

1987

## The Dolphin Delivery Case: The Application of the Charter to Private Action

Peter W. Hogg  
*Osgoode Hall Law School of York University*

### Source Publication:

Saskatchewan Law Review. Volume 51, Issue 2 (1986-1987), p. 273-280.

Follow this and additional works at: [https://digitalcommons.osgoode.yorku.ca/scholarly\\_works](https://digitalcommons.osgoode.yorku.ca/scholarly_works)



This work is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 4.0 License](#).

---

### Recommended Citation

Hogg, Peter W. "The Dolphin Delivery Case: The Application of the Charter to Private Action."  
*Saskatchewan Law Review* 51.2 (1986-1987): 273-280.

This Commentary 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.

# CASE COMMENTS

## ***THE DOLPHIN DELIVERY CASE: THE APPLICATION OF THE CHARTER TO PRIVATE ACTION\****

Does the *Charter of Rights and Freedoms* apply to private action? Does it apply to the courts? Does it apply to the common law? The Supreme Court of Canada in *Retail, Wholesale and Department Store Union v. Dolphin Delivery* (1986)<sup>1</sup> has addressed each of these three fundamental questions.

The facts of the case were these. Dolphin Delivery was a courier company. The Retail, Wholesale and Department Store Union, which represented the employees of another courier company, Purolator Courier, threatened to picket the premises of Dolphin Delivery. The purpose of the picketing was to publicize an industrial dispute between the union and Purolator. Dolphin Delivery was not a party to that dispute, thus the picketing of Dolphin Delivery's premises would have been "secondary picketing."

Dolphin Delivery sought and obtained from the courts of British Columbia an injunction to restrain the union from picketing Dolphin's premises. The ground upon which the injunction was granted was that secondary picketing in the circumstances of this case would constitute the common law tort of inducing a breach of contract. There was a prohibition on secondary picketing in the B.C. Labour Code, but this statutory prohibition did not apply, because the applicable labour law was federal (in view of Purolator's interprovincial operations), and the Canada Labour Code was silent on secondary picketing, leaving it to be regulated by the common law.

In the Supreme Court of Canada, the union argued that the injunction ought to be set aside on the ground that it limited freedom of expression, guaranteed under s.2(b) of the *Charter*. The Supreme Court of Canada, sitting as a seven-judge bench, held unanimously that the injunction should stand. McIntyre J., with the concurrence of Dickson C.J., Estey, Chouinard and Le Dain JJ., wrote the principal opinion, holding that the *Charter* did not apply to private action of the kind involved in this case. Beetz and Wilson JJ., who wrote separate concurring opinions, each agreed with McIntyre J.'s opinion on the applicability of the *Charter*. On that issue, therefore, the seven-judge bench was unanimous.

### **I. THE DOLPHIN DELIVERY DECISION**

#### **A. APPLICATION TO PRIVATE ACTION**

The first and most basic point settled by *Dolphin Delivery* is that s.32 of

---

\* This article is a revised version of a paper delivered at the Spring Convention of The Advocates' Society on April 3, 1987.

<sup>1</sup> [1986] 2 S.C.R. 573.

the *Charter* is an exhaustive statement of who is bound by the *Charter*. Section 32 provides as follows:

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.

The references in s.32 to "the Parliament and government of Canada" and "the legislature and government of each province" make plain that the *Charter* applies to "governmental action" (or "state action," as the Americans call it). But s.32 does not say that the *Charter* applies only to governmental action. This omission has led some commentators to argue that s.32 serves a function similar to the common statutory provision that "this Act binds the Crown."<sup>2</sup> On this argument, s.32 is intended to make clear that governments are bound, but is not intended to exclude private action, and the *Charter* should be interpreted as applying to private action. The underlying assumption of the argument, of course, is that the values represented by the *Charter* are so good, and their interpretation and enforcement by judges will be so reliably benign, that the values ought to be imposed in the private as well as the public realm.<sup>3</sup>

In *Dolphin Delivery*, McIntyre J. rejected the argument that the *Charter* extended to the private realm. He held that s.32 was an exhaustive definition of the actors bound by the *Charter*.<sup>4</sup> This means that Canada has a governmental action (or state action) restriction on the application of the *Charter*. McIntyre J. did not give his reasons for reaching this important conclusion, but, in my view, there are good reasons for reading the *Charter* in this way. I think that it is the best reading of the (admittedly ambiguous) language of the *Charter*; it is supported by the legislative history of the *Charter*; and it is consistent with the "state action" limitation on the American *Bill of Rights*.<sup>5</sup> Underlying these reasons, of course, is the assumption that there is a private realm in which people are not obliged to subscribe to "state" virtues and into which constitutional norms ought not to intrude.<sup>6</sup>

## B. APPLICATION TO COURTS

The second point settled by *Dolphin Delivery* is that the *Charter* does not apply to the courts. The union had argued that, even if the *Charter* did not apply to private action, the injunction, that had in this case been issued by the courts of British Columbia, supplied the necessary element of govern-

<sup>2</sup> Dale Gibson, "The Charter of Rights and the Private Sector" (1982), 12 *Man. L.J.* 213.

<sup>3</sup> For argument that the *Charter* applies to private action, see Manning, *Rights, Freedoms and the Courts* (1983), at 115-126; Slattery, "Charter of Rights and Freedoms — Does it bind private persons?" (1985), 53 *Can. Bar Rev.* 148; de Montigny, "Section 32 and Equality Rights" in Bayefsky and Eberts, *Equality Rights and the Charter of Rights* (1985), ch. 13; Gibson, *The Law of the Charter: General Principles* (1986), at 110-118.

<sup>4</sup> *Supra*, note 1, at 598.

<sup>5</sup> These points are elaborated in Hogg, *Constitutional Law of Canada* (2nd ed., 1985), at 675-677.

<sup>6</sup> See Whyte, "Is the Private Sector affected by the Charter?" in Smith (ed.), *Righting the Balance: Canada's New Equality Rights* (1986), at 145, 149.

mental action. McIntyre J. rejected this argument. He held that the word "government" in s.32 meant only the executive branch of government, and did not include the judicial branch: "The courts are bound by the Charter [only] as they are bound by all law."<sup>7</sup> A court order was not governmental action,<sup>8</sup> and the injunction in this case was not subject to the *Charter*.

The holding that the *Charter* does not apply to the courts seems wrong to me, partly, no doubt, because of a sentimental attachment to the text of my book that argued the contrary.<sup>9</sup> Several provisions of the *Charter* imply that the courts are bound by the *Charter*, for example, most of s.11 (rights of a person charged with an offence), s.12 (cruel and unusual treatment or punishment), s.13 (self-incrimination), s.14 (interpreter) and s.19 (language in court proceedings). One of these provisions has already been applied by the Supreme Court of Canada itself in a fashion which seems to entail that the courts are bound by the *Charter*. In *Dubois v. The Queen* (1985),<sup>10</sup> the Supreme Court of Canada held that the admission by a criminal court of incriminating evidence given at an earlier trial was a breach of s.13 of the *Charter*. Here, the action held to be a breach of the *Charter* was that of a court, and the remedy ordered by the Supreme Court of Canada was a new trial.

*Dubois* demonstrates that some of the provisions of the *Charter* can work only on the basis that the courts are bound by the *Charter*. These provisions, I suggest, supply a context in which it is reasonable to interpret the word "government" in s.32 as including the judicial branch. The references in s.32 to "Parliament" and "legislature" could also be regarded as catching court action, because courts are established (or continued) by statute, and their powers to grant injunctions and make other orders are granted (or continued) by statute. It is obvious that other statutory tribunals will have to comply with the *Charter*. Why not the courts?

In the United States, it has been held that a court order is "state action" to which the *Bill of Rights* applies. In *Shelley v. Kraemer* (1948),<sup>11</sup> the Supreme Court of the United States held that an injunction was subject to the *Bill of Rights*. The injunction had been issued by a state court to prohibit a white landowner from selling his land to a black purchaser in breach of a whites-only restrictive covenant that bound the land. It was clear that, if the restrictive covenant had been voluntarily adhered to, there would have been no state action and no breach of the *Bill of Rights*. But the state entered the picture when the adjoining landowners, whose land was bound by a similar covenant, obtained an injunction to enforce the covenant by divesting the black purchaser of his title and restraining him from taking possession. The Supreme Court of the United States held that the action of the state court in issuing the injunction, supported as it was by "the full panoply of state power,"<sup>12</sup> was subject to the *Bill of Rights*. The Supreme Court held that the state court's injunction amounted to an order to discriminate on the basis of race, which was contrary to the equal protection clause of the Fourteenth Amendment. The injunction was therefore set aside as unconstitutional.

---

<sup>7</sup> *Supra*, note 1, at 600.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Supra*, note 4, at 672-674.

<sup>10</sup> [1985] 2 S.C.R. 350.

<sup>11</sup> (1948) 334 U.S. 1.

<sup>12</sup> *Ibid.*, at 19.

*Shelley v. Kraemer* is very similar to *Dolphin Delivery*. In *Dolphin Delivery*, as in the American case, the government was implicated when the plaintiff (Dolphin) invoked the coercive power of a court injunction to prevent the picketers from exercising their freedom of expression. Breach of the injunction would be a contempt of court, which would lead to the arrest and imprisonment of the picketers. Are such enforcement measures by the police, and by court and corrections officials, to be regarded merely as the actions of a private security force? Surely, the American court was right to describe an injunction as supported by "the full panoply of state power," and to characterize it as state action.

I think that *Shelley v. Kraemer* was rightly decided, but I must acknowledge that some eminent American commentators do not agree with me. Professor Tribe, for example, describes the reasoning as "peculiarly unpersuasive," pointing out that the reasoning "would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement."<sup>13</sup> Tribe shares McIntyre J.'s concern that the characterization of a court order as governmental action would inevitably bring some private action within the scope of the *Charter*.<sup>14</sup> My difference with McIntyre J. (and Tribe) concerns the appropriate point at where the line should be drawn to mark the private realm that is unconstrained by the *Charter*. At the point of judicial enforcement, I believe the plaintiff has entered the public realm, and his or her court order ought to comply with the *Charter*.

### C. APPLICATION TO COMMON LAW: RATIO DECIDENDI

The third point that is probably settled by *Dolphin Delivery* is that the *Charter* does not apply to the common law. The court injunction in *Dolphin Delivery* was based on the common law that regulates relationships between private parties: it was a rule of the common law that secondary picketing in the circumstances of the case amounted to the tort of inducing a breach of contract. (In this respect, *Dolphin Delivery* is unlike *Shelley v. Kraemer*, where the injunction was based on a private agreement.) In *Dolphin Delivery*, therefore, it was argued that the general rule of the common law should be regarded as governmental action. McIntyre J. rejected this argument. He said: "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."<sup>15</sup>

Despite some confusing dicta which are discussed later in this article, it seems to be part of the *ratio decidendi* of the case that the *Charter* does not apply to the rules of the common law that regulate relationships between private parties. The Supreme Court of the United States has decided this issue the other way. The best-known case is *New York Times v. Sullivan* (1963).<sup>16</sup> In that case, it was held that the *Bill of Rights*' guarantees of

<sup>13</sup> Tribe, *American Constitutional Law* (1978), at 1155-1156. The best-known criticism of the case is Wechsler, "Toward Neutral Principles of Constitutional Law" (1959), 73 *Harv. L. Rev.* 1, at 29-31.

<sup>14</sup> McIntyre J. said at 600: "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."

<sup>15</sup> *Ibid.*, at 603.

<sup>16</sup> (1963) 376 U.S. 254.

freedom of speech and of the press applied to the common law of defamation, shielding a newspaper from tortious liability for defamatory criticism of a public official, unless the criticism was actuated by malice. In this way, the *Bill of Rights* modified the common law of Alabama by adding a new ingredient to the tort of defamation, namely, malice, where the defamatory statement took the form of political speech. There is an earlier American case that is on all fours with *Dolphin Delivery*. In *American Federation of Labor v. Swing* (1941),<sup>17</sup> the Supreme Court of the United States held that an injunction issued by a state court to restrain a union from secondary picketing was an unconstitutional violation of the guarantee of freedom of speech. The injunction was based on the common law, and the effect of the decision was to modify the common law of the state of Illinois.<sup>18</sup>

The decision in *Dolphin Delivery* means that *New York Times v. Sullivan* and *American Federation of Labor v. Swing* would have to be decided differently in Canada. It also means that a recent decision of the Appellate Division of the Supreme Court of Nova Scotia,<sup>19</sup> holding that the common law rule denying costs to a litigant unrepresented by counsel was a breach of s.15 of the *Charter*, was wrongly decided. In each of these situations, if the applicable legal rule had been contained in a statute instead of the common law, the *Charter* would apply: the statute would unquestionably supply the needed element of governmental action. This anomaly is starkly presented by the facts of *Dolphin Delivery* itself. Because the prohibition on secondary picketing had not been enacted in the Canada Labour Code, it remained a matter of common law, and the *Charter* did not apply. But in most jurisdictions, including British Columbia, the prohibition on secondary picketing has been enacted in the Labour Code: in those jurisdictions, the *Charter* will apply. It seems odd that the applicability of the *Charter* should turn on the question whether the applicable law is a rule of the common law or a rule of statute law.<sup>20</sup>

In support of the Court's decision in *Dolphin Delivery*, it could be said that the exclusion of private action from the operation of the *Charter* does entail the exclusion of, at least, some of the common law. Since viewed in an expansive sense, the common law could be said to authorize any private action that is not prohibited by a positive rule of law. On this view, if I were to refuse to permit Anglicans to enter my house, my refusal would be an act authorized by the common law, and therefore subject to *Charter* review. This line of reasoning would make the *Charter* applicable to all private activity. The American courts have not allowed themselves to be beguiled down that slippery slope. The Supreme Court of Canada is right to be concerned that the application of the *Charter* to any rule of the common law would later require

---

<sup>17</sup> (1941) 312 U.S. 321.

<sup>18</sup> Both these cases could be explained on the basis that in each case the court order supplied the necessary governmental action. But the cases are accepted as authority for the proposition they assert, namely, that the *Bill of Rights* applies to the common law. "The general proposition that common law is state action is hardly controversial": Tribe, *supra*, note 13, at 1168.

<sup>19</sup> *McBeth v. Governor of Dalhousie College* (1986), 26 D.L.R. (4th) 321 (N.S.A.D.).

<sup>20</sup> See Slattery, "Does Dolphin Deliver?: The Charter's Relevance to Private Litigation" (1987), unpublished, wherein he criticizes the exclusion of the common law from the *Charter* on the basis that in most Canadian jurisdictions the original reception of the common law from England, and its continuing force, depends upon a statute. He points out as well that the *Civil Code* of Quebec, which substitutes for the common law in that civilian jurisdiction, is a statute.

difficult distinctions to be drawn if a zone of private action is to be shielded from *Charter* review.

#### D. APPLICATION TO COMMON LAW: OBITER DICTA

It is now necessary to describe some passages in McIntyre J.'s opinion that discuss the applicability of the *Charter* to the common law, and that do not sit comfortably with my account of the *ratio decidendi* of the case, which is that the *Charter* does not apply to the rules of the common law that regulate relationships between private parties.

Quite early in his opinion, McIntyre J. asks the question: "Does the *Charter* apply to the common law?"<sup>21</sup> His answer is that "there can be no doubt that it does apply,"<sup>22</sup> and he condemns the view "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" as being "wholly unrealistic."<sup>23</sup> These sweeping assertions are flatly contradictory to the later holding that the *Charter* does not apply to the common law respecting secondary picketing. McIntyre J. makes it plain that the *Charter* applies to the common law "only in so far as the common law is the basis of some governmental act which it is alleged infringes a guaranteed right or freedom."<sup>24</sup> This means that the *Charter* would apply when the Crown acts under a prerogative power<sup>25</sup> or under another kind of common law power.<sup>26</sup> It is questionable whether one ought to describe the *Charter* as applicable to the common law in even these situations, where it is the presence of the governmental actor, not the source of the actor's power, that makes the *Charter* applicable. Yet, these seem to be the only situations in which the *Charter* could be said to apply to the common law.

Another difficult passage is to be found near the end of the opinion where McIntyre J. asserts that "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," and he says that "in this sense, . . . the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law."<sup>27</sup> What is meant by the word "ought," which I have emphasized in the foregoing passage? Probably, all that it means is that where a common law rule is unsettled, the Court in developing the law in the normal incremental way should take account of *Charter* values. This interpretation best fits the *ratio decidendi* of the case, which denies the applicability of the *Charter* to the rules of the common law that regulate private relationships.

The word "ought" may be intended in a much stronger sense.<sup>28</sup> It could mean that in private litigation the Court must measure each applicable common law rule (however well settled) against the guarantees of the *Charter*, and, if the rule is found to be inconsistent with a *Charter* guarantee, inquire into the rule's justification under s.1. If this is what is contemplated,

---

<sup>21</sup> *Supra*, note 1, at 592.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, at 593.

<sup>24</sup> *Ibid.*, at 599 (my emphasis).

<sup>25</sup> So held in *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 (*Charter* applied to government decision to allow U.S. missile testing in Canada).

<sup>26</sup> For example, an exercise of proprietary or contractual powers by a government would attract the *Charter*.

<sup>27</sup> *Supra*, note 1, at 603. (my emphasis)

<sup>28</sup> Slattery, *supra*, note 20.

then for all practical purposes, the *Charter* does apply to the common law. Moreover, this procedure is exactly the one that McIntyre J. followed in this case. He considered the question whether picketing was a form of expression guaranteed by s.2(b) of the *Charter*, and he concluded that it was, so that the common law prohibition limited a *Charter* right. He then went on to examine the question whether a prohibition on secondary picketing was justified under s.1, and he concluded that it was so justified. It followed that the common law rule that crystallized in the court's injunction was not inconsistent with the *Charter*.

In view of the principal holding of the case, that the *Charter* does not apply to the common law in the absence of a governmental actor, the discussion of ss.2(b) and 1 of the *Charter* was all unnecessary. Indeed, McIntyre J. said that his discussion of s.1 was unnecessary,<sup>29</sup> although he said nothing similar about his discussion of s.2(b). But the fact that he discussed ss.2(b) and 1 gives some credence to the strong version of the "ought" statement. According to the strong version, the discussion of ss.2(b) and 1 was relevant, because, if the common law had been found to be in violation of the *Charter*, the Court would have been under a duty to modify it to make it consistent with the *Charter*. This would have required the Court to set aside the injunction.

If I were qualified to identify interpolations in an author's text, I would be interested in the question of whether more than one hand had contributed to McIntyre J.'s opinion. The inconsistencies and ambiguities are, with respect, uncharacteristic, and suggest an imperfect knitting together of two different opinions, one asserting and the other denying that the *Charter* applies to the common law. This suspicion is reinforced by the extraordinary delay in the issuance of the judgment; more than two years elapsed from the end of the oral argument to the delivery of judgment. While it is obviously highly desirable for the Court to achieve unanimity on an issue as basic as the scope of the *Charter's* operation, in this case, it looks as though unanimity has been purchased at the cost of clarity.

## E. CONCLUSIONS

The following conclusions are indicated:

First, the Court's decision to exclude private action from the binding effect of the *Charter* establishes a fundamental principle of *Charter* interpretation. In my view, this ruling is not only technically correct but is also sound as a matter of constitutional policy.

Secondly, the Court's decision to exclude a court order from the binding effect of the *Charter* establishes another fundamental principle of *Charter* interpretation. In my opinion, this ruling is harder to justify on either technical or policy grounds. However, the controversy surrounding the American decision in *Shelley v. Kraemer*, which held that a court order was state action, demonstrates that this is an area where it is easy for reasonable people to disagree.

Thirdly, the Court's treatment of the application of the *Charter* to the common law is confusing. Probably, the *ratio decidendi* of the case is that the *Charter* does not apply to the rules of the common law that regulate relationships between private parties. While such a ruling produces some anomalies, it is a defensible answer to a difficult question. The confusion stems from

<sup>29</sup> *Supra*, note 1 at 588. This statement is probably fatal to the strong version of the ought statement, because, under the strong version of the ought statement, the discussion of s.1 would have been necessary.

*dicta*, which seems inconsistent with what I have identified as the *ratio decidendi* of the case, and the presence of these *dicta* makes this part of the decision ambiguous.<sup>30</sup>

Peter W. Hogg\*

---

\*Peter W. Hogg, Q.C., of Osgoode Hall Law School, York University, Toronto.

<sup>30</sup> I acknowledge the help of Professors Andrew Petter and Brian Slattery, who read an earlier version of this article and made helpful suggestions for its improvement.

## PROVOCATION AND THE ORDINARY PERSON: *R. v. HILL*

Save for one of the litigants, there is a little something for everyone in the recent decision of the Supreme Court of Canada in *R. v. Hill*.<sup>1</sup> The case concerns the defence of provocation to a charge of murder, which is codified in s.215 of the *Criminal Code*.<sup>2</sup> At issue were questions of substance and procedure respecting the objective requirement that the provocation be "sufficient to deprive an ordinary person of the power of self-control." For practising criminal lawyers, the decision amounts to Supreme Court approval of variance of the objective ordinary person standard even though the variance need not necessarily be conveyed to a jury. For academic lawyers, the five judgments provide ample target for intellectual debate. For proponents of the jury system, there is a ringing defence by Chief Justice Dickson of the "collective good sense"<sup>3</sup> of jurors. For the Crown, there is the satisfaction of having a murder verdict upheld. It is only for poor Mr. Hill that the decision represents a setback.

### I. THE FACTS AND THE ISSUES

Hill was sixteen years of age in December 1979, when he caused the death of Verne Pegg and was charged with first degree murder. The Crown and the defence theories differed greatly. The Crown sought to prove that the two were homosexual lovers, that there had been a falling out and that Hill killed Pegg as a result. Hill maintained that he, while sleeping, had been the subject of unwelcome homosexual advances by Pegg, whom he knew through the "Big Brothers" organization. Hill's version was that he struck Pegg with a hatchet in an attempt to scare him off, that he had fled, and then returned to check upon Pegg's condition. Threatened again by Pegg, he stabbed him to death with two knives. He argued self-defence and provocation. The jury rejected both defences and convicted him of second degree murder. His appeal was allowed by the Ontario Court of Appeal on the ground of misdirection with respect to provocation and a new trial was ordered.<sup>4</sup> However, on further appeal by the Crown, the Supreme Court of Canada, by a six-three majority, reinstated the second degree murder conviction.

---

<sup>1</sup> (1986), 25 C.C.C. (3d) 322 (S.C.C.).

<sup>2</sup> *Criminal Code*, R.S.C. 1970, c. C-34, s. 215.

<sup>3</sup> *Supra*, note 1, at 335.

<sup>4</sup> *R. v. Hill* (1982), 2 C.C.C. (3d) 396 (Ont. C.A.).