legislative sequels can often be enacted in the United States. The persistence of most of the states in enacting capital punishment statutes, despite the ever-increasing restrictions imposed by the U.S.

²⁷ Carissima Mathen, "Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on 'Charter Dialogue Revisited'" (2007) 45 *Osgoode Hall L.J.* 125 at 145.

²⁸ Huscroft, *supra* note 5 at 97.

²⁹ K. Roach, "Dialogue or Defiance: Legislative Reversals of Supreme Court decisions in Canada and the United States" (2006) 4 *Int'l J. Const. Law* 347. See also C. Mathen, "Constitutional Dialogue in Canada and the United States" (2003) 14 *N.J.C.L.* 403 (contrasting the U.S. inability to modify the *Miranda* rule with the Canadian ability to modify the *O'Connor* rule).

Supreme Court, is a good example. Moreover, as we recognized in “*Charter Dialogue Revisited*,” a considerable body of literature exists in the United States on “dialogue.” However, in the American literature, “dialogue” is a term that has as many meanings as there are American commentators. Since the publication of “*Charter Dialogue*,” we have tried to check periodically on the state of the American literature, and we continue to be surprised that there is no published American study that tracks the legislative sequels to all the cases in which laws were struck down by the U.S. Supreme Court for breach of the American Bill of Rights. In short, there is no study that uses the term “dialogue” in the sense that we used it, or that offers a direct comparison to our “*Charter Dialogue*” and “*Charter Dialogue Revisited*” articles, with their appendices of legislative sequels.

Huscroft and Petter each speculate (it can only be speculation) that dialogue (in our sense) occurs just as frequently in the United States as it does in Canada, and that we are wrong to assume that Canada has a weaker form of judicial review than does the United States.³⁰ This conjecture will surprise the many commentators in the United States who have struggled to reconcile judicial review with democratic governance. Intuitively, it seems clear to us that our section 1 provides more flexibility for legislative sequels than does the “definitional balancing” that takes place in the United States. However, the big difference is our section 33. Section 33 changes the balance of power between the judicial and legislative branches. In 1937, President Roosevelt’s “court-packing” plan was needed (until the Court changed its mind) to protect his “New Deal” program; it would not have been necessary in a country with a legislative override. The intense controversies about the Supreme Court (and the ideology of the judges) that have surrounded issues of school desegregation, prayer in the schools, the *Miranda* warnings to criminal suspects, the burning of the flag, and, above all, abortion, have all been driven by frustration that neither the Congress nor the state legislative assemblies were competent to change judicial rulings with which they profoundly disagreed. The existence of a legislative override for Congress and the state legislatures would have changed everything. It would certainly have been used on each of the issues mentioned above.

³⁰ Huscroft, *supra* note 5 at 95; Petter, *supra* note 5 at 160.

The section 33 override is the basis for the legislative sequel in only one of our recorded cases, and that is the case of the Quebec law requiring that signs in Quebec be in French only. The decision of the Supreme Court of Canada that struck down the law for breach of the guarantee of freedom of expression was overridden by Quebec under section 33.³¹ Because this is the only example of the use of section 33 to overcome a judicial decision, section 33 is unimportant in our *statistics* of legislative sequels. However, we do not accept the assumptions of Huscroft and Petter that section 33 is an unimportant feature of the *Charter*. There is no reason to suppose that the current political reluctance to use section 33 is a permanent feature of the Canadian legal system, which will prevail no matter what the Court does, or how public opinion changes, or which political parties come into power.³² On the contrary, section 33 is part of the structure of the *Charter*, and it was included in the *Charter* for the very purpose of preserving parliamentary sovereignty on rights issues. As one of us has written elsewhere: "[S]o long as the last word remains with the competent legislative body, there can be no acute or longstanding conflict between the judicial and legislative branches."³³ Make no mistake about it: if conflict between the judicial and legislative branches in Canada ever approached the intensity and duration of the conflict that occurred in the United States during the Lochner era (1905–1937) or during, and just after, the Warren Court (1953–1973) (and that continues to this day with respect to abortion), the current reluctance by Canadian politicians to use the override would disappear. Indeed, the use of the override by Quebec to protect its French language policy is a reliable indication of what would happen elsewhere in the country if a cherished policy were threatened by the Court. Only the fact that public opinion outside Quebec has not been deeply disturbed by decisions of the Court has so far kept the override locked up and out of sight.

Whether judicial review in Canada is weak or strong is a matter on which wordsmiths may argue, but our conclusion is that judicial review in Canada is weaker than it is in the United States. This fact has

³¹ The override was upheld in *Ford v. Quebec*, [1988] 2 S.C.R. 712.

³² Huscroft, *supra* note 5 at 96 ("the notwithstanding clause is unused, and all but unusable"); Petter, *supra* note 5 at 161 ("the political inability of legislatures to exercise [the override power]").

³³ Hogg, *Constitutional Law of Canada*, *supra* note 12 at 36-11.

protected us from the court-packing and court-bashing that are the staples of political debate in the United States. Canadians do not care as much as Americans about the personnel and decisions of our Supreme Court; this is partly because so far the Canadian decisions have not departed too markedly from Canadian public opinion, but partly because the final court's decisions are not the formidable obstacles to democratic choice that they are in the United States. Our Court's decisions do not matter as much.

V. MUCH ADO ABOUT METAPHORS

Haigh and Sobkin make the perceptive point that a metaphor like dialogue is a literary device that is probably best avoided by courts, because of the risk that it will be misunderstood and employed in ways that we did not intend.³⁴ It is fair to say that this same point is made in various fashions by all but one (Roach) of the other commentators: they too find the use of the word "dialogue" problematic. We said in the "*Charter Dialogue Revisited*" article that our problem was that no one had found a better word for us to use, but Mathen argues that no word is needed: sentences could be constructed that articulate our thesis without the word "dialogue" in them. And she has followed up by constructing some sample sentences for us to use.³⁵ Perhaps all commentators would be satisfied by a leaner and meaner version of our thesis from which the word dialogue has been completely banished. We will have to think about that.

³⁴ *Supra* note 16 at 90.

³⁵ *Supra* note 27 at 129.