

THE CHARTER CHALLENGE LE DÉFI DE LA CHARTE

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CASE SCENARIO FALL 2008

LIEUTENANT ANDREA REDWING

V.

*HER MAJESTY THE QUEEN
(In Right of Canada)*

*THE MINISTER OF NATIONAL DEFENCE
ADMIRAL JEAN DELEAU, CHIEF OF THE DEFENCE STAFF*

FEDERAL COURT OF CANADA

BETWEEN:

LIEUTENANT ANDREA REDWING
(Applicant)

- and -

HER MAJESTY THE QUEEN
(In Right of Canada)

THE MINISTER OF NATIONAL DEFENCE
ADMIRAL JEAN DELEAU, CHIEF OF THE DEFENCE STAFF
(Respondents)

REASONS FOR JUDGEMENT

BEATTIE-COLLEEN J.:

1. This is an application brought by Lieutenant Andrea Redwing of the Canadian Navy for certiorari or other related relief for an alleged breach of her constitutional rights by the Navy. The Respondents take no issue with the form of this application, nor the nature of the relief sought. They do, however, oppose the applicant's request for relief.
2. To fully appreciate the interesting issue which is now before me, it is necessary to set out the background of the Applicant, the nature of the litigation, and the relief requested.
3. The Applicant was born in 1970 and came from a military family. Many of her male relatives have served this country, with distinction, in the armed forces. In 1988, at the age of 18, the Applicant joined the Navy. She enlisted as a Seaman, the lowest rank, and the equivalent of a private in the army. She was sent to the Canadian Naval Academy at Esquimalt, British Columbia, where she distinguished herself both academically and in her role as a recruit. This led to her being sent to Halifax, Nova Scotia, for further specialized training on frigates and later, destroyers. Again, she excelled in her chosen field.

4. Seaman Redwing advanced through the ranks of the Forces steadily. She was promoted to Petty Officer, Chief Petty Officer, Warrant Officer, Sub-Lieutenant and then to her present rank of Lieutenant. It is fair to say that both her commanding officers and those under her command have praised her for her knowledge, dedication and courage. She has been awarded several citations and commendations. It is very likely that her career will continue in this manner.
5. Her service in the Forces is also wide ranging. In the first Gulf War, she served on a *Protecteur* class auxiliary ship, which re-supplied frigates and destroyers, and provided medical support for other craft. In 1996 through 1999, she served on a coastal patrol vessel, which was responsible for guarding Canadian waters against smugglers, providing search and rescue and other duties. She then was a Warrant Officer on a destroyer for four years, followed by service as the third ranking commander of a frigate. By all accounts, in all capacities, she has performed well.
6. In 2008, the Forces conducted an internal competition for a submarine Lieutenant Commander. This would be a position second or third in command of the vessel, depending upon the other officers aboard. Lt. Redwing applied for the position, but was told by her commander that due to the Forces' policy regarding women on submarines, she could not apply. She appealed this decision within the ranks of the military, receiving the same reply at each level, often expressed with personal regrets. It is to this Court that she now applies.
7. The Applicant stressed that her claim for relief is not to be given the submarine Lieutenant Commander position. She is merely asking, according to her counsel, to be allowed to apply. From there, she will be judged on her merits and the best candidate will be selected. In her submission, to not allow her to even enter the competition is to state that simply because she is female she is not entitled to the same opportunities as her male colleagues. It is a denial based on her sex and nothing else. She has therefore brought this application arguing that the Navy's policy is discriminatory and puts forth four points in support of her position:
 - a. the policy violates s. 15(1) of the *Charter*, denying her equal benefit and protection of the law based on her gender;
 - b. Naval policies must be interpreted in light of s. 15(2) of the *Charter*, which is designed to advance the

- position in society of traditionally disadvantaged persons or classes of person;
- c. the policy violates s. 28 of the *Charter*, which guarantees rights and freedoms be available to both genders, equally; and
 - d. the Navy's policy is not a reasonable limit upon her rights, prescribed by law, demonstrably justified in a free and democratic society.
8. Although these arguments may appear convincing, I have concluded that they cannot withstand close scrutiny. I must therefore deny the Application. My reasons follow.
9. I must state first and foremost that any analysis of *Charter* rights must be done in a contextual manner. This takes account of not only the person alleging a breach of the right, but also the situation in which the alleged breach comes about. There must be due regard to the historical situation, institutions, and the allocation of economic resources. This is not to say that rights are dependent upon how government has decided to spend money or the traditions of government departments. Rights drive the allocation of resources and traditions are measured against the *Charter*. But, these factors cannot be divorced from one another.
10. A submarine is, to state the obvious, an extremely cramped environment. In a relatively small vessel, most space must be dedicated to motor, weapons and monitoring systems. This is a practical reality. There is little space for the crew and far less space than would be available aboard surface ships. This has led to situations such as "hot bunking" where up to three crew members will share a bunk, in sequence, depending on who is on duty at the time. Similarly, there are very limited bathing or toilet facilities. These conditions will endure for the entire length of a voyage. There is virtually no privacy. For these reasons, crews have historically been limited to males. I note in passing that Lt. Redwing is in fact the first Canadian woman who has applied to serve upon a submarine.

Section 15(1) of the *Charter*

11. This sub-section states:

Every individual is equal before and under the law and has the right to the equal protection and equal

benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

12. In order for the Applicant to succeed, she would have to demonstrate both that she has a right and that it is being denied in a discriminatory manner. I find that she has failed to do so on both grounds. It may be common to speak of a right to do something, such as, in this case, the right to apply for the Lieutenant Commander's position. In law, however, a right is not synonymous with the ability to do something. Further, it must be understood in the context of the situation being analysed.
13. A right is a lawfully granted ability to do something. It comes either from the common law, statutory law, the Constitution, or a combination of these. For example, a person may speak of the right to vote. Statute puts restrictions on this right. A seventeen year old, no matter how politically aware, is not entitled to vote in elections. Thus, there is no right to vote for that person, even though he or she may have the intellectual capacity to do so.
14. Secondly, the Applicant argues that different treatment equals discriminatory treatment. This is not accurate. Simply because two people may be treated differently in a situation does not mean that one has been discriminated against. To constitute discrimination, there must be an improper, arbitrary, or unreasonable basis for a distinction to be made. I note as well that Lt. Redwing makes no claim that she has suffered a particular, personal adversity, such as a demotion, reduction in pay or improper re-assignment of duty. There has been no suggestion that her career will in any way suffer by seeking this position or bringing this application. As noted, her commanders have expressed regret that she is not able to pursue this position. There has been no ill treatment directed toward her as an individual. I take this into account in concluding that there has been no discrimination.
15. Lt. Redwing has only demonstrated that she has the capacity to apply for a position. She has not gone the further step of showing that she has a lawfully guaranteed ability to obtain the position. Nor has she shown, in light of the practical realities of life aboard a submarine, that she is being treated differently from her male colleagues on an improper, arbitrary, or unreasonable basis. On this basis alone, the Application must be

dismissed. In order to provide a full record for any future proceedings, I will deal with the remaining arguments advanced.

Section 15(2) of the *Charter*

16. This sub-section states:

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

17. There is no doubt that the case law has established females in Canadian society have, unfortunately, been an historically disadvantaged group. The intent of this portion of the *Charter* is to *permit* affirmative action programs which will help ameliorate the disadvantages imposed upon certain groups over time. It does not *require* affirmative action programs to be put in place. The Applicant's argument is that all Naval policies must be interpreted in accordance with this sub-section and therefore must be interpreted in favour of a member of a traditionally disadvantaged group. The result would be for this Court to order the Navy to adopt affirmative actions programs. That is not acceptable.

18. It is open to the Navy to adopt affirmative action programs. Indeed, it may be highly desirable. However, I cannot, as a judge, become involved in the micro-management of naval affairs. I do not have the jurisdiction to supervise these operations, nor would it be wise to suggest that a court oversee the allocation of financial resources or personnel. This could lead to a situation where the orders of officers could be challenged on the basis of violating a *Charter* right of a soldier. That is too much for a court to accept. The military will operate in its sphere. If it transgresses the laws of Canada, it is subject to the supervision of the Courts. That does not mean that every activity is reviewable nor that the courts will take on the role of commanding officers of the military.

Section 28 of the *Charter*

19. This section states:

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

20. In order to succeed in this argument, it would be necessary for the Applicant to show that she had a right or

freedom in the first place. As set out above, she has a capacity to seek the position applied for, not a right to do so. This section is limited in its scope. It is designed to assist a court with the interpretation of the *Charter*. It does not convey any substantive rights or freedoms in and of itself. If a court finds that a person does not have a right or freedom under the other sections of the *Charter*, this section cannot create a right or freedom.

21. I am not persuaded by the argument that draws an analogy between this section and the provision in the *Interpretation Act* that all legislation is remedial. First, the *Interpretation Act* deals with federal statutes, not the Constitution. A simple Act of Parliament cannot override the provisions of the *Charter* (except for the notwithstanding clause, which is in itself part of the *Charter*). Secondly, legislation is designed to address some problem, or to put it another way, to remedy a mischief. It is specific. The Constitution contains broad parameters of how our society is to be governed. To suggest that section 28 was designed to remedy the "mischief" of sexual discrimination and thus should be read as requiring all governmental acts to be interpreted in the manner most advantageous to a person claiming sexual discrimination is to give this section more power than it was intended to have. I cannot accept this argument.

Reasonable Limits

22. Section 1 of the Charter reads as follows:

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.

23. As can be seen from its very wording, rights are not absolute. I have found that the rights of the Applicant have not been violated. Even if I am wrong in this, I would find that any violation is a reasonable limit upon her rights. In order to establish a reasonable limit, demonstrably justified in a free and democratic society, I turn to the decision of the Supreme Court in *R. v. Oakes*, [1986] 1 S.C.R. 103, and draw from it. Two central criteria must be satisfied. First, the objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. This standard must be high. It is necessary that an objective relate to concerns which are pressing and substantial before it can be characterized as sufficiently important. Secondly, once a proper objective has been recognized, a "proportionality test" must be adopted to balance the rights of the individual and the limitations sought to be put on them. There are three steps to this. First, the measures

adopted must be carefully designed to achieve the objective in question, they must not be arbitrary, unfair or based on irrational considerations. Second, the means chosen to limit the right should impair the right or freedom as little as possible. Third, effects of the measures which limit the *Charter* right and the objective must be proportionate.

24. In determining what is a reasonable limit, I again must look at rights in context. In this situation, I will look at the role of women in the navies of other countries. There is no question that some other states permit women to serve on submarines. Australia did so in 1998. New Zealand does not limit the role of women. Since 1995, Norway has permitted female submariners. Spain permits women on submarines.
25. However, many countries do not permit women on submarines. Britain does not, nor does France. I understand that there are no female submariners in Germany. The United States does not permit women submariners. I draw from this that there are simply differing policies in regard to women serving on submarines.
26. In deciding that the Navy's policy is a reasonable limit, I pay special attention to the policy of the United States military. The United States is our closest ally. We share a land mass and common seas. There is a great deal of co-operation and integration between the forces, especially in a post- 9/11 world. This could be endangered if Canada adopted a radically different policy than our military partners.
27. As well, if submarines were ordered to be fully integrated, there would have to be separate washing and toilet facilities for the genders. This would require the re-fitting of vessels at unknown cost. It is not for a court to order the Navy to spend its limited budget in a particular way. I cannot reasonably order the Navy to spend its budget to purchase larger submarines that could possibly provide such facilities for the sake of one Applicant. To do so would be to take over budgetary matters of the Navy and I decline to do so. Therefore, I find that the male-only policy is a reasonable limit on any gender equality rights, in this situation.
28. I find that the deployment of military personnel in the ways determined by the military to best defend this

country and which is consistent with the policies of our allied nations is a pressing objective. I also find that the gender policy on submarines (which does not exist on other vessels in other situations) has been carefully tailored to this objective. It impairs the rights of naval officers as little as possible in the situation and is proportionate to the need to maintain a functioning military.

29. I should mention one argument made by the Respondents, which I find totally inappropriate. They submitted that in the close confines of a submarine, there was an increased danger of sexual harassment (or worse) of female personnel. The military code of discipline does not break down or is not optional depending on the gender of a recruit. If another member of the service acts improperly, it is they who are subject to punishment. The victim of the offending conduct cannot be denied personal security because of the improper acts of another. To suggest this as a basis for upholding restrictions on women serving on submarines is akin to punishing the victim of a crime. This argument should never have been raised.

Conclusion

30. There is no doubt that Lt. Redwing is a fine officer and excellent member of the Canadian Navy. It is with reluctance that I must dismiss her application. The law compels me to do so. The *Charter* does not guarantee a perfect world, only one in which contextual rights are respected. It may be appropriate that women serve on submarines, but that is a decision for the Navy to make. I cannot, applying the law, force them to change this policy.

BEATTIE-
COLLEEN J.