REPLY TO “SIX DEGREES OF DIALOGUE”©

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In our article, “The Charter Dialogue Between Courts and Legislatures,”[1] we argued that it was helpful to think of judicial review as part of a dialogue between the courts and the legislative bodies. We argued that a judicial decision striking down a law on *Charter*[2] grounds nearly always left room for the law to be re-enacted by the competent legislative body in a form that still accomplished the objectives of the invalid law, and we presented evidence to show that most judicial decisions striking down laws have been followed by legislative sequels. The conclusion that we drew was that the constraints on the democratic process that are imposed by judicial review are much less severe than is often asserted by those who question the legitimacy of judicial review in a democracy.

In “Six Degrees of Dialogue: A Response to Hogg and Bushell,”[3] Christopher Manfredi and James Kelly offer a number of thoughtful criticisms of our article. In this brief note, we set out each point of criticism, and attempt to provide an answer.

1. *We ignored those decisions in which the courts did not nullify a statute, but merely nullified the action of a police officer or other official.*

The reason why we focused on decisions that nullified *statutes* as opposed to those that reviewed executive action flows from the question that we posed near the beginning of our article, namely, whether the

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[1] P.W. Hogg & A.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 [hereinafter “Charter Dialogue”].

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

[3] C.P. Manfredi & J.B. Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell” (1999) 37 Osgoode Hall L.J. 513 [hereinafter “Six Degrees of Dialogue”].

Charter is a "bad thing" for democracy.[4] Canadian courts have always had the power to review executive action, albeit on more limited grounds than are now available under the *Charter*. What is new under the *Charter*, and what tends to upset ardent supporters of parliamentary sovereignty, is the power of unelected judges to interfere with the *legislative* decisions of elected representatives. Judicial decisions that do not strike down a law do not, generally speaking, impugn legislative choices, and do not raise concerns about judicial interference with democratic processes.

While they are unusual, there are cases where the competent legislative body is moved to alter the law by reason of a decision condemning police action or administrative action. For example, as we noted in our article,[5] the Supreme Court of Canada decided in *R.* v. *Duarte*[6] that electronic surveillance of suspects by undercover police participants was a breach of section 8 of the *Charter*. This ill-considered decision not only deprived the courts of reliable evidence, but it also put police officers at risk since they could not wear electronic body packs even for protection. Parliament quickly acted to enact a code authorizing and regulating state-initiated participant electronic surveillance.[7] Another example (which comes from outside our time frame) is the case of *R.* v. *Feeney*,[8] where the Supreme Court held that a police officer who held a warrant for the arrest of a murder suspect, and who suspected on reasonable grounds that the suspect was in his unlocked home, violated section 8 of the Charter when he peacefully entered the home and made the arrest. Parliament quickly enacted an amendment[9] to the *Criminal Code* making provision for such a warrant, but also authorizing entry without warrant where "by reason of exigent circumstances it would be impracticable to obtain a warrant."[10]

The decisions and legislative sequels to both *Duarte* and *Feeney*

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[4] See "Charter Dialogue," *supra* note 1 at 76-82.

[5] *Ibid.* at 89.

[6] [1990] 1 S.C.R. 30 [hereinafter *Duarte*]. This decision was followed in *R.* v. *Wiggins*, [1990] 1 S.C.R. 62; and *R.* v. *Wong*, [1990] 3 S.C.R. 36.

[7] See *An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40, s. 4, which added sections 184.1-184.6 to the *Criminal Code*, R.S.C. 1985, c. C-46.

[8] [1997] 2 S.C.R. 13 [hereinafter *Feeney*].

[9] See *An Act to amend the Criminal Code and the Interpretation Act (powers to arrest and enter dwellings)*, S.C. 1997, c. 39, s. 2, which added sections 529-529.5 to the *Criminal Code*, *supra* note 7.

[10] *Criminal Code*, *supra* note 7, s. 529.3(1).

are excellent examples of dialogue, because in each case a judicial decision led to the enactment of a law to regulate the action of police officers, and the law tried to strike a fair balance between the civil liberties of the suspect (as identified by the Court) and the exigencies of police enforcement. Our focus on legislative nullifications led us to include in our data only those cases where a law was struck down. We could have hunted for and recorded all the cases where the striking down of police (or other executive) action led to legislative sequels. However, it should be noticed that this research would strengthen our thesis rather than weaken it, because the research would reveal that dialogue is more extensive than indicated by a focus on legislative sequels to judicial nullification of statutes.

2. *We may have missed some non-Supreme Court decisions where laws were struck down, thereby potentially biasing the study and making it "impossible to draw any meaningful conclusions about Charter dialogue."*[11]

We selected for study all of the decisions of the Supreme Court of Canada in which a law had been struck down on *Charter* grounds. Needless to say, the attorney general of any particular jurisdiction will normally appeal any decision striking down a law all the way up to the Supreme Court, so that there are few nullifications of laws that end at a lower court. There are, however, some of these, and so we added them to the study. We assumed that we had all the important ones by using all the cases cited in *Constitutional Law of Canada*.[12] It is true that, while Peter Hogg's text purports to track all the important developments in constitutional law, it is not infallible, and our research would have been more exhaustive if we had hunted for any cases that Hogg had somehow missed in his text. Manfredi and Kelly do not claim that there are any such cases, and so the point seems to be quite trivial. It is perhaps worth pointing out that our thesis depends not at all on having precise figures of every instance or non-instance of *Charter* dialogue—the mere fact that many decisions have legislative sequels establishes the empirical part of the thesis.

[11] "Six Degrees of Dialogue," *supra* note 3 at 517.

[12] P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997).

3. *We wrongly included cases where the legislative sequel was enacted before the case reached the Supreme Court of Canada.*

There is no merit to this criticism. Where the competent legislative body acts on the basis of a lower court decision, it is equally an example of dialogue. Manfredi and Kelly have confused "dialogue," as we defined it, with other (equally valid) definitions of dialogue that have been suggested by others. Our article was not about "the *Supreme Court*'s willingness to engage in an institutional dialogue with the other branches of government,"[13] as Manfredi and Kelly assert. Our article was about the extensive ability of *legislative bodies* to *respond* to decisions striking down laws by courts of any level. Where the legislative body acts on the basis of a lower court decision before the case moves on to the Supreme Court, it is equally an example of dialogue.

We cannot take credit for the idea of the Supreme Court self-consciously engaging the legislatures in dialogue when rendering *Charter* decisions. That form of dialogue could perhaps be more correctly attributed to opinions by members of the Court in several cases that have been released since our article was published.[14]

4. *We exaggerated the number of legislative sequels by counting cases where a single legislative sequel dealt with more than one case.*

We must acknowledge the fact that, if one were to treat as a single instance of dialogue those cases that stood for the same proposition and generated the same legislative response, there would be a modest reduction in our sample size, from 65 cases to 60 cases. However, Manfredi and Kelly go too far when they suggest that the replacement of several sections of the *Narcotic Control Act*[15] with new provisions of the *Controlled Drugs and Substances Act*[16] constitutes only a single instance of dialogue. The sections of the *Narcotic Control Act* were struck down in several cases for a variety of reasons, and the legislative sequel involved the replacement of the entire *Act*. Is it only one example

[13] "Six Degrees of Dialogue," *supra* note 3 at 517 [emphasis in original].

[14] See, for example, Iacobucci J. in *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 at 565-66, 578 [hereinafter *Vriend*]; Bastarache J. in *M.* v. *H.*, [1999] 2 S.C.R. 3 at 181-83; L'Heureux-Dubé J. in *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at 283-85; and McLachlin and Iacobucci JJ. in *R.* v. *Mills*, [1999] S.C.J. No. 68 at paras. 57-60, online: QL (SCJ).

[15] R.S.C. 1985, c. N-1.

[16] S.C. 1996, c. 19.

of dialogue when a legislative sequel deals with various different issues in a single enactment? We do not think so.

With respect, it is a mistake to focus too intently on the specific number of cases and legislative sequels. The question of what to count is always open to argument. Consider the following examples. First, as we have already mentioned, there are cases where a decision striking down executive action is followed by a legislative sequel. Second, it is not uncommon for several jurisdictions, in addition to the one directly affected, to enact changes to legislation in response to a successful *Charter* challenge. Third, there are examples of legislative responses to unsuccessful *Charter* challenges, such as *Thibaudeau* v. *Canada*,[17] that led to changes in the taxation of child support payments.[18] Fourth, in some cases—*Vriend*[19] is a good example—where no legislative sequel follows, what appears to be inaction is the result of a lively political debate over how to respond to a judicial decision. Although we mentioned these kinds of legislative responses to judicial decisions in our article, we did not put them into our data. In short, while our counting methods are open to criticism, they do not exaggerate the prevalence of dialogue.

5. *We also exaggerate the prevalence of dialogue by including cases where the legislative sequels are "major legislative responses on the part of elected officials, such as repealing sections or replacing entire Acts.*[20]"

We do not accept the proposition that, if a constitutional defect exposed by a judicial decision is corrected as part of a wider legislative reform, it does not count as an example of dialogue. For example, as noted above, a variety of constitutional infirmities in the old *Narcotic Control Act* were corrected in a new *Controlled Drugs and Substances Act*. Similarly, the old *Tobacco Products Control Act*,[21] which was held to be a violation of freedom of expression, was replaced by a new *Tobacco Act*,

17 [1995] 2 S.C.R. 627; cited in "Charter Dialogue," *supra* note 1 at 104-05.

18 See *Income Tax Budget Amendments Act, 1996*, S.C. 1997, c. 25.

19 *Supra* note 14. *Vriend* was followed by a public debate and an explicit decision by the Government of Alberta not to use section 33 to override the judicial decision, which read in sexual orientation as a ground of discrimination into Alberta's human rights legislation.

20 "Six Degrees of Dialogue," *supra* note 3 at 521.

21 R.S.C. 1985 (4th Supp.), c. 14.

with more carefully targeted prohibitions of advertising.[22] Manfredi and Kelly say that these cannot be counted at all because they are not examples of a "positive" dialogue. We say, why not? Whenever a legislative response follows a *Charter* nullification ruling, it is reasonable to assume that the legislature has given consideration to the range of constitutionally permissible options left open by the ruling.

6. *We do not answer the critique of democratic legitimacy, because "policy distortion" occurs "whenever a legislature must subordinate its understanding of constitutionally permissible policy to that articulated by a court."*[23]

We probably should not have said in the conclusion to our article that "the critique of the *Charter* based on democratic legitimacy cannot be sustained."[24] No amount of argument or evidence will shake the convictions of those who regard *any* influence by the courts on legislative policymaking as illegitimate "policy distortion." But that is an extreme position. When legislative bodies follow judicial interpretations of the *Charter* to enact laws that require search warrants for searches, that eliminate provisions that cast the burden of proof on the accused, that require *mens rea* for serious criminal offences, that introduce standards for censorship of movies, that make provision for absentee voting, and that permit limited forms of advertising by dentists—to use a few examples from our survey of sequels—no major democratic objective is defeated at the same time that a civil libertarian value is respected. The *Charter*, admittedly as interpreted by the courts, forces the legislative bodies to pay more attention to the liberty of the individual and to show more respect for minorities than the majority's representatives in the legislature are likely to do in the absence of judicial review.

Our point is that judicially-imposed constitutional norms rarely defeat a desired legislative policy; they generally operate at the margins of legislative policy, affecting issues of process, enforcement, and standards, all of which can accommodate most legislative objectives.

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[22] S.C. 1997, c. 13, ss. 18-33 (Part IV).

[23] "Six Degrees of Dialogue," *supra* note 3 at 522.

[24] "Charter Dialogue," *supra* note 1 at 105. We are much more moderate, at 80, where we acknowledge that the Court may have forced issues onto the legislative agenda that the legislature would have preferred not to have to deal with, and that the Court may have influenced the text of the new law by requiring greater weight to be given to *Charter* values.

7. *Because the Supreme Court of Canada has several times gone on to decide a constitutional issue after the legislative sequel has been enacted, this shows that the judges are not particularly interested in "engaging in a dialogue about constitutional norms.*[25]

This point reflects the fallacy identified earlier that attributes to us the assumption that courts want to engage in a dialogue. What they want to do is decide cases. A legislative sequel is nearly always prospective in its operation, having no effect on past cases, including cases in the judicial system. The parties to those cases will reasonably want their rights to be determined according to the law as it stood when the facts occurred. Some appeals go to the Supreme Court as of right; they have to be decided whether or not new legislation has been enacted. But, even for those appeals that require leave, if there is concern that an appellant has suffered an injustice on an important constitutional point, it may be a reasonable choice for the Court to accept the appeal even if new legislation has altered the law for the future.

8. *We assume "a judicial monopoly on correct interpretation" of the Charter.*[26]

We do not. All we say is that the decisions of courts, *whether right or wrong*, rarely preclude a legislative sequel and usually get one. As an aside, we note that many of the decisions that led to legislative sequels were vigorously criticized as wrongly decided in Hogg's *Constitutional Law of Canada*.[27] However, Hogg's developing understanding of the concept of dialogue has caused him to repent of some of his more categorical condemnations on the ground that the decisions that he criticized have sometimes resulted in legislation that he is forced to acknowledge constitutes a major improvement of the law.[28]

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[25] "Six Degrees of Dialogue," *supra* note 3 at 522.

[26] *Ibid.* at 523.

[27] *Supra* note 12.

[28] A good example is the legislation that followed the *Duarte* decision: see notes 5-7, *supra.*

9. *We inflate the data by including as examples of "dialogue" legislative sequels that simply give effect to the judicial decision. These kinds of sequels should not be counted, because they reinforce the "hierarchical relationship between judges and legislators" by allowing "the judiciary's interpretation of the Charter to go unchallenged."*[29]

It is an arguable point that there is no dialogue when a legislature responds to a judicial decision by doing exactly what the court orders. But, remembering that the legislature nearly always has a range of choice, it is difficult to maintain that the legislature is not exercising any of that choice when it implements the court's decision. After all, in common experience, dialogue does sometimes lead to agreement. We have not researched the debates within government that preceded each legislative sequel, but we consider it safe to assume that in most if not all cases a range of legislative sequels would have been under consideration.

10. *Charter dialogue is "far more complex and less extensive" than we reported.*[30]

This is the conclusion of "Six Degrees of Dialogue." Manfredi and Kelly do shed interesting light on what is without question a complex phenomenon. However, it will be obvious from the foregoing account that we do not accept many of the distinctions relied on by them to exclude legislative sequels from consideration as dialogue, and we certainly do not agree that *Charter* dialogue is "less extensive" than we reported.

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[29] "Six Degrees of Dialogue," *supra* note 3 at 525.

[30] *Ibid.* at 524-25.