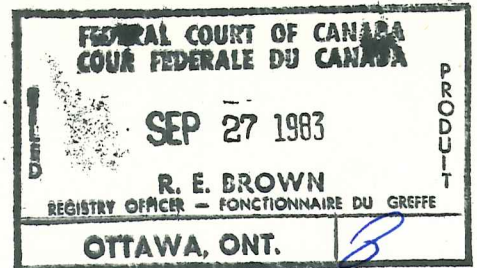




Federal Court of Canada
Trial Division



BETWEEN:

OPERATION DISMANTLE INC., CANADIAN UNION OF PUBLIC EMPLOYEES, CANADIAN UNION OF POSTAL WORKERS, NATIONAL UNION OF PROVINCIAL GOVERNMENT EMPLOYEES, ONTARIO FEDERATION OF LABOUR, ARTS FOR PEACE, CANADIAN PEACE RESEARCH AND EDUCATION ASSOCIATION, WORLD FEDERALISTS OF CANADA, ALBERNI VALLEY COALITION FOR NUCLEAR DISARMAMENT, COMOX VALLEY NUCLEAR RESPONSIBILITY SOCIETY, CRANBROOK CITIZENS FOR NUCLEAR DISARMAMENT, PEACE EDUCATION NETWORK, WINDSOR COALITION FOR DISARMAMENT, UNION OF SPIRITUAL COMMUNITIES OF CHRIST COMMITTEE FOR WORLD DISARMAMENT AND PEACE, AGAINST CRUISE TESTING COALITION, B.C. VOICE OF WOMEN, NATIONAL ACTION COMMITTEE ON THE STATUS OF WOMEN, CARMAN NUCLEAR DISARMAMENT COMMITTEE, PROJECT SURVIVAL, DENMAN ISLAND PEACE GROUP, THUNDER BAY COALITION FOR PEACE AND NUCLEAR DISARMAMENT, MUSKOKA PEACE GROUP, GLOBAL CITIZENS' ASSOCIATION, PHYSICIANS FOR SOCIAL RESPONSIBILITY (MONTREAL BRANCH),

Plaintiffs,

- and -

HER MAJESTY THE QUEEN, THE RIGHT HONOURABLE PRIME MINISTER, THE ATTORNEY GENERAL OF CANADA, THE SECRETARY OF STATE FOR EXTERNAL AFFAIRS, THE MINISTER OF DEFENCE,

Defendants.

REASONS FOR JUDGMENT

CATTANACH, J.

The plaintiffs herein by statement of claim dated July 19, 1983 and filed on July 20, 1983 seek a declaration that the decision of the defendants, jointly or severally made, whereby it was agreed and whereby permission has been accorded to a foreign sovereign power and ally to test cruise missiles within the territorial limits of Canada is unconstitutional as being in violation of rights guaranteed in

Schedule B to the *Canada Act* entitled the *Constitution Act, 1982* particularly the *Canadian Charter of Rights and Freedoms* constituting Part I thereof.

In addition to the declaratory relief so sought the plaintiffs seek other consequential relief in the nature of an injunction and damages which may or may not be available to them.

By notice of motion dated August 11, 1983 the defendants moved to strike out the plaintiff's statement of claim and to dismiss the action pursuant to Rule 419(1) as disclosing no reasonable cause of action within paragraph (1)(a) of the Rule as well as being frivolous and vexatious within paragraph (1)(c) and as constituting an abuse of the process of the Court within paragraph (1)(f).

The contention advanced on behalf of the defendants was limited to the ground that the statement of claim disclosed no cause of action and the effect of the motion so brought to dismiss the action contemplates the striking out of the statement of claim in its entirety, without leave to amend.

The additional two grounds were ancillary and supplementary to the first and in actuality the first ground is the only ground relied upon. No evidence by way of affidavit was adduced in support of the two additional grounds.

When a statement of claim is sought to be struck out under paragraph (1)(a) of Rule 419 as disclosing no reasonable cause of action no evidence is admissible in support of the application. The reason therefor is obvious. The statement of claim stands or falls upon the allegations of fact contained therein.

By virtue of Rule 408 a statement of claim must contain a precise statement of the material facts upon which the plaintiff relies. The statement of claim is limited to the pleading of material facts. It shall not plead conclusions of law or fact, evidence or conjecture.

The cardinal principle of long standing is that a statement of claim will not be struck out if the allegations of fact alleged therein are susceptible of constituting the scintilla of a cause of action.

The British are not ^{so} ~~as~~ much without a written constitution as they profess to be and further a constitution exists without being reduced to writing.

One such principle basic to the English constitution is the sovereignty of Parliament. That principle of English law was imported into Canada and existed in the unwritten Canadian constitution as a convention.

Upon the advent of Confederation the Parliament of Canada and the Legislatures of the Provinces within their respective spheres of jurisdiction remained supreme.

The supremacy of Parliament was settled beyond question when James II was deposed and succeeded by his daughter, Mary and her husband, William of Orange.

The ~~Act of Settlement~~ ^{Bill of Rights} of 1688 so resolved the supremacy of Parliament and ~~that Act~~ ^{The Act of Settlement 1701} is also looked upon as foundation of the separation of powers among the three branches of government.

Those three branches are:

- (1) the legislative branch, the primary function of which is to make or change the laws; it is the Sovereign acting in Parliament;

- (2) the executive branch, the primary function of which is to carry on the business of government, and
- (3) the judicial branch which interprets the law which is done in the settlement of disputes between litigants by the finding of facts and applying the law and legal rules to the facts as found.

The very fundamental contention advanced on behalf of the defendants for striking out the plaintiffs' statement of claim is that the decision to permit the testing of the cruise missile in Canada was one made by the Government of Canada in its executive capacity based upon policy and expediency and as such is not subject to control or interference from the judicial branch.

Had the decision here in question been made prior to the enactment and proclamation of the *Canadian Charter of Rights and Freedoms* I could not agree more with the validity of that contention.

In the remote likelihood that any solicitor would have launched such an action, that action would have been summarily dismissed as the present statement of claim is sought to be dismissed.

But the decision which the present statement of claim seeks to impugn was made after the *Canadian Charter of Rights and Freedoms* came into force and the decision is alleged to violate those rights.

Subsection 52(1) of the ~~Canadian Constitution, 1982~~ provides:

52. (1) 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.

Paragraph 32(1)(a), ranged under the heading "Application of Charter" to which reference may be had to interpret sections following thereunder, which in Part I under the title *Canadian Charter of Rights and Freedoms*, provides:

32. (1) 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;

Thus the basic principle of the unwritten Canadian Constitution heretofore existing as to the supremacy of Parliament is diluted or eroded to the extent that Parliament and the Government of Canada cannot breach the rights and freedoms guaranteed by the Charter.

Parliament is supreme and it is within the competence of Parliament to say that it is not supreme in certain instances as it has done in paragraph (a) of subsection 32(1) of the Charter as well ^{as} to say ^{that} the Government of Canada is likewise ^{subject} to the *Charter of Rights and Freedoms*. ad
xx

In the light of the plain meaning of the language of section 32, expressed in clear and unequivocal terms, to ignore that meaning and ascribe to those words a different meaning to the effect that the Charter should not apply to matters decided on the basis of policy is to abandon the role of a judge and assume the function of a legislator. No such exception is made. However a method is provided in section 33 of the Charter which applies to legislation and would apply to executive action if within the legislation. That method was not adopted.

Limitations are imposed in section 1 of the Charter which will be the subject of specific comment later.

The words "Government of Canada" may be interpreted and read as the Cabinet, which by convention is a committee of Parliament.

The Cabinet acts in an executive way to implement the policies and decisions made by the Government of the day.

Thus, too, the watertight compartments of the separation of powers are likewise breached by paragraph 32(1)(a) in that executive decisions of the Government of Canada are subject to the *Canadian Charter of Rights and Freedoms* and if these decisions offend against the rights and freedoms guaranteed thereby are subject to judicial review.

In *Thorson v. Attorney-General of Canada* ([1975] 1 S.C.R. 138) it was held that an individual has the status and the right to challenge the constitutional validity of an Act of Parliament. A question of alleged excess of legislative power is a justiciable one.

It is but a short and logical step to take to conclude that in the 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.

This Court did not arrogate unto itself jurisdiction over the decision taken by the Government of Canada herein.

Rather that jurisdiction has been thrust upon the Court by subsection 24(1) of the *Charter of Rights and Freedoms* which reads:

24. (1) Anyone whose rights or freedoms, as guaranteed by this 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.

This, in turn, raised the question as to what rights and freedoms have been infringed which, when posed, elicited the response of those guaranteed in section 7 which reads:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

It is not incumbent upon me to proffer an interpretation of the words, "in accordance with the principles of fundamental justice" other than to hazard the view that the words, "fundamental justice" may be synonymous with words such as, "natural justice".

In that event should this be a case where national security is involved and the state is endangered then our cherished freedom of the individual and doing justice to him must in the last resort take second place to the security of the country itself.

If that should be the case it is the proper subject of defence.

Section 1 of the *Charter of Rights and Freedoms* reads:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Whether the limitation so imposed upon the guarantee exists is, in my view, the proper subject of defence.

Accepting as I have the premise that the purpose of the motion was to strike out the statement of claim in its

entirety and dismiss the action I directed my attention primarily to ascertaining if the germ of a cause of action was alleged in the statement of claim.

In so doing I did not overlook that in many instances there are technical defects in the manner of pleading which can be corrected by appropriate amendments and responses to demands for further and better particulars.

I also entertained reservations as to the availability of some of the remedies sought, other than the declaration, against one or other of the defendants.

By virtue of Rule 302 no proceeding in this Court shall be defeated by mere formal objection, none of which was made. Non-compliance with the rules of Court or a rule of practice in force does not render the proceedings void in which an irregularity occurs which can be corrected by amendment.

Mention was also made that allegations of fact in paragraph 7 of the statement of claim are possibly conjecture, remote and constitute a *causa sine qua non* rather than the *causa causans* of a breach of the *Charter of Rights and Freedoms*.

However I did conclude that the statement of claim did contain sufficient allegations to raise a justiciable issue. In so doing I had in mind the analogy of the nature of liability from extra-hazardous activities and the escape of noxious things within the principle of *Rylands v. Fletcher* (1866 L.R. 1 Ex. 265) in which a dangerous activity may be stigmatized on account of its foreseeable harmful potentialities coupled with the fact that a general beneficial character requires toleration in the interest of the community at large

which latter circumstance would be within the exception similarly contemplated by section 1 of the Charter and which I have concluded is properly the subject matter of defence.

It was for these reasons at the conclusion of the hearing that the application to strike out the statement of claim and dismiss the action was denied.

At the same time I granted the defendants an extension of time within which to file a statement of defence.

This was not done upon my own initiative. It was an alternate request included in the defendants' notice of motion.

However on consent of counsel I did extend the time sought for the defendants to file their answer from 10 days to 30 days from the date of the order which is the normal time from service of a statement of claim within which to file a statement of defence.

This time further than that requested was granted to permit of demands for particulars and like matters which were foreseen as likely.

It was for the foregoing reasons that the order was given at the conclusion of the hearing. Counsel for the parties were well aware of the reasons which were thoroughly discussed in the day-long hearing but it has been considered expedient to reduce those reasons to writing for inclusion in the appeal book because the order has been appealed and because the decision has excited wide public controversy.

J.F.C.C.

Ottawa, Ontario
September 27, 1983

In the Federal Court of Canada

Court No. T-1679-83

BETWEEN

OPERATION DISMANTLE INC., CANADIAN UNION OF PUBLIC EMPLOYEES, CANADIAN UNION OF POSTAL WORKERS, NATIONAL UNION OF PROVINCIAL GOVERNMENT EMPLOYEES, ONTARIO FEDERATION OF LABOUR, ARTS FOR PEACE, CANADIAN PEACE RESEARCH AND EDUCATION ASSOCIATION, WORLD FEDERALISTS OF CANADA, ALBERNI VALLEY COALITION FOR NUCLEAR DISARMAMENT, COMOX VALLEY NUCLEAR RESPONSIBILITY SOCIETY, CRANBROOK CITIZENS FOR NUCLEAR DISARMAMENT, PEACE EDUCATION NETWORK, WINDSOR COALITION FOR DISARMAMENT, UNION OF SPIRITUAL COMMUNITIES OF CHRIST COMMITTEE FOR WORLD DISARMAMENT AND PEACE, AGAINST CRUISE TESTING COALITION, B.C. VOICE OF WOMEN, NATIONAL ACTION COMMITTEE ON THE STATUS OF WOMEN, CARMAN NUCLEAR DISARMAMENT COMMITTEE, PROJECT SURVIVAL, DENMAN ISLAND PEACE GROUP, THUNDER BAY COALITION FOR PEACE AND NUCLEAR DISARMAMENT, MUSKOKA PEACE GROUP, GLOBAL CITIZENS' ASSOCIATION, PHYSICIANS FOR SOCIAL RESPONSIBILITY (MONTREAL BRANCH),

Plaintiffs,

- and -

HER MAJESTY THE QUEEN, THE RIGHT HONOURABLE PRIME MINISTER, THE ATTORNEY GENERAL OF CANADA, THE SECRETARY OF STATE FOR EXTERNAL AFFAIRS, THE MINISTER OF DEFENCE,

Defendants.

REASONS FOR JUDGMENT

RECORDED ENTRY NO.
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