

DISCUSSION

Following is an abstract of parts of a general discussion on the application of the Charter to the private and public sectors. It followed the presentation of the papers of Professors Gibson and Levy. The moderator was Judge Sandra E. Oxner.

A Participant: The emphasis should be on the nature of the conduct complained of, not on the person engaged in such conduct. If my rights, such as mobility rights, are infringed it does not matter to me whether the infringement is by a Province or by a union. It is at least as likely that rights of speech and association will be infringed by private conduct as by governmental action.

Professor R.D. Gibson: I am grateful to have at least one supporter! Two small thoughts might usefully be added. First, the *Charter* seems to me to involve a direction to Courts to balance social and constitutional values; those who assert that private action should not be intruded upon by the *Charter* are asserting a particular liberty, to be free from constitutional intrusion. That is a significant liberty, but it ought to be balanced against the interests of the particular patients, employees, or whoever are affected and a desirable conclusion would come by allowing this balancing within the scope of the *Charter*. Second, as indicated by a note to my paper, Professor Maxwell Cohen brought explicitly to the attention of the Parliamentary Joint Committee the ambiguity of section 32(1), and pointed out that if Parliament wished clearly to limit its scope to governmental action, it had but to insert the word "only" in section 32(1). That amendment was not made, perhaps indicating a desire to leave the matter to be worked out.

Professor Paul Bender: I largely agree with the view that attention should be given to the conduct rather than the actor, but I also think there are often significant differences between governmental behaviour and private behaviour. Suppose the owner of a small Winnipeg restaurant, because of his opposition to the cruise missile, decided not to serve American tourists. A customer refused service would be inconvenienced and offended, but could go elsewhere. If the government made it a crime to serve U.S. citizens, that would have much more comprehensive effects on those customers and also have an "educational" effect, dispensing a message that people from the U.S. should be discriminated against.

A Participant: Need we, and should we, distinguish in this discussion between Federal state action and Provincial state action?

Professor J.C. Levy: The *Charter* on its face applies, at a minimum, to both Federal and Provincial action. One of the substantially unexplored questions at this stage is how far we might be able to apply different evaluative standards to each. Consider the experience of the United States Supreme Court in articulating criteria of review under the Fourth Amendment in relation to Federal action and articulating criteria under the Four-

teenth Amendment in relation to State action. It may be argued that it is possible to treat Provincial matters by reference to different standards of review than we use to treat Federal matters. But can or should one go further to look at a particular Province and infuse into the criteria for review principles of reasonableness derived from the social construct of that particular Province?

Professor Bender: It was once true there was a substantial difference under the United States Constitution between the standards applicable to Federal behaviour and those applicable to State behaviour but the trend has been away from that and now in virtually all areas the same standards of justification apply whether it is the State or the Federal government that is, say, violating freedom of speech. I had not considered the interesting possibility of different standards for different States! I don't think, however, that there is a lot of promise in that.