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Author(s): Matthew A. Hennigar

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Expanding the “Dialogue” Debate: Canadian Federal Government Responses to Lower Court Charter Decisions

MATTHEW A. HENNIGAR  Brock University

Introduction
Political and legal scholars in countries with entrenched constitutions and judicial review, such as Canada and the United States, have long been concerned with the inter-institutional dynamics between courts and the legislative and executive branches. Although some research has explored the influence of legislatures and executives on judicial behaviour (for example, Baum, 1997; Murphy, 1964; Perry, 1991; Segal, 1997; Tanenhaus et al., 1963), attention has overwhelmingly focused on the judiciary’s impact on public policy. This reflects the long-standing concern with what Alexander Bickel terms “the counter-majoritarian difficulty,” or the degree of influence unelected judges exercise over elected officials (1962: 16; see also Ely, 1980; Hamilton, 1961; Horowitz, 1977; Rosenberg, 1991; Tushnet, 1995). The counter-majoritarian nature of judicial review has been thoroughly debated in Canada since the 1982 adoption of the Canadian Charter of Rights and Freedoms, by critics on the ideological left (Bakan, 1997; Bogart, 1994; Hutchinson, 1995; Mandel, 1994; Petter, 1986) and right (Knopff...
and Morton, 1992; Manfredi, 2001; Morton and Knopff, 2000), defenders of judicial power (Beatty, 1995; Roach, 2001; Weinrib, 1997), and those who argue that critics overstate the court’s actual influence (Hiebert, 1996; Kelly, 1999b; Monahan, 1987; Russell, 1994; Sigurdson, 1993). In addition, Kelly (1999a) and Hiebert (2002) document how officials in the federal Department of Justice have internalized “judicial” review on Charter grounds in the policy-making process, with Hiebert further arguing that elected legislators should address rights issues when debating bills.

Recently, the field of Canadian judicial politics has witnessed the meteoric rise of the “dialogue” metaphor to describe the relationship between courts and elected governments under the Charter, the crux of which is that there is no counter-majoritarian difficulty, because legislatures are usually able to respond to judicial rulings. Shortly after its initial use in the Canadian context by legal scholars Peter Hogg and Allison Bushell in 1997,1 the Supreme Court of Canada (SCC) cited the dialogue metaphor in Vriend v. Alberta to justify its controversial decision to amend Alberta’s human rights code to “read in” protection for gays and lesbians (1998: 562-67).2 A flurry of scholarly work debating the metaphor subsequently emerged (Hiebert, 2002; Manfredi and Kelly, 1999 and 2001; Morton, 2001; Roach, 2001), characterized by an almost-exclusive focus on the SCC, and vigorous disagreement over how to properly operationalize the “dialogue” concept.

The SCC’s status as the highest court in Canada certainly warrants extensive attention, particularly from the perspective of inter-institutional dynamics. By the same token, however, an accurate assessment of the judiciary’s institutional power to limit the legislature’s policy-making capacity requires determining the degree of dialogue with lower courts, which are increasingly the final courts in practice. For example, Greene et al. note that “98.5 per cent of the cases heard by the provincial, territorial, and federal appellate courts are final appeals” (1998: x), a situation which has been exacerbated by the Supreme Court’s falling annual caseload even as the collective caseload of the lower courts of appeal has risen (McCormick, 1994: 99). On the methodological front, while there are those who reject the “dialogue” metaphor outright as inaccurate (Morton, 2001), the principal disagreement is between legal scholars and political scientists over how to operationalize the concept. The empirical validity of the dialogue theory hangs in the balance of this debate. That is, whether dialogue exists is secondary to the debate over the proper definition of the term, since the metaphor’s accuracy follows directly from the definition used. To date, political scientists have employed a stricter definition than that used by legal scholars, by requiring the government’s response to entail some degree of creativity. Although this approach is correct, both groups have been too narrowly focused in their research.

This following article begins to assess the level of inter-institutional dialogue with lower courts by measuring the Canadian federal government’s responses to adverse, Charter-based rulings by the penultimate courts of...
Abstract. The inter-institutional dynamics between courts and elected governments under the Canadian Charter of Rights and Freedoms have recently, and widely, been characterized as a “dialogue” over constitutional meaning. This article seeks to expand the systematic analysis of “dialogue” to lower courts of appeal, using Canadian federal government responses as a case study. In the process, the article clarifies the hotly debated operational definition of this metaphor, and develops two methodological innovations to provide a comprehensive measure of dialogue. The article’s findings suggest that there is more dialogue with lower courts than with the Supreme Court of Canada. However, the evidence indicates that dialogue in the form of government appeals to higher courts—which explicitly signal the government’s disagreement with the lower court—is as prevalent as legislative sequels, and is the dominant form following judicial amendment.

Résumé La dynamique interinstitutionnelle entre les tribunaux et les gouvernements élus sous la Charte canadienne des droits et libertés a récemment et largement été caractérisée en termes de « dialogue » quant au sens constitutionnel. Cet article se propose de développer une analyse rigoureuse de ce « dialogue » pour les cours d'appel en prenant les réactions du gouvernement fédéral canadien comme études de cas. Il illustre également le débat passionné autour d'une définition opérationnelle d'une telle métaphore et exploite deux innovations méthodologiques destinées à offrir une lecture compréhensive du dit dialogue. Les conclusions de l'article suggèrent qu'il y a beaucoup plus d'interactions avec la cour d'appel qu'avec la Cour suprême du Canada. Cependant, les données démontrent que ce « dialogue » sous la forme d'un pourvoi en appel à la Cour suprême – mettant explicitement en lumière le désaccord du gouvernement avec la cour d'appel – est aussi courant que les conséquences législatives elles-mêmes, et la forme dominante qui suit l'amendement judiciaire.

appeal—that is, those courts one level below the SCC, including the Federal Court of Appeal and the highest Court of Appeal in each province and territory. To this end, I develop two methodological innovations, which, when added to the existing approaches, provide a comprehensive operational definition of “dialogue” that can be employed when analyzing other courts. The first innovation applies only to lower courts: unlike decisions by the SCC, which are final in appellate terms, lower court rulings may be contested by appealing to a higher court. Despite considerable scholarly discussion of the dialogue metaphor, however, the only form of governmental expression within this dialogue that has been examined is legislative “sequels,” or legislation passed in response to judicial decisions. That approach conceives of dialogue in discrete inter-institutional terms, with the judiciary “speaking” through rulings, and government through legislation. This overlooks the important, ongoing dialogue that occurs through government litigation, which brings the two institutional actors together within the court setting, with government lawyers arguing legal interpretation before judges. Dialogue through litigation can occur in several scenarios and this article addresses one important form: appeals to higher courts.3 Manfredi and Kelly are exceptional for their acknowledgment of this form of dialogue (which they do not pursue, however), observing that “[a]n appeal explicitly communicates a democratic actor’s judgment that a judicial decision is wrong in some sense” (1999: 524).

In light of this, it is necessary to expand the operational definition of “dialogue” to include such appeals.
The second innovation is applicable to all levels of courts, and entails including governmental responses to “judicial amendment,” rather than focusing only upon judicial invalidations as others have done to date. Judicial amendment occurs when the court effectively rewrites unconstitutional legislation, either by “reading in” or “reading down.” According to the SCC’s ruling in *R. v. Schachter*, which affirmed this remedial power under s.24(1) of the Charter,

In the case of reading in, the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. The reach of the statute is effectively extended by way of reading in rather than reading down. (Lamer C. J. at 681; emphasis in original)

In contrast, “reading down,” or severance, entails nullifying only part of the law in question—for example, a given phrase, but not an entire subsection—which may nevertheless profoundly alter the meaning and scope of the legislation. As one senior Justice Department official observes:

Usually reading in or reading down is going to be one of the most intrusive remedies. When you just strike down, usually you’re giving Parliament a little leeway to devise a solution. You may be saying this one solution is bad, but you’ve still got all the others to choose from, whereas when they read in [or down] they’re saying this is what the law shall be henceforth. It may not be legally impossible...to come along with a different solution, but it’s going to be politically very difficult. (Garton, 2001)

The article proceeds in two parts. The first provides a brief review of the existing literature on operationalizing the concept of “dialogue.” The stricter definition used by political scientists such as Manfredi and Kelly is endorsed, but with the reservation that they have defined away the potential for genuine agreement between elected governments and the courts. However, as explained below, this must be accepted as a methodological necessity at this point. In the second part, I measure the degree of dialogue between the federal government and the lower appeal courts, incorporating the methodological innovations discussed above. The findings reveal that although there is a significant degree of dialogue between the Canadian federal government and the lower appeal courts, these courts are able to limit Parliament’s capacity to make public policy, particularly when judicial amendment is employed.

**Defining Dialogue: The Debate So Far**

Hogg and Allison contend that “where a judicial decision is open to legislative reversal, modification or avoidance, then it is meaningful to regard the
relationship between the Court and the competent legislative body as a dialogue” (1997: 79). Hogg and Bushell’s central argument is that concerns about the unelected judiciary frustrating the actions of democratic governments overestimate the courts’ real power, by ignoring the capacity of elected officials “to devise a response that is properly respectful of the Charter values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded” (79-80). Based on their study of “legislative sequels” to 65 invalidations by the SCC and selected lower courts, the authors conclude that “Charter cases nearly always can be, and often are, followed by new legislation that still accomplishes the same objectives as the legislation that was struck down” (75). As such, the court cannot usually “block” legislative objectives, only “influence” them by articulating the Charter values at stake (79-80).

Political scientists have generally agreed with Hogg and Bushell’s initial claim that dialogue occurs when a judicial decision is open to legislative reversal, modification or avoidance. Profound disagreement has arisen, however, concerning the proper operationalization of the dialogue metaphor for the purposes of empirical analysis. Manfredi and Kelly, in particular, criticize Hogg and Bushell for shifting their operational definition to “some action by the competent legislative body” (Hogg and Bushell, 1999: 82; Manfredi and Kelly, 2001: 325). Employing this far looser standard, Hogg and Bushell count as meaningful responses legislation which predates the courts’ rulings, legislative repeals, and amendments which simply incorporate judicial decisions virtually verbatim.

Manfredi and Kelly distinguish six “degrees” of dialogue, only one of which they consider a “positive” legislative response satisfying Hogg and Bushell’s initial criteria (1999: 520-21). A “positive” response occurs when “elected officials reflect on the implications of judicial decisions, and revise statutes to advance legislative objectives in a manner that complies with the Charter” (1999: 520). They cite as an example the federal government’s rejection of the Supreme Court’s decision in Daviault (extending the drunkenness defence to assault offences), “since Parliament amended the Criminal Code to include a preamble that discussed the constitutionality of the new section” (1999: 520).

In contrast, “Charter dialogue does not characterize the process whereby elected officials simply repeal offending sections or replace entire Acts. Such responses...border on Charter ventriloquism because elected officials are simply expunging sections or whole laws found to be offensive to judicial actors, and thus are simply complying with judicial decisions” (1999: 520-21). Similarly, Morton bluntly observes, “[o]beying orders is not exactly what most of us consider a dialogue. If I go to a restaurant, order a sandwich, and the waiter brings me the sandwich I ordered, I would not count this as a ‘dialogue’” (2001: 111). In addition to simply repealing
Acts and replacing Acts to satisfy judicial requirements, Manfredi and Kelly characterize legislative “prequels,” judicial amendment of laws, and the absence of a legislative sequel as the remaining “degrees” of “negative” dialogue. Based on these redefined parameters, Manfredi and Kelly conclude that “true” dialogue occurs in only one third of cases, and, contrary to Hogg and Bushell, most involve major legislative changes rather than minor amendments (1999: 521).

The implication of these arguments is clear: “true” dialogue requires a legislative response which dissents, to some degree, from the court’s ruling; that is, it must entail a creative element. As Manfredi and Kelly argue, echoing Madison’s theory of co-ordinate construction, “genuine dialogue only exists when legislatures are recognized as legitimate interpreters of the constitution and have an effective means to assert that interpretation” (1999: 524; emphasis in original). While Manfredi, Kelly and Morton are right to criticize treating any legislative response as “dialogue,” it is important to note that, by requiring some form of legislative noncompliance, they define away the potential for genuine agreement resulting from inter-institutional discourse. Such agreement is certainly conceivable, given the potential for value change within the executive and legislative branches, and the practice of internally screening proposed legislation for potential Charter conflicts. This is particularly the case when the judicially remedied legislation is relatively old. The irony is that historical and contemporary characterizations of dialogue in the political context—for example, J. S. Mill’s view of discourse in On Liberty and Considerations on Representative Government (for example 1993: 88, 120, 207-08, 259, 331), Jürgen Habermas’ theory of communicative action (1994; see also Benhabib, 1989 and 1996, and for criticism Holmes, 1988), the idea of diplomatic “dialogue,” and Aboriginal sentencing circles—emphasize its educative function and ability to promote compromise. Unfortunately, it is unclear how to operationalize this ontological distinction empirically; simply put, genuine agreement and grudging compliance “look” identical. In the absence of a satisfactory methodological solution, the appropriate course of action for researchers is to count as evidence of dialogue only those legislative responses which overtly signal government participation in a meaningful discourse—in other words, a creative legislative response, such as reversal, modification or avoidance.

Manfredi and Kelly also identify several methodological problems in Hogg and Bushell’s study, which, given the empirical basis of their core argument, are not lightly dismissed. These include, briefly: Hogg and Bushell’s exclusive focus on nullifications, thereby ignoring judicial remedies such as reading in and severance; case selection bias associated with only considering lower court cases deemed “important” by Hogg himself; the use of lower court cases at all, when such decisions may be reversed on appeal; and artificially inflating the number of “sequels” by counting multiple responses
when there was only one legislative action following several judicial rulings on the exact same law (1999: 515-21). While these criticisms are largely justified and are not convincingly rebutted by Hogg and Thornton (1999: 529-36), the inclusion of lower court cases cannot be ruled out so hastily. It is an empirical question whether lower court rulings producing a legislative sequel have been reversed by a higher court, and Manfredi and Kelly do not provide such data. As I demonstrate in the second part of this article, there are several occasions where the lower appeal court rendered the final judicial decision, or where there was a legislative sequel to a lower court ruling despite a reversal of that ruling by the SCC. To the extent one accepts Hogg and Bushell’s dialogue metaphor, such scenarios should be included.

Empirical Analysis: Charter Dialogue with Lower Appeal Courts

The review of the empirical dimension of the dialogue debate reveals three related shortcomings in the literature: first, an exclusive focus on the Supreme Court of Canada, or, in the one exception (Hogg and Bushell, 1997), the findings are undermined by serious case selection bias; second, as Manfredi and Kelly note but do not pursue, a failure to include government appeals from lower courts as a form of dialogue; and third, an exclusive focus on responses to invalidations, ignoring cases involving judicial amendment. In this section, I begin to fill these gaps, by examining the federal government’s sequels to all reported Charter case losses from 1982-2000 in the penultimate courts of appeal, which consist of the Federal Court of Appeal (FCA), Court Martial Appeal Court of Canada (CMAC), and the highest Court of Appeal in each province and territory. The inclusion of all lower appeal court cases involving the federal government also permits testing the hypothesis, suggested above, that invalidations are easier to respond to than judicial amendments. Following from the discussion in part 1, I identify eight possible outcomes to lower appeal court invalidations or judicial amendments: (1) “positive” or creative legislative response; (2) successful appeal to the Supreme Court of Canada, or positive litigative response; (3) unsuccessful appeal to the Supreme Court of Canada, or negative litigative response (by definition, unsuccessful appeals do not result in “modification, avoidance or reversal” of the lower court’s ruling, and do not, therefore, qualify as “dialogue”); (4) repeal of the impugned law; (5) replacement or amendment of the impugned law which simply complies with the court’s decision (“compliance”); (6) the lower court ruling comes after the law has already been altered or repealed (that is, the decision is technically moot) (“pre-emption”); (7) the legislative response is subsequently ruled unconstitutional by the Supreme Court of Canada (“overturned”); or (8) no response.

The first step in this analysis is to isolate legislative responses to the lower court from those to the Supreme Court. Accordingly, I exclude
responses which followed an invalidation or judicial amendment by the Supreme Court, but include responses to appeal court decisions when any of the following conditions were met: (1) there was no appeal to the Supreme Court; (2) the response preceded the Supreme Court ruling; or (3) the government obtained a reversal of the lower court’s remedy in the Supreme Court. Together, these criteria also address Manfredi and Kelly’s criticism that “lower court decisions are simply too unstable to provide unequivocal evidence of dialogue” (1999: 517). The lower court’s decision is “stable” for analytical purposes if there is no subsequent appeal to the SCC, or if the response is independent of the SCC ruling.

The database of all federal government losses in the highest federal and provincial courts of appeal (not including the SCC) yielded 45 cases involving an invalidation or judicial amendment. Counting a single legislative response where multiple cases dealt with the identical legal issue, these cases generated 30 outcomes meeting the criteria listed above, and consisted of seven positive legislative and litigative responses each, four negative litigative responses, two repeals, four instances of compliance, two pre-emptions, one subsequently overturned legislative response, and two cases with no response of any kind. The cases are summarized by category in Table 1, and a list of legislative outcomes for judicially remedied laws is available from the author.

Three important conclusions are immediately evident. The first is that positive litigative responses (successful appeals) are as frequent as positive legislative responses, each occurring seven times. Bearing in mind that these seven appeals were not accompanied by a legislative response, the finding highlights the weakness of previous operational definitions which excluded this form of dialogue. Second, and similarly, expanding the study to include judicial amendments produced 12 cases that would have been missed by Hogg and Bushell’s original approach. Among these are several cases of particular importance, such as Rosenberg, in which the Ontario Court of Appeal rewrote the Income Tax Act’s definition of spouse to include same-sex couples, and Corbiere, which eliminated the residency requirement for Indian band council elections. Third, the proportion of responses that are “positive” (14/26, or 54%) is significantly higher than Manfredi and Kelly found with the Supreme Court (33%). My data confirm their supposition that “Charter dialogue is less representative of the Supreme Court than it is of lower courts” (1999: 521).

While the same can be said with respect to legislative responses alone (positive responses, repeals, compliance and overturned only), the discrepancy between the two levels of courts is smaller. Positive responses constituted just under half (7/15) of such outcomes for Courts of Appeal, compared to Manfredi and Kelly’s finding of 33 per cent for the SCC. The figure for lower Courts of Appeal is probably generous, however, as the positive responses to two cases, R. v. Rao and R. v. LaPlante, came 13 and 9 years
TABLE 1
Charter Dialogue with Courts of Appeal, by Category

<table>
<thead>
<tr>
<th>Positive Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Section(s) creatively amended or replaced (n=7)</td>
</tr>
<tr>
<td>Luscher v. Deputy Minister, Revenue Canada, Customs &amp; Excise, [1985] 1 F.C. 85 (F.C.A.)</td>
</tr>
<tr>
<td>* Schachter v. Canada, [1990] 2 F.C. 129 (F.C.A.) †</td>
</tr>
<tr>
<td>Thibaudeau v. Minister of National Revenue, [1994] 2 F.C. 189 (F.C.A.) †</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Negative Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. Unsuccessfully appealed to Supreme Court of Canada (Exclusively) (n=4)</td>
</tr>
<tr>
<td>Osborne v. Treasury Board of Canada [sub nom Millar], [1988] 3 F.C. 219 (F.C.A.)</td>
</tr>
</tbody>
</table>

| 4. Section(s) repealed (n=2) |

| 5. Section(s) amended or replaced to comply with Court of Appeal ("compliance") (n=5) |
| * Haig v. Canada, 94 D.L.R. (4th) 1 (O.C.A.) |

| 6. Creative response overturned by Supreme Court of Canada (n=1) |

<table>
<thead>
<tr>
<th>Non-Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. Section(s) amended before Court of Appeal decision (&quot;pre-emption&quot;) (n=2)</td>
</tr>
</tbody>
</table>

| 8. No response (legislative or litigative) (n=2) |

* case involved judicial amendment (n=12) † denotes case also appealed to Supreme Court (n=3)
later respectively, shortly after similar rulings on the issue by the Supreme Court in three other cases (R. v. Grant, [1993]; R. v. Wiley, [1993]; R. v. Plant, [1993]). As an aside, Rao highlights why the government and the judiciary are not equal partners in dialogue through litigation: despite addressing a novel constitutional issue with important implications for police procedure (warrantless searches of non-dwelling-houses, such as businesses and vehicles), the SCC refused the Crown’s request for leave to appeal. The Court’s almost complete control over its docket must be kept in mind when assessing the capacity for this form of dialogue.

My findings contradict Hogg and Bushell’s assertions that legislative responses typically require only minor changes and little time (1997: 99-104). While negative responses (other than simple repeals) typically involved minor amendments, the seven positive responses, with one exception (Luscher), all entailed major policy revisions. Four of these responses—to Rao, LaPlante, Ingebrigtson and Somerville—witnessed fairly blatant government noncompliance with the court’s ruling. Many years after the 1984 Rao and 1988 LaPlante decisions ruling unconstitutional those provisions of the Narcotic Control Act and Food and Drugs Act, respectively, authorizing warrantless searches of non-dwelling-houses, Parliament replaced both with the Controlled Drugs and Substances Act. While the new Act dropped the distinction between dwelling-houses and non-dwelling-houses with respect to warrant requirements for “peace officers” (s.11), it also created a new classification of enforcement official, “Inspector,” who is empowered to enter and search “non-dwelling-houses” without a warrant (ss.30-31), in apparent defiance of the courts’ earlier rulings. Similarly, following the CMAC’s finding in Ingebrigtson that Standing Courts Martial violated judicial independence and should only be used in times of emergency, the Department of National Defence reorganized the entire military judges section, and created an independent commission to oversee staffing and reappointment, but ignored the court’s “emergency function” directive (National Defence Act, 1998, s.42). And after the Alberta Court of Appeal ruled in Somerville that the Canada Elections Act’s restrictions on third-party election advertising (R.S.C. 1985, ss.213, 259.2[2]) unreasonably violated freedom of expression, Parliament passed legislation which strictly limits such activity. Specifically, the Canada Elections Act’s nullified restrictions on advertising at the beginning and end of election campaigns (“black-out” periods) and third-party spending for election advertising ($1,000) were replaced with regulations limiting the blackout period to polling day only, while increasing the third-party spending limit to $3,000 per riding to a total of $150,000 (Canada Elections Act, S.C. 2000, c.9, s.323(1); s.350(1)). However, as Hiebert observes, Parliament was probably emboldened by the SCC’s subsequent disapproval of the Somerville decision in the unrelated Libman v. Quebec case (1998: 104-05).
Ottawa also devised more complex and less confrontational responses in two cases, Schachter and Thibaudeau. In Schachter, the federal government conceded to the FCA that the then Unemployment Insurance Act, 1971’s refusal of “maternity” benefits to natural fathers but not adoptive fathers violated Mr. Schachter’s section 15(1) equality rights. Immediately after the FCA’s ruling (which focused on interpreting the Charter’s s.24[1] remedy clause), Parliament amended the Act to allow both natural and adoptive parents to divide benefits, but reduced the coverage period from 15 to 10 weeks (An Act to Amend the Unemployment Insurance Act, S.C. 1990, s.24). Parliament’s response to the FCA’s invalidation in Thibaudeau of the “inclusion/deduction” system for child support payments was to eliminate the system in 1997, replacing it with a system of tax credits (see Krause, 1996; Beaulieu, 2001). In other words, the government used alternative policy instruments to pursue the core objective of financially aiding families with children, or a complex strategy of “modification.”

Regarding the “timeliness” of legislative sequels (appeals to the Supreme Court must be filed within 60 days of the lower court’s ruling), there was a significant difference between “positive” and “negative” responses. The findings are summarized in Table 2, which employs the time increments used by Hogg and Bushell. All responses consistent with the court’s ruling (repeals and compliance) took less than five years, and most less than three. In contrast, most positive responses came after at least three years, with three (Rao, LaPlante and Ingebrigtsen) taking more than five years.

**Table 2**

Timing of Federal Government Legislative Responses to Lower Appeal Court Rulings

<table>
<thead>
<tr>
<th>Response Type</th>
<th>&lt;3 Years</th>
<th>3-5 Years</th>
<th>&gt;5 Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive Responses</td>
<td>2</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Negative Responses*</td>
<td>5</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Totals</td>
<td>7</td>
<td>4</td>
<td>3</td>
</tr>
</tbody>
</table>

*Information was unavailable for one case.

On a related note, the evidence confirms the earlier hypothesis that it is markedly more difficult to respond legislatively to judicial amendments than to invalidations (Table 3). All but one positive legislative response to judicial amendment took over five years (8, 9 and 13), and two of these (Rao and LaPlante) could be coded “no response,” as explained above. As well, all four responses required major legislative revisions. In contrast, none of the three positive responses to invalidation took over five years, and one required only minor revisions. A similar pattern emerged for negative
responses, as compliance with invalidations took less than three years, and judicial amendments between three and five years. The same conclusion is suggested by the types of judicial remedies appealed by the government, rather than addressed through the more difficult legislative process. Of 12 judicial amendments, six were appealed (50%), versus five of 17 invalidations (29%); that is, judicial amendments were appealed at almost twice the rate as invalidations.

TABLE 3
Timing of Legislative Responses, by Type of Judicial Remedy

<table>
<thead>
<tr>
<th>Remedy Type</th>
<th>Response Type</th>
<th>&lt;3 Years</th>
<th>3-5 Years</th>
<th>&gt;5 Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Invalidations</td>
<td>Positive Responses</td>
<td>1</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Negative Responses*</td>
<td>5</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>6</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Amendments</td>
<td>Positive Responses</td>
<td>1</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Negative Responses</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
</tbody>
</table>

*Information was unavailable for one case.

A puzzling question remains, however: Why do negative responses to judicial amendments take longer? Intuitively, would it not be relatively easy to (negatively) accept a judicial amendment, or at least as easy as a judicial nullification? The answer may be that complying with a judicial amendment is usually unnecessary—the law has already been amended, so there is something clear to guide other judges and executive officials such as the police and departmental officials. In contrast, nullification usually leaves, if not a pure legal vacuum (Flanagan, 1997), far greater uncertainty for these other actors, which puts pressure on legislatures to craft explicit policy guidelines. Another possible explanation is suggested by the nature of the cases themselves. The invalidations were based on technical issues with fairly clear legal rights violations that were easily addressed by changing a single word or phrase: warrantless searches of homes in *R. v. Noble*; public immigration hearings in *Pacific Press/Armadale Communications*; and stricter grounds for issuing search warrants in *Goguen v. Shannon*. Those involving judicial amendment, in contrast, dealt with highly contentious issues: whether sexual orientation must be protected from discrimination under the Canadian Human Rights Act (*Haig v. Canada*), and whether the Income Tax Act must recognize same-sex couples (*Rosenberg v. Canada*). It is reasonable to conclude that the governing party found passage of complying legislation more difficult politically for the judicial amendments than for the invalidations.
The evidence also yields the important finding that responding legislatively and appealing are not mutually exclusive strategies. Both strategies were employed in three cases, Tétreault-Gadoury v. CEIC, Thibaudeau v. Minister of National Revenue and Schachter. In Tétreault-Gadoury, the government complied with the lower court by repealing the age restriction on claiming unemployment insurance, but simultaneously appealed to the Supreme Court. Similarly, after Schachter, Parliament immediately recognized in legislation—yet appealed—the FCA’s reading in of “natural parents” to the Unemployment Insurance Act provision allowing adoptive parents to divide parental leave benefits. In both Tétreault-Gadoury and Schachter, the Court allowed Ottawa’s appeals on technical grounds while ruling against the government on the substantive Charter issues (which, nevertheless, reversed the lower courts’ remedies). In contrast, Ottawa successfully appealed the Charter issue to the Supreme Court in Thibaudeau, but subsequently repealed the inclusion/deduction scheme for taxation of child support payments.

Galanter’s classic concept of “repeat player” litigants helps explain why the federal government pursued both strategies (1974). According to Galanter, a repeat player (RP) has the resources—including courtroom experience, legal expertise, ready access to specialists, financial capacity and institutional credibility—to pursue its long-run interests (1974: 98-99). Among these long-run interests are the rules of the game itself, or what Galanter terms the “rule component” of case outcomes (1974: 101). As he observes, “RPs can also play for rules in litigation itself…. Since they expect to litigate again, RPs can select to adjudicate (or appeal) those cases which they regard as the most likely to produce favourable rules” (1974: 100-01). In the context of Charter litigation, the rule component includes the interpretation of constitutional rights, which are neither unambiguous nor self-executing.6

Given the frequency of its appearances before the Court, as well as its funding, personnel resources and expertise, the ultimate repeat player litigant is the government. In all three cases witnessing both a litigative and legislative response, the government appealed to challenge interpretive rules developed by the lower courts that threatened its long-run interests. In Tétreault-Gadoury, the Attorney General of Canada urged the Court to exercise a lower degree of scrutiny regarding age discrimination claims, on the grounds that unlike s.15’s other enumerated grounds, age is not an immutable personal characteristic (Bureau and Côté, 1990: 29-30). In Thibaudeau, Ottawa discouraged systemic equality analysis, and instead advocated judicial deference to complex socio-economic policy, particularly in the area of taxation. As part of this argument, the federal government criticized judicial review that focuses only upon individual sections of broader policies. And in Schachter, the Attorney General of Canada argued unsuccessfully that the judicial remedy power did not include the
authority to “read in,” but was limited to nullification. The “rule component” also helps explain the Court’s decision to hear the two moot cases, as they provided an opportunity for the Justices to render judgment on these important interpretive issues. These cases therefore underline the calculated behaviour of both judicial and governmental actors.

Conclusion

In concluding, I wish to register a caveat and a clarification. The caveat relates to the normative dimension of the dialogue debate. Hogg and Bushell’s original argument is an attempt to rebut, using empirical evidence, critics of judicial power who share Bickel’s concerns about the “counter-majoritarian difficulty.” My focus herein has been strictly empirical—how to measure dialogue, and how much exists involving lower appeal courts—but there are obvious normative implications to my conclusion that there are significant limits on the degree of dialogue with these courts. Empirical analysis alone does not resolve the key normative issues concerning the democratic nature of judicial review, particularly Mark Tushnet’s concerns about “policy distortion,” or when elected officials forego potentially constitutionally valid policy options for fear of judicial invalidation (1995; cited in Manfredi and Kelly, 1999). As Manfredi and Kelly, in their first reply to Hogg and Bushell, wrote: “It is unclear...that even uncritical acceptance of the dialogue metaphor as operationalized by Hogg and Bushell would answer the democratic critique of Charter-based judicial review” (1999: 522). These important normative questions are beyond the scope of this article, but they are discussed extensively elsewhere (Hiebert, 2002: 20-51; Manfredi and Kelly, 1999: 522-24; Roach, 2001; Slattery, 1987).

The clarification relates to Hogg and Bushell’s assumption that inter-institutional Charter dialogue is initiated by judicial rulings. They write: “[T]he judicial decision causes a public debate in which Charter values play a more prominent role than they would if there had been no judicial decision” (1997: 79-80). Although the focus of this article is upon the federal government’s responses to appellate court rulings, I do not share Hogg and Bushell’s assumption. As discussed extensively by Hiebert (2002), Kelly (1999a) and Jai (1998), the federal Department of Justice now routinely reviews new legislation for potential Charter violations, and recommends to the responsible minister or parliamentary committee whether such limitations may be “reasonable” and sustained under Section 1 analysis. If the “vetted” law subsequently comes under judicial review, the court’s ruling would thus not be the first round in an inter-institutional Charter dialogue, but rather a response to Parliament’s initial assessment of the law’s constitutionality (unless, of course, the new law was itself a response to a judicial ruling). That said, the government’s Charter review process does not occur
within a legal vacuum, but typically involves bureaucratic actors attempting to gauge the courts’ likely response to legislation, based on existing case law. To this extent, there is usually, if not always, an external judicial influence on internal legislative-executive discussions of constitutional rights.

My goal in this article has been two-fold. The first has been to clarify the operational definition of the dialogue metaphor. My review of the literature to date reveals that much of the “dialogue” debate—particularly between legal scholars and political scientists—is really a disagreement over what constitutes a valid governmental response. I side with critics who persuasively reject Hogg and Bushell’s broad criterion of “any action” in favour of requiring some creativity on the government’s part. The second pertains directly to the inter-institutional dynamics between the courts and the elected branches, and involves expanding the focus of the dialogue debate in three related directions. First, I extend the systematic analysis of legislative/executive responses to lower appeal courts. My findings suggest that there is, in fact, a fairly robust level of inter-institutional dialogue at this level, although still less than Hogg and Bushell initially claimed. Furthermore, legislative responses may be greatly delayed and may require major changes. This is particularly true when the court has rewritten rather than invalidated the law; including the hitherto-neglected scenario of judicial amendment is the article’s second novel contribution to the empirical dimension of the dialogue debate. My third contribution involves a conscious redefinition of “dialogue” to include government litigation. Herein, I have analyzed one such form of litigative dialogue with the lower courts, namely, appeals to the Supreme Court of Canada. The evidence indicates that this is as prevalent a form of dialogue with the lower courts as legislative sequels, and the dominant form following judicial amendment. However, it is important to recognize that litigative dialogue occurs within the judicial arena, where judges control the rules and the agenda, and, as such, does not respond to the counter-majoritarian difficulty. This said, future research should endeavour to enhance our understanding of substantive government litigation strategies, such as third-party intervention, where governments engage judges directly on issues of constitutional interpretation.

Notes

1 Notably, the dialogue metaphor had already been explored in the United States context; see, for example, Barry Friedman, who argues that “[t]he process of interpreting the Constitution is interactive. It is dialogic. Courts play a prominent role, but theirs is assuredly not the only voice in the dialogue” (1993: 658). Also, Allan C. Hutchinson addressed—and criticized—the depiction of judicial review as a “dialogue” in his earlier work, Waiting for CORAF (1995), but his treatment referred to a dialogue with the public, not the inter-institutional sense in which the term is used here.
The Supreme Court of Canada’s recent decision on prisoner voting in *Sauvé v. Canada*, [2002], however, may serve to undermine the analytical value of the dialogue metaphor. In contrast to the minority in *Sauvé*, the majority—including the previously leading proponents of the metaphor, Justice Iacobucci and Chief Justice McLachlin—rejected the dialogue approach by blocking any attempt by Parliament to restrict prisoner voting, even though the Court had previously accepted that the government’s objectives, of punishment and promoting civic responsibility, were legitimate (*Sauvé v. Canada*, [1993]). See Hennigar and Batstone (2003).

There are four such scenarios, the first three of which are initiated by the government: (1) when government appeals from its loss in a lower court; (2) when government “intervenes” in a case as a third party; (3) reference cases, where the Government of Canada may ask the Court directly for an “advisory opinion” (there is no lower court “case” in this scenario); and (4) when the government appears before the Court as a respondent, that is, involuntarily, as the target of litigation.

Notably, Manfredi and Kelly criticize Hogg and Bushell for ignoring judicial amendments (1999: 515-16), but the former do not expand their empirical analysis to include such cases. The one example of judicial amendment they cite (*Miron v. Trudel*), is a correction to the Hogg and Bushell study, which classified the case as an invalidation.

Flanagan argues that even when courts nullify legislation, they create new “policy status quo” which are institutionally difficult to alter. This said, my findings suggest that this staying power is weaker after nullification than after judicial amendment.

Manfredi has developed a similar concept he terms “micro-constitutional politics” (1997). See also Riddell and Morton (1998) and Hennigar (1996).

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