

Commentary

DOES THE OBSERVER HAVE AN EFFECT?: AN ANALYSIS OF THE USE OF THE DIALOGUE METAPHOR IN CANADA'S COURTS[©]

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In “*Charter Dialogue Revisited—Or ‘Much Ado About Metaphors,’*” 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 have employed the metaphor properly, *i.e.*, 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 judicial decisions.

Dans « *Charter Dialogue Revisited* » (Refonte du dialogue sur *la Charte*), on note que l’idée de départ de la métaphore du dialogue consistait simplement à décrire la structure constitutionnelle du Canada. En dépit de cela, la métaphore a été critiquée pour son contenu normatif et son influence sur les tribunaux et les législatures. Dans ce commentaire, les auteurs analysent tous les usages que font de la métaphore du dialogue la Cour suprême du Canada et les tribunaux en aval. Ils en arrivent à la conclusion que, certaines exceptions mises à part, les tribunaux emploient la métaphore correctement, c’est-à-dire de manière descriptive. Mais puisque la métaphore peut être mal appliquée—servir à d’autres fins que la description ou l’explication de la relation entre les tribunaux et les législatures au Canada—les auteurs conseillent de mettre fin à son usage dans les décisions judiciaires.

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KERNER: Because we looked. Every time we don't look, we get wave pattern. Every time we look to see how we get wave pattern we get particle pattern. The act of observing determines what's what.

BLAIR: How?

KERNER: Nobody knows. Somehow light is continuous and also discontinuous. The experimenter makes the choice. You get what you interrogate for.

—Tom Stoppard, “Hapgood,” Act One, Scene 2

I. INTRODUCTION

There is little doubt that Peter Hogg's and Allison Bushell's idea of institutional dialogue, proposed in their article “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All),”¹ caused a minor storm in the constitutional law arena when it arrived on the scene in 1997. As noted in the follow-up article “*Charter* Dialogue Revisited—Or ‘Much Ado About Metaphors,’”² which forms the core of this special issue of the Osgoode Hall Law Journal, the metaphor has been discussed in numerous court decisions, scholarly articles and reviews, political and extra-judicial speeches, and student assignments.³ In the normally staid world of public and constitutional law scholarship, it was a whirlwind of an idea whose provocations continue to be felt today.

At its heart, the metaphor is an elegant, yet relatively simple, idea: that the structure of our uniquely Canadian *Charter*,⁴ particularly sections 1 and 33, allows legislatures to respond to courts that strike down legislation as unconstitutional. The authors of “*Charter* Dialogue” demonstrated that legislatures usually did respond to such decisions. They found that, of sixty-six cases surveyed in which legislation was

¹ (1997) 35 Osgoode Hall L.J. 75 [“*Charter* Dialogue”].

² 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”].

³ *Ibid.* at 5, nn. 9-14.

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*”].

struck down for a *Charter* violation, legislative action of some kind followed in all but thirteen.⁵ These observations were an important contribution to the debate concerning the legitimacy of judicial review. Critics had maintained that judicial review under the *Charter* is undemocratic because “judges, who are neither elected to their offices nor accountable for their actions, are vested with the power to strike down laws that have been made by the duly elected representatives of the people.”⁶ By demonstrating that judges do not necessarily have the final say, the authors made it difficult to sustain critiques of the *Charter* based on democratic legitimacy.⁷

Critics were not convinced. As explored in great detail in “*Charter* Dialogue Revisited,” they faulted the authors for a range of misdeeds, including failure to furnish a justification for judicial review under the *Charter* and not recognizing that true “dialogue” cannot exist where final authority to interpret the *Charter* resides in the courts. The authors in “*Charter* Dialogue Revisited” respond to these and other critiques before going on to identify a line of criticism that has been voiced more frequently lately, namely “that the notion of dialogue is flawed because it can be used both to support a deferential approach to Parliament and the provincial legislatures and to defend decisions striking down legislation.”⁸ In this the authors somewhat agree, noting that the Supreme Court of Canada has referred to the metaphor for a “variety of different ends,”⁹ not all of which are consistent or appropriate. But, they contend, failure to use the concept correctly or consistently hardly constitutes “a fair critique of the article itself.”¹⁰ The authors are at pains to note that their idea of dialogue was descriptive, by which they mean that they intended to show “how legislatures *did* behave—rather than how they *should* behave—following a court decision striking down one of their laws on *Charter* grounds.”¹¹ They do, however, acknowledge now that “the notion of dialogue may also have

⁵ “*Charter* Dialogue,” *supra* note 1 at 97.

⁶ *Ibid.* at 77.

⁷ *Ibid.* at 105.

⁸ “*Charter* Dialogue Revisited,” *supra* note 2 at 46-47.

⁹ *Ibid.* at 47.

¹⁰ *Ibid.*

¹¹ *Ibid.* at 26 [emphasis in original].

some limited normative content”¹² and “may influence courts as well as legislatures”¹³ in the way each approaches its work.

The purpose of this commentary is to consider whether the judiciary has indeed misunderstood or misapplied the metaphor. As a descriptive tool, the metaphor should be neutral in terms of the outcome of the case and, as the authors say in “*Charter Dialogue Revisited*,” militate neither for nor against deference.¹⁴ To date, the criticism has focused on whether courts are using dialogue to justify striking down laws in some cases and upholding them in others.¹⁵ The critics, however, fail to explain how the courts have impermissibly used the metaphor for these opposing ends. For them, it seems that if the metaphor is invoked in a case striking down legislation the court should be labelled as “activist,” while if the metaphor is discussed in the context of upholding legislation the court should be regarded as “deferential.” It is a fact of constitutional adjudication that courts will sometimes strike down laws and other times uphold them. Both kinds of decision constitute dialogue, and the appearance of the metaphor does not tell us whether it is being used to rationalize the decision on the merits, which would be an impermissible use according to the authors.¹⁶ Moreover, the critics, in focusing on the deference/activism dichotomy, have failed to consider whether the courts might be using the metaphor in other inappropriate ways. In these circumstances, we believe the time is ripe for a closer examination of judicial uses of dialogue. To that end, we will consider whether the courts have used the metaphor in ways not originally intended by the authors: that is, other than to describe or explain the relationship between the courts and legislatures in a constitutional democracy.

Scientific experimenters and anthropological researchers can influence the results of their studies in unintended ways. Kerner in “Hapgood” describes this phenomenon, known as the observer effect.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.* at 47.

¹⁵ See Jamie Cameron, “Dialogue and Hierarchy in *Charter* Interpretation: A Comment on *R. v. Mills*” (2001) 38 *Alta. L. Rev.* 1051 at 1062-63; Christopher P. Manfredi, “The Life of a Metaphor: Dialogue in the Supreme Court, 1998-2003” (2004) 23 *Sup. Ct. L. Rev.* (2d) 105 at 112.

¹⁶ For these reasons we take issue with the methodology and conclusions in Christopher Manfredi’s article, *ibid.* For one, the author declines to provide a full explanation of what he means by all three “Directions” in his Table 1A: neutral, activism, and deference. Nor does he explain how he decided which of these labels was appropriate for each reference to dialogue by a member of the Supreme Court of Canada.

Judges, as “observers” of the dialogue metaphor, are similarly positioned: they can remain neutral observers if they only describe the metaphor, but they can also unintentionally change a simple metaphor into an analytical tool by being interfering observers and using the metaphor prescriptively. Our conclusion is that judges, with some exceptions, have correctly understood and applied the dialogue metaphor. In other words, we believe that the authors in “*Charter Dialogue Revisited*” were too quick to concede their critics’ point.

In finding that courts on the whole have correctly understood the dialogue metaphor, we do not wish to be taken as endorsing the use of it (or metaphors generally) in reasons for judgment. Continually referring to the same metaphor is a form of overwriting, and as we show in Part II, can ultimately lead courts astray. Moreover, we question the necessity and wisdom of courts using this particular metaphor to justify their constitutional role. The simple fact is that section 52(1) of the *Constitution Act, 1982*¹⁷ tells judges what their role is. More contentiously, relying on a dialogue metaphor may lead litigants to wonder whether their rights are being protected by an independent judiciary or sacrificed by a cooperative partner of government in an ongoing process of metaphysical confabulation.

II. THE COURTS AND THE METAPHOR

A. *The Dialogue Metaphor in the Supreme Court of Canada*

The Supreme Court has used the dialogue metaphor in ten cases,¹⁸ either directly, by reference to “*Charter Dialogue*,” or indirectly, by reference to its own previous decisions relying on the same article. These cases are listed in Table 1.

¹⁷ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁸ *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [*Vriend*]; *M. v. H.*, [1999] 2 S.C.R. 3; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [*Corbiere*]; *R. v. Mills*, [1999] 3 S.C.R. 668 [*Mills*]; *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 [*Little Sisters*]; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 [*Bell ExpressVu*]; *R. v. Hall*, [2002] 3 S.C.R. 309 [*Hall*]; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 [*Sauvé*]; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 [*Doucet-Boudreau*]; and *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 [*Harper*].

Table 1: Supreme Court cases referencing dialogue metaphor

Name of Case	Year	Judge(s)	Application
<i>Vriend v. Alberta</i>	1998	Iacobucci J. (majority)	Descriptive
<i>M. v. H.</i>	1999	Iacobucci J. (majority)	Descriptive
		Bastarache J. (concurring)	Descriptive
<i>Corbiere v. Canada</i>	1999	L'Heureux-Dubé J. (concurring)	Prescriptive
<i>R. v. Mills</i>	1999	McLachlin/Iacobucci JJ. (majority)	Descriptive
<i>Little Sisters Book & Art Emporium v. Canada</i>	2000	Iacobucci J. (dissent)	Prescriptive
<i>Bell ExpressVu v. Rex</i>	2002	Iacobucci J. (unanimous court)	Prescriptive
<i>R. v. Hall</i>	2002	Iacobucci J. (dissent)	Descriptive
<i>Sauvé v. Canada (Chief Electoral Officer)</i>	2002	McLachlin C.J. (majority)	Descriptive
		Gonthier J. (dissent)	Prescriptive
<i>Doucet-Boudreau v. Nova Scotia</i>	2003	Iacobucci/Arbour JJ. (majority)	Descriptive
<i>Harper v. Canada (Attorney General)</i>	2004	McLachlin C.J./Major J. (dissent)	Descriptive

The last column of Table 1 notes how the metaphor was used in the particular case. We have adopted the term “descriptive” to indicate the situation where a court relies on the dialogue metaphor simply to describe or explain the relationship between courts and legislatures as set out by the authors in “*Charter Dialogue*.” We use “prescriptive” to refer to situations where courts imbue the dialogue metaphor with more substantive content.¹⁹ In our view, judges of the Supreme Court have misused the metaphor on four occasions. The results are discussed in more detail in the next subsections.

1. The Court as Neutral Observer: Descriptive Dialogue

The Supreme Court of Canada first cited “*Charter Dialogue*” in *Vriend v. Alberta*,²⁰ where the issue was whether the absence of “sexual orientation” from the list of prohibited grounds of discrimination in Alberta’s human rights legislation violated the right to equality under

¹⁹ We deliberately chose not to use “normative” to describe these cases because we wished to avoid any confusion with the lengthy debate that continues between dialogue proponents and their critics—all of whom use normative to describe whether dialogic judicial review is more or less democratic and superior to legislative or judicial supremacy. See e.g. Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); “Dialogic Judicial Review and its Critics” (2004) 23 Sup. Ct. L. Rev. (2d) 49 at 72 [Roach, “Dialogic Judicial Review”].

²⁰ *Vriend*, *supra* note 18 at 565.

section 15(1) of the *Charter*. The Court found the omission was a breach of section 15(1) and was not saved under section 1. Before deciding on the appropriate remedy, Justice Iacobucci, for the majority, thought “it might be helpful to pause to reflect more broadly on the general issue of the relationship between legislatures and the courts in the age of the *Charter*.”²¹ It is during this part of the judgment that “*Charter Dialogue*” is cited and discussed:

As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a “dialogue” by some [citing “*Charter Dialogue*”].

...

To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.²²

In our view, this passage expresses a perfect understanding of dialogue. The majority correctly described the relationship between, and the work product of, courts and legislatures as “dialogue,” and it did not use the metaphor to justify a particular result. It simply acknowledged the occurrence of “dialogue” as Hogg and Bushell had described it. This is not unexpected, given that the decision came out fresh on the heels of “*Charter Dialogue*,” when the Court was likely eager to capture the metaphor in its simple and elegant state. This was also the case in *M. v. H.*,²³ where Justice Iacobucci, for the majority, used dialogue in a descriptive or neutral sense to explain the respective roles of the courts and legislatures.²⁴

In these cases, the Court used the metaphor correctly. Dialogue does not dictate a particular result or approach, nor does it justify interference in matters properly falling within the legislature’s domain. Indeed, Justice Iacobucci in *Vriend* specifically affirmed that courts “are not to make value judgments on what they regard as the proper policy

²¹ *Ibid.* at 562.

²² *Ibid.* at 565-66.

²³ *M. v. H.*, *supra* note 18.

²⁴ *Ibid.* at 59-61. See also the reasons of Justice Bastarache, concurring, who refers to dialogue as part of his introduction to the case and later on in his analysis, both times in a manner consistent with the metaphor as a simple descriptive tool (*ibid.* at 158, 181).

choice.”²⁵ The use of dialogue in this context is neutral in terms of the outcome.

In *R. v. Mills*,²⁶ the Court relied on the metaphor in a situation where the law at issue was one that Parliament had passed partly in response to an earlier court decision. The process established by the Court a few years earlier in *R. v. O'Connor*²⁷ for the production of documents in sexual assault proceedings had been superseded by a statutory scheme. It was argued that the legislation was unconstitutional to the extent that it was inconsistent with the decision of the Court in *O'Connor*. The Court determined that Parliament is entitled to build on a previous court decision and develop a different scheme as long as it is constitutional. It buttressed this conclusion by referring to the dialogue metaphor. The Court quoted the passage from *Vriend* reproduced above and made specific reference to “*Charter Dialogue*.” It then added, “[i]f the common law were to be taken as establishing the only possible constitutional regime, then we could not speak of a dialogue with the legislature.”²⁸ The process by which Parliament had responded to *O'Connor* was characterized as “a notable example of the dialogue between the judicial and legislative branches.”²⁹

We believe the Court correctly apprehended the meaning of dialogue in *Mills*. If common law rules were inviolate, there would be no room for a legislative response. It is the availability of legislative action that is the essential idea underlying the dialogue metaphor. To the authors of “*Charter Dialogue Revisited*,” who question whether the Court’s appeal to the dialogue metaphor in *Mills* can be rationalized,³⁰ we would simply say that the Court’s use of dialogue was surprising, since there should be no doubt that Parliament can override a common law rule; this is so even for one designed to ensure respect for *Charter* values, as long as the superseding legislation is compatible with the *Charter*. Nevertheless, the Court’s reference to the metaphor itself was descriptive.

²⁵ *Supra* note 18 at 564.

²⁶ *Supra* note 18.

²⁷ [1995] 4 S.C.R. 411 [*O'Connor*].

²⁸ *Mills*, *supra* note 18 at 711. Also, the Court stated that “[t]he law develops through dialogue between courts and legislatures” (*ibid.* at 689).

²⁹ *Ibid.* at 745.

³⁰ “*Charter Dialogue Revisited*,” *supra* note 2 at 50.

*R. v. Hall*³¹ is worth a short explanation because it is the first case in which members of the Court expressed disagreement over what dialogue entails.³² *Hall* was a challenge to bail provisions of the *Criminal Code*³³ enacted in response to an earlier case, *R. v. Morales*,³⁴ in which the Court had struck down a provision of the *Criminal Code* that authorized pre-trial detention if it were in the “public interest.”

The Court in *Hall* split over the constitutionality of the new provisions. Justice Iacobucci, who wrote the dissenting judgment, noted the Court’s use of the dialogue metaphor in *Vriend* and referred to *O’Connor* and *Mills* “as a good example of how this process plays out.”³⁵ For him, the legislation in *Hall* “demonstrates how this constitutional dialogue can break down.”³⁶ By this he meant that Parliament had not responded to the Court’s decision in *Morales* with “due regard for the constitutional standards set out in that case.”³⁷ Moreover, the majority, in upholding the provision in part, had for him “transformed dialogue into abdication.”³⁸ The majority, for its part, felt the case before it furnished “an excellent example of such dialogue.”³⁹ It noted that the Court had struck down the “public interest” ground in *Morales* and that Parliament, after considering its reasons, had “replaced the ‘public interest’ ground with new language.”⁴⁰

In our view, the majority and dissent used the dialogue metaphor descriptively. The majority correctly characterized as dialogue the sequence of the enactment of legislation authorizing pre-trial detention where it is “necessary in the public interest,” the Court’s decision in *Morales* on the constitutionality of that provision,

³¹ *Supra* note 18.

³² As shown in Table 1, judges employing the metaphor were not always speaking for a unanimous court. However, until *Hall*, other opinions were silent on the use of dialogue. For example, the dissenting judge in *Mills*, Chief Justice Lamer, made no comment on the majority’s liberal use of the metaphor. Justice Binnie, who wrote the majority judgment in *Little Sisters*, did not respond to Justice Iacobucci’s use of the metaphor. Justice Gonthier, dissenting in *M. v. H.*, made no comment on how the doctrine was used by the majority or by Justice Bastarache in his concurring opinion.

³³ R.S.C. 1985, c. C-46.

³⁴ [1992] 3 S.C.R. 711 [*Morales*].

³⁵ *Hall*, *supra* note 18 at 368.

³⁶ *Ibid.* at 369.

³⁷ *Ibid.*

³⁸ *Ibid.* at 370.

³⁹ *Ibid.* at 333-34.

⁴⁰ *Ibid.* at 334.

Parliament's response in the form of revised legislation, and the Court's decision on the constitutionality of that response. The dissent correctly described as dialogue the Court's decisions in *O'Connor* and *Mills* and the intervening legislation passed by Parliament. Furthermore, neither the majority nor the dissent invoked the metaphor to justify a particular result in the case.

There is, however, one part of the dissenting judgment that betrays a misunderstanding of the metaphor. Justice Iacobucci thought there was a "break down" in dialogue because Parliament had not responded to *Morales* "with due regard for the constitutional standards set out in that case."⁴¹ The assumption here is that a legislative response should pass constitutional muster. But dialogue cannot be said to occur only when Parliament has responded constitutionally; it is the response that is dialogue. To find Parliament's response to a decision inadequate means the matter is returned to Parliament for further consideration. This is a continuation of dialogue. For dialogue to break down, there must be no response or perhaps a disingenuous response from Parliament—the latter is possibly what Justice Iacobucci was alluding to in this case. As long as the response is subject to a rigorous constitutional analysis, however, the courts are performing their institutional role. The majority did this by not showing deference to Parliament merely because it had responded to *Morales*, and by conducting a thorough analysis of the new provision in light of the Court's jurisprudence.

The final two cases listed as "descriptive" in Table 1 require only a brief discussion. These most recent dialogue examples show that, despite some missteps outlined in the next section, the Court may be back on track with its use of the metaphor. Both *Doucet-Boudreau v. Nova Scotia*⁴² and *Harper v. Canada (Attorney General)*⁴³ have brought the metaphor full circle to its original idea as a descriptor. In *Harper*, the dissenting judges simply observed that Parliament is said to be participating in a dialogue with the courts on where to set limits on election spending (albeit, in their ultimate view, not in a fashion that passes constitutional scrutiny).⁴⁴ In *Doucet-Boudreau*, the majority seemed to acknowledge the damage caused by prescriptive uses when it

⁴¹ *Ibid.* at 369.

⁴² *Supra* note 18.

⁴³ *Supra* note 18.

⁴⁴ *Ibid.* at 849.

stated that “judicial restraint and metaphors such as ‘dialogue’ must not be elevated to the level of strict constitutional rules to which the words of s. 24 can be subordinated.”⁴⁵ Even the use of quotation marks around the word dialogue (are these intended to suggest irony?) indicate a change of heart in the Court’s view of the metaphor. As the authors note in “*Charter Dialogue Revisited*,” “Justices Iacobucci and Arbour, writing for the majority, were obviously troubled by their espousal of dialogue in other contexts”⁴⁶ Our next section shows why.

2. The Court as Interfering Observer: Prescriptive Dialogue

On four occasions, judges of the Supreme Court have been overzealous in their use of the metaphor. The first hint of difficulty appeared in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*.⁴⁷ In this decision, much argument was directed to the question of the appropriate remedy should the Court find the legislation unconstitutional, as it ultimately did. Justice McLachlin (as she then was) and Justice Bastarache, speaking for the majority, decided to suspend the implementation of a declaration of unconstitutionality for eighteen months.⁴⁸ Justice L’Heureux-Dubé wrote a concurring opinion in which she cited “*Charter Dialogue*” in the context of deciding upon the appropriate remedy:

There are a number of ways this legislation may be changed so that it respects the equality rights of non-resident band members. Because the regime affects band members most directly, the best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal people affected by it. ... The principle of democracy ... encourages remedies that allow the democratic process of consultation and dialogue to occur. In [*Charter Dialogue*], the authors characterize judicial review under the *Charter* as a “dialogue” between courts and legislatures. The remedies granted under the *Charter* should, in appropriate cases, encourage and facilitate the inclusion in that dialogue of groups particularly affected by legislation. [A] court should consider the effect of its order on the democratic process, understood in a broad way, and encourage that process⁴⁹

This use of the dialogue metaphor is troubling. Justice L’Heureux-Dubé is, in effect, invoking the metaphor to tell Parliament who it should consult in deciding how to respond legislatively to a court

⁴⁵ *Supra* note 18 at 36-37.

⁴⁶ “*Charter Dialogue Revisited*,” *supra* note 2 at 19.

⁴⁷ *Supra* note 18.

⁴⁸ *Ibid.* at 226.

⁴⁹ *Ibid.* at 283-84.

decision. Indeed, later in her reasons she states that should decisions be made during the period the declaration is suspended, “without non-residents’ involvement that directly affect their interests and which directly prejudice them, it may be that the decisions themselves could be challenged as violations of non-residents’ equality rights.”⁵⁰ Legislation enacted in response to a decision is dialogue, whether there was consultation or not, and is subject to the same constitutional review as the latter. In our view, a court uses the metaphor prescriptively when it goes beyond recording the fact that a legislature has the opportunity to respond to its decision and directs the process by which that response will be realized. This is what happened in *Corbiere*.

The next problematic application of the dialogue metaphor was in the dissenting opinion in *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*,⁵¹ a case where the administrative review process in the *Customs Act*⁵² and the *Customs Tariff*⁵³ underwent *Charter* scrutiny. The Court split six to three. The majority found that the Act, properly administered, was a reasonable limit on the appellant’s right to free speech; the dissenting judges held that the legislation did not contain enough safeguards to protect expressive rights.

In light of their conclusion on section 1, the dissenting judges had to decide whether to strike down the legislation or, as the majority had done, uphold the declaration made at trial, which merely affirmed that the appellant’s expressive and equality rights had been infringed. Justice Iacobucci, who wrote the dissenting opinion, mentioned dialogue as part of his consideration of this issue:

These are not the kinds of problems that can be solved by simply directing Customs to behave themselves. In all the circumstances, further indulgence misses the mark; what is needed is the firm guidance that only new legislation from Parliament can provide. Striking down the applicability of the Customs legislation to expressive materials is consistent with the dialogue theory [as described in “*Charter* Dialogue”]. This Court has frequently recognized the importance of fostering a dialogue between courts and legislatures Particularly where, as here, it appears that Parliament has not turned its mind to the issue at hand, striking down the legislation may encourage much needed changes.⁵⁴

⁵⁰ *Ibid.* at 286.

⁵¹ *Supra* note 18.

⁵² R.S.C. 1985 (2d Supp.), c. 1.

⁵³ R.S.C. 1985 (3d Supp.), c. 41.

⁵⁴ *Little Sisters*, *supra* note 18 at 1257-58.

It is difficult to characterize this use of dialogue. We conclude on balance that it is not descriptive, and therefore improper. Justice Iacobucci remarked that it would be “consistent” with the notion of dialogue to strike down the legislation which would, in turn, give Parliament an opportunity to furnish its own dialogue in the form of new legislation containing the missing procedural safeguards. Though, in this respect, he did nothing more than state the basic thesis of dialogue; it is in the context of his discussion as a whole that he faltered. Properly understood, the thrust of the dialogue metaphor is that Parliament has the opportunity to respond to a court decision. Dialogue is thus the consequence of a decision striking down legislation, not an independent reason for striking it down. Justice Iacobucci said that Parliament had not turned its mind to the manner in which expressive rights are to be protected; that is, it had not engaged in dialogue on the subject, and should be given the opportunity to do so. This brings him close to saying that the desirability of dialogue is a reason for declaring legislation unconstitutional. Viewed in this way, dialogue was employed prescriptively to justify a particular disposition of the case.

Similarly, in *Bell ExpressVu Limited Partnership v. Rex*,⁵⁵ the Court overreached. The claimants argued that the federal *Radiocommunication Act*⁵⁶ offended section 2(b) of the *Charter*. Because there was no factual record upon which the Court could determine the freedom of expression issue, it treated the case solely as one of statutory interpretation. In addition, the Court refused to apply *Charter* values to the process of statutory interpretation, as it thought such an approach should be confined to cases “of genuine ambiguity, *i.e.*, where a statutory provision is subject to differing, but equally plausible, interpretations.”⁵⁷ The difficulty with always interpreting a statute in a manner that complies with the *Charter* is that it might “frustrate true legislative intent.”⁵⁸ Moreover, as the Court had stated in *Symes v. Canada*,⁵⁹ it would make it impossible “for the government to justify infringements as reasonable limits under s. 1 of the *Charter*, since the interpretive process would preclude one from finding infringements in

⁵⁵ *Supra* note 18.

⁵⁶ R.S.C. 1985, c. R-2.

⁵⁷ *Bell ExpressVu*, *supra* note 18 at 597.

⁵⁸ *Ibid.*

⁵⁹ [1993] 4 S.C.R. 695 [*Symes*].

the first place.”⁶⁰ As a result, “legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status.”⁶¹ Such a development “would wrongly upset the dialogic balance.”⁶²

Although it is not perfectly clear, we believe that the Court in *Bell ExpressVu* used dialogue in a prescriptive sense, namely, as a justification for not using a particular technique of statutory interpretation. To be sure, the rationale for limiting the circumstances in which *Charter* values should guide the interpretation of legislation had been articulated nearly ten years earlier in *Symes*. However, the Court in *Bell ExpressVu* clearly was of the view that “the importance of retaining a forum for dialogue among the branches of the government” constituted an independent reason for holding that “where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result.”⁶³ This is not a neutral reference to dialogue.

Probably the most hostile use of the metaphor at the Supreme Court arose in *Sauvé v. Canada (Chief Electoral Officer)*.⁶⁴ At issue was whether Parliament’s second attempt to limit the voting rights of prisoners by recalibrating the *Canada Elections Act* was constitutional. The Court was bitterly divided on the issue. Chief Justice McLachlin, on behalf of the majority, held that Parliament had not done its homework, and that the new provisions remained unjustifiable breaches of section 3 of the *Charter*. In contrast, Justice Gonthier, for the dissent, found the legislative response to be reasonable and therefore saved by section 1.

The dialogue metaphor appears in both the majority and dissenting reasons. Chief Justice McLachlin stated:

[Justice Gonthier] further argues that in justifying limits on the right to vote under s. 1, we owe deference to Parliament because we are dealing with “philosophical, political and social considerations”, because of the abstract and symbolic nature of the government’s stated goals, and *because the law at issue represents a step in a dialogue between Parliament and the courts*

...

⁶⁰ *Ibid.* at 752.

⁶¹ *Bell ExpressVu*, *supra* note 18 at 598.

⁶² *Ibid.*

⁶³ *Ibid.* at 599.

⁶⁴ *Supra* note 18.

Finally, the fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court *should defer to Parliament as part of a "dialogue"*. Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try again".⁶⁵

These passages, taken together, treat the metaphor as a descriptive device, but at the same time contain an accusation that Justice Gonthier has used the metaphor prescriptively. The chief justice found that he had based part of his reasons on the fact that dialogue occurred. And she was correct. Justice Gonthier states: "[S]ince this case is about [evaluating choices and shaping values], "dialogue" is of particular importance."⁶⁶ He then went on to find the provision constitutional. It is clear that he was equating "dialogue" with "deference." As noted in "*Charter Dialogue Revisited*," a proper, descriptive application of the metaphor does not indicate whether deference is required or not.⁶⁷

In summary, it is our hope that with the recent statement of the majority in *Doucet-Boudreau*, the Court has returned to a correct understanding of the metaphor. Although the prescriptive applications of it have caused some problems within the Court itself, and led to hundreds of pages of commentary, a renewed appreciation of the proper role of the metaphor should reduce confusion. But what of the lower courts? How do they perceive the metaphor? The next section of the commentary explores these questions.

B. *The Dialogue Metaphor in the Lower Courts*

Our review of the lower court uses of the dialogue metaphor covered all cases where the dialogue theory was advanced, either directly, by reference to "*Charter Dialogue*," or indirectly, by reference to the early Supreme Court jurisprudence that relied upon the same article.⁶⁸ The twenty-seven cases⁶⁹ that rely on the dialogue metaphor are listed in Table 2.

⁶⁵ *Ibid.* at 535, 538 [emphasis added].

⁶⁶ *Ibid.* at 577.

⁶⁷ "*Charter Dialogue Revisited*," *supra* note 2 at 47.

⁶⁸ Our list is more extensive than that contained in "*Charter Dialogue Revisited*." The authors in "*Charter Dialogue Revisited*" were only looking for references to dialogue resulting from a citation of "*Charter Dialogue*," whereas we broadened our search to include any reference to dialogue. It is also worth noting that Jeremy Waldron, in an otherwise well-argued critique of

Table 2: Lower court cases referencing “dialogue” metaphor⁷⁰

Name of Case	Year	Jurisdiction and Court	Application
<i>United States of America v. Tilley</i>	1996	Alberta – Queen’s Bench	Descriptive
<i>R. v. Regan</i>	1998	Nova Scotia – Supreme Court	Descriptive
<i>R. v. Brenton</i>	1999	Northwest Territories – Supreme Court	Descriptive
<i>Driskell v. Manitoba (Attorney General)</i>	1999	Manitoba – Queen’s Bench	Other

courts, legislatures, and the interaction of bills of rights and dialogue, strangely states: “By the time cases reach the high appellate levels we are talking about – at which *alone* the claim about inter-branch dialogue becomes plausible” See “Some Models of Dialogue Between Judges and Legislators” (2004) 23 Sup. Ct. L. Rev. 7 at 42-43 [emphasis added]. On the other hand, Christopher Manfredi argues that the upward climb from trial to appeal in the litigation process should be viewed as a significant part of ongoing dialogue—the “most direct form” of dialogue. See *supra* note 15 at 127-28. We agree with Manfredi. It is certainly not clear to us why Waldron’s argument should be taken at face value without further elaboration.

⁶⁹ *United States of America v. Tilley*, [1996] A.J. No. 718 (Q.B.) (QL); *R. v. Regan* (1998), 174 N.S.R. (2d) 230 (S.C.); *R. v. Brenton* (1999), 180 D.L.R. (4th) 314 (N.W.T.S.C.); *Driskell v. Manitoba (Attorney General)*, [1999] 11 W.W.R. 615 (Man. Q.B.); *R. v. Manios* (1999), 67 C.R.R. (2d) 138 (Ont. Sup. Ct. J.); *Sauvé v. Canada (Chief Electoral Officer)*, [2000] 2 F.C. 117 (C.A.); *Reilly v. Alberta, (Provincial Court, Chief Judge)*, 2000 ABCA 241, 266 A.R. 296; *Spracklin v. Kichton*, [2002] 3 W.W.R. 703 (Alta. Q.B.) [*Spracklin*]; *Festing v. Canada (Attorney General)*, [2000] 5 W.W.R. 413 (B.C.S.C.) [*Festing*]; *R. v. Song* (2001), 296 A.R. 132 (Q.B.) [*Song*]; *Alberta (Director of Child Welfare) v. G.N.* (2002), 332 A.R. 41 (Q.B.) [*G.N.*]; *Collins v. Abrams* (2002), 118 A.C.W.S. (3d) 644 (B.C.S.C.); *Condon v. Prince Edward Island* (2002), 114 A.C.W.S. (3d) 921 (P.E.I.S.C.); *J.T.I. MacDonald Corp. v. Canada (Attorney General)*, [2003] R.J.Q. 181 (C.S.); *Mathew v. Canada* (2002), 99 C.R.R. (2d) 189 (T.C.C.); *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 (Div. Ct.) [*Halpern*]; *Harper v. Canada (Attorney General)* (2002), 223 D.L.R. (4th) 275 (Alta. C.A.); *R. v. Masse*, [2004] B.C.W.L.D. 168 (Prov. Ct.); *Highline Produce Ltd. v. United Food and Commercial Workers Union Canada* (2003), 93 C.L.R.B.R. (2d) 161 (OLRB); *Hislop v. Canada (Attorney General)* (2004), 73 O.R. (3d) 641 (C.A.); *Communications, Energy and Paperworkers Union of Canada, Local 707 v. Alberta (Labour Relations Board)* (2004), 351 A.R. 267 (Q.B.) [*C.E.P.*]; *R. v. Everette-Dorland* (2004), 21 C.R. (6th) 225 (Man. Q.B.) [*Everette-Dorland*]; *Criminal Lawyers’ Assn. v. Ontario (Ministry of Public Safety and Security)* (2004), 70 O.R. (3d) 332 (Div. Ct.); *R. v. Thomson* (2004), 21 C.R. (6th) 209 (Ont. Sup. Ct. J.) [*Thomson*]; *Christie v. British Columbia (Attorney General)* (2005), 262 D.L.R. (4th) 51 (B.C.C.A.) [*Christie*]; *R. v. Raponi* (2006), 144 C.R.R. (2d) 192 (Alta. Q.B.) [*Raponi*]; and *Fédération franco-ténoise c. Procureure générale du Canada* (2006), 150 A.C.W.S. (3d) 348 (N.W.T.S.C.)

⁷⁰ The case *Procureur général du Québec c. Conférence des juges du Québec*, [2003] R.J.Q. 2057 was cited in “Charter Dialogue Revisited,” *supra* note 2 at 5, n. 11 as one of the Superior Court decisions. It is actually the Court of Appeal decision that references “Charter Dialogue”; the lower court decision, [2001] J.Q. no. 2373 (QL), does not. However, the reference to “Charter Dialogue” by the Court of Appeal is not properly a reference to the dialogue metaphor, so we exclude that case from our list.

<i>R. v. Manios</i>	1999	Ontario – Superior Court of Justice	Prescriptive (partially)
<i>Sauvé v. Canada (Chief Electoral Officer)</i>	1999	Federal Court of Appeal	Descriptive
<i>Reilly v. Alberta (Provincial Court, Chief Judge)</i>	2000	Alberta – Court of Appeal	Descriptive
<i>Spracklin v. Kichton</i>	2000	Alberta – Queen's Bench	Other
<i>Festing v. Canada (Attorney General)</i>	2000	British Columbia – Supreme Court	Descriptive/Prescriptive
<i>R. v. Song</i>	2001	Alberta – Queen's Bench	Descriptive
<i>Alberta (Director of Child Welfare) v. G.N.</i>	2002	Alberta – Queen's Bench	Descriptive
<i>Collins v. Abrams</i>	2002	British Columbia – Supreme Court	Other
<i>Condon v. Prince Edward Island</i>	2002	Prince Edward Island – Supreme Court, Trial Division	Descriptive
<i>J.T.I. MacDonald Corp. v. Canada (Attorney General)</i>	2002	Quebec – Superior Court	Descriptive
<i>Mathew v. Canada</i>	2002	Tax Court of Canada	Descriptive
<i>Halpern v. Canada (Attorney General)</i>	2002	Ontario – Superior Court of Justice, Divisional Court	Prescriptive
<i>Harper v. Canada (Attorney General)</i>	2002	Alberta – Court of Appeal	Descriptive
<i>R. v. Masse</i>	2003	British Columbia – Provincial Court	Descriptive
<i>Highline Produce Ltd. v. United Food and Commercial Workers Union Canada</i>	2003	Ontario – Labour Relations Board	Descriptive
<i>Hislop v. Canada (Attorney General)</i>	2004	Ontario – Court of Appeal	Descriptive
<i>Communications, Energy and Paperworkers Union of Canada, Local 707 v. Alberta (Labour Relations Board)</i>	2004	Alberta – Queen's Bench	Descriptive
<i>R. v. Everette-Dorland</i>	2004	Manitoba – Queen's Bench	Descriptive
<i>Criminal Lawyers' Assn. v. Ontario (Min. of Public Safety and Security)</i>	2004	Ontario – Divisional Court	Other
<i>R. v. Thomson</i>	2004	Ontario – Superior Court	Descriptive
<i>Christie v. British Columbia</i>	2005	British Columbia – Court	Descriptive

<i>(Attorney General)</i>		of Appeal	
<i>R. v. Raponi</i>	2006	Alberta – Queen’s Bench	Other
<i>Fédération franco-ténoise c. Procureure générale du Canada</i>	2006	Northwest Territories – Supreme Court	Descriptive

As in Table 1, the last column sets out how the metaphor was applied. We used “other” to capture situations that did not fit easily within a “descriptive” or “prescriptive” category. The results in this section are heartening; in our view, the dialogue metaphor was misused in only three cases. The vast majority of lower court judgments (twenty-four out of twenty-seven) simply described the phenomenon, as we shall see.

1. The Courts as Neutral Observers: Descriptive Dialogue

Most lower courts refer to the dialogue metaphor in order to provide background and context to their cases, or simply to recognize legislative and judicial history. It is clear to some lower court judges that dialogue is a straightforward reflection of reality—so much so that it has almost lost its value as metaphor. These judges simply employ the metaphor descriptively. For example, in *Festing v. Canada (Attorney General)*,⁷¹ Justice Romilly began his decision by discussing the role of the legislature and judiciary. He relied extensively on *Vriend* and *Mills*, which are probably the Supreme Court of Canada’s strongest pronouncements on dialogue. After lengthy quotations from *Mills* he stated, “It is with these sage comments in mind that I begin my analysis of the issues raised in this application.”⁷² In *R. v. Everette-Dorland* the question for the court was purely one of criminal law, dealing with whether judicial interim release was warranted given the facts at hand. There was no constitutional law issue per se. Nevertheless, Justice Oliphant referred to the dialogue that occurred when Parliament amended section 515(10)(c) of the *Criminal Code* to deal with specific types of judicial release after the Court’s decision in *Morales*.⁷³ Justice Corbett in *R. v. Thomson*⁷⁴ expressed a similar sentiment when he pointed out that “*Hall* arises as part of the ongoing ‘dialogue’ between

⁷¹ *Supra* note 69.

⁷² *Ibid.* at 428.

⁷³ *Everette-Dorland*, *supra* note 69 at 228.

⁷⁴ *Supra* note 69.

the courts and Parliament over the requirements of the *Charter*.”⁷⁵ All of these judges recognized the dialogue metaphor as, at best, an attempt to symbolize the reality of constitutional life in Canada. Only Justice Corbett’s use of quotations around the word “dialogue” hinted at any continuing controversy surrounding the idea.

Sometimes the lower court judges are more aware of their role in the process, but at the same time, are careful to continue using dialogue descriptively. In *R. v. Regan*,⁷⁶ Justice MacDonald, after recounting a lengthy history of the interplay between the Supreme Court and Parliament over the *O’Connor* case and Bill C-46, concluded:

The case at bar is somewhat unique in that the process began by the Supreme Court of Canada filling a legislative void [*O’Connor*]; to which Parliament apparently felt the need to respond, [Bill C-46]; to which I am now called upon to examine constitutionally.⁷⁷

He then continued at some length, analyzing Bill C-46 and its constitutionality in a kind of “meta-dialogue” of his own, which prefigures the Court’s decision in *Mills* and reinforces Manfredi’s observation that lower courts can play a key role in the dialogue process.⁷⁸ Justice Veit had the same view in *United States of America v. Tilley*,⁷⁹ applying the dialogue metaphor to the relationship between courts and the executive:

I adopt the approach recently outlined by Prof. P.W. Hogg [in the precursor to “*Charter Dialogue*”] ... [where] references to executive bodies should replace references to legislative bodies The Minister has the last say, but he does not have the only say. In the system adopted by our Parliament, including our executive, the courts have a say. When the courts speak, they should deal with all the legal issues. Then, if necessary, the matter goes to the Minister. Once the Minister has spoken, an aggrieved fugitive can appeal the decision to the provincial Court of Appeal.⁸⁰

As an aside to the discussion about judges’ awareness, it is interesting to note, with the exceptions of *Sauvé* and *Harper*, the lack of dialogue cases in the Supreme Court (Table 1) appearing in Table 2. Part of this is due to the fact that almost half of the lower court decisions were rendered prior to “*Charter Dialogue*,” but that still

⁷⁵ *Ibid.* at 216.

⁷⁶ *Supra* note 69.

⁷⁷ *Ibid.* at 235.

⁷⁸ Manfredi, *supra* note 15 at 127-28.

⁷⁹ *Supra* note 69.

⁸⁰ *Ibid.* at para. 15.

leaves a significant number for which we do not have a ready explanation as to why the dialogue metaphor is not mentioned. All told, it seems to strengthen our argument that there is little point in judges using the metaphor in their reasoning.

Finally, a remark about the use of the term “Other” in the last column of Table 2. In the cases so categorized, a judge used the metaphor, but did not make it clear whether he or she accepted its validity, even as a metaphor. For example, in *Driskell v. Manitoba (Attorney General)*,⁸¹ Justice Kaufman discussed a report prepared for the Alberta Minister of Justice by the MLA Committee. The report referred to *Vriend* as an example of the respectful relationship between courts and legislatures; without further comment, Justice Kaufman simply remarked that this proposition is contained in the report. Similarly, Justice Watson’s view on dialogue is not clear in *Spracklin v. Kichton*,⁸² where he counselled himself to “[be] mindful of the position of the Supreme Court of Canada in *Mills* that there should be taken to be an ongoing dialogue between the Legislative and Judicial Branches of Government in Constitutional matters”⁸³ In Justice Watson’s case, however, his view of the metaphor became clear over time. This is because he alone, among all lower court judges, cited the dialogue metaphor more than once. In fact, next to the most frequent observer, Justice Iacobucci with seven citations, Justice Watson is in second place with five citations.⁸⁴

2. The Courts as Interfering Observers: Prescriptive Dialogue

As discussed above, problems may arise where judges do not just describe dialogue. The concern is that judges may employ the metaphor prescriptively as an analytical tool to help fashion a result.

The first example from the lower courts is *Festing*, mentioned above. The case involved an application by Festing for an order declaring unconstitutional certain search warrant and claims of privilege provisions in the *Criminal Code* relating to lawyers (sections 487 and

⁸¹ *Supra* note 69.

⁸² *Supra* note 69.

⁸³ *Ibid.* at 711.

⁸⁴ *Spracklin, Song, G.N., C.E.P., Raponi, supra* note 69. Despite his exuberance, Justice Watson remains a proper observer of the metaphor, never once straining its effect or using it in a prescriptive fashion. One gets the sense that Justice Watson would love to sit down with the now retired Justice Iacobucci and Professor Hogg over coffee and discuss the intricacies of dialogue!

488.1). Justice Romilly allowed the application in part, holding that section 488.1 infringed sections 7 and 8 of the *Charter* and was not saved by section 1. As noted, Justice Romilly devoted a lengthy part of his background analysis to describing the dialogic process that occurs in *Charter* jurisprudence. He then reviewed the existing jurisprudence on section 488.1, noting the conflict between the lower court judgments in *Lavallee v. Canada*,⁸⁵ *R. v. Claus*,⁸⁶ and *R. v. Fink*,⁸⁷ before embarking on his own reasoning process.⁸⁸ After that comes an interesting passage: in assessing various options for an appropriate remedy in the case, Justice Romilly noted, “it would be more in keeping with the ‘dialogue’ between courts and Parliament ... to strike down s. 488.1 ... rather than to attempt my hand at amending the legislation.” This is potentially problematic. His assertion could be interpreted to mean that the dialogue metaphor is one of the justifications for striking down section 488.1 of the *Criminal Code*. This would not be dialogue as metaphor but as analytical tool.⁸⁹

Another questionable use of dialogue occurred in the first instance case of *Halpern v. Canada (Attorney General)*.⁹⁰ This was an Ontario court’s first considered response to the same-sex marriage question. At the Divisional Court level, all three judges agreed that the common law definition of marriage was discriminatory and inconsistent with constitutional values; all agreed that the violation could not be justified under section 1 of the *Charter*. Where the three judges diverged was on the question of remedy. Justice LaForme concluded that the option of reformulating the common law rule should be exercised immediately. Justice Blair and Justice Smith thought differently. Justice Blair held that the common law definition should be struck down and declared constitutionally invalid and inoperative, but that the declaration should be suspended for twenty-four months to

⁸⁵ Citing both the Alberta Queen’s Bench decision and the Alberta Court of Appeal decision: (1998), 218 A.R. 229 (Q.B.), aff’d (2000), 255 A.R. 86 (C.A.) [*Lavallee*]. At the time *Festing* was decided, the Supreme Court had not rendered its decision in *Lavallee*.

⁸⁶ (2000), 149 C.C.C. (3d) 336 (Ont. C.A.), aff’g (1999), 139 C.C.C. (3d) 47 (Ont. Sup. Ct. J.).

⁸⁷ (2000), 51 O.R. (3d) 577 (C.A.), rev’g (2000), 143 C.C.C. (3d) 566 (Sup. Ct.).

⁸⁸ Of course, the issue of the constitutionality of section 488.1 was later decided by the Supreme Court in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, [2002] 3 S.C.R. 209.

⁸⁹ Justice Romilly also seems unaware of the possibility of a suspended declaration as a third option.

⁹⁰ *Supra* note 69.

enable Parliament to correct the violation; if it failed to do so, the declaration would take effect. Justice Smith went even further, deciding that the suspended declaration should remain in effect for at least twenty-four months, and at that time, if it remained unresolved, the court could revisit the matter, only modifying the common law definition “in circumstances and at a time when the court has the necessary and most recent material before it to determine existing needs and values of society.”⁹¹

The two judges who suspended the declaration, Justice Blair and Justice Smith, both relied on dialogue. These judges arguably used the metaphor incorrectly. Justice Smith began by quoting two Supreme Court passages related to dialogue: Justice Iacobucci’s oft-quoted passage from *Vriend* that cites “*Charter Dialogue*,” and a similar passage from *M. v. H*. She then went on to state:

If there is to be a *proper dialogue* between the judicial and legislative branches of government, I think it prudent that such a dialogue is conducted in circumstances where the legislative framework that is under consideration is clearly before the court.⁹²

In a similar vein, Justice Blair, in discussing the remedy, noted the Supreme Court’s characterization of the respective roles of courts and legislatures, and also cited Justice Iacobucci in *Vriend*. He added:

The temptation to act positively – and to correct the wrong as well as to strike it down – is strong... .

That, however, is not our role in my opinion. Members of the judiciary are appointed to uphold the Constitution and to ensure that the laws of this country measure up against the values and principles underlying and enunciated in the Constitution and the Charter. Major changes and reforms to the law are the responsibility of the legislature

This approach balances the respective roles of the branches of government and promotes the *kind of dialogue* between the courts and legislative bodies recently underlined [by the Supreme Court]⁹³

The way dialogue is portrayed by these two judges, compared to judges using the metaphor descriptively, is telling. Justice Blair, in particular, used dialogue as a device to bolster his argument about using caution in crafting a remedy.

⁹¹ *Halpern*, *supra* note 69 at 331.

⁹² *Ibid.* at 330 [emphasis added].

⁹³ *Ibid.* at 367-68 [emphasis added].

There is a danger in using dialogue in this prescriptive fashion. Appropriate remedies should not be based on what the “proper” state of dialogue is. Too many questions would arise: What “kind of dialogue” is not suitable? How does one determine whether a given situation should result in dialogue? How could a suspended declaration ever *not* contribute to the kind of dialogue required? Is improper dialogue related to improperly striking down legislation? Fortunately, Justices Smith and Blair made good use of the suspended declaration of invalidity in *Halpern*. Despite the restrictions placed on the remedy by the Court in *Schachter v. Canada*⁹⁴ (honoured more in the breach than actually applied), the unique nature of same-sex marriage as a legal problem and its polarizing political and philosophical effects warrant judicial caution. In fact, the result in that case was more in keeping with the spirit of dialogue than the subsequent Court of Appeal decision that held that recognition of same-sex marriages applied immediately.⁹⁵

It is also worth noting that for Justice Romilly, proper use of dialogue required legislation to be struck down, whereas for Justices Smith and Blair, appropriate dialogue meant deference to the legislatures. This itself is a clear indication that prescriptive use of the metaphor is dangerous. The metaphor should point neither to nor away from a particular remedy.

In sum, despite the problematic applications, the good news is that very few of the lower courts misused the metaphor. These courts seem to understand what Hogg and Bushell set out to document in the 1997 article on dialogue.

III. CONCLUSION

In this commentary, we have attempted to show how courts have, in general, properly applied the dialogue metaphor. Despite the authors' concern in “*Charter Dialogue Revisited*,” the metaphor has been correctly applied in most Supreme Court decisions, and (perhaps surprisingly, given the Supreme Court's occasional prescriptive use) it has been used descriptively in almost all lower court decisions. The bulk of the difficulties that have arisen from the metaphor, therefore, seem to surface in the academic commentary.

⁹⁴ [1992] 2 S.C.R. 679.

⁹⁵ *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.). See Roach, “Dialogic Judicial Review,” *supra* note 19 at 75ff for an excellent discussion on this topic.

The debate will no doubt continue. This special issue of the Journal probably guarantees that. From our vantage, that is fine—to a point: there are certainly important philosophical questions about the role of courts and bills of rights in contemporary society that are worth mooting. Our hope is that all courts, including the Supreme Court of Canada, recognize, at a minimum, that it is wrong to use the dialogue metaphor prescriptively; better yet, they should see this as a good time to move on from discussing the metaphor at all.

Because courts can employ metaphors in a way that seems prescriptive, they may become interfering observers. Judges should strive to stay immune from the observer effect and keep all metaphors to a minimum, as these are literary devices not necessarily useful for, and possibly detrimental to, resolving legal disputes. Those judges who have pretensions to metaphor would be wise to recall Robert Frost, who, in answer to whether he felt any affinity between his work and any other poet's, said, "I'll leave that for somebody else to tell me. I wouldn't know."