

1-1-1997

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Recommended Citation

Richard Fader, "Reemergence of the Charter Application Debate: Issues for the Supreme Court in Eldridge and Vriend" (1997) 6 Dal J Leg Stud 187.

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REEMERGENCE OF THE CHARTER APPLICATION DEBATE: ISSUES FOR THE SUPREME COURT IN *ELDRIDGE* AND *VRIEND*

RICHARD FADER[†]

With the Supreme Court poised to hear the Eldridge and Vriend cases, and the lack of academic and individual consensus on the effectiveness of the government actor test, it appears that we are entering round two of the Charter application debate. The author contends that the threshold approach should be scrapped in favour of a rights-based analysis, which defines the Charter's scope within the context of the right or freedom in question. Attention is also given to similar issues being examined by the South African Constitutional Court.

Considérant que la Cour suprême du Canada est prête à entendre l'arrêt Eldridge et Vriend et considérant le manque d'accord académique et individuel concernant l'efficacité de l'examen des acteurs gouvernementaux, il semblerait que nous sommes à l'aube de la deuxième ronde des débats sur l'applicabilité de la Charte. L'auteur soutient que l'analyse fondée sur les droits, selon laquelle la portée de la Charte est définie par le droit ou la liberté en question, doit prendre place à l'approche d'analyse fondée sur un seuil. L'auteur porte aussi attention à la façon dont ces mêmes questions sont traitées par la Cour Constitutionnelle de l'Afrique du Sud.

I. INTRODUCTION

The *Canadian Charter of Rights and Freedoms*¹ came into force on April 17, 1982. It has been described as an "unremitting protection of individual rights and liberties,"² and a protector of "a complex of

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

² *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155.

interacting values, each more or less fundamental to the free and democratic society that is Canada."³ It has also been described as "a flawed exercise, yielding only limited and imperfect results,"⁴ "a regressive instrument more likely to undermine than to advance the interests of . . . Canadians,"⁵ and "an invitation [for the courts] to exercise enormous political power."⁶ More astutely, however, it has been called "a balancing of competing values,"⁷ and "a particular form of political struggle."⁸ The conflict to which Professors MacKay and Fudge refer is the natural corollary to defining, in an adversarial setting,⁹ rights and freedoms such as religion, speech, and equality.¹⁰ Thus, where there are winners and losers, and the commodity being fought for is rights and freedoms, inevitably the system will produce conflict.¹¹

This clash of human interests in *Charter* litigation has had significant political consequences.¹² Despite the court's immediate

³ *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136.

⁴ E. McWhinney, *Canada and the Constitution 1979-1982* (Toronto: University of Toronto Press, 1982) at 113.

⁵ A. Petter, "Immaculate Deception: The *Charter's* Hidden Agenda" (1987) 45 Advocate 857 at 857.

⁶ D. Frum, "Who's Running This Country Anyway?" *Saturday Night* (October 1988) 56 at 58.

⁷ W. MacKay, "Judging and Equality: For Whom Does the *Charter* Toll?" in C. Boyle *et al.*, eds., *Charterwatch: Reflections on Equality* (Toronto: Carswell, 1986) 35 at 93.

⁸ J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485 at 551.

⁹ See *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1353-1354, where Wilson J. wrote, "Nor should one, it seems to me, balance a private interest, i.e. litigant x's interest in his privacy against a public one, the public's interest in an open court process. Both interests must be seen as public interests, in this case the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process."

¹⁰ See *Charter*, *supra* note 1, ss. 2(a), 2(b), 7, 8, 9, 10, 11, 12, 13, 14 and 15.

¹¹ See generally A. Petter, "The Politics of the *Charter*" (1986) 8 Supreme Court L.R. 473 at 474: "Rights are not commodities that can be given away; they are entitlements governing the relationships among people within a community. The extent to which one person's rights and entitlements are expanded is the extent to which the rights and entitlements of others are contracted."

¹² *E.g.* from 1982-1992 the *Charter* was used to strike down 41 statutes. For a good analysis of the court's impact in the first decade of the *Charter*, see F. Morton, P. Russell, & T. Riddell, "The *Canadian Charter of Rights and Freedoms*: A

acceptance of its role as umpire to these conflicts, and acceptance of the broad scope of the *Charter*,¹³ there is still limited academic and judicial discomfort with the political role of the court.¹⁴ While it is clear to most that this role is here to stay, it is not clear how successful competing forces will be in their prospective battles on this judicial landscape. One area where the confrontation has been most heated,¹⁵ and the focus of this paper, is *Charter* application.

In the context of this study, *Charter* application can be conceptualized as the judicial method of defining the scope or breadth of the *Charter's* reach. It becomes apparent, even to the casual reader, that this threshold is of fundamental importance in *Charter* litigation. In the political battleground over human rights, values and freedoms, this is the high-ground, where amplification of rights is to be won or lost.

The significance of this threshold is not lost on those who study law as a discipline, nor those who engage in the process of defining rights and freedoms in Canada.¹⁶ The range of opinion on this

Descriptive Analysis of the First Decade, 1982-1992" (1994-95) 5 N.J.C.L. 1. For an example of the highly politically charged nature of some *Charter* decisions, see generally *R. v. Morgentaler*, [1988] 1 S.C.R. 30, where restrictions on abortion were held to be unconstitutional, violating *Charter* protections under section 7.

¹³ See especially *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [hereinafter *Big M.*].

¹⁴ See generally F. Morton, "Canada's Judge Bork: Has the Counter-Revolution Begun?" (1996) 7 Constitutional Forum 121. Morton speaks of the long-term growth of judicial activism and the need for judicial self-restraint. Morton is analyzing the case of *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595, *infra* note 16, where Justice McClung, of the Alberta Court of Appeal, noted at page 614, "We cannot look on with indifference and allow the superior courts of this country to descend into collegial bodies that meet regularly to promulgate 'desirable legislation'."

¹⁵ For an example of this, compare the wildly different interpretations/ critiques given by the following authors over the issue of *Charter* application: D. Gibson, "The Charter of Rights and the Private Sector" (1982-83) 12 Man. L.J. 213, arguing the *Charter* should apply to both the public and private sectors; P. Hogg, "The Dolphin Delivery Case: The Application of the *Charter* to Private Action" (1987) 51 Sask. L. Rev. 274, arguing the *Charter* only applies to the public sector; and A. Hutchinson & A. Petter, "Private Rights/Public Wrongs The Liberal Lie of the *Charter*" (1988) 38 U.T.L.J. 278, arguing that the *Charter* is a political weapon rooted in the dominant liberal democratic state with the inherent bias of protecting and perpetuating this oppressive mode of governance.

¹⁶ See the recent round of debate in: M. Carter, "Non-Statutory Criminal Law and the *Charter*: The Application of the Swain Approach in *R. v. Daviault*" (1995) 59(2) Sask. L. Rev. 241; D. Pothier, "The Sounds of Silence: *Charter* Application

subject¹⁷ would probably shock the average person. In searching for some clues on the breadth of this document, they would likely be drawn to the marginal note¹⁸ "Application of *Charter*," and inevitably to subsection 32(1) which rests beside it. That subsection is as follows,

32. (1) 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.

When considering the range of opinion, a layperson might point out that the wording of section 32(1) is clear. He or she might conclude that those arguing for an expanded scope to the *Charter* are reading tea-leaves, not the constitution.

Given the recent round of *Charter* application cases,¹⁹ and the fact that the Supreme Court is reconsidering this issue, the time is ripe to address the following questions: What can we learn from the variance of opinion on this vitally important question? Is the meaning of section 32(1) clear? We need to recognize the magnitude of political forces at work and ask: (a) are arguments to

When the Legislature Declines to Speak" (1996) 7 Constitutional Forum 113; P. Godin, "Anton Piller Orders in an Age of Scepticism: *Charter* Application and Other Safeguards for Judicially Ordered Searches" (Winter 1996) 54 U.T. Fac. L. Rev. 107. See also recent judicial comment in: *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595 (Alta. C.A.) [hereinafter *Vriend*]; leave to appeal to S.C.C. granted October 3, 1996; *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 [hereinafter *Hill*]; *Eldridge v. British Columbia (Attorney General)* (1995), 7 B.C.L.R. (3d) 156 (C.A.) [hereinafter *Eldridge*]; leave to appeal to S.C.C. granted May 9, 1996; *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835 [hereinafter *Dagenais*].

¹⁷ *Supra* note 15.

¹⁸ Such reliance would certainly be consistent with the importance the S.C.C. placed on marginal notes in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 at 556-558, where Wilson J. for the majority wrote, "The marginal note to s.11 seems to support this interpretation of the section. . . . The case for their utilization as aids to statutory interpretation is accordingly weaker. I believe, however, that the distinction can be adequately recognized by the degree of weight attached to them."

¹⁹ *Supra* note 16, and for a general discussion, see Part Three of this paper.

expand the breadth of the *Charter* merely the political seduction of the law,²⁰ or (b) is it time to give full meaning and breadth to the *Charter*?²¹ Is our understanding of the history, text and nature of our constitution sufficient to answer these questions? Do we need to go deeper than the drafters of the constitution in explicitly defining the structure of government we wish to have? In reading the constitution as the Supreme Court of Canada has done up until now, is it merely gazing at tea-leaves or are arguments which call instead for an expanded *Charter* the rantings of alienated political forces? If change is needed, is it of a radical nature or can it occur within the framework of our existing traditions and norms?

These questions are still in dispute, despite significant academic and judicial writing on the subject. The following is an attempt to address some of these questions. It is important to analyze the different perspectives in an attempt to make sense of the forces at work and to try and predict where discussion is likely to lead in the future.

Toward these ends the paper will begin, in Part Two, by examining the wide range of academic writing and judicial opinion on this subject. This is essential, both for understanding the foundational arguments that current law is built upon, and for highlighting the range of opinion on the various points of controversy. The areas addressed are: historical analysis, textual construction, the nature and function of constitutional documents, and the floodgates/individual autonomy argument.

Part Three will analyze the current debate over the scope of the *Charter*. The focus will be on the functionality of the test itself, rather than analysis of why the test developed as it did. The general thrust is that we are entering a new round of academic debate, and judicial reconsideration, in this area of constitutional jurisprudence.

²⁰ To borrow from United States constitutional scholar, former U.S. Court of Appeals Judge, Robert Bork, who uses this phrase in the title of his text *The Tempting of America: The Political Seduction of the Law* (New York: Simon & Schuster Inc., 1990).

²¹ The full-breadth argument has been championed by D. Gibson, *supra* note 15 and "Distinguishing the Governors from the Governed: The Meaning of 'Government' Under Section 32(1) of the *Charter*" (1983) 13 Man. L.J. 505.

In Part Four, having exposed the serious weaknesses of the government actors test,²² the paper will question where the Court should go from here. Should Canada follow the United States down the well-worn road of doctrinal confusion? Or, as an alternative, should we approach the issue with a rights-based methodology, where the scope of the *Charter* is determined within the context of the right or freedom in question, rather than through the threshold test?

In Part Five, the paper engages in an analysis of a recent case out of the South African Constitutional Court, raising issues and arguments similar to those being considered in Canada. In conclusion, it will attempt to organize the issues which will face the Supreme Court of Canada in the *Eldridge* and *Vriend* cases, as well as those which will likely continue to emerge over time. In the author's opinion, it is not a coincidence that we are back in the middle of this debate: we need a new approach to this constitutional issue. The Court has the choice to either reverse the heavily criticized jurisprudence in this area or to continue building further on inadequate case law.

II. ANALYSIS OF THE FOUR PILLARS

The purpose of this Part is to develop an understanding of the arguments relied on by a majority of Canadian academics and judges in determining the scope of the *Charter*, while at the same time highlighting arguments to the contrary. By showing the tension that exists on both sides of the debate, and examining each, it becomes clear that analysis in this area generally starts with a conclusion and flows into a search for supporting evidence.

As will be discussed in Part Four, the undercurrent of various opinions on the application of the *Charter* is political, and depends upon one's view or conception of the proper mode of governance.²³

²² See generally G. Crann, "How Far Does the *Charter* Reach? A Theoretical Review of the s.32(1) Debate and Canada's Emerging 'Government Action' Doctrine" (1988-89) 47 U.T. Fac. L. Rev. 156.

²³ For example, P. Hogg, arguably Canada's most eminent constitutional scholar, in his text *Constitutional Law of Canada*, 3rd ed. (Supplemented) (Toronto: Carswell, 1992) at 34-22 states, "[I]f a private abuse exists, the democratic political process can drive the legislative bodies to produce laws that are needed to

More specifically, these are basic, often unarticulated, views about the legislature, the electorate and the courts. Such ideological perspectives are the true engine of this process.

The goal of the following exercise, in part, is to show how eminent constitutional scholars can disagree on history, grammar, the nature of constitutions, and the potential effects of a wider *Charter* breadth. These are issues the layperson might consider to be objectively verifiable. The following are the key issues cited by the majority of Canadian judges and scholars to “conclude” that the *Charter* only applies to government (or the “public” sector).²⁴

1. Historical arguments

To varying degrees, those who argue for the narrow scope of the *Charter* share a conception of the role of its framers, which is

provide a remedy.” This ringing affirmation of the state of Canadian democracy is not shared by D. Gibson. In discussing the scope of the *Charter*, Gibson makes reference to the legislative override to (some) *Charter* rights under section 33. This point is raised not to draw us into an analysis of section 33 (which does have the potential to impact the breadth of the *Charter*) but to highlight Gibson’s view of Canadian democracy and the Court’s role in it. Gibson’s affirmation of judicial review in favour of unadulterated democracy is reflected in *The Law of the Charter: General Principles*, (Toronto: Carswell, 1986) at 126: “With respect to rights (language rights, for example), that are not subject to being overridden, judges may proceed with equal confidence, knowing that the intensely democratic negotiations that produced section 33 confirmed the need for those rights to be protected by unqualified judicial review.” The conclusions drawn by these two authors over the scope of the *Charter* flow, in large part, from their individual views of democracy rather than from logical conclusions drawn from the “arguments” highlighted in this chapter.

²⁴ This notion of public/private is discussed in Part Four. It should be noted that the true debate is not over the public/private issue because, although a component, to focus on this vague distinction tends to take one’s attention away from the actors in the process. It is useful to remind ourselves that we are in the political battleground over rights and freedoms, not in a shopping centre where rights and freedoms can be purchased as commodities from the public sector shelves. This vague public/private notion, although inevitably creeping into the debate, should not be allowed to dominate the focus and thereby mystify the process. See D. Pothier, *Crossing the Lines in Dolphin Delivery: Thoughts on the Parameters of Charter Application* (Faculty of Law, Dalhousie University, 1987) [unpublished] reprinted in *Public Law Course Materials 1993-1994* (Vol. 2) (Dalhousie University) 5-127 at 5-130: “All of this assumes, of course, that there is a clear distinction between public and private, and that the world can be divided into neat little boxes. . . . I would not say that the public/private distinction has no content, but I see it as a continuum (or a series of continua) rather than a dichotomy. . . .”

sometimes referred to as "original understanding."²⁵ Basically, the position is that the purpose or intent of a section, or group of sections, can be found by historical analysis and therefore should drive the current understanding and application of that section. This, it seems logical, would be a more arguable position in Canada than the United States, since the *Charter* is of fairly recent origin, with a great wealth of material documenting it.²⁶

There is a common thread which runs through the historical analysis of those who prefer a narrow scope to the *Charter*. Rather than attempting to compile a collective understanding of the members of the Parliament which passed the *Constitution Act, 1982*, focus is given to comments made by the Minister of Justice, Deputy Minister and senior Department of Justice lawyers before a Parliamentary Special Joint Committee on the Constitution. Speaking in public/private terms, all of these actors stated that the *Charter* was to apply only as between the "individual" and the "government." For example, on January 15, 1981, R. Tasse, Q.C., the Deputy Minister of Justice, speaking before the Committee stated, "we do not see these rights or these proscriptions of the *Charter* to have application in terms of a relationship between individuals."²⁷

²⁵ This term is more prevalent in the United States literature. The view, in its most strict form, is put forth by Robert Bork. He describes U.S. society as a liberal democracy in which the court's authority -judicial review- should be approached with great caution. The theory is that, where the intention of drafters of the constitution is not clear, there is no authority for a judge to act. Any changes (growth) to the constitution must come by way of amendment, *supra* note 20. It is interesting to note that the U.S. Bill of Rights was passed in 1791, yet the claim to understand the original intent is still made. Debate on this method of interpretation continues (see e.g., J. Rakove, "The Original Intent of Original Understanding" (1996) 13 Constitutional Commentary 159).

²⁶ For instance, see McWhinney, *supra* note 4; 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, 1986) 145.

²⁷ *Minutes of Special Joint Committee on the Constitution of Canada*, January 15, 1989, 38:49.

What authors like Peter Hogg²⁸ and Katherine Swinton²⁹ glean from such statements is the conclusion that there was a clear legislative intent. Added to this are arguments based on a proposed early draft, which was as follows:

29. (1) to the Parliament and government of Canada and to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories.³⁰

When compared to the current text,³¹ one sees that the words "and to all matters within" were changed to "in respect of all matters within." J. D. Whyte points out that the change was made by the legislative drafters in order to avoid ambiguity and clearly limit the scope to the public sector.³²

From these facts, the conclusion is drawn that there was a clear subjective legislative intent. At first blush, this line of argument appears convincing. The layperson would likely be satisfied with this seemingly overwhelming historical account. In addition to academic support, the Supreme Court of Canada has relied, in part, on this argument. In the landmark case of *Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd.* the Court said of the *Charter*, "it was intended to restrain government action and to protect the individual. It was not intended . . . to be applied in private litigation."³³ It can be argued that the Court was not relying on a historical argument when it made these comments, since sparse attention was paid to the actual history (other than the references to "intent"). However, the Court's reliance on the historical record was made more clear in *McKinney v. University of Guelph* where the Court wrote, "[t]he exclusion of private activity from the *Charter* was not the result of happenstance. It was a deliberate choice which

²⁸ *Supra* note 15.

²⁹ "Application of the Canadian Charter of Rights and Freedoms (Ss. 30, 31, 32)" in W. Tarnopolsky and G. Brandoin, eds., *The Canadian Charter of Rights and Freedoms: A Commentary* (Toronto: Carswell, 1982) 41 at 41.

³⁰ As can be seen in McWhinney, *supra* note 4 at 145.

³¹ See text following note 18.

³² *Supra* note 26.

³³ [1986] 2 S.C.R. 573 at 593 [hereinafter *Dolphin Delivery*]. This case was the Supreme Court of Canada's first attempt to define the scope of the *Charter*. It remains the most exhaustive and authoritative attempt by the Court to give reasons for creating the current *Charter* application test.

must be respected.”³⁴ This conclusion, however, was made without much in the way of an explicit historical review. Nonetheless, it was a determinative factor in the outcome. The problem of sparse attention being paid to actual history was compounded by the Court, in subsequent cases, when it simply cited these two earlier cases as authority for the “historical intent.”³⁵

Despite these arguments, a flurry of challenges from the “expansionist camp” (authors promoting a wider application of *Charter*) ensued. These authors argued that the history was not clear and that no single theme can emanate from the “historical” analysis.³⁶ More fundamentally, they argued that the *Charter* (specifically section 32) was a political compromise,³⁷ with forces on both sides of the issue failing to reach any solid conclusion or vision,³⁸ and as such, there was no subjective consensus.

Dale Gibson challenges the historical arguments made in favour of the narrow approach. First, he points out that the constitution was passed by a legislative assembly, and therefore, the Minister of Justice cannot be seen as the authority for the subjective intent of the entire House.³⁹ He points out that there was no attempt to canvass the legislature and determine who voted for what.⁴⁰ Also, he

³⁴ [1990] 3 S.C.R. 229 at 262 [hereinafter *McKinney*].

³⁵ For example, *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 [hereinafter *Stoffman*].

³⁶ See generally D. Buckingham, “The Canadian Charter of Rights and Freedoms and Private Action: Applying the Purposive Approach” (1986) 51 Sask. L. Rev. 105.

³⁷ See R. Hawkins & R. Martin, “Democracy and Bertha Wilson” (1995) 41 McGill L.J. 1 at 29, “. . . the *Charter* was a typically Canadian compromise, a deal struck after a very politicized negotiation in which it was decided that rights would be protected by the Constitution . . .” The article goes on in footnote 125 to quote from *The Ottawa Citizen*, speaking about the Federal-Provincial Conference of First Ministers on the Constitution, November 2-5, 1981, “When future chroniclers of Canada’s constitution examine the events of this week, they will likely conclude that the first ministers haggled like merchants in a bazaar until they made a deal that nobody could claim was a victory” (“History in the Bazaar” *The Ottawa Citizen* (6 November 1981) 8).

³⁸ Gibson, *supra* note 15 at 213.

³⁹ Gibson, *supra* note 23 at 115.

⁴⁰ This critique is on all fours with basic notions of statutory interpretation. For instance, in Sir R. Cross, J. Bell, & Sir G. Engle., *Statutory Interpretation*, 3rd ed. (London: Butterworths, 1995) at 24, it is observed, “. . . the phrase cannot mean the intention of the majority who voted for the statute as this will almost certainly have

points out that the change in drafts was made “without political instructions,”⁴¹ implying that this was not a matter of politically contested debate. Because of this, it is impossible to glean any statutory intent from it. In addition, the Supreme Court of Canada, in *Reference Re Section 94(2) of the Motor Vehicle Act*, R.S.B.C. 1979, c.288, went out of its way to say the Court was not bound by the drafters’ intent.⁴²

What this highlights is how the two sides of the “bigger picture debate” frame the issues and conduct their historical analysis. The approaches are driven by an end result, and are not good historical exercises. In fact, Robin Elliot and Robert Grant, who themselves argue “practical” reasons (ie., limited judicial resources) for excluding the breadth of the *Charter* from including the private sector, concede that the historical debate bears no fruit.⁴³

Thus, in the first of the four main arguments, the point of departure tends to be a conclusion, with the facts and analysis framed in a manner to bolster that conclusion. Specifically, in the case of the Supreme Court of Canada, no attempt was made to back up conclusions drawn about the subjective intent of the drafters.

2. Textual Arguments

While the search for subjective legislative intent is not a well established tenet of Canadian jurisprudence, textual analysis of a document in order to determine the objective intent of the

been constituted by different persons at different stages of the passage of the Bill and, in any event, it would be rash to assume that all those who vote for it have the same intentions with regard to a particular piece of legislation.” Similar points are raised by E. Drieger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 106.

⁴¹ Gibson, *supra* note 23 at 115.

⁴² (1986), 24 D.L.R. 536 at 554 where Lamer J. wrote, “Moreover the simple fact remains that the *Charter* is not the product of a few individual public servants, however distinguished How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?”

⁴³ R. Elliot & R. Grant, “The *Charter’s* Application in Private Litigation” (1988-89) 23 U.B.C. L. Rev. 459 at 463, “The prevailing wisdom, however, is that the *Charter* does not reach some private actions . . . an appeal is invariably made to the intention of the drafters . . . these . . . are often advanced with little conviction and are used to buttress conclusions reached for other reasons.”

legislature certainly is.⁴⁴ In fact, the law on *Charter* application, as it presently exists in Canada, is based solidly on the textual argument. This approach was relied on extensively in the landmark case of *Dolphin Delivery*. In Canadian jurisprudence, the textual approach is the most accepted and least controversial, as it fits most easily with our understanding of our liberal democratic system of government.

By interpreting the words of the *Charter*, the attempt is to glean the most accurate picture of the "legislative intent."⁴⁵ In theory, this limits judicial re-construction and avoids a fictional attempt to subjectively determine the actual "intent" of the legislature. Because of its importance, the paper will examine the current textual arguments put forth by both the Supreme Court of Canada and those academics who, like the Court, favour a narrow application of the *Charter*.

The Supreme Court of Canada, in its first pronouncement on the scope of the *Charter*,⁴⁶ characterized the debate within the parameters of section 32. That is, the Court ruled that section 32 is a conclusive statement on the breadth of the *Charter*. The same observation has been made by Peter Hogg⁴⁷ and other academics.⁴⁸ As noted in part one of this paper, the marginal note "Application of *Charter*" does add weight to the proposition that section 32 is the touchstone provision for *Charter* application.

What arguments then are drawn from section 32 to reinforce the position that the *Charter* should only apply against government action (ie., classical liberalism)? The layperson would likely observe that section 32,⁴⁹ while expressly including "Parliament," "government" and "in respect of all matters within the authority

⁴⁴ See Cross, *supra* note 40 at 25, where it is noted that, "the intention to be attributed to the legislature is to be determined from the objective words used, rather than from any subjective intentions which were not expressed in the text."

⁴⁵ See Lord Reid, in *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591 at 613, where he said, "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said."

⁴⁶ *Dolphin Delivery*, *supra* note 33.

⁴⁷ Hogg, *supra* note 23 at 34-20.2.

⁴⁸ See generally A. McLellan & B. Elman, "To Whom Does the *Charter* Apply? Some Recent Cases on Section 32" (1985-86) 24 *Alta. L. Rev.* 361.

⁴⁹ See text following note 18.

of," does not mention private actors. Those judges and academics in favour of a narrow scope to the *Charter* are quick to point out the long-standing principle of interpretation known as *expressio unius est exclusio alterius* (inclusion of one implies the exclusion of another). Thus, if the Parliament (which passed the constitution) wanted to include the private sector, it would have done so expressly.⁵⁰ The argument is that the public sector is included, and the private is excluded, because the section is "clear."

The textual argument is sometimes made in terms of section 1 of the *Charter*.⁵¹ The argument is that "prescribed by law" is a qualifier to all enumerated rights. As such, the text of this section indicates that the rights so protected are protected only against government action.⁵² Thus the qualifier only speaks to those limitations prescribed by law.⁵³

Considering the weight of these arguments, does it not seem clear from the text of section 32 and section 1 that the *Charter* was only intended to apply against government action? Why do some academics persist in claiming that nothing conclusive can be drawn from such an analysis of the text?⁵⁴ Who are these radicals who claim the text is not clear, and more importantly, can they read?

When examining the textual arguments from the expansionist camp, one discovers that they do not seem all that radical, and that they do flow from a textual analysis of the *Charter*. The most obvious starting point is to analyze criticism of the inductive reasoning used to limit the application debate to section 32.

Dale Gibson puts forth a cogent argument⁵⁵ regarding the purpose of section 32. His argument is that the inclusion of

⁵⁰ *McKinney*, *supra* note 34 at 261; LaForest J. speaking of section 32(1), concludes, "These words give a strong message that the *Charter* is confined to government action."

⁵¹ Section 1. states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in its subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

⁵² This raises the question, "What laws are proponents of this argument referring to?" Section 32(1) only excludes the common law where there is no government actor. *Dolphin Delivery*, *supra* note 33, allows a range of law to be challenged which does not fit within the section 1 "prescribed by law" test. This inconsistency shows the weakness of this argument, *infra* note 64.

⁵³ See McLellan & Elman, *supra* note 48 at 363.

⁵⁴ See generally Elliot & Grant, *supra* note 43; Buckingham, *supra* note 36.

⁵⁵ *Supra* note 15.

"Parliament" and "government" should not lead one to the *expressio unius est exclusio alterius* doctrine, but should give way to *ex abundante cautela*. That is, inclusion of the public sector was needed to refute the principle of statutory interpretation that legislation does not apply to the Crown, except for explicit reference or necessary implication. Conversely, it is assumed to apply to all others.⁵⁶

Flowing out of this, commentators attempt to apply the Supreme Court of Canada's own "purposive approach" to *Charter* application, in order to determine the proper scope of the *Charter* itself.⁵⁷ Donald Buckingham refers to *Big M.*, where the Supreme Court held that the purpose of a section is "ought by reference to the character and larger objects of the *Charter*." Robert Howse also relies on this purposive approach.⁵⁸ Howse points out that there is no reason to limit the analysis to section 32, noting that in *Dolphin Delivery* the Court did not give reasons for such a restrictive approach. The idea that the *Charter* must be read as a whole in order to achieve the objective meaning of any one section drives this argument. Dale Gibson highlights some of the various sections of the *Charter* which have a "ring" that would seem broader than that accorded to section 32.⁵⁹ Some sections used as examples are:

2. Everyone has the following fundamental freedoms. . .

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

⁵⁶ *Ibid.* at 214. This position is shared by M. Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Toronto: Edward-Montgomery, 1983); and M. 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. Wilson J., in *McKinney*, *supra* note 34, challenged this position, at 335: "I do not find this line of reasoning persuasive since it seems to me obvious that one of the basic purposes of a constitutional document like the *Charter* is to bind the Crown. I do not believe therefore that in absence of s.32(1) it would have been open to the Court to apply ordinary principles of statutory interpretation when construing the *Charter* and thereby conclude that the Crown was not bound by its provisions."

⁵⁷ See generally Buckingham, *supra* note 36.

⁵⁸ R. Howse, "Dolphin Delivery: The Supreme Court and the Public/Private Distinction in Canadian Constitutional Law" (1988) 46 U.T. Fac. L. Rev. 248.

⁵⁹ *Supra* note 15.

15. (1) Every individual is equal before and under the law and has the right to 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.⁶⁰

Indeed, it seems strange that the Court would adopt such a narrow approach, when this mode of interpretation is so inconsistent with other statements.⁶¹

Authors in the expansionist camp come to the same conclusion, on the textual argument, that any attempt to glean an objective purpose or clear meaning from section 32(1) is pure fiction. In fact, even Peter Hogg states that the language of section 32(1) is "admittedly ambiguous,"⁶² going on to ground his argument in constitutional history and legal theory.

The most convincing and articulate characterization of the state of this section is given by Dale Gibson. He points out that since this was a political compromise section, it is "deliberately ambiguous:"

⁶⁰ Reference is also made to s.52(1):

52. (1) 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.

It is argued that since the *Charter* is the supreme law of the land, it should apply to both the public sector (law) and the private sector (law). See Doody, *supra* note 56; and Gibson, *supra* note 23 at 113-114.

⁶¹ *E.g.* *R. v. Lyons*, [1987] 2 S.C.R. 309 at 326, where La Forest for the majority wrote, "[T]his case exemplifies the rather obvious point that the rights and freedoms protected by the *Charter* are not insular and discrete . . . [E]ach enunciated right and freedom imbues and informs our understanding of the value structure sought to be protected by the *Charter* as a whole and, in particular, of the content of the other specific rights and freedoms it embodies." This wider ring was noted, in the section 2(b) context, by the Supreme Court of Canada in *Irwin Toy Ltd. v. Quebec (Procureur General)*, [1989] 1 S.C.R. 927 where they quoted with favour Thomas Emerson, "Toward a General Theory of the First Amendment" (1963) 72 Yale L.J. 877 at 886, "[T]he theory of freedom of expression . . . is put forward as a prescription for attaining a creative, progressive, exciting and intellectually robust community." In the Canadian context we can use Emerson's line of argument to the effect that section 32 must be read in light of the other objects and purposes of the *Charter* and not as an insular and discrete touchstone in defining the scope of the *Charter*.

⁶² *Supra* note 15 at 274.

[i]t 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 omissions of the conclusive word "only" cannot be regarded as accidental.⁶³

This keen observation certainly breathes life into the expansionist camp's argument that the textual argument is incomplete⁶⁴ because of the nature of the document itself.

Yet, it should be noted that the current law rests heavily on the textual argument that section 32 "clearly" excludes application to the private sector. As such, is the above dialogue a barren exercise in academic analysis? Hopefully not. As pointed out earlier,⁶⁵ and as will be analyzed in detail in the following Part, there is a new round of *Charter* application cases and debate going on. The important point is that the textual argument has not produced consensus.

Once again we see the same parties on the same side of the "big picture debate" arguing in favour of their position. With the wide range of interpretation and the passionate nature of the debate, it is impossible to conclude that either side is engaged in a purely objective attempt to determine the meaning of this section. The point is that these judges and commentators are not looking at tea

⁶³ Gibson, *supra* note 15 at 213.

⁶⁴ Little rebuttal has been given to the section 1 argument, perhaps due to the relatively weak nature of the position. Yet Elliot & Grant, *supra* note 43 at 467, portray section 1 as operating when the limitations on rights or freedoms are prescribed by law (obviously) but they reject the argument that this, on its own accord, limits the scope of the *Charter*. It is noted that if the *Charter* did apply to the private sector, the non-application of section 1 "would impose more stringent conditions on individuals than on government," but this does not speak to the scope of the *Charter*. But see Hill, *supra* note 16, where the Court, in developing the common law in a manner consistent with the *Charter*, applied a variation of the section 1 test; also see *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 [hereinafter *B.C.G.E.U.*].

⁶⁵ *Supra* note 16.

leaves, they are looking at an ambiguous document and filling in the gaps with their own political baggage.⁶⁶

3. Nature of Constitutions

Having seen a lack of consensus regarding the textual interpretation of the *Charter*, it comes as no surprise that there is no agreement on the vague and value-laden question: what is the fundamental nature of a constitution? Comment on this point came early and often in the life of the *Charter*.⁶⁷ In many cases, it formed the basis for the conclusion that the *Charter* does not apply to purely private action.⁶⁸ Both Hogg and Swinton buttress their arguments in this area on brief statements, with no cited support. They conclude that "the normal role of a constitution"⁶⁹ is to "set out the terms of relationship between the citizen and the state. . . ."⁷⁰

This simple analysis, as noted by Brian Etherington,⁷¹ was the basis for *Dolphin Delivery*,⁷² the Supreme Court of Canada's first look and lasting effort to define the scope of the *Charter*. The Court began its analysis from the "orthodox position" that the role of a constitution is to regulate the individual versus the state.⁷³ Anne

⁶⁶ This terminology is not used in an attempt to be overly cynical of the process. Unlike Hutchinson & Petter, *supra* note 15, it simply makes the point that the political undercurrent is what drives the debate in this area.

⁶⁷ See generally B. Etherington, Notes of Cases: *Retail, Wholesale and Dept. Store Union, Local 580 v. Dolphin Delivery Ltd.* (1987) 66 Can. Bar Rev. 818; and J. Manwaring, "Bringing the Common Law to the Bar of Justice: A Comment on the Decision in the Case of *Dolphin Delivery*" (1987) 19 Ott. L. Rev. 413.

⁶⁸ Hogg, *supra* note 23 at 34-20.2-20.3; Swinton, *supra* note 29; and *Dolphin Delivery*, *supra* note 33.

⁶⁹ Hogg, *supra* note 23 at 34-20.3.

⁷⁰ Swinton, *supra* note 29 at 44.

⁷¹ *Supra* note 67.

⁷² A similar observation is made by G. Otis, "The *Charter*, Private Action and the Supreme Court" (1987) 19 Ott. L. Rev. 71 at 77: "It is submitted that the Supreme Court of Canada, without necessarily engaging in the lofty exposition of the Canadian brand of western constitutional philosophy, should at least have given a broader textual basis to its interpretation of the *Charter* as a strictly "public law" instrument."

⁷³ For an analysis of this orthodox view of liberalism/constitutionalism, as well as an alternative vision, see R. Yalden, "Liberalism and Canadian Constitutional Law: Tension in an Evolving Vision of Liberty" (1988-89) 47 U.T. Fac. L. Rev. 132 at 148: "To date, the orthodox vision of liberty has been very much at the forefront of these decisions. . . . [I]t remains the dominant vision. . . an approach that embraces

McLellan and Bruce Elman,⁷⁴ in pre-*Dolphin Delivery* jurisprudence, flag a number of cases in which Canadian courts have expressed the same view of the nature of constitutions. John Manwarning notes that a majority of Canadian commentators also accept this orthodox view. He succinctly boils the argument down by pointing out,

[t]his view is fundamental to classical liberal theory which was intended to justify the freeing of private economic activity from pervasive state regulation.⁷⁵

The characterization established in *Dolphin Delivery* was confirmed by the Supreme Court of Canada in *McKinney*.⁷⁶

While it is not surprising that the two sides in the *Charter* application debate stick to their positions in this vague and indeterminate area, two things do warrant mentioning. First, the amount of weight given by current law to this position is not reflected in the logical weight of the argument itself. Second, the polarization and high level of emotionally charged writing in this area reflect the political forces at work. For example, Hogg refers to the private sector as "a sphere of the private where the truly bad stuff goes on." Clearly he is taking a shot at those who believe the *Charter* should apply to some forms of the private sector. He then derides the position of his opponents by noting that "only academic lawyers really believe in this distinction."⁷⁷ He concludes by reaffirming his commitment to the liberal democratic process.

When one reviews the comments of those Hogg describes as "academic lawyers," a whirlpool of dissent surrounding this argument becomes apparent. It is obvious that there is no generally held consensus on the nature of constitutions, especially when it

the proposition that private spheres of action that need to be protected can be distinguished from public spheres in which governmental intervention is justified. . . ."

⁷⁴ *Supra* note 48.

⁷⁵ J. Manwarning, "Bringing the Common Law to the Bar of Justice: A Comment on the Decision in the Case of *Dolphin Delivery*" (1987) 19 Ott. L. Rev. 413 at 435.

⁷⁶ *Supra* note 34 at 261: "This Court has repeatedly drawn attention to the fact that the *Charter* is essentially an instrument for checking the powers of government over the individual."

⁷⁷ Hogg, *supra* note 23 at 34-22.

comes to the *Charter*. For example, Robin Elliot and Robert Grant write,

the *Charter* does not contain a single vision; it portrays the state in both positive and negative terms, as an instrument for progressive change. . . . The *Charter* should not therefore be burdened by the preconceived notions.

While history and tradition should be reflected in the *Charter* interpretation, we need not cling dogmatically to the conventional image of constitutions just because it is comfortably familiar. [footnotes excluded]⁷⁸

But, were they asleep in Poli-Sci 100? Were Peter Hogg and Katherine Swinton wide awake and actively taking notes when the "clear" and "obvious" nature of constitutions was revealed?

The reader will have to excuse the attempt at humour, but it is a fallacy that jurisprudence should be built on vague notions of constitutionalism. This is a weak platform at best. This is not to say that the position is not well accepted in Canada. Rather, the point is that the argument is itself without a logical foundation, when used in the *Charter* context. Dale Gibson,⁷⁹ for example, points out that the individual versus state conception of constitutionalism has never existed in pure form in either the United States,⁸⁰ the United Kingdom, or Canada.⁸¹ Gibson is supported by Brian Slattery, who stresses the importance of reading the *Charter* itself, to determine its scope. He eschews vague references to other constitutional documents. He humorously notes that "claims that a particular horse has five legs [are] settled, not by reading the dictionary definition of horse, but by counting the legs."⁸² Donald Buckingham⁸³ suggests that we "count the legs" by taking a

⁷⁸ *Supra* note 43 at 473.

⁷⁹ *Supra* note 15.

⁸⁰ *New York Times Co. v. Sullivan* (1964), 376 U.S. 254 (U.S.S.C.).

⁸¹ For a recent example of this in Canada, see *Hill*, *supra* note 16.

⁸² B. Slattery, "Legislation" (1985) 63 Can. Bar Rev. 148 at 159.

⁸³ *Supra* note 36.

purposive approach to the analysis.⁸⁴ Again, the argument is that to determine the scope of the *Charter*, one needs to refer to the Canadian *Charter* and not, for example, to the United States *Bill of Rights*. Again, however, there is a lack of consensus on this key issue. Furthermore, at the Supreme Court we again see very little discussion or analysis before conclusions are drawn.

4. Floodgates—"Individual Autonomy"

The fourth justification on which current law is built is the "floodgates" argument. However, it is not widely relied upon, even by academics who favour the narrow application of the *Charter*. Yet, it is important to review (and to characterize as one of the four pillars) because it was so extensively relied upon in *Dolphin Delivery*.

Dolphin Delivery is clearly predicated upon the assumption that application of the *Charter* to the private sector would be a disaster. In fact, David Beatty⁸⁵ posits that paranoia over the private/public dichotomy led the Court not only to conclude that the *Charter* does not apply to purely private action, but also to the roundly criticized position that courts are not "government" for the purposes of section 32.⁸⁶

The Court drew heavily on an article written by Anne McLellan and Bruce P. Elman.⁸⁷ There, the authors apocalyptically spoke of the problems Canada would face if the *Charter* were applied to purely private action. Peter Hogg picked up on aspects of this (as did the Supreme Court in *McKinney*⁸⁸) when he wrote,

This would create an extensive new body of "constitutional tort law". . . [t]he existence of these remedies would vastly expand the role of the courts. The *Charter of Rights*, and the judicial review that inescapably accompanies its prescriptions, would be intolerably

⁸⁴ Discussed above in the section on "textual arguments," at Part Two, Section 2, and the discussion on the wording of sections 2, 15 and 51(1), which ring much broader than the narrow wording of section 32.

⁸⁵ "Constitutional Conceits: The Coercive Authority of Courts" (1987) 37 U.T.L.J. 183.

⁸⁶ *Ibid.*; Gibson, *supra* note 21; Godin, *supra* note 16; and Hogg, *supra* note 23 at 34-16.

⁸⁷ *Supra* note 48.

⁸⁸ *Supra* note 34.

pervasive, applying to the most intimate relationship.
[footnote excluded]⁸⁹

It is interesting to note that Robin Elliot and Robert Grant,⁹⁰ while sounding the floodgate alarm, are careful to separate it from the individual autonomy argument (ie., that allowing the *Charter* into the purely private sphere of human life would be unbearably restrictive and an affront to liberty). They first point out that an individual subject to the *Charter* would be able to argue privacy as part of his or her defence (ie., balancing privacy against the right of another to free expression). Such a position is not available to the government, operating in the public sector. Second, they state that in some cases, not applying the *Charter* could lead to a greater threat to personal autonomy. They challenge the myth that only the government threatens personal autonomy by arguing that similar threats exist in the private sector.⁹¹

And yet, Elliot and Grant do argue for a limited *Charter* on the pure policy position of the floodgates argument. Their concern is that the wide scope would increase the role of the court at the expense of our democratic institutions. They point out that, in addition to the anti-democratic sting, our courts are not equipped to legislate social policy wholesale.

Brian Slattery⁹² directly challenges the floodgates argument by pointing out that the absence of a threshold application test does not mean that there is no limitation on the scope of the *Charter*. Rather than sticking their fingers into the dam to protect against the rising waters of "private sector" *Charter* litigation, Slattery and Dianne Pothier⁹³ point out that a rights-based analysis would produce limitations on *Charter* application. These limits are developed depending on the particular right in question. For example:

11. Any person *charged with an offence* has the right

⁸⁹ Hogg, *supra* note 23 at 34-22.

⁹⁰ *Supra* note 43.

⁹¹ Of course this depends on the circumstances of a given case. This statement is not meant to imply that the government never threatens personal autonomy, rather that such a denial of liberty also occurs within the purely private sphere of human life.

⁹² *Supra* note 82.

⁹³ *Ibid.*; and Pothier, *supra* note 24.

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal [emphasis added];

15. (1) 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. . . . [emphasis added]

Should the following rights be applied on the same threshold as section 2(b)?

2. *Everyone* has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; . . . [emphasis added]

If so, why? The argument is that these rights clearly have limitations built in. For instance, section 11 is not going to be used to guarantee a child who has “allegedly” taken from the cookie jar without permission, the right to a trial before judge or jury. The right clearly has a limitation, namely being “charged with an offence.” This line of argument is consistent with the view of United States constitutional scholar Lawrence Tribe.⁹⁴ How better to determine the scope of the *Charter* than in the context of the specific right in question? Given the range of debate, it is apparent that there is no significant consensus in this area.⁹⁵

It is useful at this point to stop and reflect on what has been reviewed in this Part. This paper has not been trying to map out the private/public parameters, necessitated by a test which employs the term “government” as the threshold.⁹⁶ Rather, the focus has been on arguments used as justification for the test itself. Thus, the test in *Dolphin Delivery* is distinct from the reasons given for applying such a test. It is apparent that the lack of consensus on the four pillars is a primary reason why we are entering the second phase of

⁹⁴ L. Tribe, *American Constitutional Law*, 2nd ed. (Mineola: Foundation Press, 1988) at 1699.

⁹⁵ Gibson, *supra* note 15 at 219.

⁹⁶ *Dolphin Delivery*, *supra* note 33. Analysis of this test is conducted in Part Four of this paper.

the *Charter* application debate. What the paper hopes to show is that without asking the right questions, Canada is likely to pursue the "100 years of doctrinal confusion" Dale Gibson refers to as the hallmark of the United States "state-action" doctrine.⁹⁷

An attempt has been made to show how each of the four pillars is the subject of significant dispute,⁹⁸ and that none of them produce an argument which is complete. You might ask, so what? Is there not enough support by academics and judges to forget about the lack of logical foundation for the current *Charter* application tests? Until recently, this might have appeared to be the case. However, as discussed in the following Part, there is a new round of *Charter* application arguments and cases ongoing. In many instances, they are addressing the same questions that were not resolved in previous decisions. The flaw with the jurisprudence in this area is that the Supreme Court only argued, in any detail, the four pillars in two cases, namely: *Dolphin Delivery* and *McKinney*. Despite numerous cases attempting to define and refine the government actor test, the Supreme Court has yet to fully expound upon the background reasons for having such a test. There are cogent academic arguments on both sides of these issues, and yet only fleeting judicial comment in the two cases mentioned. The lack of dialogue at the Supreme Court level, and the lack of consensus among academics, is one of the reasons we are entering phase two of the *Charter* application debate. It is essential that the Court meet these issues directly.

In Gibson's terms, the Supreme Court of Canada has failed to do the job the drafters of the constitution left to it. Now the Court is going to have a second chance to explicitly define concepts central to the make-up of the Canadian state.

III. THE REEMERGENCE OF THE DEBATE

The law on *Charter* application is not only confusing and inconsistent, it is under constant academic and judicial attack.

⁹⁷ *Supra* note 15.

⁹⁸ See Crann, *supra* note 22 at 160, noting that "[i]n the final analysis, the academic debate has revolved around two competing visions of constitutionalism . . . [g]iven such a fundamental normative rift, it is not surprising that the result of the academic debate is rather indeterminative."

The critical nature of both the academic critique and judicial uncertainty is forcing the courts to reconsider issues fundamental to the *Dolphin Delivery* decision. That is, despite a decade of jurisprudence and many attempts to make the law in this area consistent, it has only become more and more eroded.⁹⁹ However, before highlighting the reemergence of this debate, it is useful to briefly state the current law regarding *Charter* application:

i) The *Charter* applies to government;¹⁰⁰

ii) "Government" actors (ie., not only the core of government but also delegated authority) are identified by a control test, not by the function they carry out or whether they appear to be government entities. The trick is to establish an institutional link to the Parliament or legislature;¹⁰¹

iii) The *Charter* does not apply to the private sector where there is no government presence;¹⁰²

iv) The *Charter* does not apply to judge-made law where this law regulates the actions between purely private actors,¹⁰³ although such law is to be developed in a manner consistent with the *Charter*,¹⁰⁴

v) The *Charter* does apply to the courts but not when the courts are resolving disputes between private parties.¹⁰⁵

This line of *Charter* development is consistent with classical liberalism.¹⁰⁶ That is, the *Charter* may apply in an area we refer to as

⁹⁹ See Godin, *supra* note 16 at 109, who writes that "[e]ven in light of the recent Supreme Court of Canada decisions . . . confusion continues as to when and how the *Charter* applies to litigation between 'private parties.' It is high time to revisit *Dolphin Delivery*"

¹⁰⁰ *Dolphin Delivery*, *supra* note 33.

¹⁰¹ Hogg, *supra* note 23 at 34-21.

¹⁰² *Dolphin Delivery*, *supra* note 33.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Dolphin Delivery*, *supra* note 33.

¹⁰⁶ For a more sophisticated look at this issue, see Yalden, *supra* note 73. Yalden concurs that the Court in *Dolphin Delivery* embraced the orthodox understanding of "rights" as a qualified conception of negative liberty. His arguments concerning

private, but only because the government is there, and it applies only against the government action. The focus is on the coercive power of the state. As such, democratic forces determine the scope of the *Charter* and, by corollary, they determine the scope of individual autonomy. Yet, rather than a glowing affirmation of democracy, this traditional model perpetuates the myth that the only serious threat to rights and freedoms comes from the involvement of government in our lives.

In terms of our earlier analysis, one might point out that despite the lack of logical or historical foundation for this test (ie., the four pillars), it has been in place for ten years. There is much to be said in favour of stability and certainty. Yet, recent judicial decisions would suggest that the law in this area is not only under attack by academics, but is also collapsing from within.¹⁰⁷

There are two areas which most significantly expose the weaknesses of the current test. The first is the issue of "legislative silence." In *Vriend* (on appeal to the Supreme Court of Canada),¹⁰⁸ the Alberta Court of Appeal, divided two to one on the issue of *Charter* application, ruled that the legislature's failure to include sexual orientation in the human rights code was in fact government action. Hunt J.A., dissenting (in the result but in the majority on the *Charter* application issue) wrote,

the purpose of the legislature's failure to protect homosexuals under the *IRPA* [*Individual's Rights Protection Act*, R.S.A. 1980, c. I-2] is to encourage or support the distinction that exists between homosexuals and other victims of discrimination that are protected by the *IRPA*.¹⁰⁹

The effect of getting past this threshold (section 32(1)) creates, for future cases, the potential for the *Charter* to be used in a more

possible solutions for the courts, in coming to grips with a Canadian vision of individual and community, are discussed in the following part of the paper.

¹⁰⁷ We are seeing the result of an illogical test built on myths and unconvincing arguments, as described by Benjamin Cordozo in *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 178: "The work of a judge is in one sense enduring and in another ephemeral. What is good endures. What is erroneous is pretty sure to perish. *The good remains the foundation on which new structures are built.* The bad will be rejected and cast off in the laboratory of the years." [emphasis added]

¹⁰⁸ *Supra* note 16.

¹⁰⁹ *Supra* note 16 at 641.

positive manner. Rather than reacting to governmental action in traditional terms, the *Charter* could be used to force government to act (although it must be noted that *Vriend* failed on the section 15(1) issue).

This is more than a semantic exercise of characterizing silence as action or non-action. It is a fundamental shift in the nature of Canadian constitutional law.¹¹⁰ Dianne Pothier wades into the argument by criticizing McClung's J. decision (in minority on the *Charter* application issue):

[t]he technical answer to that, it seems to me, is that section 32 does not require a legislature to choose to exercise authority; it applies to the legislature "*in respect of all matters within the authority of the legislature*". [emphasis added]¹¹¹

Although a legislature may choose not to occupy the field, this does not alter the scope of its authority.¹¹² This principle is analogous to the exclusivity doctrine in division of powers cases, and is of long standing in Canadian jurisprudence. For example, in *Union Colliery Co. v. Bryden*, [1899] A.C. 580 (P.C.), the Judicial Committee of the Privy Council affirmed that the scope of a government's authority is not determined by the scope of their legislation. Rather, powers are exclusive to the particular level of government.

¹¹⁰ In *Eldridge*, *supra* note 16, all three judges on the Court of Appeal found the underinclusiveness of the *Medical and Health Care Services Act*, S.B.C. 1992, c.76 to be government action, to the extent of not providing services for sign language. What is surprising is the sparse attention the court paid to the section 32 question. Leave to appeal was granted on May 9, 1996 by the Supreme Court of Canada.

¹¹¹ *Supra* note 16 at 115.

¹¹² Pothier, though, speaks only to situations where there is legislation in an area and not to a scenario of total absence of legislation. This qualification is an important rebuttal to those who criticize the positive use of the *Charter* as having an anti-democratic sting. Pothier, *supra* note 16, notes that "[a]lthough there are specific *Charter* provisions, such as minority language education rights in section 23, that expressly impose positive obligations on governments, the same could not easily be said about the *Charter* in general. In the equality context, however, the issue is more complex than a dichotomy between positive and negative rights. The fact that equality is by definition a comparative concept means that governmental obligations may arise because the government itself has chosen to occupy the field, but in a less than even-handed way." [footnotes omitted] See the discussion on the pluralistic nature of the *Charter*, at text accompanying note 132.

Therefore, when we speak of "authority," we refer to those things within legislative competence.

The ambiguous wording of section 32(1) leaves one in doubt as to whether this doctrine is or is not meant to operate in *Charter* litigation. When the drafters chose the words "within the authority of," they surely were aware of the meaning. Are the words "[t]his *Charter* applies" "to the Parliament and government" (or "to the legislature and government") sufficient to outweigh the use of the words "within the authority of?" If the intention of the latter was simply to extend application of the *Charter* from Parliament (or the legislature) to delegated authority, they could have written "and all actors within the authority granted by Parliament."

The point to be noted from the legislative silence cases is that the courts are themselves moving away from the *Dolphin Delivery* and *McKinney* vision of constitutional law. The effect of characterizing legislative silence as government action is a fundamental departure from an orthodox brand of constitutional theory. The importance of this issue was foreshadowed by Robin Elliot. He pointed out that accepting the legislative silence argument would alter the generally well understood negative nature of constitutional rights. He writes,

[i]f one accepts this premise, then there are no cases in which, in theory at least, the *Charter* will not apply, because counsel for A can always point the finger at government and attribute responsibility for B's *Charter* violation to it.¹¹³

Although accurately identifying the importance of this issue, Elliot failed to recognize the limitations within the *Charter* which preclude such a serious result flowing from a finding that, in some cases, legislative inaction can properly be characterized as government action. For example, in *Vriend* the issue failed on the section 15(1) test (not to mention that there is an additional section 1 backup). The legislative silence issue will be canvassed further in Part Four. The salient point at this stage is to be aware that the law in this area is unsettled, both in the academic and judicial arenas.

¹¹³ R. Elliot, "Scope of the *Charter's* Application" (1993) 15 *Advocates' Q.* 204 at 221.

The second area which exposes the weakness of the government actor test is the issue of applying the *Charter* to the common law,¹¹⁴ in cases as between purely private parties. Acceptance of the *Charter's* application under such circumstances is a direct contradiction to the position that the *Charter* only applies as against government action (legislative/executive). The most important declaration in this area came in the *Hill* case.¹¹⁵

This case involved the application of the common law rule of libel between purely private parties. The defence argued the right to freedom of expression (section 2(b)) under the *Charter*. Yet, the Court was faced with *Dolphin Delivery* and *McKinney*, and the desire to keep judge-made law, between private parties, away from *Charter* litigation. However, hard cases challenge old dogma. In this instance, the Court had a defendant who faced a limit on free speech due to the application of the common law rule of libel:

There is no government action involved in this defamation suit. It now must be determined whether a change or modification in the law of defamation is required to make it comply with the underlying values upon which the *Charter* is founded.¹¹⁶

The Court responded to the inevitability that it would have to develop judge-made law in a manner consistent with the *Charter*.¹¹⁷

¹¹⁴ See *B.C.G.E.U.*, *supra* note 64, where the common law power of injunction was found to violate section 2(b) of the *Charter* but was upheld by a traditional section 1 analysis (in the specific context of criminal contempt of court); *R. v. Salituro*, [1991] 3 S.C.R. 654, where a common law rule of evidence was held to be inconsistent with *Charter* values; *R. v. Swain*, [1991] 1 S.C.R. 933, where a common law criminal procedure rule was found to violate section 7 of the *Charter*. A traditional section 1 test was applied, balancing the individual rights to liberty versus societal interests in prosecuting crime, finding in favour of the individual; *Dagenais*, *supra* note 16, where a common law rule regarding publication bans was subject to the *Charter* and again the Court balanced the interest of the individual versus the purpose of the common law rule. It is important to note that these cases did not involve the application of the common law between purely private parties.

¹¹⁵ *Supra* note 16.

¹¹⁶ *Supra* note 16 at 1164.

¹¹⁷ See generally M. Smith, *Jurisprudence* (Columbia University Press, 1909) at 21, stating that "[t]he common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively . . . [t]he rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in the great laboratories of

The Court attempted to deal with section 52(1) and the jurisprudential baggage of *Dolphin Delivery* by semantically claiming that the *Charter* did not “apply” to the common law. Rather the common law had to be developed in a manner consistent with *Charter* values.¹¹⁸ The concern was that the *Charter* must not be applied as between private parties. The Court went on to say:

[t]he *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enshrined in the *Charter*.¹¹⁹

Yet, flowing out of this expansionist language, the Court pulled back, warning that individuals do not owe constitutional duties to one another. Towards these ends, the Court stated the obvious point that the *Charter* (in these circumstances) only operates in relation to the common law. It is difficult to see how this was much of a qualification. For example, if what was being challenged was the *Libel and Slander Act*, R.S.O. 1990, c. L. 12, the issue would be the same. Specifically, the *Charter* would be applied against the law in question (consistent with the orthodox view of constitutionalism). As such, the only remaining qualification is the semantic difference in applying *Charter* rights (statute law) as opposed to *Charter* values (common law - private parties).

the law, the courts of justice . . . if a rule continues to work injustice, it will eventually be reformulated.”

¹¹⁸ On a practical level it appears as though the Court has decided to follow United States jurisprudence. In *Shelley v. Kraemer* 334 U.S. 1 (1948), the court held that a voluntarily entered covenant in a deed, prohibiting the sale of land to people of certain social backgrounds enforced by a lower court, was reviewable state action. Note, H. Friendly, “The Public-Private Penumra—Fourteen Years Later” (1982) 130 U. Pa. L. Rev. 1289 at 1295, observing that “the action of its courts in enforcing that rule, that was the unconstitutional state action in *Shelley*.” In *New York Times v. Sullivan* 376 U.S. 254 (1964), (distinguished on other grounds), the judge-made rules of libel were considered state action. Otis, *supra* note 72 at 89, writes “[i]n 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.”

¹¹⁹ *Hill*, *supra* note 16 at 1169.

The Court went on to engage in a section 1-type balancing act. The Court recognized, as it does with "government action," the inevitability of competing values. There was an attempt to phrase this in terms of *Charter* values versus the principles which underlie the common law. In reality, however, the court juxtaposed the individual right to free speech with the individual interest in personal reputation. The Court used the word "clash"¹²⁰ appropriately, since this was a clash of human values, not *Charter* versus common law. Freedom of expression was weighed against the value of reputation. After balancing these interests, the Court concluded:

the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it.¹²¹

The Court, it seems, tried to cast *Charter* values in a language which is looser than *Charter* rights. It did this by pointing out that the challenge applied only as between the individual and the common law, and by altering the onus and flexibility in the section 1 balance. Since there was no government presence, the onus remained on the party challenging the common law. By themselves, these rulings do not soften the effect of the decision, and it appears that the *Charter* does apply as between private parties (with only minor modifications).¹²² Likewise, the difference between *Charter* values and *Charter* rights remains confusing, unless this is just a recognition of the different burdens and levels of flexibility in balancing the rights and freedoms of private individuals, as opposed to a situation where one of the parties is government.

Flowing out of *Hill* we see the inevitability that "private law," in future cases, will be developed by the *Charter*. The whole decision rings of a positive approach to constitutional law; as Cory J. (writing for the majority) noted,

¹²⁰ *Hill*, *supra* note 16 at 1172.

¹²¹ *Ibid.* at 1188.

¹²² C. Schmitz, "Hill Expands Scope to Challenge Common Law Rules" [11 August 1995] *The Lawyers' Weekly* 2 at 2, "The reality of that is that really the common law does have to apply with the *Charter of Rights*," Prof. Hogg said. While the door is now open to *Charter* challenges to all manner of common-law rules in cases not involving government action, 'we don't know quite how that will work itself out yet,' he said."

[t]he *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enshrined in the *Charter*.¹²³

If these *Charter* "values" are different then *Charter* rights, then we have a two-tiered system of rights.

What then is the state of the law? If the scope of the *Charter* is determined by the presence of some government involvement (legislative/executive), then individual zones of privacy are developed where government is not (Hogg's residual category¹²⁴). However:

- i) We greatly expand this residual category where we make the common law subject to *Charter* scrutiny; and
- ii) We potentially obliterate the zone where we use the *Charter* to force the government to legislate.

As Paul D. Godin points out in a recent article,

Hill and *Dagenais* go far toward erasing the unfortunate public-private distinction that has existed up until now in *Charter* jurisprudence.

Courts have restricted the application of the *Charter* to the common law in the past largely because of the perception that the *Charter* would cause a major upheaval of the common law. . . . If the gap between the *Charter* and the common law is large, evolution of the common law is needed. If the gap is small, the concern about a flood of common law *Charter* litigation is unwarranted. [footnotes omitted]¹²⁵

Where do these recent collapses and attacks leave us? Are we back where we started ten years ago? Not quite. This time the Court, in asking whether the *Charter* should apply only as against

¹²³ *Supra* note 16 at 1164.

¹²⁴ Hogg, *supra* note 23 at 34-21.

¹²⁵ *Supra* note 16 at 140-141.

government, will have the advantage of not relying on old dogmatic arguments, such as the nature of constitutions.¹²⁶ It appears that the government actor test is without foundation and is inoperative on a practical level. Like it or not, we are right back in the middle of the debate, and the Supreme Court of Canada has another crack at this question in the *Eldridge* and *Vriend* cases.

IV. WHERE DO WE GO NOW?

Before engaging in a search for "solutions," it is important to establish *why* the law developed as it has. Throughout all the uncertainty and semantics, it is still possible to identify a golden thread running through the case law flowing from the Supreme Court of Canada on the issue of *Charter* application. At its most fundamental level, the Court is engaged in the political issue of defining and insulating a zone of privacy from *Charter* litigation.

The jurisprudential primacy given to this desire has led the Court, early in the life of the *Charter*, to adopt and apply a general threshold test for all *Charter* rights and freedoms (section 32(1)). The desire has continued to be an impetus for the Court to cling to the heavily criticized government actor test. In its desire to protect this vaguely defined zone, the Court has unfortunately rendered some poor decisions.

For example, the Court's continued assertion that the *Charter* does not apply to the common law as between private individuals led to the distinction in *Hill* between *Charter* rights and *Charter* values. It appears that this was not grounded in logic or a literal reading of section 32(1), but was the Court scrambling to balance section 52(1) with a desire to protect the zone of privacy,¹²⁷ a zone

¹²⁶ See generally R. Devlin, *The Charter and Anglophone Legal Theory* (Faculty of Law, Dalhousie University, 1996) [unpublished] at 57, stating that "[i]n sum, what these various examples of working theory suggest is that contemporary Canadian jurists believe that legal doctrine matters, but that doctrine is not simply a matter of rules. Rather, legal doctrine is inevitably dependent upon juridically significant background assumptions and social visions and that the role of the legal theorist is to engage in the articulation of these assumptions and visions, to translate needs and aspirations into juridical form."

¹²⁷ Hogg, *supra* note 23 at 34-22, where Hogg raises the concern over allowing the *Charter* to apply in purely private actions not governed by statute. "This would create an extensive new body of 'constitutional tort law' The Charter of Rights,

where human activity would be free from *Charter* attack and litigation. Those who speak apocalyptically of life without a strict threshold test, speak of situations where, for example, a homeowner could not deny strangers entry into his or her home to scream out political beliefs, since this would be a violation of free expression under section 2(b). They argue that the only way to protect the *Charter* from being used in such a perverse manner is to maintain a rigid threshold test, in essence, using a negative liberty template to weed out improper actions.

In defence of the government actor test, it is argued that this is not about drawing the public/private line, rather it is about applying the neutral principle of individual versus state. As such, the *Charter* is said to only apply against the "government." It is pointed out that since government is involved in many activities we consider "private," by corollary the *Charter* sometimes applies to the private sector. It is worth pointing out the obvious fact that in these cases, the *Charter* still only applies as against government action. So when speaking of the "zone," the paper is referring to Hogg's "residual category"¹²⁸ in the private or public sectors, where the democratically elected government has chosen not to go. This is the area that is outside the scope of the *Charter*.

This fiction begins to break down, however, when one looks at the operation of the government actor test in its practical application. For example, the Court is willing to apply the *Charter* to the common law as between private parties (at least by developing the common law in a manner consistent with the *Charter*).¹²⁹ Clearly this is within the private sector but is not a response to legislative action. Nonetheless, the scope of the *Charter* is expanded (the shrinking "residual category" must subtract out the vast areas where the common law applies). In addition, some courts are characterizing legislative silence as government action.¹³⁰ No longer can it be said that the scope of the *Charter* shadows legislative/executive action. This residual category, in terms of being characterized as a neutral principle, is a fiction. There is a

and judicial review that inescapably accompanies its prescriptions, would be intolerably pervasive, applying to even the most intimate relationship." [footnote excluded] Also see Beatty, *supra* note 85.

¹²⁸ Hogg, *supra* note 23 at 34-21.

¹²⁹ Hill, *supra* note 16.

¹³⁰ Eldridge, *supra* note 16; and Vriend, *supra* note 16.

privacy line to be drawn, but this involves a political choice by the courts.

This is demonstrated in the *Hill* (common law) and *Eldridge* (legislative silence) cases. They are logical decisions which seem to respond to academic consideration of the issues, as well as unique and challenging fact situations before the bench. These cases fundamentally expose the fiction of the government actor test. The test is not a neutral principle. Because the role of the legislature in our lives is all pervasive, there are positive expectations on the state (recognized by Canadian society and certain provisions of the *Charter*). Characterizing the present threshold as responding only to negative liberty is simply not accurate.

Canadian courts are no longer focusing nicely and neatly on government action. The continued use of a threshold after *Hill* and *Eldridge* can only be the result of the political desire to draw a line between what is within the zone of privacy and what is not. If the goal was to create a neutral test which could objectively define public from private, by focusing on the powers exercised and delegated by the legislatures, then the Court has failed. In essence it is already sliding down the slippery slope. On its way down, it is attempting to draw the public/private line.¹³¹

Why does the threshold test not work? Quite simply, it is because the Court is asking it to perform a task which is too great in scope. Canada is a complex society, containing many notions of liberty. For example, can the traditional individual versus state brand of liberty be said to spring from the same fountain of liberty which spawned the welfare state? In addition, we live with a modern *Charter of Rights*, which itself has a range of rights and freedoms which span from negative liberty to positive liberty. It is apparent that creating consensus on one notion of liberty is impossible (as well as not being desirable). But when the Court creates a threshold test, a gatekeeper function for the *Charter*, it is doing just that. This relies upon just one vision of liberty. The confusion seems to be over the fact that the Court is focusing on

¹³¹ See Howse, *supra* note 58 at 258: "If only by approving the applicability of the *Charter* to human rights codes in cases such as *Blainey*, the Supreme Court has made the capacity to draw principled public/private distinctions indispensable to constitutional adjudication. Formalistic distinctions, such as those employed in *Dolphin*, do not adequately respond to the task."

developing a single vision of liberty, which should not be the issue. The struggle really is over the two competing forces in the *Charter* application debate:

- i) The desire to give full breadth to all the rights and freedoms contained in the *Charter*, versus
- ii) The desire to protect a zone of privacy, keeping this free from *Charter* litigation/interference.

It is with these two competing forces in mind that both sides in this debate take up their positions. The following is the environment this balancing act occurs in.

It has long been recognized that Canada is a pluralistic society:¹³² there is no single vision of liberty. While the classical liberalism of individual versus state is one of the threads of Canadian society, it is not the only one. Although this essay is not an exercise in sociology, some elementary observations can be made.

First, it can be argued that Canada does not have a pervasively negative view of government.¹³³ Second, for a very long time, Canadians have looked to government to get involved in their lives, accepting government regulation as a way to produce a better society. This was recognized by E.R. Hopkins in 1939 when he wrote,

[i]n democratic countries the last fifty years have seen the attempted working out of a new theory of government which, while repudiating the various forms of state idolatry elsewhere prevalent, contemplates the co-functioning of amelioration and control in part of the state and self-interested action on the part of the individual. . . on the positive or enlarging side, it [the state] seeks to satisfy the essential wants of the many, to

¹³² For example, see Yalden, *supra* note 73 at 147, arguing that "[b]ecause the language of rights—a language that places boundaries between the private and the public or between the individual and society—has always been less rigid in Canada than in the United States, this emerging vision is much better equipped to move beyond the artificiality of these barriers than is the language of hard-edged rights, of rights as trumps. . . ."

¹³³ Slattery, *supra* note 82.

provide facilities whereby the ill effects of poverty, sickness, old age, crop failure, inadequate housing and unemployment may be insured against or otherwise guarded against . . . *Judicial law has not escaped the effects of this new theory*. . . [emphasis added]¹³⁴

This principle was picked up by Bora Laskin in an article he wrote in 1959 discussing various categories of "liberty" in Canada.¹³⁵ Having spoken of legal and political liberty in the classical sense of individual versus state, he went on to identify a more recent strand in Canadian society:

liberty in a human rights or egalitarian sense. Involving as this has, positive state intervention to secure such things as equality of employment opportunity or of access to public places without discrimination. . . it is, in a sense, the antithesis of the economic individualism that deprecated state interference in business or social relations.¹³⁶

The lasting nature of this characterization of Canadian society is illustrated by Neil Finkelstein's article on "Laskin's Four Classes of Liberty."¹³⁷ His point is that Laskin's view of egalitarian liberty called for a more positive governmental presence than for political and legal liberty. This is important to our analysis because this fourth category of liberalism actually establishes a positive burden on the state to act.

What should be taken away from this is that Canada, as a pluralistic society, has a range of views on liberty. Some of these cannot be categorized in classical negative terms. Indeed, some of these view the role of government very positively.

In addition, the *Charter* similarly casts rights and freedoms along a spectrum of positive and negative liberties. As Slattery

¹³⁴ E. Hopkins, "Administrative Justice in Canada" (1939) 17 Can. Bar Rev. 619 at 626-627.

¹³⁵ B. Laskin, "An Inquiry Into the Diefenbaker Bill of Rights" (1959) 37 Can. Bar Rev. 77. It should be noted that having a positive view of liberty does not necessarily mean one wants this enforced through the constitution (as opposed to the political process). This is not to imply that Laskin was in any way giving the impression that the courts should be used in such a way, especially since this article was written in the pre-*Charter* era.

¹³⁶ *Ibid.* at 81.

¹³⁷ N. Finkelstein, "Laskin's Four Classes of Liberty" (1987) Can. Bar Rev. 227.

points out, the *Charter* is not rooted in any antagonism toward government.¹³⁸ As noted in the first part of this paper, many academics are quick to point out that certain sections of the *Charter* are written in very positive language.¹³⁹ It can be seen that some of the forces recognized by Laskin are also evident in the *Charter*. These are:

Legal:

10. Everyone has the right on arrest or detention. . .
11. Any person charged with an offence has the right. . .

Political:

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Egalitarian:

15 (1) Every individual is equal before and under the law and has the right to the equal protection and 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.

The notion that there is more than one stream running through the *Charter* is easier to accept when one recalls that this was the product of political compromise. To brand the *Charter* a 19th century document, as some do,¹⁴⁰ simply ignores its history. Taking the Laskin typology (that this brand of liberty requires state action) one step further, it can be argued that since egalitarian liberty is reflected in various sections of the *Charter*, a court, when applying these sections, has a positive duty to intervene.

¹³⁸ *Supra* note 82 at 161.

¹³⁹ See, e.g., Buckingham, *supra* note 36; Gibson, *supra* note 15; Elliot, *supra* note 113; and Slattery, *supra* note 82.

¹⁴⁰ See e.g. Petter, *supra* note 11.

This sub-section concludes by highlighting the point that both Canadian society and the *Charter* are pluralistic and as such cannot be pigeonholed into a purely negative theory of liberty. The Court is still faced with the competing forces of giving full breadth to the *Charter* while protecting an individual zone of privacy. It has not been the intention of this paper to discredit the legitimacy of either one of these forces. Rather, it has been to show the context in which both of these must be balanced.

How then should the Court go about creating this balance? As Parts Two and Three demonstrated, there is nothing inherent in the *Charter* which calls for a threshold approach, and it is for that reason that the current attempt by the Court to apply a threshold is under attack.¹⁴¹ This recent round of attack is not simply the result of setting a threshold in classical liberal terms (missing much of what Canadian society and the *Charter* call for). The threshold approach to determining the scope of the *Charter* is inherently flawed,¹⁴² since using a threshold invariably involves setting a level.

The level in this case is a particular brand of liberty. For example, while expanding section 11 into areas without government presence would, in most cases, be a mistake (ie., parent/child disciplinary matters), it is also a mistake to limit equality rights only as against government since much inequality exists in Hogg's "residual category." Although human rights legislation covers this "zone," and this legislation is subject to the *Charter*, there still must be a positive approach to *Charter* litigation for inequalities in the zone to be covered, since traditionally, the *Charter* only applies to action, not inaction. To understand the gap that exists between Hogg's residual zone, human rights legislation and a true guarantee

¹⁴¹ See *Eldridge*, *supra* note 16. The position argued in this paper might be criticized as being simplistic, in that the legislation in this case is being treated as the threshold. However, the legislative silence issue arises since what was being challenged was the state's failure to provide funding for sign language interpretation services. In essence, the challenge was to the failure of the government to provide such services. The Court allowed this to pass section 32(1) and launched into a section 15(1) analysis.

¹⁴² As noted by A. Brownstein, "Constitutional Wish Granting and the Property Rights Genie" (1996) 13 Constitutional Commentary 7 at 63: "Both arguments, however, miss an essential point about the nature of rights. The range of interests recognized and protected as rights by the constitutional case law is too broad and the nature of those interests is too varied for rights to be protected under any one set of universal principles."

of equality, one needs to focus on the difference between *Blainey v. Ontario Hockey Association*¹⁴³ (permissive legislation allowing discrimination to occur) and *Vriend* (failure to include, or "gaps" in the human rights act).¹⁴⁴

The problem with the threshold is made more acute when the Court awkwardly tries to maintain a 19th century brand of constitutional theory. A similar point is recognized by U.S. constitutional scholar Lawrence Tribe:

In resolving state action questions, therefore, the Court has not been able to resort to a unified, affirmative theory of liberty in order to reconcile the tension between the premise of the state action requirement, or to decide when government tolerance of private conduct amounts to "state action." Not surprisingly, therefore, many of the Court's recent state action decisions, insofar as they

¹⁴³ (1986), 14 O.A.C. 194.

¹⁴⁴ *Supra* note 16. But see *Haig and Birch v. The Queen in Right of Canada et al.* (1992), 9 O.R. (3d) 495 (C.A.) [hereinafter *Haig*]; and D. Pothier, "Charter Challenges to Underinclusive Legislation: The Complexities of Sins of Omission" (1993-94) 19 *Queens's L.J.* 161 at 180-81: "How did the Court in *Haig*, specifically involving the failure to include sexual orientation as a prohibited ground of discrimination in the *Canadian Human Rights Act*, deal with . . . [s.32(1)]. Both the Ontario High Court and the Court of Appeal avoided the issue entirely, and proceeded to find and remedy a s.15 violation. Was this a failure to recognize the issue, or a deliberate strategy of avoidance, hoping that a thorny issue would just go away if ignored? It is difficult to say but sooner or later the issue will need to be confronted head-on." [footnotes excluded] Yet, "head-on" involves a recognition of positive liberty.

For an example of this "head-on" approach, see *Taylor v. Rossu*, [1996] A.J. No. 918 (Q.B.)(Q.L.), where Power J. writes,

The fact that the Alberta Legislature has omitted common law spouses in the *Domestic Relations Act* is sufficient to engage the *Charter* . . . I agree with the approach of Hunt J.A. in *Vriend* . . . where she states:

A third approach is that legislatures cannot avoid a s.15(1) analysis merely because they have failed to extend a protection or benefit to a particular group. In other words, a failure to legislate, (or legislative silence or omission), can of itself attract *Charter* scrutiny.

. . . The exclusion of common law spouses from the meaning of the word "spouse" is not a reasonable limit and is not justified in a free and democratic society."

purport to articulate and apply an autonomous state action doctrine, appear peculiarly unpersuasive.

If we accept the fact that we cannot, with a threshold test, balance the competing forces of giving full breadth to the *Charter* with protecting a zone of privacy, do we give up on the idea of limiting the scope of the *Charter*? Not necessarily. We can develop limits in a manner which is consistent with the Canadian legal tradition of gradual change. As noted by Crann, "[post-liberal theory] . . . must be capable of taking root in existing Canadian legal traditions and, at the same time transcending them."¹⁴⁵

This can be done by taking a rights-based approach to determining the scope of the *Charter*.¹⁴⁶ For example, determining the scope of egalitarian liberty should be done in the context of section 15, and not by setting a threshold at a level more appropriate for section 11. It is possible to allow these competing streams to develop, by adopting a flexible approach. This will give the court the opportunity to carefully construct this modern vision of liberty on a case by case, right by right, basis.

A rights-based approach will not produce one acceptable global theory of liberty.¹⁴⁷ However, it will allow the Court to develop the *Charter* to its full breadth while operating in a manner consistent with Canadian legal history.

1. The *Eldridge* Example

The rights-based approach has been adopted by many Canadian academics.¹⁴⁸ The recent decision of the British Columbia Court of

¹⁴⁵ *Supra* note 22 at 171.

¹⁴⁶ Brownstein, *supra* note 142 at 54, stating that "ultimately, the only truly universal principle that applies to all constitutional rights is the need to define and defend the protection provided the right on its own terms."

¹⁴⁷ C. Stone, "Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?" (1982) U. Pa. L. Rev. 1441 at 1442, noting that "there is not so much one 'public/private' dichotomy as several."

¹⁴⁸ For example, Slaterry, *supra* note 82 at 154, says, "[i]n short, no uniform answer can be given to the question whether the *Charter* regulates private relations. All that can be said is that the *Charter* does not contain a general rule exempting them from its effects. The true issue, then, is not whether *Charter* rights en bloc affect such relations but whether specific *Charter* rights do so . . . the argument should be addressed to the particular provision in question, and not to the abstract (and ultimately unanswerable) issue of the *Charter's* scope as a whole."

Appeal in *Eldridge* (on appeal to the Supreme Court of Canada) is an example of this approach. This case involved a challenge to the *Hospital Insurance Act*¹⁴⁹ and the *Medical and Health Care Services Act*¹⁵⁰ of British Columbia. The applicants were deaf patients who challenged the acts under section 15(1) of the *Charter*. The basis for this was the absence of funding for sign language interpretation services. Essentially the challenge was to legislative silence, or failure of the government (legislature and hospital) to provide such services, while hearing patients were able to receive full medical services.

Hollinrake J.A. (Cumming J.A. concurring) discussed how the *Charter* did not apply to the hospital, since the facts were on all fours with *Stoffman v. Vancouver General Hospital*.¹⁵¹ However, with regard to the benefit of the law challenge against the *Medical and Health Care Services Act*, there was no discussion of the section 32(1) issue and no threshold, in a sense. The Court launched immediately into the section 15(1) analysis. Perhaps not by design, but in effect, this was a rights-based approach (although finding no right in the section 15(1) analysis).

It is important to recognize that the Court was able to define the scope of the *Charter* within the section 15(1) analysis. The rights-based approach gave the Court greater flexibility in its analysis:

In my opinion the submissions of the appellants would take us beyond anything yet provided for in existing equality rights jurisprudence. They submit that s.15 be interpreted in such a manner as to effectively impose on the government a positive duty to address all inequalities when legislating benefits in the area of medical services. That, in my opinion, is equivalent to imposing an obligation on the government of ensuring absolute equality. With respect, for the reasons given above, I do not think that s.15 imposes such an obligation.¹⁵²

The Court talks about positive rights (although rejecting them on section 15(1) grounds) and interference with the democratic

¹⁴⁹ R.S.B.C. 1979, c.180.

¹⁵⁰ S.B.C. 1992, c.76.

¹⁵¹ *Supra* note 35.

¹⁵² *Eldridge*, *supra* note 16 at 175.

process. The important point is that, although there was, in effect, no section 32(1) threshold, the floodgates did not open.¹⁵³ Rightly or wrongly (in terms of defining the section 15(1) liberty in question¹⁵⁴), they developed the *Charter* application/scope analysis at the level of the right in question.

Further to this is the decision of Lambert J.A. (concurring in the result) who did not discuss section 32(1) at all! Lambert went directly into section 15(1) and found a *prima facie* violation. In the section 1 analysis there was considerable discussion of budgetary constraints on government, judicial inability to allocate scarce resources, and a general tone of judicial restraint.

This highlights the fidelity of the rights-based approach. The simple fact is that in addition to limiting the scope of the *Charter* at the level of the right in question, there is also the section 1 back up, where issues relating to democratic government are more appropriately discussed. This is a backstop for those concerned about judicial encroachment on the democratic process, a constitutionally created mechanism for balancing the interests of society with those of the individual.

This case shows the potential benefit of a rights-based analysis, which allows the court to fashion liberty in a flexible manner, on an individual basis, without choking the pluralistic range of rights and freedoms in the *Charter*. This is the best way to balance the two competing streams. Perhaps the British Columbia Court of Appeal started us down the road to what Robert Yalden asked of the Supreme Court of Canada:

The challenge that our courts face, and that some justices of Canada's Supreme Court have sought to meet, is to explore the non-paternalistic form of positive liberty, to make use of a distinctly Canadian language of rights to overcome an unduly rigid distinction between public and

¹⁵³ Another element which will prevent a flood of litigants is the nature of the litigation process itself. For example, in the *Vriend* case, *supra* note 16, Delwin Vriend was fired in January 1991 and the Alberta Human Rights Commission made its decision in June 1991. The Court of Queen's Bench of Alberta came to its decision in 1994. The Alberta Court of Appeal came to its decision in February 1996. This is not an environment which encourages individuals to start frivolous actions.

¹⁵⁴ For a critique of the Court's decision in relation to the section 15(1) issue, see Pothier, *supra* note 16.

private spheres, and yet remain true to the orthodox vision's most profound insight: that is, the importance of enabling individuals to lead dignified and rewarding lives, of enabling them to pursue their own good in their own way.¹⁵⁵

It is interesting that this approach occurred in a case which failed on the section 15(1) issue. The lack of a threshold test did not give way to an activist court. The new approach to *Charter* application may not produce consensus on liberty, but it will provide the court a better environment and opportunity to fashion the various streams of liberty, on a case by case basis.

V. THE SOUTH AFRICAN EXAMPLE

With the plethora of Canadian and U.S. cases on this subject it may seem strange that the paper now shifts its focus to the South African context. However, the recent case of *De Klerk v. Du Plessis*¹⁵⁶ from the South African Constitutional Court exposes and highlights many of the same arguments which have occurred in Canada over the last ten years. This case is particularly applicable to the Canadian context, since the Court itself relies heavily on Canadian and U.S. experiences.

Specifically however, this case is being used because it reflects the utility in approaching the issue of *Charter* application in the manner suggested in this paper. That is, the task is to recognize that the engine of the application debate is politics, that the test developed by the Court is analytically separate from the reasons for creating and applying the test, and, when one unpacks the various "reasons" and analyses them individually, it becomes apparent that these do not breed consensus. The point is that these arguments are insufficient ground on which to build jurisprudence. The focus of analysis should be on producing the best test, one which serves the desire to give full breadth to the constitution while protecting a zone of privacy, rather than adhering to vague, dogmatic recollections of a history which never happened or a theory of

¹⁵⁵ Yalden, *supra* note 73 at 155.

¹⁵⁶ [1996] S.A.J. No. 10 (QL) [hereinafter *De Klerk*].

constitutionalism which did not exist at the time our *Charter* was drafted.

The facts of *De Klerk* involve the application of the common law doctrine of defamation. The defendants to the action were the editor, owner, journalist and distributor of a newspaper called the *Pretoria*. The plaintiffs Gert de Klerk and Wonder Air Limited were suing the defendants as a result of articles written in the *Pretoria*. The defence tried to rely on the Constitution. The trial judge, Van Dijkhorst, transferred the matter to the Constitutional Court on two grounds. Only the second ground involved the determination of the scope of application of constitutional rights and freedoms.¹⁵⁷

With respect to the second ground of the reference, it is possible to summarize the seven written decisions into two competing streams. The first is given by Kentridge J. and concurred with in the result by Chaskalson P., Langa J., O'Reagan J., Mahomed DP., Ackermann J., Makgoro J., and Sachs J. This approach is consistent with *Dolphin Delivery* and *Hill*. Specifically, the Court applied the constitution to this dispute (common law as between two private parties) but only "indirectly."¹⁵⁸ The other line of decision is given by Kriegler J. and concurred in result by Didcott J. (and partially in result by Madala J.), finding for a direct application¹⁵⁹ of the constitution to the common law (as between

¹⁵⁷ *De Klerk*, *supra* note 156. The trial judge used the terms vertical and horizontal to summarize the nature of the debate. Kentridge AJ. picked up on this and defined the terms as follows: "The term 'vertical application' is used to indicate that the rights conferred on persons by a Bill of Rights are intended only as a protection against the legislative and executive power of the state in its various manifestations. The term 'horizontal application' on the other hand indicates that those rights also govern the relationship between individuals, and may be invoked by them in their private law disputes."

¹⁵⁸ *De Klerk*, *supra* note 156. Kentridge AJ. explains the indirect application principle in the following terms, saying that it "does not have a general direct horizontal application but that it may and should have an influence on the development of the common law as it governs relations between individuals." There is also a strong emphasis on the incremental nature of such change in the common law, nothing akin to striking down the law.

¹⁵⁹ *Ibid.* Madala J. explains the direct application of the Constitution to the common law in the following way: "In my view, it is the task of the Supreme Court to oversee this development. The law is always changing. The Supreme Court has always participated on an active basis in the adjudication of the common law rules."

private parties). It is interesting, and consistent with the Canadian experience, that the various sides to the "big picture" debate (indirect versus direct application) have different views on the democratic process. For example, Sachs J. (indirect camp), writes:

[h]ow best to achieve the realization of the values articulated by the Constitution, is something far better left in the hands of those elected by and accountable to the general public, than placed in the lap of the courts.¹⁶⁰

This faith in the democratic system's ability to effect change and to be the engine for a new and better South Africa is not shared by Madala J. (direct camp, concurring in part with Kriegler J.):

Ours is a multiracial, multicultural, multilingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. . . . In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels.¹⁶¹

As in the Canadian context, these underlying beliefs (about the democratic process) are the undercurrent to the analysis. That is, arguments on history, text, etc., flow from conclusions already formed concerning desired forms of government.

Although not written in such a circular fashion, these judgments, in effect, approach the traditional arguments from these conclusions. The paper will now analyze the arguments made to support the conclusions drawn on the vertical/horizontal issue. The point of this comparative exercise is to point out the lack of solid ground in these traditional grounds.

1. Historical Arguments

Those in the indirect camp argue, to varying degrees, the historical record. For instance, Kentridge J. (Chaskalson J., Langa J., and O'Reagan J. concurring) argue that there is no history calling for a horizontal application.¹⁶² In the same camp, Ackerman J. and Sachs

What is now required of it is that in disputes between private individuals it should balance their competing rights as envisaged in the Constitution." This approach does not call for incrementalism or a softer version of judicial review.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *De Klerk, supra* note 156.

J. more strongly rely on the historical record to conclude that the constitutional history clearly precludes a horizontal application. For example, Ackerman J., states "[d]irect application . . . could not have been intended by the drafters."¹⁶³

Out of the direct application camp, a polar opposite conclusion is drawn from the "historical analysis." Kriegler J. notes that the intent of those who created the Constitution must have been such that they were "familiar with the stark reality of South Africa and the power relationships" He concluded that their intent was never to limit the Constitution to vertical application.

2. Textual Arguments

The recurring pattern of inductive analysis continues here with judges drawing opposite conclusions on the "clear meaning" of the text. For the indirect camp, the position (except for Mohamed DP.) can be summed up by Ackermann J.:

For the reasons given by Kentridge AJ in his judgment and those advanced above, the text of the Constitution, properly construed, strongly favours the conclusion that the direct horizontal application of Chapter 3 to private legal relations is not intended.¹⁶⁴

Kentridge AJ. argues that the lack of clear wording, to the effect that the Constitution applies horizontally, means that it was not intended to do so: "Had the intention been to give it a more extended application that could have been readily expressed."¹⁶⁵ Meanwhile, Kriegler J. argues that had the intent been to exclude horizontal application, it should have been made explicit: "It is common cause that it nowhere says that Chapter 3 governs only the relationship between the state and the individual."¹⁶⁶ He goes on to say, "[i]f indeed the drafters had such a major constraint in mind, why did they not say so? Instead they wax expansive, leaving it to the microscope of a 'verticalist' to pick up hidden clues."¹⁶⁷ Kriegler J. draws the opposite conclusion from Ackermann J. in the textual analysis:

¹⁶³ *De Klerk*, *supra* note 156.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

My reading of Chapter 3 gives to the Constitution a simple integrity. It says what it means and means what it says The fine line drawn by the Canadian Supreme Court in the *Dolphin Delivery* case . . . between private relationships involving organs of state and those which do not, have no place in our constitutional jurisprudence.¹⁶⁸

The Court is clearly flip-flopping on the "clear meaning" of the text.

3. Nature of Constitutions

Not surprisingly, both sides stick to their positions in the "nature of constitutions" argument. Kentridge J., for example, states, "[e]ntrenched Bills of Rights are ordinarily intended to protect the subject against legislative and executive action. . . ." On the other hand, Kriegler J. and Madala J. put far less weight on comparative analysis and vague notions of the proper role of a constitution.

4. Floodgates

The Kentridge J. group, arguing for indirect application, is quick to sound the floodgate alarm. Kentridge warns of a widely expanded role for the courts,¹⁶⁹ and Sachs J. warns of the serious effect this would have in terms of hamstringing the legislature. The inconclusive nature of this argument is attacked by Kriegler J.:

The second point concerns a pervading misconception held by some and, I suspect, an egregious caricature propagated by others. That is that so-called direct horizontality will result in an Orwellian society in which the all powerful state will control all private relationships. The tentacles of government will, so it is said, reach into the marketplace, the home, the very bedroom. . . . That is nonsense I use strong language designedly. The caricature is pernicious, it is calculated to inflame public sentiments and to cloud people's perceptions of our fledgling constitutional democracy.¹⁷⁰

¹⁶⁸ *De Klerk, supra* note 156.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

The paper has purposely excluded the text of the South African Constitution because it is the contention of the author that the text is less controlling than the suppositions one brings to the analysis.

VI. CONCLUSION

The approach which is most interesting and consistent with what this paper is proposing is that of Madala J. in *De Klerk*. This judgment goes further than arguing against the traditional grounds for a vertical application of the Constitution. Madala's judgment can serve as a model for the type of analysis which should occur at the Supreme Court of Canada.

To begin with, in challenging the orthodox approach of constitutionalism, Judge Madala points out that both the South African Constitution and South African society are pluralistic. The point is that some elements of the constitution call for vertical application while others call for horizontal:

Those who would widen the scope of the operation of the Bill of Rights hold the view that the verticality approach is unmindful of the modern day reality that in many instances the abuse in the exercise of power is perpetrated less by the State and more by private individuals against other private individuals.¹⁷¹

He adopts the methodology of the rights-based approach. It is interesting to note that Madala J. held that Chapter 15 of their Constitution was limited to indirect application while Chapter 3 would be applied directly.

Although this essay is not one which purports to be a comparative exercise, it is useful to employ the U.S. and South African contexts as signposts. They help reinforce the point that the fundamental nature of constitutional rights and freedoms is political. Producing consensus on the political issue of liberty is difficult. Further, the attempt to produce consensus through the use of a threshold test (ie., one vision of liberty) when both the *Charter* and Canadian society are pluralistic, is an exercise in futility. We see over a hundred years of doctrinal confusion in the U.S. and a seriously fractured court in South Africa. The Supreme

¹⁷¹ *De Klerk*, *supra* note 156.

Court of Canada has the opportunity in *Eldridge* and *Vriend* to change the state of the law regarding *Charter* application.

If the Court is going to take advantage of this opportunity, it will have to develop a judicial method distinct from *Dolphin*, *McKinney*, and *Hill*. The Court will have to re-address the four pillars objectively, reflect on the fractured jurisprudence, and try to come up with an approach which will be able to produce some certainty and uniformity in the law. It is hoped that this paper has made clear that there are two legitimate and to some extent competing streams involved in this:

- i) The desire to give full breadth to all the rights and freedoms contained in the *Charter*;
- ii) The desire to protect a zone of privacy, keeping this zone free from *Charter* litigation/interference.

If the Court sticks to a threshold approach, it will not be able to balance these two forces. Through semantics, the Court may be able to bolster the second branch but this will certainly be at the expense of the first. The Court should follow the lead of the British Columbia Court of Appeal and reject the threshold approach in favour of a rights-based approach. Developing competing forces of liberty in a complex society is a daunting task. However it is one the Supreme Court must accept, and the best it can do is to develop, through the rights-based test, a methodology which provides it with the greatest opportunity for success.