# DISTINGUISHING THE GOVERNORS FROM THE GOVERNED: THE MEANING OF "GOVERNMENT" UNDER SECTION 32(1) OF THE CHARTER

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I believe that the *Canadian Charter of Rights and Freedoms*[1] is equally applicable to the public and private sectors of Canadian life. The obligation to respect the rights and freedoms guaranteed by the *Charter* applies as much to those who are engaged in private activities, as employers, entrepreneurs or parents, as it does to those who exercise governmental responsibilities. This view, which I developed in an earlier paper,[2] is not universally shared, however. While it is supported by Mr. Manning's recent book,[3] it was rejected in earlier commentaries by Professors Hogg[4] and Swinton.[5]

The Hogg-Swinton thesis is that the *Charter* imposes obligations on only those who are engaged in governmental activities. This view is based primarily on section 32(1) of the *Charter,* which reads as follows:

> (1) This Charter applies
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> (a) to the Parliament and government of Canada in respect to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
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> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

This section bears the marginal notation "Application of Charter". Since it refers only to governmental activities, Professors Hogg and Swinton conclude that the *Charter* has no application outside that realm.[6]

The view that the *Charter* is enforceable in the private sector is primarily rooted in section 52(1) of the *Constitution Act 1982*[7], which states that "the Constitution of Canada is the supreme law of Canada ...", coupled with the explicit reference in the Preamble of the *Charter* to the fact

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1. Part I, Constitution Act, 1982, being Schedule B to Canada Act 1982, c. 11 (U.K.).
2. Dale Gibson, "The Charter of Rights and the Private Sector" (1982), 12 Man. L.J. 213. There are, as yet, no firm judicial decisions on the question. A private security officer was held to be subject to the *Charter* when effecting an arrest in *R.* v. *Easterbrook,* Ont. Co. Ct., unreported decision, July 18, 1983, but that decision was based on the fact that the officer was exercising statutory powers of arrest, and the judge expressed the view that the *Charter* does not generally apply to private actions. In *The Queen, et al.* v. *Operation Dismantle Inc., et al.* Fed. C.A., unreported decision, Nov. 28, 1983 both Pratte, J., and Hugesson, J., commented, *obiter dictum* that the *Charter* does not cover private conduct.
3. Morris Manning, *Rights, Freedoms and the Courts,* (1983), at 115, *et seq.* M.R. Doody, "Freedom of the Press, the Canadian Charter of Rights and Freedoms, and a New Category of Qualified Privilege" (1983), 61 Can. Bar Rev. 124, at 136, expresses a similar view, but only with respect to the common law of defamation, concerning which there can be little doubt.
4. Peter Hogg, *The Canada Act Annotated,* (1982), at 75-78.
5. Katherine Swinton, "Application of the Canadian Charter of Rights and Freedoms", in W. Tarnopolsky and G. Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms — Commentary,* (1982) 41, at 44, *et seq.* Professor Swinton acknowledges that the language of the *Charter* is loose enough to permit a broader interpretation that would include the private sector, but she contends that such an interpretation would be undesirable.
6. There are other arguments that lead in the same direction. For example, an earlier draft of section 32, which had clearly been broad enough to cover private actions, was amended before presentation to Parliament, and some federal spokespersons claimed that this was the result of a desire to restrict the Charter to governmental conduct. See Gibson, *supra,* n. 2, at 213, and, at 214-216.
7. *Supra,* n. 1.

that "Canada is founded upon principles that recognize ... the rule of law". Since universality of the responsibility to obey the law is the essence of the rule of law, and since section 32(1) does not state that it applies *only* to governmental activities, there is good reason to conclude, as the person on the street undoubtedly believes, that the *Canadian Charter of Rights and Freedoms* is applicable to all aspects of Canadian life.[8]

The present paper is based on the hypothesis that my view is mistaken, and that Professors Hogg and Swinton are correct in their belief that the *Charter* applies only to the governmental sector. If that view prevails, it will be extremely important to determine the meaning of the term "government" as it is used in section 32(1) of the *Charter*. There do not appear to have been any major judicial decisions on the question as yet,[9] and although both Professor Hogg and Professor Swinton have published valuable opinions on the subject[10] (the latter's commentary being especially thoughtful and thorough) some of their conclusions are open to debate.

## The United States Analogy: "State Action"

The temptation is strong to turn to American experience for assistance in determining what should be regarded as "governmental" under section 32(1). The text of *The Constitution of the United States* is much clearer than the language of the Canadian *Charter* in restricting the operation of most constitutional guarantees to the public sector. American courts have become unavoidably involved, therefore, in efforts to distinguish between governmental and non-governmental activities for constitutional purposes. If Canadian courts ultimately decide that the *Charter* does not apply to the private sector, they can expect counsel to turn for inspiration to the American principale of "state action" when fashioning arguments about the proper scope of the Canadian *Charter*.[11] It is my submission that although American authorities can often shed valuable light on Canadian constitutional problems, especially under the *Charter*, their primary usefulness on this question is negative — admonitory — in nature.

Much has been written, both judicially and extra-judicially, about the

8. See Gibson, *supra*, n. 2, at 216-217, for further arguments in support of the broader view. It is interesting to note that although the ambiguity of the language of section 32 was brought to the attention of the Joint Parliamentary Committee at public hearings by Professor Maxwell Cohen, neither the committee nor the government took steps to clarify the meaning, even though it would have required no more than insertion of the word "only": R. Sheppard and M. Valpy, *The National Deal: The Fight for a Canadian Constitution*, (1982), at 146.

9. The question of whether an Appeal Board established under Manitoba's *Social Allowances Act* constituted a "government" agency came before the Manitoba Court of Appeal in *Elliott* v. *Director of Social Services*, [1982] 1 C.R.D. 925-01. In dismissing a challenge to the Appeal Board's action, the Court of Appeal seems to have assumed that the *Charter* was applicable, but no reasons were offered; unreported, 1 December, 1982, suit No. 226/82. The *Easterbrook* case, *supra*, n. 2, held that the *Charter* does apply to a private security officer exercising statutory powers of arrest. The Ontario High Court held in *Re McCutcheon and Toronto* (1983), 147 D.L.R. (3d) 193 that municipal by-laws are covered by the *Charter*.

10. *Supra*, n. 4 and 5.

11. The Swinton article, *supra*, no 5, makes considerable use of American material.

problem of defining "state action" under the U.S. *Constitution*.[12] While it would be unwise for a Canadian to attempt a summary of the major decisions over the years, one fact is overpoweringly obvious to even an outside observer: a century of litigation on the subject has not produced a consistent and workable theory of state action. A leading American constitutionalist has referred to the problem of distinguishing private action from state action as "a conceptual disaster area",[13] and the United States Supreme Court has itself referred to it as "an impossible task".[14] That the Court has not found any new inspiration since that comment was made is demonstrated by the fact that it divided five to four in a very recent state action case.[15] A senior professor of constitutional law has confessed in print that he is unable to understand the full meaning of the majority decision in that case.[16]

Professor Laurence Tribe contends that the Court's inability to agree on a general formula for distinguishing between private and governmental actions is an ineluctable consequence of the pluralistic way in which civil rights are regarded in the United States.[17] Generally accepted views as to the extent to which the state should properly intrude into the activities of the citizenry vary, not only from on era to another, but also from one area of constitutional rights to another within a given time period. In the absence of "a general theory of liberty allocating public and private responsibility", Tribe asserts, "a coherent and autonomous body of state action doctrine cannot exist."[18] Canadian experience is even less likely to disclose a generally accepted "theory of liberty".

Although he rejects the view that the American state action cases are animated by any general notion of the respective roles of private and governmental regimes, Professor Tribe nevertheless believes that many of the decisions can be rationally explained. He advances a "pluralistic" approach to the problem, which he claims to be "generally consistent"[19] with the outcome (though not with the reasoning) of most United States Supreme Court rulings on the subject. Since it is an important recent analysis by a distinguished American constitutionalist, Professor Tribe's approach deserves the attention of Canadian courts engaged in the search for the elusive boundary between public and private. It is unlikely, however, that they will find it very helpful.

12. See, for example, R. Hemphill, "State Action and Civil Rights" (1972), 23 Mercer L. Rev. 519; R.T.B., "State Action" (1974), 60 Va. L. Rev. 840; D.S. Elkind, "State Action" (1974), 74 Col. L. Rev. 656; R.J. Glennon and J.E. Nowak, "A Functional Analysis of the Fourteenth Amendement 'State Action' Requirement" (1976), Sup. Ct. Rev. 221; Note, "Private Conspiracies to Violate Civil Rights" (1977), 90 Harv. L. Rev. 1721; L.H. Tribe, *American Constitutional Law*, (1978), at 1147.

13. Charles Black, "The Supreme Court, 1966 Term — Foreword: State Action, Equal Protection, and California's Proposition 14" (1967), 81 Harv. L. Rev. 69, at 95. Tribe, *supra*, n. 12, quotes the comment with apparent agreement.

14. *Reitman* v. *Mulkey*, 387 U.S. 369, at 378 (1967).

15. *Lugar* v. *Edmondson Oil Co.*, 102 S. Ct. 2744 (1982). The Court also divided, though not as closely, on two other major state action cases in 1982: *Rendell-Baker* v. *Kohn*, 102 S. Ct. 2764 (1982); and *Blum* v. *Yaretsky*, 102 S. Ct. 2777 (1982).

16. Abram Chayes, "The Supreme Court — 1981 Term — Foreword: Public Law Litigation and the Burger Court" (1982), 96 Harv. L.R. 4, at 241, *et seq.*

17. Tribe, *supra*, n. 12, at 1149, *et seq.*

18. *Ibid.*, at 1157.

19. *Ibid.*, at 1161. He admits, however, that his theory is not "uniformly" consistent with the cases listed at *supra*, n. 15.

The Tribe thesis is based on a recognition of the fact that the rights protected by the *Constitution* are pluralistic in nature, expressing "a series of distinct if related values which the Supreme Court has found to be implicit in the constitutional plan".[20] When dealing with state action problems, he says, the Court should therefore be concerned less with general notions of the proper role of government than with the particular constitutional values underlying the particular right being relied upon. Two questions should be asked:

> 1. In what way are governmental actors involved in the precise action, inaction, or law[21] that is being challenged?[22]
> 2. Would it advance the value served by the particular constitutional right being asserted to apply it to the kind of governmental involvement identified?[23]

A few examples may help to clarify the approach.

When discussing the "state function" cases, in which certain activities have been found to constitute state action because, although conducted privately, they resemble or replace services customarily provided by government, Tribe deals with an inconsistent line of cases concerning the prohibition of picketing and similar forms of expression in privately owned shopping centres. He suggests that they would have been more satisfactorily determined if the Court had concerned itself with whether it would advance the constitutional goals of the expression and assembly rights in question to apply those rights to the government's enforcement or tolerance of the private prohibitions:

> The relevant inquiry would not have been whether the property was public or private, but whether exercise of free speech in the shopping center context was required to secure first amendment values.[24]

When dealing with the extent to which the application of common law principles in private litigation constitutes state action, Professor Tribe juxtaposes the cases of *New York Times* v. *Sullivan*[25] and *Shelley* v. *Kraemer*.[26] In the first case it was held that the constitutional guarantee of freedom of the press precluded liability under the common law tort of defamation for a newspaper's good faith publication of erroneous facts in a story about a matter of public interest. In the second case, a common

20. *Ibid.*, at 1157.

21. The *Lugar* decision, *supra*, n. 15, now seems to indicate that at least where the actor is not a government official or agent, there must be *both* activity and law involved to qualify as state action. See Chayes, *supra*, n. 16.

22. The Supreme Court has sometimes been willing to recognize quite subtle forms of governmental involvement. For example, in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), a private restaurateur who leased restaurant space in a government parking structure, and refused service to blacks, was held to have offended constitutional guarantees of equality. Since his decision to discriminate against blacks was made without any governmental involvement or sanction, one might wonder how it could be regarded as the decision of a governmental actor. The justification for so treating it was the fact that by benefitting from the parking business of customers attracted by the restaurant, and by failing to distinguish the two enterprises in the public eye, the parking authority had become so closely associated with the restaurant as to be properly regarded as a member of a joint venture. The case illustrates that even the allegedly straight-forward question of whether the actor is a governmental agent or not is far from simple. As Tribe says (*supra*, n. 12, at 1158):

> "... cases turning on the characterization of an actor as private or governmental properly depend upon external symbols no less than upon the government's internal criteria for identifying agents as its own".

23. These are not Tribe's words; they are my attempt to summarize his approach.

24. Tribe, *supra*, n. 12, at 1167.

25. 376 U.S. 254 (1964).

26. 334 U.S. 1 (1948).

law principle, permitting racially restrictive covenants in real property conveyances, was struck down on the grounds that it offended the constitutional guarantees of equality. Whereas the first case has been generally approved by commentators, the second has been heavily criticized. Tribe admits that the cases are distinguishable on the surface. While the newspaper case involved a clear-cut instance of a law which intruded directly on a constitutionally guaranteed right, the restrictive covenant case had to do with a law which, on its face, was neutral, since it applied to all forms of restrictive covenant, whether racially based or not. Professor Tribe acknowledges that the latter case is "problematic" for these reasons, but he contends that it was correctly decided. He suggests two different rationales for the decision that would be consistent with his approach to state action: (1) that neutrality is not sufficient to satisfy the equality guarantee in situations like this, and (2) that, taking account of the social realities that lie below the surface, the law in question did not really operate in a neutral fashion. Thus, in his view, the solution to the state action problem ultimately depends on one's view of the content of the substantive constitutional right asserted:

> The approach to state action advocated in this chapter provides no sudden solution to that ... problem ...; its mission is simply to reveal how the search for state action, properly conducted, ends by identifying the precise substantive constitutional issue to be addressed.[27]

It will be noted that Tribe's concern is not with answers, but with the proper formulation of questions. Having assisted the courts to ask the right questions he leaves them to their own resources to find appropriate answers. Because of the pluralistic nature of the values involved, the results have been, and no doubt will continue to be, inconsistent and confusing. Although Tribe has contributed to our understanding of the state action decisions, he offers little guidance as to appropriate solutions to precise problems.

His approach is summed up as follows in the concluding paragraph of his chapter on state action:

> Thus, if constitutional law is understood as a snapshot of the deepest norms by which we govern our political lives, the state action problem is its negative. It is a problem, or rather a series of problems, whose solutions must currently be sought in perceptions of what we do not want particular constitutional provisions to control.[28]

In other words, the American state action decisions are based, in Tribe's view, not on any distinctive constitutional principle, but rather on a series of ad hoc decisions reflecting the view of the courts of the extent to which particular constitutional guarantees should be extended into the private sector in particular fact situations at particular moments in time.

What can Canadians learn from this? Two things. First, that there is no workable general principle of state action that can be borrowed from

27. Tribe, *supra*, n. 12, at 1170.
28. Ibid., at 1174.

American experience. If the Canadian courts are required to make a distinction between private and governmental matters for *Charter* purposes, they must either develop a distinctively Canadian general principle, or — much more likely in light of a century of American failure — be forced into the same kind of chaotic ad-hoc decision-making that marks the American scene. In discussing the "anarchy" currently prevailing in this area of American constitutional law, Professor Tribe observes that: "Chaos, however, may itself be a form of order."[29] While that may be true, constitutions, and law in general, exist for the purpose of ending that primordial form of "order".

The second lesson to be learned from studying American experience is that there is a considerable body of American case law and academic experience which may be put to use by Canadians, whether in attempting to forge a general principle, or in arriving at more particularized determinations. What must be borne in mind, however, is that this body of material is so extensive and so contradictory that, like Bartlett's *Familiar Quotations,* its real function will be to provide make-weight arguments for all sides, rather than to influence the direction of Canadian jurisprudence.

A Canadian solution to the problem of defining governmental involvement will require separate treatment of several different elements of the question. With regard to some of these elements, the solution is obvious; in other respects it appears to be very difficult. Several of these elements will now be discussed.

### Levels of Government Covered: Federal, Provincial, and Municipal?

The wording of section 32(1) of the *Charter* leaves no doubt about its application to both the federal and provincial orders of government; each is explicity mentioned. There is no explicit reference, however, to the municipal or local level of government. Was it intended to be excluded? If so, the consequences could be very serious, since most police forces are employed by local governments, many vital services are delivered by such governments, and laws enacted at the local level have significant impact on the lives of all Canadians.

Most constitutionalists, even those who believe that section 32(1) contains an exhaustive statement of the *Charter*'s application, seem to agree that local government is subject to the *Charter*.[30] To the extent that this conclusion is derived from section 32(1), it must be founded upon a broad interpretation of the words "government of the province". The justification for giving the expression so generous an interpretation can be

29. Ibid., at 1149.

30. See, for example, Hogg, *supra*, n. 4, at 75, and Swinton, *supra*, n. 5, at 59. The Ontario High Court has held that s. 32 does apply to local government: see *Re McCutcheon and Toronto, supra*, n. 19.

found in two familiar and important maxims of interpretation: (a) the presumption that remedial measures should be construed liberally, and (b) the presumption that ambiguities should be resolved in favor of the liberties of the subject.[31] The fact that the *Charter* is a constitutional document adds further weight to the argument, since most modern constitutional authorities are of the opinion that constitutions call for a "large and liberal interpretation", rather than the "narrow and technical construction" that might be appropriate for a statute intended to have a more restricted scope and a shorter life.[32] The use of the lower case "g" in the terms "government of Canada", and "government of each province" may add further support to the argument, although one would hope that so important a constitutional question would not hinge upon typography.

## Branches of Government Covered: Legislative, Executive, and Judicial?

If the term "government" is interpreted broadly enough to include local governments, it is likely that it will also be construed to apply to all three sectors of government: legislative, executive, and judicial. The interpretative arguments supporting such a broad construction are identical to those which call for the inclusion of local government.

The legislative arm is dealt with explicitly. The executive arm must also have been intended to be subject to the *Charter*, since the term "government" was used in contradistinction to the terms "Parliament" and "legislature". Moreover, a number of the rights guaranteed by the *Charter* — especially the legal rights — are so phrased as to be obviously applicable to police officers and other administrative officials. The Federal Court of Appeal has held that even royal prerogative powers in the areas of international relations and national security are subject to *Charter* surveillance.[33] Professor Hogg has tentatively suggested that the Charter should be binding on only those administrative officers and agencies that can be described as acting under the authority of the Crown, in the strict sense, but Professor Swinton seems to take a broader view, and it is submitted that the latter approach is more consonant with the generous interpretation of protections that a constitutional document deserves.[34]

With respect to the judicial arm of government, even Professor Hogg agrees that the *Charter* is applicable. He points out that several of the *Charter*'s specific guarantees (for example: section 11 — rights of person charged with an offence; section 12 — protection against cruel and unusual treatment or punishment; section 13 — protection against self-incrimination; section 14 — right to an interpreter in court proceedings; and section

31. See Dale Gibson, "Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations", in Tarnopolsky and Beaudoin (eds.), *supra*, n. 5, at 25.

32. See, for example, the famous "living tree" dictum of Lord Sankey in *Edwards* v. *A.-G. Canada*, [1930] A.C. 124, at 136 (P.C.).

33. *The Queen, et al.* v. *Operation Dismantle Inc., et al.*, *supra*, n. 2.

34. Hogg, *supra*,n. 4, at 76; Swinton, *supra*, n. 5, at 52.

19 — language rights in court proceedings) were clearly intended to operate in the courtroom. Therefore, he contends, the term "government" must be intended to embrace the judicial branch.[35]

### Laws

If the *Charter* applies to all levels and all branches of government in Canada, it follows that it must apply to the laws which are created by those governmental authorities. If further support were required for that proposition it could be found in section 52(1) of the *Constitution Act, 1982,* which reads as follows:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

and section 15(1) of the *Charter* (in force after April 15, 1985), which reads:

> 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 and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is not yet entirely clear how the term "law" in sections 52(1) and 15(1) will be interpreted by the courts, but there are early indications that the word will be interpreted broadly where it occurs in section 1 (the "reasonable limits" section) of the *Charter,*[36] and there does not appear to be any reason why it should be given a narrower construction in the other contexts. The arguments which favour a broad interpretation of the word "government" are equally applicable here, so it is likely that a wide range of governmental ordinances will be included.

The Supreme Court of Canada has recently adopted an expansive interpretation of the term "Acts", as used in connection with the language guarantees contained in section 133 of the *Constitution Act, 1867.*[37] In that case, *Attorney-General of Quebec* v. *Blaikie, et al.*[38] it was held that "Acts" includes "enactments of a legislative nature issued by the Government ... including enactments issued by a group of Ministers being members of the Government ... or by a Minister",[39] as well as rules of court, and "regulations of the civil administration and of semi-public agencies ... which, to come into force, are subject to the approval of ... Government, A Minister or a group of Ministers".[40] The decision excluded "rules or directives of internal management",[41] bylaws and other enact-

35. Hogg, *supra*, n. 4, at 76.
36. See, for example, *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 147 D.L.R. (3d) 58 (Ont. Div. Ct.).
37. Formerly *British North America Act, 1867.*
38. (1981), 123 D.L.R. (3d) 15 (S.C.C.).
39. *Ibid.*, at 21.
40. *Ibid.*, at 32.
41. *Ibid.*, at 21.

ments of local government authorities,[42] and regulations of bodies subordinate to a Government if the regulations do not require approval of the Government, a Minister, or a group of Ministers.[43] Having given so wide an interpretation to a relatively narrow term like "Acts", for the purposes of bilingualism guarantees, the Court can be expected to place an even more generous construction on the broader term "government" for the purpose of determining the scope of the entire *Charter of Rights and Freedoms*.

So far as statutes and regulations of a legislative nature passed or approved by the Governor General in Council or the Lieutenant Governor in Council are concerned, there can be no doubt that they would be subject to the *Charter*.[44] It is likely that some laws excluded from the language guarantees by the *Blaikie* decision would also be covered. Municipal bylaws and other general ordinances of local government authorities would probably be included, for example. The reason that the Supreme Court of Canada gave in the *Blaikie* case for excluding them from the protection of the language guarantees was the fact that there was strong historical evidence indicating that language guarantees at the local government level were not regarded as essential in 1867, and were deliberately excluded from the *British North America Act*.[45] It would be highly unlikely that Canadians could be demonstrated to have believed, in 1982, that laws made at the local level were less deserving of the general constitutional protections provided by the Charter than laws made by provincial or federal governments. Moreover, the expression being interpreted by the Supreme Court in the *Blaikie* case was: "the Acts of the Parliament of Canada and of the Legislature of Quebec ...", while both the term "government" under section 32(1) of the *Charter* and the term "laws" under section 52(1) of the *Charter* are much broader expressions. If, as has been asserted above, the local level of government is covered by the *Charter* at all, bylaws, regulations and other general legislative ordinances enacted at that level must surely be included.

"Rules or directives of internal management", which the *Blaikie* decision held to be immune from constitutional language requirements, might also elude direct *Charter* scrutiny, since it could be regarded as a characteristic of a "law" that it be applicable to the public at large in a general fashion, rather than to merely internal matters. However, whenever an administrative rule or directive resulted in administrative *acts or omissions* which denied constitutionally guaranteed rights or freedoms, those acts or omissions would be challengeable.

The third group of laws which the Supreme Court of Canada held in the *Blaikie* case to be immune from language guarantees were regulations

42. *Ibid.*, at 26.
43. *Ibid.*, at 29.
44. Both Hogg (*supra*, n. 4) and Swinton (*supra*, n. 5) agree.
45. *Supra*, n. 38, at 23, *et seq*.

of subordinate governmental agencies which do not require governmental or ministerial approval. Whether these laws are caught by the *Charter* will depend on how far down the administrative ladder the courts are prepared to go in the application of *Charter* responsibilities. This question will be examined more fully at a later point.

A question with respect to which no assistance can be derived from the *Blaikie* case is whether the *Charter* applies to common law principles and other forms of judge-made law. Consider, for example, the ruling of the Supreme Court of Canada in *Harrison* v. *Carswell*.[46] The majority of the Court held in that case that the occupier of a shopping centre has the legal right to prohibit peaceful picketing on the premises. Chief Justice Laskin and two other judges dissented, holding that the law of trespass ought not to prohibit this kind of activity on quasi-public property in modern times. The Laskin dissent has attracted favorable comment in many quarters. Would it now be open to the Supreme Court of Canada to reconsider the question in the light of the *Charter,* which protects, as part of the "supreme law of Canada", freedom of expression, freedom of peaceful assembly, and freedom of association, but pointedly excludes constitutional guarantees with respect to property? In my view, it would. The Court might choose not to deviate from the decision of *Harrison,* of course, since it might regard the traditional rules of trespass law as constituting "reasonable limits ... in a free and democratic society" in accordance with section 1 of the *Charter.* The point is that it would be open to the Court to review its earlier decision, since judge-made law is, in my opinion, both a "law" within the meaning of section 52(1) and a product of governmental activity within the meaning of section 32(1). American authority is unequivocal to the effect that common law principles are subject to the Constitution[47] and the consensus of Canadian writers is to the same effect.[48]

I have argued elsewhere, in fact, that if one adopts as generous an interpretation of the term "law" as Canadian legal tradition permits, most significant matters in life can be regarded as affected by law, and thus subject to *Charter* constraints. It is axiomatic under our legal system that whatever is not prohibited is permitted. Since there is no law against scratching one's nose in public, it can be concluded that the law permits one to do so. If the term "law" in section 52(1) of the *Charter* were interpreted to include these permissive aspects of law as well as those which are prohibitory, the *Charter* would have a very wide range of operation.[49] Suppose, for example, that in a province where "mental disability" is not one of the prohibited grounds of discrimination under the prov-

46. (1975), 62 D.L.R. (3d) 68 (S.C.C.).

47. Frankfurter J. commented, for a unanimous Court: "It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books...": *Nashville, Chattanooga and St. Louis Railway* v. *Browning*, 310 U.S. 362, at 369 (1940). See also Tribe, *supra*, n. 12, at 1168.

48. See Manning, *supra*, n. 3, at 50-51; Doody, *supra*, n. 3, at 136; and Gibson, *supra*, n. 2, at 218.

49. See Gibson, *ibid*. Joseph Raz rejects the notion of legal plenitude in *The Authority of Law*, (1979), at 53, *et seq.*, but he deals with the idea in quite a different context.

incial human rights legislation, a landlord refuses to rent an apartment to someone because he or she is retarded. Would it not be possible, after section 15 of the *Charter* is in effect, to argue that the law which permits a landlord to discriminate in this manner offends the constitutional guarantees of equality before and under the law, and equal protection and benefit of the law? There does not appear to be any logical reason why such an argument could not succeed, given a liberal interpretation of the remedial powers conferred by section 24(1) of the *Charter*.[50]

If it failed for the policy reason that, in the court's opinion, the *Charter* should not intrude so far into the private sector, the result would be to give one particular democratic right, (freedom from responsibility to others), priority over a large number of equally important rights. One of the best features of the *Charter* is that it provides a mechanism for weighing the respective claims of the often conflicting rights and freedoms our society values. A common standard — that which is "reasonable" and "demonstrably justified in a free and democratic society" — is established for the evaluation of all claims based upon rights protected by the *Charter*. The right to be free from unreasonable intrusion into one's affairs by the courts or other arms of government is important, and is embedded in the "liberty" guarantee contained in section 7 of the *Charter*. If, as I have urged, the protections of the *Charter* are extended to even behavior that is implicitly permitted by law, those who think it desirable to continue the behavior in question, even though it may derogate from rights protected by the *Charter*, would be able to argue that the *Charter* itself grants them the "liberty" to do so. The court would then be called upon to weigh the relative values, in that context, of that liberty of the defendant against the right to equality or other *Charter* guarantee asserted by the plaintiff. If, on the other hand, it were decided that the *Charter* does not apply at all to the area of law in question, the effect would be to give this "liberty" undue priority over other *Charter* values. That, it is submitted, would be unfortunate.

### Governmental Officers, Servants, and Agents

It seems beyond dispute that the acts and omissions of ministers, civil servants, Crown agencies, and others having the authority to act on behalf of the federal, provincial, or local orders of government, are bound by the *Charter* in most circumstances. Two questions call for special consideration, however.

The first is whether wrongful acts carried out by governmental officers, servants, or agents, outside the scope of their authority, would be subject to *Charter* obligations. The American Supreme Court has held that unauthorized actions by governmental officials are subject to the *Bill of*

50. See Dale Gibson, "Enforcement of the Canadian Charter of Rights and Freedoms", in Tarnopolsky and Beaudoin, (eds.), *supra*, n. 5, at 489.

*Rights*.[51] Canadian courts would be wise to adopt the same view. Where a government officer or employee purports to act in his or her official capacity, the arguments in favour of subjecting those actions to constitutional obligations are powerful. If the actions turned out to be unauthorized, it is possible that the government would escape liability.[52] To deny the victim the same legal rights against the individual wrongdoer that would have been available against the government if the act had been authorized would be manifestly unfair. If a similar situation arose in a private commercial context, the courts would seize upon the principles of estoppel and warranty of authority to impose liability on the unauthorized agent. It is to be hoped that they will be equally ready to do so where the unauthorized act involves a violation of the *Canadian Charter of Rights and Freedoms*. The problem would be more difficult if the action in question were beyond the jurisdiction of the government itself. Section 32(1) applies "in respect of all matters within the authority of" the government in question. While there is nothing to prevent the courts developing constitutional notions of estoppel or warranty of authority to cover such situations, they would be constitutional novelties.

The second question concerning governmental officers that calls for special consideration here relates to Crown enterprises which, although legally designated as Crown agents, perform activities that are substantially similar to private enterprises. An example would be Air Canada, which competes in the air transport business against private carriers of both Canadian and non-Canadian domicile. Professor Swinton contends that such organizations should not be subject to the *Charter* because it would be unfair to impose on them important obligations which are not shared by their commercial competitors:

> A company such as Air Canada is similar in operation to private carriers like Canadian Pacific. It is regulated by the same government entity, the Canadian Transport Commission, and competes for routes and passengers. Its shareholders may be the people of Canada, but otherwise it is similar to any commercial airline. Why should the Charter be applied to its fare or hiring policies?[53]

She makes the same point with respect to the Canadian Broadcasting Corporation, and suggests that a distinction should be drawn between Crown agencies like Air Canada and C.B.C., which conduct ordinary commercial or quasi-commercial operations, and bodies like the Canadian Transport Commission or the Canadian Radio and Television Commission, which are basically regulatory rather than operational in function. In Professor Swinton's view, it will be necessary for the courts to look behind the mere fact of Crown ownership, and attempt to decide whether the activity being carried out is a "governmental function", which she would subject to the *Charter*, or a commercial activity, which she would exempt from the

51. *Munroe* v. *Pape*, 365 U.S. 167 (1961). For a discussion as to whether this principle has been altered by the recent *Lugar* decision (*supra*, n. 15), see Chayes, *supra*, n. 16, at 244, *et seq*.

52. Vicarious liability could be imposed in some circumstances, of course, on the basis of apparent authority, or the principle in *Lloyd* v. *Grace Smith*, [1912] A.C. 716 (H.L.).

53. Swinton, *supra*, n. 5, at 57-8.

*Charter*'s reach. She points out that a similar distinction is developing with respect to the principle of sovereign immunity. Immunity is granted to traditional governmental operations, but not to the commercial activities in which many modern governments engage.[54]

If one must distinguish between the private and public sectors for *Charter* purposes, the commercial/non-commercial distinction may appear useful at first glance. It would certainly be more satisfactory than an attempt to distinguish between "regulatory" and "operational or service" functions. The latter dichotomy would create grave difficulties with respect to programmes of education, social assistance, public housing, and other services that have long been regarded as within the legitimate purview of government.

Defining what is "commercial" for this purpose would not be easy, however. The fact that a fee is charged for a service should not place it within the "commercial" sector, since a significant percentage of government operations and programmes, from museums to building inspectorates to toll bridges and canals, recover at least a portion of the cost of the service through user fees. Profit-making might not be a very helpful criterion either; in Manitoba the Office of the Public Trustee and the Land Titles Office, both traditional governmental activities, turn over substantial profits to the general revenue of the Province every year. The presence or absence of competition might be a more helpful guideline, but even that has its drawbacks. Provincial Liquor Commissions operate monopolies with respect to the sale of alcoholic beverages for consumption off the premises,[55] yet they resemble commercial retailers of other commodities so closely that it is difficult to understand why the *Charter* should apply to them and not to other retailers. There are, moreover, numerous activities in which government-run operations offer services parallel to those offered by the private sector, which would be difficult to label as "commercial". Hospitals, nursing homes, ambulance services, and now even postal services, are available from both public and private operators. Does the fact that the private sector is involved in similar activities to some extent deprive these operations of their "governmental" quality? If so, not much would be left for *Charter* scrutiny. Even police activities have analogues in the private sector.

It appears, therefore, that in order to draw satisfactory lines between "commercial" and "governmental" activities, the courts would need to develop a more sophisticated standard than any of these automatic criteria. To be effective, such a standard would have to differentiate *qualitatively* between that which is legitimately governmental and that which is not.

But what would be the basis for such a standard? For the purposes of determining the scope of sovereign immunity, a satisfactory basis for dis-

54. *Ibid.*, at 59. See also, *The Philippine Admiral*, [1976] 1 All E.R. 78 (P.C.); *I Congreso de Partido*, [1981] 2 All E.R. 1064 (H.L.); H.M. Kindred, "Foreign Governments Before the Courts" (1980), 58 Can. Bar Rev. 602.

55. The fact that beer is also sold by private vendors does not alter the substantially monopolistic nature of the operation.

tinction may be found in history — by limiting that which is "governmental" to functions traditionally performed by government. But the rationale for granting sovereign immunity is rather narrow: to facilitate diplomatic intercourse. The obligation of Canadian governments to respect certain constitutional rights of their own citizens has an entirely different rationale. The fact that tradition may provide an adequate standard for determining the situations in which legal immunity should be granted to a foreign government is not even faintly relevant to determining which functions of Canadian governments should be subject to constitutional constraints. If tradition were the guide to the latter question, the result would be paradoxical: constitutional protections would be denied with respect to all new incursions by government into the private sector, even though such new governmental initiatives often create the most intense need for protections.

All this would seem to indicate that Professor Tribe was right in pointing out the futility of drawing lines, for the purposes of constitutional guarantees, between that which is "governmental" and that which is not. It would make much more sense to ask, as Tribe urges the American courts to ask, whether the particular activity is one to which the particular constitutional guarantee alleged to have been violated ought to be relevant. If Canadian courts took this approach they would first attempt to determine the purpose of the *Charter* protection in question, and then ask whether it would significantly advance that purpose to apply the protection to the particular activity.

Some illustrations might assist. Consider two significant governmental operations: a provincial Liquor Control Commission and the Canadian Broadcasting Corporation. Let us consider a few hypothetical *Charter* challenges that might be faced by each organization. First, suppose that both the C.B.C. and the Liquor Control Commission have denied a small radical political party the right to express its views (the C.B.C. by not allowing them to take part in a programme in which representatives of major political parties express their views on some subject, and the Liquor Commission by refusing to allow the party to post a notice of a rally on a "community affairs" bulletin board maintained in one of the Commission's retail stores). A court, trying to determine whether the *Charter*'s guarantee of freedom of expression should be applied in these circumstances, might ask itself whether the purpose for which freedom of speech was constitutionally entrenched would be significantly undermined if that right were denied by the operation in question. In the case of the C.B.C. the answer would probably be affirmative. A publicly owned broadcasting enterprise exists, among other reasons, to ensure that adequate dissemination facilities are available for all shades of political, social and economic thought, and failure by such an enterprise to provide such facilities for advocates of certain views would impede the free exchange of ideas that the free speech guarantee serves. (A private broadcaster might not be

in the same situation, since it can be argued that the right of private communications media to advance single points of view actually assists the effective exchange of ideas). The Liquor Control Commission would likely be held immune from the free expression provisions of the *Charter* because the exchange of political ideas would not be significantly hampered by denial of access to Liquor Control Commission bulletin boards.

Other situations involving the same organizations might lead to different results. Suppose the complaint were that the C.B.C. denied someone's "liberty" under section 7 of the *Charter* by failing to provide satisfactory wheelchair access to a studio to which the public was invited to watch a popular programme being recorded, and a similar complaint were made about lack of wheelchair access to government liquor stores. A court might decide that the *Charter* was not applicable to the C.B.C., since denial of access to television studios is not (given the relative ease with which the handicapped can be served by television, both as audience and as participants, outside the studio) a major threat to anyone's liberty. The Liquor Commission, on the other hand, might be found subject to this aspect of the *Charter,* since it operates a monopoly service, and lack of access to its facilities would constitute a serious interference with one's liberty.

It is submitted that the particularized approach demonstrated by these examples would be the soundest way to distinguish between those forms of governmental activity to which the *Charter* should apply and those to which it should not. It is the approach that Professor Tribe claims to have been applied, though not articulated, in many of the American decisions on state action. Could one realistically expect Canadian courts to adopt it, and to apply it any more consistently than their American brethren? I doubt it.

## Governmental Funding, Assistance, and Indirect Involvement

If the *Charter* applied only to governmental activities and undertakings, would it govern operations in which the government is involved on a merely indirect or tangential basis, such as by providing financial assistance, contracting for the operator's services, or regulating the particular type of operation? Probably not.

Let us consider, by way of illustration, the question of whether the *Charter* would apply to the activities of a university simply because the university, and some of its students and professors, receive governmental grants-in-aid, or because some of the university's activities are subject to the supervision of a grants commission appointed by the government, or because the university and some of its professors have entered into research contracts with the government.

In choosing persons and organizations upon whom to bestow its largesse, the government must certainly abide by *Charter* requirements. Sim-

ilarly, university grants commissions and the regulations they make or supervise must conform to the *Charter,* and any contracts entered into by government must not offend constitutional guarantees. However, it would be stretching the word "government" unduly to embrace all of those individuals and organizations with whom the government becomes involved through grants-in-aid, contracts, or powers of regulation. If universities are to be treated as "governmental" for *Charter* purposes, a more convincing ground for doing so must be discovered.

### "Private Government"

I discussed earlier the problems that could arise with respect to activities undertaken by government that are not within the traditional governmental mandate. The converse situation — traditional functions of government carried out by private entrepreneurs — could create equally perplexing problems. If the ambit of the *Charter* were restricted to the public sector would it, for example, include: (a) police services provided to a section of the general public by a private security company under contract with a city or provincial government; (b) policing and other public services provided by a corporation for the residents of a "company town" created by the corporation for its own employees; or (c) the educational activities of a private school or university? The examples chosen were selected to illustrate various types of "private government" situations, and it is not unlikely that appropriate answers would vary according to the particular type of situation involved.

With respect to services that are normally provided by government directly, but which government decides to "contract out", it is likely that the *Charter* would be found to be applicable. While the mere existence of a contract with government should not, in itself, render the contractee's operation "governmental", the operation should be so regarded if it is provided to the general public or to a segment thereof in place of services that would otherwise be provided directly by government. The contractee in such circumstances would properly be regarded as an agency of the government in question, and therefore subject to the *Charter.*

The "company town" problem is not so simple, but it is probable that the *Charter* would also be found applicable there. To some extent, that conclusion might be based on special factors, such as the likelihood that company police personnel would be designated as "peace officers" under federal or provincial legislation, and thus be linked directly to the government in question,[56] but a more general argument is also possible. As I suggested earlier, in order to include the municipal order of government within the embrace of section 32, it would be necessary to give the

56. The *Criminal Code of Canada,* R.S.C. 1970, c. C34, s. 2, defines "peace officer" to include "a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process." The decision in *Easterbrook, supra,* n. 2, to apply the *Charter* to a private security officer was based on the fact that statutory arrest powers were involved.

words "government of each province" a broad interpretation. Such a broad interpretation is supported by common sense, as well as by the shared understanding of most of those who were involved in the enactment of the *Charter,* and the use of the lower case "g" on the word "government". The prospect that it will be adopted by the courts is good. In that broad sense of "governmental institutions within the province", it is easy to read section 32 as applying to private governments such as company town administrations. The administrative officers of a company town are simply substitutes for the more common type of municipal or local government, and therefore should be answerable to the courts for any conduct which transgresses the *Charter*.[57]

The third type of situation, private enterprises which parallel educational or other services customarily provided by government, is rather more difficult to deal with.

On the one hand, it could be argued that Mary, who attends a private school, should be entitled to the same protections against "cruel and unusual punishment or treatment" as her playmate Bryan, who goes to a public school. Since the *Charter* is stated by section 52(1) of the *Constitution Act, 1982* to be part of the "supreme law of Canada", and since section 15 of the *Charter* guarantees everyone equality "before and under the law and ... equal protection and equal benefit of the law", a court might well conclude that *Charter* protections apply equally to Mary and Bryan.

On the other hand, it could be plausibly argued that Mary's parents have consciously chosen to remove her education from the governmental sector, and that it would therefore be inappropriate to treat her education as a governmental function. One of the difficulties with the latter line of reasoning is that there are probably as many motives for choosing private education as there are families that make the choice. Some will select a private school because they wish their children to be inculcated with certain religious precepts. Among that group will be some whose precepts reject the legalism that permeates the *Charter*. For them, the choice of a private school could properly be seen as an "opting-out" of *Charter* protection. Others, however, make the choice for reasons that have nothing to do with acceptance or rejection of constitutional protection: concern for teaching quality, geographic convenience, a desire to expose their children to a wide spectrum of ideas, a wish that their children associate with "the right social classes", the need to send a handicapped child to a school with special facilities, etc. Where, as in the case of most universities, there is no government equivalent, and the private operation is the "only game

57. The U.S. Supreme Court found it unconstitutional to treat as trespass the distribution of Jehovah's Witness literature on the streets of a company town contrary to the wishes of the company management in *Marsh* v. *Alabama*. 326 U.S. 501 (1946). Black, J., stated, for a unanimous Court: "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." (at 507).

in town'', it becomes even less realistic to associate use of the facilities with any desire to escape the long arm of government.

One solution to the problem would be to decide which functions are customarily provided by government, and to subject those activities to the operation of the *Charter,* regardless of their proprietorship. However, as we have seen, it is extremely difficult to draw any general distinction between that which is ''normally'' governmental, and that which is not. After attempting to adapt Professor Tribe's more sophisticated approach to the Canadian situation, I suggested that it would not be realistic to expect such a test to be applied satisfactorily. If one applied that approach to the problem now under consideration, the results would be no more satisfactory.

## Conclusion

I have attempted to identify some of the difficulties that will face the courts if they are required to draw lines between that which is governmental and that which is not for the purposes of applying the *Canadian Charter of Rights and Freedoms.* In some cases, such lines would not be difficult to draw. In many other situations, however, the prospect appears dim that distinctions would be drawn that are at once practical, consistent, and fair.

It has long been a maxim of interpretation that if language is ambiguous and one interpretation would lead to an impossibility, the alternate interpretation should be favored: *lex non cogit ad impossibilia.*[58] While it might not be true to say that it is completely impossible to make a useful distinction between that which is governmental and that which is not for the purpose of determining the applicability of the *Charter,* the difficulty of doing so effectively is so great that it amounts to almost the same thing. This fact should surely be taken into account when the Supreme Court of Canada is eventually called upon to determine to whom the *Charter* applies. Reference has already been made to arguments supporting the application of the *Charter* to the private sector.[59] If one adds to those already persuasive arguments the fact that the alternative construction would lead to a bewildering interpretative labyrinth, it is difficult to resist the conclusion that the *Canadian Charter of Rights and Freedoms* must apply equally to the governmental and non-governmental domains.

58. Sir P.B. Maxwell, *Interpretation of Statutes* (12th ed., 1969), at 326.
59. Gibson, *supra,* n. 2.