NOTES AND COMMENTS

THE CHARTER OF RIGHTS AND THE PRIVATE SECTOR

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There is an impression abroad that the *Canadian Charter of Rights and Freedoms* applies only to governmental activities; that it would not apply, for instance, to a private employer's interference with employees' freedom of speech or of association. I believe that this impression is mistaken.

The Problem

The basis for the misunderstanding is easy to trace. Section 32(1) of the *Charter*, which is the only provision bearing the marginal note "Application of Charter", states that the *Charter* applies to the Parliament and government of Canada and to the legislature and government of each province. Nothing is said about the applicability of the *Charter* to the actions of anyone outside government. Moreover, earlier drafts of the *Charter* had been phrased in a way that clearly embraced private activities[1], and the re-wording of Section 32(1) in the final version was undoubtedly intended by many of those involved in the constitutional negotiations which preceded the *Charter's* adoption to restrict its application to the public sector.[2]

Negotiated agreements are always compromises, however, and the *Charter* is no exception. It is replete with deliberately ambiguous provisions on matters upon which complete agreement could not be reached. Section 32(1) is an obvious example of such a compromise. It is clear that some of those at the bargaining table did not want the *Charter* to apply to the private sector, and accordingly refused to accept the language of the previous draft, which would have put the matter beyond doubt. It is equally clear that other parties to the negotiations were not willing to exclude the private sector unequivocally; if they had been willing they would have agreed to state that the *Charter* applied "*only*" to governmental activities. Given the constitutional and drafting expertise of those who advised the various negotiating governments, the omission of the conclusive word "*only*" cannot be regarded as accidental.

There can be little doubt, therefore, that those responsible for the wording of the *Charter* had divided intentions as to its scope, and that they all agreed upon the inconclusive language of Section 32(1) in the belief that it would be capable of judicial interpretation supporting their particular intention, but aware that they were delegating the final determination of the question to the courts.

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1. *Eg.*: Canada, Department of Justice, *Consolidation of Proposed Resolution and Possible Amendments as Placed Before the Special Joint Committee by the Minister of Justice, January 1981:*

> 29. (1) This Charter applies (a) to the Parliament and government of Canada *and to* all matters within the authority of Parliament ...; and (b) to the legislature and government of each province *and to* all matters within the authority of the legislature of each province. (Emphasis added).

2. Mr. R. Tassé, Q.C., Deputy Minister of Justice for Canada, told the Joint Parliamentary Committee on January 15, 1981, that: "... we do not see these rights or these proscriptions of the Charter to have application in terms of a relationship between individuals. We see them as applying in terms of a relationship between the state and individuals, so I am not sure that in terms of contract laws, ... contractual relationships between individuals, I do not see how the Charter itself could be called upon to assist in resolution of conflicts that may arise." Canada, Parliament, *Minutes of Special Joint Committee of Senate and House of Commons on the Constitution of Canada*, January 15, 1981, No. 38, p. 49. It should be borne in mind, however, that although Mr. Tassé was an important spokesperson for an important party to the negotiations, his interpretation is only a matter of opinion.

Even if those who took part in the federal-provincial bargaining had been unanimous in their desire to exclude private transactions, that fact alone would not settle the question. It was the Senate and House of Commons of Canada, acting on behalf of the people of Canada, whose Resolution ultimately requested the constitutional amendment by the British Parliament. To the extent, therefore, that "intention" is a relevant factor to be taken into account by courts when interpreting the *Charter*[3], the intentions of the Senators and Members of Parliament who passed the Resolution, and of the citizens on whose behalf they acted, are at least as significant as those of the federal-provincial negotiators. It would be even more difficult to ascertain these opinions than those of all the negotiators, of course. Few Parliamentarians or citizens would have given express consideration to whether the *Charter* would apply to the private sector. Yet it is probable that if they had been asked a large proportion of them would have expressed the expectation that the *Charter* would, where appropriate, apply as much to the actions of private investigators and store detectives as to police officers; and that its protections would be as available to the pupils of a private school as to those of a public school. Why would they have expected it to be otherwise?

Ultimately, then, it is not a question of what was intended; competing intentions cancel each other out. The courts' task is to determine for themselves, on the basis of the language used, construed in light of the kind of society to which Canadians aspire, the *Charter's* proper ambit.[4]

The Narrow View

The strongest legal argument that can be made in support of the view that only the public sector is covered by the *Charter* is probably that which relies on the interpretative principle: *Expressio unius est exclusio alterius*. By expressly referring to governmental activities, Section 32(1) may be presumed to have impliedly excluded non-governmental activities. However, this presumption, like all principles of interpretation, must yield to stronger opposing presumptions, as well as to contrary implications arising from the context. In this case there is an obvious explanation for the explicit reference to governmental activities, which rebuts the presumption that non-governmental matters are excluded.

Generally speaking, all legislation applies to everyone within the jurisdiction of the enacting legislature, without explicit reference. This is not true of the Crown, however. It is a long-established principle of interpretation that legislation does not apply to the Crown unless the Crown is referred to explicitly or by necessary implication.[5] Statutes which state that they apply to the Crown, but make no explicit reference to the others to whom they apply are commonplace.[6] Since it is likely that similar principles operate with respect to constitutional instruments like the *Charter*, there was good reason to refer

3. *See*: J.A. Corry, "The Use of Legislative History in the Interpretation of Statutes" (1954), 32 Can. B. Rev. 624, for a well reasoned exposition of the problems associated with relying on "legislative intent".

4. *See*: Dale Gibson, "Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations", in *Canadian Charter of Rights and Freedoms: Commentary (W. Tarnopolsky ed.)* (to be published in 1982 by Carswell).

5. P.B. Maxwell, *Interpretation of Statutes* (12th ed. 1969) 161, ff.; E.A. Driedger, *The Construction of Statutes* (1974) 162, ff.

6. *Eg.*: *Canadian Human Rights Act*, S.C. 1976-7, c. 33, s. 63, which also carries the marginal notation "Application".

explicitly to governmental activities in Section 32(1).[7] Two other considerations were also involved: a wish to include explicit references to Parliament and the legislatures in case the historic judicial deference to legislative supremacy should lead to a similar exclusionary presumption with respect to those bodies; and a desire to ensure that the *Charter*, unlike the *Canadian Bill of Rights* before it[8], should be understood to apply to both the federal and provincial spheres. It is possible, of course, that courts might have arrived at similar results by means of "necessary implication" even if s. 32(1) had not been adopted.[9] It was wise draftsmanship, however, to employ explicit language, and avoid the possibility that such an implication might not have been found. The presumption arising from the principle *expressio unius est exclusio alterius* is therefore fully refuted by the explanation that the drafters acted *ex abundante cautela*.

Another argument that is sometimes made to support the exclusion of private conduct from *Charter* protection is the contention that, as a general rule, constitutions exist for the purpose of defining and regulating the relationship between the state and the citizen, or between various branches of the state, rather than between citizens. While this is a reasonably accurate generalization about the primary function of constitutions, it is by no means a universal or necessary characteristic. The American Constitution has, for example, often been applied to private transactions.[10] While the United Kingdom does not possess the same kind of constitution as Canada, some of the major devices that courts have developed to protect citizens from government excesses over the years have also been held by British courts to apply to private conduct. For example, in *Somerset* v. *Stewart*[11], Lord Mansfield freed a slave from the custody of his master on a writ of *habeas corpus*, thereby establishing the principle that slavery is contrary to English law. In Canada it has been common for individuals to rely on constitutional principles in the course of private litigation. In *Switzman* v. *Elbling*[12], for example, Quebec's infamous "Padlock Law" was struck down in an action by a landlord against a tenant for cancellation of a lease on the ground that the premises had been used for purposes prohibited by the statute in question. It is true that in such cases the constitutional obligation involved was that of a legislature, rather than of the citizen against whom the obligation was indirectly enforced. It is not a very

7. The reference is to "government", rather than to "Her Majesty". The reason for using the popular term was probably to make the reference more intelligible to lay readers. Few legal measures are likely to be read by more non-lawyers than the *Charter*, so the use of language that could be readily understood by persons without legal training was more than usually appropriate.

8. *Nissan* v. *Pelletier* (1977), 77 D.L.R. (3d) 646 (Que. S.C.).

9. The *Canadian Bill of Rights* makes no explicit reference to the Crown, but probably applies to it. *See: Steiner* v. *The Queen* (1981), 126 D.L.R. (3d) 304 (F.C.T.D.).

10. *Eg.: New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254 (U.S.S.C.), a decision which modified the "fair comment" defence in defamation cases to comply with the constitutional guarantee of free speech. The Court pointed out at 265 that: "Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action and that it is common law only, though supplemented by statute."
It must be acknowledged, however, that the American jurisprudence is far from consistent on this question. Many decisions have denied constitutional relief in private litigation. It is also true that the cases in which the Constitution has been applied to the private sector have been based on the theory that the state was somehow involved in the matter, if only in the form of common law principles which gave "governmental" sanction to the private conduct complained of. The American approach is therefore more appropriate to the "Alternative Approach" developed later in this paper. *See Infra* n. 19.

11. (1772), Lofft 1.

12. [1957] S.C.R. 285.

large step, however, from requiring citizens to bear the consequences of unconstitutional acts of government, to requiring them to abide by the constitution themselves. In any event, Section 52(1) of the *Constitution Act, 1982* has removed any possibility that constitutional obligations affect only governmental agencies in Canada. That provision, which embraces much more than the *Charter*, and is therefore not restricted by Section 32(1), states without qualification that "the Constitution of Canada is the supreme law of Canada." Since all Canadians, public or private, are subject to the law, the notion that constitutional laws are inherently inapplicable to private conduct is no longer supportable, if it ever was.

The Broad View

The argument that the *Charter* does operate in the private sphere begins with the plain meaning of the broad language with which many of the *Charter's* guarantees are expressed. Section 2, for example, states that "*everyone*"[13] has the various fundamental freedoms listed. If a court were to hold that a governmental employee has been assured by the *Charter* the right to express opinions with which the government disagrees, or the right to associate with a trade union or political party of which the employer disapproves, while someone working for a private employer does not have equivalent rights, the universality of Section 2 guarantees would be denied. Section 12 states that everyone has the right not to be subjected to "*any* cruel and unusual treatment or punishment".[14] To interpret this guarantee as prohibiting improper treatment of patients in public mental hospitals or pupils in public schools, but as not protecting the inmates of similar private institutions would violate the English language.

Corroboration for this view can be found in the principle of interpretation that remedial measures (as opposed to penal ones) should receive a "large and liberal" interpretation.[15] If ever a measure was remedial, the *Canadian Charter of Rights and Freedoms* is such. It should, therefore, be interpreted expansively, in a manner that will advance to the greatest degree possible the various rights it enshrines.

Another interpretative guide that supports the application of these broadly stated rights to the private sphere is Section 15 of the *Charter* itself. That section ordains that:

> Every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law without discrimination ....

If the *Charter*, which is part of the "supreme law of Canada,"[16] were interpreted to provide broader constitutional protections to governmental employees than to private employees, and fuller constitutional protection to inmates of public hospitals and schools than to those in private institutions, the guarantee of equal protection and benefit of the law would have a hollow ring.

13. Emphasis added.
14. Emphasis added.
15. Maxwell, *Supra* n. 5 at 93-94.
16. Section 52(1).

A final guide to the meaning of Section 32(1) — indirect but illuminating — is the horde of interpretative problems that would arise if the section were construed to restrict the operation of the *Charter* to governmental matters. Section 32(1) refers only to: "the Parliament and government of Canada," and "the legislature and government of each province." Even acknowledging that the word "government" would likely be construed liberally (such an interpretation being aided by the use of the lower case "g"), there are many public sector operations to which the term could not easily apply. It is widely assumed, for example, that the municipal level of government, which employs many of Canada's police forces, would be covered. Yet local government, while created by and subject to provincial legislation, cannot, strictly speaking, be properly described as the "government of the province." To give effect to the meaning everyone associated with the negotiations clearly intended so far as local government is concerned, some stretching of the language would clearly be needed. What about other governmental operations? Crown agencies would undoubtedly be covered, but would organizations (such as the Canada Development Corporation) in which governments have a substantial involvement, but not exclusive control? What about courts and other independent tribunals? Because they are supposed to remain insulated from government, it would be strange to regard them as part of "government" for this purpose; yet it would be startling if they had no obligation to comply with the *Charter*.[17] Most Canadian universities are heavily funded and regulated by provincial governments, but they are private organizations. How could the *Charter* be extended to cover them if only the governmental sphere were protected? What about the governing bodies of self-governing, but legislatively regulated, professions?

These questions, and dozens like them, would plague the courts if the *Charter* were applied only to the public sector. The absence of any attempt by the drafters of the *Charter* to anticipate such problems offers another reason for choosing the interpretation of Section 32(1) which would avoid them altogether.

It cannot be plausibly contended that *every* right and freedom embedded in the *Charter* is applicable to private conduct. Section 15, for example, is expressly limited in its operation to "laws". Control of discrimination in the private sector therefore remains in the hands that dealt with the problem prior to the enactment of the *Charter*: federal and provincial human rights commissions, provincial bills of rights, and so on. Legal rights under Section 11 would similarly seem to be restricted by the words "person charged with an offense" to those who have run afoul of the law and are prosecuted by governmental authorities. Many of the *Charter's* provisions are stated in much broader language, however. Such provisions are entitled to the broad construction their plain meaning suggests.

An Alternative Approach

A final point must be made. Even if all the foregoing arguments were mistaken, the *Charter* would still have an extensive impact on the private sphere.

17. In fact, some provisions of the *Charter* — such as Section 11(d), which calls for "a fair and public hearing by an independent and impartial tribunal" — would make little sense if not binding on courts and tribunals.

All *laws* are explicitly made subject to the *Charter* by Section 52(1) of the *Constitution Act, 1982*, and laws are unquestionably governmental in nature. While some may contend that this applies only to written laws — statutes and regulations — and not to common law and other forms of judicially created law, there is little reason to believe that so narrow an interpretation will prevail. Section 52(1) speaks, in the English version, of "*any* law", rather than of statutes and regulations, and the French removes any possible doubt by using the broad phrase "toute...règle de droit", rather than the narrower term "loi".[18] If the term "government" is to receive the generous interpretation to which the provisions of a remedial law are entitled, it must include the courts, and the laws they make and interpret.[19]

Since so much of private action is regulated by laws, written or unwritten, the private sector would therefore be heavily influenced by the *Charter* even if Section 32(1) were construed as limited in its operation to governmental matters.

In fact, if one ponders the full significance of this observation, one may be driven logically to the same conclusion dictated by the earlier arguments: that the *Charter* applies, where appropriate, to *all* aspects of private legal relationships. The *Charter* explicitly recognizes the principle of the rule of law.[20] One ramification of that principle is that every aspect of life falls within the law's embrace, in the sense that every act a person may commit is either prohibited or permitted by law. It has long been one of our most fundamental bulwarks of freedom that the law permits whatever it does not clearly proscribe. Viewed against this notion of the law's plentitude, it is possible to regard all private conduct as subject to law, and therefore to the *Charter*.

Suppose, for example, that an employer fires an employee for belonging to a particular political party, and defends a wrongful dismissal action by the employee on the ground that the Law permits, as part of "management rights", dismissal on any ground not expressly prohibited. It would be open to the employee to attack that particular permissive aspect of the *law* as offending the *Charter's* guarantees of freedom of belief and freedom of association. By similar reasoning all private transactions upon which a court could be asked to rule would fall under the protection of the *Charter*, even if its application were restricted to governmental matters, because the *laws* which courts create and apply must comply with the *Charter*.[21]

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18. Emphasis added to the English text. For a discussion of the problem of reconciling discrepancies between the French and English versions, *see* Gibson, *supra* n. 4.

19. In his evidence before the Joint Parliamentary Committee, Deputy Minister of Justice Roger Tassé expressed the view that Section 52(1) should include common law: *Supra* n. 2. The American cases referred to in *Supra* n. 10 which have applied constitutional constraints to private action have done so by treating common law principles as manifestations of "state action". *See generally*: L.H. Tribe, *American Constitutional Law*, (1978) 1147, ff.

20. Preamble.

21. Other rationales for applying the *Charter* to particular features of private law are also possible. A contract to violate the *Charter* could, for example, be held to be invalid on the ground that, like a gambling contract, or an agreement in restraint of trade, it is contrary to public policy. The seldom used, but still viable, power of the courts to create new torts could lead to tortious liability for denying or interfering with *Charter* rights.

The importance of the question discussed in this note would be difficult to exaggerate. Professor F.R. Scott has observed that a very large part of our lives is regulated by "private government":

> (P)rivate authorities — ... principally the large private corporations — ... govern us in the way that best suits themselves — ... What I may call the constitutional law of the private corporation is in many respects today quite as important to Canadians as what we call constitutional law proper .... J.K. Galbraith ... points out that we now live under an increasingly planned economy, in which the large corporation has become a planning unit ... I have called the large corporations private governments because I think it is essential we include powers, their jurisdiction, and their policies in our thinking about the constitution and government of Canada in general.[22]

If the *Canadian Charter of Rights and Freedoms* were construed so narrowly as not to apply to matters within the sphere of "private government", it would tear a gaping hole in Canada's new umbrella of rights.

22. F.R. Scott, "Canadian Federalism: The Legal Perspective", (1966-67) 5 Alta. L.R. 262 at 265.