# Hogg and Bushell “The Charter Dialogue Between Courts and Legislatures”.

**Hogg, Peter W. and Allison Bushell. “The Charter Dialogue Between Courts and Legislatures”. *Osgoode Hall Law Journal*. 35:1, 1997.**

**Manfredi, Christopher and James Kelly. “Six Degrees of Dialogue: A Response to Hogg and Bushell”. *Osgoode Hall Law Journal*. 37:3.**

***Thesis and Summary:***

Hogg and Bushell argue that the Charter is democratically legitimate. The relationship between the courts and the legislatures is a *dialogue*: in 80% of the cases Hogg and Bushell studied, a court’s decision to strike down a given statute was followed up by a legislative response (a new law, an amendment, etc.). Even the language of legislation today (especially in preambles) reflects the fact that legislatures think of themselves in dialogue with courts on the interpretation of the Charter. Lawmakers have a wide variety of means (including means within the Charter itself such as s.1 and s.33) to “push back” when their legislation is struck down by the courts.

In their critique of Hogg and Bushell, Christopher Manfredi and James Kelly first point out that the “dialogue” metaphor, which influenced the Court itself in *Vriend*, originated with Hogg and Bushell’s well-known article. They then critique the article on empirical and normative grounds. They offer a number of arguments (of varying quality), the most compelling of which are (1) that the dialogue between Courts and Parliament exists but is considerably less extensive than Hogg and Bushell claim and (2) that Hogg and Bushell improperly assume that the judiciary has a monopoly on the interpretation of the Charter.

***Methodology and Theoretical Perspective***

The methodology in this well-known article is clear and straightforward: Hogg and Bushell examined sixty-five cases in which a court struck down a law on Charter grounds; this included every Supreme Court case and a number of important lower-court cases.

***Comparison with Other Readings and Contribution to the Literature***

Hogg and Bushell’s argument is an alternative to the much more common view (see Morton/Knopff, Manfredi, and even, to some extent, Hiebert) that judicial power in Canada is improperly taking over the legislating and policy-making role of legislatures and executives. Hogg and Bushell’s article forms the basis of Hiebert’s normative understanding of the proper relationship between courts and legislatures.

***Relevant Exam Questions***

This article is especially useful for any questions about the Charter’s effect on Parliament and the post-Charter relationship between Parliament and the courts.

***Detailed Notes:***

*The Concept of Dialogue*

79-80 Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between judiciary and legislature as a dialogue; in such a case the judicial decision causes a public debate

*How Dialogue Works*

80-81 The court may have forced a topic onto the legislative agenda that the legislature might have preferred not to deal with, but the final decision is a democratic one

The dialogue can only take place if the judicial decision can be reversed, modified, or avoided, but it turns out that this is the normal situation; in most cases, minor amendments are all that is required to respect the Charter

It is rare, in fact, when a constitutional defect can’t be remedied; the Charter acts as a catalyst for a two-way exchange between the judiciary and the legislature on the topic of human rights and freedoms; rarely raises a barrier to the wishes of the democratic institutions

*The Definition of Dialogue*

81-82 Surveyed sixty-five cases in which a law was struck down for a breach of the *Charter*, including all SCC decisions and several important lower court decisions; then surveyed whatever “legislative sequels” might exist to those decisions

A dialogue, then, is a case in which a judicial strike-down is followed up by a legislative body

*Features of the Charter that facilitate Dialogue*

82-91 Four features of the Charter that facilitate dialogue:

1. Section 33: the power of legislative override; it has become relatively unimportant because of a political climate resistant to its use
2. Section 1: the reasonable limits clause: all the rights can be limited by a law that meets the standards of this section as laid down in the *Oakes* test: (a) law must pursue an important objective (b) must be rationally connected with the objective (c) must impair the objective no more than necessary (d) must be proportionate – policy makers can usually devise a less restrictive alternative
3. Qualified Charter rights: some of the rights are framed in qualified terms: “unreasonable” search and seizure; “arbitrary” detention; “cruel and unusual” punishment, and so on; Parliament is forced to review its investigatory powers and include more elaborate safeguards; here again a productive dialogue
4. Equality rights: there are a number of ways to comply with a violation: include the excluded in a benefit, get rid of the benefit altogether; but the section leaves the door for dialogue since the option of getting rid of the benefit is always there

*Features of the Charter or situations where dialogue is precluded*

92-96 Three situations where dialogue is precluded:

1. Where section 1 does not apply: sometimes there is no room for “reasonable limits”; very rare that this happens, but an example is the *Quebec School Boards* case, in which section 1 and section 33 didn’t apply so they were forced to comply
2. Where the objective of the law is unconstitutional: the actual *purpose* of the law is unconstitutional, e.g. *R v. Big M Drug Mart Ltd.* which struck down the federal *Lord’s Day Act* because the purpose violated freedom of religion
3. Where political forces preclude legislative action: the issue is so controversial that legislative action is precluded, as in *Morgentaler*

*The Nature of the Dialogue between Courts and Legislatures*

96-98 Most decisions have legislative sequels: 80% of the decisions which struck down laws have generated a legislative response; this legislation is a conscious response to the words spoken by the courts; even on a more restrictive understanding of dialogues, a strong majority of cases were responded to by a legislature

99-101 Legislative responses are usually prompt: in 75% of cases, the legislature responds to the court within two years; the only real exception was *Quebec School Boards* where the nine-year delay could be seen as a protest of the decision

101-04 Legislatures are engaging in “Charter-speak” – the language of the laws themselves, particularly in statutory preambles and purpose clauses, suggests that the legislators are engaging in a self-conscious dialogue; a good example is *Daviault*

104-05 Even when a law is upheld, dialogue may occur: the Charter does not give judges a veto over the democratic will of the legislature; in *Thibaudeau*, for example, the legislature acted even though the law was upheld; the Charter dialogue continues outside the courts even when the courts hold that there’s not a Charter issue to talk about

*Conclusion*

105 The critique of the Charter based on democratic legitimacy can’t be sustained: the decisions of the court leave room (almost always) for a legislative response and they usually get one; judicial review is therefore the beginning of a dialogue on how to reconcile the individualist values of the Charter with the accomplishment of various social policies

*Christopher Manfredi and James Kelly: A Response to Hogg and Bushell*

515-21 Empirical Issues with Hogg/Bushell’s argument: four points:

1. Can’t use judicial nullification as the sole indicator of judicial interference with the democratic will – nullification is becoming increasingly less important; must also consider other remedies such as “reading in”
2. Case selection: the study does not explain why the lower court cases were selected for “importance” and the sample is not representative; can’t draw conclusions from the data
3. Can’t treat SCC and lower court cases as equivalent; the question is whether dialogue becomes more one-sided as cases progress through the judicial hierarchy; furthermore, legislative sequels in areas like campaign spending and abortion have not fared well in the courts
4. Can’t say that one legislative sequel is a response to a number of cases: if we adjust the data, we get a significantly lower number than the percentage reported by them

Furthermore, many of the legislative sequels could be characterized as simple compliance with the judicial decisions; if we reclassify judicial nullifications in terms of “positive” and “negative” dialogue, we find that there is in fact an institutional dialogue, but not one as extensive as they suggest

522-24 Normative issues : the question is what degree of judicial distortion of policy is acceptable; when a legislature must subordinate its understanding to that articulated by a court, this is policy distortion, not dialogue; furthermore, many legislative sequels occurred *before* a final court decision, which suggests that courts are at least as interested in asserting their supremacy as engaging in a dialogue

Most importantly, Hogg/Bushell assume that there is a judicial monopoly on correct interpretation; but you can’t say that the judiciary has such a monopoly

524-25 The dialogue metaphor (which influenced Frank Iacobuci in his decision on *Vriend*) largely comes from the Hogg and Bushell article; it’s important to critically examine it; in fact, the Charter dialogue is far more complex and less extensive than Hogg and Bushell report