

THE CHARTER, PRIVATE ACTION AND THE SUPREME COURT

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I. INTRODUCTION

This article attempts to present an overview of the issue of the application of the *Canadian Charter of Rights and Freedoms*¹ in the private sphere following the decision of the Supreme Court of Canada in *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*² This landmark case came at a time when the academic debate over the scope of the *Charter* seemed to have reached a deadlock. Yet, while the Court largely settled the controversy by holding that the *Charter* directly regulates government action only, it failed to articulate convincingly the textual and theoretical basis of this solution.

The Court's decision appears to center on a narrow interpretation of subsection 32(1). That subsection provides:

This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

It is argued in this paper that broader foundations exist for the limitation of *Charter* duties to government. The impact of the narrow interpretation approach is also critically examined. In particular, it will be asserted that the decision produces an unnecessary distinction between the common law and statute law which could lead to a dual constitutional order in Canada. The possible significance of the *Charter* in the context of purely private litigation is also briefly investigated.

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¹ Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

² (1986), [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577 [hereinafter *Dolphin Delivery*].

II. THE CHARTER AND PRIVATE ACTION

A. *The Supreme Court of Canada and the Academic Debate*

In earlier cases, members of the Supreme Court of Canada had commented briefly as to the position they would adopt with regard to the constitutional regulation of the private sphere. In *Hunter v. Southam Inc.*, Mr. Justice Dickson, as he then was, noted that the *Charter* "is intended to constrain governmental action inconsistent with those rights and freedoms".³ Chief Justice Dickson touched again on the subject in the recent case of *R. v. Beaugard* where he stated that:

[T]he enactment of the *Canadian Charter of Rights and Freedoms* conferred to the courts another truly crucial role: the defense of basic individual liberties and human rights against intrusions by all levels of branches of government.⁴

These general *dicta*, however, failed to provide any guidance as to the textual or policy basis of limiting the *Charter* to the public sector. The issue was tackled in *Dolphin Delivery*.⁵ In that case, the respondent private company, Dolphin Delivery Limited, was granted a court order restraining the appellants (a trade union and its members) from a proposed picketing of its place of business in Vancouver. The injunction was issued on the grounds that the action threatened by the union would amount to the torts of inducing breach of contract and civil conspiracy. The appellants argued before the Supreme Court of Canada that the common law rules upon which the order was grounded violated their right of freedom of speech under subsection 2(b) of the *Charter*. Since the parties to the dispute were purely private, the Court addressed the issues of the impact of the *Charter* on private litigation and on the common law.

The most important aspect of the judgment is undoubtedly to be found in the negative answer given by the Supreme Court justices to the question formulated in terms of "whether or not an individual may found a cause of action or defence against another individual on the basis of a breach of a *Charter* right".⁶ However, it is both surprising and disappointing to see how little analytical attention the Court devoted to this crucial point. After quoting some views expressed by a segment of academic opinion, Mr. Justice McIntyre, speaking for the Court on this point, cursorily observed:

³ (1984), [1984] 2 S.C.R. 145 at 156, 11 D.L.R. (4th) 641 at 650.

⁴ (1986), [1986] 2 S.C.R. 56 at 72, 30 D.L.R. (4th) 481 at 493. In *Société des Acadiens du Nouveau-Brunswick and Ass'n of Parents for Fairness in Education, Grand Falls District 50 Branch* (1986), [1986] 1 S.C.R. 549 at 565, 27 D.L.R. (4th) 406 at 415 [hereinafter *Société des Acadiens*], Chief Justice Dickson observed: "I should add that the *Charter* was designed primarily to recognize rights and freedoms of individuals vis-a-vis the State." See also *Law Soc'y of Upper Canada v. Skapinker* (1984), [1984] 1 S.C.R. 357 at 367, 9 D.L.R. (4th) 161 at 169, Estey J. [hereinafter *Skapinker*].

⁵ *Supra*, note 2.

⁶ *Ibid.* at 593, [1987] 1 W.W.R. at 593.

In my view, s. 32 of the *Charter*, specifically dealing with the question of *Charter* application, is conclusive on this issue.

It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government.⁷

Existing interpretations of section 32 were varied and far from unanimous in opposing a comprehensive notion of constitutional rights. Opponents to the “constitutionalization” of private dealings argued that the replacement of the terms “and to all matters”, which appeared in earlier drafts of subsection 32(1), by the formula “in respect of all matters”, which is found in the final version, showed that only government action is caught.⁸ A further textual argument based on subsection 32(2) was proposed by Professor Hogg who maintained that the opening words “[n]otwithstanding subsection (1)” clearly indicate that section 15 and the other *Charter* guarantees take effect through subsection 32(1) only and are therefore applicable in the context of that provision exclusively.⁹ However, subsection 32(2) simply reinforces the first subsection which stands for nothing more than the proposition that the *Charter*, including section 15, applies to government. Subsection 32(2) does not inevitably lead to the conclusion that the private sector is altogether excluded from all the *Charter* guarantees except if it is assumed that section 32 must be conclusive as to the scope of the *Charter*.

It is precisely this assumption which the advocates of an extension of the *Charter* contended should not be made. They asserted quite rightly that nowhere is it stated in subsection 32(1) that government action “only” is to be regulated by the *Charter*.¹⁰ Specific reference to both federal and

⁷ *Ibid.* at 597-8, [1987] 1 W.W.R. at 596-7.

⁸ See K. Swinton, *Application of the Canadian Charter of Rights and Freedoms* in W. Tarnopolsky & G.A. Beaudoin, eds., *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS — COMMENTARY* (Toronto: Carswell, 1982) 41 at 45 [hereinafter Swinton]. Professor Hogg explains this textual hypothesis as follows:

It is not clear what if anything is the impact of the closing language of each paragraph of s. 32(1), that is to say, “in respect of all matters within the authority of” Parliament (in s. 32(1)(a)) or the Legislature (in s. 32(1)(b)). The version of s. 32(1) in the October 1980 and April 1981 versions of the *Charter* used the words “and to” in place of “in respect of” The words “and to” could have been interpreted as giving some independent force to the closing language, and conceivably even encompassing the private activity on the basis that the private activity was within the authority of either Parliament or Legislature. The replacement of the words “and to” with “in respect of” seems to preclude this interpretation.

P. Hogg, *CANADA ACT 1982 ANNOTATED* (Toronto: Carswell, 1985) at 77-8.

⁹ See P. Hogg, *CONSTITUTIONAL LAW OF CANADA*, 2d ed. (Toronto: Carswell, 1985) at 674-5 [hereinafter Hogg].

¹⁰ D. Gibson, *The Charter of Rights and the Private Sector* (1982) 12 *MAN. L.J.* 213 [hereinafter Gibson]. It has been said that “[b]y s. 32(1), the *Charter* is specifically made applicable only to the Parliament and government of Canada and to the legislature and government of each province. . . .” See W.S. Tarnopolsky, *The Equality Rights* in

provincial authorities, they said, might be aimed at indicating that the *Charter*, in contrast to the *Canadian Bill of Rights*,¹¹ can be invoked against both levels of government. Exploiting the ambiguity of subsection 32(1) to extend the *Charter* to individual conduct would conform to the rule demanding a generous and liberal interpretation of constitutional rights.¹² The use of the word "everyone" in several provisions was also claimed (unconvincingly) to support the conception of constitutional rights and freedoms as capable of applications to private action.¹³

But it appears that the Supreme Court justices had little time for such exercises in textual exegesis since these contentions were not examined in detail or even mentioned. Nor was any consideration given to arguments of "legislative" history based on statements by the drafters of their intent to limit the *Charter* to the public sphere.¹⁴ Following the judgment of Mr. Justice Lamer in *Reference Re Section 94(2) of the Motor Vehicle Act*,¹⁵ it should not have been expected that the Supreme Court of Canada would give much significance to extrinsic material of this sort. Mr. Justice Lamer cited "the inherent unreliability of such statements"

W.S. Tamopolsky & G.A. Beaudoin, *supra*, note 8 at 423. Certainly, the wording of subsection 32(1) is not that unequivocal with reference to the *Charter* being applicable only to the institutions listed there.

¹¹ *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1970, App. III.

¹² See Gibson, *supra*, note 10 at 216. A much less satisfactory point is that the reference to "government" may be aimed at circumventing the well-established rule of statutory interpretation that Her Majesty is not bound by an enactment in the absence of a specific indication to that effect, see Gibson, *ibid.* at 214-5. This argument wrongly assumes that the principles of statutory interpretation are directly applicable in the constitutional field. The Supreme Court of Canada has repeatedly indicated that the Constitution is a document *sui generis* calling for principles of its own, suitable to its character. See *Hunter v. Southam Inc.*, *supra*, note 3 at 155, 11 D.L.R. (4th) at 649 [hereinafter *Hunter*]; *Skapinker*, *supra*, note 4 at 366-7, 9 D.L.R. (4th) at 168-9; *R. v. Big M Drug Mart Ltd.* (1985), [1985] 1 S.C.R. 295 at 344, 18 D.L.R. (4th) 321 at 359 [hereinafter *Big M Drug Mart*]; *R. v. Oakes* (1986), [1986] 1 S.C.R. 103 at 125, 26 D.L.R. (4th) 200 at 217 [hereinafter *Oakes*]. Furthermore, the "legal rights" enshrined in sections 7 to 14 would make little sense if the Crown's machinery of administration of justice was not subject to them.

¹³ See Gibson, *ibid.* at 216. See also D. Lulles & P. Trudel, *L'Application de la Charte canadienne des droits et libertés aux rapports de droit privé* (1984) 18 R.J.T. 219 at 227 [hereinafter Lulles & Trudel]. Professor de Montigny has eloquently exposed the weakness of this argument in remarking that "[t]he *Charter* tells us that we are all, by its own terms, creditors of certain rights, but it does not say against whom". See Y. de Montigny, *Section 32 and Equality Rights* in A. Bayefski & M. Eberts, eds., *EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* (Toronto: Carswell, 1985) 565 at 571 [hereinafter de Montigny].

¹⁴ For examples of these arguments, see Hogg, *supra*, note 9 at 676; Swinton, *supra*, note 8 at 45. For a detailed account of the background of section 32, see J. Whyte, *Is the Private Sector Affected by the Charter?* in L. Smith et al., eds., *RIGHTING THE BALANCE, CANADA'S NEW EQUALITY RIGHTS* (Saskatoon: Canadian Human Rights Reporter Inc., 1986) 145 at 149-54 [hereinafter Whyte].

¹⁵ (1985), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 [hereinafter *Motor Vehicle Reference*].

in justification of the Court's reluctance to attach any great weight to them.¹⁶

One line of doctrinal reasoning which did seem to appeal to the Supreme Court of Canada concerns the purported superiority of legislative schemes over constitutional documents as instruments of protection and promotion of human rights among private actors. Mr. Justice McIntyre refers approvingly to the position of writers who doubt the ability of the court-based *Charter* system to cope with private constitutional litigation. More flexible administrative machinery of the type set up under statutory schemes is said to be more adequate and less likely to duplicate the function of private law remedies.¹⁷ Put differently, the legislature is better equipped to reconcile the need to combat the social problems engendered by disrespect for human rights among individuals with the imperative of securing a measure of personal autonomy.¹⁸ These points, however, are not necessarily compelling. Assuming the *Charter* could correctly be construed as binding on private actors, the constitutional protection would only add, at the most fundamental level, to the safeguards of the individual who could, and no doubt would, still resort to alternative, less expensive and less formal remedial conduits.

There are also those who believe that the legislatures and Parliament are incapable or unwilling to eradicate the widespread injustice flowing from human rights violations in the context of private activity. For them, there is no justification for two conceptions of rights and freedoms — one applicable to the state and the other valid only in the private sphere — at a time when the very concept of government is so diffuse as to elude definition.¹⁹ They assert that direct governmental infringements of human rights are nowadays nothing but the tip of the iceberg as most of the inequity and oppression plaguing society are the work of powerful private entities and individuals. To them, limiting the *Charter* would be giving effect to outmoded "laissez-faire" theories of constitutionalism.²⁰

It is deplorable that the Supreme Court of Canada seems prepared to take sides at this level of the debate since advantages in existing statutory schemes cannot justify extending the *Charter* any more than their perceived lacuna. On both sides of the argument, the underlying proposition is intended to foster a particular theoretical view of consti-

¹⁶ *Ibid.* at 508, 24 D.L.R. (4th) at 554. For a discussion of the limitations of interpretations of the *Charter* based on "legislative intent", see de Montigny, *supra*, note 13 at 572-3.

¹⁷ See A.A. McLellan & B.P. Elman, *The Enforcement of the Canadian Charter of Rights and Freedoms; An Analysis of Section 24* (1983) 21 ALTA. L. REV. 205 at 219; A.A. McLellan & B.P. Elman, *To Whom does the Charter Apply? Some Recent Cases on Section 32* (1986) 24 ALTA. L. REV. 361 at 367; Swinton, *supra*, note 8 at 47-8.

¹⁸ See the opinion of Professor Morel as reported in Vallieres, *La Charte s'applique-t-elle aux rapports de droit privé?* (1986) 13 NAT. (A.B.C.) No. 2 at 25.

¹⁹ See Gibson, *supra*, note 10 at 217; de Montigny, *supra*, note 13 at 595-6; H. Brun, *The Canadian Charter of Rights and Freedoms as an Instrument of Social Development* in C. Beckton & A. MacKay (Research Co-ordinator), *THE COURTS AND THE CHARTER* (Toronto: Univ. of Toronto Press, 1986) 1 at 31, n. 83.

²⁰ See de Montigny, *supra*, note 13 at 579.

tutionalism on the basis of an extrinsic factor which is variable. An assessment of the situation made today could be totally outdated in a few years. It is hard to see how the courts could permanently enshrine in the Constitution what actually amounts to little less than a judicial appraisal of the good or bad record of the legislature of the day in the field of human rights protection in the private sector. As Professor Whyte remarked: "It would seem that to interpret a constitutional provision in order to produce a fit with ordinary legislation is a mistaken strategy."²¹

In the end, Mr. Justice McIntyre subscribes to the orthodox conception of constitutional instruments as designed to regulate relationships between individuals and the state only.²² This position is certainly not surprising in view of the attachment to certain liberal values which Canada shares with other western democracies²³ and which the Court has emphasized in earlier cases.²⁴ What is remarkable, however, is the failure of Their Lordships to elaborate on the jurisprudential and contextual assumptions underlying their stance. With respect, Mr. Justice McIntyre's simple reliance on section 32 being "conclusive" cannot be seen as entirely convincing. Indeed, the judgment as a whole does not live up to the analytical standards the Court had set in other landmark cases such as *Hunter*, *Big M Drug Mart* and *Oakes*.²⁵ In ruling on this cardinal question of Canadian constitutional ordering, the Supreme Court of Canada has not gone one inch further in its reasoning than the lower courts, which have been generally happy to quote what are sometimes questionable academic propositions.

It should be noted that at least three courts of appeal, in addition to several lower jurisdictions,²⁶ have held specifically that the *Charter* does

²¹ See Whyte, *supra*, note 14 at 156.

²² He refers to Professor Swinton's oft-quoted passage:

The automatic response to a suggestion that the Charter can apply to private activity, without connection to government, will be that a Charter of Rights is designed to bind governments, not private actors. That is the nature of a constitutional document: to establish the scope of government authority and to set out the terms of the relationship between the citizen and the state and those between the organs of government.

Dolphin Delivery, *supra*, note 2 at 596, [1987] 1 W.W.R. at 595-6.

²³ For a discussion, see Whyte, *supra*, note 14 at 174-9.

²⁴ See, in particular, *Oakes*, *supra*, note 12.

²⁵ See generally note 12, *supra*.

²⁶ See *Re Wark and Green* (1984), 58 N.B.R. (2d) 229, 15 D.L.R. (4th) 557 (Q.B.), *aff'd* (1985), 66 N.B.R. (2d) 77, 23 D.L.R. (4th) 594 (C.A.); *Peg-Win Real Estate Ltd. v. Winnipeg Real Estate Bd.* (1985), 34 Man. R. (2d) 127, 19 D.L.R. (4th) 438 (Q.B.), *aff'd* (1985), 37 Man. R. (2d) 183 (C.A.) [hereinafter *Peg-Win*]; *Re Chyz and Appraisal Institute of Canada* (1984), 36 Sask R. 266, 13 C.R. 3 (Q.B.), *rev'd* on other grounds (1985), 44 Sask. R. 165 (C.A.); *Lasalle c. Kaplan* (1985), [1985] C.S. 854; *Royer c. Migneault* (1985), [1985] C.S. 1017; *Baldwin v. British Columbia Gov't Employee Union* (1986), 3 B.C.L.R. (2d) 242, 28 D.L.R. (4th) 301 (S.C.) [hereinafter *Baldwin*]; *A.A.A. Royal Ambulance Serv. Ltd. v. Howes* (1986), 48 Sask. R. 43, 37 A.C.W.S. (2d) 449 (Q.B.); *Cat Prods. Ltd. v. Macedo* (1985), 5 C.P.R. (3d) 71 (F.C.T.D.); *Re Grant and Crane Constr. Corp.* (1986), 3 B.C.L.R. (2d) 114, 28 D.L.R. (4th) 606 (S.C.); *Bancroft v. Governing Council of the Univ. of Toronto* (1986), 53 O.R. (2d) 460, 24 D.L.R. (4th) 620 (H.C.); *Harrison v. University of British Columbia* (1986),

not govern the actions of private individuals acting as such. In *Re Blainey and Ontario Hockey Assoc.*,²⁷ the Ontario Court of Appeal declined to declare a regulation of a voluntary sport organization inconsistent with subsection 15(1) of the *Charter*. The Court relied on the views of authors against applying the *Charter* to private bodies.²⁸ Similarly, the Manitoba Court of Appeal in the case of *Kohn v. Globerman and Shane*²⁹ exercised its statutory power to stay a damages action against psychiatrists partly based on alleged violations of the *Charter*. It was ruled that: "The *Charter* thus ensures that no right guaranteed by it can be removed or restricted by legislative enactment, but it does not confer rights as between private citizens."³⁰

In *Bhindi v. British Columbia Projectionists' Local 348 of Int'l Alliance of Picture Mach. Operators of United States and Canada*,³¹ the British Columbia Court of Appeal arrived at a similar conclusion and upheld a closed-shop provision contained in a private sector collective agreement. Although it was responsive to broader contextual elements, the Court in that case nevertheless kept mainly to the well-trodden path of existing arguments.³²

It is submitted that the Supreme Court of Canada, without necessarily engaging in the lofty exposition of a Canadian brand of western constitutional philosophy, should at least have given a broader textual and contextual basis to its interpretation of the *Charter* as a strictly "public law" instrument. This would have been in keeping with its contextual analysis of section 1³³ and of various other substantive provisions.³⁴ It would have been possible to present a more complete and convincing case through a comprehensive examination of the *Charter* in light of the emerging body of *Charter*-law which the Supreme Court of Canada has developed.

[1986] 6 W.W.R. 7, 30 D.L.R. (4th) 206 (B.C.S.C.) [hereinafter *Harrison*]; *Re Lavigne and Ontario Pub. Serv. Employees Union* (1986), 55 O.R. (2d) 449, 29 D.L.R. (4th) 321 (H.C.), currently on appeal to the Court of Appeal. Some judges have been prepared to extend the *Charter* to private action. See, e.g., the obiter of Dea J. in *Re Edmonton Journal and A.G. for Alberta* (1983), 42 Alta. R. 383, 146 D.L.R. (3d) 673 (Q.B.). The decision of Rowbothan J. in *R. v. Lerke* (1984), 55 Alta. R. 216, 11 D.L.R. (4th) 185 (Q.B.), has been somewhat neutralized by the Court of Appeal, which avoided the issue by ruling the citizen's power of arrest to be governmental action. See *R. v. Lerke* (1986), 26 D.L.R. (4th) 403 at 408-10, 24 C.C.C. (3d) 129 at 133-5 (C.A.). In the case of *Morgan v. Acadia Univ.* (1986), 69 N.S.R. (2d) 109 at 122, 163 A.P.R. 109 at 122 (S.C.T.D.), the Court approved the view of Rowbothan J. that the *Charter* could be invoked against private parties.

²⁷ (1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728 (C.A.) [hereinafter *Blainey*]. Leave to appeal was refused by the Supreme Court of Canada on 26 June 1986.

²⁸ *Ibid.* at 521-2, 26 D.L.R. (4th) at 736-7.

²⁹ (1986), 39 Man. R. (2d) 263, [1986] 4 W.W.R. 1 (C.A.).

³⁰ *Ibid.* at 269, [1986] 4 W.W.R. at 16.

³¹ (1986), 4 B.C.L.R. (2d) 145, [1986] 5 W.W.R. 303 (C.A.), leave to appeal to S.C.C. refused [hereinafter *Bhindi*].

³² The majority considered the "legislative" history of the *Charter* and endorsed the orthodox view of constitutional rights as being limited to public action. *Ibid.* at 149-52, [1986] 5 W.W.R. at 308-11.

³³ See *Oakes*, *supra*, note 12 at 135-6, 26 D.L.R. (4th) at 225.

³⁴ See section II.B (*Subsection 32(1) in its Charter Context*), *infra*.

Mr. Justice McIntyre resorts to an exceedingly narrow approach by apparently reading subsection 32(1) in isolation from the rest of the document of which it is an integral part. It is proposed to demonstrate that his interpretation of subsection 32(1) can be strengthened and complemented by an analysis of other *Charter* provisions.

B. *Subsection 32(1) in its Charter Context*

When section 32 is inserted into its broader *Charter* context, it becomes quite clear that the document as a whole applies directly only to government. Many substantive provisions are textually restricted to government, while others have been arguably construed as such by the Supreme Court of Canada. The Court has more than once affirmed that in attempting to comprehend *Charter* provisions, regard must be paid to "the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*".³⁵

Although the above quotation looks more like a mere amalgamation of all possible approaches than a coherent method of constitutional interpretation, the clear indication is that the interpreter is justified in going beyond the textual reading of an individual provision. The fact that some provisions of the *Charter* are not explicitly limited to governmental processes may not be decisive. There is, nevertheless, little doubt that, considering "the language chosen to articulate the specific right[s] or freedom[s]", many provisions are textually aimed at government. This is the case of most linguistic rights which include: the right to publicly funded minority education; the right to receive government services and communications in French or English; and the right to proceedings pursuant to section 19.³⁶

The equality rights of section 15 also contain strong textual indications that the section is only concerned with government action. The English version refers to equality before and under the "law" and equal benefit of the "law". The French phrase "la loi", however, refers to the body of rules enacted by the legislature,³⁷ as opposed to "règle de droit"

³⁵ *Big M Drug Mart*, *supra*, note 12 at 344, 18 D.L.R. (4th) at 360. See also *Motor Vehicle Reference*, *supra*, note 14 at 500, 24 D.L.R. (4th) at 547; *Société des Acadiens*, *supra*, note 4 at 560, 27 D.L.R. (4th) at 411; *Oakes*, *supra*, note 12 at 119, 26 D.L.R. (4th) at 212.

³⁶ In his separate opinion in *Société des Acadiens*, *ibid.* at 564, 27 D.L.R. (4th) at 415, Chief Justice Dickson made the following observations to which no other member of the bench objected: "Sections 16 to 22 of the *Charter* entrench two official languages in Canada. They provide language protection in a broad spectrum of public life, including legislatures, courts, government offices and schools."

³⁷ P. Robert, *LE PETIT ROBERT*, 2d ed. (Paris: Société du Nouveau Littre, 1979). See also D. Turp & J. Leaby, *SOURCES ET MÉTHODOLOGIES DU DROIT QUÉBÉCOIS ET CANADIEN* (Montreal: Les Éditions Thémis Inc., 1981) at 7: "La loi peut être définie de façon générale, comme étant toute mesure ayant *force obligatoire*, adoptée par le *législateur compétent*. . .". See also H. Brun & G. Tremblay, *DROIT CONSTITUTIONNEL* (Cowansville, Que.: Les Éditions Yvon Blais Inc., 1982) at 88.

used in section 1 and subsection 52(1). The latter corresponds more closely to the English "law", extending to the common law.³⁸ The French version, therefore, suggests that the provision is limited to legislative measures. "La loi" and "law" being equally authoritative, it seems that the most generous interpretation would extend the equality requirement to action taken pursuant to statutory power.³⁹ Contrary to the view expressed by one author, it is very doubtful that section 15 could be applied directly to private contracts as being the "law" of the parties. This gives, at best, very little consideration to the French version.⁴⁰

An argument sometimes put forward by those advocating an extension of subsection 15(1) to cases of private discrimination is that the internal logic of the provision requires it. It is asked how the equality before the law, proclaimed by the Constitution, could be said to be achieved at all if the protection of subsection 15(1) itself were not equally applicable to victims of private discrimination.⁴¹ This is trying to prove a conclusion by merely stating it. It is like saying that freedom of speech enshrined in subsection 2(b) must certainly bind individuals because it would be against such constitutional freedom if private citizens infringed upon it. At best, the argument assumes that the terms "loi" and "law" refer to the Constitution of Canada as well as any other law. This would inevitably mean that parts of the Constitution itself could be assailed as inconsistent with subsection 15(1) since everyone would be entitled to equality before the Constitution. This result is precluded by section 52 which places all parts of the Constitution on the same footing as the supreme law of Canada. The *Charter* enjoys no greater supremacy than other components of the supreme law.⁴²

³⁸ See A. Gautron, *French/English Discrepancies in the Canadian Charter of Rights and Freedoms* (1982) 12 MAN. L.J. 220.

³⁹ Section 57 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, provides: "The English and French versions of this Act are equally authoritative." In case of discrepancy between the two versions, a common generous meaning should be sought. See R. Beupre, *Vers l'interprétation d'une constitution bilingue* (1984) 25 C. DE D. 939 at 948; J. McEvoy, *The Charter as a Bilingual Instrument* (1986) 64 CAN. BAR REV. 155 at 168. However, contrary to the view expressed by these authors, it does not seem possible to discard one version altogether because it may be perceived as "objectionable" or "less generous". See Beupre at 946 and McEvoy at 168-70. Such a solution would not be compatible with section 57 which mandates equal weight to both versions. This should at least be taken to mean that one version may not totally override the other for whatever reason may suit the interpreter. Absolute contradiction between two versions does not appear a realistic possibility. Yet, that possibility would be the only case where supremacy would have to be attributed to one version over the other.

⁴⁰ See B. Slattery, *Charter of Rights and Freedoms — Does It Bind Private Persons* (1985) 63 CAN. BAR REV. 148 at 154-6 [hereinafter Slattery].

⁴¹ See Gibson, *supra*, note 10 at 216; de Montigny, *supra*, note 13 at 579.

⁴² See *R. v. Bienert* (1986), Alta. L.R. (2d) 198 at 211, 18 C.R.R. 285 at 297 (Prov. Ct.). It would not be accurate to suggest that sections 91 and 92 of the *Constitution Act, 1867* are made subject to the *Charter* by the words "with respect to all matters within the authority of . . ." contained in subsection 32(1) therein. What is made subject to the *Charter* is not the substance of sections 91 or 92, but actions taken by Parliament

Other provisions of the *Charter* containing built-in restrictions to government are the “democratic rights” in sections 3 and 4 to be a candidate for membership of Parliament or of a provincial legislature, to have elections every five years and to require a sitting of Parliament and each legislature at least every twelve months. Likewise, the “legal rights” recognized in section 11 protecting everyone “charged with an offence” refer without much doubt to safeguards against the state power of repression. The majority of the Supreme Court of Canada in *R. v. Dubois*⁴³ identified a close substantive link between sections 11 and 13 which suggest that they are both restricted to criminal or penal proceedings.⁴⁴ Section 10 deals with the right of an “arrested” person and, in *R. v. Lerke*, the Alberta Court of Appeal ruled that because the power of arrest was historically an integral part of “the function of the Sovereign in maintaining the ‘King’s peace’”, it remained a purely governmental function whether the person making the arrest is a peace officer or another citizen.⁴⁵ Also, because “fundamental justice” is not legal terminology ordinarily applied to private behaviour, section 7 seems to address deprivations of life, liberty and security of the person by public bodies to which is normally reserved the authority or status to perform such deprivation. In *Operation Dismantle Inc. v. R.*, Madame Justice Wilson remarked that the central concern of section 7 “is direct impingement by government upon the life, liberty and security of individual citizens”.⁴⁶

Apart from these provisions, however, it must be conceded that section 2, subsection 6(1) and sections 8, 9 and 12 could be found to be ambiguous. But, as was observed above, the fact that they do not in so many words refer to government should not end the enquiry. The interpreter ought to transcend textual literalism in order to glean information from the broad context of these provisions. Sections 8, 9 and 12 are part of the “legal rights” group. Their location in the midst of provisions which are more obviously limited to government action is relevant in assessing their scope. Indeed, the Supreme Court of Canada has dealt specifically with the question of the relationship between respective “legal rights” in the *Motor Vehicle Reference*⁴⁷ case. The majority, in seeking

and both levels of government within their respective spheres of competence. The fundamental scheme of division of powers contained in these provisions cannot be challenged under the *Charter*.

⁴³ (1985), [1985] 2 S.C.R. 350, 23 D.L.R. (4th) 503.

⁴⁴ *Ibid.* at 356, 358, 23 D.L.R.(4th) at 509, 510. Various appellate courts have ruled that section 11 applies only to proceedings of a criminal or quasi-criminal nature. See *Fang v. College of Physicians and Surgeons* (1986), 66 Alta. R. 352, 25 D.L.R. (4th) 632 (C.A.); *Re Barry and Alberta Secs. Comm'n* (1986), 67 Alta. R. 222, 25 D.L.R. (4th) 730 (C.A.); *Isabey v. Health Servs. Comm'n* (1986), 40 Man. R. (2d) 198, 28 D.L.R. (4th) 735 (C.A.); *Re Trumbley and Fleming* (1986), 55 O.R. (2d) 570, 29 D.L.R. (4th) 557 (C.A.).

⁴⁵ *Supra*, note 26 at 408-10, 24 C.C.C. (3d) at 133-5.

⁴⁶ (1985), [1985] 1 S.C.R. 441 at 490, 18 D.L.R. (4th) 481 at 518 [hereinafter *Operation Dismantle*].

⁴⁷ *Supra*, note 15.

to define the content of fundamental justice under section 7, held that sections 8 to 14 "address specific deprivations of the right of life, liberty and security of the person in breach of the principles of fundamental justice".⁴⁸ Their Lordships rejected the idea that sections 8 to 14 might have "greater content than the general concept from which they originate".⁴⁹ The Court thus discerned some basic unity of scope among the "legal rights".⁵⁰

It becomes harder to defend the view that sections 8, 9 and 12 should apply to private actions if section 7 and other legal rights are correctly interpreted as binding solely government. On this question, the Supreme Court of Canada declared that sections 8 to 14 are "illustrations" of the meaning, in criminal or penal law, of the principles of "fundamental justice" and are "essential elements of a system of administration of justice".⁵¹ There seems to be a suggestion that the legal rights are aimed only at the governmental machinery of justice. In fact, this would conform to the definition given by members of the Court in *R. v. Therens* to "detention" under sections 9 and 10 as a situation where "a police officer or other agent of the state assumes control over the movement of a person".⁵²

The decision in *Big M Drug Mart*⁵³ provides a further example of judicial contextual interpretations of a *Charter* freedom containing no textual limitation to government. The question before the Supreme Court of Canada was whether the federal *Lords Day Act*⁵⁴ prohibiting Sunday trading infringed the freedom of conscience and religion enshrined in subsection 2(a).⁵⁵ In attempting to circumscribe the purpose of guaranteeing freedom of conscience and religion, the Court noted that it was important "to recall that the Charter was not enacted in a vacuum, and must therefore . . . be placed in its proper linguistic, philosophic and historical contexts".⁵⁶ The Court's account of the origins of the demand for freedom of religion in western democracies correctly centers on a long-standing tradition of what Their Lordships refer to as an "opposition to the use of the State's coercive power to secure obedience to religious precepts and to extirpate non-conforming beliefs".⁵⁷ The following anal-

⁴⁸ *Ibid.* at 502, 24 D.L.R. (4th) at 549.

⁴⁹ *Ibid.* at 502, 24 D.L.R. (4th) at 549.

⁵⁰ The Supreme Court of Canada followed up on this approach in *Oakes*, *supra*, note 12 at 119, 26 D.L.R. (4th) at 212. See also the judgments of Lamer (Dickson C.J.C. concurring), Wilson and LaForest JJ. in *Mills v. R.* (1986), [1986] 1 S.C.R. 863, 29 D.L.R. (4th) 161. For a critical comment, see P. Hogg, *The Meaning of Fundamental Justice (B.C. Motor Vehicle Reference)* (1986), 18 C.R.R. 70.

⁵¹ See *Motor Vehicle Reference*, *supra*, note 15 at 502, 24 D.L.R. (4th) at 549.

⁵² (1985), [1985] 1 S.C.R. 613 at 642, 18 D.L.R. (4th) 655 at 678 [hereinafter *Therens*].

⁵³ *Supra*, note 12.

⁵⁴ R.S.C. 1970, c. L-13.

⁵⁵ *Supra*, note 12.

⁵⁶ *Ibid.* at 345, 18 D.L.R. (4th) at 360.

⁵⁷ *Ibid.* at 345, 18 D.L.R. (4th) at 360-1.

ogy with the First Amendment of the United States Constitution, applying only to state action, is illuminating:

What unites enunciating freedoms in the American First Amendment, s. 2(a) of the Charter and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation.⁵⁸

Referring further to the First Amendment whose scope broadly compares to that of section 2, the Court pointed out that its "firstness", like the "fundamental" character of subsection 2(a), was due to its primary importance in free and democratic political systems.⁵⁹ The Court's emphasis on the common historical and philosophical underpinning of this aspect of the United States Constitution and the *Charter* suggests that not only subsection 2(a) but all fundamental freedoms protected by section 2 are concerned with government encroachments.

The Court's outlook on section 2 is probably vindicated by the remaining elements of the contextual study of ambivalent provisions. These elements are to be found in sections 26 and 1. Section 26 reads:

The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

In *Singh v. Minister of Employment and Immigration*,⁶⁰ three members of the Supreme Court of Canada indicated that this provision enabled the courts to give proper effect to human rights instruments other than the *Charter*.⁶¹ Nothing in the wording of section 26 suggests that the reasoning may not be applied to freedoms enjoyed under the common law.

Extending constitutional obligations to individuals would no doubt be conducive to some restriction of the residuary individual autonomy which has long been central to the legal theory of civil liberties in Canada. Individual freedoms have traditionally been defined negatively in terms of absence of specific legal regulation.⁶² There are still important areas of personal choice and social attitudes which remain beyond the reach of legal restrictions despite the advent of wide-ranging human rights legislation.⁶³ If they applied to individual conduct, some *Charter* rights or freedoms would most likely cover areas of private life which have until

⁵⁸ *Ibid.* at 346, 18 D.L.R. (4th) at 361.

⁵⁹ *Ibid.*

⁶⁰ (1985), [1985] 1 S.C.R. 177, 14 C.R.R. 13.

⁶¹ *Ibid.* at 223-4, 14 C.R.R. at 18.

⁶² See, e.g., W.R. Lederman, *The Nature and Problems of a Bill of Rights* (1959) 37 CAN. BAR REV. 4.

⁶³ See Llullès & Trudel, *supra*, note 13 at 223.

now been exempted from the law's constraint. In this sense, it is arguable that the freedoms enjoyed by Canadians outside of the *Charter* would be limited if it were applicable to individuals. The presence of section 26 militates against such a result. This argument was successful in *Bhindi*.⁶⁴

The limitation clause contained in section 1 should be considered at this point. This provision acknowledges that rights and freedoms cannot be absolute. Some restrictions may be justifiable in certain circumstances. No such limitation can be excused, however, unless it is "prescribed by law". This requirement was considered in *Therens*,⁶⁵ where Mr. Justice Le Dain said:

The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule.⁶⁶

This is a definition of "law" which, in accordance with the French version, seems to require a formal rule of law and would therefore exclude mere contractual stipulations. But even under the broadest definition of "law" put forward by some authors,⁶⁷ many personal attitudes and actions which form the ingredient of everyday community life and are often contrary to the values embodied in the *Charter* could never be said to be *prescribed* by law.⁶⁸ This is all the more true if the interpretation suggested by Mr. Justice Le Dain is retained. The limitation clause could then be resorted to by government to validate *prima facie* breaches of the *Charter*, whereas private individuals could not invoke it since their actions or attitudes do not amount to rules of law.⁶⁹

The Court acknowledged in *Bhindi* that there would consequently be a risk of constitutional rights taking on a more absolute character in the private sector than in the area of governmental action.⁷⁰ The danger is made evident by a reading of section 2, a prime candidate for private application, which is couched in absolute terms. This state of affairs would be incongruous. In addition to introducing a fundamental incoherence in the *Charter* system, it would impose rigidity in the legal regime

⁶⁴ *Supra*, note 31 at 153-4, [1986] 5 W.W.R. at 311.

⁶⁵ *Supra*, note 52.

⁶⁶ *Ibid.* at 45, 18 D.L.R. (4th) at 680.

⁶⁷ See Gibson, *supra*, note 10 at 218; Slattery, *supra*, note 40 at 152-4.

⁶⁸ Indeed, Professor Gibson himself, in a subsequent article, claims that "law" in section 1 should not be given as broad a connotation as he had proposed in the context of subsection 52(1). See D. Gibson, *Reasonable Limits Under the Canadian Charter of Rights and Freedoms* (1985) 15 MAN. L.J. 27 at 44 [hereinafter Gibson]. Regardless of the meaning ascribed to "law", private actions and attitudes would not be "prescribed", that is "capable of being known by the community in order that [they] may be complied with". *Ibid.*, at 45.

⁶⁹ This point has been briefly touched upon by Professor Hogg who, however, fails to spell out the full implications of section 1 in this context. See Hogg, *supra*, note 9 at 676, n. 129.

⁷⁰ *Supra*, note 31 at 155, [1986] 5 W.W.R. at 312.

of interpersonal relationships, whereas balance and flexibility seem to be golden rules in tackling such societal phenomena as discrimination or intolerance. It can fairly be speculated that in recognition of this fact, the courts would feel bound to relax the definition of constitutional rights and freedoms as between individuals so that a dual meaning would be attached to them — one meaning applicable between individuals and the other valid for governmental activities. Ironically, such a dual approach to human rights is precisely what the proponents of a comprehensive application of the *Charter* claim to abhor. Moreover, the courts would then have to elaborate some kind of private/governmental dichotomy which the same authors warn would give rise to intractable conceptual and definitional difficulties.⁷¹

When the whole picture of the *Charter* is thus revealed, its application to the private sector appears ruled out and the conclusion reached by the Supreme Court of Canada is vindicated.⁷² It is hoped that when a further opportunity is provided to address the matter, probably in a case involving the governmental/private dichotomy, the Court will not shrink from fleshing out the textual and doctrinal basis of its historic decision to limit the concept of constitutional wrong-doing to the state.

III. THE CHARTER IN PRIVATE LITIGATION

A. *The Governmental Action Requirement*

The holding of the Court, which excludes the *Charter* dictates from the realm of purely private activity, does not inevitably mean that no constitutional issue can ever be raised by a purely private party involved in a dispute with another purely private party. It merely resolves the question against whom *Charter* duties and remedies may be invoked: strictly governmental actors within the meaning of subsection 32(1). Mr. Justice McIntyre makes the important point that the *Charter* “will apply to those branches of government whether or not their action is invoked in public or private litigation”.⁷³ It was therefore open to the appellant trade union to rely on the *Charter* in support of its claim against Dolphin Delivery, provided a constitutional challenge could be mounted against the actions of some governmental actor. No constitutional breach can be imputed to a purely private party. Consequently, for a *Charter* issue to

⁷¹ See, e.g., Gibson, *supra*, note 10 at 217; de Montigny, *supra*, note 13 at 596.

⁷² Professors McLellan and Elman advance another contextual argument based on subsection 24(2). They maintain that it is hard to see how the administration of justice could be brought into disrepute by action of private citizens. See *To Whom Does the Charter Apply?*, *supra*, note 17 at 363. However, the language of subsection 24(2) suggests that the bringing of the administration of justice into disrepute ultimately results from the decision of the court to admit the evidence. Therefore, it can be envisaged that such a judicial decision could undermine respect for the justice system in the case of private violations, especially when they result from egregious conduct.

⁷³ *Dolphin Delivery*, *supra*, note 2 at 598-9, [1987] 1 W.W.R. at 597.

arise on a case involving two purely private parties, the action impugned by any of these parties must be that of a governmental actor. In other words, a case of private litigation where the *Charter* will be applicable will in fact have a collateral public litigation dimension. It can be said that the *Charter* extends to private litigation only in the sense that public litigation can be superimposed upon the main dispute which remains purely private since its resolution cannot lead to the constitutional liability of any of the private parties involved.

The Court consequently had to grapple with two crucial questions: who is a governmental actor under subsection 32(1) and when can the conduct of such an actor be constitutionally challenged by a private party in a dispute with another private party? In the case before the Court, a judge-made rule of tort law regulating private relationships was attacked under the *Charter* so that the position of the courts under subsection 32(1) had to be determined. If this provision applies to the judiciary, then positive rules developed and enforced by judges could be reviewable under the *Charter* as the products of governmental action. The appellants would at least have succeeded in showing the required element of governmental action.

Mr. Justice McIntyre construes subsection 32(1) as excluding the judiciary.⁷⁴ His remarks concerning the scope of the *Charter* warrant extensive comment but it is proposed to dwell on the disqualification of the courts as governmental actors and the far-reaching implications of this decision. His Lordship achieves this result first by giving the words "Parliament", "Legislature" and "government" in subsection 32(1) what could be described as a narrow institutional meaning.⁷⁵ Several commentators had suggested that "government" could be given a connotation broad enough to embrace the judiciary.⁷⁶ Mr. Justice McIntyre, however, holds that the word "government" as used in subsection 32(1) refers to the executive and administrative branch of government specifically and not to "the whole of the governmental apparatus of the state".⁷⁷

He thus finds that only the legislative and executive branches of the state can fall within subsection 32(1). No mention is made of the judiciary until further on in the judgment when the proposition that court orders amount to governmental action is dismissed in the following terms:

While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the *Charter*. The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to

⁷⁴ *Ibid.* at 600, [1987] 1 W.W.R. at 599.

⁷⁵ See generally *ibid.* at 598, [1987] 1 W.W.R. at 597.

⁷⁶ See, e.g., McLellan & Elman, *supra*, note 72 at 369; Slattery, *supra*, note 40 at 153; Hogg, *supra*, note 9 at 672. But see Whyte, *supra*, note 14 at 169-70.

⁷⁷ *Dolphin Delivery*, *supra*, note 2 at 598, [1987] 1 W.W.R. at 597.

apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute.⁷⁸

The courts, in other words, are not compelled by the *Charter* in everything they do, although they must respect constitutional requirements if and when they apply. Given the fact that the *Charter* does not reach into purely private relationships, the courts, in developing and enforcing common law principles regulating these relationships, are not directly bound by the *Charter* even if they should regard its provisions as a guide to the requirements of public policy in judge-made private law. This is arguably what Mr. Justice McIntyre means when he later points out that the judiciary “ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution”.⁷⁹

It seems reasonable to infer that, in Mr. Justice McIntyre’s opinion, the judiciary is not constitutionally constrained under subsection 32(1) to alter *all* its judge-made law to conform to the rights and freedoms guaranteed by the *Charter*. This would explain why he agrees that the term “law” in subsection 52(1) encompasses the common law but insists that it does so only within the context of subsection 32(1), that is, when executive or administrative action is present.⁸⁰ Hence his assertion to the effect that “the *Charter* applies to the common law but not between private parties”.⁸¹ This link between subsections 52(1) and 32(1) at least has the merit of making clear that the role of subsection 52(1) is not to define the scope of application of the *Charter*, as some writers mistakenly maintained,⁸² but to affirm its supreme status and thus dispel any doubt the courts might entertain as to their power of review.⁸³ The supremacy of the *Charter* may not go beyond the reach of the *Charter* itself. The words “any law” in subsection 52(1) must therefore be fitted within the limits set in subsection 32(1).

The Supreme Court of Canada ruled that the appellants could not invoke the *Charter* in their dispute with Dolphin Delivery Limited since they were unable to ground their claim on any element of governmental action. There was only a rule of private law developed by the judiciary to whom subsection 32(1) does not extend. The case at bar was contrasted with *Blainey*⁸⁴ where government action, namely legislation, was clearly involved.⁸⁵ In his concluding remarks, Mr. Justice McIntyre again em-

⁷⁸ *Ibid.* at 600, [1987] 1 W.W.R. at 599.

⁷⁹ *Ibid.* at 603, [1987] 1 W.W.R. at 601 (emphasis added).

⁸⁰ *Ibid.* at 592-3, 597-9, [1987] 1 W.W.R. at 593, 596-8.

⁸¹ *Ibid.* at 599, [1987] 1 W.W.R. at 598.

⁸² *See, e.g.*, Gibson, *supra*, note 10 at 218; Slattery, *supra*, note 40 at 153.

⁸³ Several judicial pronouncements support this point. *See, e.g.*, *Therens, supra*, note 52 at 638, 18 D.L.R. (4th) at 675, Le Dain J.; *Operation Dismantle, supra*, note 46 at 482, 18 D.L.R. (4th) at 512, Wilson J.; *Motor Vehicle Reference, supra*, note 15 at 495-8, 24 D.L.R. (4th) at 542-5, Lamer J.

⁸⁴ *Supra*, note 27.

⁸⁵ *Dolphin Delivery, supra*, note 2 at 601-4, [1987] 1 W.W.R. at 599-602.

phasizes that had the rule specifically prohibiting secondary picketing been statutory in nature, the *Charter* could have been directly relevant, because an Act of legislature clearly constitutes action falling within subsection 32(1).

This distinction between common law and statute law for the purpose of determining the scope of the constitutional guarantees enshrined in the *Charter* is not without consequence in view of the bijuridical nature of Canada.

B. *The Common Law/Statute Law Divide*

Amazingly, the Justices of the Supreme Court of Canada do not appear to have realized that such a sharp distinction between the common law and statute law in applying the *Charter* could be of significant consequence for the civil law system of Quebec. Virtually the whole field of private legal relationships in Quebec is governed by the Civil Code or statutes. If the Court's reasoning in *Dolphin Delivery* is applied to characterize the Code under subsection 32(1), the *Charter* seems likely to have a broader scope in Quebec than in the common law provinces where judge-made law relating to private dealings is immune from direct constitutional challenge. Quebecers potentially enjoy more extensive constitutional protection than other Canadians and, conversely, Quebec's private law is subjected to potentially greater constitutional constraint than its common law counterparts.⁸⁶ This arguably amounts to little less than instituting a dual constitutional order in Canada on the slim ground that "government" in subsection 32(1) must be given an institutional connotation.

Is this constitutional dualism avoidable? The courts could not equate the Civil Code to the common law as is sometimes done for the purpose of statutory interpretation.⁸⁷ This approach would simply ignore the legislative foundation the Code and thus fly in the face of subsection 32(1) which explicitly binds the legislature of each province. Alternatively, the doctrine of public policy seemingly favoured by Mr. Justice McIntyre could be employed in order to reshape the common law in a manner similar to the way the Quebec civil law will be influenced through a direct application of *Charter* constraints. Even if the latter approach were adopted, however, constitutional remedies under subsection 24(1) would not be available through public policy but they would be available in Quebec with regard to provisions of the Code irreconcilable with the *Charter*.

The textual argument advanced by Mr. Justice McIntyre to exclude the courts from "government" as used in subsection 32(1) is that this term is "almost always" taken to refer specifically to the executive in the

⁸⁶ See Slattery, *supra*, note 40 at 157. See also Bhindi, *supra*, note 31 at 159, [1986] 5 W.W.R. at 316, Anderson J.A.

⁸⁷ P.A. Cote, *INTERPRÉTATION DES LOIS* (Montréal: Les Éditions Yvon Blais, 1982) at 451-2.

context of the *Constitution Act, 1867*.⁸⁸ It would have been quite possible, it is submitted, for the Supreme Court of Canada to resort to the now well-established purposive approach in order to distinguish the *Charter* from other parts of the Constitution and attach a broader meaning to "government".

Perhaps the real rationale behind this technical construction of subsection 32(1) lies in the fear that if the courts were bound by the *Charter* in everything they do, its exclusion from the private sphere would be rendered meaningless. In rejecting the contention that the judiciary constitutes a branch of government under the *Charter*, Mr. Justice McIntyre explains:

To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the *Charter* precludes the making of the order, where a *Charter* right would be infringed, it would seem that all private litigation would be subject to the *Charter*. In my view, this approach will not provide the answer to the question.⁸⁹

It is reasonable to think that this passage betrays an unavowed apprehension that the jurisprudence of the celebrated American case of *Shelley v. Kraemer*⁹⁰ would be imported into Canadian law if court orders were considered governmental action. In that case, the Supreme Court of the United States ruled that judicial enforcement of discriminatory private covenants amounted to state action contrary to the *Bill of Rights* since the state's court process was used in support of discrimination.

If this interpretation of Mr. Justice McIntyre's words is correct, his position is certainly open to criticism. Contrary to the view apparently taken by some authors,⁹¹ subjecting judge-made private law and enforcement of that law to the *Charter* would not necessarily lead to the American solution. In the first place, positive rules of common law specifically mandating or proscribing private conduct in a manner contrary to the *Charter* would properly be invalidated and would naturally not give rise to court orders susceptible to constitutional attack. In cases where no such positive rule exists, it could be argued that "permissive" common law involves no governmental action even by the courts. It is by no means obviously logical that a mere judicial acknowledgement of an absence of legal prescription or prohibition automatically gives rise to a judicial infringement of the Constitution. A useful example would be when the legality of the action of a private individual who prevents someone from

⁸⁸ *Dolphin Delivery*, *supra*, note 2 at 598, [1987] 1 W.W.R. at 597. The possible significance of the fact that "government" is not capitalized in subsection 32(1) is not discussed. *But see* the study referred to in *Peg-Win*, *supra*, note 26 at 132-3, 19 D.L.R. (4th) at 445.

⁸⁹ *Dolphin Delivery*, *ibid.* at 600-1, [1987] 1 W.W.R. at 599.

⁹⁰ 334 U.S. 1 (1948).

⁹¹ *See, e.g.*, Hogg, *supra*, note 9 at 673; McLellan & Elman, *supra*, note 72 at 369-70.

speaking at a private meeting comes to be tested in court.⁹² Would the court infringe subsection 2(b) of the *Charter* by finding that no legal prohibition prevented the denial of a chance to speak at a private meeting? It could not be said that the court supports unconstitutional private behaviour because this behaviour is not subject to the *Charter*. If a specified private conduct is lawful because it is not proscribed by the common law, it is the duty of the court to say so. In doing this a court does not violate the *Charter*. Only by a quite unusual fiction would the court itself become the author of that particular conduct merely by stating that the law does not prohibit it.

There is no reason why this reasoning should not be applicable when a court delivers enforcement orders as a result of a valid exercise of its judicial role of ascertaining an absence of legal prohibition. It is arguable that if the prior act of ascertaining the law is constitutional, so is the act of enforcing it, because the court is merely giving effect, in a neutral manner, to lawful private conduct. It seems that arguing that such enforcement is unconstitutional disguises an attack on the impartiality of the judiciary. Judicial impartiality ought to be treated as a separate issue unless the suggestion of certain commentators that courts, as state institutions, can never be neutral is accepted.⁹³ The judicial act of enforcing permissive common law, even if it is recognized as governmental in nature and therefore subject to the *Charter*, remains distinct from the private act to which the court is giving effect. Court orders would consequently not be in breach of the *Charter* simply because they serve to enforce private conduct, which, if it were governmental, would be unconstitutional.

There is, on the other hand, widespread concern among writers that if the courts enforce discriminatory private contracts, for example, they will be supporting discrimination with "the full panoply of state power".⁹⁴ This apprehension, although legitimate, is not warranted. It assumes that barring a direct constitutional prohibition on their judicial enforcement, these contracts will be enforceable under statute or the common law. Yet Mr. Justice McIntyre himself states that the courts ought to apply the common law in a manner consistent with the values embodied in the *Charter*. In cases where no human rights legislation is applicable, the *Charter* can be used as a persuasive, albeit not conclusive, guide to the requirements of public policy in contract law or other areas of private law.⁹⁵

The above approach would only conform to a reasonable understanding of the judicial enforcement of permissive common law. It would also

⁹² Professor Hogg uses this example to make another point. See Hogg, *supra*, note 9 at 676, n. 129.

⁹³ de Montigny, *supra*, note 13 at 588.

⁹⁴ See *Shelley v. Kraemer*, *supra*, note 90 at 19.

⁹⁵ It has been suggested that the *Charter* could embody an authoritative statement of Canadian public policy. G.V. La Forest, *The Canadian Charter of Rights and Freedoms: An Overview* (1983) 61 CAN. B. REV. 19 at 28.

afford the courts a flexible tool in the performance of this function. They could enforce commercial or other contracts containing reasonable limitations of personal freedom as being consonant with public policy.

In the end, Mr. Justice McIntyre's justification for restricting the meaning of "government" to the executive is not free from defects. To the extent that the common law/statute law divide stems from a desire to avoid a wholesale extension of the *Charter* to private litigation, it is probably unnecessary. It will be difficult, however, for the courts to avoid the divide unless they are prepared to reassess their position under subsection 32(1).

It may be that in practice the common law/statute law divide will have no great impact. A statute (or a code) governing private relationships might not infringe the *Charter* unless it specifically mandates or actively supports private behaviour incompatible with the *Charter*. It has been suggested that when private action contrary to the *Charter* is not specifically prohibited by statute, such permissive law could be declared unconstitutional. The underlying theory is that legislative silence is not neutral but conceals a "delegation" to private parties of the power to do what the state itself is barred from doing by the Constitution.⁹⁶ While the delegation theory may constitute a plausible proposition in terms of political analysis, it could not be spelled out in legal terms in the absence of some judicially ascertainable delegating act on the part of the legislature. The global context of the *Charter* does not so unequivocally favour regulation of private behaviour as to justify the courts embarking upon the formulation of a dubious doctrine of "state inaction" whereby "the state is inevitably involved in *all* private dealings".⁹⁷

The courts are beginning to appreciate the difficulty of testing permissive legislation against the *Charter*. In *Blainey*,⁹⁸ subsection 19(2) of the Ontario *Human Rights Code* explicitly reserved the liberty of athletic organizations to restrict membership and participation to persons of the same sex.⁹⁹ Section 15 of the *Charter*, however, guarantees equal treatment and benefit of the law without discrimination based on sex. The Ontario Court of Appeal found that subsection 19(2) offended subsection 15(1) of the *Charter* and declared it to be of no effect pursuant to subsection 52(1). The Court said that the provision was unconstitutional because it permitted sex-based discrimination.¹⁰⁰ It seems that the section did not on its face represent legislative discrimination between men and women since it covered all organizations. Its actual wording was perhaps construed as active legislative support of private discrimination.

⁹⁶ See de Montigny, *supra*, note 13 at 589, 593-4.

⁹⁷ *Ibid.* at 593.

⁹⁸ *Supra*, note 27.

⁹⁹ *Human Rights Code, 1981*, S.O. 1981, c. 53, s. 19(2):

The right under section 1 to equal treatment with respect to services and facilities is not infringed where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex.

¹⁰⁰ *Supra*, note 27 at 527, 26 D.L.R. (4th) at 742.

In the case of *Harrison*¹⁰¹ the Supreme Court of British Columbia was reluctant to endorse the *Blainey* approach and refused to interfere with provisions of the provincial *Human Rights Act*¹⁰² which prohibited age-based discrimination in employment but only when directed at persons between 45 and 65 years of age. The statute, in other words, "permitted" discrimination with regard to people outside the protected age category. The Court declined to invalidate the restrictive definition of "age" on the ground that the legislature did not have a constitutional duty to legislate to the full extent of the scope of subsection 15(1) of the *Charter*.¹⁰³ Commentators have maintained that such an obligation might exist. Their view now finds some support in a recent decision by the Supreme Court of Ontario which held that a positive legislative intervention in the field of age discrimination must conform to the *Charter*.¹⁰⁴ The problem of permissive statutes has arisen in relation to other provisions of the *Charter*, especially in the field of labour law.¹⁰⁵

It is apparent that to invalidate a statute for failing to restrain private conduct contrary to the *Charter* could sometimes be tantamount to a constitutional compulsion to enact legislation whereby the state prohibits, sanctions or prosecutes private behaviour which may run counter to *Charter* values. It would be surprising if this became a common feature of the *Charter* jurisprudence.

It remains to be seen to what extent the courts will be prepared to interfere with legislation regulating private relationships but falling short of prescribing or actively supporting private action offending the values of the *Charter*. The emerging trend, however, suggests that the *Charter* is likely to be applied when a permissive statutory provision results, in the view of the court, from a deliberate legislative choice.¹⁰⁶ The real impact of the common law/statute law divide on the civil law of Quebec will depend on the degree of judicial activism in this area.

C. *The Governmental Connection with Private Litigation*

If private parties cannot sue each other for breach of the *Charter*, how can the *Charter* be applicable to private litigation at all? Presumably,

¹⁰¹ *Supra*, note 26 at 7, 30 D.L.R. (4th) 206.

¹⁰² S.B.C. 1984, c. 22, ss. 1, 8(b).

¹⁰³ *Supra*, note 26 at 22, 30 D.L.R. (4th) at 219. The decision in *Harrison* was distinguished in *Stoffman v. Vancouver Gen. Hosp.* (1986), [1986] 6 W.W.R. 23, 30 D.L.R. (4th) 700 (B.C.S.C.).

¹⁰⁴ See, e.g., *Re McKinney and Bd. of Governors of the Univ. of Guelph* (1987), 57 O.R. (2d) 1 at 25, 32 D.L.R. (4th) 66 at 90. Commentators have included McLellan & Elman, *supra*, note 72 at 368-9; M. Morin, *Les stipulations à caractère discriminatoire au sein des régimes de rentes et d'assurance de personnes: dix ans de retard à rattraper* (1986) 46 R. DU B. 557 at 590-4.

¹⁰⁵ See *Bhindi*, *supra*, note 31 at 175, [1986] 5 W.W.R. at 333, Hutcheon J.A.; *Baldwin*, *supra*, note 26 at 242, [1986] 4 W.W.R. 679.

¹⁰⁶ See *Hsuen v. Mah* (1986), 7 B.C.L.R. (2d) 21 (S.C.) In that case, a deliberate legislative failure to prohibit age discrimination was tested against subsection 15(1) but was found consistent with it.

private litigation cannot result in the constitutional liability of any of the parties since they are not governmental actors. An individual can successfully claim that another individual is not really acting as a private party but rather as a governmental actor and consequently have a claim under the *Charter*. But this is arguably no longer a purely private dispute since one of the parties is not private for the purpose of the *Charter*. It can be said to have become public litigation.

Mr. Justice McIntyre indicates that the *Charter* can be relied upon by private litigants in private litigation where there is a "direct and close connection" between an element of government action and the claim advanced by a private party.¹⁰⁷ This could mean in practice that the constitutional issue raised by the conduct of a governmental actor must be such that its resolution by a court will change the outcome of the private dispute. The *Blainey* case,¹⁰⁸ which Mr. Justice McIntyre himself uses to explain his proposition, will provide an illustration of this type of connection. In that case the success of a private party's claim against another private party depended on a finding that the action of a governmental actor, the Ontario Legislature, was in contravention of the *Charter*. The effect of declaring subsection 19(2) of the Ontario *Human Rights Code*¹⁰⁹ to be of no force was to extend the statutory requirement of equal treatment to the particular case of sex discrimination in athletic organizations. The unconstitutionality of a third party's governmental conduct resulted in the Ontario Hockey Association (O.H.A.) being susceptible to a complaint under the statute. It must be pointed out that the O.H.A. itself was not found to be a governmental actor nor, therefore, was it held subject to a *Charter* remedy.¹¹⁰ This would be an example of private litigation where a private party has invoked the *Charter* to sustain a claim against another one, and which claim was based on statute, not the Constitution.

It would seem that a private party would not be justified in relying on the *Charter* in the context of a private litigation if, despite a finding of inconsistency of some governmental action with a provision of the *Charter*, the legal position of the parties to the private dispute would remain unchanged. For example, an individual may be denied employment by a private sector employer on the basis of age. The decision of the Supreme Court of Canada in *Dolphin Delivery* precludes a cause of action under the *Charter* against the employer. From the hypothesis that the relevant human rights statute fails to prohibit age-based discrimination, the individual may, in taking legal action against the employer, wish to challenge the legislation for violating subsection 15(1) in order to

¹⁰⁷ See *Dolphin Delivery*, *supra*, note 2 at 601, [1987] 1 W.W.R. at 599.

¹⁰⁸ *Supra*, note 27.

¹⁰⁹ S.O. 1981, c. 53.

¹¹⁰ Finlayson J.A. emphasizes that no constitutional remedy can be obtained against the O.H.A.: "I have already held that the *Charter* does not extend to private activity within the province, and, thus, a *Charter* remedy cannot be granted in a situation to which the *Charter* does not apply." *Supra*, note 27 at 532, 26 D.L.R. (4th) at 747.

acquire a statutory claim. However, no right under the statute would be made available by an invalidation of the deficient legislative provision and the courts have refused to read words into a statute in order to make it constitutionally valid.¹¹¹ This is probably a case where there would be no direct connection between a constitutional issue raised by governmental conduct and a claim made in private litigation between the aggrieved individual and the employer.

Mr. Justice McIntyre, however, reaches a point in his judgment where he is apparently discussing a different type of connection. He observes that, "it is difficult and probably dangerous to attempt to define with narrow precision that element of governmental intervention which will suffice to permit reliance on the *Charter* by private litigants in private litigation".¹¹²

He then suggests that the *Charter* would apply, for instance, to a railway company acting pursuant to regulatory powers conferred by the *Railway Act*, and to regulations or by-laws. The *Charter* will also be applicable, in his view, when a private party relies on statutory power "to produce an infringement of the *Charter* rights of another".¹¹³ His Lordship may be confusing the problem of circumscribing the notion of governmental action under subsection 32(1) with the distinct issue of ascertaining when the constitutionality of such action can be called into question in the context of a dispute between two private parties. A party, when purporting to act under a statutory power of constraint designed to serve the public interest, is arguably not purely "private" for the purpose of *Charter* application. Thus, the *Charter* would cover the exercise of this type of power without reference to the particular problem of private litigation.

From an institutional point of view, a railway company may be private but it should be considered "governmental" when it exercises its regulatory function.¹¹⁴ It is submitted that this element of confusion in Mr. Justice McIntyre's analysis should be clarified because the position of a purely private actor in private litigation should not be mistaken for that of a party who is actually a governmental actor. Only the latter can "produce" a constitutional infringement, to use Mr. Justice McIntyre's own term, and be answerable for it under subsection 24(1) of the *Charter*.

¹¹¹ See *R. v. Edwards Books and Arts Ltd.*, where Chief Justice Dickson said that "it is not the role of this Court to devise legislation that is constitutionally valid". (18 December 1986) [unreported] at 43. See also *Phillips v. Social Assistance Appeal Bd.* (1986), 73 N.S.R. (2d) 415, (*sub nom. Re Phillips and Lynch*) 27 D.L.R. (4th) 156 (S.C.T.D.).

¹¹² *Dolphin Delivery*, *supra*, note 2 at 602, [1987] 1 W.W.R. at 600.

¹¹³ *Ibid.* at 603, [1987] 1 W.W.R. at 601.

¹¹⁴ For a review of recent cases where bodies similarly exercising statutory powers were found to be "governmental" under subsection 32(1), see McLellan & Elman, *supra*, note 72 at 370-2. See also *Stoffman v. Vancouver Gen. Hosp.*, *supra*, note 103.

IV. CONCLUSION

With the advent of the *Charter*, Canadian constitutional law has moved from relatively unfettered parliamentary sovereignty within a federal division of power to a considerably more extensive system of judicial review of governmental action reinforced by wide-ranging remedial powers in the hands of the judiciary. This is, by all standards, no insignificant change. The *Charter* embodies an as yet unsteady compromise between untrammelled sovereignty and a "constitutionalization" of all spheres of Canadian life.

Following *Dolphin Delivery*, the debate over the application of the *Charter* is likely to focus on the wording and context of subsection 32(1). Definitional conundrums will be inevitable in unravelling the governmental/private dichotomy. The courts, however, should not walk away from the difficulty by adopting a technical and strictly institutional approach to subsection 32(1). Instead, a modern theory of the state should be developed which is sensitive to the realities of the power relationship between government and the governed. The "state", a term used with increased frequency by the Supreme Court of Canada in its *Charter* jurisprudence, should be defined similarly across Canada for the purpose of applying the *Charter*. Subsection 32(1) might then help bring about a truly developed system of public law in Canada.