Citation: *R. v. Master Seaman R.J. Middlemiss*, 2009 CM 1002

Docket: 200857

GENERAL COURT MARTIAL
CANADIAN FORCES SUPPORT UNIT COLORADO SPRINGS
COLORADO SPRINGS, COLORADO
UNITED STATES OF AMERICA

Date: 9 January 2009

PRESIDING: COLONEL M. DUTIL, C.M.J.

MASTER SEAMAN R.J. MIDDLEMISS
(Applicant)
v.
HER MAJESTY THE QUEEN
(Respondent)

DECISION RESPECTING AN APPLICATION ALLEGING A VIOLATION OF THE RIGHTS OF THE ACCUSED UNDER S. 2(*d*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*
(Rendered orally)

INTRODUCTION

[1] The applicant has made an application on the question of law that the orders given to attend at the 9 November 2007 Canadian NORAD OUTCAN Staff (CNOS) Fall Mess Dinner violate his rights under s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) from association, and that these violations cannot be demonstrably justified under s. 1. He also submits that the associate order to pay for that dinner also violates that right.

THE EVIDENCE

[2] The evidence before this court consists of the following:

(1) the facts and matters that the court took judicial notice of, under section 15 of the Military Rules of Evidence, including CFAO 27-1 -(Messes);

(2) the testimony of Dr Kenneth Reynolds, a historian, who testified as an expert concerning the history and evolution of messes and mess dinners in the Canadian Forces;

(3) the exhibits filed before the court by consent of the parties, and for the limited purposes stated by the parties, including:

a. M3-2: An agreed statement of facts describing a series of events between 11 October 2007, and 9 November 2007, that led to the laying of the charges before the court;

b. M3-3: An excerpt from a Canadian Forces publication entitled, "Mess Administration," last updated in1984 that contains the CF policy statements on mess dinners;

c. M3-5: A book by E. C. Russell entitled, "Customs and Traditions of the Canadian Forces," published in 1980, which was adopted by the Canadian Forces as a Canadian Forces publication; and

d. M3-6: Excerpts from a document entitled, “CDS Guidance to Commanding Officers,” last modified in 2008.

[3] The facts before the court indicate that at the relevant times the applicant was a member of the Canadian Forces Support Unit (CFSU) Colorado Springs. On 11 October 2007, the commanding officer (CO) sent an announcement to the Canadian Forces personnel at Colorado Springs announcing that the unit fall mess dinner would take place on 9 November 2007, at the Peterson Air Force Base Club. This announcement stated that CF personnel were strongly encouraged to attend. On 11 October 2007, the commanding officer informed the applicant that the mess dinner was a compulsory function. The cost of the dinner to be paid by the members was set at $35. On 31 October 2007, the applicant sent an email to Petty Officer 2nd Class (PO2) Starling, stating that he would be unable to attend as he believed that the order of the CO was unlawful, and he asked to see the regulation which required him to attend and spend money. He questioned the legitimacy of the order, in the context of the original announcement by the CO that members were strongly encouraged to attend. On 1 November 2007, the applicant sent an email to his superior, Starling, in which he requested not to have to attend the mess dinner because it would cost him to spend money that he had not forecasted. He added that based on past experience, he felt that he would not have an enjoyable time. In response, PO2 Starling advised the applicant that mess dinners were intended to be *esprit de corps* events. He outlined his expectation that, as a junior leader, the applicant was expected to support mess dinners and act as a role model to his subordinates. On 2 November 2007, PO2 Starling forwarded the applicant’s request to be excused from the mess dinner to the CO. On 5 November

2007, Captain Whelan met with the applicant in presence of Petty Officer 1st Class Hilliard and gave the applicant a direct order to attend at the mess dinner because the mess dinner was an official function and that, as such, it was a parade that he must attend. The applicant took the position that the order was unlawful. Captain Whelan asked the applicant to use another method to challenge the policy, rather than not attending at the mess dinner. The applicant requested a copy of the relevant policy. The applicant sent an email to Captain Whelan requesting to see the regulation saying that a member must spend his or her money for attending at a mess dinner. He stated again that he believed that the CO's order and his order to attend were unlawful. He asked for further clarification.

[4] Exhibit M3-3, entitled, "Mess Administration," provides at paragraph 11:

> Mess dinners provide an opportunity for mess members to meet on a formal but friendly occasion, allowing the senior member or his guest(s) to address the members as a group. By custom and tradition, which in the service context is an extension of the common law, mess dinners are considered to be a parade and as such attendance is compulsory except for members excused by the B Comd, PMC or other convening authority.

[5] On 5 November 2007, PO2 Starling showed the applicant the said paragraph and sent him a copy by email. The following day, the applicant sent an email reply to the president of the mess committee, stating that he would not attend at the mess dinner. On 8 November 2007, PO2 Starling ordered the applicant to provide payment for the mess dinner that would be held on 9 November 2007. The applicant refused and informed those present that he did not intend to attend at the mess dinner. On 9 November 2007, the dinner was held. The applicant was not present and he did not pay for the dinner. These are the facts before the court which relate to the surrounding circumstances that led to the charges for the purposes of this application.

[6] The applicant asked the court to accept Dr Kenneth Reynolds as an expert witness to provide the historical background for the existence of messes and mess dinners in the Canadian Forces. The court has accepted him as an expert. Dr Reynolds has a PhD in history and he has been employed as the Assistant Canadian Forces Heritage Officer in the Department of National Defence for several years. He undertakes scholarly research and writing on Canadian military heritage for official publications, including Canadian Forces publication 007[1], "Customs and Traditions of the Canadian Armed Forces." During his testimony, he testified that the origins of messes go back to the 17th-18th century in the British context. In essence, Dr Reynolds provided a quick overview of Chapters 2 and 3 of the book written by E.C. Russell at Exhibit M3-5. He testified to the origin of mandatory membership in messes until today and how they are meant to

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[1] See Exhibit M3-5.

contribute to military morale and *esprit de corps*. He also testified to the origin of mess dinners, which are a formal function, governed by a multitude of customs and traditions often related to a specific environment and often within units. Dr Reynolds stated that mess dinners are one of the social sides of the mess function. He said that they are an important function that contributes to socialization, indoctrination, the opportunity to know each other in a unit, and gain experience in a social but formal context. A mess dinner should build cohesion and *esprit de corps*. Ideally, they should inculcate military values and serve as career development for the participants. They should teach the traditions and customs of a unit or organization for those in attendance. Dr Reynolds testified that one of the common aspects for mess dinners consists in their mandatory attendance. He added that the current policy statement with regard to mess dinners in the Mess Administration Manual[2] flows from the publication of E.C. Russell. Dr Reynolds expressed his opinion with regard to the absence of written policies concerning the rules and policies applicable to mess dinners prior to 1970. Although he could not base his opinion on any tangible written material on the subject, he offered that the need to put a policy on mess dinners in writing could be linked to the changes in the civil society, itself, during that period, where formal social functions and their associated etiquette became less present. In his opinion, mess dinners have always been mandatory. Despite the absence of any written rule to that effect, he offered that everybody then knew they had to attend and did not need to be told. That is the evidence before the court for the purposes of this application.

POSITION OF THE PARTIES

The Applicant

[7] The applicant submits that the orders received by the applicant to attend and to pay for the Canadian NORAD OUTCAN Staff Fall Mess Dinner were not lawful orders because they violate his rights under s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). He asks this court to grant the following remedies:

> 1. An order declaring that these orders were not lawful;
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> 2. An order declaring that the place where the mess dinner was held was not his place of duty; and
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> 3. A direction to the panel of the General Court Martial to make a finding of not guilty on all charges.

[8] The applicant submits that the mandatory attendance at a mess dinner and mandatory payment for such a dinner violate his rights under s. 2(*d*) of the *Charter*. He argues

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[2] See Exhibit M3-3.

that the current policy of the Canadian Forces with regard to mess dinners violates his rights not to associate or from forced association. In support of his submissions, he relies mostly on the decisions of the Supreme Court of Canada in *Lavigne v. Ontario Public Service Employees Union*[3] and *R. v. Advance Cutting & Coring (2001)*[4]. He further relies on the decision of the Court Martial Appeal Court in *R. v. Scott*[5] to say that these orders can not be demonstrably justified under s. 1 of the *Charter* because the current policy on mess dinners serves no clear military purpose.

[9] The applicant strongly argued that the forced attendance and payment at a mess dinner imposed what has been described by the Supreme Court of Canada as an ideological conformity that violates his right from association. The compulsory attendance and payment at mess dinners is a tradition that existed before the *Charter* was enacted, in order to foster military ethos and values as well as the customs of the service. The applicant suggests that s. 83 and s. 90 of the *National Defence Act* are being used against him to enforce paragraph 11 of the Mess Administration Manual[6], which is only a policy and not a limit prescribed by law. Finally, he submits that such forced attendance and payment at mess dinners does not meet the proportionality test in *R. v. Oakes*[7].

[10] He stressed that he did not challenge the mandatory participation of members in messes and the associated fees attached to them. The applicant relies on the approach of Bastarache J., in *Advance Cutting & Coring,* with regard to the test to be applied in the context of a violation of the right from association. The applicant submits that the "ideological conformity" is therefore imposed by simply requiring someone to join an activity against his or her will. Counsel for the applicant states that the ideological conformity in this case did not arise from the refusal to accept and foster the military values in the Canadian Forces. He rather argues that it is the fact of forcing him to spend money that he had not forecasted and the implied enjoyable participation at the mess dinner, contrary to his belief that, based on personal experience, he would not have an enjoyable time, that constitutes the imposition of ideological conformity. This constitutes, according to the applicant, a violation of his rights under s. 2(*d*) of the *Charter.*

The Respondent

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[3][1991] 2 S.C.R. 211.

[4][2001] 3 S.C.R. 209.

[5]2004 CMAC 2, 22 November 2004.

[6]Supra, note 2.

[7][1986] 1 S.C.R. 103.

[11] The respondent submits that the application should be dismissed. After his review of the leading cases from the Supreme Court of Canada dealing with the freedom of association under s. 2(*d*) of the *Charter*, he submits that the rights contemplated by s. 2(*d*) are important rights that should not include trivial matters. The respondent submits that s. 2(*d*) of the *Charter* does not protect the activities of the association, but the right to association. Therefore, the right from association must be interpreted in that context.

[12] He further submits that the applicant's recriminations are aimed at the activities of the association, not the association, i.e., the Canadian Forces. The respondent further submits that the freedom of association protected by the *Charter* protects the associational aspects of activities, not the activity itself. If the activity is to enjoy *Charter* protection, it must be found elsewhere than in s. 2(*d*). Counsel for the respondent argued that the applicant did not have problems with his association with the military organization, but with an activity of the organization and the mandatory payment for that activity. The respondent submits that if a command given to a member of the Canadian Forces to be somewhere and do something would violate the rights of a person under s. 2(*d*), every command would have to be justified under s. 1. Counsel for the respondent argued that a member of the Canadian Forces cannot pick and choose which activity that person will accept to participate, unless it is protected elsewhere in the *Charter.* The respondent does not challenge the fact that the freedom of association includes the freedom not to associate, or, i.e., freedom from association. However, counsel for the respondent takes the position that this negative right should be reserved to matters that are equally serious to those that were discussed in the context of challenges to the positive freedom of association, unlike the mandatory attendance at a mess dinner, which is only an activity. Therefore, the respondent submits that the evidence shows that mess dinners are profoundly entrenched in the tradition and customs of the Canadian Forces and that the regulating policy and doctrine with regard to the mandatory participation at such activities corresponds to a proper military purpose.

DECISION

Legal Analysis

[13] The issue before this court is not to determine whether an order to mandatorily attend at a mess dinner and pay for that activity is an unlawful order because it violates the protected freedom of a person not to associate under s. 2(*d)* of the *Charter.* Rather, the issue before this court is limited to the following question:
Does the mandatory attendance at a mess dinner by a member of the Canadian Forces and the mandatory payment for the cost of that dinner to be supported by that member, in the context of the current policy of the Canadian Forces concerning mess dinners, engage the protection of s. 2(*d)* of the *Charter*? If yes, is it justified under s. 1?

[14] The court disagrees that a mandatory activity that would seek the presence of a member of the Canadian Forces at a mess dinner should be viewed as a triviality in the context of s. 2(*d)* of the *Charter*. It may well be that such important activities in a modern society, such as the right to collective bargaining and the right to strike, were examined by the Supreme Court of Canada in relation to the protection of these activities by the language of s. 2(*d*), however the determination of whether the rights of the applicant have been violated in this case shall be examined in accordance with the applicable legal principles. I agree with the applicant that the two leading cases dealing with the right not to associate are *Lavigne v. Ontario Public Service Employees Union* and *R. v. Advance Cutting & Coring (2001)*. In *Lavigne*, a small majority held that the right of freedom of association included the negative right not to associate. Laforest J. held that the forced payment of union dues did not amount to a forced association, except if the union dues were used to support other purposes than the employee representation. McLachlin J., as she then was, agreed that the right of association included the right from association, however she found no violation of s. 2(*d*) since the payments did not bring the person into association with ideas and values to which the person did not voluntarily subscribe. In *Advance Cutting & Coring (2001)*, the Supreme Court considered the validity of legislation in the context of the construction industry in the Province of Quebec, where construction workers were forced to belong to one of five statutorily recognized unions in order to work in that industry. Eight judges agreed that the right not to associate was protected by s. 2(*d*) of the *Charter*. Lebel J., who wrote with the agreement of Arbour and Gonthier JJ., held that this section included the right from association only if the forced association imposed "ideological conformity" on the person. He also concluded that the "bare obligation to belong to a union [did not] create any mechanism to enforce ideological conformity"[8]. He upheld the legislation. Bastarache J., with the agreement of McLachlin C.J., (Major and Binnie JJ. dissenting), was in general agreement with the analysis on the constitutional test made by Lebel J., except that he held that the simple fact of requiring a worker to join a union against his or her will imposed ideological conformity. He also held that the union shop requirement could not be saved by s. 1 and would have struck down the legislation. Iacobucci J. rejected the test adopted by Lebel J. and proposed his own test to the effect that if the state obliges an association of individuals whose affiliation is already compelled by the facts of life, such as in the workplace, and the association serves the common good or furthers the collective social welfare, s. 2(*d*) will not be violated unless the forced association imposes a danger to a specific liberty interest. He held that the legislation was invalid, but upheld it after his s. 1 analysis. Finally, L'Heureux-Dube upheld the legislation because she expressed her view that the right from association did not exist under s. 2(*d*).

[15] I cannot agree with the applicant that the test to be applied in the circumstances is that of Bastarache J., who was part of the group of dissenting justices in *Advance*

[8] *Supra* note 4 at para. 218.

Cutting & Coring (2001). The test of Lebel J., shared by two other justices, is the test that was retained by the three of five judges that formed the majority of the Court.

[16] When the applicant submits that the forced attendance and payment at a mess dinner imposed on him an ideological conformity that violates his right from association, he asserts that the ideological conformity in this case arises from the fact of forcing him to spend money that he had not forecasted and the implied enjoyable participation at the mess dinner, contrary to his belief that, based on personal experience, he would not have an enjoyable time. It is well accepted that the right of non-association is not a right of isolation. Some form of forced association is inherent in a working environment. In *Advance Cutting & Coring (2001)*, Lebel J. made the following comment after his review of the reasons of Laforest J. in *Lavigne*, at paragraph 195:

> I take these comments to mean that the state, the family and the workplace create some forms of association immune in principle from *Charter* review.
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> ...
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> The first liberty interest that might be threatened by forced association was the governmental establishment or support of parties or causes. The second was defined as the impairment of an individual freedom to join a cause of one's choice. The third and fourth consisted of the imposition of ideological conformity.

[17] The court does not consider that the forced attendance and payment at a mess dinner imposes an ideological conformity that violates a member of the Canadian Forces' right from association if it is based on the fact that it would force him to spend money that he had not forecasted and the implied enjoyable participation at the mess dinner, contrary to his belief that, based on personal experience, he would not have an enjoyable time. To paraphrase Lebel J., to impose ideological conformity is to impose values and views of the world antithetical to his or her own[9]. The reasons put forward by the applicant not to participate at the mess dinner were guided by his frustration to be forced to pay for an event that he considered unpleasant. They were not guided by his refusal to share the customs and traditions of the Canadian Forces, nor the values and purposes surrounding the holding of regimental or unit mess dinners. In this particular context, s. 2(*d*) is not engaged.

Conclusion

[18] Based on the totality of the evidence, the applicant has failed to establish that the mandatory attendance at a mess dinner by a member of the Canadian Forces and the mandatory payment for the costs of that dinner to be supported by that member, in the context of the current policy of the Canadian Forces concerning mess dinners, violates the protection of s. 2(*d)* of the *Charter* from forced association. The application is therefore dismissed.

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[9] *Ibid*, at para. 206.

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