

The *Charter's* Relevance to Private Litigation: Does *Dolphin* Deliver?

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The author critically examines the recent decision of the Supreme Court of Canada in *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.* This case holds that the *Canadian Charter of Rights and Freedoms* only applies to the relations between government and private persons and not to relations between private persons alone, with two exceptions. The author argues that the first exception — when a private person invokes a statute, rather than the common law, against another private person — is untenable because both the common law and the *droit civil* are grounded in legislative instruments, respectively Reception Acts and the *Civil Code of Lower Canada*. He also argues that the second exception — that the courts ought to develop the common law in a manner consistent with the *Charter* in general — is incongruous, for it directs them to do on the one hand what they have been disqualified from doing on the other. The author suggests that the distinction between legislation and the common law (or *droit civil*) is not helpful in determining when the *Charter* should apply. This determination should be made, not on a wholesale basis, but in light of individual *Charter* provisions.

L'auteur jette un regard critique sur la récente décision de la Cour suprême dans l'affaire *Retail, Wholesale and Department Store Union, Local 580 c. Dolphin Delivery Ltd.* Cette décision est à l'effet que la *Charte canadienne des droits et libertés* ne vise que les relations entre le gouvernement et les individus, et non les relations des individus entre eux, sauf deux exceptions. Selon l'auteur, la première exception — soit le cas où un individu allègue une loi plutôt que la *common law* contre un autre individu — n'est pas utile car la *common law* et le droit civil sont tous deux fondés sur des textes législatifs, soit les *Reception Acts* et le *Code civil du Bas-Canada*. L'auteur soutient de plus que la seconde exception — soit que les tribunaux doivent développer la *common law* conformément aux principes de la *Charte* — est inappropriée, car elle exige des tribunaux qu'ils fassent d'un côté ce qui de l'autre leur est interdit. L'auteur suggère que la distinction entre législation et *common law* (ou droit civil) ne constitue pas un critère utile pour déterminer d'avance les cas où la *Charte* devrait s'appliquer. Plutôt, cette détermination dépend exclusivement, dans chaque cas, d'une analyse des dispositions de la *Charte*.

Introduction

In *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*,¹ the Supreme Court of Canada holds that the *Canadian Charter of Rights and Freedoms*² does not apply to relations between private

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¹(1986), [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 [hereinafter *Dolphin* cited to S.C.R.].

²Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

persons, but only to relations between the government and private persons.³ Nevertheless, the Court qualifies this holding in two ways. It says that the *Charter* will apply to private relations where one party invokes a governmental act in the form of a statute or delegated legislation to justify the infringement of the rights of another private party.⁴ Second, the Court says that even where this is not the case, the courts ought to apply and develop the common law rules governing private relations in a manner consistent with the fundamental values embodied in the Constitution.⁵

I will argue here that these qualifications have the remarkable (and apparently unforeseen) effect of exposing all private conduct to possible scrutiny under the *Charter* in most parts of Canada. The fact that this result directly contradicts the Supreme Court's major holding makes *Dolphin* a decision at war with itself. The matter will have to be reconsidered by the Court on some future occasion. Hopefully, by that time it will have had the opportunity to take fuller account of the difficult structural problems inherent in the *Charter*.

The issue in *Dolphin* is whether or not a court injunction to restrain a union from picketing at the premises of a company infringes the union's freedom of expression under section 2b) of the *Charter*. The injunction was originally granted on the basis that the company was a third party to an industrial dispute between the union members and their employer, and that picketing of third parties is tortious at common law and lacks statutory protection.

In a majority judgment written by Justice McIntyre, the Supreme Court agrees with the contention that the anticipated picketing involves an exercise of freedom of expression under the *Charter*, but goes on to find that the tort of inducing a breach of contract is a reasonable limit on that freedom under section 1 of the *Charter*. In any case, the Court holds, these rulings are strictly unnecessary, for the case can be disposed of on a separate basis. The party allegedly in breach of the *Charter* is a private company with no governmental connections. Moreover, the injunction restraining the picketing is based on the common law, not a statutory provision or other governmental act. In short, neither is the company itself a state agent nor does it invoke state authority for its claim. But under section 32(1), argues the Court, the *Charter* applies only to the Parliament and government of Canada

³The majority judgment was delivered by McIntyre J., with Dickson C.J., Estey, Chouinard and Le Dain JJ. concurring. Beetz J. and Wilson J. each wrote separate opinions that concur with the majority judgment on this point. All references in this paper are to the majority judgment of Justice McIntyre.

⁴*Supra*, note 1 at 602-3.

⁵*Ibid.* at 603.

and to the legislatures and governments of the provinces.⁶ The section does not refer to private parties. Therefore, the company is not bound by the *Charter* and the union can not use the *Charter* as a shield.

In reaching this conclusion, the Supreme Court deals with two important counter-arguments. According to the first, under section 52(1) of the *Constitution Act, 1982*, the *Charter* takes precedence over all ordinary laws, including the common law.⁷ On this basis the common law rules invoked to prevent the picketing must be subject to scrutiny under the *Charter* like any other legal rules, regardless of the private or governmental character of the parties.

The Court accepts the premise of this argument, but denies the inference drawn from it. There can be no doubt that the *Charter* does apply to the common law: "To adopt a construction of s. 52(1) which would exclude from *Charter* application the whole body of the common law which in great part governs the rights and obligations of the individuals in society, would be wholly unrealistic and contrary to the clear language employed in s. 52(1) of the Act."⁸ However, maintains the Court, the common law is not subject to the *Charter* in all instances, but only when invoked to support the action of a governmental agent covered by section 32(1). Such action usually depends on statutory authority, but occasionally it may rest on the common law, as in the case of prerogative acts. In such instances, where the common law rule constitutes or creates an infringement of a *Charter* right, the governmental action taken pursuant to it will be unconstitutional. "In this way", comments Justice McIntyre, "the Charter will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom."⁹

The second counter-argument enters the scene at this point. If it is necessary to identify a governmental agent acting in reliance on the common law, such an agent can be found in the court applying the common law rule

⁶S. 32(1) provides:

This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

⁷S. 52(1) provides:

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.

⁸*Dolphin, supra*, note 1 at 593.

⁹*Ibid.* at 599.

to the private dispute before it. The courts are clearly bound by the *Charter* in the sense that they are required to apply its terms whenever appropriate. But, it is argued, this proposition necessarily entails that, where a private party urges a court to use a common law rule in a manner that would infringe the *Charter* right of another, the court must decline to take the action sought unless it can be justified under section 1.

The Supreme Court agrees that judges have the duty to apply the *Charter* to the matters that come before them. However, it rejects the conclusion drawn from this proposition:

The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the *Charter* precludes the making of the order, where a *Charter* right would be infringed, it would seem that all private litigation would be subject to the *Charter*.¹⁰

This passage points to the main concern animating the Court's decision: the fear that if the *Charter* is held applicable to private relations, there will be virtually no private dispute that will not raise a *Charter* argument. The desire to prevent the *Charter* from intruding into every area of human activity is a valid one. But the Court's concern is misplaced. As I will argue later, holding the *Charter* applicable to private relations will not inevitably draw it into most private disputes. The extent of the *Charter*'s application to private relations will depend on the interpretation given to its individual provisions, some of which may have little or no application to private matters.

In fact, the Court itself does not fully endorse the conclusion that the *Charter* is irrelevant to private relations, for it notes two significant exceptions. The first is this: the *Charter* will apply to disputes between private parties where the party interfering with the rights of another invokes or relies on a governmental act. The act may take the form of a statute or delegated legislation such as regulations, orders-in-council and by-laws.¹¹ Where, however, the private party allegedly infringing the *Charter* rights of another invokes the common law and not a governmental act, the *Charter* will not apply.

¹⁰*Ibid.* at 600-1.

¹¹*Ibid.* at 602. In a puzzling aside, the Court suggests that this is only "possibly" true of municipal by-laws.

The Court's views on this matter emerge in the course of its discussion of the judgment of the Ontario Court of Appeal in *Re Blainey and Ontario Hockey Association*.¹² Justice McIntyre writes:

In the *Blainey* case, a law suit between private parties, the *Charter* was applied because one of the parties acted on the authority of a statute ... which infringed the *Charter* rights of another. *Blainey* then affords an illustration of the manner in which *Charter* rights of private individuals may be enforced and protected by the courts, that is, by measuring legislation — government action — against the *Charter*.

The lesson drawn by the Court is clear: "Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the *Charter* rights of another, the *Charter* will be applicable. »¹³

Lest there be any doubt as to the meaning of these observations, the Court goes on to apply them to the facts in *Dolphin*:

Can it be said in the case at bar that the required element of government intervention or intrusion may be found? ... If in our case one could point to a statutory provision specifically outlawing secondary picketing of the nature contemplated by the appellants, the case — assuming for the moment an infringement of the *Charter* — would be on all fours with *Blainey* and, subject to s. 1 of the *Charter*, the statutory provision could be struck down.

But the parallel does not exist: "In the case at bar, however, we have no offending statute. We have a rule of the common law which renders secondary picketing tortious and subject to injunctive restraint, on the basis that it induces a breach of contract. »¹⁴

So the application of the *Charter* to private disputes depends on whether they are governed by legislation or the common law. Where no legislative element is present, the *Charter* will not affect purely private relations. But even this conclusion the Court hastens to qualify. Although the *Charter* will not protect a private person from the acts of another individual under the common law, this does not mean that the *Charter* has no relevance to the common law at all. Rather, the Court asserts, the judiciary ought to apply and develop the common law in a manner consistent with the fundamental values of the Constitution, including the *Charter*.

My aim here is not to give a detailed analysis of the Court's reasoning, although much of it is controversial. I propose instead to take the decision at its word and see where it leads. My point is that the Court ushers us over the edge of the very abyss that it conjures up, all the while reminding us to

¹²(1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728.

¹³*Dolphin*, *supra*, note 1 at 602-3.

¹⁴*Ibid.* at 603.

keep our footing. I will concentrate on the two areas in which the Court holds that the *Charter* is relevant to private litigation: where a statute or other enactment is invoked by a private party to justify the infringement of the rights of another; and where the common law governing the relations between private parties conflicts with basic constitutional values.

I. Statutory Authority for the Infringement of *Charter* Rights

As we have seen, the Court argues that the *Charter* applies to private relations where an alleged infringement of *Charter* rights is justified by reference to legislation, but not where the common law is invoked. The distinction between legislation and the common law is, of course, a time-honoured one in English law. But it is doubtful whether it can play a useful role in Canada in defining the scope of the *Charter*. There are two essential reasons. First, in parts of Canada other than Quebec, the application of English common law usually depends on explicit provisions in Reception Acts. And in Quebec, the sphere of private law is governed by the *Civil Code of Lower Canada*, which was given the force of law by a pre-Confederation statute. Thus, the distinction between reliance on the common law (or *droit civil*) and reliance on legislation ultimately dissolves. Second, even assuming that the distinction can somehow be salvaged, it is irrelevant for the purpose of determining when the *Charter* should apply. I will deal with these points separately.

A. *The Legislative Basis of Private Law in Canada*

In the common law areas of Canada, the private law is grounded in legislation. The explanation for this is simple: English common law, which governs private relations in the absence of specific legislation, itself applies by virtue of provisions found in various enactments.

The point can best be appreciated if we return to the facts of the *Dolphin* case. There, the Supreme Court argues that the *Charter* did not apply because the dispute between the parties was governed by the common law. That is, the company sought to prevent the union's picketing by invoking the common law tort of inducing a breach of contract. If the same tort were embodied in a statute, observes the Court, the *Charter* would have applied. However, no such statutory tort was available.

What the Court fails to consider is the fact that the tort in question forms part of British Columbia law by virtue of a series of legislative acts.¹⁵

¹⁵For a fuller account of the introduction of English law into British Columbia, see R.G. Herbert, "A Brief History of the Introduction of English Law into British Columbia" 2 U.B.C. Legal Notes 93; J.E. Cote, "The Reception of English Law" 15 Alta L. Rev. 29 at 91-92.

A Proclamation issued on 19 November 1858 by the Governor of British Columbia, under legislative authority conferred by imperial statute, provided that English law as it existed on that date applied in the colony, which comprised the southern mainland of modern British Columbia.¹⁶ Later, after the province was expanded to its modern borders, a local enactment, the *English Law Ordinance, 1867*, extended English law as of 19 November 1858 to the entire territory.¹⁷ The relevant provisions are now found in the *Law and Equity Act*.¹⁸ These Acts provide the ultimate basis for the tort of inducing a breach of contract in British Columbia, and arguably, on the Court's reasoning, supply a sufficient governmental connection to make the *Charter* applicable.¹⁹

Several objections may be made to this conclusion. The first is that the Reception Acts are not specific enough to supply the needed governmental link. That is, they do not state in so many words that the tort of inducing a breach of contract is part of the law of British Columbia. They simply introduce an amorphous mass of English law comprised of common law and statutes. Thus, it is argued, the Reception Acts cannot be taken as direct governmental approval of the tort in question, since it would be straining the imagination to think that the legislature specifically considered and approved each common law rule and statutory provision covered. This argument is supported by a passage from the *Dolphin* judgment quoted above. The Court states: "If in our case one could point to a statutory provision *specifically outlawing* secondary picketing of the nature contemplated by the appellants, the case ... would be on all fours with *Blainey* and, subject to s. 1 of the *Charter*, the statutory provision could be struck down."²⁰

¹⁶The Proclamation is quoted in Herbert, *ibid.* at 96. The Governor's authority derived from an Order-in-Council issued by the Queen under s. 2 of *An Act to Provide for the Government of British Columbia* (U.K.), 21 & 22 Vict., c. 99.

¹⁷Rev. Laws B.C. 1871, 30 Vict., No. 70. The original Ordinance is No. 7 of 1867: see Herbert, *ibid.* at 97 n. 16.

¹⁸R.S.B.C. 1979, c. 224, s. 2:

Subject to section 3, the Civil and Criminal Laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in the Province; but those laws shall be held to be modified and altered by all legislation having the force of law in the Province or in any former Colony comprised within its geographical limits.

S. 3 specifies that certain provisions in designated English statutes are not in force in the Province.

¹⁹It may be noted that the tort in question may be traced back to 14th-century English law, and finds its modern basis in the 1853 case of *Lumley v. Gye* (1853), 2 El. & Bl. 216, 118 E.R. 749, [1843-60] All E.R. Reprint 208, 95 R.R. 501 (Q.B.). See the brief historical review in J.G. Fleming, *The Law of Torts*, 6th ed. (Sydney: Law Book, 1983) at 649-50. So, the tort predates the 1858 reception date for British Columbia and was received at that time.

²⁰*Supra*, note 1 at 603 [emphasis added].

Of course, the *English Law Ordinance, 1867* does not *specifically* outlaw secondary picketing. But it does make the tort of inducing a breach of contract part of the law of British Columbia. Where a statute referentially adopts a body of law without itemizing the particular rules adopted, do those rules escape scrutiny under the *Charter*?

The question has broader ramifications than is first apparent. The Reception Acts introduce not only English common law but also all ordinary English statutes in force on the reception date, except those inapplicable in the local circumstances of the colony. The statutes are not, however, introduced by name; much less are their specific provisions itemized. So, if the Reception Acts do not make English common law subject to the *Charter*, the same must hold for English statutes that have not been specifically received.

It might be thought that English statutes stand in a different position from the common law because they are enactments of the British Parliament, which formerly held supreme power over Canada. But the statutes in question were not enacted for Canada and would not have applied here in the absence of a reception of English law, which in British Columbia is governed by the Reception Acts. In this respect, there is no difference between received English statutes and the common law: both owe their authority in British Columbia to the Reception Acts. If the *Charter* does not apply to the common law through the medium of the Reception Acts, it cannot apply to these statutes.

Section 32(1) does not help us to escape from this difficulty. The British Parliament is not one of the bodies named in this section, which only lists modern Canadian legislatures and governments.²¹ Yet it is inconceivable that old English enactments should be immune to the *Charter* when legislation passed in a democratic fashion by a modern Canadian legislature is subject to review. Such a proposition, which would grant a privileged status to a decaying residue of our colonial past, is incompatible with section 52 of the *Charter*, which says that the Constitution of Canada is the supreme law of Canada, and that any law inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect. There seems to be no good reason to exempt received English statutes. But if English statutes received *en masse* into British Columbia under the Reception Acts are subject to the *Charter*, including those governing private relations, it follows that received common law rules governing such relations are in the same position.

This conclusion is supported by another consideration. It would be startling to maintain that, whenever a statute referentially incorporates a

²¹See *supra*, note 6.

body of rules (whether statutory or common law) by a general phrase, the rules in question escape scrutiny under the *Charter*. On this view, for example, provincial statutes that are made applicable to Indians by the general terms of section 88 of the *Indian Act* would be exempt from the *Charter* in so far as their application to Indians depends on their referential incorporation in federal law.²² Moreover, a legislature could evade *Charter* scrutiny by referentially adopting the statutes of other jurisdictions or, more drastically, repealing all its current laws and re-enacting them by reference.²³

A second objection could be made to the argument that the Reception Acts bring the common law governing private relations under the *Charter*. The *Charter*, it could be said, does not cover legislation passed for British Columbia before the province entered Confederation in 1871. Section 32(1) refers only to the government and Parliament of Canada and the governments and legislatures of the provinces. It does not refer to the governments and legislatures of British colonies in America prior to their entry into Confederation. Therefore, the Reception Acts passed for British Columbia before 1871 are not the Acts of a government or legislature covered by the *Charter*.

This objection may be met by two observations. First, the continuing force of the common law in British Columbia rests on the *Law and Equity Act*.²⁴ That Act is the work of a legislature covered by the terms of section 32(1). More generally, it seems wrong to say that provincial legislation enacted before Confederation escapes the *Charter*'s reach.²⁵ In principle, why should a statute passed in Nova Scotia in late 1866 be exempt while another

²²R.S.C. 1970, c. I-6, s. 88 states:

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province ...

In *Dick v. R.* (1985), [1985] 2 S.C.R. 309, 23 D.L.R. (4th) 33, it was held that this section gives force to provincial laws of general application that would otherwise be invalid in their application to Indians by reason of the constitutional division of powers and the exclusive federal responsibility for Indians under s. 91(24) of the *Constitution Act, 1867*.

²³A parallel is provided by *An Act Respecting the Constitution Act, 1982*, S.Q. 1982, c. 21, s. 1 which stipulates that each of the Acts adopted in Quebec before 17 April 1982 is replaced by the text of each of them as they existed at the date, with the addition of a notwithstanding clause enacted under s. 33 of the *Constitution Act, 1982*. Nevertheless, the effects of this wholesale repeal and re-enactment are strictly limited by the section's terms. The validity of the notwithstanding clauses enacted in this manner is considered in *Alliance des Professeurs de Montréal v. A.G. Quebec* (1985), [1985] C.A. 376, 21 D.L.R. (4th) 354.

²⁴*Supra*, note 18.

²⁵See *Re Dixon and Attorney-General of British Columbia* (1986), 31 D.L.R. (4th) 546, 7 B.C.L.R. (2d) 174 (S.C.), where it was held that the *Charter* applied to the current version of the British Columbia *Constitution Act*, which originally came into force one day prior to British Columbia's entry into Confederation on 20 July 1871.

passed one year later would be covered? There is nothing in the wording of section 52(1) to suggest such a strange result. Indeed, older statutes may merit particular scrutiny for possible violations of *Charter* rights and freedoms.

These reflections indicate that section 32(1) does *not* list the complete range of governments and legislatures whose acts are subject to the *Charter*. This section simply enumerates the main governments and legislatures in existence when the *Charter* took effect, and indicates that laws passed by those bodies after that date will be subject to review. However, laws already in force in Canada on that date are subject to the *Charter* under section 52(1), *regardless of their origin*. Otherwise all pre-Confederation legislation would be excluded. The same proposition, of course, seems applicable to the common law governing relations between private parties.

A different objection could be made to the argument advanced here. This holds that the common law was initially received in British Columbia, not by virtue of statute, but under an unwritten principle of imperial constitutional law whereby a colony acquired by settlement rather than conquest or cession automatically receives an infusion of English law.²⁶ The British Columbia Reception Acts merely confirm this position and provide an exact date of reception. So, a governmental act is not responsible for bringing English law to British Columbia, and the *Charter* does not apply to such law except in cases where some other governmental involvement can be shown.

This argument encounters several difficulties. First, it proves too much, for it results in the strange proposition already considered that not only the common law, but also received English statutes, escape *Charter* scrutiny. But a more fundamental misconception lies at the root of the argument. It urges us to ignore the Reception Acts on the ground that they simply confirm the position flowing from an unwritten rule of imperial law. In short, it implicitly suggests that statutory provisions that merely codify or confirm the existing position at common law are not covered by the *Charter*. Such a view would require a court to discriminate between statutory provisions enacting new law and those merely confirming the common law and to

²⁶I have traced the complex genesis of this rule in *The Land Rights of Indigenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979) at 10-44; a briefer account is given in "The Independence of Canada" (1983) 5 Sup. Ct L. Rev. 369 at 375-78. Useful discussions of the subject may be found in: Sir K. Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966) at 98-116, 539-57; Cote, *supra*, note 15; P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 21-36; A.H. Oosterhoff & W.B. Rayner, eds, *Anger and Honsberger Law of Real Property*, vol. 1, 2d ed. (Aurora, Ont.: Canada Law Book, 1985) at 52-76.

determine the *Charter's* application accordingly. A more artificial process can hardly be imagined.

For good reason, then, the Supreme Court specifically rejects this approach in *Dolphin*, holding that if the common law tort of inducing a breach of contract were embodied in a statute it would require justification under the *Charter*.²⁷ Moreover, the view is inconsistent with the result in *Re Blainey and Ontario Hockey Association*,²⁸ which the Court in *Dolphin* treats as correct. In that case, the Ontario Court of Appeal held that a provision in the Ontario *Human Rights Code, 1981* effectively preserving the common law freedom of athletic organizations to determine membership on the basis of sex was subject to the *Charter* in a case involving two private parties.

Let us suppose, however, that the opposite position is correct, and that the British Columbia Reception Acts fail to provide the needed governmental connection because they merely confirm unwritten imperial constitutional law. This solution is inapplicable to parts of common law Canada that were initially settled by the French, areas that include the current Maritime Provinces, southern Ontario and portions of the Prairie Provinces. In those areas, French law applied among the settlers at the time of British conquest and cession. Under imperial constitutional law, the local law of a conquered territory generally remains in force until altered by competent authority. There is no automatic reception of English law.²⁹ In principle at least, the application of English law in a former French area generally owes its origins to some definite Act.³⁰ A clear example is furnished by the colony of Upper Canada, where the first Act passed by the newly-summoned legislative assembly of the province ousted the prevailing French law in favour of English law in all matters of property and civil rights.³¹ Thus, the operation of English law in Ontario (the successor to Upper Canada) has a legislative base. Yet it hardly seems appropriate to differentiate between the

²⁷See passage above, quoted in text accompanying note 14.

²⁸*Supra*, note 12.

²⁹See references *supra*, note 26.

³⁰Nevertheless, the source of English law in the Maritime Provinces is in doubt. The strongest candidate is the Royal Commission issued to Governor Cornwallis of Nova Scotia in 1749, which authorizes the establishment of courts to hear all matters both criminal and civil "according to Law and Equity", and provides that laws passed by the colonial assembly "are not to be repugnant but as near as may be agreeable to the Laws and Statutes of this our Kingdom of Great Britain"; see text in T.B. Akins, ed., *Selections from the Public Documents of the Province of Nova Scotia* (Halifax: Charles Annand, 1869) 497 at 500-1, and discussion in Slattery, *The Land Rights of Indigenous Canadian Peoples*, *supra*, note 26, at 126-32, 141-42. In view of the fact that the colony of Nova Scotia, after 1763, came to include the present-day provinces of New Brunswick and Prince Edward Island, this Commission may provide the basis for the reception of English law in all three Maritime Provinces.

³¹S.U.C. 1792, 32 Geo. 3, c. 1, ss 1 and 3. The current provision is found in R.S.O. 1980, c. 395.

application of the *Charter* in Ontario and British Columbia on this ground alone.

We may conclude, then, that if the *Charter* applies to the common law governing private relations wherever Reception Acts exist, most and perhaps all of common law Canada is covered.

This conclusion, contrary as it is to the Court's expressed intentions, also extends to the province of Quebec. Following the cession of French Canada to the British Crown, the *Royal Proclamation, 1763* introduced English law into the newly formed province of Quebec.³² The position was reversed in the following decade by the *Quebec Act, 1774*³³ which restored the former law of New France in all matters of property and civil rights, virtually the whole of private law. This heterogeneous mass of custom and legislation was codified shortly before Confederation, and the resulting *Civil Code of Lower Canada* was given the force of law by an Act of the legislature of the Province of Canada.³⁴

The *Civil Code* lays down the basic law governing relations between private individuals in Quebec. Generally speaking, all rights asserted by private persons against other persons or groups find their origins in the *Civil Code*, in the absence of legislation supplementing or overriding its provisions. In Quebec, then, whenever a private party seeks to justify the alleged infringement of the *Charter* rights of another individual, that justification is normally found in the provisions of the *Civil Code* itself or some other legislative instrument. It follows that in principle most private relations in Quebec are open to scrutiny under the *Charter*.

B. The Relevance of the Distinction between the Common Law and Statutes

I have argued that the suggested distinction between the common law and legislation cannot be sustained in most parts of Canada. This argument may, however, leave some readers with a faint sense of unease, as having been coerced by "technical" considerations to a counter-intuitive conclusion. Such a reader might respond: "Yes, it may be true that the application of the common law in many areas depends on legislation. But that is merely

³²Reprinted in R.S.C. 1970, App. II. It has been argued, nevertheless, that this was not the true effect of the *Proclamation's* wording, and that there was no intention to totally supplant the existing system of French law.

³³(U.K.), 14 Geo. 3, c. 83, s. 8.

³⁴*An Act Respecting the Civil Code of Lower Canada*, S. Prov. C. 1865, 29 Vict., c. 41. For historical background, see J.-G. Castel, *The Civil Law System of the Province of Quebec* (Toronto: Butterworths, 1962) at 5-35. The *Code* has been the subject of revision: see *An Act to Establish a New Civil Code and to Reform Family Law*, S.Q. 1980, c. 39; see also Quebec, Civil Code Revision Office, *Report on the Québec Civil Code: Draft Civil Code*, vols 1, 2 (Québec: Éditeur officiel, 1978).

a matter of *form*. In practice, the common law has basically the same status in Canada as it has in England, and is treated by courts as a body of unwritten law falling within their particular jurisdiction. The distinction drawn in the *Dolphin* case may have to be patched up to solve the technical problem posed by the existence of Reception Acts. But it has a firm grounding in the ordinary sensibilities of Canadian judges and lawyers. And that, in the end, is what matters.”

The short answer to this objection is that it misses the point. Of course, important differences exist between the common law and legislation, as our ordinary sensibilities testify. The point is that these differences are irrelevant to the question of the *Charter's* application to private relations. On the supposition that State activity is required to attract *Charter* review, it is clear, for example, that the decision of the legislature of Upper Canada to replace French law with English law was a State act, and a supremely important one at that. To hold that the body of common law and statutes introduced by a Reception Act escapes *Charter* scrutiny, where a local Ditches and Drains Act might qualify, is itself an argument employing technical and counter-intuitive distinctions.

Assuming, however, that the significance of the Reception Acts can somehow be downplayed or ignored, the following question arises. Does it make *sense* to hold that the *Charter* applies to relations between private parties where those relations are regulated by legislation, but not when they are governed by the common law? Are there good reasons in principle or policy, or in the clear wording of the *Charter*, for reaching this result? Or is the distinction an arbitrary one, producing artificial and unprincipled results?

The rationale often given for the distinction is that the *Charter* applies only in instances where the State, through its agents, seeks to violate someone's *Charter* rights, or where a private person tries to do this on the basis of State authority. The *Charter*, then, stands as a shield between the individual and the State. It is not intended, in principle, to protect individuals from the acts of other private individuals. It only does this, by way of exception, where a private person is acting as a surrogate for the State, or on State authority.

On this view, then, the *Charter* will apply where a private individual invokes a State act, in the form of legislation, to justify the violation of another's rights. But this rationale (so the argument runs) is not available where the justification lies in the common law. The common law cannot be seen as an emanation of the State in the same way that legislation obviously is. The common law is the law of the community as a whole. So far as it affects relations between the State and the individual, it often op-

erates to limit the power of the State. In this respect, it is now reinforced by the *Charter*. But when the common law merely governs the relations of private individuals in the community, it does not present the face of State action. In this context, it should be exempt from *Charter* scrutiny.

This, I take it, is the argument that underlies the reasoning of the Supreme Court in *Dolphin*. How well does it stand up? The argument involves several debatable propositions. First, it is not obvious that the *Charter* is directed exclusively at shielding people from State interference; it can plausibly be argued that the *Charter* sets out certain basic values that are paramount to all forms of law, whether public or private.³⁵ The resolution of this question (which cannot be pursued here) depends in part on the relative weights to be assigned to sections 52(1) and 32(1).

Second, even on the "anti-State" view of the *Charter*, it is far from clear that the common law regulating private relations can correctly be characterized as a body of law that does not present the face of State action. The common law was originally articulated by the courts, and its continuing application and development rests in their hands. Yet the courts are a branch of government. They act in the name of the community as a whole, as symbolized by the Crown, and derive their authority from that fact. In this respect they represent the State, even if they function differently than other branches of government.

The Supreme Court in *Dolphin* is at pains to repudiate this argument:

While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of *Charter* application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the *Charter*. The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute.³⁶

This passage implicitly portrays the common law as a system of law that is *external* to modern courts — a body of rules embedded in old precedents that the courts do their best to apply "as neutral arbiters" to the disputes that come before them. On this view, the courts' diligent application of the law hardly converts them into governmental actors.

But this portrayal of the judicial function is not persuasive. No Canadian court, least of all the Supreme Court of Canada, would want to deny the active role that courts have always played in developing and re-

³⁵I have developed this argument more fully in "Charter of Rights and Freedoms — Does It Bind Private Persons" (1985) 63 Can. Bar Rev. 148 at 158-61.

³⁶*Supra*, note 1 at 600.

forming the common law, even if in doing so they do not act as legislatures but look beyond themselves to an ideal pattern suggested by elements of the existing social order. In cases where a court adapts or reforms the common law, can it be argued convincingly that this action is not a species of State activity covered by the *Charter*? And if we admit the relevance of the *Charter* in such instances, can any workable distinction be maintained between cases where a court “develops” the common law, and those where it merely “applies” it?

On these points, even the Supreme Court does not seem persuaded by its own arguments, for it goes on to contend, in a passage discussed later, that in fact courts ought both to *apply* and *develop* the common law in light of basic constitutional values. But why should they do so, unless they are obligated in their role as representatives of the community at large?

Nevertheless, assuming that there is a fundamental difference between the common law and legislation in this respect, it may be doubted how well the distinction enables us to determine the *Charter's* scope in practice. Consider the following questions. Where a statute partially *modifies* the common law governing a particular subject, silently leaving other parts intact, is it sensible to hold that the statutory portions of the resulting legal regime are governed by the *Charter* while the common law portions are exempt? By the same token, where a statute merely *replicates* a portion of the common law rules governing a subject, making no mention of the remaining portion, should we hold that the replicated rules are subject to *Charter* scrutiny while the others are not?

Suppose that the common law holds that a private person should not do act A to another person in situation X and probably also situation Y, although in the latter case the judicial precedents are unclear. However, the common law clearly permits a person to do act A in situation Z (among other situations). The legislature, in its wisdom, judges this result undesirable and passes a statute providing that no person shall do act A to others in situations Y and Z, on pain of the normal civil remedies. The statute does not mention situation X. It *assumes* the existence of the basic common law rule, and effectively *extends* it to contexts where its application was hitherto doubtful or nonexistent. Does it make sense to hold that the rule barring act A is subject to *Charter* review in contexts Y and Z but not in context X?

One way of approaching this problem is to argue that the legislature has tacitly *affirmed* the original common law rule in its entirety and thus brought it within the *Charter's* scope. For if the statute had stated that the common law rule in situation X was not affected, that would have been

sufficient to subject the rule to *Charter* scrutiny. Where a statute does the same thing *sub silentio*, is there any real difference?

It may be noted that this argument takes for granted the necessity of discovering some definite connection between the rule in question and the State. It suggests that when a legislature acts in a manner that leaves little doubt that it is affirming or approving a common law rule, if only by *tacitly assuming the existence of that rule*, there is a sufficient State connection to justify *Charter* review.

The argument may be persuasive, given these premises. But it has a certain artificiality arising from the fact that the legislature is manifestly not the *author* of the rule in question. If we hold that any common law rule that a legislature has *declined to repeal* is subject to the *Charter*, where does this leave us with the general run of common law rules? There can be few areas of the common law that have not been significantly modified by legislative action. Such action is often founded on an understanding and acceptance of the general position at common law. To the extent that any legislation makes *some* changes in the common law, can it not be understood as a decision to leave the common law in that area otherwise undisturbed?

Given that the law in most of Canada today is a tightly woven mesh of mixed common law and statutory origins, the search for the golden thread of State action is likely to prove both frustrating and in the end pointless.

II. The Common Law and Basic Constitutional Values

We saw earlier that the Court attaches a second qualification to its holding that the *Charter* does not directly govern the common law relations between private parties. According to McIntyre J.:

Where ... private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of *Charter* causes of action or *Charter* defences between individuals.³⁷

The Court holds, then, that in applying and developing the common law the courts ought to act in a manner consistent with fundamental constitutional values, including those embodied in the *Charter*. The problem is

³⁷*Ibid.* at 603.

that any such judicial role seems inconsistent with the premise that the *Charter* does not extend to private disputes governed by the common law.

If the courts "ought" to develop the common law in the way suggested, this can only mean that they have some sort of a duty to do so. This duty must stem from the Constitution itself, for it is difficult to see where else it might come from. So the Court seems to be saying, in effect, that the courts have the constitutional duty to take account of fundamental constitutional values in developing the common law as it applies to disputes between private parties. But this proposition is not readily reconcilable with the Supreme Court's earlier insistence that a court order is not an element of governmental action, because the courts are not a branch of government to which the *Charter* applies under section 32(1).³⁸ If a court order need not conform to the *Charter*, how can it be said that the courts have any duty to take account of the *Charter* in applying the common law to private parties?

Second, as seen earlier, the Court holds that the *Charter* will apply to the common law "only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom."³⁹ This holding flows from the proposition that the *Charter* applies to the alleged infringement of a right only where the offending party is itself a governmental agent or invokes a governmental act. On this view, then, the basic values embodied in the *Charter* do not extend to private relations founded on the common law. If this is the true interpretation of the *Charter*, then the courts would be constitutionally *unwarranted* in making use of basic *Charter* values to develop the common law rules governing private action.

In brief, either the *Charter* covers the common law governing private relations or it does not. If it does, there is no need to create a separate doctrine mandating the development of the common law in light of constitutional values. If the *Charter* does not, then the values it embodies are inapplicable to the common law governing private relations.

Assuming, however, that the courts ought to develop the common law in a manner consistent with the *Charter* values, the question arises how they should go about doing this. The proper method, it would appear, is to ask whether a given common law rule is inconsistent with the value represented by a *Charter* right, and, if so, whether the limit posed by the rule is a reasonable one. That is, a court should follow the normal methodology employed in applying the *Charter*, which the Supreme Court in fact follows

³⁸*Ibid.* at 600-1.

³⁹*Ibid.* at 599.

in the first part of *Dolphin* in reviewing the tort of inducing a breach of contract. The irony is that the Supreme Court asserts that this part of the decision is unnecessary in view of its later ruling on the *Charter's* application to private action.

Conclusion

One reason why the *Dolphin* decision embraces at the back door callers turned away at the front is that it attempts an essentially impossible task. To ask whether the *Charter* as a whole applies to private relations in general is like asking whether all the shoes in the store fit all potential customers. The only sensible response is: "Which shoes? Which feet?"

It is submitted that the extent to which the *Charter* affects private relations can only be determined by a series of inquiries directed to the *Charter's* individual provisions.⁴⁰ In each case, a court must ask whether the particular *Charter* provision, on its true interpretation, extends to the private activities under consideration. This holds true regardless whether the activities in question are governed by rules of statutory or common law origins. The presence of a statute does not resolve the question.

No doubt, in many instances, a court may conclude that the *Charter* does not apply. Courts could be expected to hold, for example, that the parental power of disciplining children is not subject to the *Charter* guarantee of natural justice in section 7, and that invitations to a bridal shower are not governed by the sexual equality provisions in section 15. On the other hand, it would not be surprising for a court to find that where a private corporation instructs its employees not to express public support for the Liberal Party it violates the employees' freedom of expression. The point is that these decisions should not be made on some wholesale basis, such as whether the private activities in question happen to be authorized by statute, but in light of factors germane to the particular *Charter* section in question.

Thus, the Supreme Court's fear that if it held the *Charter* applicable to the laws governing private relations "all private litigation would be subject

⁴⁰For a more complete exposition of this view, see Slattery, *supra*, note 35.

to the *Charter*⁴¹ is groundless, for it fails to recognize the potential for differentiated responses grounded in individual *Charter* provisions. Only when courts begin to approach the question in this manner will they find their way out of the conceptual maze that has the Supreme Court, in *Dolphin*, unwittingly returning on its own footsteps.

⁴¹*Dolphin, supra*, note 1 at 600-1.