SCC File Number:_____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

MICHAEL MCATEER, SIMONE E.A. TOPEY, AND DROR BAR-NATAN

APPLICANTS
(Appellants)

and

THE ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
Pursuant to s. 40 and 58(1) of the *Supreme Court Act* and Rule 25 of the *Rules of the Supreme Court of Canada*

Peter Rosenthal
Barrister
226 Bathurst St., suite 200
Toronto ON M5T 2R9

Tel: 416.924.2257
Fax: 416.657.1511
Email: rosent@math.toronto.edu

Counsel for the Applicants

Justin Dubois
Power Law
130 Albert St.
Ottawa ON K1P 5G4

Tel: 613.702.5565
Fax: 613.702.5565
Email: jdubois@juristespower.ca

Agent for the Applicants

Nicolas M. Rouleau
NICOLAS M. ROULEAU
PROFESSIONAL CORPORATION
720 Brock Ave.
Toronto ON M6H 3P2

Tel: 416.885.1361
Fax: 1.888.850.1306
Email: RouleauN@gmail.com

Counsel for the Applicants

ORIGINAL TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

COPIES TO:

Kristina Dragaitis
Department of Justice
The Exchange Tower
130 King St. W.
Suite 3400, Box 36
Toronto ON M5X 1K6

Tel: 416.952.6992
Fax: 416.954.8982
Email: Kristina.Dragaitis@justice.gc.ca

Counsel for the Respondent

TABLE OF CONTENTS

SCC File Number:_____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

MICHAEL MCATEER, SIMONE E.A. TOPEY,
AND DROR BAR-NATAN

APPLICANTS
(Appellants)

and

THE ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that Michael McAteer, Simone E.A. Topey, and Dror Bar-Natan hereby apply for leave to appeal to the Court, pursuant to rule 40 of the *Supreme Court Act* from the judgment of the Court of Appeal for Ontario, docket no. C57775 made 13 August 2014, and for such further or other order that the Court may deem appropriate.

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. A statute whose purpose it is to compel the articulation of a commitment to Canada has the purpose of controlling expression.

2. Requiring applicants for Canadian citizenship to take an oath or affirmation that contains the phrase "I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors" contravenes their rights enshrined in ss. 2(a) and 2(b) of the *Canadian Charter of Rights and Freedoms*;

3. Those contraventions are not saved by s. 1 of the *Charter*.

DATED at the City of ~~Toronto,~~ Ottawa Province of Ontario, this 8th day of October 2014.

SIGNATURE

Peter Rosenthal
Barrister
226 Bathurst St., suite 200
Toronto ON M5T 2R9
Tel: 416.924.2257
Fax: 416.657.1511
Email: rosent@math.toronto.edu
Counsel for the Applicants

Justin Dubois
Power Law
130 Albert St.
Ottawa ON K1P 5G4
Tel: 613.702.5565
Fax: 613.702.5565
Email: jdubois@juristespower.ca
Agent for the Applicants

Nicolas M. Rouleau
NICOLAS M. ROULEAU
PROFESSIONAL CORPORATION
720 Brock Ave.
Toronto ON M6H 3P2
Tel: 416.885.1361
Fax: 1.888.850.1306
Email: RouleauN@gmail.com
Counsel for the Applicants

ORIGINAL TO: THE REGISTRAR

COPIES TO:

Kristina Dragaitis
Department of Justice
The Exchange Tower
130 King St. W.
Suite 3400, Box 36
Toronto ON M5X 1K6
Tel: 416.952.6992
Fax: 416.954.8982
Email: Kristina.Dragaitis@justice.gc.ca
Counsel for the Respondent

NOTICE TO THE RESPONDENT: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the *Supreme Court Act*.

SCC File Number:_____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

MICHAEL MCATEER, SIMONE E.A. TOPEY,
AND DROR BAR-NATAN

APPLICANTS
(Appellants)

and

THE ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

CERTIFICATE OF THE APPLICANTS

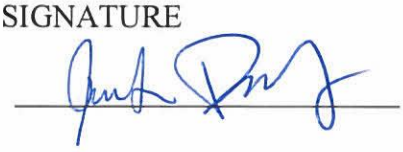
I, Nicolas M. Rouleau, counsel for the Applicants, certify that:

a) There is no sealing order or ban on the publication of evidence or the names or identity of a party or witness in this case; and

b) There is no confidential information on the file that should not be accessible to the public by virtue of specific legislation.

DATED at the City of ~~Toronto~~ Ottawa, Province of Ontario, this 8th day of October 2014.

SIGNATURE



Peter Rosenthal
Barrister
226 Bathurst St., suite 200
Toronto ON M5T 2R9
Tel: 416.924.2257
Fax: 416.657.1511
Email: rosent@math.toronto.edu
Counsel for the Applicants

Justin Dubois
Power Law
130 Albert St.
Ottawa ON K1P 5G4
Tel: 613.702.5565
Fax: 613.702.5565
Email: jdubois@juristespower.ca
Agent for the Applicants

Nicolas M. Rouleau
NICOLAS M. ROULEAU
PROFESSIONAL CORPORATION
720 Brock Ave.
Toronto ON M6H 3P2
Tel: 416.885.1361
Fax: 1.888.850.1306
Email: RouleauN@gmail.com
Counsel for the Applicants

ORIGINAL TO: THE REGISTRAR

COPIES TO:

Kristina Dragaitis
Department of Justice
The Exchange Tower
130 King St. W.
Suite 3400, Box 36
Toronto ON M5X 1K6
Tel: 416.952.6992
Fax: 416.954.8982
Email: Kristina.Dragaitis@justice.gc.ca
Counsel for the Respondent

Court File No.: 05-CV-301832

ONTARIO

SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	FRIDAY, THE 20th DAY OF
	)	
JUSTICE MORGAN	)	SEPTEMBER, 2013

B E T W E E N:

MICHAEL McATEER, SIMONE E.A. TOPEY
and DROR BAR-NATAN

Applicants

-and-

THE ATTORNEY GENERAL OF CANADA

Defendant

JUDGMENT

THIS APPLICATION was heard July 12, 2013, in the presence of lawyers for all parties,

ON READING THE NOTICE OF APPLICATION AND THE EVIDENCE FILED BY THE PARTIES and on hearing the submissions of the lawyers for the parties,

1. THIS COURT ORDERS that the application is dismissed.

2. THIS COURT ORDERS, on consent, that there shall be no order as to costs.

ENTERED AT / INSCRIT À TORONTO
ON / LE:
NOV 07 2013

NOV 06 2013

R. Ittleman, Registrar
Superior Court of Justice

catastrophic impairment, which lists more than one car accident, and purports to claim that the insured is catastrophically impaired, as a result of the cumulative effects of the multiple car accidents.

[51] While I agree that the application should not list more than one car accident in respect of which a designation is requested, I am concerned that the declaration might be interpreted as going beyond that proposition. In particular, I am concerned that the proposed wording might be interpreted as meaning that an application referring to one identified accident may not claim that the insured is catastrophically impaired as a result of the cumulative effect of multiple car accidents, where the last was the "tipping point" that has propelled the plaintiff toward a catastrophic designation.

[52] Such an interpretation would be inconsistent with my view of the matter and would contradict Dominion's position acknowledged during oral argument.

[53] In the result, I simply declare and order as follows: Section 45 of *SABS* requires an insured person to specify one accident in respect of which a determination of catastrophic impairment is requested. In my view, this is sufficient to address the insurer's valid concerns without restricting the parties' ability to make appropriate reference to an injured person's condition, as a result of previous accidents or otherwise upon which the identified accident was superimposed.

[54] If the parties cannot agree, I will receive written submissions on costs, first from the applicant by November 15, 2013, and the respondent by November 22, 2013.

Application granted in part.

McAteer et al. v. The Attorney General of Canada

[Indexed as: McAteer v. Canada (Attorney General)]

2013 ONSC 5895

Superior Court of Justice, E.M. Morgan J. *September 20, 2013*

Charter of Rights and Freedoms — Equality before the law — Citizenship oath to Queen not violating s. 15(1) of Charter — Canadian Charter of Rights and Freedoms, s. 15(1).

Charter of Rights and Freedoms — Freedom of expression — Citizenship oath to Queen violating s. 2(b) of Charter but oath being reasonable limit on freedom of expression under s. 1 of Charter — Canadian Charter of Rights and Freedoms, ss. 1, 2(b).

Charter of Rights and Freedoms — Freedom of religion — Citizenship oath to Queen not violating s. 2(a) of Charter — Canadian Charter of Rights and Freedoms, s. 2(a).

The applicants were permanent residents of Canada who wished to become Canadian citizens, but were unable to do so because they objected to taking an oath to the Queen, as required by the *Citizenship Act*, R.S.C. 1985, c. C-29. M claimed that swearing an oath to the Queen would betray his republican heritage and impede his activities in support of ending the monarchy in Canada. T was a Rastafarian, and argued that it would violate her religious beliefs to take an oath to the "head of Babylon". B claimed that swearing an oath to the Queen would violate his belief in the equality of all persons. The applicants brought an application challenging the constitutionality of the oath to the Queen, arguing that it violated their rights under ss. 2(*a*), 2(*b*) and 15(1) of the *Canadian Charter of Rights and Freedoms*.

Held, the application should be dismissed.

The oath to the Queen is a form of compelled speech that *prima facie* infringes the applicants' freedom of expression under s. 2(*b*) of the *Charter*. However, the oath is a reasonable limit on freedom of expression under s. 1 of the *Charter*. The objective of the oath — ensuring a public, symbolic avowal of commitment to Canada's constitutionally entrenched political structure and history — is pressing and substantial. There is a rational connection between that objective and an oath that directly references Canada's official head of state. The oath to the Queen is in fact an oath to a domestic institution that represents egalitarian governance and the rule of law. Once the Queen is understood, in context, as an equality-protecting Canadian institution rather than an aristocratic English overlord, any impairment of the applicants' freedom of expression is minimal. The notion that the citizenship oath represents a restriction on dissenting expression, including any expression of dissent against the Crown itself, is a misapprehension of Canadian constitutionalism and Canadian history. The applicants' beliefs were subjectively sincere, so the deleterious effect of the oath was not nil. However, given that those beliefs about the oath reflected a fundamental misapprehension, it was difficult to attribute them great objective weight. On the other hand, the salutary effect of an expression of fidelity to a head of state symbolizing the rule of law, equality and freedom to dissent is substantial.

The oath to the Queen does not violate s. 2(*a*) of the *Charter*. It is a universal requirement applied to applicants without regard or reference to religion. While the subjective religious beliefs of the applicants (or at least of T) might be affected, the court could not order an accommodation of T's or any of the other applicants' religious particularity in the face of the secular universality of the Act and the oath.

The oath to the Queen does not violate s. 15(1) of the *Charter*. There is no discriminatory purpose in requiring the oath, and there is no objective evidence that it has a discriminatory effect.

Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567, [2009] S.C.J. No. 37, 2009 SCC 37, 310 D.L.R. (4th) 193, [2009] 9 W.W.R. 189, J.E. 2009-1407, EYB 2009-161892, 390 N.R. 202, 9 Alta. L.R. (5th) 1, 81 M.V.R. (5th) 1, 460 A.R. 1, 179 A.C.W.S. (3d) 327; *Heib (Re)*, [1979] F.C.J. No. 155, [1980] 1 F.C. 254, 104 D.L.R. (3d) 422, [1979] 2 A.C.W.S. 524 (T.D.); *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, [1997] S.C.J. No. 85, 151 D.L.R. (4th) 385, 218 N.R. 241, J.E. 97-1912, 46 C.R.R. (2d) 234, 74 A.C.W.S. (3d) 42; *Roach v. Canada (Attorney General)*, [2009] O.J. No. 5286, 84 C.P.C. (6th) 276 (Div. Ct.),

affg [2009] O.J. No. 737, 74 C.P.C. (6th) 22, 185 C.R.R. (2d) 215 (S.C.J.); *Roach v. Canada (Minister of State for Multiculturalism and Culture)*, [1994] F.C.J. No. 33, [1994] 2 F.C. 406, 113 D.L.R. (4th) 67, 164 N.R. 370, 23 Imm. L.R. (2d) 1, 46 A.C.W.S. (3d) 387 (C.A.), **consd**

R. v. Oakes, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 16 W.C.B. 73, **apld**

Other cases referred to

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6, 56 D.L.R. (4th) 1, 91 N.R. 255, [1989] 2 W.W.R. 289, J.E. 89-259, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, 36 C.R.R. 193, 13 A.C.W.S. (3d) 347; *Augier v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 761, 2004 FC 613, [2004] 4 F.C.R. 150, 256 F.T.R. 231, 240 D.L.R. (4th) 372, 119 C.R.R. (2d) 67, 37 Imm. L.R. (3d) 218, 133 A.C.W.S. (3d) 233, 62 W.C.B. (2d) 210 (T.D.); *Baier v. Alberta*, [2007] 2 S.C.R. 673, [2007] S.C.J. No. 31, 2007 SCC 31, 283 D.L.R. (4th) 1, 365 N.R. 1, [2007] 9 W.W.R. 389, J.E. 2007-1327, 76 Alta. L.R. (4th) 1, 412 A.R. 300, 156 C.R.R. (2d) 279, 158 A.C.W.S. (3d) 918; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, [1997] S.C.J. No. 26, 143 D.L.R. (4th) 577, 208 N.R. 81, J.E. 97-493, 42 C.R.R. (2d) 1, 37 Imm. L.R. (2d) 195, 69 A.C.W.S. (3d) 233; *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215, [2001] O.J. No. 1853, 199 D.L.R. (4th) 228, 147 O.A.C. 141, 105 A.C.W.S. (3d) 239 (C.A.); *Bruker v. Markovitz*, [2007] 3 S.C.R. 607, [2007] S.C.J. No. 54, 2007 SCC 54, J.E. 2008-68, 52 C.C.L.T. (3d) 1, 46 R.F.L. (6th) 1, 370 N.R. 1, 288 D.L.R. (4th) 257, EYB 2007-127332, 166 C.R.R. (2d) 36, 162 A.C.W.S. (3d) 940; *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313, [1973] S.C.J. No. 56, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1, 7 C.N.L.C. 91; *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, [2010] S.C.J. No. 3, 2010 SCC 3, 293 B.C.A.C. 144, 71 C.R. (6th) 201, 251 C.C.C. (3d) 435, 206 C.R.R. (2d) 1, EYB 2010-168789, 2010EXP-424, J.E. 2010-219, 397 N.R. 294, 315 D.L.R. (4th) 1; *Chainnigh v. Canada (Attorney General)*, [2008] F.C.J. No. 53, 2008 FC 69, 322 F.T.R. 302, 78 Admin. L.R. (4th) 201, 164 A.C.W.S. (3d) 635; *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, [2005] S.C.J. No. 33, 2005 SCC 35, 254 D.L.R. (4th) 577, 335 N.R. 25, J.E. 2005-1144, 130 C.R.R. (2d) 99, 139 A.C.W.S. (3d) 1080; *Chartbrook Ltd. v. Persimmon Homes Ltd.*, [2009] UKHL 38, [2009] 4 All E.R. 677 (H.L.); *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, [1991] S.C.J. No. 3, 77 D.L.R. (4th) 385, 120 N.R. 241, J.E. 91-184, 4 C.R.R. (2d) 60, 25 A.C.W.S. (3d) 40; *Condon v. Prince Edward Island*, [2006] P.E.I.J. No. 4, 2006 PESCAD 1, 265 D.L.R. (4th) 492, 253 Nfld. & P.E.I.R. 265, 41 Admin. L.R. (4th) 77, [2006] CLLC ¶230-024, 138 C.R.R. (2d) 109, 146 A.C.W.S. (3d) 302 (C.A.), affg [2002] P.E.I.J. No. 56, 2002 PESCTD 41, 214 Nfld. & P.E.I.R. 244, 43 Admin. L.R. (3d) 71, [2002] CLLC ¶230-029, 95 C.R.R. (2d) 216, 114 A.C.W.S. (3d) 921 (S.C.); *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, [1999] S.C.J. No. 24, 173 D.L.R. (4th) 1, 239 N.R. 1, J.E. 99-1058, [1999] 3 C.N.L.R. 19, 61 C.R.R. (2d) 189, 88 A.C.W.S. (3d) 518; *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374, [1985] 3 All E.R. 935, [1985] 3 W.L.R. 1174 (H.L.); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104, 120 D.L.R. (4th) 12, 175 N.R. 1, J.E. 95-30, 76 O.A.C. 81, 94 C.C.C. (3d) 289, 34 C.R. (4th) 269, 25 C.R.R. (2d) 1, 51 A.C.W.S. (3d) 1045, 25 W.C.B. (2d) 304; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, [1988] S.C.J. No. 88, 54 D.L.R. (4th) 577, 90 N.R. 84, J.E. 89-30, 19 Q.A.C. 69, 36 C.R.R. 1, 13 A.C.W.S. (3d) 7, 6 W.C.B. (2d) 186; *Godden v. Hales* (1686), 2 Shower 475 (K.B.); *Guerin v. Canada*, [1984] 2 S.C.R. 335, [1984] S.C.J. No. 45, 13 D.L.R. (4th) 321, 55 N.R. 161, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, [1985]

1 C.N.L.R. 120, 20 E.T.R. 6, 36 R.P.R. 1; *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, [1993] S.C.J. No. 84, 105 D.L.R. (4th) 577, 156 N.R. 81, J.E. 93-1526, 16 C.R.R. (2d) 193, 42 A.C.W.S. (3d) 442; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, [2004] S.C.J. No. 28, 2004 SCC 33, 239 D.L.R. (4th) 193, 320 N.R. 49, [2004] 8 W.W.R. 1, J.E. 2004-1104, 27 Alta. L.R. (4th) 1, 348 A.R. 201, 119 C.R.R. (2d) 84, 130 A.C.W.S. (3d) 746; *Hodge v. The Queen* (1883), 9 App. Cas. 117 (J.C.P.C.); *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36, 58 D.L.R. (4th) 577, 94 N.R. 167, J.E. 89-772, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 15 A.C.W.S. (3d) 121; *L. (S.) v. Commission scolaire des Chênes*, [2012] 1 S.C.R. 235, [2012] S.C.J. No. 7, 2012 SCC 7, 252 C.R.R. (2d) 168, 426 N.R. 352, 2012EXP-662, J.E. 2012-364, 341 D.L.R. (4th) 577, 210 A.C.W.S. (3d) 363; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, [1991] S.C.J. No. 52, 81 D.L.R. (4th) 545, 126 N.R. 161, J.E. 91-1122, 48 O.A.C. 241, 91 CLLC ¶14,029 at 12257, 4 C.R.R. (2d) 193, 27 A.C.W.S. (3d) 795; *Lavoie v. Canada*, [2002] 1 S.C.R. 769, [2002] S.C.J. No. 24, 2002 SCC 23, 210 D.L.R. (4th) 193, 284 N.R. 1, J.E. 2002-494, 15 C.C.E.L. (3d) 159, [2002] CLLC ¶210-020, 92 C.R.R. (2d) 1, 22 Imm. L.R. (3d) 182, D.T.E. 2002T-266, REJB 2002-28412, 112 A.C.W.S. (3d) 254, affg [1999] F.C.J. No. 754, [2000] 1 F.C. 3, 174 D.L.R. (4th) 588, 64 C.R.R. (2d) 189, 88 A.C.W.S. (3d) 991 (C.A.); *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, [2000] S.C.J. No. 66, 2000 SCC 69, 193 D.L.R. (4th) 193, 263 N.R. 203, [2001] 2 W.W.R. 1, J.E. 2001-49, 145 B.C.A.C. 1, 83 B.C.L.R. (3d) 1, 28 Admin. L.R. (3d) 1, 150 C.C.C. (3d) 1, 38 C.R. (5th) 209, 79 C.R.R. (2d) 189, 5 T.T.R. (2d) 161, REJB 2000-21529, 101 A.C.W.S. (3d) 732, 48 W.C.B. (2d) 76; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, [1990] S.C.J. No. 122, 76 D.L.R. (4th) 545, 118 N.R. 1, J.E. 91-12, 45 O.A.C. 1, 91 CLLC ¶17,004 at 16062, 2 C.R.R. (2d) 1, 24 A.C.W.S. (3d) 479; *Quebec (Attorney General) v. Quebec Assn. of Protestant School Boards*, [1984] 2 S.C.R. 66, [1984] S.C.J. No. 31, 10 D.L.R. (4th) 321, 54 N.R. 196, J.E. 84-625, 9 C.R.R. 133, 26 A.C.W.S. (2d) 447; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] S.C.J. No. 17, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 18 C.C.C. (3d) 385, 85 CLLC ¶14,023 at 12108, 13 C.R.R. 64, 14 W.C.B. 157; *R. v. Boucher*, [1951] S.C.R. 265, [1950] S.C.J. No. 41, [1951] 2 D.L.R. 369, 99 C.C.C. 1, 11 C.R. 85; *R. v. Chaulk*, [1990] 3 S.C.R. 1303, [1990] S.C.J. No. 139, 119 N.R. 161, [1991] 2 W.W.R. 385, J.E. 91-76, 69 Man. R. (2d) 161, 62 C.C.C. (3d) 193, 2 C.R. (4th) 1, 1 C.R.R. (2d) 1, 11 W.C.B. (2d) 558; *R. v. Downey*, [1992] 2 S.C.R. 10, [1992] S.C.J. No. 48, 90 D.L.R. (4th) 449, 136 N.R. 266, J.E. 92-807, 2 Alta. L.R. (3d) 193, 125 A.R. 342, 72 C.C.C. (3d) 1, 13 C.R. (4th) 129, 9 C.R.R. (2d) 1, 16 W.C.B. (2d) 163; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, [1986] S.C.J. No. 70, 35 D.L.R. (4th) 1, 71 N.R. 161, J.E. 87-82, 19 O.A.C. 239, 30 C.C.C. (3d) 385, 87 CLLC ¶14,001 at 12001, 55 C.R. (3d) 193, 28 C.R.R. 1, 1 W.C.B. (2d) 19; *R. v. Keegstra*, [1990] 3 S.C.R. 697, [1990] S.C.J. No. 131, 117 N.R. 1, [1991] 2 W.W.R. 1, J.E. 91-42, 77 Alta. L.R. (2d) 193, 114 A.R. 81, 61 C.C.C. (3d) 1, 1 C.R. (4th) 129, 3 C.R.R. (2d) 193, 11 W.C.B. (2d) 352; *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Assn. of Alberta*, [1982] Q.B. 892, [1982] 2 All E.R. 118, [1982] 2 W.L.R. 641 (C.A.); *R. v. Sharma*, [1991] O.J. No. 14, 77 D.L.R. (4th) 334, 44 O.A.C. 355, 62 C.C.C. (3d) 147, 3 C.R. (4th) 195, 3 M.P.L.R. (2d) 1, 11 W.C.B. (2d) 643 (C.A.); *R. v. Sharpe*, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, 2001 SCC 2, 194 D.L.R. (4th) 1, 264 N.R. 201, [2001] 6 W.W.R. 1, J.E. 2001-294, 146 B.C.A.C. 161, 88 B.C.L.R. (3d) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, 86 C.R.R. (2d) 1, 48 W.C.B. (2d) 287; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, [1987] S.C.J. No. 10, 38 D.L.R. (4th) 161, 74 N.R. 99, [1987] 3 W.W.R. 577, 51 Alta. L.R. (2d) 97, 78 A.R. 1, 87 CLLC ¶14,021 at 12149, 28 C.R.R. 305, 4 A.C.W.S. (3d) 138; *Reference re Resolution to Amend the Constitution*

("Patriation Reference"), [1981] 1 S.C.R. 753, [1981] S.C.J. No. 58, 125 D.L.R. (3d) 1, 39 N.R. 1, [1981] 6 W.W.R. 1, 11 Man. R. (2d) 1, 34 Nfld. & P.E.I.R. 1, 1 C.R.R. 59, 10 A.C.W.S. (2d) 489; *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, [2004] S.C.J. No. 75, 2004 SCC 79, 246 D.L.R. (4th) 193, 328 N.R. 1, J.E. 2005-42, 125 C.R.R. (2d) 122, 12 R.F.L. (6th) 153, 135 A.C.W.S. (3d) 612; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, [1998] S.C.J. No. 61, 161 D.L.R. (4th) 385, 228 N.R. 203, J.E. 98-1716, 55 C.R.R. (2d) 1, 81 A.C.W.S. (3d) 798; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, [1990] S.C.J. No. 52, 109 N.R. 81, [1990] 4 W.W.R. 481, J.E. 90-907, 68 Man. R. (2d) 1, 56 C.C.C. (3d) 65, 77 C.R. (3d) 1, 48 C.R.R. 1, 10 W.C.B. (2d) 191; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, [1995] S.C.J. No. 68, 127 D.L.R. (4th) 1, 187 N.R. 1, J.E. 95-1766, 100 C.C.C. (3d) 449, 62 C.P.R. (3d) 417, 31 C.R.R. (2d) 189, 57 A.C.W.S. (3d) 578, 28 W.C.B. (2d) 216; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, [1959] S.C.J. No. 1, 16 D.L.R. (2d) 689; *Rosen v. Ontario (Attorney General)*, [1996] O.J. No. 100, 131 D.L.R. (4th) 708, 87 O.A.C. 280, 34 C.R.R. (2d) 84, 60 A.C.W.S. (3d) 723 (C.A.); *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, [1986] S.C.J. No. 75, 33 D.L.R. (4th) 174, 71 N.R. 83, [1987] 1 W.W.R. 577, J.E. 87-81, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 87 CLLC ¶14,002 at 12037, 25 C.R.R. 321, 2 A.C.W.S. (3d) 243; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, [1989] S.C.J. No. 45, 59 D.L.R. (4th) 416, 93 N.R. 183, J.E. 89-775, 26 C.C.E.L. 85, 89 CLLC ¶14,031 at 12247, 40 C.R.R. 100, 15 A.C.W.S. (3d) 132; *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, [2004] S.C.J. No. 46, 2004 SCC 47, 241 D.L.R. (4th) 1, 323 N.R. 59, J.E. 2004-1354, 121 C.R.R. (2d) 189, 28 R.P.R. (4th) 1, 132 A.C.W.S. (3d) 170; *Thomson Newspapers Co. v. Canada (Attorney General)* (1998), 38 O.R. (3d) 735, [1998] 1 S.C.R. 877, [1998] S.C.J. No. 44, 159 D.L.R. (4th) 385, 226 N.R. 1, J.E. 98-1224, 109 O.A.C. 201, 51 C.R.R. (2d) 189, 79 A.C.W.S. (3d) 921; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, [2001] S.C.J. No. 32, 2001 SCC 31, 199 D.L.R. (4th) 1, 269 N.R. 1, J.E. 2001-1034, 151 B.C.A.C. 161, 31 Admin. L.R. (3d) 163, [2001] CLLC ¶230-026, 82 C.R.R. (2d) 189, REJB 2001-24105, 105 A.C.W.S. (3d) 83; *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, [1951] S.C.J. No. 31, [1951] 4 D.L.R. 529

Statutes referred to

Act of Settlement, 1701, 12 & 13 Will. III, c. 2
An Act respecting Aliens and Naturalization, 31, V, c. 66 (1869), s. 4(2)
Canadian Charter of Rights and Freedoms, ss. 1, 2(*a*), (*b*), 15(1)
Canadian Citizenship Act, S.C. 1946, c. 16, s. 1
Citizenship Act, R.S.C. 1985, c. C-29, ss. 3(1)(*c*) [as am.], 12(3), 24, Schedule (Section 24)
Citizenship Act, S.C. 1974-75-76, c. 108
Constitution Act, 1791, 31 Geo. 3, c. 31
Constitution Act, 1867, ss. 9, 17
Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 41(*a*)
Law Society Act, R.S.O. 1990, c. L.8
Québec Act, 1774, 14 Geo. III, c. 83
Royal Title and Styles Act, R.S.C. 1985, c. R-12, s. 2
Statute of Westminster, 1931, 22 Geo. V, c. 4, Preamble
Succession to the Throne Act, 2013, S.C. 2013, c. 6

Authorities referred to

Bagehot, Walter, *The English Constitution* (1st ed. 1867) (New York: Cosimo Classics, 2007)
Blackstone, W., I *Commentaries* 149

Brown, Wallace, and Hereward Senior, *Victorious in Defeat: the Loyalists in Canada* (Toronto: Methuen, 1984)
Bumsted, J.M., *Understanding the Loyalists* (Sackville, NB: Centre for Canadian Studies, Mount Allison University, 1986)
Choudhry, Sujit, "So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian *Charter's* Section 1" (2006), S.C.L.R. 501
Chrimes, Stanley Bertram, "Richard II's Questions to the Judges, 1387" (1956), 72 Law Q. Rev. 365-90
Fellows, Jo-Ann, "The Loyalist Myth in Canada", in *Historical Papers*, 1971, Canadian Historical Association 94
Holdsworth, William Searle, *A History of English Law* (London: Methuen, 1926)
Johnson, Arthur, *Myths and Facts of the American Revolution* (Toronto: W. Briggs, 1908)
MacRae-Buchanan, Constance, "American Influence on Canadian Constitutionalism" in Ajzenstat, J., ed., *Canadian Constitutionalism 1791-1991* (Ottawa: Canadian Study of Parliament Group, 1992)
Martin, Ged, "Introduction to the 2006 Edition" in Waite, P.B., ed., *Confederation Debates in the Province of Canada, 1865*, 2nd ed. (Montreal: McGill-Queen's University Press, 2006)
Potter, Janice, "The Lost Alternative: the Loyalists in the American Revolution" (1976), 27 Hum. Assoc. Rev. 89
Shachar, Ayelet, and Ran Hirschl, "Citizenship as Inherited Property" (2007), 35 Political Theory 253
Smith, David E., *Across the Aisle: Opposition in Canadian Politics* (Toronto: University of Toronto Press, 2013)
Statement — Minister Kenney celebrates Citizenship Week, online: Citizenship and Immigration Canada, October 17, 2011, <http://www.cic.gc.ca/english/department/media/statements/2011/2011-10-17.asp>
Weinrib, Lorraine E., "The Supreme Court of Canada and Section 1 of the Charter" (1988), 10 S.C.L.R. 469

APPLICATION for a declaration that the citizenship oath is unconstitutional.

Peter Rosenthal, *Michael Smith*, *Selwyn Pieters* and *Reni Chang*, for applicants.
Kristina Dragaitis and *Ned Djordjevic*, for defendant.

[1] E.M. MORGAN J.: — Under s. 3(1)(*c*) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the "Act"), a person over 14 years old must take an oath of citizenship in order to become a Canadian citizen. Section 12(3) of the Act provides that a certificate of citizenship issued to a new Canadian by the Minister of Citizenship and Immigration does not become effective until the oath is taken.

[2] The form of oath is authorized and set out in s. 24 of the Act, and the Schedule (Section 24) thereto, 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 fulfill my duties as a Canadian citizen.

[3] The applicants submit that the oath to the Queen violates s. 2(*b*) (freedom of expression), s. 2(*a*) (freedom of religion) and s. 15(1) (equality rights) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). They further submit that the oath does not constitute a reasonable limit on those rights under s. 1 of the *Charter*. The respondent takes the position that what the applicants are seeking is a positive right to citizenship, which is not a right protected by the *Charter*; accordingly, the respondent submits that the oath to the Queen does not violate any of the constitutional rights of the applicants.

[4] For the reasons that follow, the application is dismissed. The oath to the Queen, as required by the Act, is a form of compelled speech that *prima facie* infringes the applicants' freedom of expression under s. 2(*b*) of the *Charter*. At the same time, the oath is a reasonable limit on the right of expression and is therefore saved by s. 1. The oath does not violate either s. 2(*a*) or s. 15(1) of the *Charter*.

I. *The Applicants' Claims*

[5] All three of the applicants are permanent residents of Canada who wish to become Canadian citizens. Other than their failure to take the oath of citizenship, they have each resided in Canada for more than the number of years required to become new citizens and depose that they have otherwise qualified for citizenship under the Act.

[6] The applicant Michael McAteer immigrated to Canada from Ireland. He deposes that his family fought for Irish independence from the British Crown and that he holds republican beliefs that prevent him from "taking an oath of allegiance to a hereditary monarch who lives abroad". He further states in his affidavit that swearing an oath to the Queen, as required by the Act, would amount to "a betrayal of my republican heritage and impede my activities in support of ending the monarchy in Canada".

[7] The applicant Simone Topey immigrated to Canada from Jamaica. She explains in her affidavit that she adheres to the Rastafarian faith. She deposes that to Rastafarians, the "current society is Babylon" and that the Queen is regarded as the "head of Babylon". She further states that it would violate her religious belief to take an oath to the person who is the head of such a society.

[8] The applicant Dror Bar-Natan immigrated to Canada from Israel. He deposes that the oath is "repulsive" to him because "it states that some people, the royals and their heirs, are born with privilege". He further states that "it is a historic remnant of

a time we all believe has passed", and that it would violate his belief in equality of all persons to swear allegiance to "a symbol that we aren't all equal and that some of us have to bow to others for reasons of ancestry alone".

[9] The application was initiated by Charles Roach, a prominent Ontario lawyer who passed away in October 2012. He had immigrated to Canada from Trinidad and Tobago in 1955 and became a lawyer in 1963. Cullity J. set out the salient features of Mr. Roach's case in a reported decision in his judgment denying certification of the present claim as a class action (*Roach v. Canada (Attorney General)*, [2009] O.J. No. 737, 74 C.P.C. (6th) 22 (S.C.J.), at paras 18-21, affd [2009] O.J. No. 5286, 84 C.P.C. (6th) 276 (Div. Ct.)).

[10] In 1988, Mr. Roach was informed by the Law Society of Upper Canada that he had to become a citizen by July 1, 1989 in order to continue practising law in Ontario. Mr. Roach applied for citizenship at the time and went so far as to attend a citizenship ceremony, during which he asked the presiding judge whether he could become a citizen without swearing an oath to the Queen. He received a negative answer, whereupon, due to his conscientious objection, he refused to take the oath and the certificate of citizenship was withheld from him.

[11] As it turned out, before the expiry of the Law Society's deadline the Supreme Court of Canada rendered its decision in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6, striking down the requirement of Canadian citizenship for those seeking to be called to the bar. Under amendments to the *Law Society Act*, R.S.O. 1990, c. L.8 that came into force on February 27, 1989, the criteria for admission to the Ontario bar were amended to bring the law into compliance with the *Andrews* ruling. Mr. Roach was therefore permitted to continue practising law despite not having sworn the requisite oath to become a citizen of Canada.

[12] It is fair to say that Mr. Roach's stance as an objector to the oath, although not successful in its previous legal iterations (see *Roach v. Canada (Minister of State for Multiculturalism and Culture)*, [1994] F.C.J. No. 33, 113 D.L.R. (4th) 67 (C.A.); *Roach v. Canada (Attorney General)*, *supra*), brought prominence to the issue at hand. He was very active in the political movement to abolish the monarchy for Canada. In addition, the case of Charles Roach illustrates that there are real costs to a long-time member of Canadian society remaining a permanent resident rather than becoming a citizen. As Cullity J. pointed out, at para. 22 of his judgment:

> He has turned down an invitation to apply for appointment as a provincial judge because of a requirement to take the oath of allegiance, he is unable to vote or run for public office, he is no longer eligible for Canada Council grants that, as a poet, he previously received, and he is unable to travel on a Canadian passport.

II. *Legislative History*

[13] Although the concept of Canadian citizenship itself originated in 1947 with the *Canadian Citizenship Act*, S.C. 1946, c. 16, s. 1 (the "1947 Act"), the taking of an oath to the sovereign by new subjects of the Crown pre-dates Confederation. The *Québec Act, 1774*, 14 Geo. III, c. 83, enacted in the wake of the transfer of Lower Canada from the French monarch to the English Crown, took into account the sensitivities of the Roman Catholic population of Quebec to the fact that the form of oath at the time made reference to the Protestant faith. It provided a secular alternative for the first oath specific to persons newly naturalized in Canada: "*I [name] do sincerely promise and swear, that I will be faithful, and bear true Allegiance to his Majesty King George . . . .*"

[14] An oath to the Queen as a condition of naturalization across the country was introduced in the very first parliamentary session following Confederation. Section 4(2) of *An Act respecting Aliens and Naturalization*, 31, V, c. 66 (1869) provided that every alien, in order to be naturalized as a British subject resident in Canada, had to swear (or affirm) "*that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, as lawful Sovereign of the United Kingdom of Great Britain and Ireland, and of the Dominion of Canada*".

[15] The requirement of taking an oath to the Queen as a condition of citizenship was re-enacted and imposed on every applicant for citizenship, whether a British subject or not (except for a limited class of British subjects who had already been resident in Canada for five years and were "grandfathered" as automatic Canadian citizens), when Canadian citizenship was first introduced in the 1947 Act. Thirty years later, the oath was once again reconfirmed in the revisions brought about by the *Citizenship Act*, S.C. 1974-75-76, c. 108. It is this version of the Act that contains the oath of citizenship in its current form.

[16] As for the Queen's stature as head of state, the ancient common law recognized the monarch as the repository of English sovereignty prior to the Norman conquest. The courts elaborated on and confirmed monarchial authority in the late middle ages in response to a series of questions posed to them by Richard II. See Stanley Bertram Chrimes, "Richard II's Questions to the Judges, 1387" (1956), 72 Law Q. Rev. 365-90. This took into

account the limits on royal powers imposed by *Magna Carta*, 1215, which was itself followed by the gradual emergence of *habeas corpus* and other relevant enactments and common law restraints on royal power. See W. Holdsworth, *A History of English Law* (London: Methuen, 1926). With all of this, the courts nevertheless confirmed in *Godden v. Hales* (1686), 2 Shower 475 (K.B.) that the Crown sits at the sovereign apex of the legal and political system.

[17] The monarch as head of state was further entrenched by the *Act of Settlement, 1701*, 12 & 13 Will. III, c. 2, which set out the rules for succession to the Crown of the United Kingdom (Great Britain and Scotland). This conception of sovereignty and executive authority was inherited by Canada in the *Constitution Act, 1867*, s. 9, which provides that "[t]he Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen". The role of Her Majesty as sovereign has also been reinforced in s. 41(*a*) of the *Constitution Act, 1982*, which requires unanimity of the federal and all provincial legislatures in order to enact any amendment to the constitutional status of "the office of the Queen, the Governor General and the Lieutenant Governor of a province".

[18] Of course, sovereign powers in the Anglo-Canadian tradition reside not in the executive alone but in the legislature as well, as reflected in William Blackstone's articulation of the "king-in-parliament". Sovereignty, according to this view, vests "in the king's majesty, sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal. . . and the commons" (W. Blackstone, I *Commentaries* 149). Again, this conception of executive and legislative sovereign authority was inherited by Canada in its founding constitution. Section 17 of the *Constitution Act, 1867* provides that "[t]here shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons".

[19] Actual royal power, certainly, has "gradually relocated from the Monarch in person to the Monarch's advisors or ministers" (*Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215, [2001] O.J. No. 1853, 199 D.L.R. (4th) 228 (C.A.), at para. 32). Nevertheless, the Queen retains authority over "the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers" and other matters commensurate with her stature as national sovereign (*Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374, [1985] 3 All E.R. 935 (H.L.), at p. 418 A.C.), even if most of the prerogative powers are today exercised on advise of the prime minister

and subject to the *Charter* (*Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, [2010] S.C.J. No. 3, at para. 36).

[20] The preamble to the *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.) identifies Canada as one of "His Majesty's Governments". Likewise, the recently enacted *Succession to the Throne Act, 2013*, S.C. 2013, c. 6 describes Canada as one of "the Realms of which Her Majesty is Sovereign". In Canada's system of constitutional monarchy, the sovereign, like all institutions of state, exercises power within constitutional limitations. But there is no doubt that Her Majesty the Queen is Queen of Canada, the embodiment of the Crown in Canada, and the head of state (*Royal Title and Styles Act*, R.S.C. 1985, c. R-12, s. 2).

III. *Freedom of Expression*

[21] As the Supreme Court of Canada pointed out in one of its earliest judgments under s. 2(*b*) of the *Charter*, "[t]he content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts" (*Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36, at para. 42). Certain behaviours, such as a labour strike (*Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, [1987] S.C.J. No. 10), acts of criminal violence (*RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, [1986] S.C.J. No. 75, at p. 588 S.C.R.), and the display of commercial wares (*R. v. Sharma*, [1991] O.J. No. 14, 77 D.L.R. (4th) 334 (C.A.), at para. 19), have been specifically excluded from the ambit of the constitutional right; otherwise, "s. 2(*b*) of the *Charter* embraces all content of expression irrespective of the particular meaning or message sought to be conveyed" (*R. v. Keegstra*, [1990] 3 S.C.R. 697, [1990] S.C.J. No. 131).

[22] Accordingly, "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee" (*Irwin Toy*, *supra*, at p. 969 S.C.R.). Protected speech therefore includes not only the spoken word but the choice of language (*Ford v. Québec (Attorney General)*, [1988] 2 S.C.R. 712, [1988] S.C.J. No. 88), and the right to receive or hear expressive content as much as the right to create it (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, [2000] S.C.J. No. 66). Section 2(*b*) also guarantees the right to possess expressive material regardless of how repugnant it may be to others or to society at large (*R. v. Sharpe*, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3).

[23] Most significantly, "[f]reedom of expression encompasses the right *not* to express views" (*Rosen v. Ontario (Attorney*

General), [1996] O.J. No. 100, 131 D.L.R. (4th) 708 (C.A.), at para. 16 (emphasis added)). As explained by Lamer J. (as he then was) in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, [1989] S.C.J. No. 45, at para. 92, "[t]here is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do." A statutory requirement whose effect is "to put a particular message into the mouth of the plaintiff" would run afoul of s. 2(*b*) of the *Charter* (*Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, [1991] S.C.J. No. 52, at p. 267 S.C.R.).

[24] Indeed, the right not to express the government's preferred point of view extends to those who oppose socially positive messages such as health warnings (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, [1995] S.C.J. No. 68, at para. 124), and includes even the right to refrain from expressing objective, uncontested facts (*Slaight Communications*, *supra*, at para. 95). As Chief Justice Lamer explained in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, [1991] S.C.J. No. 3, at para. 18, individuals are not only protected from having to articulate a message with which they disagree, but are also guaranteed the correlative right not to have to listen to such a message.

[25] The applicants submit that imposing on them, as a condition of citizenship, a requirement to swear an oath with which they do not agree curtails their expression in the very way that the courts have said it may not be curtailed. As Cullity J. pointed out in *Roach v. Canada (Attorney General)*, *supra*, at para. 22, quoted above, the burden that the oath places on their speech, or their desire not to speak the words prescribed in the Act, is a rather steep one. In a celebratory statement issued in 2011, the then Minister of Immigration and Citizenship reconfirmed the weight of that burden, declaring that "[f]ew things in this world are more precious to us than our Canadian citizenship" (*Statement — Minister Kenney celebrates Citizenship Week*, Citizenship and Immigration Canada, October 17, 2011, <http://www.cic.gc.ca/english/department/media/statements/2011/2011-10-17.asp>).

[26] Despite the respondent's surprising argument to the contrary in its factum, the inability to become a citizen is not the kind of "state-imposed cost or burden [that is] . . . not prohibited [because] . . . the burden is trivial or insubstantial" (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, [1986] S.C.J. No. 70, at para. 97). The fact that the applicants can remain in

the country as permanent residents does not devalue the benefit that they are unable to access without speaking words they do not wish to speak. Iacobucci J. put as high a price as possible on it in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, [1997] S.C.J. No. 26, at para. 68: "I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship." The burden on the applicants' speech — putting citizenship out of their grasp — is real and substantial.

[27] The respondent contends that the applicants' *Charter* claim in effect seeks a "positive right" rather than a "negative right", and that s. 2(*b*) guarantees only the latter form of right. Quoting the Supreme Court of Canada in *Baier v. Alberta*, [2007] 2 S.C.R. 673, [2007] S.C.J. No. 31, at para. 41, the respondent submits that, here, "what is sought is 'positive government legislation or action as opposed to freedom from government restrictions on activity in which people could otherwise freely engage'".

[28] It is literally correct to say, as the respondent does in its factum, that "the status of citizenship is not an 'activity' in which [the applicants] could otherwise freely engage without government enablement". That, however, does not mean that the burden imposed on their expression is not a coercive one.

[29] L'Heureux-Dubé J. pointed out in *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, [1993] S.C.J. No. 84, at para. 79, that "[t]he distinctions between . . . positive and negative entitlements, are not always clearly made, nor are they always helpful". That observation certainly describes the arguments made here.

[30] On one hand, the respondent is right that the applicants' *Charter* challenge strives to attain a legislative change permitting them to access a government-created "platform" — the hallmark of an unprotected "positive right" (*Baier*, *supra*, at para. 36). On the other hand, the applicants' challenge strives to avoid being coerced into words of fidelity to the Queen — the "platform" of citizenship is not the goal of their speech/silence, but rather represents the club or carrot which the government holds out to them.

[31] The current challenge is analogous to that in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, [1997] S.C.J. No. 85, where the challenger sought to fundraise for his cause during the Quebec referendum. The governing regulations denied him the benefit of access to any officially sanctioned committee that would permit regulated expenses to be incurred during the referendum period. As with the present applicants, the challenger

sought to express his view (there through funding a political cause, here through non-reference to the Queen in the citizenship oath), independent of any government activity — but was denied a government-created benefit if he did so.

[32] While the positive/negative question can thus be looked at in two ways — *i.e.*, either as an access-to-platform claim or a denial-of-benefit claim — the courts have already determined that citizenship criteria are subject to *Charter* scrutiny. It does not matter that there is no constitutional right to citizenship *per se.* See *Lavoie v. Canada*, [1999] F.C.J. No. 754, [2000] 1 F.C. 3 (C.A.), at para. 11, affd [2002] 1 S.C.R. 769, [2002] S.C.J. No. 24. *Charter* challenges to citizenship criteria or to the citizenship application process do not seek citizenship, they seek an end to a burden imposed on a recognized *Charter* right. Citizenship cannot, in effect, be a prize that the Act rewards to applicants who give up a right such as freedom of expression that exists outside of the citizenship process.

[33] It is as much of a *Charter* violation to compel speech by denying a statutory benefit as it is to censor speech by imposing a statutory punishment; the former "positive"-looking right is really just the flip side of the latter "negative"-looking right. A person who cannot access the benefit of citizenship as a consequence of a rights-infringing provision in the Act deserves a constitutional remedy unless the impugned provision is saved by s. 1 (*Augier v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 761, 2004 FC 613 (T.D.), at para. 25).

[34] Accordingly, the guarantee of freedom of expression contained in s. 2(*b*) of the *Charter* is *prima facie* infringed by the statutory requirement that the applicants recite an oath to the Queen in order to acquire citizenship. The oath of citizenship is a form of compelled speech that is only permissible if it can be shown to be a reasonable limit on the right of expression within the meaning of s. 1 of the *Charter*.

IV. *The Citizenship Oath as a Reasonable Limit on Expression*

[35] Since the applicants have established that the Act's requirement of an oath to the Queen is a *prima facie* breach of s. 2(*b*) of the *Charter*, it is for the respondent to show that it the oath is, in the words of s. 1, demonstrably justifiable in a free and democratic society. Needless to say, the proof at this stage of the analysis need not be definitive; indeed, it probably could not be in the usual courtroom sense of the word "proof". The Supreme Court of Canada has acknowledged that "[d]ecisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and

knowledge of the needs, aspirations and resources of society" (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, [1990] S.C.J. No. 122, at p. 304 S.C.R.).

[36] Nevertheless, the court is mandated under s. 1 to investigate the justifications for a *Charter* breach. The present case does not, of course, involve criminal justice or entail the potential incarceration of any person, but rather represents a choice made by Parliament in fashioning the process of citizenship acquisition. It therefore need not, and probably could not, be "tuned with great precision in order to withstand judicial scrutiny" (*R. v. Edwards Books & Art Ltd.*, *supra*, at 772 S.C.R.). The respondent must, however, provide what McLachlin C.J.C. has called a "reasoned demonstration" that the breach is a justifiable one (*RJR MacDonald*, *supra*, at para. 129).

[37] In order to establish a s. 1 justification, the respondent must first establish that there is a sufficiently important objective sought to be accomplished by the measure in issue — *i.e.*, the oath (*Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, [1990] S.C.J. No. 52 ("*Prostitution Reference*"), at para. 90). It must then demonstrate that this measure is designed to achieve its objective, and is not based on arbitrary, unfair or irrational considerations. Following that, the respondent must show that, even if rationally connected to its objective, the oath impairs "as little as possible" the applicants' right or freedom (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] S.C.J. No. 17, at para. 139). Finally, the respondent must then explain to the court's satisfaction the "proportionality between the effects of the [required oath] . . . and the objective which has been identified as of 'sufficient importance'" (*R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, at para. 70).

a. *The pressing and substantial objective*

[38] Counsel for the respondent describes the objective of the citizenship oath as follows:

> The purpose of the oath requirement including an oath of allegiance to the Queen is to ensure a public, symbolic avowal of commitment to this country's constitutionally entrenched political structure and history, during the solemnities of the citizenship ceremony, as a condition of acceding to full membership in the Canadian polity. The language of the oath reflects Canada's current political reality and constitutional order.

[39] The applicants respond by submitting polling data suggesting that for contemporary Canadian society the Queen may not serve the symbolic function that the oath seeks to reinforce. In oral argument, counsel for the applicants supported this

approach by asking, rhetorically, why it is pressing and substantial objective to swear allegiance to the Queen as opposed to an oath to Canada or its constitution. Similar sentiments are expressed by the applicants in their affidavits. Each indicate that they object to the monarch finding her way into the citizenship oath, but that they would have no objection to swearing an oath to Canada or its laws.

[40] With respect, the argument presented by the applicants does not establish the conclusion that they draw. Nothing in the applicants' argument takes issue with, or counters, the objective of ensuring during the citizenship ceremonies "a public, symbolic avowal of commitment" to the country and its established order. Indeed, the applicants and the respondents appear to share that objective, but each seeks to achieve it with a different form of words.

[41] The applicants may disagree with the oath as a viable method of accomplishing the legislative objective. That disagreement will be discussed below in terms of whether the means used by Parliament are appropriate or proportional to the ends it seeks to accomplish. However, as indicated above, the applicants take no real issue with the legislative objective of expressing commitment to the country, or with its characterization as pressing and substantial; frankly, it is difficult to see how anyone could argue with the pressing and substantial nature of that objective, given the context of the Act in which the oath is set out and the ceremony at which it is administered.

b. *The oath as a rational measure*

[42] The applicants argue that the Queen stands for social hierarchy and elitism, and that there is no rational basis for her presence in a statement of allegiance to the nation. Their contention is that the notion of personal fidelity to the monarch is so antiquated and antithetical to modern Canada that the oath alienates new Canadians more than it reflects their membership in the polity or binds them to it in a community of status. They therefore argue that it is an arbitrary and irrational way to accomplish the stated objective that motivates the citizenship oath.

[43] The applicants' affidavit material addresses this view, describing their perception of the monarchy as essentially undemocratic, inegalitarian and a figure that runs counter to what they conceive as the essence of Canadian society. They also submit statistical data showing that the percentage of new Canadians of British descent has decreased dramatically since the early decades after Confederation, and they surmise that the

personal oath to a monarch of British heritage sends a divisive and elitist rather than a unifying and all-inclusive message.

[44] The applicants may not be in favour of the continuing historic arrangement, but in analyzing the rationality of Parliament's choice of an oath to the Queen one cannot ignore the fact that the monarch is Canada's constitutional head of state. Whereas in analyzing the *prima facie* infringement of their rights the applicants are entitled to insist on remaining silent even with respect to objectively unassailable facts, in making a s. 1 rational connection argument those objective facts — the foremost of which is the Queen's constitutional status — must be taken into account.

[45] In *Chainnigh v. Canada (Attorney General)*, [2008] F.C.J. No. 53, 2008 FC 69, the Federal Court had occasion to consider, and dismiss, similar arguments in the context of a Canadian Forces officer who challenged various expressions of loyalty required during the course of his military service. As Barnes J. put it, at para. 49, "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".

[46] It is certainly rational for Parliament to have embraced an oath that references in a direct way Canada's official head of state. Whatever problems the applicants think are associated with the monarchy, it is not irrational for Parliament to have selected a figure that has been throughout the country's history, and continues to be until the present day, a fixture of its constitutional structure.

[47] Whether or not there is reliable polling data to suggest what Canadians' current attitude toward the Queen might be is not a relevant consideration here. By way of analogy, French and English are Canada's official languages, and given their constitutionally entrenched status it is rational for Parliament to require the oath of citizenship in either of those languages. That would remain true even if polling data could be produced showing that some other language has become more prevalent among new Canadians.

[48] The constitution contains universal rights that exist in most liberal societies, such as freedom of expression, as well as "a unique set of constitutional provisions, quite peculiar to Canada", that in many ways define the nation (*Quebec (Attorney General) v. Quebec Assn. of Protestant School Boards*, [1984] 2 S.C.R. 66, [1984] S.C.J. No. 31, at p. 79 S.C.R.). Among the latter are any number of clauses that privilege foundational

aspects of Canadian society: French-English bilingualism, common law-civil law bi-juridicalism, a parliamentary system, federalism, aboriginal treaty rights and the status of Her Majesty, to name but a few. It would be entirely rational for Parliament, if it so desired, to fashion an oath of citizenship that referenced any such defining element established by the country's most fundamental law.

c. *The minimal impairment of rights*

[49] While the citizenship oath is a rational choice, is it one that impairs expression as little as possible?

[50] To reiterate what was said at the outset of the s. 1 discussion, this inquiry is not an exact science. The Supreme Court of Canada has observed that "[t]he analysis under s. 1 of the *Charter* must be undertaken with a close attention to context" (*Thomson Newspapers Co. v. Canada (Attorney General)* (1998), 38 O.R. (3d) 735, [1998] 1 S.C.R. 877, [1998] S.C.J. No. 44, at para. 87). Thus, while the court has made it clear that "Parliament is not required to choose the absolutely least intrusive alternative" (*R. v. Downey*, [1992] 2 S.C.R. 10, [1992] S.C.J. No. 48, at p. 37 S.C.R.), the question remains whether there is some other method available that would be less intrusive on the applicants' rights but "which would achieve the objective as effectively" (*R. v. Chaulk*, [1990] 3 S.C.R. 1303, [1990] S.C.J. No. 139, at p. 1341 S.C.R.).

[51] The applicants' affidavits are replete with descriptions of how reference to the Queen is contrary to their conception of equality and democracy, how it perpetuates hereditary privilege, how it connotes British ethnic dominance in Canadian society, and how it is antithetical to minorities' identity and rights. They concede that some form of oath might be acceptable, but they submit that it must contain a message that they can pronounce in good conscience so that their right to free expression is not so severely impaired. As it is, the applicants state that while they could physically mouth the words of the oath, they cannot do so if they are to take the message of the oath seriously and adhere to it faithfully.

[52] The applicants' record contain examples of citizenship oaths from other democratic nations such as the United States, and even Australia, where the Queen is likewise titular head of state, where the expression of fidelity is to the country, its laws and its heritage, but not to a person of any special, elevated status. Counsel for the applicants contends that the fact that other comparable societies manage to confer citizenship without an oath that is personalized to a national figure is indicative that

the means chosen by Parliament to accomplish its goal does not represent a minimal impairment of freedom of expression.

[53] A similar argument was put forward by an applicant for citizenship in *Heib (Re)*, [1979] F.C.J. No. 155, 104 D.L.R. (3d) 422 (T.D.), at para. 7. Like the applicants here, the appellant in *Heib (Re)* "interprets the oath as a binding promise by him to bear allegiance to a living person, Queen Elizabeth, and to her successors. He says he cannot bring himself to swear allegiance to any living person." Likewise, Charles Roach in his Federal Court litigation held fast to the view that "a public oath is the most solemn rite and that its terms must be faithfully observed" (*Roach v. Canada* (F.C.A.), *supra*, at para. 41 (*per* Linden J.A., dissenting)).

[54] Much as this high respect for the oath of citizenship is admirable, it becomes problematic if the oath itself is misinterpreted. This court has no reason to doubt, and no inclination to inquire into, the *bona fides* of the applicants' beliefs and viewpoints. That, however, does not mean that a misunderstanding on the applicants' part must be taken as being true.

[55] The Federal Court in *Heib (Re)* viewed that appellant's similar objection to the oath as misguided. Collier J., at para. 8, preferred the interpretation that "the oath can be regarded, not as a promise to a particular person, but as a promise to the theoretical political apex of our Canadian parliamentary system of constitutional monarchy". Likewise, 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 para. 15, that the oath, properly understood, required a citizenship applicant to simply "express agreement with the fundamental structure of our country as it is".

[56] The appellants have rejected these interpretations, opting to apply a "plain meaning" to the reference to the Queen in the citizenship oath.

[57] It appears that the applicants have not embraced the prevalent view that eschews "plain meanings" as an approach to legal texts. Contemporary jurisprudence has for the most part seen so-called plain meaning interpretations as misleading, concluding that, where such plain meanings are invoked, it is as often as not the case that "the context and background [drive] a court to the conclusion that 'something must have gone wrong with the language'" (*Chartbrook Ltd. v. Persimmon Homes Ltd.*, [2009] UKHL 38, [2009] 4 All E.R. 677 (H.L.), at para. 14). In the applicants' view, however, the meaning of the citizenship oath — in particular, the reference to the Queen — is in need of no

further interpretation. They simply object to the meaning which they view as plain on the face of the oath.

[58] In fact, as indicated above, the applicants take the plain words of the oath with much solemnity. They adopt the same posture as the appellant in *Heib (Re)*, who, at para. 7, "said he could have, at the hearing before the Citizenship Judge, taken the designated oath, but . . . [h]is conscience . . . would not allow him to do that". As counsel for the applicants states in his factum, "[t]he insistence on the Oath to the Queen is an obstacle only to those who, like the applicants, do not support the Monarchy and also take oaths very seriously".

[59] It would seem, however, that the applicants' problem is not so much that they take the oath seriously. Rather, their problem is that they take it literally.

[60] In the first place, 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. Thus, for example, Canada has divided sovereignty, with both the federal and provincial Crowns represented by the Her Majesty. In *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Assn. of Alberta*, [1982] Q.B. 892, [1982] 2 All E.R. 118 (C.A.), at p. 916 Q.B., Lord Denning explained that "the Crown was no longer single and indivisible", but rather had Canadianized as "was separate and divisible for each self-governing dominion or province or territory".

[61] One would presume that the applicants understand that, despite the words used in our constitutional practice, there has never been a literal dicing or replication of the Queen. She "may for one aspect and for one purpose fall within Sect. 92 [and] may in another aspect or another purpose fall within Sect. 91" (*Hodge v. The Queen* (1883), 9 App. Cas. 117 (J.C.P.C.), at p. 127 App. Cas.), but she does so figuratively, not literally.

[62] Moreover, at least since the writings of A.V. Dicey and Walter Bagehot in the latter half of the 19th century, the Crown as a symbol of the constitutional monarchy is not generally conceived as an arbitrary authority. In fact, "[t]he Queen is only at the head of the dignified [*i.e.*, formal] part of the Constitution. The Prime Minister is at the head of the efficient [*i.e.*, political] part" (W. Bagehot, *The English Constitution* (1st ed. 1867) (New York: Cosimo Classics, 2007), at 296). Together, these institutional embodiments of legal sovereignty are more accurately conceived as representing "the rule of law as a fundamental postulate of our constitutional structure" (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, [1959] S.C.J. No. 1, at p. 142 S.C.R.).

[63] Not only is the Canadian sovereign not foreign, as alleged by the applicants in identifying the Queen's British origin, but the sovereign has come to represent the antithesis of status privilege. For one thing, the Crown is, *inter alia*, the repository of responsibility toward aboriginal peoples (*Guerin v. Canada*, [1984] 2 S.C.R. 335, [1984] S.C.J. No. 45, at p. 376 S.C.R.).

[64] The *Royal Proclamation of 1763*, for example, was described by Laskin J. (as he then was) as a form of "Indian Bill of Rights" (*Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313, [1973] S.C.J. No. 56, 34 D.L.R. (3d) 145, at p. 203 D.L.R.). It was therefore the Crown, or the royal sovereign, that first acknowledged aboriginal rights in Canada. In *Ex parte Indian Association of Alberta*, *supra*, at 916 Q.B., Lord Denning concluded that "the obligations to which the Crown bound itself in the *Royal Proclamation of 1763*" continue apace in "the territories to which they related and [are] binding on the Crown . . . in respect of those territories".

[65] As indicated above, the applicants depose that they find it "repugnant" to swear an oath to a foreign person that represents hierarchical authority and privileged status. It is more plausible, however, that the oath to the Queen is in fact an oath to a domestic institution that represents egalitarian governance and the rule of law.

[66] In fact, the Canadianization of the Crown, along with all the other institutions of constitutional government, "was achieved through legal and political evolution with an adherence to the rule of law and stability. The proclamation of the *Constitution Act, 1982* removed the last vestige of British authority over the Canadian Constitution and re-affirmed Canada's commitment to the protection of its minority, aboriginal, equality, legal and language rights, and fundamental freedoms" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, [1998] S.C.J. No. 61, at para. 46).

[67] In interpreting the oath in a literalist manner, the applicants have adopted an understanding that is the exact opposite of what the sovereign has come to mean in Canadian law. Little wonder, then, that they perceive the oath to represent a maximal rather than a minimal impairment of their rights.

[68] The normative clash that forms the essence of their position is premised on a misunderstanding born of literalism. Once the Queen is understood, in context, as an equality-protecting Canadian institution rather than as an aristocratic English overlord, any impairment of the applicants' freedom of expression is minimal.

d. *Proportionality of the oath's objective to its effects*

[69] As with other cases involving expression in a political context, stacking the citizenship oath up against the rights of those who disagree with it poses a problem that is, once again, "difficult, if not impossible, to measure scientifically" (*Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, [2004] S.C.J. No. 28, at para. 79). The court, however, is entitled not only to consider the evidence in its proper context, but to apply some common sense to the analysis. It is certainly relevant to consider whether, as the applicants argue, the oath mandated by the Act is "so arbitrary and unreasonable that it *detracts* from the value of Canadian citizenship" (*Lavoie v. Canada*, *supra*, at para. 59 (emphasis in original)).

[70] The key to the proportionality test under s. 1, as with the test for arbitrary deprivations of the s. 7 right to life, liberty, and security of the person, is to combine logic with empirically discernible facts — *i.e.*, "to evaluate the issue in the light, not just of common sense or theory, but of the evidence" (*Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, [2005] S.C.J. No. 33, at para. 150). While the legal onus is on the respondent to establish that the legislation falls within reasonable limits, the risk of empirical uncertainty with respect to the s. 1 evidence is, in effect, shared by both parties. See Sujit Choudhry, "So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006), S.C.L.R. 501, at 530.

[71] Accordingly, the government party must provide evidentiary support for its position about the salutary effects of its actions. On the other hand, the challenging party must demonstrate that its position as to the deleterious effects of the state action has a modicum of credibility, or at least makes logical sense (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104, at pp. 884 and 888 S.C.R.).

[72] The applicants are of the view that the oath to the Queen is not only itself an instance of compelled speech but that it will, if taken seriously, forever restrict their freedom to express dissenting views. One of the applicants, Dror Bar-Natan, sums up this viewpoint succinctly in his affidavit, deposing that if he is compelled to take the oath, "I will be bound in allegiance to the monarchy, and unlike born-Canadians, I will be morally bound to support it."

[73] With all due respect, the notion that the citizenship oath represents a restriction on dissenting expression, including any expression of dissent against the Crown itself, is a 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. As Rand J. put it in *R. v. Boucher*, [1951] S.C.R. 265, [1950] S.C.J. No. 41, at p. 288 S.C.R., "[f]reedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life".

[74] Although the applicants correctly perceive the oath as a vow of loyalty, they misconceive the notion of loyalty in Canada. Ironically, they appear to adopt what historians have labeled the "loyalist myth" about the founding of the country, and characterize the citizenship oath in terms reminiscent of the traditional characterization of the country's 18th century "loyalist" settlers. This myth of supposed blind faith in royal authority, and the explosion of that myth, is important to understanding Canadian nationhood; indeed, it reflects "the value system of a society writ metaphorically" (Jo-Ann Fellows, "The Loyalist Myth in Canada" in *Historical Papers*, 1971, Canadian Historical Association 94, at 104).

[75] As historians explain it, the "loyal" half of the continent that received its first constitution, the *Constitution Act, 1791*, 31 Geo. 3, c. 31, in the wake of the American Revolution, and that eventually formed an independent confederation under the *Constitution Act, 1867*, was not founded on uncritical acceptance of Empire or loyalty to the Crown (J.M. Bumsted, *Understanding the Loyalists* (Sackville, NB: Centre for Canadian Studies, Mount Allison University, 1986), at 12). Rather, the loyalists shared with their counterparts to the south the ethos of dissent against authority — albeit democratic rather than revolutionary dissent (Arthur Johnson, *Myths and Facts of the American Revolution* (Toronto: W. Briggs, 1908), at 188).

[76] History teaches that what distinguished those who remained with the Crown was not thoughtless fidelity to the monarch: "[b]oth patriots and loyalists had grievances against the King, George the Third" (Constance MacRae-Buchanan, "American Influence on Canadian Constitutionalism", in J. Ajzenstat, ed., *Canadian Constitutionalism 1791-1991* (Ottawa: Canadian Study of Parliament Group, 1992), at 154). Rather, what distinguished these proto-Canadians from their southern counterparts was their notion of loyal opposition — *i.e.*, the ability to dissent from within the fold (*ibid.*, at 147).

[77] Those living in, and fleeing to, the colonial precursors to Canada remained "loyal" to the concept that loyalty and dissent can live together (Janice Potter, "The Lost Alternative: the Loyalists in the American Revolution" (1976), 27 Hum. Assoc. Rev. 89). The earliest Canadians, it turns out, "looked . . . to a pluralistic

society and produced the first significant justification of partisanship in American political thought" (MacRae-Buchanan, *supra*, at 154). As one historical study puts it, the "loyalists" who became Canadians were (and one could say still are) "cursed with an open mind" (Wallace Brown and Hereward Senior, *Victorious in Defeat: the Loyalists in Canada* (Toronto: Methuen, 1984), at 15).

[78] One of the applicants, Simone Topey, deposes that if she were to take the oath of Canadian citizenship she "would feel bound by that oath to refrain from participating in such [anti-monarchist] political movements". That belief is doubtless sincere, but it is premised on a mistake. The nation was born in debate rather than revolution, reflecting a commitment to engagement even while disagreeing with each other and with the governing Crown (Ged Martin, "Introduction to the 2006 Edition" in P.B. Waite, ed., *Confederation Debates in the Province of Canada, 1865*, 2nd ed. (Montreal: McGill-Queen's University Press, 2006), at vii, ix).

[79] It is in this light — a heritage of debate and dissent — that one can best understand Canada's tradition of permitting all viewpoints, including advocacy directly contrary to the existing constitutional order. Thus, for example, not 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, [1981] S.C.J. No. 58; *Reference re Secession of Quebec*, *supra*). 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).

[80] I accept that the applicants' beliefs are subjectively sincere, and so the deleterious effect of the oath is not nil (*Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, [2004] S.C.J. No. 46, at para. 68). Given that these beliefs about the oath to the Queen reflect a fundamental misapprehension, however, it is difficult to attribute them great objective weight. On the other hand, the salutary effect of an expression of fidelity to a head of state symbolizing the rule of law, equality and freedom to dissent is substantial.

[81] In requiring a vow of commitment to national values at the moment of citizenship, the Act, as indicated earlier in these reasons, places a limit on free speech; but it does so in a way

that is appropriate to the free and democratic society that is Canada. Indeed, the Act, with its mandatory oath, restricts a *Charter* right in a way "that reflects the very purpose for which rights were entrenched" (Lorraine E. Weinrib, "The Supreme Court of Canada and Section 1 of the Charter" (1988), 10 S.C.L.R. 469, at 494). As a statement that embraces constitutional values, it is a rights-enhancing measure that is justified under s. 1 of the *Charter*.

[82] Accordingly, notwithstanding that it is a *prima facie* violation of s. 2(*b*) of the *Charter*, the oath to the Queen is constitutionally valid.

V. *Sections 2(a) and 15(1) of the Charter*

[83] Unlike the challenge under s. 2(*b*) of the *Charter*, the applicants have not established that the citizenship oath rises to the level of a *prima facie* infringement of either s. 2(*a*) (freedom of religion) or s. 15(1) (equality rights).

[84] In evaluating a claim of freedom of religion, it is important to keep in mind that, "both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation" (*R. v. Big M Drug Mart Ltd.*, *supra*, at para. 80). It is equally important to recall that "[f]reedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices" (*ibid*., at para. 95).

[85] No one contends, and it could not seriously be argued, that the citizenship oath has a religious purpose. While the applicants complain that there are religious limitations on who can become the monarch (the *Act of Settlement* still prohibits Roman Catholics from ascending to the throne), the purpose of the oath in Canada is the strictly secular one of articulating a commitment to the identity and values of the country.

[86] The applicant Simone Topey however, deposes that the effect of the oath is to infringe her religious freedom by forcing a choice between citizenship and making a vow that is contrary to her faith. To be clear, there is no contention that the Act, in mandating the oath, singles out any one applicant or is aimed at any one religion; rather, the point is that its universal application to all citizenship candidates has a detrimental impact on Ms. Topey.

[87] The Supreme Court of Canada addressed this type of claim in *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, [2009] S.C.J. No. 37, where members of a minority religious community claimed that the province of Alberta's requirement of a photo on a drivers' licence violated a tenet of

their faith. In a description that could be equally apt in the present case, McLachlin C.J.C. stated, at para. 36: "Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs. . .".

[88] In *Hutterian Brethren*, the government conceded that its legislation breached the challengers' religious freedom for the purpose of enhancing public safety. The simple solution articulated by the court, at para. 96, was for those effected by the impugned law to "hire people with drivers' licences for this purpose, or to arrange third party transport to town for necessary services, like visits to the doctor". Since the case was seen as pitting the utility and security of the many against the disutility and inconvenience of the few, the court readily concluded that the licence requirement constituted a proper balance that was justifiable under s. 1.

[89] The citizenship oath has much in common with the drivers' licence photograph in that it is equally a universal requirement of the state applied to applicants without regard or reference to religion. The oath, however, presents an even stronger case for upholding the state action since the challengers' s. 2(*a*) objection — the deleterious effect on a sincerely held religious belief — runs counter to the very object of holding up constitutional values for new citizens. The freedom of religion challenge here illustrates the observation by Abella J. in *Bruker v. Markovitz*, [2007] 3 S.C.R. 607, [2007] S.C.J. No. 54, at para. 2, that "[n]ot all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary".

[90] To the extent that the oath to the Queen reflects a commitment not to inequality but to equality, and not to arbitrary authority but to the rule of law, it is not only a unifying statement but a rights-enhancing one. In taking the position that the mere recitation of the oath is an infringement of her subjectively held religious belief, Ms. Topey runs up against the settled notion that the rights of some cannot be a platform from which to strike down the rights of others.

[91] The Supreme Court of Canada embraced this notion in addressing the *Charter* arguments in *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, [2004] S.C.J. No. 75. The court stated emphatically, at para. 46, that "[t]he 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". Likewise, an oath of citizenship that references a symbol of national values enriches the society as a whole, and does not undermine the rights and freedoms that the society and its head of state foster and represent.

[92] Accordingly, while the s. 2(*a*) challenge here bears resemblance to the s. 2(*a*) challenge in *Hutterian Brethren*, the analysis need not proceed to s. 1. Rather, it suffices to say that while the subjective religious beliefs of the applicants (or at least one of them) may be effected, the court could not order an accommodation of Ms. Topey's or any of the other applicants' religious particularity in the face of the secular universality of the Act and the oath. The applicants' desired remedy would itself undermine the values enshrined in s. 2(*a*) of the *Charter*.

[93] An accommodation of religion such as that sought here — taking account of Ms. Topey's personal religious beliefs in the context of a non-religious citizenship procedure — would be analogous to a public school board accommodating a religious group by de-secularizing its curriculum. In other words, it would amount to a form of accommodation that the Supreme Court has said is impermissible (*L. (S.) v. Commission scolaire des Chênes*, [2012] 1 S.C.R. 235, [2012] S.C.J. No. 7). After all, it stands to reason that "state sponsorship of [or support for] one religious tradition amounts to discrimination against others" (*ibid*., at para. 17).

[94] Accordingly, the Act does not amount to a *prima facie* violation of freedom of religion in the way that it does for freedom of expression. As Deschamps J. put it in *L. (S.)*, at para. 23, "it is not enough for a person to say that his or her rights have been infringed". Freedom of religion under s. 2(*a*) of the *Charter* has both a subjective and an objective, societal component, both of which must be shown to be infringed before moving on to s. 1. The applicants have not satisfied that test.

[95] Turning to the s. 15(1) claim raised by the applicants, two of the three of them (Mr. McAteer and Mr. Bar-Natan) identify the ground of discrimination against them as one of political belief. Mr. McAteer states that he believes in republicanism, while Mr. Bar-Natan states that he believes in a non-hierarchical society. Ms. Topey, as noted above, claims interference with freedom of religion; and although she bases her argument more on s. 2(*a*) than s. 15(1), she raised the issue in a way that is closely related to a claim of discrimination on religious grounds. Further, Cullity J. made it clear in *Roach*, *supra*, at para. 17, that an opposition to the entrenchment of "racial hierarchies", and thus to racial discrimination, was a significant part of Charles Roach's original claim in this case.

[96] Race and religion are specifically enumerated grounds of prohibited discrimination under s. 15(1) of the *Charter*. Furthermore, the Supreme Court of Canada reasoned in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, [1999] S.C.J. No. 24, at p. 219 S.C.R., that a ground of discrimination is an analogous *Charter* ground if it is based on characteristics that are immutable, or changeable only at an unacceptably high cost to personal identity. Recent case law has suggested that s. 15(1) of the *Charter* can be invoked "to protect against discriminatory treatment of a person on account of having a political belief" (*Condon v. Prince Edward Island*, [2002] P.E.I.J. No. 56, 214 Nfld. & P.E.I.R. 244 (S.C.), at para. 49, affd on other grounds [2006] P.E.I.J. No. 4, 253 Nfld. & P.E.I.R. 265 (C.A.)).

[97] Whether the applicants' claim is based on racial discrimination, religious discrimination or the somewhat more novel ground of political belief discrimination, there is sufficient evidence in the record to consider a s. 15(1) challenge alleging that the oath to the Queen violates equality rights.

[98] The claims of discrimination on the grounds of religion and race are raised as purely subjective matters by Ms. Topey (and formerly by Mr. Roach). There is no discriminatory purpose in requiring the oath, and there is likewise no objective evidence that it has a discriminatory effect — that is, no statistical evidence or demographic data to establish that the requirement of an oath to the Queen has a disparate impact on religious or racial minorities. Absent evidence of discriminatory purpose or impact, there is no basis on which a *Charter* challenge based on unequal treatment can succeed (*Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, [2001] S.C.J. No. 32, at para. 35).

[99] As for the claim of political belief discrimination raised by Mr. McAteer and Mr. Bar-Natan, this claim is equally unsubstantiated in the evidentiary record. These two applicants no doubt feel that the impact of the citizenship oath is discriminatory toward those with their republican and anti-hierarchical beliefs, but there is no evidence that any particular political movement or group has been adversely impacted by these measures. Indeed, if anything, the evidence in Canada, where there are many dissenting political groupings and movements — including, as indicated above, a thriving anti-monarchist movement — is to the contrary.

[100] What the claim of political belief discrimination really reduces to is a claim that the oath discriminates against those who object to the oath. It is self-evident that a claim under

s. 15(1) cannot be so finely tuned to the very measure being challenged lest every enactment be labeled discriminatory.

[101] That said, the applicants' argument here is closely allied with their overall claim that they are discriminated against on the grounds of their non-citizenship status. They submit that since persons who are Canadian citizens by birth do not need to take an oath to the Queen, applicants for citizenship by naturalization are inherently discriminated against by requiring them to take an oath. Those who, like the applicants, hold political beliefs that oppose the content of the oath, are the ones who feel this discrimination the most.

[102] The applicants' claim of discrimination on the ground of (non-)citizenship, however, attempts to prove too much. While it is impermissible for government to distinguish between citizens and non-citizens in certain other contexts that are not intrinsically related to citizenship (*Andrews*, *supra*), the very concept of citizenship is premised on there being a legal distinction between citizens and others. "Citizenship", according to Rand J., and just about every other jurist who has written about the issue, "is membership in a state" (*Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, [1951] S.C.J. No. 31, at p. 918 S.C.R.). Needless to say, the very existence of a category of membership also signifies the existence of non-members.

[103] For this reason, the courts in Canada have perceived citizenship to be a status that is "determined by Parliament under subsection 91(25) of the British North America Act, 1867 . . . and is a political prerogative derived from the sovereignty of the nation" (*Lavoie* (F.C.A.), *supra*, at para. 11). 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 citizenship would disappear. Accordingly, "one cannot even speak of the possibility of a breach of the equality principle when comparing the privileges of citizenship to those accorded to immigrants"(*ibid.*, at para. 9).

[104] Citizenship, as Linden J.A. indicated in *Lavoie*, at para. 125, "is a cherished privilege, not for the pecuniary benefits which accrue to its holders, but for the bonds that it creates". Likewise, when *Lavoie* reached the Supreme Court, the plurality judgment by Bastarache J. 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.

[105] Bonds by definition separate people within from people without. This fact has been the subject of critique by political

theorists and legal scholars, who have pointed out that the political and material advantages given to birthright citizens raises for some a "moral disdain against acquisition and transfer rules that systemically exclude prospective members on the basis of ascriptive criteria" (Ayelet Shachar and Ran Hirschl, "Citizenship as Inherited Property" (2007), 35 Political Theory 253, at 255). It is this sentiment that is reflected in, for example, Mr. Bar-Natan's testimony that the oath is a form of initiation ritual that is "tantamount to hazing".

[106] Nevertheless, one simply cannot have citizens without non-citizens, or members of the state without non-members; and since the non-citizens define the citizens, their very status cannot be discriminatory within the meaning of s. 15(1) of the *Charter*. As Arbour J. said in her separate concurrence in *Lavoie*, at para. 110: "It is the essence of the concept of citizenship that it distinguishes between citizens and non-citizens and treats them differently . . . Were the differences . . . eliminated so that all rights available to citizens were also immediately and equally available to non-citizens, the notion of citizenship would become meaningless."

[107] Thus, in challenging the disparate impact of the oath on non-citizens as opposed to birthright citizens, the applicants in effect challenge citizenship itself. In doing so, they impugn the unimpugnable. In Canada, the courts have been directed to "accord the state a . . . wide latitude in determining some of the special rights of citizenship" (*Lavoie* (S.C.C., *per* Arbour J.), at para. 116). One such right, or determining factor, is that Parliament can determine the admission criteria such as an oath without being subject to equality rights analysis on the grounds of the challengers' citizenship itself.

[108] In enacting the oath, Parliament has sought "to enhance the meaning of citizenship as a unifying bond for Canadians" (*Lavoie* (S.C.C., *per* Bastarache J.), at para. 57). As with the freedom of religion claim, the applicants cannot use s. 15(1) as a means of undermining the equality and unity of others. To put it another way, "[t]he mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another" (*Reference re Same-Sex Marriage*, *supra*, at para. 46).

[109] Accordingly, there is no violation of either ss. 2(*a*) or 15(1) of the *Charter* in requiring new citizens to take an oath to the Queen.

VI. *Disposition*

[110] The application is dismissed.

[111] The citizenship oath to the Queen, as set out in the Act, infringes s. 2(*b*) of the *Charter* as a form of compelled expression, but is saved by s. 1 as being a reasonable limit on the right of expression that is justifiable in a free and democratic society.

[112] The oath does not violate s. 2(*a*) (freedom of religion) or s. 15(1) (equality rights) of the *Charter*.

[113] The parties have agreed not to seek costs against each other, and none are ordered.

Application dismissed.

Abarca et al. v. Vargas et al.; The Wawanesa Mutual Life Insurance Company, Third Party

[Indexed as: Abarca v. Vargas]

2013 ONSC 6499

Superior Court of Justice, Matheson J. October 18, 2013

Actions — Abuse of process — Plaintiffs bringing ex parte motion under Rule 26 in Newmarket action to add insurer as defendant — Motion judge ruling that statutory limitation period had expired (subject to discoverability) and directing that motion be brought on notice to parties and insurer — Plaintiffs instead commencing action in Toronto against same defendants and insurer — Insurer moving successfully to strike paragraphs in Toronto statement of claim which asserted claims against it — Plaintiffs attempting to circumvent express procedural requirements of Rule 26 — Toronto action an abuse of process — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 26.

The plaintiffs in a Newmarket action brought an *ex parte* motion pursuant to Rule 26 of the Rules of Civil Procedure to add two insurers, Wawanesa and Economical, as defendants. The motion judge found that the statutory limitation period had expired, subject to discoverability, and directed the plaintiffs to bring the motion in open court on notice to the parties and the proposed defendants. Instead, the plaintiffs commenced an action in Toronto against the same defendants as well as Wawanesa and Economical. Economical brought a motion to dismiss the Toronto action or, alternatively, to strike out those paragraphs of the statement of claim that asserted a claim against it.

Held, the motion should be granted.

By commencing the new action, the plaintiffs introduced more inefficiency and complications. Counsel for the plaintiffs conceded that the two actions would have to be tried together and that at some point the plaintiffs would have to pick a region and take steps to transfer the other action to that region. In commencing the Toronto action instead of complying with the motion judge's direction, the plaintiffs effectively circumvented the express procedural requirements of Rule 26 and the court's jurisdiction under Rule 26. The action was an abuse of process. However, not all of the defendants were moving for relief against the Toronto action. Accordingly, it was appropriate to strike out

Court File No. C57775

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE JUSTICE WEILER	)	WEDNESDAY, THE 13th DAY
THE HONOURABLE JUSTICE LAUWERS	)	
THE HONOURABLE JUSTICE PARDU	)	OF AUGUST, 2014

B E T W E E N:

MICHAEL McATEER, SIMONE E.A. TOPEY AND DROR BAR-NATAN

Applicants
(Appellants/Cross-Respondents)

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent
(Respondent/Cross-Appellant)

ORDER

THIS APPEAL, brought by the applicants (appellants/cross-respondents) for an order setting aside the judgment of the Honourable Justice E.M. Morgan of the Superior Court of Justice dated September 20, 2013 (the "judgment") and for a declaration that requiring applicants for Canadian citizenship to take an oath or affirmation that contains the phrase "I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors" contravenes the rights enshrined in sections 2(a), 2(b) and 15(1) of the *Canadian Charter of Rights and Freedoms* and that those contraventions are not saved by section 1 of the *Charter*, and the CROSS-APPEAL brought by the respondent (respondent/cross-appellant) for an order setting aside the part of the judgment holding that the impugned portion of the citizenship oath violates s. 2(b) of the *Charter*, were heard on April 8, 2014 at Osgoode

Hall, 130 Queen Street West, Toronto, Ontario, with the decision having been reserved until this day.

exhibit book, transcript

ON READING the appeal book and compendium, facta, and brief of authorities of the applicants (appellants/cross-respondents), and the compendium, factum, and brief of authorities of the respondent (respondent/cross-appellant), and upon hearing submissions of counsel for the parties,

1. THIS COURT ORDERS that the appeal is dismissed.

2. AND THIS COURT FURTHER ORDERS that the cross-appeal is allowed.

3. AND THIS COURT FURTHER ORDERS that there shall be no order as to costs.

Registrar of the Court of Appeal

ENTERED AT / INSCRIPT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

SEP 24 2014

PER / PAR: JR

REPORTS OF CASES

DETERMINED IN

ONTARIO COURTS

McAteer et al. v. The Attorney General of Canada

[Indexed as: McAteer v. Canada (Attorney General)]

2014 ONCA 578

Court of Appeal for Ontario, Weiler, Lauwers and Pardu JJ.A.
August 13, 2014

Charter of Rights and Freedoms — Equality rights — Requirement to swear oath of allegiance to Queen in order to become Canadian citizen not violating s. 15(1) of Charter — Canadian Charter of Rights and Freedoms, s. 15(1).

Charter of Rights and Freedoms — Freedom of conscience and religion — Requirement to swear oath of allegiance to Queen in order to become Canadian citizen not violating s. 2(a) of Charter — Canadian Charter of Rights and Freedoms, s. 2(a).

Charter of Rights and Freedoms — Freedom of expression — Requirement to swear oath of allegiance to Queen in order to become Canadian citizen not violating s. 2(b) of Charter — Canadian Charter of Rights and Freedoms, ss. 1, 2(b).

The applicants were permanent residents of Canada who wished to become Canadian citizens. They challenged the constitutionality of the requirement in the *Citizenship Act*, R.S.C. 1985, c. C-29 that they swear an oath of allegiance to the Queen, arguing that it violated their rights under ss. 2(*a*), 2(*b*) and 15(1) of the *Canadian Charter of Rights and Freedoms*. M claimed that swearing an oath to the Queen would betray his republican heritage and impede his activities in support of ending the monarchy in Canada. T was a Rastafarian, and argued that it would violate her religious beliefs to take an oath to the "head of Babylon". B claimed that swearing an oath to the Queen would violate his belief in the equality of all persons. The application judge found that the applicants' freedom of religion under s. 2(*a*) of the *Charter* and their equality rights under s. 15(1) of the *Charter* were not violated. He found that their right to freedom of expression was violated but that the violation was justified under s. 1 of the *Charter*. The appellants appealed the dismissal of their application, and the respondent cross-appealed the finding that the oath violated the applicants' right to freedom of expression.

Held, the appeal should be dismissed; the cross-appeal should be allowed.

The applicants' arguments were based on a literal "plain meaning" interpretation of the oath to the Queen in her personal capacity. That interpretation was incorrect because it was inconsistent with the history, purpose and intention behind the oath. The reference to the Queen in the citizenship oath is not to the

Queen as an individual but to the Queen as a symbol of our form of government and the unwritten constitutional principle of democracy.

The requirement to recite an oath to the Queen of Canada in order to become a Canadian citizen did not violate the applicants' right to freedom of expression. While the oath is expression, its purpose is not to control expression but rather to inquire into prospective citizens' willingness to accept the rights and responsibilities of citizenship. Accepting that there was an effect on the applicants' freedom of expression, it did not warrant constitutional disapprobation. If there was a violation of s. 2(*b*) of the *Charter*, the violation was justified under s. 1 of the *Charter*. The legislative objective of expressing commitment to Canada was pressing and substantial, and there was a rational connection between the oath to the Queen and that objective. When the reference to the Queen in the oath was properly understood, any impairment of the applicants' freedom of expression was minimal. The salutary effect of the oath was substantial, and outweighed its deleterious effects.

The oath requirement did not violate the applicants' freedom of conscience and religion as the oath is strictly secular. Purposively interpreted, the oath exemplifies the very principle s. 2(*a*) of the *Charter* was intended to foster.

The oath requirement did not violate the applicants' equality rights under s. 15(1) of the *Charter*. The applicants' claim of adverse effect was based on their misconception of the meaning of the oath. Their incorrect understanding of the meaning of the oath could not be used to ground a finding of unconstitutionality.

R. v. Khawaja, [2012] 3 S.C.R. 555, [2012] S.C.J. No. 69, 2012 SCC 69, 301 O.A.C. 200, 290 C.C.C. (3d) 361, 437 N.R. 42, 97 C.R. (6th) 223, 2012EXP-4411, J.E. 2012-2337, EYB 2012-215330, 356 D.L.R. (4th) 1, 104 W.C.B. (2d) 900; *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 16 W.C.B. 73; *Roach v. Canada (Minister of State for Multiculturalism and Culture)*, [1994] F.C.J. No. 33, [1994] 2 F.C. 406, 113 D.L.R. (4th) 67, 164 N.R. 370, 23 Imm. L.R. (2d) 1, 46 A.C.W.S. (3d) 387 (C.A.), affg [1992] F.C.J. No. 32, [1992] 2 F.C. 173, 53 F.T.R. 241, 88 D.L.R. (4th) 225, 16 Imm. L.R. (2d) 206, 31 A.C.W.S. (3d) 533 (T.D.) [Leave to appeal to S.C.C. refused (1994), 113 D.L.R. (4th) 67*n*], **apld**

Other cases referred to

Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567, [2009] S.C.J. No. 37, 2009 SCC 37, 310 D.L.R. (4th) 193, [2009] 9 W.W.R. 189, J.E. 2009-1407, EYB 2009-161892, 390 N.R. 202, 9 Alta. L.R. (5th) 1, 81 M.V.R. (5th) 1, 460 A.R. 1, 179 A.C.W.S. (3d) 327; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, REJB 2002-30904, 113 A.C.W.S. (3d) 52; *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607, [2007] S.C.J. No. 54, 2007 SCC 54, J.E. 2008-68, 52 C.C.L.T. (3d) 1, 46 R.F.L. (6th) 1, 370 N.R. 1, 288 D.L.R. (4th) 257, EYB 2007-127332, 166 C.R.R. (2d) 36, 162 A.C.W.S. (3d) 940; *Canada 3000 Inc. (Re); Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24, 2006 SCC 24, 269 D.L.R. (4th) 79, 349 N.R. 1, J.E. 2006-1215, 212 O.A.C. 338, 20 C.B.R. (5th) 1, 10 P.P.S.A.C. (3d) 66, 148 A.C.W.S. (3d) 182; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, [2005] S.C.J. No. 28, 2005 SCC 30, 252 D.L.R. (4th) 529, 333 N.R. 314, J.E. 2005-976, 28 Admin. L.R. (4th) 1, 41 C.C.E.L. (3d) 1, [2005] CLLC ¶230-016, 135 C.R.R. (2d) 189, 139 A.C.W.S. (3d) 529; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104, 120 D.L.R. (4th) 12, 175 N.R. 1, J.E. 95-30, 76 O.A.C.

81, 94 C.C.C. (3d) 289, 34 C.R. (4th) 269, 25 C.R.R. (2d) 1, 51 A.C.W.S. (3d) 1045, 25 W.C.B. (2d) 304; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, [2004] S.C.J. No. 28, 2004 SCC 33, 239 D.L.R. (4th) 193, 320 N.R. 49, [2004] 8 W.W.R. 1, J.E. 2004-1104, 27 Alta. L.R. (4th) 1, 348 A.R. 201, 119 C.R.R. (2d) 84, 130 A.C.W.S. (3d) 746; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36, 58 D.L.R. (4th) 577, 94 N.R. 167, J.E. 89-772, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 15 A.C.W.S. (3d) 121; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, [1991] S.C.J. No. 52, 81 D.L.R. (4th) 545, 126 N.R. 161, J.E. 91-1122, 48 O.A.C. 241, 91 CLLC ¶14,029 at 12257, 4 C.R.R. (2d) 193, 27 A.C.W.S. (3d) 795; *Lavoie v. Canada*, [2002] 1 S.C.R. 769, [2002] S.C.J. No. 24, 2002 SCC 23, 210 D.L.R. (4th) 193, 284 N.R. 1, J.E. 2002-494, 15 C.C.E.L. (3d) 159, [2002] CLLC ¶210-020, 92 C.R.R. (2d) 1, 22 Imm. L.R. (3d) 182, D.T.E. 2002T-266, REJB 2002-28412, 112 A.C.W.S. (3d) 254, affg [1999] F.C.J. No. 754, [2000] 1 F.C. 3, 174 D.L.R. (4th) 588, 64 C.R.R. (2d) 189, 88 A.C.W.S. (3d) 991 (C.A.); *O'Donohue v. Canada*, [2005] O.J. No. 965, 137 A.C.W.S. (3d) 1131 (C.A.), affg [2003] O.J. No. 2764, [2003] O.T.C. 623, 109 C.R.R. (2d) 1, 124 A.C.W.S. (3d) 63 (S.C.J.); *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Assn. of Alberta*, [1982] Q.B. 892, [1982] 2 All E.R. 118, [1982] 2 W.L.R. 641 (Eng. C.A.); *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, [2001] S.C.J. No. 55, 2001 SCC 56, 203 D.L.R. (4th) 513, 275 N.R. 201, J.E. 2001-1823, 206 Nfld. & P.E.I.R. 304, 157 C.C.C. (3d) 353, 45 C.R. (5th) 1, REJB 2001-25833, 51 W.C.B. (2d) 180; *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, [2004] S.C.J. No. 75, 2004 SCC 79, 246 D.L.R. (4th) 193, 328 N.R. 1, J.E. 2005-42, 125 C.R.R. (2d) 122, 12 R.F.L. (6th) 153, 135 A.C.W.S. (3d) 612; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, [1998] S.C.J. No. 61, 161 D.L.R. (4th) 385, 228 N.R. 203, J.E. 98-1716, 55 C.R.R. (2d) 1, 81 A.C.W.S. (3d) 798; *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, [2004] S.C.J. No. 75, 2004 SCC 79, 246 D.L.R. (4th) 193, 328 N.R. 1, J.E. 2005-42, 125 C.R.R. (2d) 122, 12 R.F.L. (6th) 153, 135 A.C.W.S. (3d) 612; *Reference re Supreme Court Act, ss. 5 and 6*, [2014] 1 S.C.R. 433, [2014] S.C.J. No. 21, 2014 SCC 21, 368 D.L.R. (4th) 577, 455 N.R. 202, 2014EXP-934, J.E. 2014-505, EYB 2014-234848; *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, [1986] S.C.J. No. 75, 33 D.L.R. (4th) 174, 71 N.R. 83, [1987] 1 W.W.R. 577, J.E. 87-81, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 87 CLLC ¶14,002 at 12037, 25 C.R.R. 321, 2 A.C.W.S. (3d) 243; *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, J.E. 98-201, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC ¶210-006, D.T.E. 98T-154, 76 A.C.W.S. (3d) 894; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, [1995] S.C.J. No. 68, 127 D.L.R. (4th) 1, 187 N.R. 1, J.E. 95-1766, 100 C.C.C. (3d) 449, 62 C.P.R. (3d) 417, 31 C.R.R. (2d) 189, 57 A.C.W.S. (3d) 578, 28 W.C.B. (2d) 216; *Roach v. Canada (Minister of State, Multiculturalism and Citizenship)*, [2008] O.J. No. 584, 2008 ONCA 124, 163 A.C.W.S. (3d) 945, affg (2007), 86 O.R. (3d) 101, [2007] O.J. No. 1956, 155 C.R.R. (2d) 357, 157 A.C.W.S. (3d) 525 (S.C.J.) [Leave to appeal to Div. Ct. dismissed [2007] O.J. No. 3897, 230 O.A.C. 83, 164 C.R.R. (2d) 102, 161 A.C.W.S. (3d) 61 (Div. Ct.)]; *Roach v. Canada (Attorney General)*, [2009] O.J. No. 737, 74 C.P.C. (6th) 22, 185 C.R.R. (2d) 215 (S.C.J.); *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, [1989] S.C.J. No. 45, 59 D.L.R. (4th) 416, 93 N.R. 183, J.E. 89-775, 26 C.C.E.L. 85, 89 CLLC ¶14,031 at 12247, 40 C.R.R. 100, 15 A.C.W.S. (3d) 132; *Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General)* (1998), 38 O.R. (3d) 735, [1998] 1 S.C.R. 877, [1998] S.C.J. No. 44, 159 D.L.R. (4th) 385, 226 N.R. 1, J.E. 98-1224, 109 O.A.C. 201, 51 C.R.R. (2d) 189, 79 A.C.W.S. (3d) 921; *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, 2014 SCC 44, 2014EXP-2030, J.E. 2014-1148, [2014] 7 W.W.R. 633, 459 N.R. 287, 241 A.C.W.S. (3d) 2

Statutes referred to

Act of Settlement, 1701, 12 & 13 Will. 3, c. 2
An Act for the Naturalization of Aliens, 1847, 10 & 11 Vict., c. 83
Canadian Charter of Rights and Freedoms, ss. 1, 2(*a*), (*b*), (*c*), (*d*), 12, 15, (1), 27
Citizenship Act, R.S.C. 1985, c. C-29, ss. 3(1)(*c*), 5(1)(*e*), 12(3), 24, 32(2), Schedule
Class Proceedings Act, 1992, S.O. 1992, c. 6 [as am.]
Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63
Constitution Act, 1867, Preamble, ss. 9, 12, 17, 91, 91(25), 92, 128, 129, Sch. 5
Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11
Constitutional Act, 1791, 31 Geo. III, c. 31
Quebec Act, 1774, 14 Geo. III, c. 83
Statute of Westminster, 1931, 22 Geo. V, c. 4
Supreme Court Act, R.S.C. 1985, c. S-26, s. 6
Union Act, 1840, 3 & 4 Vict., c. 35

Rules and regulations referred to

Citizenship Regulations, SOR/93-246, s. 15(2)(b), (c)
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 14.05(3)(g.1)

Treaties and conventions referred to

Treaty of Paris (1763)

Authorities referred to

Côté, Pierre-André, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 2000)
Dicey, A.V., *Introduction to the Study of the Law of the Constitution* (7th ed.) (London: MacMillan & Co. Ltd., 1908)
Hogg, Peter W., *Constitutional Law of Canada*, looseleaf (Scarborough, Ont.: Carswell, 2007)
Holdsworth, William Searle, *A History of English Law* (London: Methuen & Co. Ltd., 1909)
Laskin, Bora, *The British Tradition In Canadian Law* (London: Stevens & Sons, 1969)
MacRae-Buchanan, Constance, "American Influence on Canadian Constitutionalism", in Ajzenstat, Janet, ed., *Canadian Constitutionalism: 1791-1991* (Ottawa: Canadian Study of Parliament Group, 1992)
Marleau, Robert, and Camille Montpetit, eds., *House of Commons Procedure and Practice* (Montreal: Chenelière/McGraw-Hill, 2000)
Naturalization Commission, *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)
Sharpe, Robert J., and Kent Roach, *The Charter of Rights and Freedoms,* 5th ed. (Toronto: Irwin Law, 2005)
Smith, David E., *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995 and 2013)
Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008)

APPEAL AND CROSS-APPEAL from the judgment of E.M. Morgan J. (2013), 117 O.R. (3d) 353, [2013] O.J. No. 4195, 2013 ONSC 5895 (S.C.J.)

Peter Rosenthal, *Selwyn Pieters* and *Reni Chang*, for appellants.
Kristina Dragaitis and *Sharon Guthrie*, for respondent.

The judgment of the court was delivered by

WEILER J.A.: —

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 *Canadian Charter of Rights and Freedoms*. They submit that the government cannot justify any such violation as a reasonable limit 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*.

---

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

[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, [1989] S.C.J. No. 36, 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] F.C.J. No. 32, [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]

---

[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.

[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] F.C.J. No. 33, [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. (1994), 113 D.L.R. (4th) 67*n*.

[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 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 infringed on freedom of expression or freedom of religion. He concluded, at pp. 415-16 F.C.:

> 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 *Charter* 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 [(2007), 86 O.R. (3d) 101, [2007] O.J. No. 1956 (S.C.J.)]. 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 15 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: [2007] O.J. No. 3897, 230 O.A.C. 83 (Div. Ct.). An appeal to this court was dismissed: [2008] O.J. No. 584, 2008 ONCA 124.

[19] In 2009, Mr. Roach moved to certify the class proceeding: *Roach v. Canada (Attorney General)*, [2009] O.J. No. 737, 74 C.P.C. (6th) 22 (S.C.J.). 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, Ont.: 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 & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21; *Canada 3000 Inc. (Re); Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24, 2006 SCC 24, at para. 36; *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, 2014 SCC 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] 1 S.C.R. 433, [2014] S.C.J. No. 21, 2014 SCC 21, it did so because the majority's opinion was that the underlying purpose of s. 6 [of the *Supreme Court Act*, R.S.C. 1985, c. S-26] 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, Ont.: 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* (Ottawa: Canadian Study of Parliament Group, 1992), 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, 1791* 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 Sch. 5 of that Act before taking his or her seat. The oath prescribed in Sch. 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, "[t]he 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, [1998] S.C.J. No. 61, 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 [[1994] F.C.J. No. 33, [1994] 2 F.C. 406 (C.A.) ("*Roach*")], indicated, at p. 416 F.C., 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. 117-19.

[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

---

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 and 2013), the author argues there is a growing separation between the Crown and the monarchy.

authority pursuant to ss. 9 and 12 of the *Constitution Act, 1867*. Third, the Queen of Canada is the personification of the State, *i.e.*, with respect 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 Assn. of Alberta*, [1982] Q.B. 892, [1982] 2 All E.R. 118 (Eng. C.A.), at p. 917 Q.B., *per* Lord Denning.

[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

---

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*, looseleaf (Scarborough, Ont.: Carswell, 2007), consulted on July 18, 2014, 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.

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 F.C.:

> 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)

. . . . .

> As I stated in *Benner v. Canada (Secretary of State)*, [1994] 1 F.C. 250 (C.A.), at page 281:
>
> > 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] 2 S.C.R. 867, [2001] S.C.J. No. 55, 2001 SCC 56, at para. 52; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 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 Sch. 5; Robert Marleau and Camille Montpetit, eds., *House of Commons Procedure and Practice* (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 Act*s (1867 to 1975), now the *Constitution Acts*: see *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, [2005] S.C.J. No. 28, 2005 SCC 30, 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 and 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] 3 S.C.R. 555, [2012] S.C.J. No. 69, 2012 SCC 69, McLachlin C.J.C. held, at para. 82:

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

[64] The words of McLachlin C.J.C. 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, [1991] S.C.J. No. 52, at p. 267 S.C.R.

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, [1986] S.C.J. No. 75, at p. 583 S.C.R. 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 "point unequivocally to a purpose which, far from violating the *Charter*, flows from it": *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, [2004] S.C.J. No. 75, 2004 SCC 79, 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 S.C.R., 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, [1989] S.C.J. No. 45. These factors are important because, as Wilson J. noted in *Lavigne*, at pp. 279-80 S.C.R.:

> 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.C. 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 misapprehension of Canadian constitutionalism and Canadian history. Differences of opinion freely expressed are the hallmarks of

---

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.

> 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*, [1998] 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.C. 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, s. 15(2)(*b*) and (*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, [1986] S.C.J. No. 7.

[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] 2 S.C.R. 567, [2009] S.C.J. No. 37, 2009 SCC 37, 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 S.C.R.

[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, [1995] S.C.J. No. 68, at para. 160; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, [2004] S.C.J. No. 28, 2004 SCC 33, 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. (c.o.b. Globe and Mail) v. Canada (Attorney General)* (1998), 38 O.R. (3d) 735, [1998] 1 S.C.R. 877, [1998] S.C.J. No. 44, 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 Corp.*, [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104, at p. 884 S.C.R. 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 F.C. 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. Canada*, [2003] O.J. No. 2764, [2003] O.T.C. 623 (S.C.J.), affd [2005] O.J. No. 965, 137 A.C.W.S. (3d) 1131 (C.A.). In *O'Donohue*, the

prohibition on Catholic monarchs found in the *Act of Settlement, 1701*, 12 & 13 Will. 3, 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] 3 S.C.R. 607, [2007] S.C.J. No. 54, 2007 SCC 54, 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 "[t]he 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 [at para. 90] 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*, [1999] F.C.J. No. 754, [2000] 1 F.C. 3 (C.A.), at para. 11, affd [2002] 1 S.C.R. 769, [2002] S.C.J. No. 24, 2002 SCC 23, and held, at para. 103 of his reasons, that "[i]f an immigrant and a citizen were required to be treated equally within the meaning of s. 15(1) of the *Charter*, the concept of citizenship 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 rights 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. 119-20, 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 and 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.

Appeal dismissed; cross-appeal allowed.

MEMORANDUM OF ARGUMENT OF THE APPLICANTS

PART I : STATEMENT OF FACTS

A. Test Case: when is it constitutional for the government to require a pledge or an oath?

1. The court of appeal ruled that the requirement to pledge allegiance and be faithful to Queen Elizabeth the Second has an "incidental effect" on the Applicants' expression. Yet it is because the Acadians refused to pledge allegiance and be faithful to King George the Second that they were deported for treason from Nova Scotia in 1755.[1] It is because Jewish politician Ezekiel Hart refused to swear an oath on the New Testament that he was prevented from sitting as a member of the Legislative Assembly of Quebec for Trois Rivières in 1807.[2] Today, the pledge to the Crown is no longer used to expel Canadians. But it is still used to determine who can become a Canadian citizen, who can work in the Ontario civil service, who can be called as a lawyer to the bars of Alberta, Prince Edward Island, and Newfoundland & Labrador, and who can become a police officer in British Columbia, Nova Scotia, Saskatchewan, New Brunswick, and Alberta.

2. The U.S. Supreme Court concluded in a landmark 1943 decision that a compelled pledge to the flag violates the First Amendment. The Court of Appeal for Ontario ruled in 1945 that the compelled singing of the national anthem and salute to the flag infringe personal liberties. This case provides this Court's first chance to assess when a ceremonial pledge, such as compelled by many Canadian laws, violates the *Charter*. The Court should consider the issue because the court of appeal found in this case that compelling the Applicants to pledge that they "will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second" does not violate their s. 2(b) freedom of expression. The court claimed that the pledge does not aim 'to put a message in the Applicants' mouths' and limits their expression in a manner 'unworthy of constitutional disapprobation'. This decision is now law in Ontario. The court also dismissed the Applicants' s. 2(a) arguments without applying the *Amselem* test to their freedom of conscience claim.

---

[1] Michel Bastarache, "The Opinion of the Chief Justice of Nova Scotia Regarding the Deportation of the Acadians" (2011) 42 *Ottawa L. Rev.* 261 [**Tab 6x**]; Naomi E. S. Griffiths, *From Migrant to Acadian: A North American Border People, 1604-1755* (Montreal & Kingston: McGill-Queen's UP, 2005), p. 382 [**Tab 6y**] ("Je … promets et jure sincèrement … que Je serai entièrement fidèle et obéirai vraiment Sa Majesté Le Roi George le Second").

[2] *Roach v Canada (Minister of State for Multiculturalism and Citizenship)* (1994), [1994] 2 FC 406, 113 DLR (4th) (FCA) at para. 37 (Linden, *dissenting in part*, paraphrasing from a book by Irving Abella) [**Tab 6n**].

3. By granting leave to appeal, this Court can overturn the court of appeal's restrictive interpretation of freedom of expression and address three issues of national importance:

A. Does a statutory requirement that compels a ceremonial oath or pledge have the purpose of 'controlling expression'?

B. Does this Court's *Amselem* test apply to a freedom of conscience claim and, if so, how?

C. What evidence or rationale does the government need to constitutionally justify its requirement for a ceremonial oath or pledge?

B. The facts are simple and uncontested

4. The facts in this case are simple and uncontested; the record is thin.

C. The Applicants meet all the criteria for Canadian citizenship

5. The Applicants are permanent residents of Canada, who meet all of the criteria for Canadian citizenship and would be entitled to certificates of citizenship if they applied.[3] Before their certificates become effective, however, they must take the following oath, which includes a pledge of allegiance to Queen Elizabeth the Second:[4]

SCHEDULE **(Section 24)**	**ANNEXE** **(article 24)**
OATH OR AFFIRMATION OF CITIZENSHIP 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. [Emphasis added.]	**SERMENT DE CITOYENNETÉ** Je jure fidélité et sincère allégeance à Sa Majesté la Reine Elizabeth Deux, Reine du Canada, à ses héritiers et successeurs et je jure d'observer fidèlement les lois du Canada et de remplir loyalement mes obligations de citoyen canadien. **AFFIRMATION SOLENNELLE** J'affirme solennellement que je serai fidèle et porterai sincère allégeance à Sa Majesté la Reine Elizabeth Deux, Reine du Canada, à ses héritiers et successeurs, que j'observerai fidèlement les lois du Canada et que je remplirai loyalement mes obligations de citoyen canadien. [Emphasis added.]

6. There is no alternative wording available for the oath. Of note, the option to 'affirm' rather than 'swear' an oath aims to respect the religious freedom of people whose beliefs prevent

[3] *McAteer et al. v Attorney General of Canada*, 2013 ONSC 5895, 117 O.R. (3d) 353 ["*Application decision*"], para. 5 [**Tab 3b**]; Affidavit of Michael McAteer, para. 3 [**Tab 5e**]; Affidavit of Simone E.A. Topey, para. 3 [**Tab 5b**]; Affidavit of Dror Bar-Natan, para. 10 [**Tab 5a**]; *Citizenship Act*, RSC 1985, c C-29, s. 5 [**Part VII, Statutory Provisions**].

[4] *Citizenship Act*, RSC 1985, c C-29, ss. 3(1)(c), 12(3), and Schedule [**Part VII, Statutory Provisions**].

them from swearing an oath.[5] Today, all Canadian laws allow affirmations alternatively to oaths.[6]

7. Like the Hippocratic Oath in modern times, the pledge of allegiance to Queen Elizabeth the Second is intended to hold a purely ceremonial function. Applicants for citizenship who take the pledge have no subsequent legal obligation to "be faithful and bear true allegiance" to the Queen or Canada. In fact, they can subsequently recant the pledge without impact on their Canadian citizenship,[7] since naturalized citizen have "all rights, powers and privileges" of natural-born citizens and have "a like status to that of such person[s]."[8]

D. The Applicants cannot become citizens because they refuse to pledge allegiance to the Queen

8. Like conscientious objectors before them,[9] however, the Applicants are unwilling to pledge allegiance to the Queen. They are anti-monarchists for whom it is repugnant to mouth the words "I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors", just as it was repugnant for the Acadians to swear allegiance to King George the Second or for Jewish persons to take oaths on the New Testament. Aside from the removal of religious words, the pledge of allegiance to the monarch (including the one that the Acadians refused to swear in 1755) has remained largely unchanged since 1689.[10] As Canadian historians and political scientists have noted, it is an increasingly common view today to believe that "monarchy and democracy are opposed, as a serious matter of conscience".[11]

9. Applicant Michael McAteer immigrated to Canada from Ireland. His father fought for Irish independence from the British Crown and was discriminated against for his "republican principles". Following his father, Michael McAteer holds republican beliefs that prevent him from "taking an oath of allegiance to a hereditary monarch who lives abroad". He deposes that taking an oath to the Queen would "violate my conscience, be a betrayal of my republican

---

[5] See *Roach v Canada (Minister of State for Multiculturalism and Citizenship)* (1994), [1994] 2 FC 406, 113 DLR (4th) (FCA) at para. 37 (Linden, *dissenting in part*) [**Tab 6n**]; *R v Robinson*, 2004 CanLII 31391 (MBPC), paras. 50-57 [**Tab 6l**].
[6] See *Interpretation Act*, RSC 1985, c I-21, s. 35(1), "oath" and "sworn" [**Part VII, Statutory Provisions**].
[7] Affidavit of Ashok Charles [**Tab 5c**]; also see Affidavit of Howard Jerome Gomberg [**Tab 5d**] (Gomberg indicated that he was under duress and the oath "was not binding on my conscience").
[8] *Citizenship Act*, RSC 1985, c C-29, s. 6 [**Part VII, Statutory Provisions**].
[9] *E.g.*, *Application decision*, para. 12 [**Tab 3b**].
[10] Bryce Edwards, "Let Your Yea Be Yea: The Citizenship Oath, the Charter, and the Conscientious Objector" (2002) 60 *U. Toronto Fac. L. Rev.* 39, p. 67 [**Tab 6t**]; *supra*, Factum of the Applicants for Leave to Appeal to this Court, footnote 1.
[11] Affidavit of Randall White, para. 12 [**Tab 5f**].

heritage and impede my activities in support of ending the monarchy in Canada."[12]

10. Applicant Dror Bar-Natan immigrated to Canada from Israel. He had "found it hard to live in a place where one's ancestry determines so much of his/her future." He finds "repulsive" the phrase "I affirm that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, Queen of Canada, Her Heirs and Successors". It says that some people, the royals, are "born with privilege". While the monarchy in Canada is mostly symbolic, it is "precisely the wrong symbol: a symbol that we aren't all equal and that some of us have to bow to others for reasons of ancestry alone". Taking the oath would be "humiliating" and carries a "repugnant symbolic meaning … a ritual that born-Canadians are not subject to."[13]

11. Applicant Simone Topey immigrated to Canada from Jamaica. She is Rastafarian. In this religion, the Queen is the head of Babylon. It would violate Simone's religious beliefs to take an oath to the head of Babylon.[14]

12. Were they to pledge allegiance to Queen Elizabeth the Second, the Applicants would feel bound by their conscience to refrain from participating in movements to abolish the monarchy.[15] Their perspective is not extraordinary. When asked whether it was consistent with the pledge "to argue and join organizations that argue that [Queen Elizabeth the Second] should no longer be allowed to be Queen of Canada," Rell Deshaw, Manager of Citizenship Legislation and Program Policy at the Department of Citizenship and Immigration, testified it was not.[16] The government's citizenship Study Guide indicates that through the pledge of allegiance, citizenship applicants "profess our loyalty to a person who represents all Canadians [emphasis added]."[17]

13. It is only the specific words of the pledge of allegiance to the Queen that the Applicants find repugnant. They "would have no objection to swearing an oath to Canada or its laws".[18]

14. As noted by the trial judge, the Applicants pay a heavy price for their refusal to pledge

---

[12] *Application decision*, para. 6 [**Tab 3b**]; Affidavit of Michael McAteer, paras. 1-9 [**Tab 5e**].
[13] *Application decision*, para. 8 [**Tab 3b**]; Affidavit of Dror Bar-Natan, paras. 2, 8, and 11-17 [**Tab 5a**].
[14] *Application decision*, para. 7 [**Tab 3b**]; Affidavit of Simone E.A. Topey, paras. 1-8 [**Tab 5b**].
[15] *Application decision*, paras. 6 and 51 [**Tab 3b**]; Affidavit of Michael McAteer, para. 8 [**Tab 5e**]; Affidavit of Simone E.A. Topey, para. 11 [**Tab 5b**]; Affidavit of Dror Bar-Natan, paras. 19-20 [**Tab 5a**].
[16] Transcript of Cross-Examination of Rell DeShaw, p. 28 [**Tab 5h**].
[17] Affidavit of Rell DeShaw, Exhibit "F" [**Tab 5g**].
[18] *Application decision*, para. 39 [**Tab 3b**]; Affidavit of Michael McAteer, paras. 10-11 [**Tab 5e**]; Affidavit of Simone E.A. Topey, para. 9 [**Tab 5b**]; Affidavit of Dror Bar-Natan, para. 15 [**Tab 5a**].

allegiance. They cannot apply for appointment as provincial court judges, vote, or run for office; and they are ineligible for Canada Council grants or Canadian passports.[19] A former Minister of Immigration and Citizenship has confirmed that "[f]ew things are more precious to us than our Canadian citizenship."[20] Iacobucci J. echoes his words: "I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship."[21]

E. Many Canadians are compelled by other legislation to pledge allegiance to the Queen

15. Not only are millions of new Canadians compelled to pledge allegiance to Queen Elizabeth the Second, so are many other Canadians throughout the country. The *Public Service of Ontario Act*, for example, requires Ontario's civil servants to pledge allegiance to the Queen:

Oath or affirmation of allegiance	**Serment ou affirmation solennelle d'allégeance**
… "I swear (or solemnly affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second (*or the reigning sovereign for the time being*), her heirs and successors according to law. So help me God. (Omit this phrase in an affirmation.)"[22]	… "Je jure (ou j'affirme solennellement) que je serai fidèle et que je porterai sincère allégeance à Sa Majesté la reine Elizabeth II (*ou au souverain régnant*), à ses héritiers et à ses successeurs conformément à la loi. Ainsi Dieu me soit en aide. (Omettre cette dernière phrase pour une affirmation.)"

16. As with the Canadian citizenship oath, the Ontario civil service oath allows employees to affirm rather than swear the oath, presumably to avoid infringing their religious beliefs. Specifically, the affirmation omits the phrase "So help me God".

17. By law, employees of the Manitoba civil service, police officers in British Columbia, Nova Scotia, Saskatchewan, New Brunswick, and Alberta and lawyers in Alberta, Newfoundland & Labrador, and Prince Edward Island must also pledge allegiance to the Queen.[23]

18. For Canadians (particularly First Nations individuals), the decision to take the pledge can

[19] *Application decision*, para. 12 [**Tab 3b**].
[20] *Application decision*, para. 25 [**Tab 3b**].
[21] *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at para. 68 [**Tab 6a**].
[22] *Public Service of Ontario Act*, 2006, S.O. 2006, Chapter 35, Schedule A, s. 5(1); Ontario Regulation 373/07, *Oaths and Affirmations*, s. 1(1) [**Part VII, Statutory Provisions**].
[23] *The Civil Service Act*, CCSM c C110, s. 41(a); *Public Officers Act*, CCSM c P230, s. 9; *Police Act*, RSBC 1996, c 367, s. 70(1); *Police Oath/Solemn Affirmation Regulation*, BC Reg 136/2002, s. 1; *Police Act*, SNS 2004, c 31, s. 29; *Police Regulations*, NS Reg 230/2005, s. 16 and Form 1; *Police Act*, 1990, SS 1990-91, c P-15.01, ss. 36(1) and 79; *Municipal Police Recruiting Regulations*, 1991, RRS c P-15.01 Reg 5, s. 15 and Form 6; *Forms of Oath Regulation*, NB Reg 81-18, s. 2; *Police Act*, RSA 2000, c P-17, s. 36(3); *Legal Profession Act*, RSA. 2000, c. L-8, s. 44(2); *Oaths of Office Act*, RSA 2000, c O-1, s. 1; *Law Society Act*, 1999, SNL 1999, c L-9.1, s. 34(4); *Oaths of Office Act*, RSNL 1990, c O-2, s. 2; *Legal Profession Act*, RSPEI 1988, c L-6.1, s. 17(2)(a) [**Part VII, Statutory Provisions**].

be an extremely difficult one, sometimes resulting in the loss of employment opportunities.[24]

F. Other Canadians are no longer compelled to pledge allegiance to the Queen

19. Other Canadians are no longer required to pledge allegiance to Queen Elizabeth the Second. For example, Canadian federal public servants were previously required to pledge allegiance. Since 2005, they no longer need to do so; they are only required to take an oath of service (although those who object are exempted from speaking the words "So help me God").[25] The change followed (and presumably responded to) a legal challenge by a group of First Nations teachers who refused to pledge allegiance to the Queen for spiritual and historical reasons. The Public Service Staff Relations Board ruled in their favour, exempting them from the pledge, noting that "it seems likely that the insistence on the oath of allegiance to the Crown as a condition of employment in the Public Service for First Nations offends their right to freedom of thought, belief, opinion and expression set out in the *Charter*, as well as their "rights of aboriginal peoples" under section 35 of the *Constitution Act, 1982*."[26] The Board's decision echoed the concerns of the Court of Appeal for Ontario, which had ruled pre-*Charter* that the compelled singing of a national anthem and the salute to the flag infringe personal liberties.[27] Several legal commentators agree that the requirement to take the pledge violates the *Charter*.[28]

20. Likewise, Ontario police officers are now given a choice between two oaths: one refers to Queen Elizabeth the Second while the other does not. Lawyers in Ontario, Manitoba, and several other provinces are no longer required to pledge allegiance to Queen.[29]

G. This Court has never ruled on the constitutionality of oaths

21. Unlike in the U.S., where the Supreme Court ruled in a landmark 1943 decision on the constitutionality of a compelled pledge of allegiance to the American flag,[30] the Supreme Court

---

[24] Affidavit of Christa Big Canoe on this Application for Leave to Appeal [**Tab 5i**].
[25] Affidavit of Randall White, para. 115 [**Tab 5f**].
[26] *Public Service Alliance of Canada v Treasury Board (Indian and Northern Affairs Canada)*, 2002 PSSRB 31, para. 173 [**Tab 6h**].
[27] *Donald et al. v The Board of Education for the City of Hamilton et al.*, 1945 CanLII 117 (ONCA) [**Tab 6b**].
[28] Bryce Edwards, "Let Your Yea Be Yea: The Citizenship Oath, the Charter, and the Conscientious Objector" (2002) 60 *U. Toronto Fac. L. Rev.* 39 [**Tab 6t**]; Léonid Sirota, "True Allegiance: The Citizenship Oath and the *Charter*", 4 May 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433711 [**Tab 6v**]; Derek Smith, "The Heredity Oath in Canada's Citizenship Act Must Be Declared Optional on Appeal", 30 Mar. 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418021 [**Tab 6u**].
[29] Affidavit of Randall White, paras. 112-114 [**Tab 5f**].
[30] *West Virginia State Board of Education v Barnette* (1943), 319 US 624 (QL) [**Tab 6s**].

of Canada has never ruled on the constitutionality of the compelled pledge of allegiance to Queen Elizabeth the Second. Nor has it ruled on the constitutionality of any compelled oath. Canada is left with academic articles and board and court decisions that wrestle with the applicable *Charter* principles for First Nations groups, prospective citizens, and other individuals.

H. Reasons of the superior court: the pledge violates s. 2(b)

22. To become citizens of Canada, the Applicants must pledge allegiance to Queen Elizabeth the Second. The Applicants argued that this pledge violates ss. 2(a) and 2(b) of the *Charter* and cannot be justified under s. 1. Specifically, it violates their freedom of expression by compelling them to express a specific message in order to become citizens. It violates their freedom of conscience and religion because it morally binds them to act against their own conscience. These violations cannot be justified under s. 1: the Applicants <u>are willing</u> to articulate a commitment to Canada, as long as they are not required to take the pledge of allegiance to the Queen.

23. The application judge found that the pledge's purpose is the following:

> The purpose of the oath requirement including an oath of allegiance to the Queen is to ensure a public, symbolic avowal of commitment to this country's constitutionally entrenched political structure and history, during the solemnities of the citizenship ceremony, as a condition of acceding to full membership in the Canadian polity. …[31]

24. As such, the pledge's purpose is to compel the Applicants to "express[] commitment to the country" or "articulat[e] a commitment to the identity and values of the country."[32]

25. The judge agreed with the Applicants and ruled that the pledge violates s. 2(b). The judge noted that "[p]rotected speech … includes not only the spoken word but the choice of language … and the right to receive or hear expressive content as much as the right to create it." Citing this Court in *Slaight Communications Inc. v Davidson*, he explained that freedom of expression "necessarily entails the right to say nothing or the right not to say certain things". He confirmed that a statutory requirement "whose effect is "to put a particular message into the mouth of the plaintiff" would run afoul of section 2(b) of the *Charter*."[33]

26. The judge also confirmed that where the government offers up to citizenship applicants the statutory benefit of citizenship, it cannot prevent them from accessing this benefit by

[31] *Application decision*, para. 38 [**Tab 3b**].
[32] *Application decision*, paras. 41 and 85 [**Tab 3b**].
[33] *Application decision*, paras. 21-24 [**Tab 3b**].

compelling them to deliver a specific message. Citizenship cannot be "a prize that the Act rewards to Applicants who give up a right such as freedom of expression". [34]

27. Although the pledge breaches the Applicants' freedom of expression, the judge found it to be justified under s. 1 of the *Charter*. The judge came to this conclusion by finding that the Applicants misunderstand the meaning of the pledge. He found that the Applicants were wrong to interpret it according to its plain meaning and held that "[o]nce the Queen is understood, in context, as an equality-protecting Canadian institution rather than as an aristocratic English overlord, any impairment of the Applicants' freedom of expression is minimal."[35]

28. The judge also found that the pledge does not infringe the Applicants' freedom of religion under s. 2(a) or right to equality under s. 15 of the *Charter*, but failed to refer to the Applicants' freedom of conscience claim.[36]

I. Reasons of the court of appeal: the pledge does not violate s. 2(b)

29. The Court of Appeal confirmed the pledge's purpose as found by the application judge: to "articulat[e] a commitment to the identity and values of the country." The court added that "[i]n 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." The pledge compels "an affirmation of the societal values and constitutional architecture of this country." It "is a symbolic commitment to be governed as a democratic constitutional monarchy unless and until democratically changed."[37]

30. Turning to the law, the court confirmed that "[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)."[38] Oddly, however, the court overturned the application judge's findings on 2(b) (and implicitly overturned its own pre-*Charter* decision in *Donald et al. v The Board of Education for the City of Hamilton et al.*).[39] The court concluded that the pledge's purpose of compelling the "articulat[ion of] a commitment to the identity and values of the country" does not

[34] *Application decision*, paras. 27-34 [**Tab 3b**].
[35] *Application decision*, para. 68 [**Tab 3b**].
[36] *Application decision*, paras. 83-109 [**Tab 3b**].
[37] *McAteer v Canada (Attorney General)*, 2014 ONCA 578, 121 OR (3d) 1 ["*ONCA decision*"], paras. 62 and 72-74 [**Tab 3d**].
[38] *ONCA decision*, para. 70 [**Tab 3d**].
[39] *Donald et al. v The Board of Education for the City of Hamilton et al.*, 1945 CanLII 117 (ONCA) [**Tab 6b**].

aim to control the Applicants' expression or put a message in their mouths. It reasoned that the Applicants misunderstood the pledge: because the pledge's substance and history stand for freedom of expression, compelling the Applicants to swear it could not infringe their s. 2(b) rights. It added that the pledge's incidental effect on the Applicants' expression is trivial. The Applicants can publicly disavow what they consider to be the message conveyed by the pledge.[40]

31. The court also rejected the Applicants' ss. 2(a) submissions, wholly adopting the trial judge's reasons and, like the court below, failing to apply the *Syndicat Northcrest v Amselem* test to the freedom of conscience claim.[41] First, the court accepted that since the pledge has a religiously neutral objective, which "enriches society as a whole", it would not be appropriate to accommodate the Applicants' subjective religious beliefs, since this would undermine the "religious-neutral aspect of Canadian citizenship".[42] The court thus appeared to import into the s. 2(a) test a balancing exercise normally reserved for s. 1 of the *Charter*. Second, without conducting any analysis to this effect, the court baldly concluded that the Applicants failed to prove that the oath objectively infringed their s. 2(a) right.[43]

32. As a result of the court of appeal's decision, the law in Ontario is now that governments can compel persons to articulate commitments or swear solemn promises without such being considered a violation of ss. 2(a) and (b) of the *Charter*. A government could, for example, compel a commitment to the 'Supremacy of God', as a condition of employment (this phrase is found in the preamble of the secular *Charter*). It could compel individuals to swear statements in court (eliminating the alternative to affirm). Indeed, pursuant to the court's decision, a Jewish witness who complained about swearing on the New Testament would be 'misunderstanding the purpose of the oath', which intends only to 'articulate a commitment' to truth of their evidence.

33. Finally, the court rejected the applicants' s. 15 submissions.[44] The applicants do not renew these submissions before this Court.

---

[40] *ONCA decision*, paras. 75-87 [**Tab 3d**]. In the event it was wrong on s. 2(b), the court also addressed s. 1, confirming the application judge's finding that any 2(b) infringement was justified: *ONCA decision*, paras. 88-102 [**Tab 3d**]. As explained below, the government presented no s. 1 evidence that the pledge is connected to its purpose.
[41] *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, paras. 56-58 [**Tab 6r**].
[42] *ONCA decision*, paras. 110-112 and 114-116 [**Tab 3d**]; referencing *Application decision*, paras. 89-93 [**Tab 3b**].
[43] *ONCA decision*, para. 113 [**Tab 3d**]; referencing *Application decision*, paras. 92-94 [**Tab 3b**].
[44] *ONCA decision*, paras. 121-129 [**Tab 3d**].

PART II: QUESTIONS IN ISSUE

34. This case is a test case on the ability of government to compel individuals to speak for ceremonial purposes specific words that these individuals find repugnant to utter and that they perceive to bind their conscience. It raises three issues of national importance:

> ISSUE A: Does a statutory requirement that compels a ceremonial oath or pledge have the purpose of 'controlling expression'?
>
> ISSUE B: Does this Court's *Amselem* test apply to a freedom of conscience claim and, if so, how?
>
> ISSUE C: What evidence or rationale does the government need to constitutionally justify its requirement for a ceremonial oath or pledge?

PART III: STATEMENT OF ARGUMENT

ISSUE A: Does a statutory requirement that compels a ceremonial oath or pledge have the purpose of 'controlling expression'?

1. Requiring the applicants to 'articulate a commitment to the identity and values of the country' aims to put a particular message in their mouths

35. Writing for the majority in *Edmonton Journal v Alberta (Attorney general)*, Cory J. noted that "[i]t is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions."[45] In *Slaight Communications Inc. v Davidson*, the Court confirmed that s. 2(b) guarantees to the Applicants not only the right to say something but also the right not to say something.[46]

36. It is in *Irwin Toy* that this Court set out the test to determine whether a provision infringes the freedom of expression guarantees contained in s. 2(b) of the *Charter*.[47] **First**, the court must determine whether the Applicants' activity was within the sphere of conduct protected by freedom of expression. Here, as concluded by both courts below, the Applicants' activity – 'the refusal to make a pledge of allegiance' – falls well within the sphere of protected conduct.[48]

37. **Second**, the court must determine whether the purpose or effect of the impugned provision is to restrict the Applicants' freedom of expression. Specifically, if the purpose "is to restrict the content of expression by singling out particular meanings that are not to be conveyed,

---

[45] *Edmonton Journal v Alberta (Attorney general)*, [1989] 2 SCR 1326, p. 1336 [**Tab 6c**].
[46] *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, pp. 1050 and 1080 [**Tab 6q**].
[47] *Irwin toy ltd. v Quebec (Attorney general)*, [1989] 1 SCR 927, pp. 967-977 [**Tab 6e**].
[48] *ONCA decision*, para. 71 [**Tab 3d**]; *Application decision*, paras. 33-34 [**Tab 3b**].

it necessarily limits the guarantee of free expression [emphasis added]."[49] In *Lavigne v Ontario Public Service Employees Union*, the Court confirmed that a government purpose that aims to "put a particular message into the mouth of the plaintiff" (in other words, a government purpose that singles out particular meanings that must be conveyed) or "control the conveyance of meaning" will necessarily limit the guarantee of expression and infringe s. 2(b).[50]

38. Here, both courts below asserted that the pledge's purpose is to compel the Applicants to "articulat[e] a commitment to the identity and values of the country". (The court of appeal termed it an "articulat[ion]", a "promise[]", or an "affirmation".)[51] In other words, the pledge's purpose is solely to put a particular message into the mouth of the Applicants – the message that they are committed to the identity and values of the country. The pledge's ceremonial nature confirms that it has no other purpose than to promote this specific message, in the course of a public ceremony no less. The second part of the *Irwin Toy* test is thus met.

39. Even if the pledge's purpose were not to control the Applicants' expression, its effect is to do so by legislating the specific words and symbols that they must use to express their commitment to Canada. While the Applicants are willing to symbolically pledge a commitment to Canada, the *Citizenship Act* prevents them from doing so through symbols with which they agree and instead forces them to pledge allegiance to the Queen, a symbol that they oppose.

40. The opportunity to disavow their allegiance to the Queen in other contexts would not help the Applicants if other republicans were to question why they were willing to hypocritically pledge allegiance in the first place, in the context of a ceremony of citizenship. To them, the pledge of allegiance to the Queen symbolizes acceptance of the monarchy, not a commitment to their country. In a pre-*Charter* case, the Court of Appeal for Ontario accepted that different individuals interpret symbols to mean different things: "That certain acts, exercises and symbols at certain times, or to certain people, connote a significance or meaning which, at other times or to other people, is completely absent, is a fact so obvious from history, and from observation, that it needs no elaboration."[52] The U.S. Supreme Court has added that "[a] person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and

---

[49] *Irwin toy ltd. v Quebec (Attorney general)*, [1989] 1 SCR 927, p. 974 [**Tab 6e**].
[50] *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, pp. 267 and 271 [**Tab 6f**].
[51] *ONCA decision*, paras. 72-74 [**Tab 3d**]; *Application decision*, para. 41 [**Tab 3b**].
[52] *Donald et al. v The Board of Education for the City of Hamilton et al.*, 1945 CanLII 117 (ONCA), p. 14 [**Tab 6b**].

scorn".[53] The Applicants' inability to pledge their commitment to Canada without reference to symbols with which they disagree is an unconstitutional effect of the pledge.

2. The court of appeal decision creates new law in Ontario that narrows protection of expression

41. There is no doubt that the pledge has the purpose of putting a message into the mouths of the applicants and controlling the conveyance of meaning. Some individuals may want to express "a commitment to the identity and values of the country;" others may not. The pledge compels this message, while also compelling the specific words that must be used to express it.

42. The court of appeal's opposite conclusion significantly limits expression in Ontario in at least three ways. First, it provides that governments can compel pledges or oaths without violating s. 2(b) of the *Charter*. Since 1982, this Court has generously interpreted the *Charter*'s freedom of expression guarantees. It has protected persons from compelled speech in the context of commercial advertising,[54] the writing of objectively true reference letters,[55] and socially positive health warnings on cigarette packages,[56] unless these violations can be justified pursuant to s. 1 of the *Charter*. In Ontario, however, the requirement to swear an oath using designated words and symbols is now, as a result of the court of appeal's decision, an acceptable form of compelled speech since the court held it does not aim to 'control the expression' of individuals.

43. Second, the court reasons that "[t]he 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.*"[57] In other words, because the pledge symbolizes freedom of expression, compelling the Applicants to swear it cannot infringe s. 2(b). This is wrong: however worthy the substance and history of the pledge might be, compelling the applicants to swear it controls their expression. As this Court has explained, s. 2(b) even allows individuals to refrain from expressing objectively true facts.[58] The pledge's worthiness should not impact the s. 2(b) analysis; it should only be taken into account at

[53] *West Virginia State Board of Education v Barnette*, 319 US 624 (1943), pp. 632-633 (QL) [**Tab 6s**].
[54] *E.g.*, *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 [**Tab 6d**].
[55] *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038 [**Tab 6q**].
[56] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 [**Tab 6m**].
[57] *ONCA decision*, para. 74 [**Tab 3d**].
[58] *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, p. 1080 [**Tab 6q**].

s. 1.[59] The court of appeal's conflation of ss. 1 and 2(b), however, now stands as law in Ontario.

44. Third, the court relies on *R v Khawaja* to contend that since the Applicants' understanding of the Queen as a symbol differs from the government understanding, the Applicants' freedom of expression cannot be violated: "In *R. v. Khawaja,* … McLachlin C.J. held …: "[A] patently incorrect understanding of a provision cannot ground a finding of unconstitutionality"."[60] Notwithstanding that this excerpt is misleading,[61] there exists no reason why the Applicants' subjective understanding of the Queen as a repugnant symbol should negate the s. 2(b) protection available to them. Whatever the government's purpose behind the inclusion of the Queen as a symbol in the citizenship oath, the Applicants are unwilling to commit to Canada through a pledge of allegiance to this symbol. This Court should declare that nonetheless compelling them to do so violates their s. 2(b) rights. Otherwise, as the court of appeal's decision now provides in Ontario, the government will continue to have the ability to compel individuals to speak specific words whenever its official purpose differs from the individuals' understanding of these words.

3. This case is a test case on the expressive value of the refusal to swear an oath

45. The court of appeal's confusion in applying s. 2(b) to the pledge of allegiance exists because this Court has never before considered or provided guidance on the issue. This appeal provides a test case for this Court to consider the constitutional protections afforded to those who refuse to make oaths or pledges. On the one hand, the application decision of Morgan J. accepts that the refusal to pledge allegiance to the Queen is a constitutionally protected form of expression. This decision was consistent with the pre-*Charter* views of the Court of Appeal for Ontario.[62] On the other hand, the decision of the court of appeal in this case, now binding in Ontario, has denied this constitutional protection. It is essential for this Court to resolve the issue.

46. The issue has broad impact throughout Canada. Several laws compel professionals and employees to pledge allegiance to the Queen.[63] The Public Service Staff Relations Board

---

[59] See *e.g.*, *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, p. 1050 (which states that the harm the government is trying to prevent is only relevant to the s. 1 analysis) [**Tab 6q**].
[60] *ONCA decision*, para. 63 [**Tab 3d**].
[61] In context, the full quote reads as follows: "a chilling effect that results from a patently incorrect understanding of a provision cannot ground a finding of unconstitutionality:" *R v Khawaja*, [2012] 3 SCR 555, para. 82 [**Tab 6j**].
[62] *Donald et al. v The Board of Education for the City of Hamilton et al.*, 1945 CanLII 117 (ONCA) [**Tab 6b**].
[63] *Supra*, Factum of the Applicants for Leave to Appeal to this Court, paras. 15-17; Affidavit of Christa Big Canoe [**Tab 5i**].

observed that this requirement likely offended the s. 2(b) freedoms of First Nations teachers.[64]

ISSUE B: Does this Court's *Amselem* test apply to a freedom of conscience claim and, if so, how?

1. This appeal is a test case to determine whether and how the *Syndicat Northcrest v Amselem* test applies to freedom of conscience claims

47. Unlike most cases of compelled expression, which deal merely with the conveying of information, this case goes further. The Applicants are also opposed as conscientious objectors to the public and symbolic pledge of allegiance to Queen Elizabeth the Second, her Heirs and Successors. (Simone Topey is also opposed for religious reasons to this pledge.) To the extent that they do take the pledge, they argue they will be bound by their conscience to cease their republican activities in support of ending the monarchy in Canada.

48. In *Syndicat Northcrest v Amselem*, this Court outlined the test to determine whether a provision infringes a person's freedom of religion under s. 2(a) of the *Charter*. Section 2(a) is breached where a person has a sincere belief or practice that has a nexus with religion and where the impugned measure interferes with the person's ability to act in accordance with his religious beliefs in a more than trivial or insubstantial manner.[65]

49. Neither of the courts below applied this test to the Applicants' freedom of conscience claim (nor did they expressly apply it to Applicant Topey's freedom of religion claim). In fact, it is unclear whether the courts applied any principled test at all to the Applicants' 2(a) claims. This may be because, while the Supreme Court of Canada has clearly established the importance of freedom of conscience,[66] it has never directly addressed such a claim or prescribed the proper test. This appeal thus provides a test case for the Court.

2. The Applicants have sincere conscientiously-held beliefs that prevent them from swearing an oath to the Queen

50. A slightly modified version of the *Amselem* test would provide that s. 2(a) is also breached where a person has a sincere conscientiously-held belief or practice and where the impugned measure interferes with the person's ability to act in accordance with this

---

[64] *Public Service Alliance of Canada v Treasury Board (Indian and Northern Affairs Canada)*, 2002 PSSRB 31, para. 173 [**Tab 6h**].
[65] *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, paras. 56-58 [**Tab 6r**].
[66] *E.g.*, *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, para. 123 [**Tab 6i**]; *R v Morgentaler*, [1988] 1 SCR 30, p. 179 (per Wilson J., *concurring*) [**Tab 6k**].

conscientiously-held belief in a more than trivial or insubstantial manner.

51. Framed in this way, it is uncontested that the Applicants have sincere conscientiously-held beliefs that prevent them from pledging allegiance to Queen Elizabeth the Second or to any monarch.[67] The first step of the test is easily met. The more difficult issue, and an issue necessitating Supreme Court guidance, is whether the *Citizenship Act* compels them against their conscience to pledge allegiance to the Queen or monarchy ("from an objective standpoint", in the words of Deschamps J. in *S.L. v Commission scolaire des Chênes*).[68] The court of appeal observed that the pledge to the Queen may in fact seek to bind the applicants' conscience.[69] It argues, however, that the pledge's purpose is not to force the Applicants to pledge allegiance to the existing order but rather to commit symbolically "to be governed as a democratic constitutional monarchy unless and until democratically changed [emphasis added]."[70]

3. The Applicants' 'reasonable understanding' of the oath determines whether it objectively infringes s. 2(a)

52. The issue for this Court to decide is whether to use the Applicants' understanding of the pledge or use the pledge's purpose to determine when the requirement to take the pledge objectively infringes the Applicants' sincere beliefs. There exists a strong presumption in favour of using the Applicants' sincere understanding. Oaths and pledges are largely symbolic in meaning, and the symbolism depends on the individual. In this case in particular, the pledge is ceremonial. Understanding the pledge and determining one's duty arising out of taking it are solely matters of conscience. As the U.S. Supreme Court noted, when it ruled that the flag salute violated the freedoms of Americans contained in the First Amendment:

> There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short-cut from mind to mind. Causes and nations, political parties, lodges, and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas, just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what

[67] *ONCA decision*, paras. 101 and 113 [**Tab 3d**]; *Application decision*, para. 80 [**Tab 3b**].
[68] *S.L. v Commission scolaire des Chênes*, [2012] 1 SCR 235, para. 27 [**Tab 6p**].
[69] *ONCA decision*, para. 53 [**Tab 3d**].
[70] *ONCA decision*, para. 62 [**Tab 3d**].

is one man's comfort and inspiration is another's jest and scorn.[71] [Emphasis added.]

53. Surely, it would infringe a Jewish witness' conscience to be compelled to swear an oath on the New Testament, even if the purpose of this oath is ostensibly to ensure the witness' honesty. Likewise, it would offend an atheist's conscience to be compelled to affirm the 'Supremacy of God', even though this phrase, contained in the *Charter*'s preamble, appears to constitute "a general statement regarding the universal, normative aspirations of the Charter, rather than … a direction to privilege any one particular religious or spiritual perspective over another, or over those perspectives which deny the existence of God *per se*".[72]

54. In the present case, the *Citizenship Act* compels the Applicants to affirm: "I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors." They argue that this compels them in conscience to commit to the Queen and monarchy. While they are willing to pledge 'a commitment to Canadian values and identity', they are unwilling to do so through a form of symbolism repugnant to their beliefs.

55. Whether to use the Applicants' understanding of the pledge or the government's purpose should be determined on a case-by-case basis. Here, the Applicants' understanding should be used for three reasons. First, the Applicants' understanding is reasonable. It accords with the plain meaning of the words, which have remained essentially unchanged since 1689. The government's only explanatory document on the oath appears to confirm that the oath intends to ensure loyalty "to a person". The Manager of Citizenship Legislation and Program Policy at the Department of Citizenship and Immigration appears to agree that taking the pledge is morally inconsistent with republican activities in support of ending the monarchy in Canada.[73] Second, the oath's purpose is not easily discerned. A government employee is unclear as to the meaning of the terms "Heirs and Successors" within the pledge.[74] The court of appeal was forced to conduct a 39-paragraph analysis to determine the pledge's purpose, somehow concluding that the oath is not a symbolic commitment to the current monarchy, but rather "a symbolic commitment to be governed as a democratic constitutional monarchy unless and until democratically changed [emphasis

---

[71] *West Virginia State Board of Education v Barnette*, 319 US 624 (1943), pp. 632-633 (QL) [**Tab 6s**]; also see *Donald et al. v The Board of Education for the City of Hamilton et al.*, 1945 CanLII 117 (ONCA), p. 14 [**Tab 6b**].
[72] Lorne Sossin, "The "Supremacy of God", Human Dignity and the *Charter of Rights and Freedoms*" (2003) 52 *UNB LJ* 227 at 228 [**Tab 6w**].
[73] *Supra*, Factum of the Applicants for Leave to Appeal to this Court, paras. 8 and 12.
[74] Transcript of Cross-Examination of Rell DeShaw, pp. 22 and 24 [**Tab 5h**].

added]."[75] Third, the oath's purpose appears to be rebutted by the fact the Applicants are not permitted to directly swear an oath to this purpose. In other words, while the Applicants are willing to take a literal pledge of "commitment to the identity and values of the country", the government does not afford them this option.

56. Because it is reasonable to conclude that the oath has the effect of compelling the Applicants to pledge allegiance to the Queen and monarchy, a court applying the *Amselem* test ought to conclude that the oath infringes the Applicants' freedom of conscience.

4. The court of appeal imported a s. 1 *Charter* consideration into the s. 2(a) analysis

57. The court of appeal's suggestion that a finding in favour of the Applicants would undermine the "religious-neutral aspect of Canadian citizenship"[76] should be relevant only in the s. 1 *Charter* analysis. The s. 2(a) analysis determines whether the Applicants' *Charter* right is breached. Only at s. 1 is the breach balanced against other government objectives. This Court ought to make this clear and overturn the court of appeal's conflation of ss. 1 and 2(b).

ISSUE C: What evidence or rationale does the government need to constitutionally justify its requirement for a ceremonial oath or pledge?

58. Following a conclusion that the pledge infringes ss. 2(a) and (b) of the *Charter*, this Court will have its first opportunity to examine the parameters under which the government can justify the compulsion of a pledge or an oath, in the context of s. 1 of the *Charter*. Throughout the justification process, "the government bears the burden of proving a valid objective and showing that the rights violation is warranted".[77]

59. Here, the government argues that the pledge has a vague and symbolic purpose, which is not identified as a response to any problem. Furthermore, the government has presented no evidence that the pledge is connected to its purpose. Counter-intuitively, the government aims to compel the Applicants to 'pledge commitment to Canada' without allowing them to use the words "I swear that I will commit to Canada" or "I pledge allegiance to Canada". The violation of the Applicants' ss. 2(a) and (b) *Charter* rights is therefore not proportional.

1. The oath's objective is 'vague and symbolic'

[75] *ONCA decision*, para. 62 [**Tab 3d**].
[76] *ONCA decision*, paras. 110-112 and 114-116 [**Tab 3d**]; referencing *Application decision*, paras. 89-93 [**Tab 3b**].
[77] *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519, para. 7 [**Tab 6o**].

60. In *Sauvé v Canada*, this Court explained that a "[v]ague and symbolic objective" will almost always be "sufficiently significant" in the abstract to warrant a rights violation. However, to establish a s. 1 justification, "one needs to know what problem the government is targeting, and why it is so pressing and important that it warrants limiting a *Charter* right."[78]

61. Here, the oath's purpose is vague and symbolic: it is to compel the Applicants to "articulat[e] a commitment to the identity and values of the country."[79] While this purpose may be pressing and substantial in the abstract, and has been previously accepted as such by this Court,[80] the oath is (like in *Sauvé*) not directed at a specific problem or concern. As such, the court will need to exercise particular caution at the proportionality stage. Like in *Sauvé*, it is at this stage that "the difficulties inherent in the government's stated objectives become manifest":

> Quite simply, the government has failed to identify particular problems that require denying the right to vote, making it hard to say that the denial is directed at a pressing and substantial purpose. Nevertheless, despite the abstract nature of the government's objectives and the rather thin basis upon which they rest, prudence suggests that we proceed to the proportionality analysis, rather than dismissing the government's objectives outright. The proportionality inquiry allows us to determine whether the government's asserted objectives are in fact capable of justifying its denial of the right to vote. At that stage, as we shall see, the difficulties inherent in the government's stated objectives become manifest.[81] [Emphasis added.]

2. The government has not provided any evidence of proportionality

62. At this stage, the government must show that compelling the pledge of allegiance will promote the asserted objective (the rational connection test); that it does not go further than reasonably necessary to achieve its objectives (the minimal impairment test); and that its overall benefits outweigh its negative impact (the proportionate effect test).[82]

63. With regards to the **rational connection** test, the government has presented no evidence that compelling a non-legally-binding pledge of allegiance to Queen Elizabeth the Second engenders a commitment to Canada. The ceremonial pledge is a useless proxy to ascertain the commitment of prospective citizens. First, since the pledge is not legally binding, some will lie about their commitment to Canada (in fact, it will likely be the more unscrupulous applicants who do so). As noted by Black J., in his concurring U.S. Supreme Court opinion in *West Virginia*

---

[78] *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519, paras. 22-24 [**Tab 6o**].
[79] *ONCA decision*, para. 72 **[Tab 3b**].; *Application decision*, para. 41 [**Tab 3d**].
[80] *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358, para. 94 [**Tab 6a**].
[81] *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519, para. 26 [**Tab 6o**].
[82] *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519, para. 27 [**Tab 6o**].

State Board of Education v Barnette, "[w]ords uttered under coercion are proof of loyalty to nothing but self-interest."[83] There is no reason why the Applicants would be less committed to Canada than an individual whose conscience does not prevent him from taking the pledge.

64. Second, the limited evidence in the case unanimously suggests that there exists no rational connection between a pledge of allegiance and a commitment to the country. For example, other countries (including the Australian constitutional monarchy) have dropped the requirement for a pledge of allegiance altogether.[84] The government of Canada has dropped the pledge of allegiance for its civil servants. So have other bodies in Canada.[85] Canada, a country that fosters freedom of expression and peaceful political dissent, should accept that the Applicants' conscientious objection to the monarchy has no impact on their citizenship.

65. Finally, there was no evidence that typical citizenship applicants even understand that the pledge's purpose is to engender "a symbolic commitment to be governed as a democratic constitutional monarchy unless and until democratically changed".[86] In fact, because this purpose differs from the plain meaning of the words, applicants will likely differ on their understanding of the pledge. As accepted by the courts below, Michael McAteer, Simone Topey, Dror Bar-Natan, and even a government civil servant have different interpretations of the pledge.[87] Ultimately, it is difficult to establish that the ceremonial pledge is rationally connected to its purpose where applicants do not understand this purpose and differ on their understanding of the pledge.

66. With regards to the **minimal impairment** test, even if a ceremonial pledge of allegiance to a Canadian symbol is rationally connected to the articulation of a commitment to Canada, there are many ways to compel the articulation of this commitment to avoid violating the constitutional rights of the Applicants. For example, it would be easy to provide a range of options of Canadian symbols to use to articulate a commitment to Canada. Some symbols, such as 'Queen Elizabeth the Second' or the 'Supremacy of God' hold various meanings that needlessly violate the constitutional freedoms of applicants for citizenship.[88] The government could permit them to

---

[83] *West Virginia State Board of Education v Barnette*, 319 US 624 (1943), p. 644 (QL) [**Tab 6s**].
[84] Affidavit of Randall White, paras. 89-111 [**Tab 5f**].
[85] *Supra*, Factum of the Applicants for Leave to Appeal to this Court, paras. 19-20.
[86] *ONCA decision*, para. 62 [**Tab 3d**].
[87] *Supra*, Factum of the Applicants for Leave to Appeal to this Court, paras. 8-13.
[88] In fact, although the Queen is the Head of State, a majority of Canadians, including 71% in Quebec, do not support the monarchy: Affidavit of Randall White, paras. 79-88 [**Tab 5f**].

articulate their commitment through other symbols or even through the words "I pledge to commit to Canada".

67. Ultimately, at the **proportionality** stage, the government has failed to present any evidence to justify its breach of the Applicants' ss. 2(a) and (b) *Charter* freedoms. If the Applicants are not in fact pledging allegiance to the Queen, why must they 'pledge allegiance to the Queen'? The pledge of allegiance as currently conceived cannot be justified under s. 1.

Conclusion: this case provides an opportunity for this Court to resolve several important constitutional issues while reasserting the importance of freedom of expression

68. The Applicants are fully qualified for citizenship and willing to pledge commitment to Canada. However, they refuse to symbolically pledge allegiance to Queen Elizabeth the Second. They (and other republicans like them) perceive these words, very similar to the 1755 pledge of allegiance that led to the deportation of the Acadians, to be a public endorsement of the monarchy. Their refusal to swear words repugnant to them should not constitute a barrier to their acquisition of citizenship. As McLachlin C.J. and L'Heureux-Dubé recognized in their *Lavoie v Canada* dissent, citizenship today in Canada has become "a tool of equality, not exclusion".[89]

69. This case provides an opportunity for this Court to establish the conditions upon which government can compel ceremonial pledges and oaths. In doing so, it must overturn the court of appeal's novel limitation on freedom of expression. It also has the chance to confirm whether and how the *Amselem* test applies to freedom of conscience claims. These are issues of national importance, which should be addressed by this Court.

PARTS IV and V: ORDERS SOUGHT AND SUBMISSIONS AS TO COSTS

70. The Applicants request leave to appeal the decision of the Court of Appeal for Ontario.

71. They request that no costs be ordered in the present application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED AT TORONTO this 7th day of October 2014.

for **Peter Rosenthal**
Counsel for the Applicants

for **Nicolas M. Rouleau**
Counsel for the Applicants

[89] *Lavoie v Canada*, [2002] 1 SCR 769, para. 11 [**Tab 6g**].

PART VI: TABLE OF AUTHORITIES

	Cases	Cited at paras.
1.	*Benner v Canada (Secretary of State)*, [1997] 1 SCR 358	14, 61
2.	*Donald et al. v The Board of Education for the City of Hamilton et al.*, 1945 CanLII 117 (ONCA)	19, 30, 40, 45
3.	*Edmonton Journal v Alberta (Attorney general)*, [1989] 2 SCR 1326	35
4.	*Ford v Quebec (Attorney General)*, [1988] 2 SCR 712	42
5.	*Irwin toy ltd. v Quebec (Attorney general)*, [1989] 1 SCR 927	36, 37, 38
6.	*Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211	37
7.	*Lavoie v Canada*, [2002] 1 SCR 769	68
8.	*Public Service Alliance of Canada v Treasury Board (Indian and Northern Affairs Canada)*, 2002 PSSRB 31	19, 46
9.	*R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295	49
10.	*R v Khawaja*, [2012] 3 SCR 555	44
11.	*R v Morgentaler*, [1988] 1 SCR 30	49
12.	*R v Robinson*, 2004 CanLII 31391 (MBPC)	6
13.	*RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199	42
14.	*Roach v Canada (Minister of State for Multiculturalism and Citizenship)* (1994), [1994] 2 FC 406, 113 DLR (4th) (FCA)	1, 6
15.	*Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519	58, 60, 61, 62
16.	*S.L. v Commission scolaire des Chênes*, [2012] 1 SCR 235	51
17.	*Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038	35, 42, 43

Other Materials

PART VII: STATUTORY PROVISIONS

Citizenship Act, RSC 1985, c C-29

*all references are to the version of the *Citizenship Act* in force on September 10, 2012

Persons who are citizens	**Citoyens**
3. (1) Subject to this Act, a person is a citizen if	**3.** (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne :
…	...
(*c*) the person has been granted or acquired citizenship pursuant to section 5 or 11 and, in the case of a person who is fourteen years of age or over on the day that he is granted citizenship, he has taken the oath of citizenship;	*c*) ayant obtenu la citoyenneté — par attribution ou acquisition — sous le régime des articles 5 ou 11 et ayant, si elle était âgée d'au moins quatorze ans, prêté le serment de citoyenneté;
…	…
Grant of citizenship	**Attribution de la citoyenneté**
5. (1) The Minister shall grant citizenship to any person who	**5.** (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
(*a*) makes application for citizenship;	*a*) en fait la demande;
(*b*) is eighteen years of age or over;	*b*) est âgée d'au moins dix-huit ans;
(*c*) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, and has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada calculated in the following manner:	*c*) est un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* et a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :
(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;
	d) a une connaissance suffisante de l'une des langues officielles du Canada;

(*d*) has an adequate knowledge of one of the official languages of Canada;	*e*) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;
(*e*) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and	*f*) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.
(*f*) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.	**Période de résidence**
Residence	(1.1) Est assimilé à un jour de résidence au Canada pour l'application de l'alinéa (1)*c*) et du paragraphe 11(1) tout jour pendant lequel l'auteur d'une demande de citoyenneté a résidé avec son époux ou conjoint de fait alors que celui-ci était citoyen et était, sans avoir été engagé sur place, au service, à l'étranger, des forces armées canadiennes ou de l'administration publique fédérale ou de celle d'une province.
(1.1) Any day during which an applicant for citizenship resided with the applicant's spouse who at the time was a Canadian citizen and was employed outside of Canada in or with the Canadian armed forces or the federal public administration or the public service of a province, otherwise than as a locally engaged person, shall be treated as equivalent to one day of residence in Canada for the purposes of paragraph (1)(*c*) and subsection 11(1).	**Attribution de la citoyenneté**
Grant of citizenship	(2) Le ministre attribue en outre la citoyenneté, sur demande qui lui est présentée par la personne autorisée par règlement à représenter celui-ci, à l'enfant mineur d'un citoyen qui est résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*.
(2) The Minister shall grant citizenship to any person who is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, and is the minor child of a citizen if an application for citizenship is made to the Minister by a person authorized by regulation to make the application on behalf of the minor child.	**Dispenses**
Waiver by Minister on compassionate grounds	(3) Pour des raisons d'ordre humanitaire, le ministre a le pouvoir discrétionnaire d'exempter :
(3) The Minister may, in his discretion, waive on compassionate grounds,	*a*) dans tous les cas, des conditions prévues aux alinéas (1)*d*) ou *e*);
(*a*) in the case of any person, the requirements of paragraph (1)(*d*) or (*e*);	*b*) dans le cas d'un mineur, des conditions relatives soit à l'âge ou à la durée de résidence au Canada respectivement énoncées aux alinéas (1)*b*) et *c*), soit à la prestation du serment de citoyenneté;
(*b*) in the case of a minor, the requirement respecting age set out in paragraph (1)(*b*), the requirement respecting length of residence in Canada set out in paragraph (1)(*c*) or the requirement to take the oath of citizenship; and	*c*) dans le cas d'une personne incapable de saisir la portée du serment de citoyenneté en raison d'une déficience mentale, de l'exigence de prêter ce serment.
(*c*) in the case of any person who is prevented from understanding the significance of taking the oath of citizenship by reason of a mental disability, the requirement to take the oath.	**Cas particuliers**
Special cases	(4) Afin de remédier à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au Canada, le gouverneur en conseil a le pouvoir discrétionnaire, malgré les autres dispositions de la présente loi, d'ordonner au ministre d'attribuer la citoyenneté à toute personne qu'il désigne;
(4) In order to alleviate cases of special and unusual	

hardship or to reward services of an exceptional value to Canada, and notwithstanding any other provision of this Act, the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant citizenship to the person named in the direction.	le ministre procède alors sans délai à l'attribution.
Statelessness — bloodline connection	**Apatridie : droit de sang**
(5) The Minister shall, on application, grant citizenship to a person who	(5) Le ministre attribue, sur demande, la citoyenneté à quiconque remplit les conditions suivantes :
(*a*) is born outside Canada after the coming into force of this subsection;	*a*) il est né à l'étranger après l'entrée en vigueur du présent paragraphe;
(*b*) has a birth parent who was a citizen at the time of the birth;	*b*) l'un de ses parents naturels avait qualité de citoyen au moment de sa naissance;
(*c*) is less than 23 years of age;	*c*) il est âgé de moins de vingt-trois ans;
(*d*) has resided in Canada for at least three years during the four years immediately before the date of his or her application;	*d*) il a résidé au Canada pendant au moins trois ans au cours des quatre ans précédant la date de sa demande;
(*e*) has always been stateless; and	*e*) il a toujours été apatride;
(*f*) has not been convicted of any of the following offences:	*f*) il n'a jamais été déclaré coupable de l'une des infractions suivantes :
(i) a terrorism offence, as defined in section 2 of the *Criminal Code*,	(i) l'infraction de terrorisme au sens de l'article 2 du *Code criminel*,
(ii) an offence under section 47, 51 or 52 of the *Criminal Code*,	(ii) l'infraction visée aux articles 47, 51 ou 52 du *Code criminel*,
(iii) an offence under subsection 5(1) or any of sections 6 and 16 to 22 of the *Security of Information Act*, or	(iii) l'infraction visée au paragraphe 5(1) ou à l'un des articles 6 et 16 à 22 de la *Loi sur la protection de l'information*,
(iv) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in subparagraph (ii) or (iii).	(iv) le complot ou la tentative en vue de commettre l'infraction visée aux sous-alinéas (ii) ou (iii) ou, relativement à une telle infraction, la complicité après le fait ou l'encouragement à la perpétration.
No oath required	**Aucun serment exigé**
(6) A person who is granted citizenship under subsection (5) is not required to take the oath of citizenship.	(6) La personne à qui la citoyenneté est attribuée au titre du paragraphe (5) n'est pas tenue de prêter le serment de citoyenneté.
Rights and obligations	

6. A citizen, whether or not born in Canada, is entitled to all rights, powers and privileges and is subject to all obligations, duties and liabilities to which a person who is a citizen under paragraph 3(1)(*a*) is entitled or subject and has a like status to that of such person.	**Droits et obligations** **6.** Tout citoyen, qu'il soit né ou non au Canada, jouit des droits, pouvoirs et avantages conférés aux citoyens qui ont cette qualité aux termes de l'alinéa 3(1)*a*); il est assujetti aux mêmes devoirs, obligations et responsabilités, et son statut est le même.
Application for certificate of citizenship **12.** (1) Subject to any regulations made under paragraph 27(*i*), the Minister shall issue a certificate of citizenship to any citizen who has made application therefor.	**Demandes émanant de citoyens** **12.** (1) Sous réserve des règlements d'application de l'alinéa 27*i*), le ministre délivre un certificat de citoyenneté aux citoyens qui en font la demande.
Issue of certificate (2) When an application under section 5 or 5.1 or subsection 11(1) is approved, the Minister shall issue a certificate of citizenship to the applicant.	**Délivrance aux nouveaux citoyens** (2) Le ministre délivre un certificat de citoyenneté aux personnes dont la demande présentée au titre des articles 5 ou 5.1 ou du paragraphe 11(1) a été approuvée.
When effective (3) A certificate issued pursuant to this section does not take effect until the person to whom it is issued has complied with the requirements of this Act and the regulations respecting the oath of citizenship.	**Entrée en vigueur** (3) Le certificat délivré en application du présent article ne prend effet qu'en tant que l'intéressé s'est conformé aux dispositions de la présente loi et aux règlements régissant la prestation du serment de citoyenneté.
SCHEDULE **(Section 24)** **OATH OR AFFIRMATION OF CITIZENSHIP** 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.	**ANNEXE** **(article 24)** **SERMENT DE CITOYENNETÉ** Je jure fidélité et sincère allégeance à Sa Majesté la Reine Elizabeth Deux, Reine du Canada, à ses héritiers et successeurs et je jure d'observer fidèlement les lois du Canada et de remplir loyalement mes obligations de citoyen canadien. **AFFIRMATION SOLENNELLE** J'affirme solennellement que je serai fidèle et porterai sincère allégeance à Sa Majesté la Reine Elizabeth Deux, Reine du Canada, à ses héritiers et successeurs, que j'observerai fidèlement les lois du Canada et que je remplirai loyalement mes obligations de citoyen canadien.

Interpretation Act, RSC 1985, c I-21

General definitions	**Définitions d'application générale**
35. (1) In every enactment, ... *"oath"* and *"sworn"* « serment » *"oath"* includes a solemn affirmation or declaration when the context applies to any person by whom and to any case in which a solemn affirmation or declaration may be made instead of an oath, and in the same cases the expression "sworn" includes the expression "affirmed" or "declared"; ...	**35.** (1) Les définitions qui suivent s'appliquent à tous les textes. … *« serment »* "oath" and "sworn" *« serment »* Ont valeur de serment la déclaration ou l'affirmation solennelle dans les cas où il est prévu qu'elles peuvent en tenir lieu et où l'intéressé a la faculté de les y substituer; les formulations comportant les verbes « déclarer » ou « affirmer » équivalent dès lors à celles qui comportent l'expression « sous serment ». ...

Public Service of Ontario Act, 2006, S.O. 2006, Chapter 35, Schedule A

Oath or affirmation of allegiance	**Serment ou affirmation solennelle d'allégeance**
5. (1) Every public servant shall swear or affirm his or her allegiance to the Crown as prescribed under clause 8 (1) (c).	**5.** (1) Chaque fonctionnaire jure ou affirme solennellement son allégeance à la Couronne selon ce qui est prescrit en vertu de l'alinéa 8 (1) c).

Oaths and Affirmations, Ontario Regulation 373/07

Oath or affirmation of allegiance	**Serment ou affirmation solennelle d'allégeance**
1. (1) The following oath or affirmation of allegiance to the Crown is prescribed for the purposes of subsection 5 (1) of the Act: "I swear (or solemnly affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second (*or the reigning sovereign for the time being*), her heirs and successors according to law. So help me God. (Omit this phrase in an affirmation.)"	**1.** (1) Le serment ou l'affirmation solennelle d'allégeance à la Couronne qui suit est prescrit pour l'application du paragraphe 5 (1) de la Loi : "Je jure (ou j'affirme solennellement) que je serai fidèle et que je porterai sincère allégeance à Sa Majesté la reine Elizabeth II (*ou au souverain régnant*), à ses héritiers et à ses successeurs conformément à la loi. Ainsi Dieu me soit en aide. (Omettre cette dernière phrase pour une affirmation.)"

The Civil Service Act, CCSM c C110

Oaths and affirmations	**Serments et affirmations solennelles**
41 Except where otherwise directed by the commission, and subject to such conditions as are prescribed by the commission, every person hereafter appointed to, or employed in, a position who has not already done so shall take (a) the oath or affirmation of allegiance; …	41 Sauf décision contraire de la Commission et sous réserve des conditions qu'elle peut imposer, une personne nommée ou employée à un poste de la fonction publique doit, si elle ne l'a pas déjà fait, prêter les serments ou faire les affirmations solennelles qui suivent : a) le serment ou l'affirmation solennelle d'allégeance; …

Public Officers Act, CCSM c P230

Oath or affirmation of allegiance	**Formule**
9 The following form shall be that of the oath or affirmation of allegiance to be administered to, and taken by, every person in the province, who, either of his own accord or in compliance with any lawful requirement made on him or in obedience to the directions of any Act of the Legislature, desires to take an oath or affirmation of allegiance; and the oath or affirmation may be administered by any person authorized by *The Manitoba Evidence Act* to take affidavits in the province, or lawfully authorized either by virtue of office or by special commission from the Crown for that purpose: I, , do solemnly swear (or affirm) that I will be faithful and bear true allegiance to Her (or His) Majesty (naming the reigning sovereign for the time being), her (or his) heirs and successors, according to law. So help me God. (Omit last four words where person affirms.)	9 Quiconque prête le serment ou fait l'affirmation solennelle d'allégeance, de son propre accord ou pour se conformer à une exigence légale qui lui est imposée ou encore pour obéir aux dispositions d'une loi de la Législature, doit le faire selon la formule figurant ci-dessous. « Je, , jure (ou affirme) solennellement que je serai fidèle et porterai vraie allégeance à Sa Majesté (inscrire ici le nom du souverain de l'époque), à ses héritiers et à ses successeurs, conformément à la loi. Que Dieu me soit en aide. » (Omettre les six derniers mots dans le cas d'une affirmation solennelle.) Sont habilités à faire prêter le serment ou à faire faire l'affirmation solennelle d'allégeance, les personnes à qui la *Loi sur la preuve au Manitoba* donne compétence pour recevoir les affidavits et les personnes compétentes pour ce faire en vertu de leur charge ou d'un mandat spécial de la Couronne à cette fin.

Police Act, RSBC 1996, c 367

Oaths and affirmations

70 (1) A person must take an oath or affirmation in the prescribed form before that person assumes office, exercises any power or performs any duty or function as any of the following under this Act:

(a) an officer;

(b) a bylaw enforcement officer;

(c) a member of a board or committee;

(d) the director;

(e) any person employed or retained by, or engaged and retained by, the director.

Police Oath/Solemn Affirmation Regulation, BC Reg 136/2002

Form of oath or solemn affirmation

1. For the purposes of section 70 of the *Police Act*, the following are to be used as the forms of oath or solemn affirmation, as applicable:

(a) for an officer other than an enforcement officer:

I, ...*[name]*, do [swear/solemnly affirm] that:

• I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors;

• I will, to the best of my power, cause the peace to be kept and prevent all offences against the persons and properties of Her Majesty's subjects;

• I will faithfully, honestly and impartially perform my duties as.....*[office]*.;

(b) for an enforcement officer or bylaw enforcement officer:

I, ...*[name]*, do [swear/solemnly affirm] that:

• I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors;

• I will faithfully, honestly and impartially perform my duties as.....*[office]*.;

Police Act, SNS 2004, c 31

Oath of office

29. A person appointed as a member of the Provincial Police shall take the oath or affirmation prescribed by the regulations.

Police Regulations, NS Reg 230/2005

Oath of office for member

16 The oath of office or affirmation required for a member is prescribed as Form 1.

Form 1 - Oath of Office for Member of Police Department
Section 16 of the *Police Regulations*

I, _____ , do solemnly (*select one*) swear/affirm that I will well and truly serve our Sovereign Lady the Queen and her heirs and successors according to law, as a member of the _____ Police Department without favour, affection, malice or ill will and that I will, to the best of my power, cause the peace to be kept and preserved, and will prevent all offences against the persons and properties of Her Majesty's subjects; and that I will not, except in the discharge of my duties, disclose to any person any matter or evidence which may come to my notice through my employment; and that while I continue to hold office I will, to the best of my judgement, skill, knowledge, and ability, carry out, discharge and perform all the duties of my office faithfully, impartially and according to the *Police Act* or any other Act, and any regulation rule or by-law, (*select one*) so help me God/I so affirm.

Sworn to/Affirmed at)
in the County of)
Province of Nova Scotia, on)
_____, 20___,)
before me,)
)
_____) _____
A Commissioner of Oaths in and for
the Province of Nova Scotia

Police Act, 1990, SS 1990-91, c P-15.01

Members

36 (1) Before entering on the duties of a member, a member of a police service shall take and subscribe to an oath or affirmation in the form prescribed in the regulations before a person authorized to administer an oath or affirmation.

(2) Unless otherwise indicated in his or her appointment, a member has the power and the responsibility to:

(a) perform all duties that are assigned to constables or peace officers in relation to:

(i) the preservation of peace;

(ii) the prevention of crime and offences against the laws in force in the municipality; and

(iii) the apprehension of criminals, offenders and others who may lawfully be taken into custody;

(b) execute all warrants and perform all duties and services under or in relation to them that, pursuant to the laws in force in the municipality, may lawfully be executed and performed by constables or peace officers; and

(c) perform all duties that may lawfully be performed by constables or peace officers in relation to the escorting and conveyance of persons in lawful custody to and from courts, places of confinement, correctional facilities or camps, hospitals or other places.

(3) Unless otherwise indicated in the member's appointment, a member has authority to exercise the powers and perform the duties mentioned in sub-section (2) throughout Saskatchewan.

Oath or affirmation

79 A special constable, before entering on the duties of a special constable, shall take and subscribe to an oath or affirmation in the form prescribed in the regulations before a person authorized to administer an oath or affirmation.

Municipal Police Recruiting Regulations, 1991, RRS c P-15.01 Reg 5

Oaths of office

15 (1) The oath or affirmation to be taken or subscribed to pursuant to subsection 36(1) or section 79 of the Act, is to be in Form 6.

…

FORM 6
[Section 10 and Subsection 15(1)]
Oath of Police

I, _____ (name), do swear (or solemnly affirm) upon my appointment as a _____ (position) in the _____ (police service) that I will, without favour or affection, malice or ill-will, to the best of my ability and knowledge, well and truly serve Her Majesty the Queen, uphold the principles in the Canadian Charter of Rights and Freedoms, preserve the peace, prevent crime and other offences, enforce the law and otherwise discharge the duties of my office faithfully and according to law. So help me God.

Forms of Oath Regulation, NB Reg 81-18

2. The following oath of office shall be made in writing before a judge of the Provincial Court by each person appointed as a member of a police force and it shall be filed with the chief of police of that police force:	**2.** Chaque personne nommée membre d'un corps de police doit prêter, par écrit, devant un juge de la Cour provinciale, le serment d'entrée en fonction qui suit, et ce serment doit être déposé auprès du chef de police de ce corps policier.
OATH OF OFFICE	**SERMENT D'ENTRÉE EN FONCTION**
CANADA	CANADA
PROVINCE OF NEW BRUNSWICK	PROVINCE DU NOUVEAU-BRUNSWICK
I, , do swear that I will well and truly serve Her Majesty Queen Elizabeth II, Her Heirs and Successors, in the office of police officer for the Province of New Brunswick without favour or affection, malice or illwill and that I will to the best of my power cause the peace to be kept and preserved and will prevent all offences against the persons and property of Her Majesty's subjects and against all the laws enforceable in the Province of New Brunswick and that while I continue to hold this office, I will to the best of my skill, ability and knowledge discharge all the duties thereof faithfully according to the law. So help me God.	Moi, , je jure de servir correctement et sincèrement Sa Majesté la Reine Elizabeth II, ses héritiers et successeurs, dans mes fonctions d'agent de police pour la province du Nouveau-Brunswick sans favoritisme ni préférence, sans malice ni mauvaise volonté et de voir, au meilleur de mes capacités, au maintien et à la sauvegarde de la paix et de prévenir les infractions contre les personnes et contre les biens des personnes qui sont des sujets de Sa Majesté de même que les infractions aux lois exécutoires dans la province du Nouveau-Brunswick. Tant que j'exercerai ces fonctions j'exécuterai, conformément à la loi, les tâches qui s'y rapportent au meilleur de ma connaissance, de ma capacité et de mon habilité. Que Dieu me soit en aide.
SWORN TO before me at	SERMENT PRÊTÉ devant moi
_____ in the	à_____
County of _____	dans le comté de_____
this_____ day of _____ ,	
_____, 20_____	

_____ Judge of the Provincial Court	ce_____ jour de_____ 20_____ _____ Juge de la Cour provinciale

Police Act, RSA 2000, c P-17

Appointments of chiefs of police and police officers

36 (1) The commission shall, for a police service,

(a) appoint the chief of police, subject to subsection (1.1), and

(b) appoint police officers.

(1.1) The initial appointment of any individual as chief of police must be ratified by council.

(2) Notwithstanding subsection (1), the commission may delegate the power to appoint police officers other than a chief of police to the chief of police.

(3) Each police officer appointed under this section shall, before commencing his or her duties, take the oath set out in Schedule 3.

(4) Subject to the regulations, the commission may establish a probationary period of service for a person who is

(a) appointed to the police service as a police officer, or

(b) appointed to or promoted to a position or a higher rank within the police service.

Schedule 3
Oath of Allegiance and Office
(Police Officers and Other Peace Officers)

I, _____, swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors, according to law, in the office of _____ for the _____ of _____ and that I will diligently, faithfully and to the best of my ability execute according to law the office of _____, and will not, except in the discharge of my duties, disclose to any person any matter or evidence that may come to my notice through my tenure in this office, so help me God.

Sworn before me in the _____ of)
_____, in the Province of Alberta, this)
____ day of _____)
_____) _____
(Commissioner for Oaths) Signature
in and for the Province of Alberta))

Legal Profession Act, R.S.A. 2000, c. L-8

Admission to bar and enrolment as member

44 (1) When the Executive Director has approved the enrolment of a person under section 40, 41 or 42 or the Benchers have approved the enrolment of a person under section 45, and the prescribed enrolment fee has been paid, the Executive Director shall issue a certificate to that effect directed to a clerk of the Court of Queen's Bench or of the Provincial Court.

(2) When the certificate of the Executive Director has been delivered to the clerk, the applicant for enrolment shall, within 2 years after the date of the certificate, take and subscribe before a judge or judges of the Court of Queen's Bench or of the Provincial Court, in open court,

(a) an oath of allegiance in the form prescribed by the *Oaths of Office Act*,

(b) the official oath prescribed by the *Oaths of Office Act*, and

(c) any other oath prescribed by the rules.

Oaths of Office Act, RSA 2000, c O-1

Oath of allegiance

1 (1) When by a statute of Alberta a person is required to take an oath of allegiance it shall be taken in the following form:

I, _____ , swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors, according to law.

So help me God.

(2) Where the name of Her Majesty Queen Elizabeth the Second is expressed in the form, the name of the Sovereign at the time that the oath is taken shall be substituted therefor if different.

Law Society Act, 1999, SNL 1999, c L-9.1

Enrolment as solicitor

34. (1) A person who is entitled to be enrolled in the society may be enrolled as a solicitor of the Supreme Court.

(2) Upon production to a judge of the Trial Division of a certificate of entitlement to be enrolled in the society issued by the vice-president under this Act, the judge shall endorse his or her authorization on the certificate and the judge shall enroll the person named in the certificate as a solicitor of the Supreme Court.

(3) There shall be issued, under the seal of the Supreme Court, a certificate of an enrolment under subsection (2), and the documents upon which an authorization of admission was obtained shall be filed and retained on record in the Supreme Court.

(4) Before enrolment as a solicitor, the person applying shall take and sign the oath or affirmation of allegiance and the following oath or affirmation before a judge of the Trial Division in open court:

"I ..... do swear [affirm] that I will truly and honestly conduct myself in the practice of a solicitor according to the best of my knowledge and ability." (Where an oath is taken, add "So help me God".).

Oaths of Office Act, RSNL 1990, c O-2

Oath of Allegiance

2. The Oath of Allegiance shall be in the following form:

"I, _____, swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second Her Heirs and Successors, according to law, so help me God.".

Legal Profession Act, RSPEI 1988, c L-6.1

17. (1) An applicant for registration as a member shall, upon receipt of the notification that his or her application has been accepted, make application in the manner prescribed by the regulations to a judge of the Supreme Court for administration of the oaths of office.

(2) The judge shall, upon receipt of a certificate from the secretary-treasurer stating that the applicant has complied with this Act and that his or her application for membership has been accepted, administer the following oaths to the applicant:

(a) “I, (name of applicant), do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second (or as the case may be), Her heirs and successors, according to law. So Help Me God;”

(b) “I, (name of applicant), do solemnly and sincerely swear that I will faithfully and honestly fulfill the duties which devolve upon me as a barrister, solicitor and attorney, or as a member of the Law Society of Prince Edward Island, and that I will as a barrister, solicitor and attorney conduct all causes and matters faithfully and to the best of my ability; I will not seek to destroy any person's property; I will not promote suits upon frivolous pretences; I will not pervert the law to favour or prejudice any person; but in all things conduct myself truly and with integrity; in fine, the Sovereign's interests and that of my fellow citizens I will uphold and maintain according to the law in force in this province. So Help Me God.”

Court File No. **06-CV-301832PD3**

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CHARLES C. ROACH, ASHOK CHARLES, MICHAEL MCATEER AND HOWARD JEROME GOMBERG

Applicants

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF DROR BAR-NATAN

I, DROR BAR-NATAN, of the City of Toronto in the Province of Ontario, AFFIRM AS FOLLOWS:

1. This Affidavit is written to provide evidence in support of a motion that I be added to the Application within as an Applicant and, should such a motion be granted, as evidence to be used in the hearing of the Application itself.
2. I was born on January 30, 1966, in Kiryat-Gat, Israel, to Naomi Bar-Natan, an Israeli born in the United States, and to Shaul Bar-Natan, an Israeli born in Syria. My father's sole citizenship was Israeli, and my mother and I are citizens of both the United States and of Israel.
3. I have lived in Israel and in the United States until July 2002, over the years obtaining a Ph.D. in mathematical physics from Princeton University, teaching for a number of years at Harvard University, and eventually achieving the rank of an associate professor with tenure at the Hebrew University in Jerusalem.

4. I am married to Yael Karshon whose career path has been similar to mine. We are parents of Assaf (born 1993) and Itai (born 1996).
5. On July 31, 2002, I moved with my family to Toronto, Canada.
6. My wife and I were both appointed as associate professors of mathematics at the University of Toronto. We were both promoted to full professors in 2006, and presently we both still work at U. of T. as researchers in mathematics and teachers of mathematics.
7. While resident in Toronto, I have published numerous articles in scientific journals, taught thousands of undergraduate students, hundreds of graduate students, and supervised or am supervising about 10 Ph.D. students and several post-doctoral fellows. As a resident of Canada, I have lectured extensively domestically and internationally, I have been awarded a number of research grants, and I maintain an extensive scientific web presence. I have performed significant administrative duties within my university.
8. The primary reasons for our move out of Israel have been political and cultural. I did not want to live in an area of the world that is in a permanent state of conflict, and I found it hard to live in a place where one's ancestry determines so much of his/her future.
9. Before moving to Canada, my wife and I both lived for about a decade in the United States, where my wife was a permanent resident and I was a citizen, and we knew and know that country very well. Yet we have chosen to move to Canada, which we had only visited briefly before. I used to tell my friends that I see Canada as a "kinder, gentler America", and this, along with having established roots here, remains the reason we wish to stay and play a role in Canadian life.
10. My wife and I and our children became permanent residents of Canada in June, 2005. My wife and children became Canadian citizens in January 2011.

11. In January 2008, around the time that we became eligible to apply for Canadian citizenship, I realized, because of the requirement of taking the oath of citizenship that includes affirming allegiance to the Canadian monarch, I would not be able to become a Canadian citizen along with my family. I have not become a Canadian citizen since.
12. I find the phrase *"I affirm that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, Queen of Canada, Her Heirs and Successors"* repulsive. To me, it states that some people, the royals and their heirs, are born with privilege. It is a historic remnant of a time we all believe has passed, in which the children of peasants could be nothing but peasants, and in which aristocracy existed as a closed club.
13. I appreciate that the monarchy in Canada is mostly symbolic (I could not live here had it been anything more). Yet it is precisely the wrong symbol: a symbol that we aren't all equal and that some of us have to bow to others for reasons of ancestry alone.
14. I could and can live in Canada ignoring the monarchy and enjoying all else that is wonderful here. But I feel that affirming allegiance to what I think is wrong would be a violation of my conscience that I would find very difficult to do. I find the thought of having to violate my conscience in this way very bitter to swallow.
15. I should stress that I see nothing wrong with the second half of the oath, that *"I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen"*. Indeed, I faithfully observe the laws of Canada and I am looking forward to fulfilling my duties as a Canadian citizen. I accept that acceptance of the Canadian laws is reasonable to require of new Canadians.
16. Yet I feel that the requirement of taking the (first half of) the oath is tantamount to hazing. To be initiated as a Canadian, I am required to participate in an initiation ritual that I find disturbing and humiliating. It is a ritual that has no practical meaning and only carries what I regard as a repugnant symbolic meaning. Moreover, it is a ritual that born-Canadians are not subject to.

17. I therefore wish to be added as an Applicant to this Application so that I can have the courts consider the possibility of relieving me of the necessity of affirming my allegiance to the monarchy of Canada as a part of the process of becoming Canadian.

18. There are many reasons that I wish to become a Canadian citizen, including obtaining the right to vote in elections and the right to travel on a Canadian passport.

19. I feel there is much value in becoming a Canadian citizen. Should this Application be dismissed and possible subsequent appeals be denied, I will likely hold my nose and shut my eyes, surrender to some hazing and unhappily take the oath of citizenship in contradiction to my conscientious beliefs as indicated above.

20. Should that happen, I will be bound in allegiance to the monarchy, and unlike born-Canadians, I will be morally bound to support it. Thus my first act as a new Canadian citizen would be to write the monarch in person and request to be relieved of my obligations to her.

21. This Affidavit is for the purpose of providing evidence on a motion to add me as an Applicant and evidence on the Application itself, and for no other or improper purpose.

Affirmed before me at the City of Toronto)

this 17 day of September, 2012)

)

_____) Dror Bar-Natan

Peter Rosenthal DROR BAR-NATAN

A Commissioner, etc.

Court File No. **06-CV-301832PD3**

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CHARLES C. ROACH, ASHOK CHARLES, MICHAEL MCATEER AND HOWARD JEROME GOMBERG

Applicants

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF SIMONE E.A. TOPEY

I, SIMONE E.A. TOPEY, affirm as follows:

1. I was born in the country of Jamaica in 1966.
2. I immigrated to Canada in 1978.
3. I have been a permanent resident of Canada since 1981.
4. Canada is my home. I would like to be a Canadian citizen.
5. I would like to have the convenience of being able to travel on a Canadian passport.
6. I want to be able to vote in elections.
7. I am a Rastafarian. One of the beliefs of the Rastafarian religion is that the current society is Babylon. The Queen, as the head of state of Canada, would be regarded then as the

head of Babylon. It would deeply violate my religious belief to take any kind of oath to the person who is the head of Babylon.

8. I have not applied for citizenship because I know that the oath to the Queen is required and that I could not take such an oath.

9. I have no objection whatsoever to taking an oath that I will faithfully observe the laws of Canada and fulfill my duties as a Canadian citizen if I am granted citizenship.

10. If the part of the current citizenship oath that refers to the Queen and her heirs was removed, I would apply for citizenship.

11. I want to be able to participate in political movements whose goals include abolishing the monarchy. If I took the citizenship oath to the Queen, I would feel bound by that oath to refrain from participating in such political movements.

12. I affirm this affidavit to provide evidence on the Application herein and for no other or improper purpose.

Affirmed before me this 4th day of October 2012 at TORONTO, ON

A Commissioner, Etc.
Peter Rosenthal

SIMONE E.A. TOPEY

Court File No. **06-CV-301832PD3**

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHAEL MCATEER, SIMONE E.A. TOPEY AND DROR BAR-NATAN

Applicants

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF ASHOK CHARLES

I, ASHOK CHARLES, of the City of Toronto, AFFIRM AS FOLLOWS:

1. I was born on September 11, 1955 in India.

2. Neither of my parents was born in Canada.

3. I have resided in Canada since 1960.

4. When I commenced the application procedure for Canadian citizenship in 1977, I learned that swearing or affirming to " be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, her Heirs and successors" [hereinafter, "the Oath"] was an essential part of the naturalization process.

5. I was repelled by the Oath requirement and found it deeply distasteful that I could not become a Canadian citizen without professing an allegiance which I did not sincerely feel and which was repugnant to me.

6. I believe in the fundamental democratic principle of equality and regard the monarchy as an undemocratic institution based on hereditary privilege and inequality of status.

7. For many years, the British Crown repressed my ancestors in India. India finally won independence, after years of struggle in which soldiers representing the British monarchy killed and repressed my ancestors. This is a reason that swearing allegiance to the British monarchy is even more repulsive to me than swearing allegiance to an arbitrary monarch might be.

8. Because I felt that it was very important for me to become a citizen of Canada, I reluctantly took the Oath of Allegiance in 1977, in spite of the great discomfort this violation of my conscience caused me. I have been a citizen of Canada since that time.

9. Years later, I began to feel that the requirement of swearing the Oath to gain Canadian citizenship was in violation of both the spirit and the provisions of the *Canadian Charter of Rights and Freedoms*. This increased the ideological discomfort and distress that I experienced as a result of having sworn the Oath.

10. In 2002, I joined Citizens for a Canadian Republic, an organization which seeks to build a political movement to have the Queen replaced by a democratically-selected Canadian as Canada's Head of State. As a result of the fundamental freedoms enshrined in the *Canadian Charter of Rights and Freedoms*, I felt that I did have the right to participate in such an organization in spite of my having sworn the Oath.

11. Since 2002, I have been is an active and committed participant in Canada's republican movement.

12. In 2004, I publicly recanted the Oath to the Queen and her successors and heirs.

13. To formalize my recantation of the Oath of Allegiance, in May, 2004 I submitted a notarized document to Citizenship and Immigration Canada recanting the said portion of the citizenship Oath. In this document I reaffirmed the remainder of the Citizenship Oath. Attached to this Affidavit as Exhibit "A" is a true copy of that document.

14. On October 4, 2004, after some months had elapsed without my having received a response to my recantation, I wrote as follows to the Minister of Citizenship and Immigration:

Honourable Minister,

On May 25, 2004 I sent you, by registered mail, a legally notarized statement in which I recanted the portion of the Oath of Citizenship, which I swore in 1977, which pledges allegiance and faithfulness to Queen Elizabeth and her heirs and successors.

So far I have received no response from your office.

It is extremely disconcerting to send a communication of such gravity to an office of the federal government and receive no acknowledgement or response.

In particular I would like to know if my withdrawal of allegiance to Queen Elizabeth, and her heirs and successors, has affected the status of my citizenship in any way.

I look forward to hearing from you.

15. The next month, I received a response to my letter of October 4, 2004. Citizenship

and Immigration Canada acknowledged receipt of my recantation in writing and informed me that my citizenship had not been affected by my recantation. Attached to this Affidavit as Exhibit "B" is a true copy of the letter dated November 19, 2004 providing that information, in which the Ministry of Citizenship and Immigration also indicated that "*...there are no laws in Canada that state that a person loses citizenship if the individual recants part of the oath that was sworn at the time the individual became a citizen.*"

16. I found this response heartening because it informed me that the Canadian government recognized that my complete absence of allegiance and faithfulness to the Queen and other members of her family did not make me less worthy of Canadian citizenship.

17. As I expressed in Exhibit "A", I am proud to make the commitment contained in the other part of the citizenship oath; namely, to "faithfully observe the laws of Canada and fulfill my duties as a Canadian citizen".

18. This Affidavit is for the purpose of providing evidence on the Application herein and for no other or improper purpose.

Affirmed before me at the City of Toronto)
this 7th day of November, 2012)
)
)

Peter Rosenthal
A Commissioner, etc.

ASHOK CHARLES

Ashok Charles
94A Ascot Av.,Toronto,
Ontario. M6E 1E9.

The Honourable Ms. Judy Sgro
Minister of Citizenship and Immigration
Jean Edmonds South Tower
21st floor, 365 Laurier Av.
Ottawa, Ontario. K1A 1L1

This is Exhibit A referred to in the affidavit of Ashok Charles sworn before me, this 7th day of NOVEMBER 2012

A COMMISSIONER, ETC.

Honourable Minister,

I became a Canadian citizen in 1977. Since then I have come to embrace my identity as a citizen, among equals, in a progressive, modern democracy.

On reflection, I have also recognized that the portion of the citizenship oath I swore, which pledges allegiance to Queen Elizabeth, and her heirs and successors, is incompatible with the democratic ideals I uphold.

It is my view that it is entirely inappropriate for Canada to require of its citizenry, allegiance to a monarch. I see this state-sanctioned subjugation as detrimental to our national spirit and to the fulfillment of Canada's role, internationally, as an independent democracy.

In accordance with my principles and as a member of Citizens for a Canadian Republic, an organization dedicated to the installation of a Canadian head of State, I hereby recant that portion of my sworn oath which read "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..."
I continue to wholeheartedly respect the remainder of the oath, which read "...and that I will faithfully observe the laws of Canada and fulfill my duties as a Canadian citizen."

Sincerely,

This solemn declaration is made conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

Sworn before me at the)
City of Toronto in the)
Province of Ontario)
this 20th day of May, 2004)

Ashok Charles

Andrew C. Lewis
A Commissioner etc.
Notary Public

Citizenship and Immigration Canada | Citoyenneté et Immigration Canada

Case Management Branch
300 Slater Street, 9th Floor
Ottawa, Ontario
K1A 1L1

November 19, 2004

This is Exhibit B referred to in the affidavit of Ashok Charles sworn before me, this 7th day of NOVEMBER 20 12

A COMMISSIONER, ETC.

Mr. Ashok Charles
94A Ascot Avenue
Toronto, Ontario
M6E 1E9

Dear Mr. Charles:

I am writing in regards to your letter of October 4, 2004, to the Honourable Judy Sgro, Minister of Citizenship and Immigration. I apologize for the delay in responding.

The *Citizenship Act* states that a person becomes a citizen if they meet the requirements in section 5 and then take the oath of citizenship.

The only way that a person can renounce their citizenship is to follow the requirements described in section 9 of the *Act* and section 7 of the Regulations.

A person loses their Canadian citizenship if their application for renunciation is approved. The individual must meet all requirements of the *Act* by filing an application for renunciation. We do not recognize implicit renunciation, and there are no laws in Canada that state that a person loses citizenship if the individual recants part of the oath that was sworn at the time the individual became a citizen.

I trust that this explanation is satisfactory. Should you wish to find out more information concerning the requirements for renunciation of citizenship, please visit our web site at www.cic.gc.ca.

Sincerely,

John Warner
Case Analyst

Canada

Court File No. **06-CV-301832PD3**

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHAEL MCATEER, SIMONE E.A. TOPEY AND DROR BAR-NATAN

Applicants

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF HOWARD JEROME GOMBERG

I, HOWARD JEROME GOMBERG, of the City of Toronto in the Province of Ontario, AFFIRM AS FOLLOWS:

1. I was born on August 16th 1939 in the City of Brooklyn, New York, United States of America.

2. Neither of my parents was born in Canada.

3. I have lived in Ontario since 1974.

4. I applied for Canadian citizenship and was duly granted citizenship in 2008.

5. Before I was sworn in as a Canadian Citizen and received delivery of my Citizenship Certificate, I had sworn an affidavit stating that taking the Oath to be loyal and

bear true allegiance to Her Majesty Queen Elizabeth II, Her Heirs & Successors [hereinafter, "the Oath'] is not consistent with my religious and personal beliefs and consequently, such an Oath or Affirmation violated my fundamental freedom of conscience.

6. I took Canadian citizenship because not having it presented hardships for me with respect to my professional life as an actor and performer and also because I wanted to more fully participate in Canadian life, including voting at elections.

7. I was therefore forced to take the Oath under duress and, as a result, I have suffered ongoing mental anguish having taken a solemn Oath to be loyal to an institution and political theory that I do not believe in.

8. On my attendance to be sworn in as a Canadian citizen, I expressed to everyone who had authority at the ceremony that I was taking the oath under duress and that I believed that my right to freedom of conscience was being violated.

9. I believe that no human being by right of birth is better than any other human being. In the country of my birth, the United States, I grew up with the maxim: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." I firmly believe in that maxim, and I consequently find the notion of the divine right of royalty to be immoral.

10. I am Jewish. I believe that my religious beliefs were compromised by my being forced to affirm the impugned words of the Oath of Allegiance. I object to the religious nature of the Oath. My religious tradition states clearly, in the Book of Exodus, Chapter 20, verses 4 through 6, *"Thou shall not have any other Gods before me. Thou shall not bow down to any graven idols."*

11. It is my view that forcing me to take the Oath contravened the spirit of the above excerpt from the Book of Exodus.

12. On April 3rd 2008, I attended my citizenship swearing-in ceremony. I indicated to all persons I perceived to be in a position of authority and to a number of others that I was taking the oath under duress and that it was not binding on my conscience. Further, I explained to them my view that my rights were being compromised by being forced to swear in such a manner. The Citizenship Judge said to me "Someday it will change." However, the Judge administered the oath to me, notwithstanding my protestations that the oath is not binding on my conscience and that I had no intention of honouring it.

13. When I signed the Oath, I wrote above my signature the words "under duress" and pointed out what I had written to an official.

14. None of the officials expressed any concerns about my indications that I had no intention of honouring the Oath. No official of the Government of Canada expressed any such concerns to me at any time before or after I took the Oath.

15. This Affidavit is for the purpose of providing evidence on the Application herein and for no other or improper purpose.

Affirmed before me at the City of Toronto)
this 9 day of November, 2012)
)
)

Peter Rosenthal
A Commissioner, etc.

Howard Jerome Gomberg
HOWARD JEROME GOMBERG

Court File No. **06-CV-301832PD3**

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHAEL MCATEER, SIMONE E.A. TOPEY AND DROR BAR-NATAN

Applicants

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF MICHAEL MCATEER

I, MICHAEL MCATEER, of the City of Toronto in the Province of Ontario, AFFIRM AS FOLLOWS:

1. I was born in Dublin, Ireland on August 31, 1933.

2. I am a journalist.

3. I became a Canadian landed immigrant in 1964 and have resided in Canada ever since. I now hold a permanent resident card.

4. I am an Irish citizen.

5. For many years, I have desired to become a Canadian citizen. I wish to fully participate in Canadian Society: vote in elections, travel on a Canadian passport, and so on.

6. I have not been able to take Canadian citizenship because one of the requirements is that of taking an Oath of or affirming allegiance to Her Majesty Queen Elizabeth II, her

Heirs and Successors.

7. My family has a long history of commitment to republican beliefs and of support for the establishment of an independent, democratic and inclusive Irish Republic. My father, who was English-born (as was my mother), was a democrat and a strong advocate of social justice who saw British dominance in Ireland as a hindrance to progress and social change. He was wounded in the civil war of the early 1920's, fighting for the republican cause, and later faced discrimination for his republican principles.

8. I too am a committed republican and a democrat. I believe that, despite what flaws it may have, a democratic form of government is one that I can fully support. I take oaths very seriously, and so taking an oath of allegiance to a hereditary monarch who lives abroad would violate my conscience, be a betrayal of my republican heritage and impede my activities in support of ending the monarchy in Canada.

9. The institution of hereditary monarchy, with its hereditary privileges, its perpetuation of a class system, and its insistence that the monarch be a member of the established Church of England is anachronistic and discriminatory and has no place in a democratic, multi-cultural, multi-ethnic, multi-religious country such as Canada. I will not take an Oath to such an institution because it is not in keeping with my beliefs of egalitarianism and democracy.

10. With its mix of people from all over the world, Australia is much like Canada. Also, like Canada, Australia is a constitutional monarchy with Queen Elizabeth II as its reigning monarch. Several years back, Australia changed its citizenship oath of allegiance to eliminate any mention of the Queen and her heirs and successors. Their oath now reads in part: "From this time forward I pledge my loyalty to Australia and its people whose

democratic beliefs I share, whose rights and liberties I respect and whose laws I will uphold and obey." I would feel comfortable in making such a pledge, with "Australia" replaced by "Canada".

11. The rest of the present Canadian oath requires new citizens to faithfully obey the laws of Canada and to fulfill the obligations of a Canadian citizen. I have no objection to taking this part of the present oath.

12. I affirm this Affidavit in support of the Application herein and for no other or improper purpose.

Affirmed before me at the City of Toronto)
this 9 day of November, 2012)
)
)
)

Peter Rosenthal
A Commissioner, etc.

Michael McAteer

Court File No. 06-CV-301832PD3

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN

MICHAEL MCATEER, SIMONE E. A. TOPEY AND DROR BAR-NATAN

Applicants

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF RANDALL WHITE

I, RANDALL WHITE, of the City of Toronto in the Province of Ontario, AFFIRM AS FOLLOWS:

1. A true copy of my curriculum vitae is attached to this Affidavit as Exhibit "A".

2. I obtained the following degrees from the University of Toronto: a B.A. in Political Science and Economics, an M.A. in Political Science and a Ph.D. in Political Science. From 1968 to 1972 and then again from 1975 to 1980, I was enrolled in the Ontario Public Service. I ended my formal career in the Ontario Public Service as a Senior Policy Advisor, Economic Development.

3. From 1980 to the present, I have worked as an independent public policy consultant for

clients at all three levels of government in Canada and in various branches of the Canadian-based private sector.

4. Over the past quarter century, I have dealt with a wide variety of policy areas, including democratic reform, disaster management, economic development, health policy, heritage preservation, housing, intellectual property rights and international trade, professional governance, public finance, and real estate development and property taxation.

5. I am the author of a number of books on Canadian history, politics, and public policy issues. These include: *Ontario 1610-1985: A Political and Economic History* (Dundurn Press, 1985); *Fur Trade to Free Trade: Putting the Canada-US Trade Agreement in Historical Perspective* (Dundurn Press, 1988); *Voice of Region: The Long Journey to Senate Reform in Canada* (Dundurn Press, 1990); *Global Spin: Probing the Globalization Debate* (Dundurn Press, 1995); *Ontario Since 1985* (eastendbooks, 1998); and *Is Canada Trapped in a Time Warp? Political Symbols in the Age of the Internet* (eastendbooks, 2001).

6. The main subject of my 2001 book, *Is Canada Trapped in a Time Warp?*, was "abolishing the monarchy in Canada." The book was described as "thought provoking" by Adam M. Dodek in the Ontario Bar Association publication, *Constitutional*.

7. In the more recent past, I have written a variety of articles on Canadian republican issues

and the future of the British monarchy in Canada. These include : "Let's elect our head of state," *Toronto Star*, April 26, 2009 ; "PM Harper's new governor general shows office continues to evolve?", *counterweights.ca*, July 8, 2010 ; "PM's puzzling reticence on the monarchy," *Toronto Star*, April 29, 2011 ; and "Who pays for the Canadian forces nowadays — the offshore monarchy or the people of Canada (and Quebec)?", *counterweights.ca*, August 20, 2012.

The Citizenship Oath to the Queen

8. Section 24 of the *Citizenship Act* and the associated schedule prescribe that where a person is required under this Act to take the oath of citizenship, the person shall swear or affirm :

> "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.

9. The Ontario Council of Agencies Serving Immigrants' March 2005 submission to the Standing Committee on Citizenship and Immigration of the Parliament of Canada urged that "only naturalized citizens" (or new citizens) "are required to make ... an oath" to the Queen as a condition of citizenship in Canada today. It "is assumed that native-born Canadians would automatically agree to uphold the principles of the Oath." The submission urged that the citizenship oath be replaced buy one that made no reference to the Monarchy.

10. As opinion polls make clear, substantial numbers of native-born Canadians today would not automatically agree to uphold the oath to the Queen; and they are not compelled to do so by law as a condition of their citizenship.

11. On one understanding of modern democratic thought, at least, the principles of "monarchy" and "democracy" are fundamentally opposed. Those who have such an understanding with deep seriousness are bound to object to swearing an oath of allegiance to a monarch.

12. In Canada today not everyone may agree with the belief that the principles of monarchy and democracy are opposed. As in the case, for example, of those who continue to believe in "constitutional monarchy," or in historic conceptions of a mixed constitution, that blends elements of monarchy, aristocracy, and democracy. But many individuals feel that monarchy and democracy are opposed, as a serious matter of conscience. It is my opinion that this is an increasingly common view among Canadian historians and political scientists.

Impact on Charles Roach

13. This application was initiated some years ago by Charles Roach, who passed away on October 2, 2012.

14. Over the past several years, I had many discussions with Charles Roach about his

concerns about oaths to the Queen. The information about him that I depose to below is based on those discussions.

15. Mr. Roach was born a British subject in the Caribbean, and grew up in a household with pictures of George V and George VI on the wall. In 1955 he emigrated to Canada, where he joined the Regular Officer Training Plan of the Canadian Forces and studied at the University of Saskatchewan.

16. As a British subject and permanent resident of Canada, under the Canadian Citizenship Act of 1947 Mr. Roach could vote and stand for public office, and generally enjoyed the political rights of a Canadian citizen. In 1963 he became a barrister and solicitor in Ontario.

17. By the middle of the 1970s, what Mr. Roach characterized as his mature "egalitarian credo" included opposition to the monarchy, and this caused him to decline when a colleague nominated him for the title of "Queen's Counsel."

18. The Canadian Citizenship Act of 1977 effectively took away Mr. Roach's political rights as a British subject in Canada. In particular, he could no longer vote in elections. To become a Canadian citizen and restore these rights he would have had to swear an oath of allegiance to the British monarch, who was also the Queen of Canada, Elizabeth II.

19. By 1977, Mr. Roach had embraced republicanism, which to him included a belief that sovereignty or the supreme power in a state ought to reside with the people and their elected representatives, and not with the holder of any hereditary office.

20. In the late 1980s, Mr. Roach was informed by the Law Society of Upper Canada that he would have to become a Canadian citizen by a certain deadline to continue working as a barrister and solicitor in Ontario.

21. Mr. Roach successfully completed all parts of the required process for citizenship, except for the last one: taking the Oath. He informed the Citizenship Judge before whom he appeared that he was unwilling, as a matter of conscience, to swear or affirm an oath to the Queen. He informed the Judge that he would be willing to affirm the rest of the citizenship oath: that he would "faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen." The Citizenship Judge told him he would have to affirm the entire oath if he was to receive citizenship. His application for citizenship was not granted.

22. Before the deadline by which Mr. Roach had been required by the Law Society to become a citizen had passed, the Supreme Court of Canada ruled that it was unconstitutional to require that lawyers be citizens. As a result of this ruling, Mr. Roach was not required to obtain citizenship. He remained a member in good standing of the Law Society of Upper Canada until his death.

23. In 1994, the Attorney General of Ontario asked Mr. Roach to apply for the position of Provincial Judge. He declined since an oath to the Queen was required before assuming such a position.

Canadian Citizenship and Naturalization - Background

24. The present oath to the Queen has its origins in an earlier legal and constitutional regime, under which Canadians were legally regarded as British subjects. This regime was fundamentally changed by the Citizenship Act of 1947, which introduced the legal status of a Canadian citizen for the first time, and by the Citizenship Act of 1977, which ended all special treatment of British subjects in Canadian citizenship law.

25. The oath to the Queen in the present Citizenship Act has its origins in the earlier history of the 1867 confederation (and before that as well), when the majority of the Canadian population still reported British national or ethnic origins, and when Canadians were still legally known inside and outside Canada as British subjects.

26. According to the Canadian Genealogy Centre: "From 1763 until the Canadian Citizenship Act came into force on January 1, 1947, people born in Canada were British subjects. Thus, immigrants born in Great Britain and the Commonwealth, being British subjects by birth, had no need to be naturalized or to obtain British citizenship in Canada." Under a "number of earlier laws ... aliens could petition for naturalization. If

successful, they would swear allegiance to the British sovereign and would be granted the rights of someone born within the British Empire."

27. In the 1901 Census, just under 13% of the Canadian population were immigrants or "born outside Canada." Some 57% of these immigrants had been born in the British Isles, and retained their status as British subjects in Canada. The largest group of so-called "foreign-born" immigrants (i.e., born outside the British Empire) was from the United States (19%), with smaller groups from Russia (5%), Germany (4%), China (2.5%), and other places. In 1901 only 55% of foreign-born immigrants had sworn allegiance to the British sovereign and become naturalized.

28. During the first decade of the 20th century, immigration to Canada accelerated dramatically, especially in connection with the settlement of Western Canada. During the years immediately preceding the First World War it reached absolute levels that have never subsequently been surpassed. Canada admitted more than 400,000 immigrants in 1913.

29. Between 1915 and 1945, more than 1.9 million immigrants were admitted to Canada over the three decades. As in earlier periods, many of these newcomers had been "born in Great Britain and the Commonwealth," and "being British subjects by birth, had no need to be naturalized or to obtain British citizenship in Canada." In the 1941 Census, 17.5% of the Canadian population were immigrants or "born outside Canada." And just under

half these immigrants (49.7%) were "Other British-born" outside Canada.

30. "Foreign-born" immigrants during this period, who had to swear allegiance to the British sovereign to become naturalized and "be granted the rights of someone born within the British Empire," had somewhat more diverse origins than in earlier periods. For the first century of the present confederation, Canadian public policy preferred immigrants from Great Britain and the Commonwealth, the United States, and Europe — and more or less in that order.

31. The first Canadian Citizenship Act of 1947 was just one step in a long process of continuing Canadianization of Canadian public life. The Citizenship Act of 1947 provided for the conferring of a common Canadian citizenship on all Canadians, whether or not they had been born in Canada.

32. Not all immigrants were required to take the oath to the Queen. As Citizenship and Immigration Canada today explains, under the Citizenship Act of 1947 "unlike an alien ... a British subject could qualify for Canadian citizenship without being called before a judge for a hearing or taking the oath of allegiance in a formal ceremony."

33. As Citizenship and Immigration Canada today further explains : "Thanks to changing attitudes and the soaring numbers of non-British immigrants in the 1950s and 1960s, the distinction in treatment between British subjects and aliens began to come under attack.

The concept that citizenship is a privilege and not a right was also being questioned."

34. Two other Canadianizing events of 1947 complemented the new Citizenship Act of that year. The first was the repeal of the Chinese Immigration Act of 1923. The second was Letters Patent issued by King George VI, which effectively transferred "all the powers and authorities of the Sovereign in right of Canada" from the British monarch to the Governor General of Canada.

35. In 1965, the Parliament of Canada adopted the present independent Canadian maple leaf flag, despite protests from supporters of the old British red ensign, with the Union Jack in the top left-hand corner.

36. As explained by the now disbanded Canadian Policy Research Networks (whose archives survive in the Carleton University Library), in the centennial year of the 1867 confederation, "Canada finally broke the link between national identity and racial identity that had underpinned immigration policy for a century." With changes in immigration regulations in 1967, national origin — and, by extension, race and ethnicity — ceased to be a condition of entry or exclusion. They were replaced by a "point system" that remains in use today. These changes "had a tremendous impact on the demographic make-up of Canada ... prior to 1967 most immigrants originated in Europe or the United States ... by 2001 more than 63 percent of all newcomers originated in Asia."

37. The Official Languages Act of 1969 recognized English and French as the official languages of Canada. The Act's primary focus was to provide for federal government services in both languages, wherever warranted by local population size. The final report of the Royal Commission on Bilingualism and Biculturalism that preceded the enactment of the Official Languages Act of 1969 explained that its recommendations "encouraged federal institutions and agencies to promote ... 'cultural diversification within a bilingual framework.'"

38. The Citizenship Act of 1977 ended the last vestiges of special status for British subjects in Canadian citizenship law.

39. The content of the oath of allegiance for new citizens in the present Citizenship Act of 1977 (which essentially dates back to the Citizenship Act of 1947) has been discussed and debated.

40. In 1994, in the midst of growing controversy over the form of what still remains the current citizenship oath, Citizenship and Immigration Canada asked a group of 10 noted Canadian writers to work as a team to draft a new oath. The result was: "I am a citizen of Canada and I make this commitment: to uphold our laws and freedoms, to respect our people in their diversity, to work for our common well-being and to safeguard and honour this ancient Northern land."

41. In February 1999, during a Canadian House of Commons debate on proposed changes to citizenship legislation, Alex Shepherd, a Liberal Member of Parliament from the Durham region of Ontario, urged: "What I suggest to the government is that we propose some sort of amendment to this legislation that will recognize that the oath of citizenship is to Canada only ... as a small token of the realization that we are going into the 21st century we should as a minimum change this oath so it clearly swears allegiance solely to Canada, Canada's democratic traditions that Canadians have developed of themselves, Canada's rights and freedoms that we have developed by ourselves and those traditions that talk about our loyalty to our laws and upholding the laws of Canada that we evolved and developed."

42. During the course of debate on what Joseph Garcea of the University of Saskatchewan has called "three relatively similar pieces of draft citizenship legislation between 1998 and 2003 designed to supplant the existing Citizenship Act," individual Members of Parliament proposed other versions of a new citizenship oath that omitted all references to the Queen.

43. John Bryden from the Hamilton area in Ontario proposed a new oath which read: "In pledging allegiance to Canada, I take my place among Canadians, a people united by their solemn trust to uphold these five principles: equality of opportunity, freedom of speech, democracy, basic human rights and the rule of law."

44. Alex Shepherd from the Durham region in Ontario proposed a new oath which read: "From this day forward, I pledge my loyalty and allegiance to Canada and its Constitution. I promise to respect our country's rights and freedoms, to defend our democratic values, to faithfully observe our laws and fulfil my duties and obligations as a Canadian citizen."

45. In 1980 "O Canada" officially replaced "God Save the Queen" as Canada's national anthem.

46. The *Constitution Act 1982* finally fully patriated the Constitution of Canada from the United Kingdom, and provided for methods of Canadian constitutional amendment inside Canada for all parts of the Constitution.

47. Section 16 (and sections 17 to 23) of the Canadian Charter of Rights and Freedoms also constitutionally entrenched French and English language rights in Canada.

Changing demographics of the Canadian people

48. Demographically, as made clear in census data collected and compiled by the federal government's central statistical agency, the "British North American" national or ethnic origin majority of the Canadian population during the late 19th century has evolved into a "Multiple Origins Canadian" majority in the early 21st century.

49. People of British national or ethnic origin accounted for a majority of the Canadian population from 1867 until just before the first Canadian Citizenship Act in 1947.

50. Statistics Canada provides the following information:

TABLE 1. CHANGING ORIGINS OF THE CANADIAN POPULATION, 1871–1971

Group	% 1871	% 1921	% 1971
Aboriginal	0.7	1.3	1.5
French	31.1	27.9	28.7
British	**60.5**	**55.4**	**44.6**
Other	7.7	15.4	25.2
All Canada	**100.0**	**100.0**	**100.0**

51. As Table 1 (above) shows, even at the highest tide of "British North America" in the 19th century, close to a third of the Canadian population at the time of confederation was of French national or ethnic origin — as were most people legally and otherwise known as Canadians (or *Canadiens*) in the 17th and 18th centuries.

52. As Table 1 also shows, increasing international migrations in the 20th century meant that the British national-or-ethnic-origin majority in Canada had dwindled to a mere strong plurality Canada-wide by the 1970s.

53. Global international migrations of the last quarter or perhaps third of the 20th century have altogether transformed Canadian demography again, in the more recent past.

54. These latest and most diverse migrations have not affected all parts of the country uniformly. They are still especially concentrated in the metropolitan regions surrounding larger cities such as Vancouver, Edmonton, Calgary, Winnipeg, Hamilton, Toronto, Ottawa, and Montreal. But there are few parts of the country that have not begun to feel at least some impacts of the increasingly diverse Canada-wide demography today.

55. The following information is from Statistics Canada

TABLE 2. ORIGINS OF THE CANADIAN POPULATION, 2001

Group	%
Single Origins	
Aboriginal	1.9
French	3.6
British	**9.0**
Canadian	22.8
Other	24.5
Multiple Origins	38.2
All Canada	**100.0**

56. As a result of changes in the population, data on national or ethnic origin in the more recent 1991 and 2001 censuses is no longer directly comparable with data for the 100-year long period from 1871 to 1971.

57. For example, in the 2001 census, more than 38% of Canadians reported so-called "Multiple Origins" — based on combinations of two or more national or ethnic origins.

(Comparable data from the Census of 2011 was not available at the time this affidavit was prepared.)

58. Unlike in all the earlier history of the present confederation, in the censuses of 1991 and 2001, it became possible as well to report "Canadian" as a national or ethnic origin in official Canadian statistics. In 2001 almost 23% of Canadians, across the country, actually did report so-called single Canadian origins.

59. Statistics Canada also reports the following:

TABLE 3. TEN LARGEST SINGLE-ORIGIN GROUPS IN CANADA, 2001

Group	% of all Canadians
Canadian	22.8
British	9.0
French	3.6
Chinese	3.2
South Asian	2.7
Italian	2.5
German	2.4
Aboriginal	1.9
Caribbean	1.1
Dutch	1.1
Total Top 10	**50.3**
Other Single Origins	11.5
Multiple Origins	38.2
All Canada	**100.0**

60. The most striking feature of the data on national or ethnic origin in the 2001 Census of Canada is its sheer diversity. There are at least some people from virtually every country of the world living in Canada today. Several densely-populated parts of Canada are places of remarkable cultural, racial, and religious diversity.

61. Another striking feature of the 2001 data is the dramatic decline in the percentages of Canadians reporting British and French national or ethnic origins, especially compared to what prevailed 130 or even 80 years earlier.

62. Some might argue that the mere 9.0% of Canadians reporting single British origins in the 2001 census somewhat too dramatically under-represents the full weight of the British national or ethnic heritage in the Canadian population today. They would correctly note that another almost 25% of Canadians included "British" as one of their various "Multiple Origins" as well.

63. Another important point, however, is that this 25% of Canadians are now choosing to classify themselves as people of "Multiple Origins" rather than "British." (Though this almost certainly has something to do as well with recent changes in census design by Statistics Canada officials.)

64. The following tables are also from Statistics Canada:

TABLE 4. PERCENTAGE OF "SINGLE CANADIAN" POPULATION BY

PROVINCE, 2001

Province	% "Single Canadian"
Quebec	47.9
Newfoundland & Labrador	41.0
New Brunswick	33.7
Nova Scotia	28.0
Prince Edward Island	24.0
Ontario	14.2
Alberta	13.2
Saskatchewan	11.6
Manitoba	10.2
British Columbia	9.9
CANADA	**22.8**

TABLE 5. PERCENTAGE "SINGLE BRITISH" POPULATION BY PROVINCE, 2001

Province	% "Single British"
Newfoundland & Labrador	28.9
Prince Edward Island	19.6
Nova Scotia	17.0
New Brunswick	12.5
British Columbia	11.3
Ontario	11.2
Alberta	9.1
Manitoba	7.8
Saskatchewan	7.4
Quebec	1.8
CANADA	**9.0**

65. Some Canadians — and in some provinces considerable numbers — formerly classified as British are now classified as Canadian. And some Canadians of more diverse origins, formerly classified in non-British and non-French groups, are now classified as either "Multiple Origins" or "Canadian" as well.

66. The tables show that the old British North American majority in the first 75 years of the present confederation has now been succeeded by a new Multiple Origins Canadian majority.

67. Canadian citizens today include people of many different national or ethnic origins. The majority of Canadians now choose to identify themselves as either people of Multiple Origins or Canadians.

Impact of citizenship oaths in the new demographic environment

68. In a brief to the Standing Committee on Citizenship and Immigration of the Parliament of Canada in March 2005, the Ontario Council of Agencies Serving Immigrants (OCASI) urged:

> The Citizenship Oath is a powerful mechanism that serves to affirm the citizen's commitment to Canada. It is important to note that only naturalized citizens are required to make such an oath. It is assumed that native-born Canadians would automatically agree to uphold the principles of the Oath ...
>
> Consistent with the principles of fairness and equity, and in order to be sensitive to the concerns of members of aboriginal communities, the Quebecois and foreign-born Canadians, OCASI suggests that new legislation should omit reference to the monarchy of Great Britain in the Oath.

Constitutional Monarchy and Canadianization

69. The role of the British monarch and the constitutional monarchy in Canada is now considerably more strictly formal and honorific than it was in the late 19th century, as a result of the gradual but steady Canadianization (and democratization) of Canadian institutions, especially after the Second World War. This process was accelerated by the Citizenship Act of 1947 and George VI's 1947 Letters Patent. It reached an initial or interim culmination with the *Constitution Act 1982,* and its Canadian Charter of Rights and Freedoms.

70. It has been some time now since claims that the British monarch "personifies the [Canadian] state and is the personal symbol of allegiance, unity and authority for all Canadians" could be credibly made with broad acceptance by the great majority of the Canadian population, in all parts of the country.

71. In 2003 Frederick Vaughan, Professor Emeritus of political science at the University of Guelph, biographer of Justice Emmett Hall, and co-author of a history of the Supreme Court of Canada, published a book entitled *The Canadian Federalist Experiment: From Defiant Monarchy to Reluctant Republic*. In this book he maintains "that Trudeau's 1982 Charter quietly undermined the monarchic character of the constitution by introducing republican principles of government."

72. Professor Vaughan has also argued that the Canadian Charter of Rights and Freedoms

"was the instrument that, with one stroke, severed Canadians from their ancestral monarchical foundations. With the Charter, Canada began a new life as a nation, a republican nation. The Charter is based upon republican principles. It is the closest Canadians have ever come to a document that affirms the rights of the people."

73. Professor Vaughan has urged as well that "the Canadian regime has turned its back on monarchy," and the "direction cannot be reversed. The transformation to republican government has taken hold in the public mind and has been institutionalized by the new Charter mandate entrusted to the Supreme Court."

74. While not all Canadian political scientists would agree with Professor Vaughan's arguments, the Constitution of Canada today is not what it was when the present confederation was first established in 1867. Part of Canada's Westminster constitution is 'unwritten' and open to evolution, to keep pace with changing times. Like much else in Canadian government and politics, the role of the monarchy has evolved over the past 145 years.

75. In June 2005 the former federal government constitutional advisor James Ross Hurley testified to a committee of the Senate of Canada that was investigating changes to the oath of allegiance for Senators. He explained :

> Canada was not a sovereign country in 1867, it was a group of colonies ... at the time ... the only oath of allegiance possible was to the monarch, who was head of the empire, and the Crown had power over the colony. But Canada changed, it is now an independent country. We repatriated the Constitution, we have a flag, and a national anthem. These are all very important symbols of progress in the evolution of our

country. If we want to add other elements to the oath of allegiance today, it simply reflects the country's transformation over the years.

The "constitutional doctrine of popular sovereignty" and constitutional monarchy as an honorific institution

76. The way in which the partly unwritten Westminster constitution allowed the current Canadian parliamentary democracy to evolve over the first century of the 1867 confederation was succinctly summarized in Richard J. Van Loon and Michael S. Whittington's *The Canadian Political System : Environment, Structure & Process* — a pioneering Canadian political science textbook of the early 1970s (which subsequently went through four editions, and is still cited as an authority in the current edition of Canadian *House of Commons Procedure and Practice*):

> [The] formal executive power in Canada is vested in the Crown and, in a very formal sense, we can be said to have a monarchical form of government. The Governor General exercises all of the prerogative rights and privileges of the Queen in right of Canada, according to the BNA Act [now called the *Constitution Act 1867*] and the [1947] Letters Patent that define his office. The constitutional doctrine of popular sovereignty has, however, reduced the *de facto* role of the Governor General to that of a figurehead. The real power is exercised by the Prime Minister and his cabinet who obtain their legitimacy from the fact that they possess a popular mandate.

77. Virtually all the practical and constitutionally serious aspects of the Queen's role as Canada's formal head of state are now filled by the Governor General. The role of the Crown in Canada has become almost entirely symbolic.

Current popular confusion about the role of the constitutional monarchy

78. An EKOS poll in 2002 found that only 5% of Canadians could correctly identify the

Queen as Canada's current formal head of state. The results were as follows:

Question: WHO IS THE HEAD OF STATE IN CANADA?

Answer	% of Sample Choosing Answer
Prime Minister	69%
Governor General	9%
Queen	5%
Other	1%
Don't Know	16%
TOTAL	100%

SOURCE: EKOS Research Associates. *Trust and the Monarchy: an examination of the shifting public attitudes toward government and institutions*. May 30, 2002, 47.

Opinion surveys on the oath and the British monarchy in Canada

79. Opinion surveys provide useful information about contemporary community standards concerning the present oath to the Queen for new Canadian citizens.

80. In January 1996 an Angus Reid Survey for Citizenship and Immigration Canada found 51% of respondents felt that a new oath of allegiance for new citizens should remove any reference to the monarchy. Some 38% felt that allegiance should be pledged to both Canada and the monarchy. Only 5% favoured swearing allegiance only to the monarchy.

81. Angus Reid Strategies conducted surveys in September 2007 and February 2008 which asked representative samples of Canadians the following question:

> Under the terms of the Canadian Constitution, Queen Elizabeth II holds the position of Canada's head of state. Would you support or oppose Canada ending

its formal ties to the British monarchy?

82. The Canada-wide results for the surveys were :

	% September 2007	% February 2008
Support ending ties	53	55
Oppose ending ties	35	34
Not Sure	12	11

83. These results varied by region in some significant ways. In 2008, for example, majorities in the three largest provinces of Ontario, Quebec, and British Columbia — which together account for just over 75% of the total Canadian population — supported Canada's ending its formal ties to the British monarchy (and the largest majority was in Quebec). There was less support in Atlantic Canada, and especially in the Prairie Provinces.

84. The regional results for 2008 were:

	% BC	% Alta	% Mb/Sk	% Ont	% Que	% Atl Can
Support	51	43	25	54	71	43
Oppose	36	48	59	39	15	38
Not sure	12	9	16	7	14	19

85. In the pollster's view, the key conclusion from the 2008 survey was that the "majority of Canadians believe it is time to end the country's official relationship with the British monarchy."

86. It has been said that the April 2011 wedding of Prince William and Catherine Middleton has boosted the popularity of the British monarchy, in Canada as elsewhere. A Harris/Decima poll taken this past May 2012, for a group known as Your Canada Your Constitution, suggests that, even with this boost in popularity, it is still true that a bare but clear majority of all Canadians, coast to coast to coast, believe it is time to end the country's official relationship with the British monarchy.

87. The May 2012 Harris/Decima poll asked more than 2,000 representative Canadians whether they agreed or disagreed "that Canada's Constitution should be changed to make Canada a fully independent country by retiring the British monarchy as Head of Canada's federal and provincial governments."

88. Canada-wide, in May 2012 some 52% of all Canadians agreed that Canada's Constitution should be changed to make Canada a fully independent country by retiring the British monarchy as Head of Canada's federal and provincial governments — while only 43% disagreed. In the French-speaking-majority province of Quebec the results were more strikingly one-sided. Some 76% of all Quebec respondents agreed that the British monarchy in Canada should be retired, and only 17% disagreed.

The oath in other jurisdictions

89. Only 16 member countries of the 54-member Commonwealth of Nations today are

constitutional monarchies that retain Queen Elizabeth II as formal Head of State. They include the United Kingdom itself and 15 other so-called "Commonwealth Realms" — Antigua and Barbuda, Australia, The Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Solomon Islands, and Tuvalu.

90. Most Commonwealth Realms still require citizenship oaths in their naturalization processes similar (and in some cases virtually identical) to the present Canadian citizenship oath, with direct references to the British monarch. There are, however, some exceptions.

Australia

91. Australia — perhaps the current Commonwealth Realm most similar to Canada, in a number of respects — has since January 1994 had a citizenship "Pledge of Commitment" that makes no "reference to the Crown." This pledge simply reads :

> From this time forward [under God], I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey.

92. Prior to this pledge, the oath of allegiance for new citizens in Australia was very similar to the present citizenship oath in Canada : "I swear by Almighty God [solemnly and sincerely promise and declare] that I will be faithful and bear true allegiance to Her Majesty Elizabeth the Second, Her heirs and successors according to law, and that I will

faithfully observe the laws of Australia and fulfil my duties as an Australian citizen."

93. In 1993 the Australian government of Paul Keating announced its intention to replace this oath with a "Pledge of Commitment" that made no "reference to the Crown." In introducing the new legislation "the Minister for Immigration and Ethnic Affairs, Senator the Hon. Nick Bolkus said: 'We need to have an oath of allegiance which reflects the core values of Australia and which is a bonding instrument, and we can do this without any disrespect to our sovereign."

94. Australia has had a citizenship oath which makes no reference to the Queen for almost two decades now, without compromising its current status as a constitutional monarchy and Commonwealth Realm, which still acknowledges Elizabeth II as its formal head of state.

Papua New Guinea

95. Naturalized new citizens of Papua New Guinea are not required to take an oath of allegiance. They are required to make instead a "Declaration of Loyalty," which reads:

> I ,....., realizing fully the responsibilities to which I am committing myself and the consequences of not living up to this Declaration and those responsibilities, freely and willingly declare my loyalty to the Independent State of Papua New Guinea and its People and to the Constitution of Papua New Guinea adopted by the Constituent Assembly on 15 August 1975, as altered from time to time in accordance with its provisions, and promise that I will uphold the Constitution and the laws of Papua New Guinea.

The Bahamas

96. Section 22 (4) of the Constitution of 1973 in the Bahamas explicitly prescribes "Protection of freedom of conscience ... No person shall be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief."

The United Kingdom

97. As in Canada, there has been considerable recent discussion of and change in oaths of allegiance for new citizens in other Commonwealth Realms, and in the United Kingdom itself. The discussion has also been coloured in some degree by the events of September 11, 2001 in the United States, and by concerns about preserving and strengthening "democratic values."

98. The United Kingdom revised its citizenship oath for new citizens in 2002. The traditional British oath to the Queen remains but is now supplemented by the following pledge: "I will give my loyalty to the United Kingdom and respect its rights and freedoms. I will uphold its democratic values. I will observe its laws faithfully and fulfil my duties and obligations as a British citizen."

New Zealand

99. New Zealand recently conducted a review of all oaths in its public life, and an Oaths Modernisation Bill began working its way through the New Zealand Parliament. The Bill had its second reading discharged on 1 June 2010, however, and did not proceed further.

100. Though New Zealand would have retained an oath to the Queen as part of its proposed new citizenship oath (and still has such an oath today), it had added (as in the United Kingdom pledge) a reference to respect for "the democratic values of New Zealand."

101. Some Members of the New Zealand Parliament argued that combining the Queen and democratic values in this way "makes the oath internally contradictory ... How can I possibly pledge loyalty to democratic values and at the same time declare loyalty to the Queen as a head of State whose selection process is a complete denial of democratic values? There is simply no democratic selection process for our head of State."

102. It was also argued that an oath to the Queen is devalued "when we all know that 35 percent or more of the population are republicans and another big chunk of New Zealanders do not really support the monarchy as an institution but cannot really see that this is the right time to make a big constitutional change in that respect ... If we apply the same principle that we have been applying to religion and religious belief — that of not wanting people to swear to something they do not believe in; like not swearing to a god if they are atheists — then we should not make republicans swear their loyalty to the Queen. It only demeans the oath."

103. A Member of the New Zealand Parliament who opposed leaving references to the Queen in New Zealand's citizenship oath urged: "To take loyalty to the Queen out of the oath is

not to deny that New Zealand is a constitutional monarchy, and we just need to look at countries of a similar constitutional situation, like Australia ... which is also a constitutional monarchy. That country has a new citizenship oath that does not mention the Queen ... we could easily have an oath like Australia's in order to get out of the problem of making people swear to something they do not believe in and devaluing the oath accordingly."

104. A May 2004 discussion paper prepared by the New Zealand Ministry of Justice reported somewhat related intelligence on Jamaica, which does not directly involve citizenship oaths: "Australia and the United Kingdom have both recently made changes to their citizenship oaths and there are proposals to change Canada's citizenship oath. Australia also introduced a new version of the oath for federal Government Ministers in 1993. Jamaica, on the other hand, undertook a more comprehensive review of oaths and changed its oath for Members of Parliament, Judges and Government officials. Instead of an oath to the Queen, there is now an oath to Jamaica, the constitution and the people of Jamaica. These changes were made following a constitutional commission and a ten-year programme to 'Jamaicanise' the constitution."

Kingdom of Norway

105. The Kingdom of Norway's current head of state is King Harald V. Quoting from the King's official website: "Norway is a constitutional monarchy. This means that the King is formally the head of state but that his duties are mainly representative and ceremonial. The legislative and executive powers lie with the country's elected bodies. When the

Constitution states that: 'the executive power is vested in the King', this now means that it is vested in the Government."

106. As of September 1, 2006, new or naturalized citizens of Norway have the option of taking an oath of citizenship that makes no mention of King Harald V or his heirs and successors. It reads:

> Som norsk statsborger lover jeg troskap til mitt land Norge og det norske samfunnet, og jeg støtter demokratiet og menneskerettighetene og vil respektere landets lover. [As a citizen of Norway I pledge loyalty to my country Norway and to the Norwegian society, and I support democracy and human rights and will respect the laws of the country.]

107. This citizenship oath is not compulsory in Norway. The situation has been described as follows: "Norway used to require its naturalized citizens to pledge allegiance to their new country, but the practice was dropped around 30 years ago. Now it's been reinstated on a voluntary basis, with Norwegian officials inviting new citizens to the first of the country's new naturalization ceremonies on December 17 ... It's up to each new citizen to decide whether they want to accept the invitation to their local ceremony. Those who do accept, however, will be required to take the oath of citizenship ... "

The Kingdom of the Netherlands

108. The Kingdom of the Netherlands' current head of state is Queen Beatrix.

109. The naturalization ceremony in the Kingdom of the Netherlands does not require any oath to Queen Beatrix or the Dutch monarchy.

United States of America

110. The naturalization oath in the United States of America is as follows:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God.

111. The United States provides options for leaving out certain portions of this oath for those who have a conscientious objection. For example, the current USCIS *Guide to Naturalization* states that one "may take the [present] Oath, without the words 'to bear arms on behalf of the Unites States when required by law...' if you provide enough evidence that you are against fighting for the United States because of your religious training and beliefs." The *Guide to Naturalization* further provides that if "you provide enough evidence and USCIS finds that you are against any type of service in the Armed Forces because of your religious training and beliefs, you may leave out the words 'to perform noncombatant service in the Armed Forces of the United States when required by law'". And if the "USCIS finds that you are unable to use the words 'so help me God' because of your religious training or beliefs, you may leave out these words. If you believe you qualify for a modified Oath, you should write us a letter explaining your situation with your application. USCIS may also ask you to provide a document from your religious organization explaining its beliefs and stating that you are a member in

good standing."

Oaths of allegiance for new lawyers in Ontario and Manitoba

112. In 1992, Ontario lawyers voted to make the oath of allegiance to the Queen optional for admission to the Ontario Bar. The present By-Law 11 of the Law Society of Upper Canada explains that: "Immediately after the court has caused a person to be admitted and his or her name to be enrolled as a solicitor on the rolls of the Society ... the presiding judge shall administer in either the English or French language the Barristers Oath, the Solicitors Oath and, if the person so wishes, the Oath of Allegiance."

113. The former requirement for a new lawyer in Manitoba to swear the traditional oath to the Queen has also been abandoned.

Oaths of allegiance for Ontario police

114. In Ontario, police officers are given a choice between two oaths: one refers to the Queen while the other does not. The oath that does not refer to the Queen is as follows:

> I solemnly swear (affirm) that I will be loyal to Canada, and that I will uphold the Constitution of Canada and that I will, to the best of my ability, preserve the peace, prevent offences and discharge my other duties as (insert name of office) faithfully, impartially and according to law. So help me God. [Omit this line in an affirmation.]
>
> (See Police Services Act, ONTARIO REGULATION 268/10)

The federal public service oath in Canada

115. As of December 31, 2005, Canadian federal public servants are no longer required to

swear (or affirm) an Oath of Allegiance to the Queen. They are still required to take an oath of service, which reads:

> I, ..., solemnly and sincerely swear [or affirm] that I will faithfully and honestly fulfil the duties that devolve on me by reason of my employment in the Public Service and that I will not, without due authority in that behalf, disclose or make known any matter that comes to my knowledge by reason of such employment. [In the case where an oath is taken, add 'So help me God'.]

Debate on the oath for British Members of Parliament

116. A few years ago some British MP s engaged in an intriguing debate on their oath of allegiance to the Queen. While this debate has apparently not figured in the new parliament ushered in by the May 2010 British election, it still has some interest for the Canadian citizenship oath issue under discussion here.

117. As explained in an August 2008 article on the BBC News website, the debate had two main dimensions: First: "Anti-monarchy campaigners hope[d] to force a legal challenge to the oath of loyalty MPs swear to the Queen ... Human rights lawyer Louise Christian ... [was] ... representing campaign group Republic in its planned legal challenge." At the same time, 22 British MPs also "signed a Commons motion by Lib Dem Norman Baker, backing an alternative oath in which MPs would swear allegiance to their constituents."

118. Some of the arguments advanced by the 22 British MP s who supported Liberal Democrat Norman Baker's motion for "an alternative oath in which MPs would swear allegiance to their constituents" have some particular resonance for arguments about the

present Canadian citizenship oath. According to Mr. Baker himself, e.g.: "This is a matter of democracy ... I'm put here by my constituents and it's to them I owe my allegiance."

119. The 22 British MPs who signed Mr. Baker's motion cut across party lines, and included 14 Labour, seven Liberal Democrats, and one Conservative. The one Conservative MP, Peter Bottomley, advanced arguments that transcended customary ideological positions: "We need to make the oath something that people are offered, rather than required to take ... We should make provision for republicans ... " Mr. Bottomley himself "wouldn't drop the oath — I would make it optional." He continued : "people ought to be able to come to parliament and argue that they don't want the monarchy."

120. I make this affidavit to provide evidence concerning the application herein and for no other or improper purpose.

Affirmed before me at the City of Toronto)
this 9 day of November, 2012)
)
)

Peter Rosenthal

A Commissioner, Etc.

Randall White

05-CV-301832-PD3

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHAEL MCATEER, SIMONE E. A. TOPEY AND DROR BAR-NATAN

Applicants

And

THE ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF RELL DESHAW

I, Rell DeShaw, Manager, Citizenship Legislation and Program Policy, of the City of Ottawa, in the Regional Municipality of Ottawa-Carleton, SWEAR THAT:

1. I am currently employed in the position of Manager, Citizenship Legislation and Program Policy with the Department of Citizenship and Immigration. I have been with the Department since 2004 and have been in my current position since October 2010. My responsibilities include supervising a team to lead the development of citizenship policy. Specifically, I support a team to make policy changes related to citizenship issues, provide advice on policy positions for internal and external parties and make legislative and regulatory changes related to the *Citizenship Act*. Prior to that date, I was employed by Citizenship and Immigration in the positions of Policy Manager in the Biometrics Project and Policy Manager in the Social Policy Division in the Immigration Branch at different times. All of the documents attached to my affidavit are documents prepared in the ordinary course of

operations of the Department of Citizenship and Immigration, or Statistics Canada (where so attributed).

2. I have attached to my affidavit a table showing the number of new Canadian citizens (ie: those who become citizens in the year shown) on a year by year basis from 1947 to June 2010, which is the latest compilation that is available. The table is marked as Exhibit "A" to my affidavit. These statistics were compiled by the Operational Management and Coordination Branch (OMC) of the Department of Citizenship and Immigration based on information kept by the Department. I believe these statistics accurately reflect the number of new Canadian citizens on a year-by-year basis. These statistics are compiled for the purpose of monitoring the number of people that have been granted Canadian citizenship since the first *Canadian Citizenship Act* of 1947 and for historical comparisons through time.

3. Attached to my affidavit and marked as Exhibit "B" is a table showing the 'take up' rate of citizenship amongst eligible permanent residents in Canada for the years shown. This information is publicly available on the Statistics Canada website. The percentage (ex.: 85.1 per cent in 2006) was calculated by Statistics Canada and is the percentage of the foreign-born who were eligible for Canadian citizenship in 2006 and that had naturalized. Eligible permanent residents are those who have lived in Canada as permanent residents for at least three years. 2011 Census data on immigration including citizenship is not currently available but is expected to be released in the Spring of 2013.

4. The bottom table on Exhibit "B" is also taken from a publicly available Statistics Canada web-site and shows (on the bottom line item) the relative 'take up' rates for the United States, Australia and the United Kingdom, as well as for Canada, which clearly has the highest 'take up' rate of all of those countries. The table also reflects citizenship eligibility in those countries as well as the percentage of 'foreign born' to the population as a whole.

5. The foregoing information as compiled by Statistics Canada, in part on information maintained by the Department of Citizenship and Immigration I believe to be accurate. This information is regularly compiled by Statistics Canada and is regularly used by the Department of Citizenship and Immigration for comparison with other countries to inform policy development. It is also used when CIC needs to provide information and report to different organisations for example, for the IGC (Intergovernmental Consultations on migration, asylum and

refugees), a forum for intergovernmental information exchange and policy debate on issues of relevance to the management of international migratory flows, of which Canada is a member.

6. Attached as Exhibit "C" to my affidavit is a table current to August of 2012 showing all 54 Commonwealth countries, whether they are a 'realm', (indigenous) monarch or a republic, and whether in each case, an oath to Queen Elizabeth is contained in their respective oaths of citizenship. This information was compiled by the Department, from publicly available sources, to the extent available. It is evident that of the 12 Commonwealth countries (not including the UK) which are 'realms' or constitutional monarchies, for which the information could be located, the sole country whose oath does not mention the Queen is Australia. While Papua New Guinea's oath mentions the Queen, taking the oath is optional. In contrast, one of the countries which is a republic (Gambia) maintains an oath to the Queen in its oath of citizenship.

7. Attached as Exhibit "D" to my affidavit is a document showing the oaths of citizenship for Australia, New Zealand, the United States and the United Kingdom, which was compiled by the Department, based on publicly available information.

8. Attached as Exhibit "E" to my affidavit is a blank copy of the "Notice to Appear – To Take the Oath of Citizenship" (two pages) which contains the wording of the oath of Citizenship. This Notice to Appear is sent to all persons who have been granted citizenship to convoke them to attend their citizenship ceremony. A person does not become a Canadian citizen until they have taken the oath of citizenship. A person aged 14 and over who is granted citizenship does not become a Canadian citizen until they have taken the oath of citizenship (with the exception of those applying for citizenship under the adoption or statelessness grant provision). Under section 5(3) of the *Citizenship Act* the Minister has the discretion to waive the requirement to take the oath where an individual is unable to understand the significance of taking the oath due to a mental disability or for minors applying as adults for grants of citizenship. This version of the Notice has been in use since 2008. A version dating from 2000 was retrieved and also contains the specific wording of the oath. Research in CIC departmental archives to try to find earlier versions of this notice were inconclusive. Furthermore, in the 1980's and the 1990's, the citizenship program was not part of the current CIC department, but under a Secretary of State, rendering the research for those decades very difficult.

9. Attached as Exhibit "F" to my affidavit is a copy of the book entitled "Discover Canada" which is the current study guide sent to all persons who make application to become a Canadian citizen. The wording of the oath is reproduced on the first page of this book. This book is available electronically, as are previous versions (all of which contain the wording of the oath) as far back as 2002, and previous versions going back to 1997 are also available in hard copy only. All of these versions (previously entitled 'A Look at Canada') contain the wording of the oath. Research for earlier versions of the study guide to Canadian citizenship led us to similar obstacles as for the Notice to Appear of the paragraph above. However, a booklet entitled "Guide for Canadian Citizenship" which was addressed "for those who have filed, or who will soon file their application to become citizens of Canada" dated from 1963 was found and included the oath of citizenship.

10. Attached as Exhibit "G" to my affidavit is a copy of the publicly available Operational Bulletin 359 dated December 12, 2011 entitled: "*Requirements for candidates to be seen taking the Oath of Citizenship at a ceremony and procedures for candidates with full or partial face coverings.*"

11. Attached as Exhibit "H" to my affidavit is a copy of the news release of Citizenship and Immigration Canada issued for the July 1, 2011 citizenship ceremony at which the Duke and Duchess of Cambridge officiated and the news release issued for the citizenship ceremony held May 21, 2012 at which the Prince of Wales and the Duchess of Cornwall officiated.

12. Attached as Exhibit "I" to my affidavit are a copy of the transcript of the citizenship ceremony held July 1, 2011, the transcript of a news conference held with Minister Kenney and others on June 29, 2011 in advance of the citizenship ceremony officiated by the Duke and Duchess of Cambridge, and of a subsequent media interview with Minister Kenney after the ceremony was held.

13. This affidavit is sworn in support of the Attorney General's defence to the applicants' challenge to the constitutionality of the oath to the Queen as a condition of acquiring Canadian citizenship and for no other or improper purpose.

SWORN before me at the City of Ottawa in the Province of Ontario on January 30, 2013.

Commissioner for Taking Affidavits
Suzanne Sinnamon.

Rell DeShaw
Rell DeShaw

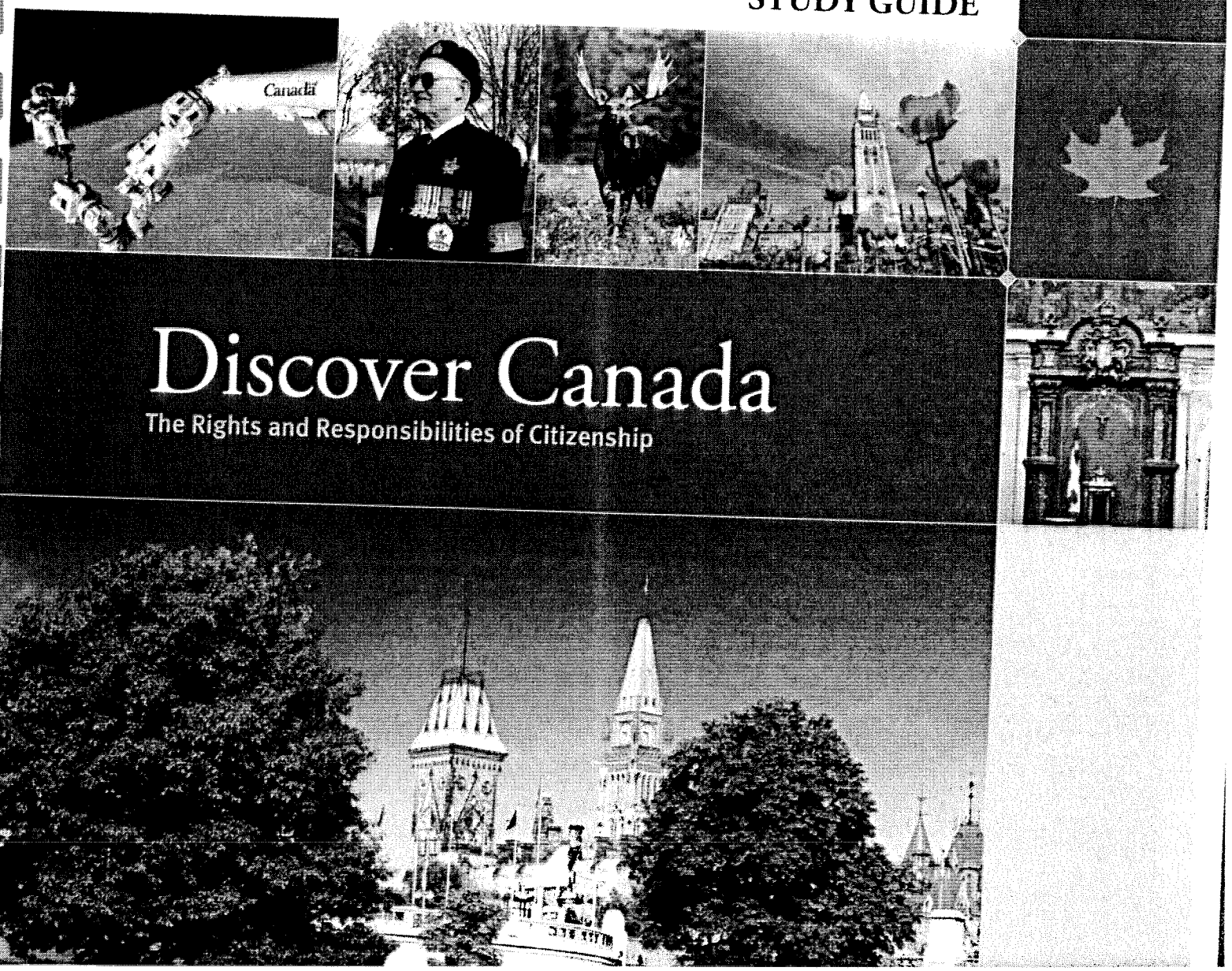
This is Exhibit "F" mentioned
and referred to in the Affidavit of
Rell Deshaw.
SWORN before me this 30th day
of January, 2013.

Commissioner for taking affidavits
Suzanne Sinnamon

Parts of Exhibit "F" omitted

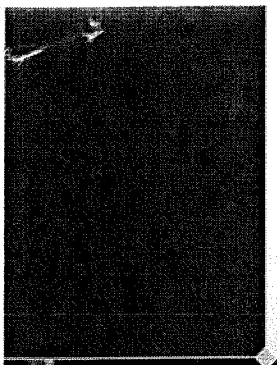
Citizenship and Immigration Canada
Citoyenneté et Immigration Canada

STUDY GUIDE



Discover Canada

The Rights and Responsibilities of Citizenship



The Oath of Citizenship

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.

Le serment de citoyenneté

Je jure (ou j'affirme solennellement)
Que je serai fidèle
Et porterai sincère allégeance
à Sa Majesté la Reine Elizabeth Deux
Reine du Canada
À ses héritiers et successeurs
Que j'observerai fidèlement les lois du Canada
Et que je remplirai loyalement mes obligations
de citoyen canadien.

Understanding the Oath

In Canada, we profess our loyalty to a person who represents all Canadians and not to a document such as a constitution, a banner such as a flag, or a geopolitical entity such as a country. In our constitutional monarchy, these elements are encompassed by the Sovereign (Queen or King). It is a remarkably simple yet powerful principle: Canada is personified by the Sovereign just as the Sovereign is personified by Canada.

05-CV-301832-PD3

ONTARIO
SUPERIOR COURT OF JUSTICE

JL/fm

B E T W E E N:

MICHAEL MCATEER, SIMONE E. A. TOPEY AND DROR BAR-NATAN

Applicants

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

- - - - - - - - - -

This is the Cross-Examination via teleconference of RELL DeSHAW on her affidavit sworn January 30th, 2013, taken at the offices of VICTORY VERBATIM REPORTING SERVICES, Suite 900, Ernst & Young Tower, 222 Bay Street, Toronto, Ontario, on the 11th day of March, 2013.

- - - - - - - - - -

APPEARANCES:

PETER ROSENTHAL -- for the Applicants
RENI CHANG
SELWYN PIETERS
MAYA JOHNSTON
(law clerk)

KRISTINA DRAGAITIS -- for the Respondent

Also Present:

Dror Bar-Natan

INDEX OF PROCEEDINGS

RELL DeSHAW, sworn

CROSS-EXAMINATION BY MR. ROSENTHAL:

1. Q. Good afternoon. Ms. DeShaw, you have been sworn to tell the truth in this examination?

A. That's correct.

2. Q. And you swore an affidavit in these proceedings, dated January 30th, 2013, is that correct?

A. Yes.

3. Q. And as far as you understand, is everything in that affidavit still true?

A. Yes.

4. Q. You wouldn't change anything upon further reflection?

A. No.

5. Q. Okay, thank you. You are the manager of Citizenship Legislation and Program Policy of the Government of Canada, is that correct?

MS. DRAGAITIS: The Department of Citizenship and Immigration.

BY MR. ROSENTHAL:

6. Q. But your title, according to your affidavit, is manager of Citizenship, Legislation,

and Program Policy?

MS. DRAGAITIS: The Department of Citizenship and Immigration.

7. MR. ROSENTHAL: I'm sorry, I'm not understanding entirely. If you look at the beginning of your affidavit, it says, "...Manager, Citizenship Legislation and Program Policy..."

And then should that be as part of the Department of Citizenship and Immigration? Is that what you mean?

MS. DRAGAITIS: At paragraph 1, Peter. "I'm currently employed in the position of manager, Citizenship Legislation and Program Policy with the Department of Citizenship and Immigration."

BY MR. ROSENTHAL:

8. Q. Right, with...okay. That's fine. Who is your superior, by the way?

A. The director of Citizenship Legislation and Program Policy?

9. Q. Yes.

A. Her name is Mary-Ann Hubers.

10. Q. What is her title?

A. She is the director.

11. Q. The director of?

A. Citizenship Legislation and Program Policy.

12. Q. Right. Okay, thank you.

A. She is acting in that position.

13. Q. Did you consult with her in the making of this affidavit?

A. She reviewed my affidavit.

14. Q. She reviewed it. Did she make any changes?

A. No, not to my memory.

15. Q. Any suggestions whatsoever?

A. Not that I recall.

16. Q. Okay. In tab B of your affidavit, you have an exhibit concerning take-up rates for citizenship for several countries.

A. Yes.

17. Q. Now, you would agree, would you not, that take-up rates are likely influenced by many different factors?

A. Yes, I would agree with that.

18. Q. And has there been any analysis of those factors that you're aware of, with respect to the countries listed?

MS. DRAGAITIS: A.There actually has been, Mr. Rosenthal, and I'm glad you raised that issue. There is a publication by Stats Canada, and we can provide it to you after today's cross-examination. It's entitled "Becoming Canadian: Intent, Process and Outcome", and it does offer an analysis of the various reasons that people choose to naturalize or not, as the case may be.

19. MR. ROSENTHAL: I see. And did it examine that with respect to several countries?

MS. DRAGAITIS: There is a breakdown. Like, the host country is a factor, yes.

20. MR. ROSENTHAL: Can I ask, Counsel, will you undertake to provide a copy of that document to us?

MS. DRAGAITIS: Of course, I will, yes. Thank you. No problem at all. U/T

21. MR. ROSENTHAL: Thank you. Now, the analysis included these questions with respect to Canada, the United States, Australia, and the United Kingdom?

MS. DRAGAITIS: The analysis in this

document, I don't think it is that detailed, although I'm certain that...in my review, I...I didn't review it this morning, unfortunately, but it does deal with people from countries, with, let's say, equivalent...I'll just say social policies, for lack of a better term, and that would include, for example, U.S.-born residents. I see here I have highlighted something that says,

"...United States born residents of Canada continue to be the least likely to hold Canadian citizenship. In 2001, 32 percent were non-citizens. In contrast, citizens of developing countries [et cetera], even ones that do not allow dual citizenship, which means that they must renounce their initial citizenship, tend to renounce their former citizenship status and become Canadian citizens..."

22. MR. ROSENTHAL: Right.

MS. DRAGAITIS: Gives the example, "...93 percent of immigrants from Vietnam, and 89 percent from the PRC adopted citizenship..."

Even, as I say, in circumstances where they had to renounce their original citizenship.

23. MR. ROSENTHAL: Thank you. So, this document, then, is an analysis of the reasons or the factors in the Canadian context as to whether people take up Canadian citizenship, do I understand correctly?

MS. DRAGAITIS: Yes. It's a Statistics Canada document based on their own review of their own material.

24. MR. ROSENTHAL: But you don't...the document doesn't examine the factors that might influence Australians to take up citizenship?

MS. DRAGAITIS: I don't want to misspeak because, as I said, it has been a few days since I have read it. It's not intended, I don't think, to examine other countries, per se.

25. MR. ROSENTHAL: Yes.

MS. DRAGAITIS: I'm just looking at it quickly to see.

26. MR. ROSENTHAL: You have the document in front of you now, do you?

MS. DRAGAITIS: I do, yes, and it's several pages. I read it earlier, highlighting, you know...and they say it's basically...it's intended to be a study for Canada, not a study...it is not an academic study to compare various countries. Not from that perspective, although it does talk about other countries.

27. MR. ROSENTHAL: It does talk about other countries. Does it talk of New Zealand?

MS. DRAGAITIS: Well, I don't know offhand. It probably does mention it somewhere.

28. MR. ROSENTHAL: That's fair. One of the problems of doing this by phone is that we can't look it over together and so on. So, let's just leave that for now, if we may.

MS. DRAGAITIS: If I can just add, the chart that is part of Exhibit B that you had just earlier taken the witness to that says CST eligibility requirements vary from country to country?

29. MR. ROSENTHAL: Yes?

MS. DRAGAITIS: That is part of this report.

30. MR. ROSENTHAL: I see. The chart at Exhibit B is part of this report?

MS. DRAGAITIS: Yes, it is.

31. MR. ROSENTHAL: I see.

MS. DRAGAITIS: And I apologize, I wasn't aware of it earlier, otherwise it would have been part of the affidavit itself.

32. MR. ROSENTHAL: Yes. So, this is one of the pages of the document that you're holding in your hands in Ottawa?

MS. DRAGAITIS: Well, it's half a page, but yes.

33. MR. ROSENTHAL: Now, I notice it mentions Canada, the United States, Australia, and the United Kingdom.

MS. DRAGAITIS: Yes.

34. MR. ROSENTHAL: It does not mention New Zealand, which I would have thought would have been a natural country for all the reasons you included the others to be included. Can you explain why New Zealand is not mentioned?

MS. DRAGAITIS: I have no way to explain it, if, in fact, it is omitted from the

discussion.

35. MR. ROSENTHAL: Okay, now...

MS. DRAGAITIS: If we come across a reason, I'm happy to provide it afterwards. There may well be some sort of reason, Mr. Rosenthal. It's just that I'm not aware of it, and I don't think Ms. DeShaw, as she would have jumped in.

THE DEPONENT: I'm not, no.

36. MR. ROSENTHAL: Okay, so, well let me ask one more question now. You're not suggesting that the high take-up rate in Canada is because people love to swear allegiance to the Queen?

MS. DRAGAITIS: No, we are saying that the high take-up rate is there even in comparison to a country like Australia, which, as you well know, no longer contains the oath the Queen as part of their oath.

37. MR. ROSENTHAL: Sorry, it's always Ms. DeShaw speaking unless Counsel identifies herself...

MS. DRAGAITIS: It's me, Ms. Dragaitis, I'm sorry.

38. MR. ROSENTHAL: ...is that correct?

Yes.

MS. DRAGAITIS: I mean, when you're...really, you're asking about argument, and so that's why I jumped in to answer.

39. MR. ROSENTHAL: That was Counsel answering the question?

MS. DRAGAITIS: Yes.

40. MR. ROSENTHAL: Well, Counsel, first off, I would respectfully suggest that you always identify yourself as Counsel, if you're answering the question, because the court reporter has to keep track of who is saying what.

MS. DRAGAITIS: I will.

41. MR. ROSENTHAL: And secondly, I would respectfully request that you not answer a question like that unless you indicate a priori that you wish to answer the question on behalf of the affiant, and we discuss whether or not you should answer the question. May I make those respectful requests of you, Counsel?

MS. DRAGAITIS: I'll bear that in mind, certainly.

BY MR. ROSENTHAL:

42. Q. Now, can you, Ms. DeShaw, give us any explanation as to why New Zealand would not be included in such a table?

A. I'm afraid I can't give you an explanation.

43. Q. Now, I had asked you something to the effect...you're not suggesting that the high take-up rate in Canada is because of people's desire to swear allegiance to the Queen, and then your counsel said something. I'm asking you, Ms. DeShaw, you wouldn't make that suggestion, would you?

A. No.

44. Q. Why did you mention take-up rates in your affidavit at all?

A. Are you referring to the international comparison table?

45. Q. Yes. Why did you include that and any discussion of take-up rates in your affidavit? Was that suggested to you by your superior?

A. By Mary-Ann Hubers? I am clarifying.

46. Q. She suggested it?

A. No.

MS. DRAGAITIS: No.

THE DEPONENT: She did not suggest it.

MS. DRAGAITIS: The witness was asking...this is Ms. Dragaitis, the witness was asking for clarification, that's all.

47. MR. ROSENTHAL: Of my question?

MS. DRAGAITIS: Yes.

BY MR. ROSENTHAL:

48. Q. I'm sorry. I have a hearing problem, and if I misunderstand, please tell me so. So, I was asking how it came to be that you thought that you might even mention take-up rates in your affidavit, and what was your answer to that, please?

A. For the international table, the goal is to show the comparative take-up rates in like...similar countries.

49. Q. No, I appreciate that's what the table shows. The table was not made specifically to deal with this application, this law case, was it?

MS. DRAGAITIS: No.

THE DEPONENT: No, it was not.

50. MR. ROSENTHAL: No.

BY MR. ROSENTHAL:

51. Q. Okay, so it was made for whatever

reasons, and it might be of interest what the reasons were, but I didn't ask you that question. The question I asked you is why you included this information in your affidavit.

A. The reason to include the take-up rates for Canada would be to show that take-up rates are comparatively high.

52. Q. And you thought that would be some argument against our position that the oath violated the Charter of Rights and Freedoms?

MS. DRAGAITIS: This is Ms. Dragaitis. Counsel, it is a matter of argument. I mean, this witness is here as a fact argument, and, I mean, our position, is as far as the facts are concerned, it is to show what the witness just attested to, the comparatively high rate of take-up of citizenship in Canada as compared to countries such as Australia. And the rest is argument, and you'll see what we argue.

53. MR. ROSENTHAL: But my question was how she came to put it in her affidavit. There might be...I'm sure there are libraries full of information at Citizenship Canada, and it's not all included. Was that her

idea, or was it someone else's idea to include that in this affidavit?

MS. DRAGAITIS: I think you could say it is protected by solicitor/client privilege.

54. MR. ROSENTHAL: Okay.

BY MR. ROSENTHAL:

55. Q. Instead of take-up rates, we could say rates of naturalization? That's an equivalent way of describing it; is that correct?

A. Yes, I would agree.

56. Q. Thank you. Are you aware of studies of take-up rates or naturalization percentages in the possession of Citizenship Canada, or in the possession of the government more generally, with respect to any countries other than those in table B?

A. I'm not aware of any other tables.

57. Q. Thank you. Now, let's turn to the oath that is at issue, is impugned in this application. Do you have a copy of the oath in front of you?

MS. DRAGAITIS: It's Ms. Dragaitis. I think it's...she can reference it...the witness can reference it from the Discover

Canada brochure, which is Exhibit F of her affidavit. The oath is on the...I guess you could call it the second page.

58. MR. ROSENTHAL: Yes. The oath is in many places, many documents in this proceeding for obvious reasons, and I trust they are all accurate. So, let's look at that version of it, if you like, that copy of it.

BY MR. ROSENTHAL:

59. Q. Do you have that in front of you then?

A. I do.

60. Q. Now, the part that is impugned in this application is that,

"...I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors..."

I wanted to ask you, please, what is meant by "Heirs"?

MS. DRAGAITIS: Mr. Rosenthal, this is Ms. Dragaitis. Are you asking for a legal opinion here?

61. MR. ROSENTHAL: No, I'm asking for...

MS. DRAGAITIS: Sorry, interpretation, because that's not what this witness is here for.

62. MR. ROSENTHAL: I'm not asking for a legal interpretation, I'm asking for the interpretation that policy...that the policy department in the Canadian Department of Immigration makes of this document.

MS. DRAGAITIS: Well, then, perhaps you should ask whether there are any policy documents about it.

63. MR. ROSENTHAL: Let me ask it in the following way.

BY MR. ROSENTHAL:

64. Q. Is it not the case, Ms. DeShaw, that some applicants for citizenship would ask questions such as, "What does that mean, 'Heirs'?" Ms. DeShaw?

A. Yes?

65. Q. Is that not a potential question that an applicant for citizenship might ask of an officer at the citizenship ceremony?

A. An applicant might ask that question.

66. Q. Yes. That might be. So, what would an appropriate answer be by such an official of Canada Immigration?

A. I believe it will refer to the people who will come after the Queen to assume the throne.

67. Q. I see. It says,

"...Heirs and Successors..."

What would you, meaning Citizenship Canada, advise an inquiring citizenship applicant "Successors" means, in that context?

A. I'm afraid I would just end up repeating what I just said. So, the people that come after the Queen to assume the role of king or queen.

68. Q. But then you're suggesting that it is redundant to say "Heirs and Successors"?

MS. DRAGAITIS: Well, Mr. Rosenthal, she is not suggesting it's redundant, she is saying that they really...they do say the same thing. You could make whatever argument you like about it.

69. MR. ROSENTHAL: May I please

cross-examine without objections unless there is a proper objection? I have a right to ask her what she is suggesting, Counsel. And I asked her that, and I would respectfully request that she be allowed to answer.

BY MR. ROSENTHAL:

70. Q. And so I will ask again, even though your counsel has interjected, I'll ask the question: Are you suggesting, then, that those two terms mean the same thing and it's therefore redundant to say "and Successors"?

A. I would take it to mean that some of her heirs will be successors.

71. Q. So, are you suggesting that "Heirs" is broader than "Successors", then? Only some of them will become successors?

A. I'm suggesting that to be an interpretation.

72. Q. Is that the interpretation you would answer a citizenship applicant who asked?

A. I would likely seek advice before I gave that answer.

73. Q. You would seek advice about that?

A. Yes, I would.

74. Q. I see. So, what is a much lower citizenship official at a citizenship ceremony supposed to answer in response to questions such as I've asked?

MS. DRAGAITIS: Mr. Rosenthal, did you say what lower? I didn't hear your second word there.

75. MR. ROSENTHAL: Official.

BY MR. ROSENTHAL:

76. Q. Somebody who is involved in a citizenship ceremony, watching people take the oath, citizenship judge, any representative of Citizenship Canada involved in the citizenship ceremony. What is that person supposed to answer about the meaning of "Heirs"?

A. I would suggest that they might do the same thing that I'm proposing, which is seek advice.

77. Q. They should seek advice?

A. Yes.

78. Q. How many steps would there be in the hierarchy of Citizenship Canada between a person who is at a citizenship ceremony, witnessing people

taking the oath, and yourself in your position as manager? I would put it to you there would be many layers of higher officers, is that correct?

A. I would say there might be one or two steps between me and that person.

79. Q. So, who would you seek advice from? You're the manager of policy, as you have told us. You don't know the answer. Who would you seek advice from?

A. I would probably contact our departmental legal services unit.

80. Q. I see. There is no document that you're aware of put out by Citizenship Canada that answers this question, is that correct?

A. I'm not aware of any document.

81. Q. If "Heirs" means what you said, I believe the second time that it arose, namely suggesting that it was more than successors, would Prince William right now be an heir within the meaning of this oath, as far as Citizenship Canada is concerned?

MS. DRAGAITIS: Mr. Rosenthal, this witness is not here to testify about the Royal Family and rules of succession. I'm sorry, that's just not what she is here

for.

82. MR. ROSENTHAL: That's correct, Counsel. But she is here to testify about the citizenship oath from the point of view of the manager of policy, as she has identified herself.

MS. DRAGAITIS: Well, I don't think...

83. MR. ROSENTHAL: And my question...

MS. DRAGAITIS: ...the question is proper for the reason I said.

84. MR. ROSENTHAL: Counsel, my question is the following: If an applicant for citizenship at a citizenship ceremony concerned about the nature of the oath that he or she is taking, asks, "Does this oath imply that, as of now, I must be faithful and bear true allegiance to Prince William?", what would Citizenship Canada answer that applicant?

BY MR. ROSENTHAL:

85. Q. Can you assist us with that, please, Ms. DeShaw?

A. And I would seek advice on that point.

86. Q. Excuse me? My hearing, sorry.

A. I would seek advice on that point.

87. Q. You would seek advice on that point. And again, there are no documents put out by the Government of Canada that would answer that question?

A. I'm not aware of any documents.

88. Q. And if there were such documents, you should be aware of it, given your position, is that not fair?

A. I would agree with that.

89. Q. If a citizenship applicant asked, "What is the significance of this oath?", what would your answer on behalf of Citizenship Canada be?

A. Can I just make sure I've heard the question correctly? What is the significance of the oath?

90. Q. Yes, I suppose that question were asked directly.

A. Okay. The significance is it's the final step in becoming a citizen of Canada.

91. Q. Yes, but what is the significance of swearing this oath as far as what it binds the person who takes the oath to? What does it bind him or her to with respect to Her Majesty and her heirs

and successors?

A. I'm struggling with the word "bind".

92. Q. You're having trouble with the word "bind"?

A. I am.

93. Q. Well, is it not the case that you understand, generally, that taking an oath is something that binds someone to something? You take an oath in court. You took an oath to tell the truth on this examination. An oath is something that, generally, in our society, binds a person to the terms of that oath. Is that not fair?

A. I think I'm just struggling with what it binds the person to. I understand that you're swearing an oath and the significance of it.

94. Q. You do understand the significance of it? You told us the significance is it's the last step to becoming a citizen.

A. M'hmm.

95. Q. Well, I understand that answer in one sense, but I'm saying it's not really responsive to a person who already knows that, who is there on the verge of becoming a citizen, and knows that that's all he or she has to do to become one.

A. M'hmm.

96. Q. If that person then asks you, "What is the significance of this oath? My taking this oath, what does it bind me to? What does it mean for me?" You have to have an answer for that, don't you, as Citizenship Canada?

A. I'm just not sure if it's more than the words that are in the oath, which is your swearing or affirming that you're going to observe the laws of Canada, and fulfil your duties as a citizen.

97. Q. We understand that part, and as you know, that part is not impugned in this application.

A. Yes.

98. Q. So, I'm talking about the impugned portion of the oath, responding...respecting Queen Elizabeth the Second and her heirs and successors. And I'm asking on behalf of a potential citizenship applicant, "What does that bind me to if I take this oath?" And you answer what?

A. So, again, the words of the oath are you're swearing or affirming that you'll be faithful and bear true allegiance to the Queen.

99. Q. Okay, let me ask you a different related question. Suppose the citizenship applicant comes to you and says, "I am anti-monarchist. In my

view, the monarchy is a relic of times when people were unequal by reason of birth, and I believe everyone is born equally. I feel repulsed by swearing allegiance to a monarch. Can I swear allegiance to the monarch, given that I will bear her no loyalty whatsoever, and that I intend to join anti-monarch associations and fight for the abolition of the monarchy in Canada?" What would you say to that applicant?

A. Well, it seems to me that if you're swearing or affirming an oath of citizenship, you should be honouring the words in that oath.

100. Q. And so by taking this oath, you would inform such an applicant, "You would be precluded from participating in organizations whose goal is to end the monarchy in Canada"?

A. I am not...I would not agree that you are prevented from those activities.

101. Q. You would not agree? So, is it consistent with an oath of loyalty to Queen Elizabeth the Second to argue that she should not longer be Queen of Canada?

MS. DRAGAITIS: Sir, I lost the question.

THE DEPONENT: Yes, I lost it as well,

I'm sorry. Could you repeat the question, please?

BY MR. ROSENTHAL:

102. Q. Is it consistent with an oath of loyalty to Queen Elizabeth the Second to argue and join organizations that argue that she should no longer be allowed to be Queen of Canada?

A. No, they are not consistent, no.

103. Q. They are not consistent. So, you would then tell such an applicant, "Sorry, but you cannot become a Canadian citizen"?

A. I would be telling people they should intend to honour the oath that they are taking.

104. Q. Yes, but if a person tells you, "I have deep beliefs that a republican [they are against monarchy]...I could never defend monarchy." And I put it to you, as a conclusion of what you said a moment ago, you would have to tell that person, "Sorry, it appears you cannot become a Canadian citizen." Isn't that fair?

A. I would not tell somebody that. I would say they have to make a personal choice about swearing the oath or not.

105. Q. Okay. You would say, "It's your personal choice", but you would...you told us earlier that it was your view that it was inconsistent with taking the oath to then immediately embark upon activities aimed at removing Queen Elizabeth as our queen. So, you would explain that to the person, and then say, "It's your choice"?

A. Their choice whether to affirm the oath or not, but to go back to what I said, you should be honouring all the words that you are saying in the oath.

106. Q. Yes. So, you would say to the person, if you do take the oath, you should not participate in such a movement to rid Canada of Queen Elizabeth, right?

A. That's not what I'm saying, no.

107. Q. Well, that's what I took from what you said. Did I misunderstand?

A. I think you are misunderstanding me.

108. Q. Okay. Please explain it more carefully, as to what you would advise such an applicant.

MS. DRAGAITIS: Counsel, your question actually...it's counsel here, it

shifts...the exact wording that you're using shifts everytime you pose it, and so it's making it difficult for the witness to come up with a clear answer to it. Bearing in mind, she is not at this ceremony to begin with, but in any event...

109. MR. ROSENTHAL: Well, I'm sorry you don't think my questions are optimally phrased, and I'll try to do them again.

BY MR. ROSENTHAL:

110. Q. And Witness, if you do not understand the question that I ask, please ask for clarification. I don't want any misunderstanding with respect to questions. But I'm asking you...perhaps we had better go back a bit, then. Did I understand you correctly as indicating that in your view, and you would express this view to a citizenship applicant, it was inconsistent with taking the oath to then immediately embark upon activities designed to rid Canada of the monarch, Queen Elizabeth the Second? Did I misunderstand you, or did you agree that that was inconsistent with the oath?

A. I agree that's inconsistent.

111. Q. Okay, thank you. So, then, if a person told you that, "I have deep anti-monarchal beliefs, and I feel I must work for abolition of the monarchy because it represents a kind of inequality that is repugnant to my morality, and I intend to do that, is it your view that I can take the oath nonetheless?"

MS. DRAGAITIS: Sorry, when is...this is counsel, when is the person saying this? I'm not understanding your hypothetical here. Are they saying it before they take the oath? This witness is not at the ceremony, so I'm allowing you some leeway to ask hypothetical questions, but you have to at least phrase them consistently and accurately so we know what we are answering.

112. MR. ROSENTHAL: I thought I did do that, Counsel, but I'll make it clear again. This entire series of questions has been by a citizenship applicant attending the ceremony at which he or she is to take the oath, and knowing that it is the last step to becoming a citizen, and in a quandary because of his or her conscientious beliefs

about monarchy. That's the context, okay?

BY MR. ROSENTHAL:

113. Q. Ms. DeShaw, is that okay? You understand the context?

A. I do.

114. Q. And did you understand that was the context for the last ten, fifteen minutes of questions, at least?

A. M'hmm.

115. Q. Thank you. Now...

MR. PIETERS: I don't think she answered. She said, "M'hmm."

BY MR. ROSENTHAL:

116. Q. Given that context, then, I believe, when I was interrupted by your counsel, I was at the point of asking you the following, more specific, situation. This citizenship applicant explains to you..."you", meaning an official of Citizenship Canada, at that ceremony, just before taking the oath, that he or she has deep conscientious feelings that monarchy represents something repulsive to equality of human beings, and that that person feels a responsibility to her or his conscience to

participate in organizations whose goal is to politically change things so that the Queen is no longer monarch of Canada. And that person says to you, "I don't know what to do. I really want to become a Canadian citizen, desperately, but on the other hand I have this deep conscientious believe and I will act on it in the sense of participating in republican activities. What should I do?"

A. And I'm sorry, I'm going to be repeating myself. That personal decision lies with the applicant about what to do about that situation.

117. Q. Okay. That is fair. It lies with the applicant. But you would communicate to the applicant your view that there is a contradiction between taking the oath and engaging in republican activities right afterwards?

A. I don't think I did say that I would communicate that to the applicant. I think you asked me if that is a contradiction, and I agreed with you.

118. Q. Yes, okay. So, in other words, the oath as it stands, the impugned portion of the oath, would tend to bar from citizenship any person who has a deep conscientious view against monarchy, and who also takes the making of an oath very seriously.

Isn't that a fair conclusion?

A. It might bar from citizenship the person who does not feel they can take the oath, and agree to the contents of the oath.

119. Q. Yes.

A. I would agree with that.

120. Q. Yes. Now, in fact, many applicants for citizenship do express concern in one sense or another about taking an oath to the Queen, isn't that fair?

A. I can't agree with the fact that many would have a problem with the oath.

121. Q. You don't think many do?

A. I have no...I have come across no evidence that many people have a problem with taking the oath.

122. Q. Well, let me ask you this question first, then, do you think that from your experience with Citizenship Canada, that most of the people taking the oath actually feel that they want to bear loyalty to the monarchy? Or, sorry, allegiance to the monarchy?

A. I believe the majority...I believe the people taking the oath agree with its contents.

123. Q. Well, I would put it to you that you

know from your experience with Citizenship Canada that most people taking the oath don't particularly think about the fact that it binds them to some sort of real allegiance to the Queen, and just say it without thinking about it very much in order to get citizenship. Isn't that fair?

A. I wouldn't agree with that statement.

124. Q. You wouldn't agree with it?

A. No.

125. Q. So, putting together the several answers that you have given me, I would suggest the conclusion is that in your view, most people who become citizens of Canada believe in monarchy, is that correct?

A. I don't...I can't agree with that statement. What I'm trying to say is that people understand the contents and the oath and are willing to swear or affirm that oath to become citizens.

126. Q. Well, everyone who becomes a citizen of Canada takes an oath to bear allegiance to the monarchy, right?

A. It's not everyone, though. There are exceptions.

127. Q. Yes, except for the exceptions for

minors and so on, right?

A. Well, there are some other groups, yes.

128. Q. Yes, except for certain small categories that are listed in the documents, right?

A. Yes.

129. Q. But of the normal citizenship applicants, every one of them takes an oath to bear true allegiance to the Queen and her successors and heirs, right?

A. Well, some people have that requirement waived, and not just for age reasons.

130. Q. Yes, for reasons of mental disability, and there are other reasons for waiving it, right?

A. Yes.

131. Q. Okay, but the vast majority...what percentage of people who become citizens of Canada do take the oath, in fact? It would be 95 or more percent, is that not correct?

MS. DRAGAITIS: Counsel, do we have numbers or...

132. MR. ROSENTHAL: Percent, I said.

BY MR. ROSENTHAL:

133. Q. Of the people who, in recent years, are naturalized Canadian citizens, what percentage of them would have been required to, and therefore did, take the oath?

A. I'm afraid I don't have a hard statistic for you. It would be the vast majority.

134. Q. It would be the vast majority, is that fair?

A. That's fair.

135. Q. Okay, so that's good enough for my present purposes. So, the vast majority have taken the oath?

A. Yes.

136. Q. Would you agree with me, then, that unless we are pushing people into hypocrisy, it should be the case that the vast majority of immigrants feel bound to allegiance to Her Majesty and her successors?

MS. DRAGAITIS: It's counsel here. Not to put too fine a point on it, but they are swearing to Queen Elizabeth as Queen of Canada, her heirs and successors.

137. MR. ROSENTHAL: Is that counsel answering that question?

MS. DRAGAITIS: I said, "It's counsel".

I'm just trying...

138. MR. ROSENTHAL: Counsel, I...

MS. DRAGAITIS: ...to be specific about the oath, which you have repeated, but you have left out a not insignificant component.

139. MR. ROSENTHAL: Counsel, I have requested that you not answer any questions until you raise the possibility of your answering the question, and we debate the legitimacy of your answering as opposed to your client answering.

MS. DRAGAITIS: I wasn't answering any question, Counsel.

140. MR. ROSENTHAL: Did you just give an answer, or did your witness answer?

MS. DRAGAITIS: I was clarifying your question.

141. MR. ROSENTHAL: Well, I would ask you not to clarify the question...

MS. DRAGAITIS: Well, if...

142. MR. ROSENTHAL: ...unless...

MS. DRAGAITIS: ...the question and I'll clarify it, I'm sorry.

143. MR. ROSENTHAL: Counsel, may I finish my

sentence, please? I would ask you not to clarify a question until we have discussed the question of your clarifying the question. Because we will read the transcript, but my impression was that your clarification to the question directed an answer. We will see it in the transcript, but I would ask you, Counsel, to refrain from doing that. We are not in the same room. It makes it more difficult.

But please, if you wish to interject, interject in a way that does not tell the witness the answer that you want. And if you feel it necessary to discuss something at some length, I would respectfully request that you ask your witness to leave the room, and I will, of course, trust you that you do that, and we can then discuss the question of whether you should clarify the question. Okay? Can we do that in the normal manner please, Counsel?

MS. DRAGAITIS: I said I will bear your comments in mind.

144. MR. ROSENTHAL: Thank you very much.

BY MR. ROSENTHAL:

145. Q. Now, excuse me a second, I forget where I was at. So, Ms. DeShaw, I believe I had asked you a question to the following effect: Do you agree, then, based on your understanding as you have told us so far, that it should be the case that the vast majority of immigrants to Canada feel an allegiance to monarchy unless we are forcing people into hypocrisy in signing the oath...in taking the oath, excuse me. I think I phrased it better the first time, but do you understand the question, Witness?

A. So, you're asking about whether new Canadians have an allegiance to the monarchy?

146. Q. Do they, in fact...you say that the vast majority take the oath. Does that mean that the vast majority really do have a true allegiance to Her Majesty, heirs, and successors? Or is there a lot of hypocrisy that is being perpetrated by Citizenship Canada?

A. And I was trying to bear distinction between monarchy and...

147. Q. Sorry? Make it exactly what is said in the oath, then.

"...Queen Elizabeth the Second, her Heirs

and Successors..."

Do the vast majority of immigrants actually bear true allegiance to the named parties, or is their taking of the oath largely hypocritical?

A. I don't agree that their taking of the oath is hypocritical.

148. Q. So, do you conclude, then, that the vast majority of new Canadians who become naturalized citizens do bear true allegiance to Her Majesty Queen Elizabeth the Second and her heirs and successors?

A. They are swearing that they will by taking the oath.

149. Q. That is clear.

A. Whether they bear it or not, I think, is a separate question.

150. Q. It is, and that's the question I asked you.

A. Are you asking me after the ceremony, whether they bear allegiance to the Queen?

151. Q. Yes.

A. I have no way to speculate on that.

152. Q. Okay, thank you. If you could turn, please, to tab G of your affidavit? Are you with me, Ms. DeShaw?

A. Yes.

153. Q. This is a document called "Operation Bulletin 359, December 12, 2011. And the heading of it is,

"...Requirements for candidates to be seen taking the Oath of Citizenship at a ceremony and procedures for candidates with full or partial face coverings..."

Now, this document was prepared while you were in your present position, is that correct?

A. That's correct.

154. Q. So, I would take it, given your title and the nature of this document, you would have had quite a lot to do in its preparation, is that fair?

A. Unfortunately, I did not have anything to do with its preparation.

155. Q. Nothing to do with it?

A. No.

156. Q. Did you have anything to do with the idea that is reflected in there, that there should be more scrutiny of candidates taking the oath?

A. I did not.

157. Q. Do you know where that idea originated?

A. I don't know specifically, no.

158. Q. Do you know generally?

A. Unfortunately, I would be speculating, and I would avoid doing that.

159. Q. Was it something that was originated within the civil service in Citizenship and Immigration Canada, or was this something that was promoted by the government...by the majority government?

A. Okay. I definitely am going to have to repeat my earlier answer. I don't want to speculate on what instigated the bulletin.

160. Q. And you don't have any knowledge of that?

A. I don't have any knowledge currently of that, no.

161. Q. Abstractly, for a document like that, it could arise in either of those two ways, is that correct?

A. I would agree with that.

162. Q. Now, according to this document, candidates for citizenship must be seen to be taking the oath, is that correct?

A. That's correct.

163. Q. And, for example, if a Muslim woman

wears a face covering that covers her mouth, she could not be seen to be taking the oath while wearing that face covering, right?

A. If it's covering her mouth, she may not be seen to be taking the oath, that's correct.

164. Q. Because that's specifically that she would not be seen to be wearing it, right?

A. Sorry, could you repeat that?

165. Q. Sorry, give me a moment, if I may? I will try to direct you to some relevant parts of the document. If you could look about three-quarters of the way down, under "Operational instructions"?

A. Yes.

166. Q. The second bullet point there,

"...At time of check-in, all candidates wearing full or partial face coverings must be reminded that they will be required to remove their face coverings for the oath taking portion of the ceremony..."

That's clear, right? As to what that means?

A. Yes.

167. Q. And it says,

"...Full or partial face coverings..."

Right?

A. Yes.

168. Q. So, that means that one cannot have any part of the face covered, is the way I read that. Am I reading it correctly?

A. I couldn't speculate about whether any part of your face could be covered.

169. Q. Well, it says,

"...All candidates wearing full or partial face coverings must be reminded they will be required to remove their face coverings..."

Right?

A. Yes, I see those words. I can't extrapolate whether any face covering is an issue.

170. Q. You can't speculate about that?

A. Well, what you said was if any part of your face is covered, and I...

171. Q. Well, what does "partial face covering" mean to you?

A. I just think it's a face covering as opposed to part of your face being covered. So, yes, partial face covering, I understand that.

172. Q. So, would you agree that the expression,

"...Full or partial face covering..."

Means any covering of any portion of your face?

A. I wouldn't extrapolate it to that.

173. Q. How could there be a covering of a portion of a face that would not be at least a partial face covering?

A. I'm just thinking of glasses or some other...like, I just would prefer to just stay with the exact wording in the bulletin.

174. Q. Suppose that there is a woman who wears a veil that covers her hair and her cheeks, but allows her eyes, nose, and mouth to be visible, is that a partial face covering, according to Citizenship Canada?

A. I think I would have to put the question back to you, just to confirm, is her face going to be visible during the oath? Is her mouth going to be visible during the oath?

175. Q. In the description that I gave you, it's clear that some of her face would be visible, and some would not be visible. Her cheeks would not be visible, part of her...say, her forehead and cheeks would not be visible, but her eyes, nose, and mouth would be visible. I would put it to you that it's clear from this directive that that person would be ordered to either remove that face covering or not get citizenship, isn't that fair?

A. I can't agree with that, actually.

176. Q. You can't agree with that? Okay, tell me what your interpretation is.

A. I think in the spirit of the bulletin, you need to be seen...your mouth needs to be seen to be saying the oath.

177. Q. But how do you explain wearing full or partial face coverings in this...

A. I would have to come back and say the bulletin needs to be read as a whole, and look at the bigger intent of what the bulletin was meant to achieve.

178. Q. So, you're saying that you would interpret it that the woman that I described would be okay?

A. I'm speculating that if we could see her mouth moving as she takes the oath, she would be okay to complete her oath to citizenship.

179. Q. You're speculating about that, you just said, is that correct?

A. Well, I think it's a hypothetical, so I don't know if I can do much more than that.

180. Q. Well, this is surely a hypothetical that occurs fairly frequently, isn't that so?

A. I don't attend citizenship

ceremonies as part of my duties.

181. Q. Right. Would you agree with me that an official at such a ceremony who reads this bulletin could not be faulted for telling that woman, "You must either remove your face covering, or you will not be able to get citizenship today"?

A. I'm not in a position to agree with that statement, no.

182. Q. You disagree with it?

A. I don't think that I could agree with something that categorical.

183. Q. Suppose that official asked you and he said, "You're the manager of policy, you must understand these things. Should I...it says, 'All candidates wearing full or partial face coverings must be reminded they will be required to remove their face coverings for the oath-taking portion of the ceremony. They are to be informed that failure to do so will result in the candidate not becoming a Canadian citizen on that day, and not receiving their citizenship certificate.'" For this hypothetical, I'm an employee of Canada Immigration, Canada Citizenship, and I've been at a ceremony, and I told the woman, sorry, she will not get citizenship today since she refuses to remove the

face covering that I described, the partial face covering. Would you tell me I did something wrong, or no?

A. Well, to go back to the earlier comment, I didn't write this bulletin, so I would be going back to the authors of the bulletin for clarification.

184. Q. I see. Would you agree that there is a serious problem if there is an operational bulletin like this that is meant to direct the activities of people...officials at Citizenship Canada doing citizenship ceremonies...that is the purpose of this bulletin, is it not?

A. That's correct.

185. Q. Would you agree that there is a serious problem if a bulletin like that has an interpretation of a phrase like I read, that the manager of Citizenship Legislation and Program Policy isn't sure of and would have to check with the authors of the document?

A. I don't agree that's a problem.

186. Q. Well, wouldn't you think that that would mean undoubtedly, day to day, there are different interpretations of this by officials actually on the scene at the ceremonies, and some

women are denied, and some women are allowed, perhaps. Isn't that fair?

A. Well, the bulletin is a guideline.

187. Q. Yes. The two most common reasons that potential citizens have problems with the oath are religious reasons and concern about swearing allegiance to the Queen. Would you agree with that statement?

A. Unfortunately, I have no evidence to support if those are the two main reasons why people don't take the oath.

188. Q. Well, would you agree those are two significant reasons? Significant in the sense of applying to a number of people.

A. I can't agree with that...I can't. No. I don't have any numbers on why people don't take the oath and the reasons for that.

189. Q. I see. There is a document, CP 15, "Guide to Citizenship Ceremonies" that is included at tab D of the affidavit of Kamal Dean that is sworn in these proceedings.

MS. DRAGAITIS: Counsel, this is counsel speaking. I don't have that affidavit with me, and this is not the affiant, of course, of that affidavit. So, in principal, I

won't allow her to answer questions about something that is not in front of us.

190. MR. ROSENTHAL: This is a document entitled "Guide to Citizenship Ceremonies", put out by Citizenship and Immigration Canada. You agree that your client should be able to speak to such a document, is that correct?

MS. DRAGAITIS: Well, we don't have it...it's counsel again. We don't have it in front of us. You didn't indicate any desire to cross-examine that affiant until...I don't really...

MS. DRAGAITIS: No, I appreciate the problem. And that is, unfortunately, a problem of doing this by telephone. But I'm hoping we can accommodate that problem. I just wanted to clarify that you're not saying that this witness cannot be asked about such a document. And then I hope...and then I just would report to you that this document says certain things, and if you dispute that, then you can dispute it. But I'm going to ask you about the implications of it.

MS. DRAGAITIS: Well, it's not in front of me, and it's not in front of the witness. And so I'm very reluctant to permit her to be examined on something where we are dependant on what you're reading from the document. And obviously, neither of us have it memorized. We don't know it by heart.

191. MR. ROSENTHAL: Okay, may I suggest the following? We are obviously going to need a break at some point.

MS. DRAGAITIS: Well, I don't. I don't think the witness does. We would rather go straight through.

192. MR. ROSENTHAL: So, may I request that over the break...this document is available online. So, you see if you can get it easily. I'm just trying to facilitate getting through this, and I just have a couple of questions about it. So, can we leave that for the moment with the request that during the break you see if you can get it up on a computer, and then we can talk about just a couple of aspects of it, okay? That's a request to be deferred to

later, is that right?

MS. DRAGAITIS: Are you planning on having a break? Because we were hoping not to.

193. MR. ROSENTHAL: Well, I am suggesting that we probably will need a break, in any event. It's going a little slower than I thought it was, partially because of disagreements between counsel. So, I'm suggesting that we might need a break, in any event. But okay, let's just see how it goes, okay? Counsel, are you willing to allow me to try a couple of questions from this, with the absolute...you have an absolute right to say that the witness should be allowed to see the full document before answering. But it may not really be required, in your view, once you hear the questions.

MS. DRAGAITIS: Well, I was just going to get to that. If they are general questions about the citizenship ceremony...sorry, which manual was it?

194. MR. ROSENTHAL: Sorry, which document was it?

MS. DRAGAITIS: Yes, we call them manuals. Which manual was it?

195. MR. ROSENTHAL: It's CP 15, "Guide to Citizenship Ceremonies".

MS. DRAGAITIS: Okay. I mean, I guess one of the issues is this witness doesn't attend ceremonies, so it kind of does depend on what the nature of your questions are.

196. MR. ROSENTHAL: Well, just let me try a question and Witness, don't answer the question until your counsel agrees that you can be permitted to answer it, okay?

THE DEPONENT: Okay.

197. MR. ROSENTHAL: So, actually, perhaps all I would need from this document at this point, Counsel, is the following. It's on page 30. I appreciate you don't have it in front of you. There is, in my reading, the following, about a third of the way down the page.

BY MR. ROSENTHAL:

198. Q. Okay,

"...When a candidate advises CIC officials,

prior to the ceremony, that he/she will not take the oath of citizenship or sign the citizenship form (e.g. for religious reasons or not wishing to swear allegiance to Her Majesty Queen Elizabeth the Second)..."

And then it says what the citizenship officer must do,

"...Remind that the oath is mandatory..."

And so on. The quotation I wanted was what I read, and what I was interested in was the parathentical remark,

"...e.g. for religious reasons or not wishing to swear allegiance to Her Majesty Queen Elizabeth the Second..."

What I was going to ask the witness flowing from that is, does this not indicate that those are two problems that citizenship officers run into in at least a reasonable number of cases?

MS. DRAGAITIS: Well, Ms. DeShaw...I think Ms. DeShaw actually can answer that.

199. MR. ROSENTHAL: She can answer that?

MS. DRAGAITIS: I think so.

200. MR. ROSENTHAL: Okay.

BY MR. ROSENTHAL:

201. Q. May I have your answer, Ms. DeShaw?

A. I would say those are given as examples of reasons why people can't swear the oath, but I can't extrapolate that to those reasons coming up on a regular basis or...I'm sorry, I can't remember your exact phrasing.

202. Q. Well, I put it to you, and I agree you don't have the document in front of you. If you trust me on this, that those are the specific reasons listed, and therefore I suggest to you that is...since this is to instruct citizenship officials, I would suggest that those are relatively common reasons, and any other reasons that were nearly as common would also, probably, be listed. Isn't that fair?

A. I can't speculate that those are common reasons for not swearing the oath. They are examples of reasons why people would not want to swear the oath.

203. Q. Okay, thank you. Now, you have been aware that residents of Quebec might tend, more than some residents of other provinces, to feel that they do not wish to swear an oath to Queen Elizabeth, isn't that fair?

A. I can understand that statement, yes.

204. Q. It's a fair statement, right?

A. Perhaps you could just repeat the statement for me, please?

205. Q. I don't know if I can repeat it exactly, but it was something to the effect that you're aware that residents of Quebec would tend to have more difficulty swearing an allegiance to the monarch, which they might regard as the British monarch, than residents of some other provinces in general?

A. I'll go back to my...I'll repeat my same statement. Yes, I can understand that statement, yes.

206. Q. Thank you. Now, you're aware of polls that show that the majority of Canadians would like to see the oath changed so that it does not include swearing allegiance to the Queen, isn't that true?

A. I'm aware of a poll that was done some time ago. And I'll be quite frank, I don't know the numbers in front of me.

207. Q. You don't have the precise numbers in front of you?

A. I don't, no. I'm aware of a poll from the mid-'90s.

208. Q. Yes, and that showed...certainly, the majority were in favour of revising the citizenship oath of Canada so that it did not mention the Queen, right?

A. I'm sorry, I don't have the numbers in front of me. I'm aware of that poll, but I didn't commit the percentages to memory.

209. Q. I'm not asking the percentages, but you agree it was a majority, right?

A. Truthfully, I'm drawing a blank on how the numbers played out.

210. Q. Well, in fact, around that time, didn't the Government of Canada then get together some writers to design a new oath?

A. I have heard that had happened, yes.

211. Q. Yes, you're aware of that, right?

A. M'hmm.

212. Q. A policy person like you has to understand that history, right?

A. I had heard of that happening, yes.

213. Q. And the oath that they came up with did not mention the Queen, right?

A. That, I'm not aware of. I'm not

aware of what oath they came up with, to be frank.

214. Q. But you're aware of the fact that it didn't refer to any monarchy, isn't that correct?

A. No, I'm not aware of the oath that they came up with and the content of it.

215. Q. If you could turn to paragraph 6 of your affidavit, please?

A. Sure.

216. Q. That refers to Exhibit C, which you attached to your affidavit?

A. Yes.

217. Q. Showing the Commonwealth countries, and whether they are a realm, monarch, or republic, and whether in each case, an oath to the Queen is contained in their respective oaths of citizenship, right?

A. Yes.

218. Q. Now, of those 54 Commonwealth countries, how many of them have a constitutional right...for how many of them do the residents of them have a constitutional right to freedom of conscience?

A. I'm afraid I don't know without further research.

219. Q. I would put it to you...I'm not sure

of this, but I would put it to you that you do not know of any one of them that does have a constitutional right to freedom of conscience, isn't that fair?

A. I can't agree with that statement, because I haven't had a chance to research that.

220. Q. Do you know if any of them has a constitutional right to freedom of expression?

A. I'm afraid I would say the same thing, I don't know without further research.

221. Q. Do you know if any of them has an analogue of the equality section of our Charter, Section 15?

A. Again, I'm afraid I don't know.

222. Q. Now, going back to the candidates not seen taking the oath question.

A. Okay.

223. Q. Let's now consider the case of a Muslim woman who wears a full veil, that shows only her eyes.

A. M'hmm.

224. Q. And suppose that woman says to an official that is at a citizenship ceremony, "I'm willing to shout the oath in your ear, but I don't want to uncover my face." I would put it to you

that that woman would still be told, according to the documents we have looked at, that she may not become a Canadian citizen, isn't that fair? Unless she removes that head covering.

A. So, to clarify, if the woman says she will shout her oath, but not remove her veil?

225. Q. Right. So, she would be...just to clarify further, you might say she would certainly be heard taking the oath, but she would not, in the words of the documents we have looked at and other documents from your organization, be seen to be taking the oath.

A. So, might that person not be permitted to become a citizen, is your question?

226. Q. Yes, and I would suggest to you the documents indicate she certainly would not be permitted to become a Canadian citizen if she were not willing to remove the veil.

A. I would say, based on the documents, she may not be able to become a Canadian citizen.

227. Q. Thank you. Now, to give another variant of a person taking the oath. Suppose a person is seen taking the oath in the sense that her or his lips are moving in the proper cadence, but it is observed that that person has her or his fingers

crossed behind the back. Would that person be pulled over by an official and told that they cannot become a Canadian citizen based on their failure to take the oath?

A. I'm going to be honest with you, I don't know.

228. Q. You do recognize that fingers crossed behind their back is a signal that many people give indicating that what they are saying is untrue, right?

A. I'm aware that may symbolize that.

229. Q. Right. Thank you. Just to see if it rings a bell with your memory, I have what I understand to be the citizenship oath that was drafted by noted Canadian writers back in the 1990s that I referred to.

A. Okay.

230. Q. If it doesn't refresh your memory then honestly tell me so. If it does, please tell me that it does.

A. Okay.

231. Q. What I understand it was, was, "...I am a citizen of Canada, and I make this commitment to uphold all laws and freedoms, to respect all people in their

diversity, to work for our common well-being, and to safeguard and honour this ancient northern land..."

Does that ring a bell with you?

A. To be honest, it doesn't.

232. Q. It doesn't?

A. No.

233. Q. So, in your policy work, you haven't looked at other possible oaths?

A. I have not, no.

234. Q. And nobody working under your supervision has done so?

A. No, they have not.

235. Q. If you could turn to tab I of your affidavit, please?

A. Okay.

236. Q. This purports to be a transcript of some statements by Jason Kenney, is that correct?

A. Yes.

237. MR. ROSENTHAL: Now, may I ask, Counsel, I take it that you are not prepared to provide Mr. Kenney for cross-examination on anything attributed to him in this document, is that correct?

MS. DRAGAITIS: No, you're right,

Counsel. The transcript is what it is.

BY MR. ROSENTHAL:

238. Q. And I'm going to ask the present witness, then, did you attend this ceremony?

A. I did not, no.

239. Q. Do you know if Mr. Kenney said these words exactly, or any variant of them?

A. I believe he did say them because of the transcript.

240. Q. But you don't know anything else than that?

A. I'm sorry, could you say that again?

241. Q. You have no other basis for knowing whether or not he said these words, other than looking at this transcript?

A. Well, the transcript is from a reputable company that we use for sourcing transcripts.

242. Q. And you have no further information about what he actually said?

A. I don't, no.

243. Q. Now, if you go several pages further...the pages aren't numbered, I don't believe, in this tab to your affidavit...but there

is another transcript.

A. Okay.

244. Q. Can you find that?

A. This is the "Personal Canadian flags"?

245. Q. Yes, "Personal Canadian flags for Royals" is at the top?

A. Yes.

246. Q. With respect to this transcript, were you present at the time any words may have been spoken?

A. I was not.

247. Q. Do you have any knowledge other than looking at the transcript of whether or not the words were actually spoken?

A. I don't.

248. MR. ROSENTHAL: Now, I'm asking, Counsel, with respect to a passage that you have side-barred on the fourth page of that transcript. Counsel, I'm asking you, what is your intention with respect to submitting this as evidence to the court?

MS. DRAGAITIS: Solely to indicate a continuing linkage between our constitutional head of state and

citizenship ceremonies, amongst many other things. But this litigation concerns the connection between citizenship ceremonies and the taking of the oath to our head of state. And this is just some indication of that continuing connection.

249. MR. ROSENTHAL: Well, the passage you have side-barred, for example, the second paragraph of it is,

"...I would say that, generally, we find...I find...a high degree of respect for the Canadian Crown as a central institution of our constitutional monarchy, our parliamentary democracy..."

Now, first off, did Mr. Kenney say "we find" or "I find"?

MS. DRAGAITIS: The transcript is what it is, Counsel. I can't speculate further or make a correction to it.

250. MR. ROSENTHAL: Yes, but the transcript is a piece of paper that is not admissible as evidence unless it's properly admitted as evidence, Counsel. And especially with apparent either stuttering or a typo like that seems particularly problematic.

MS. DRAGAITIS: It may not be a typo. It may be what the minister actually said.

251. MR. ROSENTHAL: That's true.

MS. DRAGAITIS: In fact, I suspect it is since that is the transcript.

252. MR. ROSENTHAL: And so, are you tendering it to try to argue that generally there is a high degree of respect for the Canadian Crown as a central institution of our constitutional monarchy?

MS. DRAGAITIS: It is certainly some evidence of it, yes.

253. MR. ROSENTHAL: Well, I would suggest to you it's inadmissable evidence unless I am allowed to cross-examine Mr. Kenney on the basis for that conclusion.

MS. DRAGAITIS: You can make your arguments at the appropriate time, Counsel.

254. MR. ROSENTHAL: Well, I'm suggesting one of the appropriate times is right now, when I have an affiant to whom this was attached as an exhibit...to whose affidavit this was attached as an exhibit. I'm suggesting to you, Counsel, that you now tell me the basis on which you purport to have this

introduced as evidence in this application.

MS. DRAGAITIS: This purports to be an accurate transcript of something that was said by the minister responsible for this portfolio, and represents his understanding and belief and information about things that are relevant to the litigation. That's all it purports to represent.

255. MR. ROSENTHAL: And it's your view that, based on a transcript...an alleged transcript that we have no other knowledge of than the fact that it is on paper as a transcript, that should be admissible without cross-examination of Mr. Kenney, as evidence of his view?

MS. DRAGAITIS: Yes, I do.

256. MR. ROSENTHAL: You would agree, certainly, it cannot be any evidence whatsoever of the question of the degree of respect to the Canadian Crown as a central institution of our constitutional monarchy that actually exists?

MS. DRAGAITIS: I don't even...I don't follow your question at all, if you're asking me that as a question.

257. MR. ROSENTHAL: I'm asking you a question of the evidentiary basis here. I'm asking you, there are two possible arguments you might make for admissibility of this sentence. One, that it shows Mr. Kenney's views, two, that it not only shows Mr. Kenney's views, but also lends support for the proposition that there is a high degree of respect for the Canadian Crown as a central institution. Now, which of those two, or what basis are you presenting this as evidence?

MS. DRAGAITIS: They are statements by the minister responsible for the portfolio and reflects his views. I have already said that.

258. MR. ROSENTHAL: But you're not going to argue that this, in any way, is evidence of what the actual fact is, as to the degree of respect in Canada?

MS. DRAGAITIS: Well, his view is obviously based on something. It's not just made up out of whole cloth. But this particular piece of evidence is just what I have indicated.

259. MR. ROSENTHAL: How can we possibly be sure that it's not made up out of whole cloth without knowing...

MS. DRAGAITIS: Make that argument, Counsel, at the right time.

260. MR. ROSENTHAL: I'm sorry?

MS. DRAGAITIS: I said you can make that argument all you want to the court or in your factum at the right time.

261. MR. ROSENTHAL: No, sorry. I believe there are rules of evidence in this country.

MS. DRAGAITIS: I have given you my position.

262. MR. ROSENTHAL: So, your position is you are seeking its admissibility for what purpose?

MS. DRAGAITIS: I have already indicated twice now.

263. MR. ROSENTHAL: I tried to parse that in two different ways. Let me try again, and see if you agree with one or both of them. Number one, for the purpose or telling the court what Mr. Kenney's personal views are, or...

MS. DRAGAITIS: Well, no. Now, I didn't ever hear you say "personal views" before. Maybe you did, but I don't recall. They are his views as minister of the relevant portfolio.

264. MR. ROSENTHAL: I see. Okay, so you're saying that the statement,

"...I would say that generally, we find...I find a high degree of respect for the Canadian Crown as a central institution of our constitutional monarchy, our parliamentary democracy..."

Those are his views as a minister?

MS. DRAGAITIS: He is speaking in his position as a minister, the minister responsible for this portfolio.

265. MR. ROSENTHAL: But not necessarily as a personal individual? Is that what you are telling us?

MS. DRAGAITIS: I don't really see the distinction.

266. MR. ROSENTHAL: You just made the distinction a moment ago, if I understand correctly what you said. In objecting to my phrasing, you made that distinction. Is

there a distinction?

MS. DRAGAITIS: I've said this repeatedly. He is speaking in his position as minister responsible for the relevant portfolio. That's about all I can answer on that specific point.

267. MR. ROSENTHAL: And is it, therefore, possible that his thinking as a private individual is different?

MS. DRAGAITIS: Very unlikely, I would say.

268. MR. ROSENTHAL: But possible?

MS. DRAGAITIS: Very, very unlikely.

269. MR. ROSENTHAL: But possible?

MS. DRAGAITIS: Well, anything is possible, but...

270. MR. ROSENTHAL: No, some things are not possible. And one thing that is not possible is that inadmissable evidence be admitted to court unless there is an error of law.

MS. DRAGAITIS: Well, you can make that argument at the right time.

271. MR. ROSENTHAL: Now, further with respect to understanding your position on

this as evidence, whether that is his personal view or his view as a minister, are you also going to be asking the court to rely on that as some evidence of the fact...of the actual degree of respect for the Canadian Crown as a central institution of our constitutional monarchy?

MS. DRAGAITIS: I don't know.

272. MR. ROSENTHAL: I'm sorry?

MS. DRAGAITIS: I don't know.

273. MR. ROSENTHAL: You don't know? Will you undertake to inform me when you make that decision?

MS. DRAGAITIS: Well, I'll make it at some point between now and when I file my factum.

BY MR. ROSENTHAL:

274. Q. Now, Ms. DeShaw, if you could turn, please, to I think the last page of the document that we were looking at.

A. I'm sorry, I didn't hear you.

275. Q. We are still in your tab I.

A. Tab I, yes.

276. Q. And we are looking at the transcript

of the news conference, "Personal Canadian flags for Royals".

A. Okay.

277. Q. And we are looking, then, towards the last page of that transcript.

A. Yes.

278. Q. Do you see the last paragraph attributed to Mr. Kenney on that page begins,

"...Yes, well, I'm looking forward to welcoming their Royal Highnesses here..."

And so on. Do you see that?

A. Yes.

279. Q. Then about four lines down it says,

"...We have...we swear in 180,000 new citizens every year. We have the highest rate of naturalization in the world..."

Do you know any basis for that conclusion,

"...We have the highest rate of naturalization in the world..."

A. I would just have to rely on the table we talked about earlier.

280. Q. Yes.

A. Yes.

281. Q. Would you agree...and then it goes on to say,

"...That is to say, the highest percentage of immigrants who go on to become citizens is about 85 percent..."

Right? So, I would put it to you that it seems likely that Mr. Kenney was reporting his view of that document that we looked at earlier about take-up rates, right?

A. I don't know if he is reporting his view of that particular document.

282. Q. Well, that document only talked about four countries' rates of naturalization, right?

A. That's correct.

283. Q. It would be a gross exaggeration to say that that document established that we have the highest rate of naturalization in the world, right?

A. You're right, it's a limited comparison with comparative countries, yes.

284. Q. Not a very big fraction of the world?

A. Yes.

285. MR. ROSENTHAL: Ms. Dragaitis and Ms. DeShaw, I indicated we probably would want a break. But, in any event, the court reporter wants a break and I think that we

owe her the courtesy of such. So, if we could take ten, please?

286. MR. ROSENTHAL: Okay.

THE DEPONENT: Okay.

287. MR. ROSENTHAL: So, I guess we will hang up and phone you back in ten minutes.

MS. DRAGAITIS: Okay.

288. MR. ROSENTHAL: And I would ask you, of course, not to discuss the evidence at all during that break?

MS. DRAGAITIS: Of course.

--- A BRIEF RECESS

RELL DeSHAW, resumed

CONTINUED CROSS-EXAMINATION BY MR. ROSENTHAL:

289. Q. So, you recall that I referred you to a document that you didn't have in front of you with respect to two reasons that people might have difficulty with the oath, religious head coverings and concern about the Queen?

A. Head covering? No.

MS. DRAGAITIS: You're mixing up the operational bulletin with the manual that you're talking about.

290. MR. ROSENTHAL: Sorry.

BY MR. ROSENTHAL:

291. Q. In any event, I just wanted to ask, besides those two reasons, which you didn't know the frequency of, can you tell us other kinds of objections to the oath that you have become aware of in your position?

A. To be honest, those are the only ones I can tell you that I have been made aware of.

292. Q. Oh. Well, if they are the only two, that would suggest that they are the most common, isn't it? Wouldn't it?

A. I think the distinction I was trying to make is that these are common reasons for not taking the oath, versus the most common.

293. Q. So, in your position with respect to policy, if there are any substantial number of people not taken the oath for any particular kind of reason, it should come to your attention, right?

A. I would agree, yes, if a substantial number of people were not taking the oath, it would come to my attention...

294. Q. For particular reasons, then...

A. ...but yes.

295. Q. It should come to your attention, and you should consider it as a policy matter whether you ought to do something to allow those people to take the oath, right?

A. Yes, we would consider that.

296. Q. And so these two are the reasons that have come to your attention. Has there been consideration of allowing people who conscientiously object to taking an oath to the monarchy to not say that part of the oath?

A. I'm not aware of any discussions of allowing people who have a problem with that part of the oath to not say that.

297. Q. Or of...well, you told us you were aware of discussions back in the 1990s of the possibility of revising the oath entirely, right?

A. That's correct, yes.

298. Q. More recently, have there been consideration of the possibility of accommodating in any fashion people who very much want to become citizens of Canada, are very happy to swear that they will follow Canadian laws and participate in Canada as full citizens, but who have a conscientious objection to swearing an oath to...or taking allegiance to the monarchy?

A. I'm not aware of any discussions of accommodating that group.

299. Q. Thank you. Now, there are some exemptions from the oath, as you have indicated, including minors and mental disability, right?

A. That's correct.

300. Q. What are the reasons for those exemptions?

A. They are the...so, the second one first, although I think there is overlap in reasons. They would be people who are not going to be capable of understanding the significance of the oath.

301. Q. Some people with mental disabilities would understand the significance of the oath, would they not?

A. I would agree, yes.

302. Q. And I suppose understanding the significance of the oath could be on various levels, right?

A. I suppose so.

303. Q. They could be deeper understandings of the significance?

A. I'm not sure what the question is.

304. Q. I'm suggesting that...well, when you used the expression just now, understanding the

significance of the oath, that these people would not be able to, what aspect of the significance did you mean?

A. I didn't have in mind a specific aspect. It would be the oath in general.

305. Q. The fact that it binds you to the Queen? Would that be one be one of the aspects you had in mind?

A. Truthfully, I wasn't thinking of a specific aspect, I was thinking of all of the elements of the oath.

306. Q. Well, which elements were you thinking of? You say they may not understand the significance of the oath, and understanding the significance of the oath would include the following...tell us what the following is, please.

A. I would have to read...I can read back through the oath, so yes, it includes the allegiance to the Queen, and also the need to faithfully observe Canada's laws and fulfil duties as a citizen.

307. Q. And you don't think minors could understand that?

A. Well, we are talking about people under 14, so...

308. Q. Yes.

A. ...they could maybe understand the words, but in terms of swearing or affirming to uphold those principals, there has been a decision taken that 14 is a reasonable cut off.

309. Q. On the other hand, to understand what allegiance to the Queen means in this context might not be such an easy proposition, right? We have had some difficulty in determining what that really means during the course of this examination, isn't that fair?

A. I'm not sure if I can agree or disagree. Basically, all I can do is repeat what I have said, which is we have made a determination that people 14 and over are generally able to understand the significance of the contents of the oath within the context of swearing it or affirming it.

310. Q. Okay, forgetting about the minors for a moment then, you do agree with my proposition that in the course of this afternoon, it has become evident that it's a fairly complex question as to what "allegiance to the Queen" means, right?

A. I'm not sure if I am going to agree with that point. I know we have had a lot of

discussion around how that swearing of the oath could or could not align with activities after that oath is taken.

311. Q. Well, with respect to the definition of heirs, for example, did you say...and I may be misremembering, but I think you did, that you would have to seek legal advice about that?

A. I believe I suggested what I thought the words meant, and that I would clarify that interpretation if I were to present that information to a client at a ceremony.

312. Q. So, I would suggest it's pretty compelling evidence of the complexity of that phrase regarding allegiance to the monarchy, that the manager of Citizenship, Legislation, and Program Policy would have to seek advice on interpretation of it.

A. I think I might disagree with the words that you're characterizing it as complex. Because of the importance of the meaning of the words, I would want to get advice to make sure the right meaning is ascribed to our clients that are going to be swearing that oath.

313. Q. Now, Ms. DeShaw, you know the name Charles Roach?

A. I do.

314. Q. And you are aware that for many years he attempted to obtain citizenship without swearing an oath to the Queen?

A. I am aware of that.

315. Q. You followed his case?

A. I followed it a bit, certainly, becoming an affiant, yes.

316. Q. And yes, you're aware of the fact that the present case was initiated by Mr. Roach, right?

A. That's correct, yes.

317. Q. And then you're also aware that unfortunately, he passed away last October, and therefore is no longer an applicant in this case, right?

A. Yes, I am aware of that.

318. Q. And you're aware that even earlier, he had made a case in the federal courts to a similar effect, is that correct?

A. Yes, I am. Yes.

319. Q. As a policy person with Citizenship Canada, you would have been at least vaguely aware of that situation, right?

A. Yes.

320. Q. And you knew that Mr. Roach was a civil rights lawyer in Toronto?

A. I didn't know a lot about him, personally, to be honest with you. Yes, vaguely, that element.

321. Q. And you knew that he at least asserted that he had deep conscientious beliefs that would not allow him to take that oath?

A. Yes.

322. Q. Did you know that at one point in the 1980s, the Law Society of Upper Canada informed him that if he did not become a citizen by a certain time, he would lose his right to practise law? Did you know that aspect of the situation?

A. I had heard some issues around his ability to practise and his citizenship, yes.

323. Q. And then you were aware that Mr. Roach did apply for citizenship but then refused to take the oath at the last minute, right?

A. I wasn't aware of those particular facts, to be honest.

324. Q. Okay. Please do be honest. But then you were aware that before Mr. Roach would have been disbarred, there was a decision of the Supreme Court of Canada in Andrews saying that lawyers did

not have to be citizens to practise law, and that then prevented his being disbarred. Are you aware of that situation?

A. I wasn't aware of it, but I understand it now that you have explained it to me.

325. Q. And then in the last year or so, there was a fair amount of media attention to the fact that Mr. Roach was pursuing this case, but was also dying of cancer. You were aware of that as well?

A. Yes.

326. Q. Was there any consideration of a policy decision to give some consideration to granting him citizenship before he died?

A. I'm not aware of any.

327. Q. Does the fact that a person such as Mr. Roach was unable to attain Canadian citizenship lead to any reconsideration by Citizenship Canada of the question of allowing citizenship other than by taking an oath to the Queen?

A. I'm not aware that the situation of Mr. Roach has raised any discussions at the CIC about changing the requirement to take the oath to the Queen.

328. MR. ROSENTHAL: Ms. DeShaw, I want to

thank you very much for attending by phone today, and those are my questions. Subject to...there was one document...

MS. DRAGAITIS: Yes?

329. MR. ROSENTHAL: ...that you were going to...you undertook to produce. It's unlikely, but if there are any questions arising from that document, I would request the opportunity to ask them. But I doubt that that will occur, but I just want to leave that possibility open.

MS. DRAGAITIS: Yes, Mr. Rosenthal. If they are reasonably arising from the document, and because you don't have it today, I'll certainly entertain them and ask my client, the affiant, and see where that goes. But yes.

330. MR. ROSENTHAL: Okay, thank you both very much and have a good time in Ottawa.

MS. DRAGAITIS: Thank you.

THE DEPONENT: Thank you.

INDEX OF UNDERTAKINGS

REPORTER'S NOTE:

Please be advised that any undertakings, objections, under advisements and refusals are provided as a service to all counsel, for their guidance only, and do not purport to be legally binding or necessarily accurate and are not binding upon Victory Verbatim Reporting Services Inc.

I hereby certify the foregoing to be a true and accurate transcription of the above noted proceedings held before me on the **11th DAY OF MARCH, 2013** and taken to the best of my skill, ability and understanding.

Certified Correct:

Joy Livingston
Verbatim Reporter

SCC File Number:_____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

MICHAEL MCATEER, SIMONE E.A. TOPEY, AND DROR BAR-NATAN

APPLICANTS
(Appellants)

and

THE ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

AFFIDAVIT OF CHRISTA BIG CANOE
(Affirmed October 3, 2014)

I, CHRISTA BIG CANOE, Barrister and Solicitor, of the City of Toronto, in the Province of Ontario, AFFIRM AS FOLLOWS:

1. I am a Canadian citizen of First Nations origins. I am a member of the Chippewas of Georgina Island First Nation and a registered Indian pursuant to the *Indian Act.* I make this affidavit to demonstrate for the purpose of this application for leave to appeal some ways in which requirements to make an Oath to the Queen create problems of conscience for me and some other First Nations people.

2. As a First Nations individual from a community that had pre-Dominion Treaty relationships with the British Crown, my perception of the Queen as a Canadian symbol differs from mainstream perspectives. I believe it is fair to say that other First Nations people have similar feelings to my personal perceptions of the Queen or the pre-Dominion relationships between First Nations and the Crown. Formally, the relationship

was an alliance, and First Nations people were not subjects of the British Crown. Informally, the relationship was paternalistic, wherein the Crown of the day would make proclamations to their British subjects and refer to First Nations people as their "children". The *Royal Proclamation* is a prime example of this dynamic. In pre-Dominion days, proclamations or addresses by the British Crown to First Nations people were often signed by the King of the day as "the Great White Father".

3. Although I am a Canadian citizen, I also identify as a citizen of my First Nations community and tribe, Anishinabek. Today, under s. 6 of the *Indian Act* (passed under the authority of s. 91(24) of the *Constitution Act,* 1867), I and other registered Indians are also wards of the federal government. It is difficult to reconcile that I am at once a ward and may also in certain circumstances be required to make an Oath of allegiance to a Crown that no longer has any direct relationship with my people and has arguably not kept up the responsibilities it agreed to when it entered into a relationship with my people. Today, the Canadian government under the guise of the Crown continues this paternalistic and destructive relationship, which ignores its obligations under Treaty and law.

4. The First Nations' understanding of the Treaty relationships often differs from the Crown's understanding. As a First Nations person whose ancestors entered into an alliance with the British Crown as partners and not as subjects, I personally do not believe the Queen or monarchy represents Canada or the Canadian constitution. Given the difficult historical relationship First Nations have had with settler monarchs and with the Dominion government, I find it personally repugnant to make an Oath to the Queen. This has affected my past employment experiences.

5. Section 5 of the *Public Service of Ontario Act*, 2006, S.O. 2006, c. 35, requires Ontario's public servants to make an Oath to the Queen. From March 2008 to May 2011, I was employed by Legal Aid Ontario (LAO), first as a contractor and then in a permanent position as Policy Counsel to the organization. A copy of my *curriculum vitae* is appended to this affidavit as **Exhibit "A"**.

6. Because employees of LAO are defined as public servants, I was advised once I was in a permanent position that I would have to make an Oath to the Queen. I admittedly avoided doing so for a number of months because I had a crisis of conscience about making the Oath. I advised my superiors of my personal beliefs and objection, quite vocally. I was eventually told that I could not keep the position unless I made the Oath. I then agreed to make the Oath only if a written objection to the oath were written on the front of the Oath document. I made my written objection and took the Oath. Ironically, since the objection clearly indicates that my conscience was not bound in making the Oath, the Oath turned out to be a formality. The organization accepted my Oath and I remained employed until I took a year's leave of absence to fill the position I currently hold at Aboriginal Legal Services of Toronto. In the course of my employment, LAO would direct other staff who did not want to take the Oath to me. I was never certain why they did this. Was it to use my Oath taking as an example to others? or was it for a more genuine purpose to allow them to commiserate with me? Most people who were referred to me were Aboriginal but there were others. I found it upsetting that people would be told I objected and then referred to me.

7. More recently, I have seriously contemplated applying for other positions within the public service, where I believe my skill set would be effective and help build relationships between government and Aboriginal people. I believe that I would likely be a strong candidate for such positions given my work experience and strong relationship with Aboriginal leaders and communities in Ontario. My largest holdback in applying for any public service position is the worry that I will need to once again to make an Oath to the Queen.

8. I am lucky that the Law Society of Upper Canada does not require its members to make an Oath to the Queen. When I was called to the bar by the Law Society of Upper Canada in 2007, I abstained from making the Oath. Should I have been required to do so, I am not sure if I would have done it. Had I done so, I would have treated the Oath as an insincere formality, necessary for me to begin practising law, rather than as an Oath binding on my conscience. An Oath that is not binding on my conscience is counter-

intuitive to its purpose. My opinion of the practice of law would also have been changed had I been forced to make such an Oath.

9. Today, if the Oath were required to be called to the bar in Ontario, I can say with confidence that I would not make the Oath and I would object. I would also object to making an Oath to be called to the bars of any other provinces. Because the following provinces require me to make an Oath, this means that I would be precluded from being called as a lawyer to their bars:

   a. Alberta, where new members called to the bar must take the Oath to the Queen pursuant to the *Legal Profession Act*, R.S.A. 2000, c. L-8, s. 44(2) and the *Oaths of Office Act*, RSA 2000, c O-1, s. 1;

   b. Newfoundland & Labrador, where new members called to the bar must take the Oath to the Queen pursuant to the *Law Society Act*, 1999, SNL 1999, c L-9.1, s. 34(4) and the *Oaths of Office Act*, RSNL 1990, c O-2, s. 2; and

   c. Prince Edward Island, where new members called to the bar must take the Oath to the Queen pursuant to the *Legal Profession Act*, RSPEI 1988, c L-6.1, s. 17(2)(a).

10. I know that I am not the only Aboriginal lawyer who struggles with these conflicts of conscience and I am aware that other Aboriginal colleagues both in law and otherwise find it challenging or have had problems because of the Oath. There are a number of ways in which requiring the Oath of First Nations people is repugnant and acts as a barrier for employment opportunities. It is thus important to me and to number of other First Nations people that leave be granted in this case.

AFFIRMED before me at the City of Toronto, in the Province of Ontario, this 3rd day of October 2014.

Caitlyn Smith, LSUC # 62385M

CHRISTA BIG CANOE

This is exhibit A to the
affidavit of Christa BigCanoe
dated the 3 day of October 2014

Commissioner, etc.

Christa Big Canoe, B.A., J.D.

canoecd@lao.on.ca • 416-408-4041 ext. 225

Objectives

To promote access to justice and provide representation to Aboriginal people in the Canadian legal system. To increase participation and inclusion of Aboriginal people within the justice system. To increase knowledge and awareness. To create space and understanding of the practice of Aboriginal driven justice processes and programs.

Experience

Aboriginal Legal Services of Toronto | 415 Yonge Street, Toronto, Ontario, M5B 2E7

Legal Advocacy Director May, 2011 – Present

- Responsible for supervision and training of all Legal Advocacy Program (Clinic) staff including legal responsibility for all legal work performed by lawyers, paralegals, community legal workers, students and volunteers. Such work includes supervision or performance of intake, summary advice, client representation.
- Responsible for oversight of Human Resources and Administration for clinic services. My administrative duties require me to assist the Board in developing, implementing and evaluation appropriate polices for all Legal Advocacy functions over all the day to day management. I am also responsible for the quantity and quality of services delivered by the Legal Advocacy Program and Financial Administration and oversight, including but not limited to financial reporting to Legal Aid Ontario and other funders. I am the individual responsible for the trust account and I am the joint signing officer on all Legal Advocacy Program accounts. My position requires me to act as liaison on behalf of the board with funders and ensure that funder relations are maintained.
- Client representation and case carriage on large case files, test litigation, inquests and at administrative tribunals.
- Responsible for file management and oversight of all daily clinic operations as per LSUC by-laws, rules and general good practice.
- I oversee and direct outreach, public legal education, community development and organizing, media relations, and all law reform campaigns and actions for the organization.

Legal Aid Ontario | Provincial Office-Toronto, Ontario

Policy Counsel, and lead on the Aboriginal Justice Strategy , February 2008- May 2011

- Policy support for all aspects of the Aboriginal Justice Strategy and other programs and policy initiatives.
- Develop and strategically plan initiatives to improve legal aid services to Aboriginal clients

- Developed the curriculum, and facilitated Aboriginal Cultural Competency training to over 400 staff.
- Provided advice and support to the enhancement of LAO LAW legal research resources.
- Developed the Gladue enhancements and began the implementation of increased tariff for legal representation of Aboriginal clients so that Gladue principles are applied. Assisted with the development and original launch of the panel standards for the Gladue panel.
- Assisted in the development and implementation of the Aboriginal Self Identification Question so that LAO can statistically, in a responsible manner, identify the needs of Aboriginal clients.
- Liaised with the Aboriginal Issues Advisory Committee to the Board of Directors, Ministry of the Attorney General staff, clinic serve providers and various Aboriginal service providers and stake holders.

First Nation Technical Institute | Tyendinaga, Ontario
Contracted Instructor, September *2008* – May 2012

- Instructed five courses in within the two year program for Law Clerk Program including: Word Processing for Law Clerks; Communications I- Research and Writing; Communications II- Advoccacy; Legal Drafting I- Law and Policy Development; and, Instruct and mentor the Research Assignment.

Nawegahbow, Corbiere | Rama, Ontario
Student- at- Law and *Contract Lawyer*, August 2005-February 2008

- The firm is an all First Nation firm representing only Aboriginal clients
- Was under the supervisions for articles of Dianne Corbiere and then under the supervision of David Nawegahbow following my articles.
- Provided junior support on a number of large case files including judicial reviews at Federal Court and other cases at the Superior court of justice with the senior partner David Nawegahbow.
- Provided research, drafting and support on civil cases on Aboriginal and Treaty rights, including fiduciary obligation, consultation issues, honour of the Crown, specific claim cases, historical document and filing support.
- Assisted on General Counsel files in the areas of the *Indian Act*, tax, corporate, business law, criminal and inherent rights.

GNWT- Territorial Court | Inuvik Office- Northwest Territories
D/Clerk of the Court and *Administrative Justice of the Peace*, August 2001- 2003, plus summer 2004

- This position was integral to my understanding of criminal law and procedural knowledge of court operations, court practice and legal documentation. I clerked in the remote north and traveled to small remote communities. I was the court clerk on a number of preliminary inquiries for serious criminal accusations including homicide, aggravated sexual assault and assault. I was the court clerk for many circuits through the region and in Territorial Court

matters with multiple accused, multiple charges and multiple dispositions in a jurisdiction where the majority of accused adults and youth are Aboriginal.

- I was responsible for organizing and clerking remote court circuits throughout the northwestern, coastal and Sahtu regions of the Northwest Territories.
- I clerked criminal, civil, family matters during court weeks as well as providing clerk services in the registry.
- I was responsible for carriage, endorsements, drafting of dispositions and sentencing documents, minutes, all data entry and filing of all court documents during any circuit that I conducted or in support of the clerk of the court.
- As an administrative Justice of the Peace, I swore and issued informations, warrants, remands and other legal documents in my capacity. I attended an intensive two week training course for Justice of the Peace Training instructed by Judge Coward, Deputy Judge of the Territorial Court, Judge of the Queen's Bench in Alberta. I also assisted in training presiding Justice of the Peace on bail hearings and remands.

Education

The Law Society of Upper Canada

2007 — *Barrister-at-Law*

- Comprehensive Bar Admission Course completed in 2005
- Articles completed in October 2006, remained under the supervision of David Nawegahbow until my call to the bar in January 2007

University of Toronto Law School

2005 — *Juris Doctor*

- I completed the Aboriginal Intensive Program at Osgoode Law School in the spring session of 2005 under my placement practitioner Jeffery Hewitt, General Counsel of Rama First Nation.
- I was a participant in the 2004 Kaswaskimon Moot in Calgary under the supervision of Darlene Johnson.
- I was the external review coordinator and senior of the *Indigenous Law Journal* in 2004/05.
- My environmental law placement was with CELA focusing on diesel contamination and brown fields in a remote First Nation community.
- I was an active member of the Native Law Students Association (NLSA), which is now referred to as the Aboriginal Law Students Association (ALSA)

University of Calgary

2000 — *Bachelor of Arts-History*

- Actively participated with the First Nations Student Association and held positions of the executive council, including Vice-President External and Vice-President Events.

Select Awards and Designations

2011 *Instructor of the Year,* First Nations Technical Institute
2007 *Notary Public* for the province of Ontario
2003 *Emerging Artist- Great Northern Arts Festival* for Jewelry and Armor making.

2002 *Justice of the Peace-* In and for the Northwest Territories (inactive since 2005)
2001 *Second Place-* at the Law Games National Moot (held in Calgary)
2000 *Dr. Steinhauer Award* presented by the Native Centre at the University of Calgary.
2000 *Esquao Award* presented by the Alberta Aboriginal Women's Association.

Select Volunteer Experience

Present	Spokesperson and volunteer for Thunder Woman Healing Lodge
2011	Team Diabetes- Ottawa Half Marathon, Ottawa, Ontario.
2010	Team Diabetes- Conquer the Canyon, Grand Canyon Hike, Arizona, USA
2003-2005	Native Law Students Association of Toronto, U of T Law.
2002-2003	Artic Tern Youth Correctional Facility Volunteer Cultural Facilitator, Inuvik, NT
2001-2003	Inuvik Transition House Board Member
2001-2003	Inuvik Victim Services Volunteer
1998-2000	Founder and Director of SkyReach Aboriginal Youth Initiative
1998-2000	Member of the Native Studies Curriculum Development Committee, University of Calgary
1998-2000	Vice- President External and Vice President Events. First Nation Student Assoc., University of Calgary