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Ottawa, Ontario, January 21, 2008

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ARALT MAC GIOLLA CHAINNIGH

Applicant(s)

and

THE ATTORNEY GENERAL OF CANADA

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by Captain Aralt Mac Giolla Chainnigh from a grievance decision made by the Chief of Defence Staff, General R.J. Hillier, (CDS) on August 28, 2006 under the authority of section 29.11 of the *National Defence Act* (Act), R.S.C. 1985 c. N-5.

[2] Capt. Mac Giolla Chainnigh joined the Canadian Forces in 1975 as a member of the Reserves. He was then 16 years of age. He transferred to the Regular Force in 1978 and enrolled in the Royal Roads Military College. He has continued to serve in the Canadian Forces since that time

and, at present, he is a member of the teaching faculty at the Royal Military College in Kingston, Ontario.

[3] According to Capt. Mac Giolla Chainnigh, he has, throughout his military career, consistently expressed his disaffection for the British monarchy. His resistance to monarchist symbols in the Canadian Forces began with a stated reluctance, upon enrollment, to pledge the required oath of allegiance to Her Majesty. It was only after he was assured that the oath was simply a figurative way of expressing loyalty to the people of Canada that he agreed to take the oath.

[4] Capt. Mac Giolla Chainnigh initiated his grievance on June 12, 2001. The grievance claimed that he had been subjected to a form of institutional harassment by the obligation to participate in "outward displays of loyalty to an unelected monarch of foreign origin" (i.e. Queen Elizabeth II). Capt. Mac Giolla Chainnigh sought relief in the form of being excused from any duty to toast or to pay respect to the Queen as the Head of State of Canada; from saluting or paying respect to the Union Jack as a symbol of Canada; and from singing or paying respect to the singing of "*God save the Queen*" as a symbol of Canada. He claimed that these practices were politically offensive and in conflict with his personal views.

[5] On the advice of the Canadian Forces Grievance Board (Board), the CDS rejected Capt. Mac Giolla Chainnigh's grievance and it is from that decision that this application for judicial review arises.

Adjudicative Background

[6] Capt. Mac Giolla Chainnigh's grievance was submitted for determination to the Initial Authority which was, in this instance, the office of the Assistant Deputy Minister, Human Resources (Military). Before resolving the grievance at that level, advice was sought from the Canadian Forces Heritage Officer, Major P. E. Lansey. The resulting report from Maj. Lansey described the role of the Queen within the Canadian Forces. It also identified several devices and protocols which are used to recognize the role of the monarchy in the military context.

[7] Maj. Lansey identified a number of customary items of dress and equipment within the Canadian Forces that signify a linkage to Her Majesty and he pointed out that all Canadian honours, including the Canadian Forces Decoration, emanate from her.

[8] With respect to Capt. Mac Giolla Chainnigh's specific concerns, Maj. Lansey observed that the Loyal Toast is an expression of respect and good health for the reigning sovereign, made during formal dinners in the mess. This practice, he said, was consistent with the internationally accepted custom of presenting similar toasts to other visiting heads of state. A refusal to participate would be a clear sign of rudeness and disrespect.

[9] On those limited occasions when the Union Jack is given recognition within the Canadian Forces it is as a symbol of Canada's membership in the Commonwealth and of allegiance to the

Crown. Maj. Lansey also noted that the Canadian Forces' policies respecting flag etiquette follow the direction of the Department of Canadian Heritage.

[10] Maj. Lansey observed that the playing of Royal Anthems, including *God Save the Queen*, in the military context, is a form of salute to the Queen and it is a practice that is also followed in the United States when she makes an official visit there.

[11] Capt. Mac Giolla Chainnigh took issue with several aspects of Maj. Lansey's report. He stated that he was "embarrassed to be associated with the monarchy" and he questioned whether the British monarch "has a legitimate claim to our loyalty". His objection to participating in the Loyal Toast was expressed as follows:

> …I recognize loyalty to the people of Canada alone. I could drink a toast to Elizabeth as a person (if I knew her). I could drink a toast to her as the Head of State of the United Kingdom, in respect for visitors from that country. But I can not in good faith toast her as the "Queen of Canada". In doing so I would be implicitly declaring the truth of a premise that I believe to be false.

[12] Capt. Mac Giolla Chainnigh expressed similar concerns about the use of the Union Jack and the Royal Anthem as Canadian symbols, both of which he described as personally offensive and harassing.

[13] The underlying premise of Capt. Mac Giolla Chainnigh's grievance was that while he did not object to participating in these practices insofar as they were expressions of respect for the

Queen in her role as Monarch of the United Kingdom, he did object when those practices were linked to her roles as the Canadian Head of State and Commander-in-Chief of the Canadian Forces.

[14] The determination of Capt. Mac Giolla Chainnigh's grievance at the initial stage was not favourable to his position. In addition to finding that the concept of institutional harassment did not exist in Canadian Forces policy, the grievance was denied on the merits for the following reasons:

> 2. …In order to address your grievance, one must identify the connection between two main concepts: the Queen's relationship with respect to the government of Canada and the CF is clearly established by Reference C. Under section 9, the Queen is expressly vested with the executive government and the authority of and over Canada. Section 17 specifies that the Parliament of Canada includes the Queen as well as the Senate and the House of Commons. Section 91 enables the Queen, with the advice and consent of the Senate and House of Commons, to make laws in relation to the Militia, Military and Naval Services and Defence in Canada, and section 15 vests the command-in-chief of all Canadian military forces in the Queen. The role of the Queen in relation to Canada is succinctly described in the Oaths of allegiance and citizenship as the Queen of Canada.
>
> 3. The concept of loyalty involves strong feelings of support or allegiance, which is a main principle of the CF. Loyalty means that CF members will fulfill their commitments in manner that best serves Canada and the CF within the interests of justice and respect of the law. In the context of the CF, loyalty and allegiance to the Queen and specific demonstrations of that loyalty are specifically provided for within the regulations and subordinate orders. Under Queen's Regulations and Orders 6.04, all Canadian citizens shall on enrolment in the CF make an oath or affirmation to be faithful and bear true allegiance to Her Majesty, Queen Elizabeth the Second, Queen of Canada her heirs and successors according to the law.
>
> 4. Reference D contains the CF directives with respect to the paying of compliments. Compliments such as saluting are formal marks of respect and courtesy. In Canada, military compliments are paid only to the Sovereign, the Governor-General, members of the Royal Family, recognized foreign royalty, foreign heads of state government, the Prime Minister, the Minister and Associate Minister

> of National Defence, Lieutenant-Governors and commissioned officers. The salute is required by non-commissioned members to all commissioned officers and by all officers to officers of higher rank. This is not a choice that CF members made, it is mandatory.
>
> 5. Other situations referred to in Reference C include making the toast to the Queen at such events as mess dinners and standing during the playing of *God Save the Queen*. These are signs of loyalty and respect for Her Majesty and are done to show the allegiance and loyalty CF members have towards the head of their military and State. The Queen is more than a foreign monarch, she is the Queen of Canada.

[15] Capt. Mac Giolla Chainnigh was not satisfied with the reasons given for rejecting his grievance and he asked that the matter be determined by the Final Authority, being the CDS. In accordance with article 7.12 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O's), the CDS referred Capt. Mac Giolla Chainnigh's grievance to the Board for its consideration and recommendations.

[16] The Board gave its report to the CDS on May 31, 2006 and it recommended that the grievance be denied. The Board determined that the payment of respect to the Queen within the Canadian Forces was consistent with her constitutional role as the Head of State and as the military Commander-in-Chief. The Board also resolved Capt. Mac Giolla Chainnigh's newly advanced *Canadian Charter of Rights and Freedoms* (*Charter*) arguments by applying the authority of the Federal Court of Appeal in *Roach v. Canada (Minister of State for Multiculturalism and Citizenship),* [1994] 2 F.C. 406, 164 N.R. 370. The Board concluded that his assertion of infringement of his freedoms of expression and religion under section 2(a) and (b) of the *Charter* had not been established by "substantive evidence." The Board went on to describe

Capt. Mac Giolla Chainnigh's *Charter* concerns as a reflection of his fundamental lack of understanding of the governance structures of Canada. The Board appears to have concluded that, in the context of a correct appreciation of the role of the Queen within Canada and the Canadian Forces, Capt. Mac Giolla Chainnigh's concerns were trivial and did not warrant constitutional protection.

[17] The CDS accepted the recommendation of the Board and denied Capt. Mac Giolla Chainnigh's grievance by letter dated August 28, 2006. The reasons given by the CDS for denying the grievance included the following:

> In its analysis of your grievance, the CFGB found that you were not subjected to harassment and that your constitutional rights were not violated for having to outwardly pay respect to the Queen. The CFGB also found that while you may personally oppose paying respect to the Queen, the Queen's position as Head of State is based in law, not belief, and therefore CF members have a legal obligation to respect the Queen's lawful authority over them. I concur with these findings and I can find no reason to conclude that showing respect to our Head of State is anything but proper and lawful.
>
> Regarding your specific contention of institutional harassment, the CFGB found that there were no prohibited grounds upon which you might link an allegation of harassment. I agree with this finding. Compelling CF members to exercise their legal obligation to respect lawful authority is not one of the prohibited grounds listed in section 14 of the *Canadian Human Rights Act*. The CFGB also found that your constitutional rights were not violated by having to make outward displays of loyalty to the Queen. In *R. v. Locke*, the Supreme Court of Canada confirmed that a citizen may not be excused from obeying the law based on their individual value system. I also agree with this finding. The Queen is the constitutional and legal Head of State of Canada.
>
> [footnotes omitted]

Issues

[18] The precise nature of Capt. Mac Giolla Chainnigh's concern with the CDS' decision is difficult to identify from his written or oral arguments. In its simplest form,
Capt. Mac Giolla Chainnigh's concern is that by being obliged to pay occasional compliments to the Queen and to the Union Jack and to participate in the singing of *God Save the Queen*, his freedom of expression and religious freedom under section 2(a) and (b) of the *Charter* have been infringed and that this also constitutes harassment. He says that the decision of the CDS on these issues was legally incorrect and otherwise unreasonable. In particular, he contends that the CDS erred by imposing upon him the obligation to prove that the impugned policies and protocols represented a meaningful "burden of conscience." Beyond these basic propositions,
Capt. Mac Giolla Chainnigh's legal argument becomes somewhat difficult to follow. Much of his additional concern has to do with what he perceives as inconsistencies within Canadian constitutional and governance structures and, thus, form the reasons for his disaffection. For instance, he contends that, although the Queen is the legal and constitutional Head of State for Canada, she has no "natural" right to hold that position. He also asserts that a clear definition of the Queen's powers within the Canadian Forces is lacking and that he and others are confused and conflicted about that role. For instance, he questions whether the Queen could order the Canadian Forces into combat contrary to the wishes of the Canadian Parliament and he poses that a conflict of interest problem could arise if the United Kingdom "were to invade Canada". He also asserts that hereditary class distinctions and monarchist symbolism are inconsistent with Canadian values. Finally he contends that democracy and monarchy are incongruent concepts which, despite the Canadian model of a constitutional monarchy, cannot be reconciled. According to

Capt. Mac Giolla Chainnigh, the CDS also erred by failing to provide authoritative answers to these critical questions and by otherwise misunderstanding or underestimating his concerns.

[19] With respect to the issue of religious freedom, Capt. Mac Giolla Chainnigh argues that the religiously-based rules of British monarchical succession are inconsistent with Canadian values but beyond that, he fails to indicate how his religious views or practices, if any, have been infringed.

[20] To bring some focus to the arguments made by Capt. Mac Giolla Chainnigh, I would state the issues which I am required to resolve as follows:

(a) Did the CDS err in law in holding that Capt. Mac Giolla Chainnigh's rights under section 2 of the *Charter* are not infringed by the universal application of the impugned policies and protocols?

(b) Did the CDS err in law in holding that the application of the impugned policies and protocols to Capt. Mac Giolla Chainnigh did not constitute a form of harassment?

(c) Was the decision by the CDS to decline to grant an exemption to Capt. Mac Giolla Chainnigh from the impugned policies and protocols reasonable in all of the circumstances?

Analysis

Standard of Review

[21] With respect to issues of law, the parties agree that the appropriate standard of review in this case is correctness. I agree with that view. However, with respect factual determinations and the

exercise of discretion by the CDS, some deference is clearly owed. For such matters, I would adopt the thoughtful analysis of my colleague, Justice Carolyn Layden-Stevenson, in *Armstrong v. Canada (Attorney General)*, 2006 FC 505, 291 F.T.R. 49 including the following concluding passage:

> 37 Balancing the factors, I conclude that for findings of fact, the applicable standard of review is that set out in the *Federal Courts Act*, that is, they are reviewable only if they are erroneous, made in a perverse or capricious manner or without regard to the evidence. This is equivalent to patent unreasonableness. In all other respects, the decision of the CDS (in this case the Grievance Authority) is subject to review on a standard of reasonableness. See: *McManus v. Canada (Attorney General)*, [2005] F.C.J. No. 1571, 2005 FC 1281 at paras. 14-20.

The Statutory and Regulatory Framework

[22] The role of the Queen within the Canadian Forces is constitutionally and statutorily established. Section 15 of the *Constitution Act, 1867* designates the Queen as the "Command-in-Chief" of Canada's naval and military forces. Section 14 of the *National Defence Act* establishes the Canadian Forces as the armed forces of "Her Majesty".

[23] The practices and protocols that are at the root of Capt. Mac Giolla Chainnigh's grievance are mandated by Canadian Forces' written policies which are created under the authority granted to the CDS by Section 18(2) of the Act. The practices by which members are required to show their respect and allegiance to the Queen are described as "compliments". Compliments are formal marks of respect and courtesy which are said to be indispensable to service discipline. In the Canadian Forces Manual of Drill and Ceremonial, the salute is described as a traditional and basic demonstration of respect. It is a form of compliment that is owed by members to the Sovereign, the

Governor General, members of the Royal Family, recognized foreign royalty, foreign heads of state or government, the Prime Minister, the Minister and Associate Minister of National Defence, Lieutenant Governors and commissioned officers. A salute is also required to be given to personnel of higher rank with the compliment to then be returned.

[24] Under the Canadian Forces' policy dealing with Honours, Flags and Heritage Structures, the order and form of toasts to the Queen and to other heads of state is prescribed. At formal mess dinners, "the health of Her Majesty the Queen" is honoured by means of a Loyal Toast. A similar toast is required in recognition of an officer or other distinguished person who is officially representing a foreign state at a mess dinner. These provisions also recognize the use of the Union Jack (subordinate to the National Flag) as a symbol of Canada's membership in the Commonwealth and of allegiance to the Crown. The playing of *God Save the Queen* as the Royal Anthem of Canada is approved for use in limited circumstances, most notably during the presentation of the Loyal Toast when a band is in attendance.

[25] With respect to Capt. Mac Giolla Chainnigh's freedom of religion and freedom of expression claims, the relevant provisions are sections 1, 2(a) and 2(b) of the *Charter*:

Guarantee of Rights and Freedoms: 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	Garantie des droits et libertés: 1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se

and democratic society.	démontrer dans le cadre d'une société libre et démocratique.
Fundamental freedoms:	Libertés fondamentales:
2. Everyone has the following fundamental freedoms:	2. Chacun a les libertés fondamentales suivantes :
a) freedom of conscience and religion;	a) liberté de conscience et de religion;
b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;	b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
[….]	[…]

The Claim to Freedom of Expression

[26] Although many of Capt. Mac Giolla Chainnigh's reasons for objecting to the requirement of paying compliments to the Queen are doubtful, unproven or demonstrably wrong, the fact remains that they are views which he seems to honestly and strongly hold and they are arguably entitled to the protection afforded by section 2(b) of the *Charter*. The CDS, however, did not agree that Capt. Mac Giolla Chainnigh's freedom of expression had been infringed. That conclusion was based on a fair reading of the majority decision in *Roach*, above. In *Roach*, the issue was whether the requirement to pledge the oath of allegiance to the Queen as a condition of obtaining Canadian citizenship could be a violation of Mr. Roach’s freedom of expression. The majority of the Court

found that the requirement to state the oath of allegiance in such circumstances could never constitute a constitutional breach:

> 7 Given that the appellant does not advocate revolutionary change (i.e., change contrary to the Constitution itself), 2 his freedom of expression (paragraph 2(b)), freedom of peaceful assembly (paragraph 2(c)) and freedom of association (paragraph 2(d)) cannot conceivably be limited by the oath of allegiance, since the taking of the oath of allegiance in no way diminishes the exercise of those freedoms. The fact that the oath "personalizes" one particular constitutional provision has no constitutional relevance, since that personalization is derived from the Constitution itself. As it was put by Professor Frank MacKinnon, The Crown in Canada, Glenbow-Alberta Institute, 1976, at page 69, "Elizabeth II is the personal expression of the Crown of Canada". Even thus personalized, that part of the Constitution relating to the Queen is amendable, and so its amendment may be freely advocated, consistently with the oath of allegiance, either by expression, by peaceful assembly or by association.
>
> 8 This is sufficient to dispose of the appellant's challenge to the oath of allegiance on the basis of section 2 of the Charter. No facts would be pleaded that would prove the appellant's allegation. It is "plain and obvious" and "beyond doubt" that the appellant has no chance of success at trial in this regard.
>
> […]
>
> 14 Moreover, the burden imposed on the appellant is only the minuscule one of the time and the effort involved in the uttering of the twenty-four words of allegiance. To hold this to be a coercive burden that would trigger the invocation of subsection 15(1) would in my opinion be to trivialize the Charter.
>
> 15 Of course, the total consequences of the swearing or affirming of these twenty-four words (as opposed to their nominal burden) are not at all trivial. Not only are the consequences as a whole not contrary to the Constitution, but it would hardly be too much to say that they are the Constitution. They express a solemn intention to adhere to the symbolic keystone of the Canadian Constitution as it has been and is, thus pledging an acceptance of the whole of our Constitution and national life. The appellant can hardly be heard to complain that, in order to become a Canadian citizen, he has to

> express agreement with the fundamental structure of our country as it is.
>
> 16 What our country may come to be, on the other hand, as I have suggested in relation to section 2 of the Charter, is for millions of Canadian citizens to work out over time, a process in which the appellant can himself share, if he only allows himself to do so. He cannot use his dream of a republican Constitution as a legal basis for denying the legitimacy of the present form of government. The present Constitution could indeed evolve into his ideal republic, provided that the intervening political process were peacefully constitutional. If the appellant, idiosyncratically, were to feel that thus pledging his allegiance to the existing Constitution were a "burden", this would not be a burden of which the law could take any cognizance. The Constitution, as it exists at any given time, cannot be unconstitutional, nor can it be constitutionally burdensome. It is itself the ultimate criterion by which all laws, actions and discriminatory burdens are measured.

[27] In his dissenting opinion, Justice Allen Linden dealt with the problem which arises when a person's beliefs concerning constitutional principles are seemingly out of step with legal reality. This is reflected in the following passage from Justice Linden's decision:

> 57 …It may not be unreasonable for the appellant, if he truly holds the beliefs he claims to hold, to feel that, by taking this oath, he is inhibited to some extent in his anti-monarchy activities. In other words, his serious view of the oath might be taken seriously. It may be that, after a trial, it might be concluded that the appellant was being made to choose between his political principles and his enjoyment of Canadian citizenship, something the Charter is supposed to prevent. It may be that Mr. Justice MacGuigan's view would prevail. It may be that section 1 might be invoked to justify any prima facie violation of the Charter, or it might not. In light of the uncertainty surrounding this question, it would be advisable, before resolving this matter, to have the benefit of factual underpinnings and full legal argument based on those facts.

[28] Justice Linden went on to point out that the content of one's expression is irrelevant at the first stage of deciding whether an expression is entitled to *prima facie* protection under section 2(b) of the *Charter*: see para. 60. In the end, Justice Linden would not have summarily struck out Mr. Roach's claim in all of its aspects. He would have permitted the case to move forward insofar as it involved a challenge brought under section 2(b) of the *Charter*.

[29] With respect to section 2(b) of the *Charter*, I am unable to identify any meaningful distinction between the issues resolved in *Roach*, above, and those which arise in this proceeding. Notwithstanding Justice Linden's dissenting opinion, I am bound by precedent to apply the majority decision in *Roach* in my assessment of the legal correctness of the CDS' decision and, in the result, I can only conclude that no legal error has been made out.

[30] Even if I am wrong in following *Roach* and concluding that Capt. Mac Giolla Chainnigh's section 2(b) *Charter* rights were not engaged on this record, I am satisfied that the Canadian Forces' policies under review represent a reasonable and demonstrably justified limitation and they would, therefore, be saved by section 1 of the *Charter*. This becomes evident if one scrutinizes Capt. Mac Giolla Chainnigh's grievance by way of the type of *Charter* analysis that was carried out by the Supreme Court of Canada in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, 81 D.L.R. (4th) 545.

[31] According to the jurisprudence on section 2(b) including *Lavigne*, above, the threshold for finding a *prima facie* infringement of a person's freedom of expression under section 2(b) of the

Charter is quite low. All that it is required is proof that the purpose of the law is aimed at controlling expression and, where that is so, a violation of section 2(b) is automatic: see *Lavigne*, at para. 101.

[32] *Charter* protection can be applied to all forms of governmental control over expression. Most often the protection is claimed where the effect of the law is to limit expression but protection is also available where the control is exercised by compelling expression: see *Lavigne*, above, at para. 102. Put another way, the right to free expression necessarily includes the right to say nothing at all. Indeed, in some contexts including this one, silence in the face of mandated speech can carry a significant message.

[33] In this case, the purpose of the impugned policies and protocols was to put a message into the mouth of Capt. Mac Giolla Chainnigh - a message with which he, advisedly or not, fundamentally disagrees. Assuming that this is sufficient to represent a *prima facie* breach of Capt. Mac Giolla Chainnigh's freedom of expression, it is next necessary to consider section 1 of the *Charter*.

Justification under Section 1

[34] The second stage of the *Charter* analysis requires consideration of the test established in *R. v. Oakes*, [1986] 1 S.C.R. 103 and which is restated in the following passage from *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1 at para. 117:

> 117 Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic

> society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights…

I turn, then, to the application of these principles to facts of this case.

Legislative Purpose

[35] The protocols which Capt. Mac Giolla Chainnigh finds objectionable form a small part of Canadian Forces' regulations and policies dealing with compliments and other forms of official recognition. The stated purposes for these rules are to foster respect and loyalty, to enhance good order and discipline within the ranks and to maintain the effectiveness of the hierarchical command structure. Indeed, the requirement for members to obey lawful commands is self-evident and it is not contested by Capt. Mac Giolla Chainnigh. These are also accepted details of military life which Capt. Mac Giolla Chainnigh agreed to adhere to when he joined in 1975.

[36] I accept that these rules, from which Capt. Mac Giolla Chainnigh seeks to be excused, were established to fulfill a pressing and substantial purpose. Here, I agree with the Respondent's characterization of their legislative purpose at para. 70 of its factum:

> 70. Similarly, as the Commander in Chief of the CF, all members of the CF are required to salute the Queen and obey all her lawful

> commands and orders as she is their superior officer. The required displays of loyalty to the Commander in Chief serve the objective of symbolically saluting her, as well as expressing the CF's loyalty generally in following orders made in her name. The required displays of loyalty are but instances of the general duty to salute one's superiors, which maintains order and discipline in the CF so as to ensure the prompt carrying out of lawful commands and orders. Such routine acknowledgement of the chain of command starting at the very top with the Queen helps maintain an effective military, which is a pressing and substantial objective.

Proportionality

[37] To pass constitutional muster, there is a requirement that the measures adopted by government be reasonable and proportional to their deleterious effects. This part of the analysis requires a weighing of the benefits obtained from the means adopted against their resulting harm to the freedoms of the person affected. The measures taken must be fair and not arbitrary, rationally connected to their intended purposes and carefully designed to ensure minimal impairment to the right or rights in question.

[38] The Queen is, of course, Canada's constitutional Head of State and Commander-in-Chief. It cannot be seriously disputed that she is legally at the pinnacle of the Canadian Forces hierarchy, albeit in an emblematic role. The obligation of members of the Canadian Forces to display respect to one another and loyalty to their commanders is critical to the maintenance of good order and discipline. It stands to reason that mandatory expressions of respect and loyalty to the Queen are reasonable components of the broader system for maintaining good order and discipline within the ranks.

[39] In contrast, the imposition upon Capt. Mac Giolla Chainnigh of the occasional obligation to express loyalty and respect to the Queen in her capacity as Head of State and Commander-in-Chief is not particularly profound. Such expressions do not carry any connotation that Capt. Mac Giolla Chainnigh agrees with Canada's present constitutional arrangements. Within the broad limits of political freedom in Canada, he is free to advocate for peaceful political and constitutional change commensurate with his anti-monarchist views. Indeed, it appears from the record that Capt. Mac Giolla Chainnigh's complaints have been treated with respect and concern within the Canadian Forces since the time of his enrollment. His right to freely express these views is best exemplified by his own evidence that, throughout his career, he has consistently expressed disaffection for the British monarchy. He makes no allegations that his career has been adversely affected by the views he has expressed. He holds the rank of Captain and, by all appearances, he is a respected member of the teaching faculty at the Royal Military College. The grievance which gave rise to this application seems to have been given considerable and appropriate attention at all levels. All of this belies Capt. Mac Giolla Chainnigh's argument that his freedom of expression has been significantly curtailed by the universal application of these rules. It is also worth noting that the exemption of Capt. Mac Giolla Chainnigh from these requirements would not represent a simple neutral expression on his part. Here, I accept the views of Maj. Lansey that Capt. Mac Giolla Chainnigh's refusal to participate in these practices would constitute a display of rudeness and disrespect entirely inconsistent with traditional Canadian values and accepted international protocols.

[40] As noted by Justice Bertha Wilson in *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1326 and adopted for the majority by Justice Beverly McLachlin (as she then was) in *Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68, not all expression is equally worthy of protection nor are all infringements of free expression equally serious. The right to be infelicitous, misguided or rude, even in the political context, is not a form of expression which, to my thinking, has a particularly strong claim to protection.

Rational Connection

[41] There is an obvious rational connection between the above-stated purposes and the methods chosen to achieve those purposes. Any system of effective management requires universal rules of respect and decorum. In a military environment loyalty and respect are essential ingredients of the command structure. The requirement that all members periodically express that loyalty and respect to one another and, in particular, to their superiors serves to reinforce those basic principles.

Minimal Impairment

[42] While Capt. Mac Giolla Chainnigh seems to acknowledge the Queen's legal legitimacy as "an empowered sovereign", he maintains that she has no "natural" right to hold any position of constitutional significance in Canada and, by extension, she ought not to be recognized within the Canadian Forces. Because of those personal views, he wishes to be excused from any obligation to participate in open displays of loyalty to the monarchy or to the trappings of the monarchy. In other words, he feels that the Canadian Forces' policies which oblige its members to show loyalty and respect Canada's Head of State and to their Commander-in-Chief ought not to be applied to him.

Although it was not clearly articulated, Capt. Mac Giolla Chainnigh seems to be saying that the universal application of these policies and protocols is an unnecessary or excessive response to the need for order and discipline. He did argue that the rights of members to opt out, at least for the reasons he espouses, is a more reasonable approach and one which the CDS should have adopted.

[43] One of the obvious difficulties presented by Capt. Mac Giolla Chainnigh's claim to individual relief is that it would create a precedent for others to opt out of these and other protocols for all sorts of reasons, political and otherwise. A chaotic and unworkable situation would arise in such an environment and it would entirely undermine the maintenance of good order and discipline that is essential to the effective operation of the Canadian Forces. Presumably, with such a precedent, members could decline to show respect to other dignitaries or heads of state or to decline to extend compliments to superior officers on the basis of similar personal beliefs. When asked about this, Capt. Mac Giolla Chainnigh was unable to offer a plausible basis for extending a privilege to him which would not be available to others who might choose not to participate for different reasons and in different circumstances. The problem is that there is simply no bright line by which Capt. Mac Giolla Chainnigh's political views can be distinguished from the beliefs of other members who might wish to opt out of these or similar protocols for different reasons.

[44] I do not, therefore, agree that the universal application of these rules is excessive to their intended purposes. Anything other than their universal application would substantially detract from those purposes and it was therefore reasonable for the CDS to decline to create exceptions. Any

system that allowed for an *ad hoc* exception would also have an element of arbitrariness or unfairness which is, of course, a separate consideration in any section 1 analysis.

The Claim to Religious Freedom

[45] Capt. Mac Giolla Chainnigh's claim that his 2(a) *Charter* right to religious freedom is infringed by the requirement that he participate in the Loyal Toast or in the singing of *God Save the Queen* is fully answered by reference to *Roach*, above, and there is no error in the CDS' application of that decision in these circumstances.

[46] There is a recognized threshold for the application of section 2(a) of the *Charter*. This point is well expressed by Justice Frank Iacobucci in *Syndicat Northcrest v. Amselem*, 2004 SCC 47 [2004] 2 S.C.R. 551, at paras 56-59:

> 56 Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.
>
> 57 Once an individual has shown that his or her religious freedom is triggered, as outlined above, a court must then ascertain whether there has been enough of an interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) Charter.

58 More particularly, as Wilson J. stated in *Jones*, supra, writing in dissent, at pp. 313-14:

> Section 2(a) does not require the legislature to refrain from imposing any burdens on the practice of religion. Legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion. [Emphasis added.]

Section 2(a) of the Canadian *Charter* prohibits only burdens or impositions on religious practice that are non-trivial. This position was confirmed and adopted by Dickson C.J. for the majority in *Edwards Books*, supra, at p. 759:

> All coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(a).
>
> This does not mean, however, that every burden on religious practices is offensive to the constitutional guarantee of freedom of religion... . Section 2(a) does not require the legislatures to eliminate every minuscule state-imposed cost associated with the practice of religion. Otherwise the *Charter* would offer protection from innocuous secular legislation such as a taxation act that imposed a modest sales tax extending to all products, including those used in the course of religious worship. In my opinion, it is unnecessary to turn to s. 1 in order to justify legislation of that sort... . The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial: see, on this point, *R. v. Jones*, [1986] 2 S.C.R. 284, per Wilson J. at p. 314. [Emphasis added.]

59 It consequently suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or

> her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial. The question then becomes: what does this mean?

[47] Capt. Mac Giolla Chainnigh has not demonstrated how his religious beliefs or practices would be infringed by the obligations of toasting the Queen, saluting the Union Jack or singing *God Save the Queen* and, therefore, the threshold for establishing a *prima facie Charter* breach has not been met. The fact that British royal succession adheres to certain sectarian principles does not, beyond the Royal Family, have anything to do with a person's religious beliefs or practices and there is nothing in the Canadian Forces' policies to suggest that these required expressions of loyalty to the Queen carry any religious significance whatsoever. In these circumstances, it would be generous to describe Capt. Mac Giolla Chainnigh's unstated religious interests as having been affected in even a trivial way. Capt. Mac Giolla Chainnigh's complaint that the CDS and the Board erred on this issue by imposing upon him the obligation to establish a "coercive burden" misconstrues how that term has been used in the relevant authorities. A coercive burden is just another way of saying that the interference with one's religious beliefs must be more than trivial: see *Schachtschneider v. Canada*, [1994] 1 F.C. 40 (FCA) at pages 65-66. I am satisfied that the decision of the CDS on this issue was correct and that Capt. Mac Giolla Chainnigh's burden of establishing an infringement of his religious freedom was not met.

Harassment

[48] Given that these policies and protocols are constitutionally valid, that they do not contravene human rights law and that the CDS' decision to apply them universally to all members

of the Canadian Forces was both lawful and reasonable, it necessarily follows that they cannot represent a form of institutional harassment.

Conclusion

[49] It follows from all of the above that these measures are reasonable and demonstrably justified and that the CDS' decision was both correct in law and reasonable. Whether it is wise for Canada to maintain its linkages to the British monarchy is a matter for debate and resolution in the political sphere. Since its inception, Canada has made several legislative and constitutional changes by which our historical dependence and linkages to the British Crown have been reduced. This is fundamentally a political and democratic process driven by an evolving consensus within the Canadian polity. But the fact remains that our present ties to the British monarchy are constitutionally entrenched and unless and until that is changed there is legitimacy within our institutional structures for demanding, in appropriate circumstances, expressions of respect and loyalty to the Crown.

[50] I cannot think of any Canadian institution where an expectation of loyalty and respect for the Queen would be more important than the Canadian Forces. There are occasions in the military employment context (and, indeed, in any employment context) where the organization can insist that its employees maintain standards of decorum and respect and where the failure or refusal to do so will justify the imposition of discipline. This is particularly obvious in an environment of command and control management. Whether Capt. Mac Giolla Chainnigh likes it or not, the fact is that the Queen is his Commander-in-Chief and Canada's Head of State. A refusal to display loyalty

and respect to the Queen where required by Canadian Forces' policy would not only be an expression of profound disrespect and rudeness but it would also represent an unwillingness to adhere to hierarchical and lawful command structures that are fundamental to good discipline. It follows from this that, within Canada's existing constitutional arrangements, the CDS' decision was the only rational response to Capt. Mac Giolla Chainnigh's grievance.

[51] Even if I was left in some doubt about the necessity and value of these practices (and I am not), I would still be obliged to uphold the CDS' decision. That is so because the adoption and application of standards of good order within the Canadian Forces is, in this instance as in most, a matter best left to the specialized judgment of those who are tasked to preserve it.

Costs

[52] The Respondent has requested costs and, given its success on this application, an award of costs under Column II is appropriate.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed with costs payable to the Respondent under Column II.

" R. L. Barnes "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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