

ABSTRACTS for Volume 45, Number 1, Spring 2007
Charter Dialogue: Ten Years Later

Charter Dialogue Revisited—Or “Much Ado About Metaphors”

By Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright

This article is a sequel to the 1997 article “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn’t Such A Bad Thing After All).” In the present article, the authors review various academic critiques of their “dialogue” theory, which postulates that *Charter* decisions striking down laws are not the last word, but rather the beginning of a “dialogue,” because legislative bodies are generally able to (and generally do) enact sequel legislation that accomplishes the main objective of the unconstitutional law. The authors also examine the Supreme Court of Canada’s dicta on the “dialogue” phenomenon, and update the data on which their 1997 article was based. They conclude that the dialogue phenomenon is alive and well and that the critique of the original article is largely “much ado about metaphors.”

Does the Observer Have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada’s Courts

By Richard Haigh & Michael Sobkin

In *Charter Dialogue Revisited*, it is noted that the original idea behind the dialogue metaphor was simply to describe Canada’s constitutional structure. Despite this, the metaphor has been criticized for having normative content and influencing courts and legislatures. In this commentary, the authors analyze all Supreme Court of Canada and lower court uses of the dialogue metaphor and conclude that, with some exceptions, the courts are employing the metaphor properly, ie descriptively. Since, however, the metaphor can be misapplied -- used other than to describe or explain the relationship between the courts and legislatures in Canada -- the authors recommend ending its use in the courts.

Constitutionalism From the Top Down

By Grant Huscroft

Dialogue theory regards judicial interpretation of the *Charter* as authoritative, and as a result denies that continuing disagreement with the courts is legitimate. There is little scope, in other words, for dialogue with the courts in any meaningful sense. The *Charter* is best understood as establishing strong-form judicial review rather than weak, and legislatures have only as much room to respond to judicial decisions as the courts are prepared to allow.

The Day the Dialogue Died: A Comment on *Sauvé v. Canada*

By Christopher Manfredi

In *Sauvé v. Canada* (2002) a sharply divided Supreme Court of Canada nullified the inmate disenfranchisement provision of the Canada Elections Act. One of the more important aspects of the majority decision by Chief Justice McLachlin is her refusal to let the concept of dialogue take her down the path of judicial deference. This article examines the Chief Justice’s reasons for not taking this path and explores how these reasons reveal the limitations of the dialogue

metaphor as originally articulated by Peter Hogg and Bushell. The article concludes that any meaningful concept of legislative-judicial dialogue must recognize a co-ordinate legislative authority to interpret a constitution.

Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on "Charter Dialogue Revisited"

By Carissima Mathen

By suggesting that we view the judicial-legislative relationship as a dialogue, the authors of "Charter Dialogue Revisited" have greatly influenced constitutional debate

in Canada. In this comment I offer three observations about the authors' latest contribution. First, I query the continued usefulness of the term "dialogue."

Second,

I explain my concerns with the idea that section 1 of the *Charter* promotes dialogue as the term is now explained by the authors. Finally, I query the authors' perspective on judicial review and their accompanying terminology.

Taking Dialogue Theory Much Too Seriously (Or Perhaps Charter Dialogue Isn't Such a Good Thing After All)

By Andrew Petter

This article challenges the thesis of Peter W. Hogg, Allison A. Bushell Thornton, and Wade K. Wright (put forth earlier in this issue) that the frequency of legislative responses to *Charter* decisions striking down laws, which they refer to as "*Charter* dialogue," provides evidence that Canada has a weaker form of judicial review than is thought to exist in the United States. The article also critiques their claim that judicial review is justified by the idea that individuals have rights that cannot be taken away by an appeal to the general welfare. The author maintains that this claim not only contradicts their previous arguments, but also undermines their position that *Charter* dialogue, insofar as it allows legislatures to reassert majoritarian objectives following adverse court decisions, is a good thing.

Sharpening the Dialogue Debate: The Next Decade of Scholarship

By Kent Roach

The first part of this comment examines the roles of co-ordinate construction in which legislatures act on their own interpretation of the constitution, second look cases in which the courts judge the constitutionality of a legislative reply to a judicial decision and various constitutional remedies. The second part examines some differences in emphasis between the author's approach to dialogue and that taken by Professor Hogg and his co-authors with respect to the justification of the judicial role in the dialogue, the relation between *Charter* dialogue and common law constitutionalism, and the proper interpretative approach to section 7 of the *Charter*. Three areas that may be a productive focus for the next decade of scholarship about institutional dialogue are outlined. They involve comparative studies, dialogue in the post-9/11 environment and increased study of the legislative role in dialogue.