Charter of Rights and Freedoms -- Does It Bind Private Persons

Brian Slattery
Osgoode Hall Law School of York University, bslattery@osgoode.yorku.ca

Source Publication:

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.
Legislation

I am a Canadian of Estonian origins, born in Alberta. I have applied for membership in a local social club with excellent sports facilities. I am a fitness addict, and nothing else is available in the neighbourhood. The club turns me down. They say that the club is intended solely for persons of Irish extraction. It is a club for the advancement of Irish culture in Canada. If my name were O’Brien or Mulroney or even Slattery. I would be welcome. In the circumstances, they regret that they cannot offer me membership and hope that I understand.

I do not understand. In fact, I am rather annoyed. I know that the Charter of Rights and Freedoms (the Charter) prohibits racial and ethnic discrimination, and want to find out if I can invoke it.

The lawyer I approach is doubtful. She says that the Charter probably does not apply to relations among private individuals and groups. It only deals with people’s rights vis-à-vis the government. Since the club I have applied to is private, the Charter may be irrelevant. However, she notes that writers have expressed differing opinions on the question, and offers her services for a modest hourly fee.

Is my lawyer right? Does the Charter only bind governments and legislatures, or does it also bind private individuals? The Charter is surprisingly unclear on this issue and lends itself to different interpretations.

1 Part 1, Constitution Act 1982, Schedule B to the Canada Act 1982, c.11 (U.K.). Unless otherwise indicated subsequent references to sections are to sections of the Charter.
2 Sections 15(1) and 32(2). The subsections read as follows:
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, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
32(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.
3 For a range of differing views, see: Michael R. Doody, Freedom of the Press. The Canadian Charter of Rights and Freedoms, and a New Category of Qualified Privilege.
Standard Views

At first sight, section 32(1) of the Charter appears to provide a definite answer. The section states:

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.

It can be argued that this section makes a comprehensive statement of the Charter's application. It identifies the full range of persons and institutions governed by its terms. A plea that one's rights under the Charter have been violated can only succeed where the alleged violator falls within section 32(1). The section mentions only governments and legislatures, and not private persons. So, when a Charter right is infringed by a private party, the Charter gives no protection.

This interpretation is supported by another argument. A constitution ordinarily serves to identify governmental institutions and define their powers; it does not deal with relations among private persons. So the Charter, in setting out a range of rights and freedoms held by private persons, only aims to circumscribe the powers of government over such persons. What might appear, at first blush, to be individual rights maintainable against the whole world are, on closer inspection, merely restrictions on governments.

Not all commentators, however, have accepted this viewpoint. Some have pointed out that section 32(1) does not actually say that the Charter applies exclusively to the bodies listed there, merely that the Charter does in fact apply to those bodies. Moreover, the section obviously does not give a complete description of the Charter's application. The Charter vests rights in private persons, and in that sense clearly applies to them, notwithstanding the fact that they are not mentioned in the section. On this alternate view, section 32(1) serves to indicate that the governments and legislatures of both Canada and the provinces are bound by the Charter, but does not purport to give a complete list of the persons and bodies affected. It confirms the amplitude of the Charter's scope in areas mentioned without narrowing its scope in other areas.

But why should the Charter bother to single out governments and legislatures in section 32(1) if not to indicate that these entities alone are bound by the Charter? Under a standard maxim of statutory interpretation, the specific mention of one thing impliedly excludes similar things left unmentioned.

Adherents of the second view give the following reply. So far as governments are concerned, it was necessary to mention them specifically because under standard rules of interpretation the Crown is not bound by a statute in the absence of explicit words. As for legislatures, it was prudent to mention them in order to indicate clearly that the principle of Parliamentary supremacy did not apply. After all, the Constitution also contains sections allocating legislative powers between the federal and provincial governments. Section 32(1) serves to make it clear that the Charter takes precedence over such sections. This function is not adequately performed by the supremacy clause in section 52(1), which makes the Constitution as a whole paramount to ordinary laws, without indicating the order of priority among the various parts of the Constitution itself.

What conclusions emerge from this exchange? I wish to argue here, not that one or the other view of section 32(1) is correct, but that the debate on this point is misguided. If we consider the underlying issue more closely, we can see that in the end it does not matter which view of section 32(1) we take: the result is much the same.

Clarifying the Issue

The issue, as it is normally stated, is whether or not the Charter binds only governments and legislatures, or whether it also binds private persons. Yet, this way of framing the issue obscures the real problem. It suggests that the first alternative is a feasible one, that it would be possible to hold that the only function of the Charter is to curtail legislative and governmental powers. But a moment's reflection shows that the Charter has another important function: it lays down new law governing the rights and remedies of individuals. This is at the heart of the problem.

The dual functions of the Charter become clearer on comparison with several familiar types of legal provisions. The first type is one that imposes restrictions on the powers of federal or provincial legislatures, but does not otherwise affect the existing rights and obligations of ordinary people. An example is furnished by sections 91 and 92 of the Constitution Act, 1867, which define and restrict the powers of Parlia-

---

4 For a parallel clause, see the Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 63; see also the discussion in Gibson, The Charter of Rights and the Private Sector, ibid., at pp. 214-215.

5 See, e.g., sections 91-95, Constitution Act, 1867; and also sections 50-51, Constitution Act, 1982, which add new provisions to the Constitution Act, 1867 dealing with non-renewable natural resources, forestry resources and electrical energy.
ment and the provincial legislatures by reference to a specified range of subject matters. Although these sections empower the legislatures to deal with private rights and obligations in the areas designated, they do not directly affect those rights.

The second type of legal provision is the reverse of the first. It affects the existing rights and obligations of people but does not restrict the ability of legislatures to alter those rights in future. Most ordinary Canadian statutes fall into this category. Examples would include a provincial act prohibiting racial discrimination in the rental of housing, and a federal act lowering the voting age. Such acts can be repealed in the ordinary manner.

The third and final type of legal provision combines the positive features of the first two types without sharing their limitations. It affects the existing rights or obligations of ordinary persons and at the same time shields those rights from future legislative intrusion. A good example is provided by section 93(2) of the Constitution Act, 1867, which in its terms grants the supporters of certain denominational schools in Quebec all the rights held by Catholic school supporters in Upper Canada at Confederation. This provision ostensibly enlarges educational rights in Quebec, and simultaneously prevents the provincial legislature from attacking those rights in the future.6

How should we classify the Charter? We know that it places permanent restrictions on the powers of Parliament and the provincial legislatures.7 In this respect it resembles the first type of provision rather than the second. But it also has important differences. By contrast with sections 91 and 92 of the 1867 Act, the Charter does not simply limit the powers of legislatures, it makes important changes in existing laws. A person previously denied the right to vote under federal or provincial law may now possess the right under section 3, while under section 2(c) the right to demonstrate peacefully in public, formerly restricted or denied under a municipal by-law, may now be extended. Even where the right granted by the Charter already existed under current law, the Charter provides a new basis for that right and arms it with a new set of remedies.8

So the Charter belongs in our third category of legal provisions. Like section 93(2) of the 1867 Act, which in its terms both enlarges and entrenches educational rights in Quebec, the Charter has dual functions.

---

6 Whether the section actually adds anything to the rights Quebecers already possessed is another question.
7 Under sections 32(1) and 52(1), subject to justifiable limitations within the meaning of section 1, and “notwithstanding” clauses enacted under section 33.
8 Under section 24(1), which provides that anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
It is the source of new law governing the rights and remedies of ordinary people, and at the same time it protects those rights from future legislative interference.

If we consider only the second function, the entrenchment of rights, it seems true to say that the Charter applies exclusively to governments and legislatures and not to private persons, because the former bodies are the only ones potentially capable of amending the Charter. The real issue concerns the Charter's first function: does the new law laid down by the Charter regarding individual rights and remedies only affect relations between private persons and governmental bodies, or does it also affect relations among private persons themselves?

**Effects on Laws Governing Private Relations**

Suppose that at the time the Charter took effect, a provincial statute directed private employers to give preference in hiring to applicants with ten years' residency in the province, and gave civil remedies to unsuccessful applicants. The statute, we note, governs the relations between two groups of private persons, namely employers and prospective employees, and establishes certain reciprocal rights and obligations.

Section 6 of the Charter states that every Canadian citizen has the right to move to and pursue the gaining of a livelihood in any province, subject to laws of general application in a province, other than those that discriminate among persons primarily on the basis of past or present residency. Does this section apply to the provincial statute?

*Prima facie*, the statute violates the Charter provision and may be struck down by the courts. The statute seemingly will not escape scrutiny simply because it governs relations between private persons. Section 6 confers on private persons the right to pursue the gaining of a livelihood in any province, and explicitly excludes laws that discriminate on the basis of residency. The section, on its most natural reading, applies to laws regulating the relations between private employers and employees and is not confined to laws governing the public sector.

This example suggests, then, that a Charter provision may affect the legal relations between private persons when the law governing those relations differs from the terms of the Charter. But a single example, suggestive as it may be, hardly proves the point. A broader analysis is necessary.

When the Charter came into force, the entire field of relations among private individuals was governed by laws of one sort or another, permitting, ordaining, or forbidding certain conduct towards other people, or attaching certain legal consequences to such conduct. As we have seen,

---

9 Unless the exception in section 6(4) applies, or the law is justifiable under section 1.
the Charter is the source of new law governing the rights and remedies of individuals and amends all laws inconsistent with its terms. This flows in part from section 52(1) of the Constitution Act, 1982, which 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.

There is nothing in this section to suggest that laws regulating private relations constitute a special group, uniquely shielded from the Constitution's impact. It follows that whenever laws governing those relations are inconsistent with rights guaranteed by the Charter, the Charter takes precedence. The effect holds true of both statutes and the common law, for section 52(1) makes the Constitution paramount to all forms of law, not merely statutes.

If we return now to section 32(1), we can see that it produces the same result, even on the assumption that the narrow interpretation of the section is correct. In providing that the Charter applies to the various governments and legislatures of Canada, the section effectively mandates the courts to give full effect to Charter rights, notwithstanding contrary provisions of statutes or the common law, including those governing private relations.10

Section 32(1) does not explicitly refer to the courts, but it plainly covers them. Courts owe their authority either to statutes passed by legislatures or prerogative acts issued by the Crown on behalf of a government. Yet a legislature or government bound by the Charter cannot create or maintain subordinate bodies that are free from the Charter's constraints. The act governing such a body is necessarily subject to the Charter, which limits the authority conferred.

Other considerations point to the same conclusion. Several substantive Charter provisions clearly apply to the courts, such as the provision governing self-incrimination of witnesses (section 13), or that forbidding cruel and unusual punishment (section 12).11 Moreover, section 24 mandates the courts to supply appropriate remedies for Charter violations, and section 52(1) implicitly instructs them to strike down laws inconsistent with the Charter.

If the Charter applies to the courts, it must apply not only to statutes enforced by the courts but also to the common law generated and administered there. Were the courts free to develop and apply common law rules that violated Charter rights, the supremacy of the Constitution would be undermined. It follows that, where a common law rule is inconsistent with a right granted by the Charter, the common law is superseded.

---

10 Subject always to section 1.

11 See also sections 11, 14, and 19.
Nothing in section 32(1) suggests that laws governing relations among private individuals are immune from this process.

Our analysis indicates, then, that the rights and remedies conferred by the Charter take precedence over both existing and future laws that regulate relations among private persons. It is worthwhile considering for a moment what this conclusion actually entails. It does not mean, of course, that each and every provision of the Charter necessarily affects private relations. It means only that where a Charter provision, on its true interpretation, confers rights that affect the interaction of private persons, the courts are mandated under section 32(1) to give it full effect.

In 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. It may be that certain Charter rights, on their proper interpretation, do not have a significant impact on private relations. That is a matter for argument. But 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.

Some Illustrations

A few examples may clarify the point. Suppose that a Chinese person declines to rent his house to a non-Chinese person on grounds of race. Does section 15(1) of the Charter affect the common law right of the house-owner to rent to whomever he chooses?

Section 15(1) provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination on grounds (inter alia) of race. The common law, on the other hand, simply holds that an owner may or may not rent out his property as he sees fit. His ownership of the building entitles him to lease it to another person. If he does lease it, and certain legal conditions are satisfied, the courts will enforce the lease at the instance of either party.

Is the common law on this point inconsistent with section 15(1)? The answer is arguably negative. The prospective non-Chinese tenant has the same legal power to secure a lease as anybody else. The law does not oblige the owner to accept his offer; but the law does not prevent the owner from accepting the offer, or direct him to accept anyone else's offer in similar circumstances. True, the common law fails to instruct the owner to disregard the applicant's race; but it does not oblige him to take race into account either. In short, the common law merely empowers the

---

12 Which came into effect on 17 April 1985.
owner and the applicant to conclude a lease if they both agree. It does not compel that agreement, or direct either party to advert to or ignore the other party’s complexion.

Arguably, then, the common law treats applicants of all races in an equal fashion. Obviously, the owner, in this instance, does not treat Chinese and non-Chinese equally, and his behaviour is reprehensible and possibly illegal under other laws, such as a provincial human rights code. But section 15(1) of the Charter does not directly regulate the owner’s actions, or guarantee equal treatment at his hands. Rather, it applies to the law that governs his relations with prospective tenants. So long as the law itself does not discriminate racially, it is not affected by section 15(1).

Nevertheless, it could be contended that the common law contravenes section 15(1) in that it permits the owner to practise racial discrimination in renting out his house. The section nullifies any laws that discriminate on the basis of race; arguably, it must also nullify any laws that allow private persons to discriminate. This is a strong argument. But it is not entirely convincing.

A law that affords a benefit or protection to persons of one race but not those of another plainly contravenes section 15(1). But it is not clear that a law permitting landlords to take into account the race of prospective tenants confers an unequal benefit or protection. The “benefit” conferred here is the power to rent to whomsoever one wishes. The law gives the same power to everyone, regardless of race. To put the proposition in its most paradoxical form, the law permits persons of all races to take race into account in renting out housing. This is an undesirable state of affairs. But the remedy probably does not lie with section 15(1).

It could be argued, to the contrary, that the prospective tenant has been denied the equal benefit of the law in that the benefit of obtaining a lease (as provided for by law) has been withheld on racial grounds. In other words, section 15(1) ensures not only equality in legal form, but also equal treatment under the law. Now it seems arguable that where the law gives a person the right to do something (such as to vote, or to walk freely on the streets) and another private person tries to stop him from exercising that right on racial grounds, section 15(1) of the Charter might in some cases be invoked. But here the prospective tenant has the right to sign a lease only if the other party agrees. The landlord’s refusal does not violate or deny the right of the prospective tenant. The law simply empowers the latter to make a lease; it does not compel anyone to make a lease with him.

13 It may be noted, however, that in most instances a remedy would already exist under the common law or statute, and that it would be available regardless of whether or not the right was denied on racial grounds.
Let us suppose, however, that the owner lets out his house to another Chinese person, and the lease gives the tenant the power to sub-let, subject to the undertaking that he not rent to a non-Chinese. Is this clause affected by section 15(1)? Here, the answer seems to be affirmative. The reason is that section 15(1) strikes down any laws that discriminate on grounds of race. The lease is law between the parties, in the sense that the law renders it binding and enforceable in the courts. But under section 32(1) the courts cannot enforce a provision that violates a Charter right, in this case a clause requiring a tenant to practice racial discrimination. Insofar as the lease purports to oblige the tenant to discriminate against non-Chinese persons it is invalid, unless the clause can be justified under section 1, which seems unlikely.

What, then, is the position of a non-Chinese person who applies to sub-let the house in the example above and is refused by the existing tenant on grounds of race? Here, the answer is less clear-cut. The racially restrictive clause in the lease is invalid, and the applicant presumably may obtain a court declaration to that effect.\(^{14}\) If the clause is the only reason the tenant refused to sub-let, the applicant will now be in a better position, at least theoretically. But under section 15(1) of the Charter, a court probably cannot *oblige* the tenant to sub-let to the non-Chinese applicant, or to treat applicants of all races on an equal basis. The tenant has the same rights in this respect as the original owner. He may or may not sub-let the house as he sees fit. If he discriminates racially in choosing among applicants, he is a poor citizen and perhaps violates other laws, but section 15(1) arguably does not affect him.

We have been discussing how section 15(1) interacts with the common law regulating private relations. But the same considerations apply to statutes. Take the following example, which recalls the problem posed at the start of this paper. A provincial statute provides that every person has the right to equal treatment with respect to services, goods and facilities, without discrimination on grounds of race. Persons suffering discrimination are supplied with various civil remedies. But the statute also states that the right in question is not infringed where membership in a religious, philanthropic, educational, or social organization is restricted to persons of a particular race, if the organization is primarily engaged in serving the interests of persons of that race.

Here we have a statute that explicitly authorizes certain organizations to exclude applicants on racial grounds. In this respect, the statute merely replicates the common law. Yet under arguments considered above, the common law does not violate section 15(1) in authorizing organizations to select members on whatever basis they wish, including race. Does the fact that the authorization is found in a statute alter the position? I

\(^{14}\) Under section 24(1) of the Charter, which empowers courts to grant appropriate remedies where a person's Charter rights have been denied.
suggest that it probably does not. The way in which we resolve the issue at common law determines our views of the statute and *vice versa*.

It would be surprising if this were not the case. The statutory exemption of racially-based organizations merely preserves a freedom they already held at common law. Yet if the common law does not violate section 15(1) of the Charter in allowing organizations to select members on a racial basis (as can be argued), it is hard to see why the statutory enactment of the same rule in a narrower form should itself trigger a violation of the section.

Any distinction between statutes and the common law in this respect would result in an odd disparity between the common law provinces and Quebec, where relations among private persons are presumptively governed by the Quebec Civil Code, in the absence of other provisions. It seems unreasonable to suppose that rules which escape the Charter's scrutiny in common law provinces are covered in Quebec simply because they are found in the Code.

To return to our example, the mere fact that the rule exempting ethnic organizations takes a statutory form does not bring it within the Charter's reach. But organizations that restrict membership to persons of a specific race may find themselves in conflict with section 15(1) for another reason. If the restrictions are embodied in rules that are legally binding on officers and members of the organization, then those by-laws will themselves be subject to review under the section. *Prima facie*, a by-law that confined membership in a club to Irish or Italians or blacks would violate section 15(1), and require justification under section 1. Such a justification might, however, be given successfully, particularly in light of section 27; which provides that the Charter shall be interpreted so as to preserve and enhance the multicultural heritage of Canada.

To sum up, it seems probable that section 15(1) does not affect laws that merely *permit* private persons or bodies to engage in certain activities, so long as the laws themselves do not discriminate among persons on a proscribed basis. But where the law empowers private persons or bodies to alter the rules binding on themselves or others, as by making contracts, deeds, wills, or by-laws, the rules created in this fashion will themselves be subject to review under section 15(1) and may be struck down for inconsistency with its terms.

While these observations may hold true for section 15(1), they do not necessarily apply to other sections of the Charter. Take, for example, section 20(2), which provides that any New Brunswick resident has the right to communicate with the government or legislature of the province in English or French. Would this section prevent a private person from attempting to restrain another person from exercising this right?

To take a slightly fanciful example, suppose that the zealous principal of a private Francophone boarding-school forbids students to commu-
nicate in English on school premises. A student is found writing a letter to a government department in English, and is expelled. Could she obtain a remedy against the school under section 20(2)?

If the principal, apart from the Charter, is within her rights in forbidding the use of English, this must be so because the common law or a statute permits her to do this. But, as seen earlier, the Charter is paramount to both statutes and the common law. Insofar as the law permits a private person to interfere with the right of communication guaranteed by section 20(2), the law is arguably superseded, unless section 1 can be brought in support. The fact that the law is merely permissive, and does not itself forbid the use of English on school premises does not seem to affect the question here, as it might in a case under section 15(1). The reason is that the right under section 20(2), while it affects primarily the New Brunswick government and legislature, apparently also has the incidental effect of restraining other persons from interfering with the right granted.

Our examples have shown, then, that certain Charter provisions may affect relations among private persons where there is a law that either directs or authorizes a private person to act in a manner violating the Charter right of another. This is a significant conclusion. It shows that, even on the assumption that section 32(1) gives an exhaustive list of persons and bodies bound, certain provisions of the Charter may have important effects on relations among ordinary persons. The process is clearest, perhaps, where there is a statute that governs some aspect of private relations. But the same effect may hold where the offending rule is embodied in the common law, or a binding instrument such as a contract, deed, will, or by-law.

*The Function of a Constitution*

I have argued that no uniform response can be given to the question whether the Charter governs private relations. The extent to which they are affected depends on the scope of the Charter’s individual provisions, which must be interpreted on a case by case basis. This conclusion, however, allows for different views about the manner in which these provisions should normally be interpreted.

Here, an argument mentioned earlier comes into play. This maintains that a constitution serves to identify governmental institutions and regulate their powers; it does not ordinarily deal with relations among private individuals. The Charter should be read with this fact in mind and its individual provisions construed as presumptively regulating relations with governmental agencies only.

One drawback of this argument is that it relies heavily on a stereotype. It may be true that many written constitutions deal mainly with the powers of governmental bodies. The extent to which a particular consti-
tution follows this pattern, however, can only be determined by examining its terms. If certain provisions of the Charter of Rights, on their true interpretation, affect relations among private persons, that fact is not affected by what other constitutions may or may not do. The claim that a particular horse has five legs is settled, not by reading the dictionary definition of a horse, but by counting the legs.

In any case, the stereotype is historically inaccurate. Consider some of our earliest constitutional documents in Canada. The Royal Proclamation of 1763, issued by the Crown shortly after the cession of New France, laid down a constitution for the new colony of Quebec, in the course of which it provided for the introduction of English law. So doing, it ostensibly modified the French private law formerly obtaining in the colony. The implications for legal relations among ordinary individuals were profound. So great was the resulting confusion and controversy that when a new constitution was granted to the colony in the Quebec Act of 1774, French law was restored in matters pertaining to property and civil rights (virtually the whole of private law). Section 8 of the Act specifies that the inhabitants of Quebec shall enjoy their property and possessions, together with all their other civil rights, in as large a manner as if the Proclamation of 1763 had never been issued. It would seem odd to argue that these provisions did not affect private property relations because they appeared in a constitution.

The Proclamation of 1763 also contained detailed clauses governing relations between Indians and private persons in the settler communities. In particular, it forbade such persons to purchase any lands held by the Indians or to settle on them. At the same time, it opened the Indian trade to all private individuals, on the condition of obtaining a licence. These provisions, which clearly affect relations among private individuals and groups, are mixed in with other provisions directed at public officials, such as a clause prohibiting colonial Governors to grant away Indian lands prior to their purchase by public authorities. If there be any impropriety in the juxtaposition of public and private matters in a constitutional document, the thought did not occur to the Proclamation’s authors.

Looking farther afield in the old British Empire, we find other examples of constitutional provisions affecting private relations. The British Crown frequently laid down a basic legal standard governing the laws of

---

16 There has been disagreement regarding how far French private law was actually affected. See, e.g., the varying views expressed in Stuart v. Bowman (1852), 2 L.C.R. 369 (L.C.S.C.); (1853), 3 L.C.R. 309 (L.C.Q.B.); Wilcox v. Wilcox (1858), 8 L.C.R. 34 (L.C.Q.B.).
17 14 Geo. III, c. 83, s. 8 (U.K.).
an overseas colonial territory, repugnance to which entailed nullity. Such standards were supplied not only for local statutes (usually requiring conformity with English law), but also for unwritten bodies of law such as local custom. The provisions governing customary law commonly excluded rules that were repugnant to "justice, equity and good conscience". Such provisions were constitutional in the accepted sense that they defined the powers and functions of local courts. At the same time they affected laws governing relations among private individuals.

Similarly, the standard rule governing the reception of law in a settled colony holds that English law is introduced into the colony as of the time of settlement, but only insofar as it is applicable in the new circumstances of the territory. Local courts are thus empowered to reject English statutes or common law rules that are unsuited to local conditions, and this power has frequently been exercised. The courts, of course, have not confined their scrutiny to laws regulating relations between the government and private persons.

These examples suggest, then, that there is nothing unusual or aberrant in the view that certain Charter provisions supply basic standards guiding Canadian courts in the application of statutes and the common law, regardless whether they concern relations among private persons or between a private person and the government. To the contrary, as seen above, Canadian and Commonwealth history provides notable instances of similar standards being applied by the courts without any sense of constitutional indecorum.

Underlying the arguments just reviewed are two opposing conceptions of the Charter of Rights. The first, which is inspired by the American Bill of Rights, views the Charter as designed to prevent unwarranted encroachments by governments on the rights and freedoms of citizens. This conception is rooted in a political philosophy that views unrestrained government as a major threat to the well-being of a society, and places great value on the freedom of the individual, even when the exercise of

19 See, for example, the clause in Cornwallis' Commission as Governor of Nova Scotia in 1749, stating that statutes passed by the local 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", in W.P.M. Kennedy, Statutes, Treaties and Documents of the Canadian Constitution, 1713-1929 (2nd ed., 1930), p. 6, at p. 7. Repugnancy to English law, as distinct from imperial statutes extending to a colony, was later generally eliminated as a ground for nullity by section 3 of the Colonial Laws Validity Act, 1865, 28-29 Vict., c. 63, s. 3 (U.K.).


that freedom may affect other persons adversely. To oversimplify, this political philosophy views legal restraints on government more favourably than it does restraints on private activity. It seems fair to say that this philosophy has not hitherto played a major role in the shaping of Canada.

The second conception of the Charter views it as laying down certain principles that are fundamental to our idea of Canadian society, and that operate as standards for the conduct of private persons and public bodies alike. This conception is not rooted in any particular antagonism to governments. It assumes that actions threatening the basic values of a society are as likely to proceed from private persons as from government. It sees no great danger in subjecting the laws governing private relations to limited judicial scrutiny. This view harmonizes well with the wording and spirit of the Charter, and with our political traditions. Better a five-legged horse than a Trojan one.

BRIAN SLATTERY*

* Brian Slattery, of Osgoode Hall Law School, York University, Toronto, Ontario. I am indebted to my colleagues, Professors Peter Hogg, Patrick Monahan, and Andrew Petter for their comments on an earlier version of this paper.