

PRESENTATION BY LEAF
TO SPECIAL SENATE COMMITTEE
ON NATIONAL DEFENCE

OTTAWA, JUNE 12, 1986

BY

M. DENISE ARSENAULT
MEMBER, EXECUTIVE COMMITTEE

GWEN BRODSKY
LITIGATION DIRECTOR

MARY EBERTS
LEGAL COMMITTEE (NON-APPEARING)

The Women's Legal Education and Action Fund (LEAF) is a national charitable organization that has as its goal the implementation of the guarantees of equality for women included in the Canadian Charter of Rights and Freedoms. Many of the founders of LEAF were instrumental in securing those guarantees.

LEAF has a National Board of Directors with representation from every province and territory in Canada, reflecting its widespread activities. It is financed by donations from private individuals, unions, corporations, and foundations, as well as by government: LEAF receives grants from the federal government through Secretary of State and SEED programs, and in 1985 was given funds of \$1,000,000 by the Ontario government to do equality litigation for Ontario plaintiffs.

Following the coming into force of section 15 of the Charter of Rights in April of 1985, LEAF launched a number of court actions to enforce these guarantees. In our first year, we have had three victories, in the Supreme Courts of Ontario and the Yukon, and the Ontario Court of Appeal; and have been accepted as an intervenor in both the British Columbia Court of Appeal and the Ontario Court of

Appeal. There are fifteen LEAF cases presently before the Courts. A copy of the LEAF report on its first year of litigation is attached hereto.

One of LEAF's cases brings us here today.

That is the action on behalf of the Organizational Society of Spouses of Military Members (OSSOMM) and two individual plaintiffs, Lucie Richardson and Leslie Taylor. The action is before the Federal Court of Canada; counsel in the case are from the Calgary law firm of Code, Hunter. We understand that representatives of OSSOMM will be appearing before you next week to make a presentation concerning the circumstances of military families. We do not wish to anticipate their presentation, or cover points that they are more able to discuss in depth.

We do, however, wish to outline the constitutional aspects of the case, and of the situation of military families as we see them. To do that, we begin with a few particulars of OSSOMM's situation, as cited in the court action.

The Plaintiff OSOMM was incorporated as a society with expressed objectives of improving the status of women in the military community, improving the quality of life for spouses of military personnel, educating and informing its members and developing organizational skills for women. Among the stated objectives of OSOMM was the publication of a monthly newsletter for distribution on military bases in Alberta, to further its objectives.

OSOMM members published 6 volumes of OSOMM newsletters which set out various issues relating to the quality of family life on military bases. This newsletter was distributed widely on CFB, Penhold and volume 6 was also distributed to other military bases in Alberta.

The Base Commander or Base Administration Officer at the time, of CFB Penhold, told OSOMM members that OSOMM meetings could not be held on the base because such meetings were contrary to Article 19.44 of the Queen's Regulations and Orders (the "QR&O's") enacted pursuant to the National Defence Act, R.S.C. 1970, c. 184.

Article 19.44 of QR&O's provides as follows:

"19.44 - POLITICAL ACTIVITIES AND CANDIDATURE
FOR OFFICE

- (1) No officer in command of a base or other unit or element shall:
 - (a) allow a political meeting to be held or a political speech to be delivered at his base or other unit or element; or
 - (b) allow a candidate in a federal, provincial or municipal election or a political agent or canvasser to visit his base or other unit or element for the purpose of carrying on political activities unless authorized by or under the Canada Elections Act or by service instructions or orders.
- (2) No officer or man of the Regular Force shall:
 - (a) take an active part in the affairs of a political organization or party; or
 - (b) issue an address to electors, or announce himself or allow himself to be announced as a candidate, or prospective candidate, for election to the Parliament of Canada or a provincial legislature; or
 - (c) except with the permission of the Chief of the Defence Staff, accept an office in a municipal corporation or other local government body or allow himself to be nominated for election to such office.
- (3) No officer or man shall organize or take part in a political or party meeting on a defence establishment.

OSOMM members sent a letter dated October 24, 1984, to the Honourable R. Coates, the then Minister of National Defence, setting out OSOMM's objectives and seeking

confirmation that they could proceed to associate and organize to obtain measures to enhance the quality of family life on military bases, for example, to obtain dental coverage for spouses and children of military member and to have a traffic light installed at an intersection which is dangerous for children. One method used by OSOMM to poll interest in dental coverage was by way of a card attached to an OSOMM newsletter returnable to the Prime Minister's Office.

OSOMM received a letter dated March 28, 1985 from the Honourable Erik Neilson, the current Minister of National Defence, indicating his support of the base commander's position that such activities on Department of National Defence property would in fact constitute political activity within the meaning of Article 19.44 of the QR&Os.

OSSOMM has also been prevented from meeting at CFB, Penhold by the invocation by military administrators and personnel of the Defence Establishment Trespass Regulations and the QR&O's.

OSSOMM has, moreover, been denied status as a Non Public Fund Organization (NPF) at Penhold, and all privileges which flow from such a designation, namely

- (a) Access and use of base facilities at no charge,
- (b) Payment of costs incurred for special fire/safety requirements and caretaking facilities,
- (c) Full entitlement for use of furniture, furnishing and materials which are temporary surplus to DND requirements,
- (d) Access to DND property,
- (e) Coverage by CF Consolidated Insurance or third party liability, insurance, subject to certain limitations,
- (f) Eligibility for financial assistance including interest free loans for major purchases and improvements, and
- (g) Entitlement to benefits by way of grant paid in lieu of taxes by DND.

The reason for the denial is because OSSOMM is a "political" organization.

Although there is as yet no specific allegation about this in the law suit, we believe that it is significant that OSSOMM's application to the Secretary of State Women's Program for supporting funds in the amount of

\$5,000.00 has been turned down, after being held up for a considerable period.

The Constitutional Position

The Canadian Charter of Rights and Freedoms

provides in section 2:

2. Everyone has the following fundamental freedoms:
... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
... (d) freedom of association.

The Charter also guarantees, in subsection 15(1), that 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 a number of enumerated grounds, including sex.

Because the list of prohibited grounds in section 15 is open-ended, we believe that distinctions on the basis of marital status would also be prohibited by the section.

The main focus of the litigation is the provision of the Queen's Orders and Regulations cited above. In practice, it seems to be interpreted very broadly, to catch in the net of "political" activity many types of conduct which to the civilian mind do not seem to be political. Certainly, its scope ranges beyond the partisan political activity of federal and provincial or even municipal elections to encompass community and self-help activities that are familiar to all of us.

In his presentation to this Committee on June 5, the Honourable Harvie Andre provided considerable insight into the way the DND interprets the phrase political activity. At pages A-14 and A-15 of the advance transcript provided to us, he states:

The definition that has been basically applied is quite simple when we talk about partisan activity and active political campaigning on base. The definition beyond that becomes more difficult. The interpretation I would put on "political activity" is an activity that has a purpose of changing government policy or administration. That, in itself, is not too clear because I distinguish in my own mind between what might be called lobbying and what I call political activity; lobbying being the effort to persuade the political authorities to adopt a certain attitude and make certain changes while accepting absolutely the authority of the civil authority to do that, whereas political activity as I have defined it, is where one uses political muscle, if

you will, or political force to try and cause the change, to force the authorities to make the changes by exploiting media for publicity purposes, by petitioning, which has a threat in it in the sense of voter support, by demonstrations and picket signs. I am talking about those kinds of political activities which are, in a sense, challenging to the political authorities, where an effort is made to try and force them to change their rules. In my view, those are inappropriate activities for military bases.

It is clear that lobbying, the permissible activity consists in asking politely for something, and being totally prepared to accept "no" for an answer. It is also clear that there need not necessarily be picketing or going to the media in order for an authority to decide that "political activity" is going on. We think that the Associate Minister's remarks show that mere suspicion that a group will not take "no" for an answer would be enough to have its activities banned from the base as political.

This emerges very plainly from the Associate Minister's answer to a question from Senator Marshall. Upon being asked what recourse the military wives would have if the base commander refused a request, Mr. Andre stated at pages A-30 and A-31 of the transcript:

The base commander has absolute authority....You cannot have recourse without having, in essence, a challenge to that authority. If someone does not

have to accept that authority, they can bypass it. If they can bypass it, they are immediately challenging the chain of command. You cannot have the two...the chain of command is absolutely essential.

The effect of such an interpretation of the political activity rule is to ensure that those "lobbying" the base commander or other authority will be docile in the face of denied requests. It is, in effect, to give the commander "absolute authority".

In the litigation, it is argued that such an interpretation of the Queen's Orders and Regulations is incorrect. The real purpose of the Regulation at issue must be to affirm the separation of the military from elected officials, rather than to muzzle the right of military families to speak up on issues affecting their welfare. If the language of the Regulation does indeed support the interpretation being placed upon it, then it is argued that such an interpretation is contrary to the Charter.

It is important to recall here that the persons being silenced by this Regulation are civilians. For the most part, they are women, the wives of military personnel. They are not members of the armed forces themselves. Yet by reason of the occupation of their spouses, they are denied

the right to take action in the interests of themselves and their children. There surely cannot be any parallel situation anywhere else in Canada. The situation of the military spouses evokes quite powerfully the old dictum - fading from use in contemporary Canada - that at marriage the husband and wife become one person and that person is the husband.

There has never been a judicial decision in Canada accepting the validity of this treatment of military spouses. There was a decision of the Supreme Court of Canada under the Canadian Bill of Rights (1960) which upheld the validity of a separate system of justice for military personnel: MacKay v. The Queen, [1980] 2 S.C.R. 370. Mr. Justice MacIntyre stated in that case that the different treatment, in order to be justified, must be

...created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the Canadian Bill of Rights, and ...a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective: [1980] 2 S.C.R. 370, 406-7

Although he accepted that the emergence of a body of military law and specialized tribunals was valid "because of the

peculiar problems which face the military in the performance of its varied tasks," Mr. Justice MacIntyre cautioned that departures should be countenanced only for the attainment of desirable social objectives and only to the extent necessary in the circumstances to make possible the attainment of such objectives. (emphasis added)

The new Charter of Rights provides substantially stronger protection to the citizen than did the Canadian Bill of Rights. Section 1 of the Charter provides that

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.

Under the Charter, the burden of moving that a limit on a right is demonstrably justified lies on the party seeking to uphold the limit. In this case, the Department of National Defence would have to justify the Regulation against political activity.

The Supreme Court of Canada has taken a very firm stand on what is required to justify a limit on a right or freedom. In the case of R. v. Oakes (February 28, 1986), the Court decided that rights and freedoms may be limited

where their exercise would be inimical to the realization of collective goals of fundamental importance. Section 1, the Court held, imposes a stringent standard of justification.

The Court set out a multi-part test which must be met in order to justify a limit on the Charter's freedoms:

1. The objective of the limit must relate to concerns that are pressing and substantial in a free and democratic society.
2. Once a sufficiently significant objective is recognized, the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified, i.e. meet a "proportionality test".
3. The proportionality test has three components:
 - (a) the measures chosen must be carefully designed to meet the objective in question, not arbitrary, unfair or based on irrational considerations;
 - (b) the means should impair as little as possible the right or freedom in question;

(c) there must be a proportionality between the effects of the measures and the objective; the more severe the deleterious effects of a measure, the more important the objective must be if it is to be reasonable and demonstrably justified in a free and democratic society.

We submit that the interpretation of "political action" given by the DND does not achieve the least possible impairment of the rights of the women of OSSOMM. Rather, their rights are most radically circumscribed. It is, in our view, no answer to say, as does the DND, that these rights are circumscribed only on the base. For many military families, living on the base is the only option to family separation if the base is in an isolated location; for others, living in base housing is the only effective answer to the economic dislocation and loneliness brought about by many required moves. To say that the price of base housing is total dependency on the military establishment for even the smallest details of family welfare, and total passivity and silence in the face of military unresponsiveness, is to put a constitutionally impermissible price tag on basic shelter.

We are hopeful that the Federal Court will follow the signal of the Supreme Court of Canada and award to OSSOMM the remedies it seeks in its litigation. The litigation is proceeding; discoveries are scheduled for July. However, in our opinion, the existence of the litigation should be no bar to the military relenting and affording to spouses of its members the autonomy, self-determination, and self-expression that they claim under the Charter.

Spouses of Armed Forces Personnel

Concerns were brought to the attention of the Committee by the Organizational Society of Spouses of Military Members (OSSMM) and by several other spouses of past or present members of the Canadian Armed Forces. These concerns all dealt with restrictions on the activities of civilians who live with their Armed Forces spouses on military bases. The Department of National Defence is in a position to impose these restrictions because it owns the houses and runs the schools and recreational facilities used by members and their families. The Department is therefore able to exercise authority over aspects of the lives of military spouses that would, in the civilian world, be matters of individual decision. In the view of OSSMM, the base authorities place unjustified limitations on those spouses who are not members of the Armed Forces, so that in matters of a purely civilian nature they are not treated equally with other Canadians.

Representatives of OSSMM indicated to the Committee at its Calgary hearing that they have been prevented from lobbying for a family dental plan on the base, seeking crossing lights at a busy provincial highway, and acting in leadership roles in community groups. These activities are prohibited because the Department of National Defence views them as 'political' in nature, and a possible threat to the political neutrality of the military.

We agree that spouses of service personnel on military bases may have a different role in some respects than civilian spouses living in civilian communities. However, a balance must be reached between recognizing the special situation that exists on military bases, and giving effect to the claims of spouses to be treated as independent individuals. A similar organization to OSSMM exists in the United States, operating as a support group for spouses and as a community focus. We believe that spouses on military bases should not be precluded from taking part in community activities and arguing for increased services. We urge that the Department of National Defence recognize the special concerns of spouses of military personnel — mostly women — when developing and implementing policies concerning the operation of military bases.

In its response to the Report of the Parliamentary Committee on Equality Rights (1986), the federal government offered no comment on this section.