COURT OF APPEAL FOR ONTARIO

CITATION: McAteer v. Canada (Attorney General), 2014 ONCA 578
DATE: 20140813
DOCKET: C57775

Weiler, Lauwers and Pardu JJ.A.

BETWEEN

Michael McAteer, Simone E.A. Topey and Dror Bar-Natan

Applicants (Appellants/
Respondents by way of cross-appeal)

and

The Attorney General of Canada

Respondent (Respondent/
Appellant by way of cross-appeal)

Peter Rosenthal, Selwyn Pieters and Reni Chang, for the appellants

Kristina Dragaitis and Sharon Guthrie, for the respondent

Heard: April 8, 2014

On appeal from the judgment of Justice Edward M. Morgan of the Superior Court of Justice, dated September 20, 2013, with reasons reported at 2013 ONSC 5895, 117 O.R. (3d) 353.

Weiler J.A.:

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I. OVERVIEW

[1] Permanent residents of Canada over 14 years old who wish to become Canadian citizens are required to swear an oath or make an affirmation[1]: see *Citizenship Act*, R.S.C. 1985, c. C-29 (the "Act") s. 3(1)(c). Subject to limited discretionary exceptions, s. 12(3) of the Act provides that a certificate of citizenship issued by the Minister of Citizenship and Immigration does not become effective until the oath is taken. Section 24 of the Act requires a person to take the oath in the form set out in the Schedule to the Act as follows:

> I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen.

[2] The appellants object to the following portion of the oath: "I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors."

[3] The appellants assert that the requirement in the Act to swear or affirm allegiance to the Queen in order to become a Canadian citizen is a violation of their rights under ss. 2(a) (freedom of conscience and religion), 2(b) (freedom of expression), and 15(1) (equality) of the *Charter of Rights and Freedoms*. They submit that the government cannot justify any such violation as a reasonable limit

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[1] In this appeal I will refer simply to both options as the oath.

in a free and democratic society under s. 1. If successful, they seek a declaration making the impugned portion of the citizenship oath optional.

[4] The application judge dismissed the appellants' application. He held that the requirement to swear an oath to the Queen did not violate their freedom of religion or equality rights and, although he found that there was a violation of the appellants' right to freedom of expression, he held it was justified under s. 1 of the *Charter*.

[5] The appellants appeal the dismissal of their application and the respondent, the Attorney General of Canada, cross-appeals the finding that the oath violates the appellants' right to freedom of expression.

[6] For the reasons that follow I would dismiss the appeal and allow the cross-appeal. The appellants' arguments are based on a literal "plain meaning" interpretation of the oath to the Queen in her personal capacity. Adopting the purposive approach to interpretation mandated by the Supreme Court of Canada, leads to the conclusion that their interpretation is incorrect because it is inconsistent with the history, purpose and intention behind the oath. The oath in the Act is remarkably similar to the oath required of members of Parliament and the Senate under *The Constitution Act,* 1867. In that oath, the reference to the Queen is symbolic of our form of government and the unwritten constitutional

principle of democracy. The harmonization principle of interpretation leads to the conclusion that the oath in the *Act* should be given the same meaning.

[7] The appellants' incorrect interpretation of the meaning of the oath cannot be used as the basis for a finding of unconstitutionality. The approach to analyzing claims under s. 2(b) was set out by the Supreme Court in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, and requires the court to determine: 1) whether what is in issue is expression; 2) whether the purpose is to compel expression; and 3) whether there is an effect on expression that warrants constitutional disapprobation. Applying this approach, there is no issue that the oath is expression. I hold that the purpose of the oath is not to compel expression but to obtain a commitment to our form of government from those wishing to become Canadian citizens. Although the oath has an effect on the appellants' freedom of expression, constitutional disapprobation is not warranted. Thus, there is no violation of the appellants' freedom of expression. In the alternative, if there is a violation or the appellants' right to freedom of expression, it is justified under s. 1 of the *Charter*. There is no violation of the appellants' right to freedom of religion and freedom of conscience because the oath is secular and is not an oath to the Queen in her personal capacity but to our form of government of which the Queen is a symbol. Nor is the oath a violation of the appellants' equality rights when the correct approach to statutory interpretation is applied.

II. THE OATH AND HISTORY OF THE PROCEEDINGS

1. The appellants

[8] Mr. Charles Roach, who initiated the present application and passed away in October 2012, was a committed republican who believed that to swear fealty to a hereditary monarch would violate his belief in the equality of human beings and his opposition to racial hierarchies. The appellant Mr. Michael McAteer is a committed republican who deposes that "taking an oath of allegiance to a hereditary monarch who lives abroad would violate [his] conscience, be a betrayal of [his] republican heritage and impede [his] activities in support of ending the monarchy in Canada." He further deposes that taking an oath to the Queen perpetuates a class system and is anachronistic, discriminatory and not in keeping with his beliefs of egalitarianism and democracy. Similarly, the appellant Mr. Dror Bar-Natan states that the oath would violate his conscience because it is a symbol of a class system.

[9] The appellant Ms. Simone Topey is a Rastafarian who regards the Queen as the head of Babylon. She deposes that it would violate her religious beliefs to take any kind of oath to the Queen. She further deposes that on account of the oath, she would feel bound to refrain from participating in anti-monarchist movements. The evidence of Mr. Howard Gomberg, a former plaintiff in these

proceedings, is that taking an oath to any human being is contrary to his conception of Judaism.

[10] In these reasons, I will, for the most part, not refer to the individual appellants but refer to them as a group, "the appellants".

2. Prior Roach decisions

[11] This is not the first time that Mr. Roach has advanced a claim that the oath of citizenship violates his *Charter* rights. In *Roach v. Canada (Minister of State for Multiculturalism and Culture)*, [1992] 2 F.C. 173 (T.D.), Joyal J. upheld the prothonotary's decision striking out Mr. Roach's claim that the oath of citizenship violated his right to freedom of religion, freedom of expression, and was contrary to his equality rights under s. 15 of the *Charter* – the very claims advanced here.[2]

[12] Mr. Roach's further appeal to the Federal Court of Appeal was dismissed by MacGuigan J.A. on behalf of himself and McDonald J.A., with Linden J.A. dissenting in part: [1994] 2 F.C. 406 (C.A.), leave to appeal to S.C.C. denied by a three-member panel of the F.C.A., 113 D.L.R. (4th) 67n.

[13] In his reasons, MacGuigan J.A. noted that the monarch as Head of State is recognized in s. 9 of the *Constitution Act, 1867*. However, because Canada is a constitutional monarchy, the Queen does not rule personally; rather, the Queen

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[2] Mr. Roach also argued that the oath requiring a pledge of allegiance to the Queen violated his rights under ss. 2(c) (freedom of peaceful assembly) and 2(d) (freedom of association). Additionally, he claimed that it was cruel and unusual punishment under s. 12 and that it violated the spirit of s. 27 of the *Charter*. These claims are not pursued in the application before us.

can be said to "reign" by constitutional convention, through the advice of ministers. He found that taking an oath to the Queen in no way in ringed on freedom of expression or freedom of religion. He concluded, at pp. 415-16:

> Not only are the consequences [of swearing an oath of allegiance to the Queen] 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.

[14] Dissenting in part, Linden J.A. held that it was not plain and obvious that Mr. Roach could not succeed in his claims under ss. 2(b), 2(c), and 15(1) of the *Charter*. He therefore would have allowed the claim to proceed on these bases.

3. The history of the present application

[15] The present application was initiated as an application under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6., for a remedy under the *Canadian Charter of Rights and Freedoms* pursuant to rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[16] The respondent moved to strike out or stay the application on three grounds:

1. There was no reasonable cause of action;

> 2. The proposed action was an abuse of process because the Federal Court of Canada had already disposed of the issue; and
>
> 3. In the alternative, the Federal Court of Canada was the more appropriate forum.

[17] The motion judge, Belobaba J., dismissed the motion. First, having regard to the fact that the Crown did not press the point that the claim was completely unmeritorious during oral argument, and taking into consideration the dissent of Linden J.A. in the Federal Court of Appeal, he held that the claim disclosed a reasonable cause of action. Second, he rejected the argument that the application was an abuse of process partly on the basis that under the *Class Proceedings Act*, there could be dozens or hundreds of class members, the evidence would be different, and, having regard to the more than fifteen years that had passed since the prior proceeding, the *Charter* arguments would be different or at least more refined. Third, although the application concerned a challenge to the *Citizenship Act*, he held the application did not raise issues within the particular expertise of the Federal Court of Canada but was a straightforward constitutional challenge to a provision of a federal law.

[18] The respondent's attempts to overturn the decision of Belobaba J. were unsuccessful. Leave to appeal to the Divisional Court was refused: 230 O.A.C. 83. An appeal to this court was dismissed: 2008 ONCA 124, [2008] O.J. No. 584.

[19] In 2009, Mr. Roach moved to certify the class proceeding: *Roach v. Canada (Attorney General)* (2009), 74 C.P.C. (6th) 22. Cullity J. refused the motion and directed that an individual proceeding for declaratory relief would be a preferable procedure for resolving the common issues.

[20] The appellants then brought their *Charter* challenge in the present application, which came before Morgan J. The application judge concluded that although there was a violation of s. 2(b), it was saved under s. 1. He found that there was no violation of s. 2(a) or s. 15. In reaching these conclusions, the application judge carefully considered the evolution of the Queen's role as Head of State and the history of the oath. I will refer to his reasons on each of the *Charter* issues in greater detail as part of my analysis of the issues on appeal.

III. THE ISSUES AND STANDARD OF REVIEW

[21] The four issues raised by the parties on this appeal are:

1. Does the oath violate freedom of expression under s. 2(b)?
2. Does the oath violate freedom of conscience or religion under s. 2(a)?
3. Does the oath violate the right to equality under s. 15(1)?
4. If there are *Charter* violations, are they saved under s. 1?

[22] The standard of review is correctness.

IV. DISCUSSION OF THE MEANING OF THE OATH

[23] Both before the application judge and on appeal, much of the argument focused on the meaning of the oath. As the meaning of the oath is central to the proper analysis of the appellants' *Charter* claims, I will consider this question before turning to the main issues raised by the appeal and cross-appeal.

1. The appellants' argument as to the meaning of the oath

[24] The appellants submit that the plain meaning of the words "Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors" expresses allegiance to the Queen as an individual. They claim that the notion of personal fidelity to this foreign monarch is antiquated, undemocratic and elitist in that it perpetuates hereditary privilege and is contrary to their conception of equality. For similar reasons, they object to pledging allegiance to the Queen's heirs and successors, even if those successors prove to be benevolent rulers or never become head of state at all.

[25] They assert that the requirement that the Queen be Anglican makes the oath supportive of one religion to the exclusion of all others, and that they are constrained by their religious or conscientious beliefs from swearing an oath to any person or to a foreign monarch. They further submit that the oath is antithetical to minorities' identities and rights and is a divisive message forced into the mouths of those wishing to become Canadians. The appellants also

assert that the oath is political belief discrimination under s. 15 of the *Charter* and that it discriminates against them on account of their non-citizen status, place of national origin and religious beliefs.

[26] The appellants have sworn affidavits attesting to their subjective interpretations of the oath. They assert that if they took the oath, they would feel constrained from advancing their goal of abolishing Canada's constitutional monarchy in favour of a republic.

[27] If the appellants' interpretation of the meaning of the oath to the Queen is accepted, it will go a long way towards holding that their *Charter* rights have been violated. If, on the other hand, the court rejects the appellants' interpretation, as did the application judge, the opposite conclusion is equally true.

2. A purposive approach to interpretation is required

[28] The appellants take a "plain-meaning" approach to interpretation. At the same time, they fairly acknowledge that some courts have suggested that this is not the correct approach. The current state of the law recognizes that meaning flows at least partly from context and that a statute's purpose is an integral element of that context: see Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough: Carswell, 2000), at p. 387.

[29] The question as to how a statutory provision should be interpreted has been answered definitively by the Supreme Court of Canada. On numerous

occasions the court has adopted the approach to statutory interpretation espoused by E.A. Dreidger as the only approach, namely:

> [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Re Canada 3000 Inc.; Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24, [2006] 1 S.C.R. 865, at para. 36; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] S.C.J. No. 44, at para. 108.

[30] Recently, when the Supreme Court of Canada adopted the "plain meaning" of the text in the *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] S.C.J. No. 21, it did so because the majority's opinion was that the underlying purpose of s. 6 was consistent with the plain meaning of the text. The majority held, at para. 48:

> Section 6 reflects the historical compromise that led to the creation of the Supreme Court. Just as the protection of minority language, religion and education rights were central considerations in the negotiations leading up to Confederation, the protection of Quebec through a minimum number of Quebec judges was central to the creation of this Court. A purposive interpretation of s. 6 must be informed by and not undermine that compromise. [Citations omitted.]

[31] As this statement indicates, in determining the intention of Parliament, the history that led to the creation of the provision informs a purposive approach to

interpretation. Further, in determining parliamentary intent, courts are reluctant to accept interpretations that violate the notions of rationality, coherence, fairness or other legal norms: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008), at p. 8.

[32] A "plain-meaning" approach to interpretation is inappropriate because it fails to recognize the history and the context in which the oath exists in this country. As I will discuss, these factors point to a much different understanding of the oath than the one advanced by the appellants and leads to the conclusion that their interpretation is inconsistent with the history, purpose and intention behind the oath.

a. Historical perspective on the oath to the Queen

[33] The appellants argue that the Queen is a symbol of hereditary privilege that connotes British ethnic dominance in Canada and is antithetical to minorities' rights.

[34] The application judge observed that the appellants' objections to the oath are borne out of their insistence on a "plain-meaning" interpretation that is divorced from Canada's history and evolution as a nation. I agree. The history of the Crown and its role in Canada, outlined below, supports the application judge's conclusion.

[35] British rule was cemented on September 8, 1760, when Governor Vaudreuil surrendered New France to a British invasion force by the Articles of Capitulation. Until a definitive treaty was signed, New France was under military occupation and rule. The definitive treaty, the Treaty of Paris, was signed three years later in 1763 between England, France and Spain.

[36] Steps towards democratization soon began. The Royal Proclamation of 1763 gave the colonies the power to summon a General Assembly and gave the representatives of the people the power to make laws for the public peace, welfare and good government of the colony. In the meantime, all persons inhabiting the colonies were governed by the laws of England. The laws of England at the time required persons not born in Great Britain to swear an oath of allegiance to the King that contained specific provisions rejecting the Catholic faith. The oath was required before these individuals could obtain the privileges of British subjects, such as the right to vote and to hold office.

[37] An imperial statute, the *Quebec Act, 1774*, 14 Geo. III, c. 83, replaced the oath of allegiance with one that no longer made reference to the Protestant faith. Thus, the oath in the *Quebec Act* was a compromise that recognized the religious freedom of French Canadians.

[38] A few decades later, the "loyalists" came to Canada out of a desire to remain loyal to the Crown after the American Revolution. However, their loyalty

should not be confused with blind allegiance to authority. As the application judge noted, at para. 75, "the loyalists shared with their counterparts to the south the ethos of dissent against authority – albeit democratic rather than revolutionary dissent." These loyalists brought with them the "important idea of lawful opposition," that is, the concept that one can remain loyal to the Crown while still expressing dissent: Constance MacRae-Buchanan, "American Influence on Canadian Constitutionalism", in J. Ajzenstat, ed, *Canadian Constitutionalism: 1791-1991* (Canadian Study of Parliament Group: 1991), at pp. 153-54. They brought with them to Canada the idea that factions, partisanship and dissent help strengthen the nation and that allegiance to the Queen does not preclude opposing views: MacRae-Buchanan, at p. 154. Shortly thereafter, the *Constitutional Act, 1791*, 31 Geo. III, c. 31, divided Quebec into two provinces, Upper Canada and Lower Canada, which were separated by the present-day boundary between Ontario and Quebec. The *Constitutional Act* repealed portions of the *Quebec Act* dealing with the powers and composition of the council, and it made provision for an elected assembly. Other portions of the *Quebec Act*, such as that respecting the oath, were not repealed.

[39] Conflict between the elected assembly on the one hand and the Governor and the appointed council on the other led to rebellion in Upper and Lower Canada in 1837. After it had been put down, Lord Durham recommended the institution of responsible government. He also recommended the union of the two

Canadas. These recommendations were implemented by the *Union Act*, 1840, 3 & 4 Vict., c. 35. The two provinces were known as the Province of Canada.

[40] At that time, the Parliament of Westminster functioned as a Parliament for the United Kingdom and as an Imperial Parliament, that is, as the legislative body for the overseas territories of the British Empire. However, the colonies were given the power to pass their own laws pertaining to naturalization, subject to the usual confirmation by the Crown: *An Act for the Naturalization of Aliens*, 1847, 10 & 11 Vict., c. 83. Statutes pertaining to the Province of Canada, Nova Scotia and New Brunswick all contained an oath of allegiance as a requirement for naturalization: *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance* (London: George Edward Eyre & William Spottiswoode for Her Majesty's Stationary Office, 1869), at Appendix, pp. 10-12.

[41] With Confederation the *Constitution Act, 1867*, was passed. The preamble to the *Constitution Act, 1867*, gave Canada: "a Constitution similar Principle to that of the United Kingdom."

[42] Some pertinent provisions of the structure of the government of Canada set out in the *Constitution Act, 1867* are:

> **9.** The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

> **17.** There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

[43] Each member of the Senate or House of Commons of Canada is required by s. 128 of the *Constitution Act, 1867* to take the oath contained in Schedule 5 of that *Act* before taking his or her seat. The oath prescribed in Schedule 5 of the *Constitution Act, 1867*, which is clearly constitutional, is remarkably similar to the oath of allegiance to which the appellants object. The wording of that oath is as follows:

> I *A.B.* do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.
>
> *Note. The Name of the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being is to be substituted from Time to Time, with proper Terms of Reference thereto.*

[44] The power to legislate respecting "naturalization and aliens" was granted to the federal parliament in s. 91(25). The Dominion of Canada continued to have the power to repeal or alter naturalization legislation: *Constitution Act, 1867*, s. 129. However, pursuant to the *Colonial Laws Validity Act*, 1865, 28 & 29 Vict., c. 63, that legislation could not be inconsistent with the laws of Great Britain.

[45] The restriction on repealing or amending pre-Confederation imperial statutes was removed by the *Statute of Westminster*, 1931, 22 Geo. V, c. 4. It enabled Canada to pass laws that were previously precluded by the *Colonial Laws Validity Act*. Thus, the *Statute of Westminster* was a significant

development for Canadian sovereignty, in that it permitted Canada to pass laws that were inconsistent with certain British laws for the first time.

[46] Canadians are no longer British citizens: see *Citizenship Act*, s. 32(2).

[47] The *Constitution Act, 1982* completed the "Canadianization" of the Crown. As the Supreme Court has explained, "the proclamation of the *Constitution Act, 1982* removed the last vestige of British authority over the Canadian Constitution": *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 46.

[48] The evolution of Canada from a British colony into an independent nation and democratic constitutional monarchy must inform the interpretation of the reference to the Queen in the citizenship oath. As Canada has evolved, the symbolic meaning of the Queen in the oath has evolved. The Federal Court of Appeal in *Roach* read the reference to the Queen as a reference not to the person but to the institution of state that she represents. MacGuigan J.A., for the majority, indicated at p. 416 that the oath, properly understood, required a citizenship applicant to simply "express agreement with the fundamental structure of our country as it is."

[49] The application judge noted, at para. 60, that "Her Majesty the Queen in Right of Canada (or Her Majesty the Queen in Right of Ontario or the other

provinces), as a governing institution, has long been distinguished from Elizabeth R. and her predecessors as individual people."

[50] I agree with the application judge's comments. Viewing the oath to the Queen as an oath to an individual is disconnected from the reality of the Queen's role in Canada today. During the heyday of the Empire, British constitutional theory saw the Crown as indivisible. At that time, there was no need to distinguish between the sovereign's role as an individual and as the head of the executive; nor was there any need in unitary Great Britain to differentiate between the roles that the Crown plays: see The Hon. Bora Laskin, *The British Tradition In Canadian Law* (London: Stevens & Sons, 1969), at pp. 117-119.

[51] However, as Canada developed as an independent federalist state, the conception of the Queen (commonly referred to as the Crown)[3] evolved. Unlike the unitary role of the Crown at the height of the British Empire, its role in Canada is divided into three distinct roles. First, the Queen of Canada plays a legislative role in assenting to refusing assent to, or reserving bills of the provincial legislature or Parliament – a role that is performed through the Governor General and the Lieutenant Governors. Second, the Queen of Canada is the head of executive authority pursuant to sections 9 and 12 of the *Constitution Act, 1867*. Third, the Queen of Canada is the personification of the State, i.e., with respect

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[3] In this judgment the Crown and the sovereign are used as synonyms, although, in David E. Smith, *The Invisible Crown: The First Principle of Canadian Government*, (Toronto: University of Toronto Press, 1995, 2013), the author argues there is a growing separation between the Crown and the monarchy.

to Crown prerogatives and privileges: Laskin, at pp. 119-20. "The law and learning of Crown privileges and immunities came to the colonies as received or imposed English law, and through section 129 of the British North America Act [which continues the laws in force in Canada, Nova Scotia or New Brunswick at the date of Union] they were absorbed in the Canadian federation." Laskin, at 120. Thus, English constitutional law, which had gradually subjected nearly all royal prerogative power to parliamentary sovereignty, made its way into Canada.[4] Moreover, the Crown may for some purposes fall within provincial power under s. 92 of the *Constitution Act, 1867*, and for other purposes fall within federal power under s. 91. For the purposes of Canadian federalism, the Crown therefore cannot be viewed as a single indivisible entity: Laskin, at p. 119. The Crown is "separate and divisible for each self-governing dominion or province or territory": *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] Q.B. 892, at 917 (Eng. C.A.), per Lord Denning.

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[4] The transfer of the prerogative powers of the sovereign to Parliament is described by W. S. Holdsworth in, *A History of English Law* (London: Methuen & Co. Ltd., 1909), at pp, 350-51; and by A.V. Dicey in *Introduction to the Study of the Law of the Constitution* (7th ed.) (London: MacMillan & Co. Ltd, 1908), at pp. 8-10. P.W. Hogg's *Constitutional Law of Canada* (loose-leaf consulted on July 18, 2014), (Scarborough: Carswell, 2007), at pp. 1-18-1-22,contains a discussion of the prerogative powers and their current status in Canada. After listing the residual prerogative powers not displaced by statute, Prof. Hogg concludes at p. 1-21 that most governmental power in Canada is exercised by way of statute. Further, any existing prerogative powers are subject to review by the courts as they must be exercised in conformity with the *Charter of Rights* and other constitutional norms, as well as administrative law norms such as the duty of fairness.

[52] As the application judge noted, the Queen of Canada fulfils these varying roles figuratively, not literally. The Hon. Bora Laskin explains, at pp. 118-19, that "Her Majesty has no personal physical presence in Canada.... [O]nly the legal connotation, the abstraction that Her Majesty or the Crown represents, need be considered for purposes of Canadian federalism. The fact that Interpretation Acts whether the federal Act or provincial Acts, give the term "Her Majesty" or the Crown" a personal meaning, is [an] anachronism." The oath to the Queen of Canada is an oath to our form of government, as symbolized by the Queen as the apex of our Canadian parliamentary system of constitutional monarchy.

[53] The nature of the oath and its purpose was described by Linden J.A., with whom the majority agreed on this point, as follows in *Roach*, at pp. 422-25:

> Through an oath or affirmation, a person attests that he or she is bound in conscience to perform an act or to hold to an ideal faithfully and truly. "An oath relies on the individual's inner sense of personal worth and what is right." [Citations omitted.]
>
> ...
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> As I stated in *Benner v. Canada (Secretary of State)*, [1994] 1 F.C. 250 (C.A.), at page 281:
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> > Swearing an oath as a prerequisite to citizenship is a common practice followed in many countries. It is, in essence, a simple inquiry as to whether an individual is committed to the country and shares the basic principles or ideals upon which the country was founded.

[54] Although the Queen is a person, in swearing allegiance to the Queen of Canada, the would-be citizen is swearing allegiance to a symbol of our form of government in Canada. This fact is reinforced by the oath's reference to "the Queen of Canada," instead of "the Queen." It is not an oath to a foreign sovereign. Similarly, in today's context, the reference in the oath to the Queen of Canada's "heirs and successors" is a reference to the continuity of our form of government extending into the future.

3. The interpretation given to a statutory provision must produce harmony both within the statute itself and in legislation dealing with the same subject matter

[55] The principle of harmonization in statutory interpretation presumes a harmony, coherence and consistency between statutes dealing with the same subject matter: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 52; *R. v. Bell Express Vu*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 27.

[56] The oath to the Queen is expressly required by the Constitution for those wishing to take a seat in the Senate or as a member of Parliament: *Constitution Act 1867*, s. 128 and sched. 5; Robert Marleau & Camille Montpetit (eds.), *House of Commons Procedure and Practice*, 2000 ed. (Montreal: Chenelière/McGraw-Hill, 2000), at p. 176.

[57] The *Charter* cannot be used to attack the requirement that members of Parliament and of the Senate take an oath to the Queen because one part of the Constitution, the *Charter*, cannot be used to abrogate another part of the Constitution, such as the pre-existing *British North America Acts*, (1867 to 1975) now the *Constitution Acts*: see *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 30.

[58] Inasmuch as the oath for members of Parliament is specifically required by the Constitution, and the Constitution cannot itself be unconstitutional, the harmonization principle and the legal norms of rationality and coherence suggest that the oath to the Queen in the *Citizenship Act* cannot be a violation of rights under the *Charter*.

[59] Insofar as members of Parliament are concerned, "[w]hen a Member [of Parliament] swears or solemnly affirms allegiance to the Queen as Sovereign of Canada, he or she is also swearing or solemnly affirming allegiance to the institutions the Queen represents, including the concept of democracy": Marleau & Montpetit, at p. 176.

[60] Democracy is an unwritten constitutional principle. The unwritten constitutional principles inform and sustain our Constitution, the roles of our political institutions and the scope of rights and obligations in our country: Secession Reference, at paras. 47-54. Democracy is the very principle that

permits citizens to advocate for change to our governing institutions, including the monarchy.

[61] The harmonization principle supports the interpretation that the oath to the Queen of Canada in the *Citizenship Act* is the response to the implicit inquiry of whether the prospective citizen is willing to abide by this country's form of government, a democratic constitutional monarchy, unless and until it is changed. The appellants' argument ignores this principle of statutory construction.

4. Conclusion regarding the interpretation of the oath

[62] Applying a purposive and progressive approach to the wording of the oath, with regard to its history in Canada and the evolution of our country, leads to the conclusion that the oath is a symbolic commitment to be governed as a democratic constitutional monarchy unless and until democratically changed. Inasmuch as the oath to the Queen is a requirement in the Constitution for members of Parliament and is seen as an oath to our form of government, the harmonization principle supports the conclusion that the oath to the Queen in the *Citizenship Act* be given a consistent interpretation. This interpretation of the oath, as a symbolic commitment to our form of government and the unwritten constitutional principle of democracy, is supported by the legal norms of rationality and coherence.

V. THE *CHARTER* CLAIMS

[63] The appellants' claims that their rights under the *Charter* have been violated are based on their misconception of the meaning of the oath to the Queen as an individual. Earlier in these reasons, I held that the reference to the Queen in the oath was a reference to our form of government. The appellants' incorrect understanding of the meaning of the oath to the Queen is not the basis by which to judge the constitutionality of their application. In *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555 McLachlin C.J. held, at para. 82:

> [A] patently incorrect understanding of a provision cannot ground a finding of unconstitutionality.

[64] The words of McLachlin C.J. apply equally to this case. In deciding whether the appellants' rights have been violated under the *Charter* I cannot therefore adopt their interpretation as to the meaning of the oath.

1. Freedom of expression

[65] The appellants argue that the oath violates their right to freedom of expression in two ways. First, they argue that it compels them to convey a message with which they disagree. Second, they state that it constrains their future expression by precluding them from working towards the abolition of the monarchy.

[66] The application judge held that because the oath conveys meaning, it *prima facie* falls within the scope of the guarantee in s. 2(b). He noted that the

s. 2(b) guarantee includes the right to refrain from expressing objective, uncontested facts. The application judge agreed with the appellants that the requirement to take the oath places a burden on them that is coercive. Accordingly, he held that the statutory requirement that the appellants recite an oath to the Queen in order to acquire citizenship was a *prima facie* violation of freedom of expression that was only permissible if shown to be a reasonable limit on the right to freedom of expression under s. 1 of the *Charter*.

[67] As I have indicated, the Attorney General cross-appeals the application judge's finding that the oath violates s. 2(b). The Attorney General argues that the oath does not truly associate the appellants with a message with which they disagree and that the appellants have ample opportunity to publicly disavow any association with the message that they attribute to the oath. The Attorney General further argues that the oath does not deprive the appellants of a meaningful opportunity to express themselves; therefore, despite the finding that the oath is "forced expression," it does not violate s. 2(b).

[68] With respect, I disagree with the application judge's conclusion that the appellants' freedom of expression has been violated. For the reasons that follow, I would hold that the requirement to recite an oath to the Queen of Canada in order to become a Canadian citizen does not violate the appellants' right to freedom of expression and would allow the Attorney General's cross-appeal on this issue.

a. The method for analyzing the appellants' rights under s. 2(b)

[69] The approach to analyzing claims under s. 2(b) was set out by the Supreme Court in *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*. *Irwin Toy* requires the court to answer three questions when dealing with an allegation that a person's freedom of expression has been violated. The first question is whether the activity in which the plaintiff is being forced to engage is expression. The second question is whether the purpose of the law is aimed at controlling expression. If it is, a finding of a violation of s. 2(b) is automatic. If the purpose of the law is not to control expression, then in order to establish an infringement of a person's *Charter* right, the claimant must show that the law has an adverse effect on expression. In addition , the claimant must demonstrate that the meaning he or she wishes to convey relates to the purposes underlying the guarantee of free expression, such that the law warrants constitutional disapprobation.

[70] Applying these principles to cases involving allegations of compelled speech, such as this one, "[i]f the government's purpose was to put a particular message into the mouth of the plaintiff ... the action giving effect to that purpose will run afoul of s. 2(b). If, on the other hand, the government's purpose was otherwise but the effect of its action was to infringe the plaintiff's right of free expression, then the plaintiff must take the further step and demonstrate that such effect warrants constitutional disapprobation": *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at p. 267.

i. The oath is expression but its purpose is not to control expression

[71] There is no issue that the oath is expressive activity and that, prior to becoming a Canadian citizen, the *Act* obliges the appellants to take the oath. The next question to be addressed is whether the purpose of the oath is to control freedom of expression.

[72] The application judge held, at para. 85, that the purpose of the oath "is the strictly secular one of articulating a commitment to the identity and values of the country." He went on to note, at para. 104, that:

> [T]he plurality judgment by Bastarache J. [in *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769] emphasized, at para. 57, that "citizenship serves important political, emotional and motivational purposes ... it fosters a sense of unity and shared civic purpose amongst a diverse population." In much the same way, the oath of citizenship is an articulation of the value-laden glue of which those bonds are composed.

[73] The purpose of the oath is to inquire into prospective citizens' willingness to accept the rights and responsibilities of citizenship. In exchange for the privileges of Canadian citizenship, the would-be citizen solemnly promises to be loyal to the values represented by Canada's form of government and to accept the responsibilities of citizenship.

[74] The substance of the oath and the history of its evolution also support the conclusion that the oath does not have a purpose that violates the *Charter*. The substance of the oath reflects the Queen's constitutional status, and the

circumstances giving rise to the oath flow from this country's foundational documents. More importantly, the oath promotes the unwritten constitutional principles of the rule of law and democracy, as well as the values for which this country stands. Protecting freedom of expression is one of the features of modern democracy: *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 583. Rather than undermining freedom of expression, the oath amounts to an affirmation of the societal values and constitutional architecture of this country, which promote and protect expression. All of these factors "unequivocally point to a purpose which, far from violating the *Charter*, flows from it": *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 2 S.C.R. 698, at para. 43.

ii. Is the effect of the oath to control expression, and if so, is that effect worthy of constitutional disapprobation?

[75] The oath has an incidental effect on expression in that it compels prospective citizens to say the words of the oath in order to attain the status of Canadian citizen. However, this effect is not worthy of constitutional disapprobation. I say this for five reasons.

[76] First, the appellants have the opportunity to publicly disavow what they consider to be the message conveyed by the oath. The opportunity to publicly disavow a message is relevant to the determination of whether there is a s. 2(b)

violation. In *Lavigne*, at p. 279, Wilson J. (with whom L'Heureux-Dubé and Cory JJ. agreed) stated that "this Court has already accepted that public identification and opportunity to disavow are relevant to the determination of whether s. 2(b) has been violated." The Supreme Court came to a similar conclusion in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. These factors are important because, as Wilson J. noted in *Lavigne*, at pp. 279-80:

> If a law does not really deprive one of the ability to speak one's mind or does not effectively associate one with a message with which one disagrees, it is difficult to see how one's right to pursue truth, participate in the community, or fulfil oneself is denied.

[77] The appellants submit that the reasons of Wilson J. do not represent the majority opinion of the court.[5] I note, however, that in *Khawaja*, McLachlin C.J. implicitly accepted the relevance of considering whether the legislation in issue has the effect of "chilling" or impairing freedom of expression in determining whether there had been a violation of s. 2(b). The opportunity to disavow the message is relevant to the determination of whether a chilling effect will occur.

[78] In this case, the application judge found, at paras. 73 and 79, that the appellants were not prohibited from expressing their own opinions:

> [T]he notion that the citizenship oath represents a restriction on dissenting expression, including any expression of dissent against the Crown itself, is a

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[5] The majority held that the activity at issue – the payment of union dues – was not an attempt to convey meaning and therefore did not constitute expression at all.

> misapprehension of Canadian constitutionalism and Canadian history. Differences of opinion freely expressed are the hallmarks of the Canadian political identity, and have been so since the country's origins.
>
> ...
>
> [N]ot only is advocating abolition of the monarchy explicitly permitted, *Committee for the Commonwealth of Canada, supra,* but the prospect of separation from the United Kingdom and secession of a province both form the subject of legitimate legal discourse. *Reference re Resolution to Amend the Constitution ("Patriation Reference"),* [1981] 1 S.C.R. 753; *Reference re Secession of Québec,* [1988] 2 S.C.R. 217. Moreover, a political party dedicated to constitutional fracture can form Her Majesty's Loyal Opposition in Canada's Parliament. David E. Smith, *Across the Aisle: Opposition in Canadian Politics* (Toronto: University of Toronto Press, 2013) at 85-86.

[79] The appellants, as respondents to the cross-appeal, concede that they have the opportunity to disavow what they characterize as the objectionable elements of the oath. They note that Mr. Charles, a former plaintiff in this proceeding who had taken the oath of the citizenship, has publicly recanted the oath to the Queen while, at the same time, confirming the remainder of the oath. Mr. Charles was informed by the Minister of Citizenship and Immigration that his recantation had no effect on his citizenship status. However, the appellants state that:

> It is true ... that citizenship applicants are legally free to disavow the oath. However, the Appellants have affirmed that they would feel morally bound not to do so. In addition, to acquire citizenship they must be seen to

> be taking the oath to the Queen in a public ceremony. Thus disavowal would be a public display of hypocrisy.

[80] The appellants' subjective belief that, in taking the oath, it would be hypocritical for them to work within the bounds of democracy to change our form of government cannot be used to trump the objective fact that they are entirely free to express their opinions. It is not enough for the appellants to say that their right to freedom of expression has been infringed and that they feel subjectively inhibited from expressing their opinions.

[81] Second, as I have indicated, the appellants' beliefs reflect a fundamental misapprehension of what the Queen of Canada symbolizes and, as McLachlin C.J. stated in *Khawaja*, at para. 82, "cannot ground a finding of unconstitutionality". I would add that none of the cases cited by the appellants in support of their position that freedom of speech is violated under s. 2(b) deal with the effect of a claimant's misunderstanding or misinterpretation of a provision on the assertion of the right.

[82] Third, if the reference to the Queen in the oath were eliminated, or made optional for the appellants, such a remedy would only be a superficial cure for the appellants' complaint. Because the Queen remains the head of our government, any oath that commits the would-be citizen to the principles of Canada's government is implicitly an oath to the Queen. The reference in the oath to the laws of this country necessarily includes the very foundation for the enactment of

those laws – the *Constitution Acts* – and would be an indirect reference to the Queen. Thus, the appellants' real complaint would not be addressed.

[83] Fourth, it cannot be denied that the Queen is part of Canada's cultural heritage. One of the responsibilities of citizenship is protection of Canada's cultural heritage: see *Citizenship Regulations*, SOR/93-246, ss. 15(2)(b)-(c); and s. 5(1)(e) of the Act. The appellants have not challenged these regulations nor any part thereof.

[84] Finally, the appellants' argument also gives no weight to Parliament's constitutional responsibility to make decisions on citizenship for the broader national interest and the promotion of that national interest by an oath to the Queen of Canada.

b. Conclusion on s. 2(b)

[85] The oath is expressive activity that falls within the ambit of s. 2(b). I conclude that the purpose of the oath is not to compel expression; rather, its purpose is to inquire into the would-be citizen's commitment to our form of government.

[86] Accepting that there is an effect on the appellants' freedom of expression, it does not warrant constitutional disapprobation of the oath for the following five reasons: 1) the appellants have the ability to freely express their dissenting views as to the desirability of a republican government; 2) the effect on their freedom of

expression flows from their misunderstanding of the nature of the oath to the Queen of Canada and a patently incorrect interpretation cannot ground a finding of unconstitutionality; 3) the remedy sought by the appellants only addresses their concern at a superficial level and does not resolve their real concern; 4) the appellants' argument would ignore the role of the Queen as part of Canada's cultural heritage and 5) purposively interpreted, the reference to the Queen of Canada is a symbolic reference to our form of government, a democratic constitutional monarchy, which promotes *Charter* values. The fact that the broader public interest is furthered by the oath strengthens my conclusion that there is no s. 2(b) violation.

[87] Accordingly, for the reasons I have given, I would allow the cross-appeal and hold that the appellants' right to freedom of expression under s. 2(b) is not infringed. Having regard to this conclusion, I need not, strictly speaking, address the question of justification under s. 1. However, in the event that I am wrong in my conclusion and the appellants' freedom of expression has been violated under s. 2(b), I would hold, as did the application judge, that the violation is justified under s. 1 of the *Charter*, for the reasons below.

2. Limitation on the appellants' freedom of expression is justified under s. 1 of the *Charter*

[88] Alternatively, if the oath does violate s. 2(b), any such violation is justified. In assessing whether the oath is a reasonable limit under s. 1 of the *Charter*, the onus shifts to the Attorney General to establish that the oath serves a sufficiently important objective, that the measure used to achieve the objective is rationally connected to the objective, and that the means used impairs the appellants' rights as little as possible. Finally, there must be proportionality between the effects of the required oath and its objective: *R. v. Oakes*, [1986] 1 S.C.R. 103.

[89] The appellants submit that the application judge erred in not examining whether there was some pressing and substantial objective achieved specifically by the impugned portion of the citizenship oath respecting the Queen, as opposed to the rest of the citizenship oath.

[90] The Supreme Court has recognized that "a measure of leeway" must be accorded to governments: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 35. The limit on a right need not be perfectly calibrated when judged in hindsight; it need only be "reasonable" and "demonstrably justified": *Hutterian Brethren*, at para. 37; see also *Irwin Toy*, at pp. 998-99.

[91] Insofar as the requirement of a pressing and substantial objective is concerned, the application judge noted that the appellants took no real issue with the legislative objective of expressing commitment to the country or the characterization of this objective as pressing and substantial. Rather, they disagreed with the oath to the Queen as a viable measure of accomplishing that objective.

[92] I do not accept the appellants' submission that the part of the oath referencing the Queen does not serve a pressing and substantial objective. As discussed earlier in these reasons, the Queen is the symbolic apex of our constitutional structure. Requiring would-be citizens to express a commitment to the quintessential symbol of our political system and history serves a pressing and substantial objective.

[93] With respect to the rational connection prong of the analysis, the appellants submit that widespread opposition to the monarchy suggests it is irrational to choose the monarch as the referenced "defining element," to which prospective citizens must affirm their allegiance. They argue that the Queen represents different things to different people and that no court can determine that meaning. They renew their submission that the oath to the Queen should be given its plain meaning and is an oath to Queen Elizabeth II as an individual. In support of their submission for a plain-meaning interpretation, they rely on the evidence of the Manager of Citizenship Legislation and Program Policy at the

Department of Citizenship and Immigration, which appears to accord with their views.

[94] I have already rejected the appellants' plain-meaning approach to interpretation. To the extent that the Manager appeared to agree with it, it is indicative that the government needs to better equip those involved in citizenship policy to understand and convey the meaning and significance of the phrase, "the Queen of Canada, Her Heirs and Successors." While the appellants point to polling data suggesting that many Canadians do not support the monarchy, the meaning of the oath is not dependent on the latest poll. The determination of whether any infringement of the appellants' s. 2(b) rights can be justified necessarily depends on the meaning conveyed by the oath. As I have already set out at length, the meaning of the oath to the Queen is not the one put forward by the appellants. The s. 1 analysis must be conducted in this context.

[95] Having regard to the Queen's position in Canada, as discussed earlier in these reasons, and having regard to Canadian history, it is hardly irrational to choose the Queen as a reference point for the oath. In any event, the other aspects of the oath – the promise to observe the laws of Canada and fulfil the duties of citizenship – indirectly reference the Queen. The application judge did not err in holding that the oath to the Queen is rationally connected to that objective.

[96] The appellants argue that the application judge failed to properly consider whether the means chosen to achieve the government objective – the oath to the Queen – impairs their s. 2(b) rights as little as possible. They submit that the same objective could be obtained by means that would not impair their rights at all, for example, by making the impugned portion of the oath voluntary or by replacing it with a commitment to "equality."

[97] Contrary to the appellants' submission, the application judge properly considered the minimal impairment portion of the test. He gave lengthy reasons on minimal impairment, and concluded, at para. 68, that when the reference to the Queen in the oath was properly understood, "any impairment of the Applicants' freedom of expression is minimal." The application judge correctly noted that the oath to the Queen has little effect on the appellants' rights because, properly understood, the reference to the Queen in the oath is a commitment to democratic values, one of which is equality.

[98] The Supreme Court has repeatedly held that the impugned measures need not be the least impairing means available, so long as they fall within a range of reasonable alternatives: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 110. The fact that the government could have chosen to reference a different symbol in the oath – one to which the appellants do not object – does not mean that the existing oath fails

the minimal impairment prong of the s. 1 analysis. I agree with the application judge's conclusion that, properly understood, the oath to the Queen is minimally impairing.

[99] Finally, the appellants submit that in balancing the proportionality of the oath's objective with its effects, the government failed to provide evidentiary support for the salutary effects of its actions. They therefore argue that the proportionality requirement under s. 1 has not been met.

[100] The respondent answers this submission by pointing out that Supreme Court jurisprudence has confirmed that experience and common sense or reason and logic may bridge the empirical gap: see *Thomson Newspapers Co. v. Canada*, [1998] 1 S.C.R. 877, at para. 88. I agree.

[101] The application judge considered the history of the oath, the evolution of the Queen's role in Canada, and the nature of citizenship, and applied common sense to these facts. He was right to consider whether the appellants' position as to the deleterious effects of the state action had a modicum of credibility or at least made logical sense: *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, at p. 884. While accepting that the appellants' beliefs were sincere, the application judge held that they reflected a misapprehension and, in the balancing exercise, it was difficult to attribute to them "great objective weight."

In contrast, the salutary effect of the oath to the Queen, "symbolizing the rule of law, equality, and freedom to dissent", was substantial.

[102] I agree with the application judge's comments on proportionality. Accordingly, I would hold that the application judge properly conducted the s. 1 analysis, and would dismiss the appellants' appeal on this point.

3. Freedom of religion and freedom of conscience

[103] The appellants complain that their right to freedom of religion is violated by the requirement that they swear an oath of allegiance to the Queen of Canada. They further argue that the requirement that the Queen be Anglican makes the oath supportive of one religion to the exclusion of all others.

[104] The requirement of an oath to the Queen as a condition for those wishing to become citizens is a well-established tradition of this country. It dates back to the historical compromise of the *Quebec Act*, *supra*, in which the British Crown introduced a secular oath to the Queen to secure the loyalty of the French Canadians by recognizing their freedom to practise their religion. The intent behind the introduction of a secular oath was to create a religious-neutral way of permitting individuals to become citizens. In so doing, the new oath permitted French Canadians to vote and participate in public life in a way that was previously precluded because of the religious nature of the oath that had existed until that time. Since the time of the *Quebec Act*, the oath has not had the

purpose of compelling individuals to conform to religious beliefs with which they disagree.

[105] The appellants' submission, or a variation thereof, has been raised twice before. It was first raised before the Federal Court of Appeal in *Roach*. That court unanimously struck the claim, with Linden J.A. holding, at p. 428 of his reasons:

> Parliament's purpose in framing the oath or affirmation was to require a statement of loyalty to Canada's head of state and its institutions, not to interfere with religious freedom. There is no mention in our Constitution nor in this oath of the Queen in her capacity as Head of the Church of England. The oath requires no statement of allegiance to Anglicanism nor to the Queen in relation to her role in the Church of England. Indeed, the Anglican Church of Canada is governed, not by the Queen, but by an independent Synod established in Canada. Therefore, the purpose of the oath or affirmation is not to interfere with the guarantee of freedom of religion, because its purpose was not in any way to insist upon loyalty to the Anglican Church.

[106] A related argument was raised in *O'Donohue v. The Queen*, [2003] O.T.C. 623 (S.C.), aff'd [2005] O.J. No. 965 (C.A.). In *O'Donohue*, the prohibition on Catholic monarchs found in the *Act of Settlement, 1701*, 12 & 13 Will. III, c. 2, was challenged under s. 15 of the *Charter*. Rouleau J. (as he then was) decided that the *Charter of Rights* did not apply.

[107] The argument raised in *O'Donohue* was not raised before this court. Before us, the appellants do not challenge the constitutionality of the requirement that the Queen be Anglican, found in the *Act of Settlement, 1701*. They simply

argue that this requirement causes the oath in the *Citizenship Act* to violate ss. 2(a) and 15 of the *Charter*. I would note that a *Charter* challenge to the religious requirements for the office of the Queen is scheduled to be argued before this court in August 2014. However, as this issue was not addressed in the case before us, I will limit my s. 2(a) (and s. 15) analysis on this aspect of the appellants' argument to examining whether the religious requirement for the office of the Queen renders the reference to the Queen in the oath unconstitutional.

[108] When this argument was made to the application judge, he rejected it, holding, at para. 85, that "the purpose of the oath in Canada is the strictly secular one of articulating a commitment to the identity and values of the country." He concluded that the religious requirement for the office of the Queen did not render the oath's reference to the Queen a violation of s. 2(a). As I have interpreted the oath, there is no element of religion in it and it is not an oath to an individual but to our form of government.

[109] The application judge also addressed the appellants' claim that the effect of the oath was to force them to choose between citizenship and making a vow that was contrary to their faith. The application judge held that there was no *prima facie* violation of the appellants' freedom of religion, for several reasons.

[110] First, he held that the oath is a universal requirement that applies to everyone, without regard or reference to religion. He noted that although the appellants' claims are based on their particular beliefs, in some cases, the assertion of a right based on a difference must yield to a more pressing public interest. As Abella J. observed in *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, at para. 2, not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their full expression are arbitrary.

[111] Second, the application judge applied the Supreme Court of Canada's holding in *Reference re Same-Sex Marriage*, at para. 46, that "the promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster." He held, at para. 91, that "[l]ikewise, an oath of citizenship that references a symbol of national values [the Queen] enriches society as a whole, and does not undermine the rights and freedoms that the society and its head of state foster and represent."

[112] Third, he held that the appellants' desired remedy, accommodation of their subjective religious beliefs by making the oath optional, would itself undermine the values enshrined in s. 2(a) of the *Charter* because it would de-secularize the oath and discriminate in favour of one religion.

[113] Finally, he held that freedom of religion has both a subjective and an objective component, both of which must be shown to be infringed before s. 1 is addressed. He concluded that the objective component of the test had not been satisfied. In other words, the application judge found that the appellants had failed to establish a non-trivial and non-insubstantial interference with their sincerely-held religious beliefs, as required by Supreme Court jurisprudence: *Hutterian Brethren*, at para. 32.

[114] The appellants submit that the application judge erred in holding that accommodation of their religious beliefs would amount to discrimination against others and argue that recognizing their rights does not imply support for their religion. In particular, they take issue with the application judge's statement that the appellants' claims under s. 2(a) "cannot be a platform from which to strike down the rights of others." They argue that the application judge gave no indication of what "rights of others" would be infringed by making the impugned portion of the oath optional. The appellants claim that making the oath to the Queen optional would not infringe any other rights because there is no religion that requires its adherents to take an oath to the Queen.

[115] I do not read the application judge's reasons as the appellants do. Contrary to the appellants' assertion, he was not suggesting that there is any religion that requires an oath to the Queen. My understanding is that the application judge's comments were directed to the remedy requested by the

appellants, an accommodation of their subjective religious beliefs by making part of the oath optional. The application judge was saying that the religious-neutral aspect of Canadian citizenship would be undermined if a religion-based accommodation were granted.

[116] I agree that the remedy of a constitutional exemption would undermine the societal value or common good derived from a universal religious-neutral declaration. Since the effect of granting a judicial exemption would be to undermine the societal value of a universal oath, such a remedy would be inconsistent with the intent of Parliament and would be an unacceptable intrusion into the legislative sphere. It would fundamentally change the nature of the legislation and would not be an appropriate remedy: see Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (5th ed.), (Toronto: Irwin Law, 2005), at pp. 425-426. For the same reason, it would be inappropriate to read in wording that would make the impugned portion of the oath optional.

[117] Having regard to the jurisprudence holding that s. 2(a) provides separate protection for conscientious beliefs, the appellants note that the application judge did not separately address whether their right to freedom of conscience was infringed. They allege that he erred in failing to address this argument. Mr. McAteer and Mr. Bar-Natan believe that all people are born equal, and they have not taken the oath because they believe the Queen symbolizes the inequality to which they are fundamentally opposed. The appellants assert that

their beliefs are protected by freedom of conscience as being deeply-held moral and ethical beliefs fundamental to their identities.

[118] Much of the application judge's analysis respecting freedom of religion applies equally to the appellants' argument respecting freedom of conscience. As a result, the application judge did not need to address freedom of conscience separately in his reasons. The application judge's reasons demonstrate that he understood the issues respecting s. 2(a). The path of his reasoning is clear and permits appellate review.

[119] Purposively interpreted, the oath exemplifies the very principle s. 2(a) of the *Charter* was intended to foster. This conclusion is equally applicable to both the appellants' freedom of religion claims and their freedom of conscience claims.

[120] The oath to the Queen of Canada does not violate the appellants' right to freedom of religion and freedom of conscience because it is secular; it is not an oath to the Queen as an individual but to our form of government of which the Queen is a symbol.

4. Equality rights

[121] Before the application judge, two of the appellants suggested that the oath amounted to discrimination on the basis of political belief. One of the appellants argued that the oath discriminated against her based on religious grounds. The

application judge held that there was no objective evidence in the form of statistics or demographic data establishing that the oath to the Queen has a disparate impact on religious or racial minorities. He similarly held that there was no objective evidence to substantiate the claims of political belief discrimination. Given the absence of objective evidence of discriminatory purpose or impact, he concluded that the *Charter* challenge under s. 15(1) could not succeed.

[122] The application judge then dealt with the appellants' argument that they were discriminated against on the grounds of their non-citizenship status. He held that while it was impermissible for the government to distinguish between citizens and non-citizens in contexts unrelated to citizenship, the very concept of citizenship – "membership in a state" – signified the existence of non-members. He relied on the decision of Linden J.A. in *Lavoie v. Canada*, [2000] 1 F.C. 3 (C.A.), at para. 11, aff'd 2002 SCC 23, [2002] 1 S.C.R. 769, and held, at para. 103 of his reasons, that "if an immigrant and a citizen were required to be treated equally within the meaning of s. 15(1) of the *Charter*, the concept of citizens ip would disappear." Arbour J. made a similar comment in her separate concurrence when *Lavoie* was before the Supreme Court, at para. 110. The application judge concluded that Parliament could determine the admission criteria for citizenship, such as an oath, without being subject to an equality rig its analysis on the grounds of the challengers' citizenship itself. As with the freedom of religion claim, he held that the appellants could not use s. 15(1) as a means of

undermining the equality rights and unity of others: *Reference re Same-Sex Marriage*, at para. 46.

[123] Before this court, the appellants submit that the oath to the Queen discriminates on three different grounds: national origin, religion and the analogous ground of citizenship. They submit that most of their argument relating to s. 15 was not dealt with and, in particular, complain that the judgment does not refer to the claim based on national origin.

[124] Even though the application judge did not specifically mention the appellants' claim based on national origin, his reasons effectively disposed of that claim and are sufficient to permit appellate review.

[125] With respect to the application judge's holding that the appellants failed to meet the objective component of the s. 15 analysis, the appellants acknowledge the lack of objective evidence in support of their submission. They rely on the "direct and unchallenged evidence of Ms. Topey" and the evidence of Howard Gomberg that taking an oath to any human being is contrary to his concept of Judaism, as support for their submission.

[126] I agree that proof of adverse effect on a *Charter* right need not always be based on statistical, demographic, or similar evidence. In some situations, the evidentiary basis required to establish an adverse effect can be inferred from known facts and experience: *Khawaja*, at paras. 78-81.

[127] In this case, however, the appellants' claim of adverse effect is based on their misconception of the meaning of the oath to the Queen as an individual. Earlier in these reasons, I quoted the words of Laskin, at pp. 119-120, that viewing "Her Majesty the Queen" as an individual was an anachronism and held that the reference to the Queen in the oath was a reference to our form of government. As was held in *Khawaja*, at para. 82, the appellants' incorrect understanding of the meaning of the oath cannot be used to ground a finding of unconstitutionality.

[128] Finally, the appellants also argue that the requirement that the Queen be Anglican constitutes discrimination on the basis of religion. The comments made in disposing of this argument under s. 2(a) also apply in relation to the argument made under s. 15.

[129] I agree with the application judge's conclusion that the appellants' rights under s. 15 have not been violated. I would dismiss the appellants' appeal with respect to s. 15.

VI. CONCLUSION & DISPOSITION

[130] For the reasons given, I would hold that the appellants' rights under ss. 2(b), 2(a) and 15(1) have not been violated. I would dismiss the appellants' appeal and allow the Attorney General's cross-appeal.

[131] In the event that I am incorrect with respect to my conclusion on s. 2(b), I would hold that any infringement is justified under s. 1.

[132] Any other issues raised but not dealt with in these reasons were not pursued on appeal.

[133] As in the court below, no costs are sought or ordered.

Released: AUG 13 2014

K.M. Weiler J.A.

KMW

I agree P. Lauw J.A.

I agree H. Pardu J.A.