Operation Dismantle v. The Queen: Charter Rights, Government Decisions, and the Risk of War (1985)

By the early 1980s, the Cold War and the threat of nuclear annihilation had been simmering for decades. The Canadian government decided in July 1983 to allow the United States to test its newly-developed cruise missiles in Canada. Operation Dismantle was an activist organization opposed to the nuclear arms race in general, and to the cruise missile tests in particular.[1]

Just a year earlier, in 1982, the right to life, liberty and security of the person was constitutionally entrenched in section 7 of the *Canadian Charter of Rights and Freedoms*. Operation Dismantle launched a section 7*Charter* claim against the government. The organization argued that allowing the missile tests in Canada would increase the risk of nuclear war and increase the likelihood of an attack on Canada. In their view, this increased risk effectively eroded the constitutional right of Canadians to "security of the person."[2]Operation Dismantle asked the courts to declare that the government's decision was a violation of the*Charter*, and also to issue an injunction to stop the missile tests.[3]

At the Federal Court in 1983, the government argued that Operation Dismantle's claim did not "disclose a reasonable cause of action" and so the court should not consider it at all. The main point of this argument was that it would be impossible to prove allegations about the impact of the missile tests on the future of the arms race. The trial judge saw a possibility that the allegations could be proven, so he allowed the case to proceed.[4] The government appealed this decision to the Federal Court of Appeal. The appeal court accepted the government's arguments and blocked Operation Dismantle's claim.

Operation Dismantle appealed this decision to the Supreme Court of Canada. Six judges took part in the judgment. One judge, Justice Wilson, saw a *possibility* that Operation Dismantle could prove its case, so she went on to address other issues about the application of the *Charter* to government decisions and the interpretation of section 7. The other five judges agreed with Justice Wilson's approach to the issues of the application of the *Charter*, but they saw no chance of Operation Dismantle actually proving its allegations.

Is It Possible to Prove an Increased Risk of War?

Writing for the majority of the Supreme Court, Chief Justice Dickson succinctly concluded that "the causal link between the actions of the Canadian government and the alleged violation of appellants' rights under the Charter is too uncertain, speculative and hypothetical to sustain a cause of action."[5]There is only "speculation based on

assumptions" as to how the presence of nuclear weapons in Canada affects the security of Canadians.[6]It is just as possible that the government's decision to allow cruise missile testing could be a deterrent to war as an aggravating cause of war.[7]

Because Operation Dismantle failed to make out a cause of action "capable of proof" based on section 7, Chief Justice Dickson followed the Federal Court of Appeal's decision to dismiss the case and ended his analysis there.[8]

Justice Wilson disagreed with the majority's reasoning about the possibility of proving Operation Dismantle's allegations. A court "may entertain serious doubts" about the possibility of proof, but in her view a court should take care not to "prejudge that question."[9] Because she saw a possibility of proof, she went on to consider the government's other arguments against Operation Dismantle's case.

Although the majority of the Court saw no need to decide the other arguments in the case, they emphasized that they agreed with Justice Wilson's analysis of the application of the *Charter* to government decisions and the proper role of the courts in reviewing those decisions.[10]

The Royal Prerogative and the *Charter*

Section 32(1) of the *Charter* describes the government bodies which are subject to the dictates of the*Charter*. Subsection 32(1)(a)states that the *Charter* applies "to the Parliament and government of Canada in respect of all matters within the authority of Parliament."

The government argued that a cabinet decision pertaining to national security is an exercise of royal prerogative and, thus, not a matter within the authority of Parliament.[11] Essentially, then, the courts should be limited to applying the *Charter* to legislation passed by Parliament and decisions made pursuant to legislation. According to this argument, actions and decisions pursuant to the royal prerogative are outside the scope of *Charter* review.

Justice Wilson rejected this argument. She said that the wording of section 32 is "merely a reference to the division of powers" between the federal and provincial governments. She saw "no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative." Section 32 is not to be read so as to suggest that cabinet decisions made pursuant to prerogative are excluded from *Charter* scrutiny.[12]

Chief Justice Dickson and the rest of the Supreme Court agreed: "the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the *Charter*."[13]

Justiciability and "Political Questions"

The government argued that the question of whether missile testing would increase or decrease security is inherently non-justiciable. A question that is non-justiciable is not

susceptible of proof, or it involves moral or political considerations are not within the purview of the court.[14]

Justice Wilson dismissed this argument, noting that even though the courts may have difficulty in these matters, they are still required to make decisions that relate to questions of principle and policy.[15]

The political questions doctrine is a principle of American law. The principle is that some matters are best left to the executive branch of government and not interfered with by the courts. American courts are especially deferential to the executive in the area of foreign affairs.[16]

The political questions doctrine is not a firmly established element of Canadian jurisprudence. In fact, Justice Wilson says, "courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state."[17]

In any case, section 1 of the Charter makes it unnecessary for Canadian courts to apply a political questions doctrine. Justice Wilson refers to section 1 as a "uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law."[18]

Justice Wilson also points out that in this case the court is not usurping the role of the executive. The court is not about to second-guess the wisdom of the decisions made by the executive. The executive is free to make any decision that is within its authority to make. The only task the court is charged with is to ensure that decisions made by the executive do not trammel on the rights of citizens.[19]

The Right to Life, Liberty and Security of the Person

Justice Wilson agreed with the majority of the Supreme Court that Operation Dismantle's appeal should be dismissed, but her reasons focused on the meaning of the *Charter*'s section 7 guarantee of life, liberty and security of the person.

In Justice Wilson's view, the right to life, liberty and security of the person "cannot be absolute."[20]The rights in the *Charter* must be understood in way that recognizes "the political reality of the modern state."[21]The choices of governments often increase or decrease the level of risk to citizens' lives or their security, but a choice by government that increases risk does not automatically infringe a right.

One aspect of political reality that rights must recognize is foreign relations. Government may need to counter "external threats" to the political community as a whole, or to "the individual well-being of its citizens." To protect the whole community, "it may well be necessary for the state to take steps which incidentally increase the risk to the lives or personal security of some or all of the state's citizens."[22]

For example, a government that declared war with the aim of preserving the nation's liberty would raise the risk of death or injury to citizens. However, such an action would not constitute a breach of section 7.[23]Justice Wilson reasons that "there must be a strong presumption that governmental action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s.7.…."[24

Justice Wilson agreed with Chief Justice Dickson and the majority of the Court that Operation Dismantle's appeal should be dismissed. However, her reasons were different: she concluded that even if Operation Dismantle could prove that its allegations that missile testing increased the risks to Canadians' lives and security, the increased risk could not be a violation of section 7.[25] The majority, by contrast, concluded that it was impossible for Operation Dismantle to prove its allegations at all.

In summary, Justice Wilson rejected the Crown's submission that the executive's decisions cannot be subject to judicial review. Nonetheless, she agreed that the case ought to be dismissed because the facts do not give rise to a cause of action under section 7 of the *Charter*.[26]

Jim Young (May 28, 2010)

[1] *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441. at para. 42.

[2] *Ibid*. at paras. 4, 11-12, 42.

[3] *Ibid*. at paras. 1, 43.

[4] Ibid. at para. 69.

[5] *Ibid*. at para. 3.

[6] *Ibid*. at para. 22.

[7] *Ibid*. at para. 21.

[8] *Ibid*. at paras. 30, 40.

[9] *Ibid*. at para. 79.

[10] *Ibid*. at paras. 9, 28, 38.

[11] *Ibid*. at para. 50.

[12] *Ibid*.

[13] *Ibid*. at para. 28.

[14] *Ibid*. at para. 51.

[15] *Ibid.* at para. 52.

[16] *Ibid.* at para. 55.

[17] *Ibid.* at para. 62.

[18] *Ibid.* at para. 104.

[19] *Ibid.* at para. 63.

[20] *Ibid*. at para. 98.

[21] *Ibid*. at para. 99.

[22] *Ibid*. at para. 100.

[23] *Ibid.* at paras. 102-103.

[24] *Ibid*. at para. 102.

[25] *Ibid*. at paras. 104, 109.

[26] *Ibid.* at para. 109.