Operation Dismantle, Inc. et al. v. *Her Majesty The Queen*[1]: The Application of the Charter of Rights and Freedoms to Prerogative Powers.

INTRODUCTION

Operation Dismantle, Inc.[2] sought a declaration stating that the Canadian government's decision to allow the testing of American cruise missiles over Canadian airspace was a violation of the public's right to ". . . life, liberty and security of the person," as guaranteed by section 7 of the Canadian Charter of Rights and Freedoms. The Crown unsuccessfully attempted to have the statement of claim struck out, for not disclosing a cause of action, in the motion heard before Cattanach J. of the Federal Court of Canada, Trial Division.[3] The Crown's appeal was allowed by the Federal Court of Appeal—all five Justices there finding no justiciable cause of action. Leave to appeal was granted by the Supreme Court of Canada which reserved decision on February 14, 1984.

At trial, Cattanach J. found a "scintilla of a cause of action," holding that it was enough to allow the case to be heard. He alluded to the "cardinal principle of long standing" which sustains a statement of claim if its allegations of fact are, by virtue of a wide interpretation, capable of supporting a cause of action.[4] In ultimately deciding that Operation Dismantle, Inc. had failed to disclose a cause of action, the Court of Appeal considered several questions of law concerning the Charter. First of all, the allegations that the testing would incite nuclear attack were termed as "apprehended infringements" and hence, were held to be outside the ambit of the Charter.[5] By virtue of section 24(1), the Charter is applicable only where rights "have been" denied.

Secondly, since the alleged nuclear attack would be the act of a foreign power, the Charter did not apply. Section 32 of the Charter clearly protects people from violations which emanate from governments in Canada but not from foreign governments, or for that matter, from private individuals.

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[1]Unreported, November 28, 1983 (F.C.A.D.)

[2]Representing a coalition of 14 public interest groups, ranging from national unions, e.g. CUPE, and professional associations, e.g. Physicians for Social Responsibility (Montreal Branch) to local peace groups, e.g. Windsor Coalition for Disarmament. The first named, Operation Dismantle, Inc., is a national peace group, and is the nominal plaintiff.

[3]*Operation Dismantle, Inc. et. al.* v. *Her Majesty the Queen*, unreported, September 27, 1983 (F.C.T.D.).

[4]*Ibid.*, p.3.

[5]The facts contained in the plaintiff's statement of claim alleged that: the cruise missile was undetectable so that arms' limitation agreements would be unenforceable; the tests increased the American military presence in Canada making her more susceptible to nuclear attack; and that since the missile is not detectable until eight minutes before reaching its target, the military response of "Launch on Warning" would increase the likelihood of accidental firing. See *supra*, footnote 1, at Ryan J. p.2.

Thirdly, and separate from the Charter arguments, the testing agreement was a policy decision, the appropriateness of which is open for debate in our society, and therefore, indeterminable. Since the issue was non-justiciable, there was no cause of action in the statement of claim.

Finally, Operation Dismantle, Inc. succeeded in getting the majority of the Court of Appeal to declare that the action of the federal government, in making the agreement, was the exercise of a prerogative power which is subject to the Charter by virtue of section 32(1) (a):

> 32(1) This Charter applies
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> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament . . .

The prerogative is the panoply of exceptional powers given to the Crown. Such powers are 'direct', in effecting the will of the sovereign, or 'incidental', in merely excluding the Crown from the law as it applies to his subjects. The direct prerogatives deal with the Crown's character, income and authority. The 'character' of the sovereign is exemplified by maxims such as "The King can do no wrong". For all practical purposes, the royal income prerogative has been surrendered up for public use. Finally, the royal authority includes the royal prerogative to exercise functions of state, such as: to declare war, or for our purpose, to make treaties.[6]

The question arose, at the Court of Appeal level, whether or not the term 'government', found in section 32(1)(a), renders the prerogative subject to the Charter. Pratte, Ryan and LeDain JJ. gave section 32 just such a literal interpretation in holding that the prerogative is subject to the Charter.[7] However, in the Court of Appeal's lengthiest decision, Marceau J. held that an essential characteristic of the 'royal prerogative' was that it be exercised independently from the possibility of review by the courts. Moreover, in legislating the Charter, Parliament could not have ". . . without a clearer indication of their intention . . ." meant the prerogative to be subject to the Charter.[8] In light of what is, effectively, a narrow 3:1 decision on this point, it becomes imperative for the Supreme Court of Canada to proffer a solution.

APPREHENDED INFRINGEMENTS

In addressing the question whether or not the Charter offered protection for a mere anticipated breach of section 7, Cattanach J. drew an analogy between a possible nuclear attack resulting from the tests and the facts of *Rylands* v. *Fletcher*.[9] In that case it was deemed forseeable that a

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[6]Earl Jowitt, *The Dictionary of English Law* (London: Sweet & Maxwell, 1972) at p. 1390.

[7]Hugessen J. was silent with respect to the prerogative.

[8]Per Marceau J., p.22.

[9](1868), 3 L.R. 330 H.L.

large body of water forceably retained on one's land could, by accident spill onto another's land. By analogy, the provocation of a nuclear attack made possible by the decision to allow the testing could be "stigmatised" because of ". . . its forseeable harmful potentialities."[10] The analogy was not commented upon by the Court of Appeal which was content to literally interpret section 24(1):[11]

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply . . .
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> 24(1) Toute personne, victime de violation ou de negation des droits ou libertés que lui sont garantis par la presente Charte peut s'addresser . . .

Hence, Marceau J. was able to conclude that: "It is impossible to think that the Courts can be called upon to deal with mere potential situations . . ."[12]

With reference to the French version, it is easy to see that "victime de" does not connote the past tense, as does "have been". Because section 57 of the *Constitution Act*, 1981 states that English and French versions are of equal authority, it is maintainable that the French version does apply to "apprehended infringements". The denial of the right to education in one's own official language, which the Quebec government effected with its *Charte de Langue Française*[13], was referred to in *Quebec Association of Protestant School Boards et al.* v. *A.-G. Quebec et al*, (no. 2).[14]

Even though the school year had not yet begun, and therefore no right 'had been' violated, Deschênes C.J.S.C. interpreted Quebec's firmly enunciated policy as an existing infringement to the right to an English education.[15] With respect to the Charter's reach, Deschênes C.J.S.C. reviewed the authorities and concluded that: ". . . it is in order to extend the scope of s.24 to the future as to the past."[16] Notwithstanding the argument that the French version of section 24(1) would apply to anticipated breaches, case law suggests that the English version would also apply. In *Re Allman and Commissioner of Northwest Territories*[17], De Weerdt J. referred to the English version only and concluded that it was probably applicable only to

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[10]Per Cattanach J., p.8.

[11]Per Pratte J., p.7 n5.

[12]Per Marceau J., at 7.

[13]R.S.Q. 1977, c. C-11.

[14](1983), 140 D.L.R.(3d), 33.

[15]*Ibid.*, at 42.

[16]*Ibid.* Professor Gibson in Tarnopolsky and Beaudoin (eds), *The Canadian Charter of Rights and Freedoms*, (Toronto, 1983), terms the different meanings of section 24(1) as the Charter's ". . . most serious weakness . . ." He further states that both Bill C-60 of 1978 and its revision of 1979 applied to future situations. This, coupled with the fact that each revision, culminating in the present Charter, was successively wider in application, leads one to believe that Parliament intended section 24(1) to be applicable to future infringements.

[17](1983), 144 D.L.R.(3d) 467.

past events: ". . . although future consideration in an appropriate case may suggest otherwise."[18]

It seems proper that future infringements should be protected under section 24(1). As Professor Gibson puts it: ". . . in most inchoate situations the threat of a future violation of rights has *immediate* restrictive consequences on the activities of the plaintiff."[19] Hence, if the testing had caused panic in anticipation of a nuclear attack, similar to that which occurred in the United States after the government's decision to blockade Cuba in 1962, this would represent a violation to the security of the person. It is suggested that the Federal Court of Appeal was hasty in stating that the plaintiff's allegations, if true, were outside the contemplation of the Charter.

THREATS FROM A FOREIGN POWER

Even if apprehended infringements are protected, the fact that any threat to the security of the person would emanate from a foreign power invalidates Operation Dismantle, Inc.'s claim. With reference to section 32(1), it is obvious that no protection is afforded to rights violated by the action of any body other than a government in Canada:

> 32(1) This Charter applies
>
> a) to the Parliament and government of Canada . . .

This literal interpretation of the Charter was brought to bear by Steele J. of the Ontario High Court:

> Section 32 provides that the Charter is applicable to the Parliament and Government of Canada and the Legislature and Government of each province. In my opinion, nothing therein applies to a foreign State . . .[20]

In the present case, Hugessen J. goes further by illustrating that the Charter is inapplicable to cases involving the infringements caused by other private parties:

> The Charter cannot have such a reach. If it did, the timorous citizen who feared a mugging on the street might enjoin the police to provide him with a continuous escort.[21]

While this line of reasoning is unassailable, it is not unreasonable to conceive the testing as the act of the Canadian government, and thus, allow the cause of action to survive. If the *Rylands* v. *Fletcher* reasoning is used,

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[18]*Ibid.*, at 470.

[19]*Supra*, footnote 16, at 499.

[20]*Carrato* v. *United States of America* (1983), 141 D.L.R.(3d) 456 at 459. The plaintiff claimed that an American court-appointed receiver had infringed his right, under section 8 of the Charter, to security against "unreasonable search and seizure".

[21]Per Hugessen J., at 3.

it is foreseeable that retaliation of some sort would result from an openly belligerent action of the Canadian government, which the cruise missile tests may or may not be. Indeed, Marceau J. suggested that, if Operation Dismantle, Inc. had tightened the causal connection by stating that the tests created a ". . . state of vulnerability, not the nuclear attack itself . . .",[22] the cause would have survived.

JUSTICIABILITY

Section 24 provides standing to persons who, at common law, would not have a cause of action.[23] "Any person" who claims that a right has been denied, can invoke the Charter for protection. However, if the issue is not capable of being addressed by the judiciary, there can be no standing given and no cause of action can exist. Only where the case is justiciable, therefore, will the court exercise its discretion to grant standing to a person who seeks a decision of government struck down as unconstitutional:

> Central to (the exercise of) the discretion is the justiciability of the issue sought to be raised.[24]

Because the cabinet decision to allow the tests was 'policy' made in the nation's best interest, and therefore debatable, no court could decide whether it was beneficial or harmful. Ryan J. suggested that all governmental decisions are made in good faith and that:

> The accuracy of the government's estimate of what national security and national defence require is, of course, open to debate in our society, and the government is responsible for their decisions under the principle of responsible government. But can the rightness or wrongness of their decision to permit testing be proved in a court case?[25]

LeDain J similarly dismisses the case for its inherently non-justiciable issues which depended upon:

> . . . an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes.[26]

Admittedly, courts frequently ". . . confuse issues of standing with the substantive merits of a case . . ."[27] However, if the discretion to allow standing rests on justiciability,[28] Operation Dismantle, Inc. has no standing to

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[22]Per Marceau J., at 8. This suggestion was made as one with respect to several ". . . defects in presentation and drafting . . ."

[23]Hogg, Peter W., as cited in Tarnopolsky & Beaudoin, *supra*, footnote 16, at 13.

[24]Mullan, David, as cited in Tarnopolsky & Beaudoin, *supra*, footnote 16, at 37.

[25]Per Ryan J., at 5.

[26]Per LeDain J., at 7.

[27]Blake, Sara, "*Minister of Justice* v. *Borowski*: The Inapplicability of the Standing Rules in Constitutional Litigation" (1982), 28 *McGill Law Journal* 126.

[28]*Supra*, footnote 21.

challenge the decision. Clearly they cannot surmount this obstacle before the Supreme Court. Even if we accept the view that section 24 gives automatic standing to such cases,[29] the trial would end shortly, when the judge(s) decide(s) that the case cannot be judicially addressed.

PREROGATIVE

The cruise missile testing was provided for by an "umbrella" agreement with the United States. Despite the simple, and perhaps purposely neutral term, "agreement", its legal character is that of a treaty which was intended to bind the parties in international law.[30] While section 132 of the *Constitution Act*, 1867 gave Canada the power to ratify treaties, the treaty-making power came from the prerogative. Section 9 of the *Constitution Act*, 1867 vested the executive government in the Crown: "Under this system, the treaty-making power belongs exclusively to the Crown. It is part of the royal Prerogative . . ."[31] Great Britain "progressively transferred" this power to the executive of the Canadian government. Canada's increased international presence during and after World War I precipitated an enhanced executive power which flowed from the Imperial Conference of 1926, the Statute of Westminister, 1931, the Seals Act, 1939 and the Letters Patent of 1947. These Letters Patent explicitly delegated the prerogative powers of the Crown to the Governor General in Council, which for our purposes is the Prime Minister and his cabinet.[32]

However plausible this explanation seems, there are alternative theories to explain the derivation of treaty-making power. It is possible to torture the language of section 132 (implementation power) and come up with a source for the treaty-making power. Furthermore, such a power could rest in the residual "peace, order and good government" clause of section 91 in the *Constitution Act*, 1867.[33] However, the accepted theory assigns the power to the prerogative category. Marceau J. in the present case outlined the nature of the royal prerogative:

> The idea that certain privileges, freedoms and powers remained directly associated with the dignity and responsibility of the Crown persisted even after the royal authority had become totally subject to the supremacy of Parliament, except that these royal prerogatives were then seen as arising out of the common law and their content, not defined *a priori*, became subject to the will of the elected representatives of the people, free to intervene at any time to clarify their content or limit their extent.[34]

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[29]Professor Gibson in Tarnopolsky & Beaudoin, *supra*, at 490.

This view rests on the assertion that the drafters of the section were aware of the discretionary factor, but did not mention it anywhere in the Charter. This omission supposedly gives automatic standing to "any person", which is in line with the liberalisation of the requirement before the Charter, e.g. anyone with ". . . a genuine interest" as found in *Minister of Justice(Can.)* v. *Borowski* (1981), 130 D.L.R.(3d) 588 (S.C.C.).

[30]Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 181.

[31]A. Jacomy-Millette, *Treaty Law in Canada* (Ottawa: Univ. of Ottawa Press, 1975) at 52.

[32]*Ibid.*, at 54.

[33]Gerald L. Morris, "The Treaty-Making Power: A Canadian Dilemma", (1967) 45 *Canadian Bar Review* 478 at 483.

[34]Per Marceau J., at 18.

It seems then, that until the legislature moves to carve out an area from this reservoir of powers, the prerogative remains purely executive in nature. Whether this makes the cabinet secretive in its dealings, or whether there is a need for speed in international affairs, very few treaties are ratified by Parliament. Indeed, of the four hundred and ninety-four bilateral treaties signed between 1946 and 1965, only fifty-two were presented to Parliament for ratification.[35] Professor Hogg expresses no doubt that the addition of the word "government" to "Parliament and legislature" in section 32(1) (a) was meant to allow application to the Charter to common law powers, such as ". . . the acquisition and management of property, in contracting, in the issue of passports and in the award of some appointments and honours."[36] With respect to treaties, Ryan J. saw no problem in applying the Charter:

> Both treaty making and defence are matters within the authority of Parliament in that Parliament could legislate in relation to them and to the use of the prerogative in respect to foreign affairs and defence is "within the authority of Parliament" so that the Charter could apply to it.[37]

LeDain J. affirmed this point of view:

> A matter which is subject to the prerogative of the Crown in right of Canada is one on which Parliament may legislate so as to restrict or displace the prerogative . . ., and as such, is in my opinion a matter within the authority of Parliament.[38]

However, Marceau J. contended that in the absence of Parliament's clear indication, the Charter did not apply to the royal prerogative. To subject the royal prerogative to the Charter would rob it of its autonomous operation and independence from the courts. The Honourable Justice could not admit that such an effect could be done so indirectly by Parliament.[39] With all due respect to Marceau J., the Charter has purported to change the Constitution on other fundamental points. The guarantees with respect to the administration of justice (ss. 8-13); language rights (ss. 14-23); cultural rights (s.27); and sexual equality (s.28) are certainly intended to fundamentally change the Constitution. Section 52(1) entrenches, *inter alia*, the Charter as the ". . . supreme law of Canada . . ." Professor Hogg asserts that the Constitution, which includes the Charter, is supreme over all laws ". . . whatever their origin: federal statutes, provincial statutes, common law, pre-confederation statutes and imperial statutes . . ."[40]

Two crucial questions remain to be resolved by the Supreme Court of Canada. First of all, is the prerogative exclusively a common law power? Secondly, will all laws become subject to the Charter?

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[35]Jacomy-Millette, *supra*, footnote 31, at 63.

[36]Hogg (Annotation), *supra*, footnote 30, at 76.

[37]Per Ryan J., at 4.

[38]Per LeDain J., at 4.

[39]Per Marceau J., 22.

[40]Hogg (Annotation), *supra*, footnote 30, at 105.

A survey of standard authorities led Marceau J. to conclude that the prerogative is a special law outside the "common law". While he concedes that the prerogative is "created and limited" by the common law,[41] its operation with respect to "the government of the army" is excluded from judicial review.[42] This is less an argument that the entire prerogative is excluded from judicial review than it is that only a portion of it, that dealing with defence and international relations, is unreviewable. Moreover, Professor Hogg in suggesting prerogative powers will be subject to the Charter, omits any reference to treaty and defence powers. Is it possible to delineate separate areas of the prerogative? There is authority to suggest that there are two distinct prerogatives, namely 'direct' and 'incidental' prerogatives:

> The direct prerogatives are such positive substantial parts of the royal character and authority, as are rooted in and spring from the King's political person, considered merely by itself, without reference to any other extrinsic circumstance, as the right of sending ambassadors, of creating peers and of making war or peace. But such prerogatives as are incidental bear always a relation to something else, distinct from the King's person; and are indeed only exceptions, in favour of the Crown, to those general rules that are established for the rest of the community; such as, that no costs shall be recovered against the King; that the King can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects . . .[43]

It is conceivable that the direct prerogatives would not be subject to the Charter. Such a result depends on the approach of the Supreme Court to the term "government" found in section 32. The historical approach, illustrated above by the derivation of prerogatives, may well deem treaty making as part of the direct prerogative, and outside the Charter's reach. On the other hand, a functional approach would seek to discern the essence of the activity, regardless of its derivation:

> . . . the courts should focus on the issue of whether there is governmental activity, in deciding whether the Charter applies, rather than focussing on the form thereof.[44]

The decision to permit the testing was, in reality, a decision of our government in the interest of benefitting U.S.-Canada relations. To interpret it as the will of an archaic sovereign is to give credence to the regressiveness which represents the main impediment to the success of the most important reform in the history of Canadian law—the Charter. Even if the Supreme Court should see the decision as governmental in character, there is the distinct possibility that it may interpret the Charter as applicable only in cases where statute law is challenged. This would confirm our general notion that the Canadian judiciary is habitually very conservative.[45]

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[41] *Comyns' Digest* "Prerogative A."

[42] Halsbury's, *Laws of England*, vol. vi 382.

[43] Blackstone's *Commentaries*, Book 1, at 216 (Lewis' edition). Referred to by Fundale, M.C. in *Bank of Nova Scotia* v. *Hart et al* (1982), 33 A.R. at 342.

[44] Katherine E. Swinton, as cited in Tarnopolsky & Beaudoin, *supra*, footnote 16, at 50.

[45] W. H. McConnell, "Annual Survey of Canadian Constitutional Law" (1982), 14 *Ottawa Law Review* 502 at 504.

However, before the formation of the Charter, with *Thorson* v. *A.-G. Canada*[46], a person was permitted to challenge the validity of legislation without having to show any harm caused to him. This case was part of a broadening of relief in constitutional cases, which culminated in the passage of the Charter. The obvious extension of *Thorson* is the Charter's extension to all law, as was suggested by Cattanach J. in the present case:

> It is but a short and logical step to take to conclude that in light of the clear and unequivocal language of paragraph 32(1) a) of the Charter that the Charter is applicable to the Government of Canada in the event of an executive decision being taken which is in breach of the rights and freedoms guaranteed by the Charter.[47]

Hopefully, a liberal, modern approach to the Charter will be adopted by the Supreme Court. In spite of the conception that our judiciary is conservative, a well-noted decision of Eberle J. suggests otherwise: "I think the Charter ought not to be interpreted too narrowly."[48]

SUMMARY

The real obstacles to Operation Dismantle, Inc.'s case are in proving that their allegations of fact would incite nuclear attack and the fact that the issues presented are inherently non-justiciable. It is submitted that the other impediments suggested by the Federal Court of Appeal are surmountable. The causal link between a cabinet decision and its foreseeable consequences is not too remote. Finally, an offensive governmental activity should be challengeable, irrespective of the fact that the power from which it emanates has an odd historical development.

Combining these factors, it would be possible to prevent the government from delegating to a private party the job of spraying forests with a chemical deleterious to the health, and therefore to the security, of a person. For example, the mother of a child could prevent the government of New Brunswick from spraying chemicals (through the agency of Forest Protection Ltd.) on 'Her Majesty's' forests which undoubtedly cause a disease such as Reyes' Syndrome. Thus, if the facts be proven, the decision would be impugned on the basis that: the chemicals are the cause of the disease; the cabinet decision allowed the spraying of the forest by Forest Protection Ltd.; and despite the prerogative over Crown forests, the cabinet decision was a 'governmental activity' subject to the Charter by section 32(1) (a).

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[46][1975] 1 S.C.R. 138.

[47]Per Cattanach J., at 6.

[48]*Re Postma and The Queen* (1982), 136 D.L.R.(3d) 69 at 76. This case was judicially considered in 20 cases as of January 31, 1984, and was followed by Deschênes C.J.S.C. in the *Protestant School Board* case, *supra*, footnote 13.

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