Tribe, Laurence H. "The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and 'The Purity of the Ballot Box'" (1989), 102 *Harv. L. Rev.* 1300.

United Nations. Human Rights Committee. "General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights", General Comment No. 25 (57), Annex V, CCPR/C/21, Rev. 1, Add. 7, August 27, 1996.

APPEAL from a judgment of the Federal Court of Appeal, [2000] 2 F.C. 117, 180 D.L.R. (4th) 385, 248 N.R. 267, 29 C.R. (5th) 242, 69 C.R.R. (2d) 106, [1999] F.C.J. No. 1577 (QL), allowing the respondents' appeal and dismissing the appellants' cross-appeal from a decision of the Trial Division, [1996] 1 F.C. 857, 106 F.T.R. 241, 132 D.L.R. (4th) 136, [1995] F.C.J. No. 1735 (QL). Appeal allowed, L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. dissenting.

Fergus J. O'Connor, for the appellant Richard Sauvé.

Arne Peltz, for the appellants Sheldon McCorrister, Lloyd Knezacek, Clair Woodhouse, Aaron Spence, Serge Bélanger, Emile A. Bear and Randy Opoonechaw.

David G. Frayer, *Q.C.*, and *Gérald L. Chartier*, for the respondents.

Thomas W. Wakeling and *Gerald D. Chipeur*, for the intervener the Attorney General for Alberta.

Heather S. Leonoff, *Q.C.*, for the intervener the Attorney General of Manitoba.

Allan Manson and *Elizabeth Thomas*, for the interveners the Canadian Association of Elizabeth Fry Societies and the John Howard Society of Canada.

John W. Conroy, *Q.C.*, for the intervener the British Columbia Civil Liberties Association.

Kent Roach and *Brian Eyolfson*, for the intervener the Aboriginal Legal Services of Toronto Inc.

Sylvain Lussier, for the intervener the Canadian Bar Association.

Nouveau Petit Robert. Paris, Le Robert, 2000, « moral ».

Raz, Joseph. *The Morality of Freedom.* Oxford : Clarendon Press, 1986.

Tribe, Laurence H. *American Constitutional Law*, 2nd ed. Mineola, New York : Foundation Press, 1988.

Tribe, Laurence H. « The Disenfranchisement of Ex-Felons : Citizenship, Criminality, and 'The Purity of the Ballot Box' » (1989), 102 *Harv. L. Rev.* 1300.

POURVOI contre un arrêt de la Cour d'appel fédérale, [2000] 2 C.F. 117, 180 D.L.R. (4th) 385, 248 N.R. 267, 29 C.R. (5th) 242, 69 C.R.R. (2d) 106, [1999] A.C.F. nº 1577 (QL), qui a accueilli l'appel des intimés et rejeté l'appel incident des appelants contre une décision de la Section de première instance, [1996] 1 C.F. 857, 106 F.T.R. 241, 132 D.L.R. (4th) 136, [1995] A.C.F. nº 1735 (QL). Pourvoi accueilli, les juges L'Heureux-Dubé, Gonthier, Major et Bastarache sont dissidents.

Fergus J. O'Connor, pour l'appelant Richard Sauvé.

Arne Peltz, pour les appelants Sheldon McCorrister, Lloyd Knezacek, Clair Woodhouse, Aaron Spence, Serge Bélanger, Emile A. Bear et Randy Opoonechaw.

David G. Frayer, *c.r.*, et *Gérald L. Chartier*, pour les intimés.

Thomas W. Wakeling et *Gerald D. Chipeur*, pour l'intervenant le procureur général de l'Alberta.

Heather S. Leonoff, *c.r.*, pour l'intervenant le procureur général du Manitoba.

Allan Manson et *Elizabeth Thomas*, pour les intervenantes l'Association canadienne des sociétés Elizabeth Fry et la Société John Howard du Canada.

John W. Conroy, *c.r.*, pour l'intervenante la British Columbia Civil Liberties Association.

Kent Roach et *Brian Eyolfson*, pour l'intervenante l'Aboriginal Legal Services of Toronto Inc.

Sylvain Lussier, pour l'intervenante l'Association du Barreau canadien.

The judgment of McLachlin C.J. and Iacobucci, Binnie, Arbour and LeBel JJ. was delivered by

1 THE CHIEF JUSTICE — The right of every citizen to vote, guaranteed by s. 3 of the *Canadian Charter of Rights and Freedoms*, lies at the heart of Canadian democracy. The law at stake in this appeal denies the right to vote to a certain class of people — those serving sentences of two years or more in a correctional institution. The question is whether the government has established that this denial of the right to vote is allowed under s. 1 of the *Charter* as a "reasonable limi[t] . . . demonstrably justified in a free and democratic society". I conclude that it is not. The right to vote, which lies at the heart of Canadian democracy, can only be trammeled for good reason. Here, the reasons offered do not suffice.

I. Statutory Provisions

2 The predecessor to s. 51(*e*) of the *Canada Elections Act*, R.S.C. 1985, c. E-2, prohibited all prison inmates from voting in federal elections, regardless of the length of their sentences. This section was held unconstitutional as an unjustified denial of the right to vote guaranteed by s. 3 of the *Charter: Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438. Parliament responded to this litigation by replacing this section with a new s. 51(*e*) (S.C. 1993, c. 19, s. 23), which denies the right to vote to all inmates serving sentences of two years or more. Section 51(*e*), which is now continued in substantially the same form at s. 4(*c*) of the Act (S.C. 2000, c. 9), and the relevant *Charter* provisions are set out below.

Canada Elections Act, R.S.C. 1985, c. E-2

51. The following persons are not qualified to vote at an election and shall not vote at an election:

. . .

(*e*) Every person who is imprisoned in a correctional institution serving a sentence of two years or more;

Version française du jugement du juge en chef McLachlin et des juges Iacobucci, Binnie, Arbour et LeBel rendu par

LE JUGE EN CHEF — Le droit de vote de tout citoyen, garanti par l'art. 3 de la *Charte canadienne des droits et libertés*, se trouve au cœur de la démocratie canadienne. La loi mise en cause dans le présent pourvoi prive du droit de vote une certaine catégorie de personnes — celles qui purgent une peine de deux ans ou plus dans un établissement correctionnel. Il s'agit de savoir si le gouvernement a établi que cette privation du droit de vote est autorisée en vertu de l'article premier de la *Charte* parce qu'elle s'inscrit « dans des limites [. . .] raisonnables [. . .] dont la justification [peut] se démontrer dans le cadre d'une société libre et démocratique ». Je conclus que non. Il faut une bonne raison pour entraver le droit de vote, qui se trouve au cœur de la démocratie canadienne. Or, les raisons présentées en l'espèce ne suffisent pas.

I. Les dispositions législatives

La version antérieure de l'al. 51*e*) de la *Loi électorale du Canada*, L.R.C. 1985, ch. E-2, interdisait à tous les détenus de voter aux élections fédérales, peu importe la durée de leur peine. Cette disposition a été déclarée inconstitutionnelle parce qu'elle constituait une atteinte injustifiée au droit de vote garanti par l'art. 3 de la *Charte* : *Sauvé c. Canada (Procureur général)*, [1993] 2 R.C.S. 438. Le législateur a réagi à ce jugement en remplaçant cette disposition par un nouvel al. 51*e*) (L.C. 1993, ch. 19, art. 23), qui prive du droit de vote tous les détenus purgeant une peine de deux ans ou plus. L'alinéa 51*e*), qui est repris essentiellement sous le même libellé à l'al. 4*c*) de la Loi (L.C. 2000, ch. 9), et les dispositions pertinentes de la *Charte* sont reproduits ci-après.

Loi électorale du Canada, L.R.C. 1985, ch. E-2

51. Les individus suivants sont inhabiles à voter à une élection et ne peuvent voter à une élection :

. . .

e) toute personne détenue dans un établissement correctionnel et y purgeant une peine de deux ans ou plus;

role in maintaining and enhancing the integrity of the electoral process and in exercising the criminal law power both warranted deference. The denial of the right to vote at issue fell within a reasonable range of alternatives open to Parliament to achieve its objectives and was not overbroad or disproportionate. Desjardins J.A., applying the "stringent formulation of the *Oakes* test", emphasized the absence of evidence of benefits flowing from the denial and would have dismissed the appeal.

III. Issues

5 1. Does s. 51(*e*) of the *Canada Elections Act* infringe the guarantee of the right of all citizens to vote under s. 3 of the *Charter* and if so, is the infringement justified under s. 1 of the *Charter*?

2. Does s. 51(*e*) of the *Canada Elections Act* infringe the equality guarantee of s. 15(1) of the *Charter* and if so, is the infringement justified under s. 1 of the *Charter*?

IV. Analysis

6 The respondents concede that the voting restriction at issue violates s. 3 of the *Charter*. The restriction is thus invalid unless demonstrably justified under s. 1. I shall therefore proceed directly to the s. 1 analysis.

A. *The Approach to Section 1 Justification*

7 To justify the infringement of a *Charter* right, the government must show that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified: *R. v. Oakes*, [1986] 1 S.C.R. 103. This two-part inquiry — the legitimacy of the objective and the proportionality of the means — ensures that a reviewing court examine rigorously all aspects of justification. Throughout the justification process, the government bears the burden of

du droit de vote, statuant que le rôle du législateur de préserver et de rehausser l'intégrité du processus électoral ainsi que son rôle d'exercer son pouvoir en matière de droit pénal doivent bénéficier d'une certaine retenue. La privation du droit de vote en question se situe dans une gamme de mesures raisonnables auxquelles le législateur peut recourir pour atteindre ses objectifs, et cette mesure n'a pas une portée trop large pas plus qu'elle n'est disproportionnée. Le juge Desjardins, appliquant la « formulation stricte du critère énoncé dans l'arrêt *Oakes* », insiste sur l'absence de preuve des effets bénéfiques découlant de la privation et aurait rejeté l'appel.

III. Les questions en litige

1. L'alinéa 51*e*) de la *Loi électorale du Canada* porte-t-il atteinte au droit de vote que l'art. 3 de la *Charte* garantit à tous les citoyens et, dans l'affirmative, cette atteinte est-elle justifiée au sens de l'article premier de la *Charte*?

2. L'alinéa 51*e*) de la *Loi électorale du Canada* porte-t-il atteinte au droit à l'égalité garanti par le par. 15(1) de la *Charte* et, dans l'affirmative, cette atteinte est-elle justifiée au sens de l'article premier de la *Charte*?

IV. Analyse

Les intimés reconnaissent que la restriction au droit de vote en question contrevient à l'art. 3 de la *Charte*. Elle est donc invalide à moins que sa justification puisse être démontrée au regard de l'article premier. Je vais donc passer directement à l'analyse fondée sur l'article premier.

A. *L'approche en matière de justification au sens de l'article premier*

Pour justifier l'atteinte portée à un droit garanti par la *Charte*, le gouvernement doit démontrer qu'elle vise un but ou objectif valide du point de vue constitutionnel, et que les mesures choisies sont raisonnables et leur justification peut se démontrer : *R. c. Oakes*, [1986] 1 R.C.S. 103. L'application de ce critère à deux volets — la légitimité de l'objectif et la proportionnalité des mesures — permet au tribunal d'examen d'analyser rigoureusement tous les aspects du processus de justification. Tout au

proving a valid objective and showing that the rights violation is warranted — that is, that it is rationally connected, causes minimal impairment, and is proportionate to the benefit achieved.

My colleague Justice Gonthier proposes a deferential approach to infringement and justification. He argues that there is no reason to accord special importance to the right to vote, and that we should thus defer to Parliament's choice among a range of reasonable alternatives. He further argues that in justifying limits on the right to vote under s. 1, we owe deference to Parliament because we are dealing with "philosophical, political and social considerations", because of the abstract and symbolic nature of the government's stated goals, and because the law at issue represents a step in a dialogue between Parliament and the courts.

I must, with respect, demur. The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense.

The *Charter* distinguishes between two separate issues: whether a right has been infringed, and whether the limitation is justified. The complainant bears the burden of showing the infringement of a right (the first step), at which point the burden shifts to the government to justify the limit as a reasonable limit under s. 1 (the second step). These are distinct processes with different burdens. Insulating a rights restriction from scrutiny by labeling it a matter of social philosophy, as the government attempts to do, reverses the constitutionally imposed burden of justification. It removes the infringement from our radar screen, instead of enabling us to zero in on

long de ce processus, il incombe au gouvernement de prouver que l'objectif est valide et que l'atteinte portée aux droits est légitime — c'est-à-dire qu'il existe un lien rationnel entre l'objectif et l'atteinte, qu'il s'agit d'une atteinte minimale et que celle-ci est proportionnée aux effets bénéfiques qu'elle produit.

8 Mon collègue le juge Gonthier propose une approche axée sur la retenue en matière d'atteinte et de justification. Il soutient qu'il n'y a aucune raison d'accorder une importance spéciale au droit de vote et que nous devons nous en remettre au choix du législateur parmi une gamme de solutions raisonnables. Il affirme également qu'en matière de justification des restrictions au droit de vote au sens de l'article premier, nous devons faire preuve de retenue envers le législateur parce qu'il s'agit de « considérations philosophiques, politiques et sociales », parce que les objectifs poursuivis par le gouvernement sont de nature abstraite et symbolique et parce que la loi en question représente une étape du dialogue entre le législateur et les tribunaux.

9 Avec égards, je dois exprimer mon désaccord. Le droit de vote est un droit fondamental pour notre démocratie et la primauté du droit, et il ne peut être écarté à la légère. Les restrictions au droit de vote exigent non pas une retenue judiciaire, mais un examen approfondi. Il s'agit ici non pas de substituer la préférence philosophique de la Cour à celle du législateur, mais de s'assurer que la justification de ce dernier est fondée sur la logique et le bon sens.

10 La *Charte* établit une distinction entre deux questions distinctes : celle de savoir s'il y a eu atteinte à un droit et celle de savoir si la restriction est justifiée. Le plaignant a le fardeau de prouver qu'une atteinte a été portée à un droit (première étape), après quoi il incombe au gouvernement de prouver que la restriction constitue une limite raisonnable au sens de l'article premier (deuxième étape). Il s'agit de deux processus distincts impliquant des fardeaux de preuve différents. Isoler de l'examen une restriction à des droits en la qualifiant de question de philosophie sociale, comme le gouvernement essaie de le faire, équivaut à renverser le fardeau

it to decide whether it is demonstrably justified as required by the *Charter*.

de la preuve imposé par la Constitution en matière de justification. Cette démarche supprime la violation de l'écran radar au lieu de nous permettre de nous y concentrer afin de décider si la justification de la violation peut se démontrer comme l'exige la *Charte*.

11 At the first stage, which involves defining the right, we must follow this Court's consistent view that rights shall be defined broadly and liberally: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 53. A broad and purposive interpretation of the right is particularly critical in the case of the right to vote. The framers of the *Charter* signaled the special importance of this right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33's notwithstanding clause. I conclude that s. 3 must be construed as it reads, and its ambit should not be limited by countervailing collective concerns, as the government appears to argue. These concerns are for the government to raise under s. 1 in justifying the limits it has imposed on the right.

À la première étape, qui comporte la définition du droit, nous devons suivre l'opinion que la Cour a toujours adoptée, à savoir que les droits doivent recevoir une interprétation large et libérale : *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 156; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344; *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, par. 53. Une interprétation large et fondée sur l'objet est particulièrement importante dans le cas du droit de vote. Les rédacteurs de la *Charte* ont souligné l'importance privilégiée que revêt ce droit non seulement en employant des termes généraux et absolus, mais aussi en le soustrayant à l'application de l'art. 33 (clause de dérogation). Je conclus que l'art. 3 doit être interprété littéralement et que sa portée ne devrait pas être limitée par des intérêts collectifs opposés, comme le gouvernement a l'air de soutenir. Il appartient à celui-ci de soulever la question de ces intérêts lorsque vient le temps de justifier, dans le cadre de l'article premier, les limites qu'il a imposées au droit.

12 At the s. 1 stage, the government argues that denying the right to vote to penitentiary inmates is a matter of social and political philosophy, requiring deference. Again, I cannot agree. This Court has repeatedly held that the "general claim that the infringement of a right is justified under s. 1" does not warrant deference to Parliament: *M. v. H.*, [1999] 2 S.C.R. 3, at para. 78, *per* Iacobucci J. Section 1 does not create a presumption of constitutionality for limits on rights; rather, it requires the state to justify such limitations.

À l'étape de l'article premier, le gouvernement affirme que le fait de priver les détenus du droit de vote est une question de philosophie sociale et politique, qui appelle la retenue. Là encore, je ne suis pas d'accord. La Cour a conclu à maintes reprises que « la proposition générale selon laquelle l'atteinte à un droit est justifiée par l'article premier » n'est pas une raison pour faire preuve de retenue à l'endroit du législateur : *M. c. H.*, [1999] 2 R.C.S. 3, par. 78, le juge Iacobucci. L'article premier n'établit pas une présomption de constitutionnalité des limites imposées aux droits; il exige plutôt que l'État justifie ces limites.

13 The core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion. Deference may be appropriate on a

Les droits démocratiques fondamentaux des Canadiens ne constituent pas « une gamme de solutions acceptables » parmi lesquelles le législateur peut choisir à son gré. La retenue peut se

45, 2001 SCC 2, at para. 78, *per* McLachlin C.J. However, one must be wary of stereotypes cloaked as common sense, and of substituting deference for the reasoned demonstration required by s. 1.

RJR-MacDonald, par. 127. La preuve peut être complétée par le bon sens et le raisonnement par déduction : *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2, par. 78, le juge en chef McLachlin. Cependant, il faut se méfier des stéréotypes qui revêtent les apparences du bon sens et se garder de substituer la retenue à la démonstration raisonnée requise par l'article premier.

Keeping in mind these basic principles of *Charter* review, I approach the familiar stages of the *Oakes* test. I conclude that the government's stated objectives of promoting civic responsibility and respect for the law and imposing appropriate punishment, while problematically vague, are capable in principle of justifying limitations on *Charter* rights. However, the government fails to establish proportionality, principally for want of a rational connection between denying the vote to penitentiary inmates and its stated goals.

19 En gardant à l'esprit ces principes de base de l'examen fondé sur la *Charte*, j'aborde maintenant les étapes bien connues du critère énoncé dans l'arrêt *Oakes*. Je conclus que les objectifs déclarés par le gouvernement, à savoir accroître la responsabilité civique et le respect de la règle de droit et infliger une peine appropriée, bien qu'ils soient trop généraux, peuvent, en principe, justifier des restrictions à des droits garantis par la *Charte*. Cependant, le gouvernement n'a pas réussi à établir la proportionnalité, principalement en ce qui concerne la nécessité d'un lien rationnel entre le retrait du droit de vote aux détenus et ses buts déclarés.

B. *The Government's Objectives*

B. *Les objectifs du gouvernement*

The objectives' analysis entails a two-step inquiry. First, we must ask what the objectives are of denying penitentiary inmates the right to vote. This involves interpretation and construction, and calls for a contextual approach: *Thomson Newspapers*, *supra*, at para. 87. Second, we must evaluate whether the objectives as found are capable of justifying limitations on *Charter* rights. The objectives must not be "trivial", and they must not be "discordant with the principles integral to a free and democratic society": *Oakes*, *supra*, at p. 138. To borrow from the language of German constitutional law, there must be a constitutionally valid reason for infringing a right: see D. Grimm, "Human Rights and Judicial Review in Germany", in D. M. Beatty, ed., *Human Rights and Judicial Review: A Comparative Perspective* (1994), 267, at p. 275. Because s. 1 serves first and foremost to protect rights, the range of constitutionally valid objectives is not unlimited. For example, the protection of competing rights might be a valid objective. However, a simple majoritarian political

20 L'analyse des objectifs comporte deux étapes. Premièrement, il faut définir les objectifs visés par la suppression du droit de vote des détenus. Cela suppose un exercice d'interprétation et nécessite une approche contextuelle : *Thomson Newspapers*, précité, par. 87. Deuxièmement, il faut déterminer si les objectifs ainsi définis sont de nature à justifier des restrictions à des droits garantis par la *Charte*. Les objectifs ne doivent pas être « peu importants » ou « contraires aux principes qui constituent l'essence même d'une société libre et démocratique » : *Oakes*, précité, p. 138. Pour citer un principe de droit constitutionnel allemand, mentionnons que la restriction d'un droit doit se fonder sur un motif valide du point de vue constitutionnel : voir D. Grimm, « Human Rights and Judicial Review in Germany », dans D. M. Beatty, dir., *Human Rights and Judicial Review : A Comparative Perspective* (1994), 267, p. 275. Étant donné que l'article premier sert avant tout à protéger des droits, la gamme d'objectifs constitutionnellement valides n'est pas illimitée. Par exemple, la protection de droits

preference for abolishing a right altogether would not be a constitutionally valid objective.

21 Section 51(*e*) denying penitentiary inmates the right to vote was not directed at a specific problem or concern. Prisoners have long voted, here and abroad, in a variety of situations without apparent adverse effects to the political process, the prison population, or society as a whole. In the absence of a specific problem, the government asserts two broad objectives as the reason for this denial of the right to vote: (1) to enhance civic responsibility and respect for the rule of law; and (2) to provide additional punishment, or "enhanc[e] the general purposes of the criminal sanction". The record leaves in doubt how much these goals actually motivated Parliament; the Parliamentary debates offer more fulmination than illumination. However, on the basis of "some glimmer of light", the trial judge at p. 878 concluded that they could be advanced as objectives of the denial. I am content to proceed on this basis.

22 This leaves the question of whether the objectives of enhancing respect for law and appropriate punishment are constitutionally valid and sufficiently significant to warrant a rights violation. Vague and symbolic objectives such as these almost guarantee a positive answer to this question. Who can argue that respect for the law is not pressing? Who can argue that proper sentences are not important? Who can argue that either of these goals, taken at face value, contradicts democratic principles? However, precisely because they leave so little room for argument, vague and symbolic objectives make the justification analysis more difficult. Their terms carry many meanings, yet tell us little about why the limitation on the right is necessary, and what it is expected to achieve in concrete terms. The broader and more abstract the objective, the more susceptible it is to different meanings in different contexts, and hence to distortion and manipulation. One

opposés peut être un objectif valide. Toutefois, le seul fait que la majorité exprime politiquement sa préférence pour l'abolition totale d'un droit ne constituerait pas un objectif valide sur le plan constitutionnel.

Le retrait du droit de vote aux détenus prévu par l'al. 51*e*) ne vise aucun problème ou aucune préoccupation spécifique. Les prisonniers ont voté pendant longtemps, ici et à l'étranger, dans diverses situations, sans que des effets préjudiciables apparents aient été causés au processus politique, à la population carcérale ou à la société dans son ensemble. Vu l'absence de problème spécifique, le gouvernement invoque deux objectifs généraux pour justifier cette privation du droit de vote : (1) accroître la responsabilité civique et le respect de la règle de droit; et (2) infliger une sanction supplémentaire, ou [TRADUCTION] « faire ressortir les objets généraux de la sanction pénale ». Le dossier n'indique pas clairement dans quelle mesure ces buts ont réellement motivé le législateur; les débats parlementaires proposent plus d'altercations que d'explications. Cependant, en se fondant sur « quelques éléments de réponse », le juge de première instance a conclu que ces objectifs pouvaient être invoqués pour justifier la privation (p. 878). Je me contenterai de procéder sur cette base.

Il reste à déterminer si l'objectif d'accroître le respect de la règle de droit et celui d'infliger une sanction appropriée sont valides du point de vue constitutionnel et suffisamment importants pour justifier une atteinte à des droits. Des objectifs généraux et symboliques comme ceux-là garantissent presque une réponse affirmative à cette question. Qui peut soutenir que le respect de la règle de droit n'a pas un caractère urgent? Qui peut prétendre qu'il n'est pas important d'infliger une peine appropriée? Qui peut affirmer que l'un ou l'autre de ces buts, en soi, est contraire à des principes démocratiques? Cependant, c'est précisément parce qu'ils laissent si peu place à la contestation que les objectifs généraux et symboliques rendent l'analyse de la question de la justification plus difficile. Les termes qui les traduisent comportent plusieurs sens, mais ne nous éclairent pas vraiment sur la raison qui rend la restriction du droit nécessaire et sur ce que l'on espère

articulation of the objective might inflate the importance of the objective; another might make the legislative measure appear more narrowly tailored. The Court is left to sort the matter out.

At the end of the day, people should not be left guessing about why their *Charter* rights have been infringed. Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remain constant throughout the justification process. As this Court has stated, the objective "must be accurately and precisely defined so as to provide a clear framework for evaluating its importance, and to assess the precision with which the means have been crafted to fulfil that objective": *per* Cory J. in *U.F.C.W., Local 1518*, *supra*, at para. 59; see also *Thomson Newspapers*, *supra*, at para. 96; *RJR-MacDonald*, *supra*, at para. 144. A court faced with vague objectives may well conclude, as did Arbour J.A. (as she then was) in *Sauvé No. 1*, *supra*, at p. 487, that "the highly symbolic and abstract nature of th[e] objective . . . detracts from its importance as a justification for the violation of a constitutionally protected right". If Parliament can infringe a crucial right such as the right to vote simply by offering symbolic and abstract reasons, judicial review either becomes vacuously constrained or reduces to a contest of "our symbols are better than your symbols". Neither outcome is compatible with the vigorous justification analysis required by the *Charter.*

The rhetorical nature of the government objectives advanced in this case renders them suspect. The first objective, enhancing civic responsibility and respect for the law, could be asserted of virtually every criminal law and many non-criminal measures. Respect for law is undeniably important.

accomplir concrètement. Plus les objectifs sont généraux et abstraits, plus ils risquent de prendre des sens différents selon les contextes et, par conséquent, de subir une déformation ou de faire l'objet d'une manipulation. Telle formulation de l'objectif peut en exagérer l'importance, alors que telle autre peut donner l'impression que la mesure législative a été conçue de façon plus stricte. C'est à la Cour qu'il revient de trancher la question.

23 En définitive, les gens ne devraient pas avoir à se demander pourquoi des droits qui leur sont garantis par la *Charte* ont été violés. Pour qu'une justification puisse se démontrer, l'objectif doit révéler clairement le préjudice que le gouvernement entend réparer, et cet objectif doit demeurer le même tout au long du processus de justification. Comme la Cour l'a affirmé, l'objectif « doit être défini avec exactitude et précision, de manière à établir un cadre qui permet d'en apprécier l'importance et d'évaluer la précision avec laquelle les moyens nécessaires à sa réalisation ont été élaborés » : le juge Cory dans *T.U.A.C., section locale 1518*, précité, par. 59; voir également *Thomson Newspapers*, précité, par. 96; *RJR-MacDonald*, précité, par. 144. Le tribunal appelé à se prononcer sur des objectifs généraux peut très bien conclure, comme l'a fait le juge Arbour (maintenant juge de notre Cour) dans *Sauvé n^{o} 1*, précité, p. 487, que [TRADUCTION] « le caractère hautement symbolique et abstrait de [l']objectif [. . .] en réduit l'importance en matière de justification de la violation d'un droit protégé par la Constitution ». Si le législateur peut porter atteinte à un droit aussi important que le droit de vote simplement en invoquant des motifs symboliques et abstraits, alors l'examen judiciaire devient ridiculement entravé ou se réduit à un concours où les concurrents prétendent que « nos symboles sont meilleurs que vos symboles ». Ni l'un ni l'autre de ces résultats n'est compatible avec l'analyse rigoureuse exigée par la *Charte* en matière de justification.

24 Le caractère rhétorique des objectifs que fait valoir le gouvernement en l'espèce les rend suspects. Le premier objectif, à savoir accroître la responsabilité civique et le respect de la règle de droit, pourrait être invoqué à l'égard de presque toutes les lois criminelles et de nombreuses mesures non

But the simple statement of this value lacks the context necessary to assist us in determining whether the infringement at issue is demonstrably justifiable in a free and democratic society. To establish 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. Without this, it is difficult if not impossible to weigh whether the infringement of the right is justifiable or proportionate.

25 The second objective — to impose additional punishment on people serving penitentiary sentences — is less vague than the first. Still, problems with vagueness remain. The record does not disclose precisely why Parliament felt that more punishment was required for this particular class of prisoner, or what additional objectives Parliament hoped to achieve by this punishment that were not accomplished by the sentences already imposed. This makes it difficult to assess whether the objective is important enough to justify an additional rights infringement.

26 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.

C. *Proportionality*

27 At this stage the government must show that the denial of the right to vote will promote the asserted objectives (the rational connection test); that the denial does not go further than reasonably necessary to achieve its objectives (the minimal impairment

criminelles. Il est indéniable que le respect de la règle de droit est important. Mais le simple énoncé de ce principe ne fournit pas le contexte nécessaire pour nous permettre de déterminer si la justification de l'atteinte en question peut se démontrer dans le cadre d'une société libre et démocratique. Pour démontrer une justification, il faut savoir quel problème vise le gouvernement et en quoi ce problème est si urgent et important qu'il justifie la restriction d'un droit garanti par la *Charte*. Sinon, il est difficile, voire impossible, de décider si l'atteinte portée au droit est justifiable ou proportionnée.

Le deuxième objectif — infliger une sanction supplémentaire aux personnes purgeant une peine d'emprisonnement — est moins général que le premier. Cependant, les problèmes d'imprécision demeurent. Le dossier n'indique pas précisément pourquoi le législateur a estimé qu'il fallait infliger une sanction supplémentaire à cette catégorie de prisonniers en particulier, ni quels objectifs, autres que ceux réalisés par les peines déjà prévues, le législateur espérait ainsi atteindre. Il devient donc difficile de déterminer si l'objectif est suffisamment important pour justifier une atteinte supplémentaire.

Le gouvernement n'a pas réussi à cerner les problèmes spécifiques qui nécessitent la privation du droit de vote; il est donc difficile de dire si celle-ci vise un but urgent et réel. Toutefois, malgré la nature abstraite des objectifs gouvernementaux et le fondement fragile sur lequel ils reposent, la prudence nous conseille de procéder à l'analyse de la proportionnalité au lieu de rejeter catégoriquement ces objectifs. L'analyse de la proportionnalité nous permet de déterminer si les objectifs gouvernementaux invoqués peuvent en fait justifier la privation du droit de vote. À cette étape, comme nous le verrons, la faiblesse inhérente à ces objectifs devient manifeste.

C. *La proportionnalité*

À cette étape-ci, le gouvernement doit démontrer que la privation du droit de vote favorisera la réalisation des objectifs invoqués (critère du lien rationnel), qu'elle ne va pas au-delà de ce qui est raisonnablement nécessaire à la réalisation de ses objectifs

test); and that the overall benefits of the measure outweigh its negative impact (the proportionate effect test). As will be seen, the vagueness of the government's justificatory goals coupled with the centrality of the right to vote to Canadian democracy, the rule of law, and legitimate sentencing, make the government's task difficult indeed.

1. Rational Connection

Will denying the right to vote to penitentiary inmates enhance respect for the law and impose legitimate punishment? The government must show that this is likely, either by evidence or in reason and logic: *RJR-MacDonald*, *supra*, at para. 153.

The government advances three theories to demonstrate rational connection between its limitation and the objective of enhancing respect for law. First, it submits that depriving penitentiary inmates of the vote sends an "educative message" about the importance of respect for the law to inmates and to the citizenry at large. Second, it asserts that allowing penitentiary inmates to vote "demeans" the political system. Finally, it takes the position that disenfranchisement is a legitimate form of punishment, regardless of the specific nature of the offence or the circumstances of the individual offender. In my respectful view, none of these claims succeed.

The first asserted connector with enhancing respect for the law is the "educative message" or "moral statement" theory. The problem here, quite simply, is that denying penitentiary inmates the right to vote is bad pedagogy. It misrepresents the nature of our rights and obligations under the law, and it communicates a message more likely to harm than to help respect for the law.

Denying penitentiary inmates the right to vote misrepresents the nature of our rights and obligations under the law and consequently undermines them. In a democracy such as ours, the power of

(critère de l'atteinte minimale) et que l'ensemble des effets bénéfiques de la mesure l'emporte sur ses effets négatifs (critère de l'effet proportionné). Comme nous le verrons, l'imprécision des buts invoqués par le gouvernement en matière de justification, conjuguée avec le rôle crucial que joue le droit de vote au sein de la démocratie canadienne, la règle de droit et la recherche d'une peine appropriée rendent la tâche du gouvernement plutôt difficile.

1. Le lien rationnel

Le retrait du droit de vote aux détenus accroîtra-t-il le respect de la règle de droit et infligera-t-il une peine appropriée? Le gouvernement doit démontrer que cela est probable, en se fondant sur la preuve ou sur la raison et la logique : *RJR-MacDonald*, précité, par. 153.

Le gouvernement propose trois théories pour établir le lien rationnel entre la restriction imposée et l'objectif d'accroître le respect de la règle de droit. Premièrement, il soutient que priver les détenus du droit de vote envoie un « message éducatif » aux détenus et à l'ensemble des citoyens quant à l'importance du respect de la règle de droit. Deuxièmement, il prétend que permettre aux détenus de voter « diminue la valeur » du système politique. Enfin, il affirme que la privation du droit de vote est une forme légitime de sanction, peu importe la nature spécifique de l'infraction ou la situation particulière du contrevenant. À mon avis, aucune de ces théories n'est fondée.

Le premier élément invoqué pour établir un lien avec l'objectif d'accroître le respect de la règle de droit est le « message éducatif » ou « message moralisateur ». Le problème ici tient simplement au fait que le retrait du droit de vote aux détenus constitue de la mauvaise pédagogie. Cette mesure donne une fausse idée de la nature de nos droits et obligations selon la loi et transmet un message qui risque plus de diminuer le respect de la règle de droit que de le renforcer.

Priver les détenus du droit de vote donne une fausse idée de la nature de nos droits et obligations selon la loi et, par conséquent, les met en péril. Dans une démocratie comme la nôtre, le pouvoir

lawmakers flows from the voting citizens, and lawmakers act as the citizens' proxies. This delegation from voters to legislators gives the law its legitimacy or force. Correlatively, the obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens. In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. As a practical matter, we require all within our country's boundaries to obey its laws, whether or not they vote. But this does not negate the vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it. This connection, inherited from social contract theory and enshrined in the *Charter*, stands at the heart of our system of constitutional democracy.

32 The government gets this connection exactly backwards when it attempts to argue that depriving people of a voice in government teaches them to obey the law. The "educative message" that the government purports to send by disenfranchising inmates is both anti-democratic and internally self-contradictory. Denying a citizen the right to vote denies the basis of democratic legitimacy. It says that delegates elected by the citizens can then bar those very citizens, or a portion of them, from participating in future elections. But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government's power flows.

33 Reflecting this truth, the history of democracy is the history of progressive enfranchisement. The universal franchise has become, at this point in time, an essential part of democracy. From the notion that only a few meritorious people could vote (expressed in terms like class, property and gender), there gradually evolved the modern precept that all citizens are entitled to vote as members of a self-governing citizenry. Canada's steady march to universal suffrage culminated in 1982,

des législateurs émane des citoyens votants, et ces législateurs agissent à titre de mandataires des citoyens. Cette délégation de pouvoir des électeurs aux législateurs confère à la loi sa légitimité ou force. En corollaire, l'obligation de respecter la loi découle du fait que celle-ci est élaborée par les citoyens et en leur nom. En somme, la légitimité de la loi et l'obligation de la respecter découlent directement du droit de vote de chaque citoyen. Sur le plan pratique, nous demandons à tous ceux qui se trouvent à l'intérieur des frontières de notre pays de respecter ses lois, qu'ils aient le droit de voter ou non. Mais cela ne rompt pas le lien vital qui existe, d'un point de vue symbolique, théorique et pratique, entre la participation à l'élaboration de la loi et l'obligation de la respecter. Ce lien, issu de la théorie du contrat social et consacré dans la *Charte*, est au cœur de notre système de démocratie constitutionnelle.

Le gouvernement inverse complètement cette logique lorsqu'il prétend que le fait de priver les gens de leur droit de participer aux décisions du gouvernement leur apprend à respecter la loi. Le « message éducatif » que le gouvernement a la prétention d'envoyer en privant les détenus du droit de vote est à la fois antidémocratique et intrinsèquement contradictoire. Priver un citoyen du droit de vote attaque les bases de la légitimité démocratique. Cela revient à dire que les mandataires qui ont été élus par les citoyens peuvent ensuite empêcher ces citoyens, ou une partie d'entre eux, de participer aux prochaines élections. Mais si nous admettons que le pouvoir gouvernemental au sein d'une démocratie émane des citoyens, il est difficile de voir comment ce pouvoir peut légitimement être utilisé pour priver du droit de vote les citoyens de qui il émane.

Reflet de cette vérité, l'histoire de la démocratie correspond à celle de l'octroi progressif du droit de vote. Le suffrage universel constitue aujourd'hui un élément essentiel de la démocratie. À partir de la notion que seules quelques personnes méritantes (suivant des critères tels la classe sociale, la propriété et le sexe) pouvaient voter, s'est progressivement développé le principe moderne voulant que tous les citoyens aient le droit de vote en tant que membres de la cité. La marche constante du Canada

S.L. and D.J. *Appellants*

v.

Commission scolaire des Chênes and Attorney General of Quebec *Respondents*

and

Christian Legal Fellowship, Canadian Civil Liberties Association, Coalition pour la liberté en éducation, Evangelical Fellowship of Canada, Regroupement Chrétien pour le droit parental en éducation, Canadian Council of Christian Charities, Fédération des commissions scolaires du Québec and Canadian Catholic School Trustees' Association *Interveners*

S.L. et D.J. *Appelants*

c.

Commission scolaire des Chênes et procureur général du Québec *Intimés*

et

Alliance des chrétiens en droit, Association canadienne des libertés civiles, Coalition pour la liberté en éducation, Alliance évangélique du Canada, Regroupement Chrétien pour le droit parental en éducation, Conseil canadien des œuvres de charité chrétiennes, Fédération des commissions scolaires du Québec et Association canadienne des commissaires d'écoles catholiques *Intervenants*

Indexed as: S.L. *v.* Commission scolaire des Chênes

2012 SCC 7

File No.: 33678.

2011: May 18; 2012: February 17.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Répertorié : S.L. *c.* Commission scolaire des Chênes

2012 CSC 7

N° du greffe : 33678.

2011 : 18 mai; 2012 : 17 février.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Constitutional law — Charter of Rights — Freedom of religion — Schools — Mandatory ethics and religious culture program — Burden of proof at stage of demonstrating infringement of right to freedom of religion — Objective proof of interference with practice or belief — Parents sincerely believing in obligation to pass on precepts of Catholic religion to children — Whether ethics and religious culture program objectively interfering with parents' ability to pass on faith to children — Whether parents demonstrating that program infringed their freedom of conscience and religion protected by s. 2(a) of the Canadian Charter of Rights and Freedoms — Whether refusal of school board to exempt children from

Droit constitutionnel — Charte des droits — Liberté de religion — Écoles — Programme d'éthique et de culture religieuse obligatoire — Fardeau à l'étape de la preuve de l'atteinte au droit à la liberté de religion — Démonstration de facteurs objectifs entravant le respect d'une pratique ou d'une croyance — Parents croyant sincèrement en l'obligation de transmettre à leurs enfants les préceptes de la religion catholique — Le programme d'éthique et de culture religieuse constituait-il, objectivement, une entrave à leur capacité de transmettre leur foi à leurs enfants? — Les parents ont-ils fait la preuve que le programme portait atteinte à leur liberté de conscience et de religion que protège l'art. 2a) de la

ethics and religious culture course infringed their constitutional right.

Human rights — Freedom of religion — Schools — Mandatory ethics and religious culture program — Whether parents demonstrating that program infringed their freedom of conscience and religion protected by s. 3 of the Charter of human rights and freedoms, R.S.Q., c. C-12.

Administrative law — Judicial review — School authorities — Parents requesting that school board exempt their children from ethics and religious culture course to avoid causing them serious harm — Requests for exemption denied — Whether decision of school board made at dictate of third party — Education Act, R.S.Q., c. I-13.3, s. 222.

In 2008, the Ethics and Religious Culture ("ERC") Program became mandatory in Quebec schools, replacing Catholic and Protestant programs of religious and moral instruction. L and J requested that the school board exempt their children from the ERC course putting forward the existence of serious harm to the children within the meaning of s. 222 of the *Education Act*. The director of educational resources for young students denied the exemptions. L and J requested that the school board's council of commissioners reconsider that decision, and the council of commissioners upheld this decision. L and J then turned to the Superior Court seeking both a declaration that the ERC Program infringed their and their children's right to freedom of conscience and religion, and judicial review of the decisions denying their requests for exemption from the ERC course. They claimed that these decisions had been made at the dictate of the Ministère de l'Éducation, du Loisir et du Sport ("Ministère"). The Superior Court dismissed the motion for declaratory judgment and the motion for judicial review. Upon motions being brought by the school board and the Attorney General of Quebec to dismiss the appeal, the Court of Appeal refused to hear L and J's appeal as of right and also dismissed their motion for leave to appeal.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Binnie, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.: Although the sincerity of a person's belief that a religious practice must be observed is relevant to whether the person's right to freedom of religion is at issue, an infringement of this

Charte canadienne des droits et libertés? — Le refus de la commission scolaire d'exempter leurs enfants du cours d'éthique et de culture religieuse contrevenait-il à leur droit constitutionnel?

Droits de la personne — Liberté de religion — Écoles — Programme d'éthique et de culture religieuse obligatoire — Les parents ont-ils fait la preuve que le programme portait atteinte à leur liberté de conscience et de religion que protège l'art. 3 de la Charte des droits et libertés de la personne, L.R.Q., ch. C-12?

Droit administratif — Contrôle judiciaire — Autorités scolaires — Parents demandant à la commission scolaire d'exempter leurs enfants du cours d'éthique et de culture religieuse afin d'éviter à ceux-ci un préjudice grave — Demandes d'exemption refusées — La décision de la commission scolaire a-t-elle été prise sous la dictée d'un tiers? — Loi sur l'instruction publique, L.R.Q., ch. I-13.3, art. 222.

En 2008, le programme d'éthique et de culture religieuse (« ÉCR ») devient obligatoire dans les écoles du Québec en remplacement des programmes d'enseignement moral et religieux catholique et protestant. L et J demandent à la commission scolaire d'exempter leurs enfants du cours ÉCR en invoquant l'existence d'un préjudice grave pour ces derniers au sens de l'art. 222 de la *Loi sur l'instruction publique*. La directrice du Service des ressources éducatives aux jeunes refuse les exemptions. L et J demandent la révision de cette décision au conseil des commissaires de la commission scolaire, qui la confirme. L et J s'adressent alors à la Cour supérieure et sollicitent à la fois un jugement déclarant que le programme ÉCR porte atteinte à leur droit à la liberté de conscience et de religion, ainsi qu'à celui de leurs enfants, et la révision judiciaire des décisions refusant leurs demandes d'exemption du cours ÉCR. Ils allèguent qu'elles ont été prises sous la dictée du ministère de l'Éducation, du Loisir et du Sport (« Ministère »). La Cour supérieure rejette la requête en jugement déclaratoire et la demande de révision judiciaire. Saisie de requêtes en rejet d'appel déposées par la commission scolaire et le procureur général du Québec, la Cour d'appel refuse d'entendre l'appel de plein droit de L et J et elle rejette également leur requête pour permission d'appeler.

Arrêt : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Binnie, Deschamps, Abella, Charron, Rothstein et Cromwell : Si la sincérité de la croyance d'une personne en l'obligation de se conformer à une pratique religieuse est pertinente pour établir que son droit à la liberté de religion

right cannot be established without objective proof of an interference with the observance of that practice. It is not enough for a person to say that his or her rights have been infringed. The person must prove the infringement on a balance of probabilities.

In the present case, L and J sincerely believe that they have an obligation to pass on the precepts of the Catholic religion to their children. The sincerity of their belief in this practice is not challenged. To discharge their burden at the stage of proving an infringement, L and J had to show that, from an objective standpoint, the ERC Program interfered with their ability to pass their faith on to their children. In this regard, they claim that the ERC Program is not in fact neutral and that students following the ERC course would be exposed to a form of relativism which would interfere with their ability to pass their faith on to their children. They also maintain that exposing children to various religious facts is confusing for them. The evidence demonstrates, firstly, that the Ministère's formal purpose does not appear to have been to transmit a philosophy based on relativism or to influence young people's specific beliefs. Exposing children to a comprehensive presentation of various religions without forcing the children to join them does not constitute an indoctrination of students that would infringe the freedom of religion of L and J. Furthermore, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society. The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education.

L and J have not proven that the ERC Program infringed their freedom of religion, or consequently, that the school board's refusal to exempt their children from the ERC course violated their constitutional right. They have also shown no error that would justify setting aside the trial judge's conclusion that the school board's decision was not made at the dictate of a third party.

Per LeBel and Fish JJ.: The violation claimed by L and J to their right to freedom of religion concerned the obligations of parents relating to the religious upbringing of their children and the passing on of their faith. Following the analytical approach adopted in *Amselem*, L and J needed first to establish that their religious belief was sincere and, subsequently, that the

est en jeu, la preuve de l'atteinte à ce droit requiert, elle, la démonstration de facteurs objectifs entravant le respect de cette pratique. Il ne suffit pas que la personne déclare que ses droits sont enfreints. Il lui incombe de prouver l'atteinte suivant la prépondérance des probabilités.

En l'espèce, L et J croient sincèrement avoir l'obligation de transmettre à leurs enfants les préceptes de la religion catholique. La sincérité de leur croyance en cette pratique n'est pas contestée. À l'étape de la preuve de l'atteinte, L et J devaient démontrer que le programme ÉCR constituait, objectivement, une entrave à leur capacité de transmettre leur foi à leurs enfants. À cet égard, ils prétendent que la neutralité du programme ÉCR ne serait pas réelle et que le relativisme auquel seraient exposés les élèves qui suivent le cours ÉCR entraverait leur capacité de transmettre leur foi à leurs enfants. Ils objectent aussi que l'exposition des enfants à différents faits religieux crée de la confusion chez ces derniers. Tout d'abord, il ressort de la preuve que le but formel du Ministère ne paraît pas avoir été de transmettre une philosophie fondée sur le relativisme ou d'influencer les croyances particulières des jeunes. Le fait même d'exposer les enfants à une présentation globale de diverses religions sans les obliger à y adhérer ne constitue pas un endoctrinement des élèves qui porterait atteinte à la liberté de religion de L et J. De plus, l'exposition précoce des enfants à des réalités autres que celles qu'ils vivent dans leur environnement familial immédiat constitue un fait de la vie en société. Suggérer que le fait même d'exposer des enfants à différents faits religieux porte atteinte à la liberté de religion de ceux-ci ou de leurs parents revient à rejeter la réalité multiculturelle de la société canadienne et méconnaître les obligations de l'État québécois en matière d'éducation publique.

L et J n'ont pas fait la preuve que le programme ÉCR portait atteinte à leur liberté de religion ni, par conséquent, que le refus de la commission scolaire d'exempter leurs enfants du cours ÉCR contrevenait à leur droit constitutionnel. Ils n'ont également démontré aucune erreur justifiant d'écarter la conclusion du juge de première instance selon laquelle la décision de la commission scolaire n'avait pas été prise sous la dictée d'un tiers.

Les juges LeBel et Fish : La violation alléguée par L et J de leur droit à la liberté de religion portait sur les obligations des parents à l'égard de l'éducation religieuse de leurs enfants et de la transmission de leur foi à ces derniers. Suivant la grille d'analyse adoptée dans l'arrêt *Amselem*, L et J devaient d'abord établir la sincérité de leur croyance religieuse et, par la suite, l'atteinte que

ERC Program infringed that aspect of their freedom of religion. This second part of the analysis must remain objective in nature. It was not enough to express disagreement with the program and its objectives. L and J's evidence concerning the violation of their freedom of religion consisted of a statement of their faith and of their conviction that the ERC Program interfered with their obligation to teach and pass on that faith to their children. In addition, they filed the ERC Program as well as a textbook used to teach the program. In its current form, the program says little about the actual content of the teaching and the approach that teachers will actually take in dealing with their students. It determines neither the content of the textbooks or educational materials to be used, nor their approach to religious facts or to the relationship between religious values and the ethical choices open to students. The program is made up of general statements, diagrams, descriptions of objectives and competencies to be developed as well as various recommendations for the program's implementation. It is not really possible to assess what the program's implementation will actually mean. Despite the filing of a textbook, the evidence concerning the teaching methods and content and the spirit in which the program is taught has remained sketchy. Based on the rules of civil evidence, therefore, the documentary evidence does not make it possible to find a violation of the *Canadian Charter* or the *Quebec Charter*. The state of the record, however, does not make it possible to conclude that the ERC Program and its implementation could not, in the future, possibly infringe the rights granted to L and J and persons in the same situation.

Cases Cited

By Deschamps J.

Referred to: *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641; *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *R. v. Jones*, [1986] 2 S.C.R. 284; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*,

le programme ÉCR apporterait à cet aspect de leur liberté de religion. Cette seconde partie de l'analyse doit conserver un caractère objectif. Le seul fait d'affirmer leur désaccord avec le programme et ses objectifs ne suffisait pas. La preuve présentée par L et J pour établir la violation de leur liberté de religion consistait d'abord à affirmer leur foi et leur conviction que le programme ÉCR portait atteinte à leur obligation d'enseigner et de transmettre cette foi à leurs enfants. En outre, ils ont déposé le programme en question ainsi qu'un manuel scolaire destiné à l'enseignement de ce programme. Dans sa forme actuelle, le programme dit en réalité peu de chose sur le contenu concret de l'enseignement et sur l'approche qui sera effectivement adoptée par les enseignants dans leurs relations avec les élèves. Il ne détermine pas non plus le contenu des manuels ou des autres ressources pédagogiques qui seront utilisés, ni leur approche à l'égard des faits religieux ou des rapports entre les valeurs religieuses et les choix éthiques ouverts aux étudiants. Le programme est composé d'énoncés généraux, de diagrammes, de descriptions d'objectifs et de compétences à développer, ainsi que de recommandations diverses sur son application. Il ne permet guère d'apprécier quel effet entraînera réellement son application. Malgré le dépôt d'un manuel scolaire, la preuve sur les méthodes et le contenu de l'enseignement, comme sur son esprit, est restée schématique. La preuve documentaire ne permet donc pas de conclure, suivant les normes de la preuve civile, à une violation de la *Charte canadienne* ou de la *Charte québécoise*. Par ailleurs, l'état de la preuve ne permet pas non plus de conclure que le programme ÉCR et sa mise en application ne pourront éventuellement porter atteinte aux droits accordés à L et J et à des personnes placées dans la même situation.

Jurisprudence

Citée par la juge Deschamps

Arrêts mentionnés : *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Village)*, 2004 CSC 48, [2004] 2 R.C.S. 650; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Zylberberg c. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641; *Canadian Civil Liberties Assn. c. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341; *Syndicat Northcrest c. Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551; *R. c. Jones*, [1986] 2 R.C.S. 284; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives*

[1990] 1 S.C.R. 425; *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710.

By LeBel J.

Referred to: *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650.

Statutes and Regulations Cited

Act to amend various legislative provisions of a confessional nature in the education field, S.Q. 2005, c. 20.
Act to amend various legislative provisions respecting education as regards confessional matters, S.Q. 2000, c. 24.
Act to establish the Department of Education and the Superior Council of Education, S.Q. 1963-64, c. 15.
Canadian Charter of Rights and Freedoms, ss. 1, 2(*a*).
Charter of human rights and freedoms, R.S.Q., c. C-12, s. 3.
Constitution Act, 1867, s. 93A.
Constitution Amendment, 1997 (Quebec), SI/97-141.
Décret 511-95 concernant la Commission des États généraux sur l'éducation, (1995) 127 G.O. II, 1960.
Education Act, R.S.Q., c. I-13.3, s. 222.

Authors Cited

Grimm, Dieter. "Conflicts Between General Laws and Religious Norms" (2009), 30 *Cardozo L. Rev.* 2369.
Moon, Richard. "Government Support for Religious Practice", in Richard Moon, ed., *Law and Religious Pluralism in Canada*. Vancouver: UBC Press, 2008, 217.
Ogilvie, M. H. *Religious Institutions and the Law in Canada*, 3rd ed. Toronto: Irwin Law, 2010.
Quebec. Assemblée nationale. *Journal des débats*, 2e sess., 35e lég., 26 mars 1997, p. 5993-5994.
Quebec. Ministère de l'Éducation, du Loisir et du Sport. *Establishment of an ethics and religious culture program: Providing future direction for all Québec youth*. Québec: The Ministère, 2005.

du commerce), [1990] 1 R.C.S. 425; *Chamberlain c. Surrey School District No. 36*, 2002 CSC 86, [2002] 4 R.C.S. 710.

Citée par le juge LeBel

Arrêts mentionnés : *Syndicat Northcrest c. Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551; *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256; *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315; *Chamberlain c. Surrey School District No. 36*, 2002 CSC 86, [2002] 4 R.C.S. 710; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Village)*, 2004 CSC 48, [2004] 2 R.C.S. 650.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2*a*).
Charte des droits et libertés de la personne, L.R.Q., ch. C-12, art. 3.
Décret 511-95 concernant la Commission des États généraux sur l'éducation, (1995) 127 G.O. II, 1960.
Loi constitutionnelle de 1867, art. 93A.
Loi instituant le ministère de l'éducation et le Conseil supérieur de l'éducation, S.Q. 1963-64, ch. 15.
Loi modifiant diverses dispositions législatives dans le secteur de l'éducation concernant la confessionnalité, L.Q. 2000, ch. 24.
Loi modifiant diverses dispositions législatives de nature confessionnelle dans le domaine de l'éducation, L.Q. 2005, ch. 20.
Loi sur l'instruction publique, L.R.Q., ch. I-13.3, art. 222.
Modification constitutionnelle de 1997 (Québec), TR/97-141.

Doctrine et autres documents cités

Grimm, Dieter. « Conflicts Between General Laws and Religious Norms » (2009), 30 *Cardozo L. Rev.* 2369.
Moon, Richard. « Government Support for Religious Practice », in Richard Moon, ed., *Law and Religious Pluralism in Canada*. Vancouver : UBC Press, 2008, 217.
Ogilvie, M. H. *Religious Institutions and the Law in Canada*, 3rd ed. Toronto : Irwin Law, 2010.
Québec. Assemblée nationale. *Journal des débats*, 2e sess., 35e lég., 26 mars 1997, p. 5993-5994.
Québec. Commission royale d'enquête sur l'enseignement dans la province de Québec. *Rapport Parent : Rapport de la Commission royale d'enquête sur l'enseignement dans la province de Québec*. Québec : La Commission, 1963.

Quebec. Ministère de l'Éducation, du Loisir et du Sport. *Ethics and Religious Culture*. Québec: The Ministère, 2007 (online: http://collections.banq.qc.ca/ark:/52327/1561560 and http://collections.banq.qc.ca/ark:/52327/1561568).

Quebec. Royal Commission of Inquiry on Education in the Province of Quebec. *Parent Report: Report of the Royal Commission of Inquiry on Education in the Province of Québec*. Québec: The Commission, 1963.

Quebec. Task Force on the Place of Religion in Schools in Québec. *Religion in Secular Schools: A New Perspective for Québec* (report). Québec: Ministère de l'Éducation, 1999.

Woehrling, José. "La place de la religion dans les écoles publiques du Québec" (2007), 41 *R.J.T.* 651.

Woehrling, José. "Les principes régissant la place de la religion dans les écoles publiques du Québec", dans Myriam Jézéquel, dir., *Les accommodements raisonnables: quoi, comment, jusqu'où? Des outils pour tous*. Cowansville, Qué.: Yvon Blais, 2007, 215.

APPEAL from judgments of the Quebec Court of Appeal (Beauregard, Morissette and Giroux JJ.A.), 2010 QCCA 346 (CanLII), SOQUIJ AZ-50610874, [2010] J.Q. nº 1357 (QL), 2010 CarswellQue 1362, 2010 QCCA 348 (CanLII), SOQUIJ AZ-50610876, [2010] J.Q. nº 1355 (QL), and 2010 QCCA 349 (CanLII), SOQUIJ AZ-50610877, [2010] J.Q. nº 1356 (QL), affirming a decision of Dubois J., 2009 QCCS 3875, [2009] R.J.Q. 2398, SOQUIJ AZ-50573325, [2009] J.Q. nº 8619 (QL), 2009 CarswellQue 8647. Appeal dismissed.

Mark Phillips and *Guy Pratte*, for the appellants.

Bernard Jacob, *René Lapointe* and *Mélanie Charest*, for the respondent Commission scolaire des Chênes.

Benoît Boucher, *Amélie Pelletier-Desrosiers* and *Caroline Renaud*, for the respondent the Attorney General of Quebec.

Robert E. Reynolds and *Ruth Ross*, for the intervener the Christian Legal Fellowship.

Jean-Philippe Groleau, *Guy Du Pont* and *Léon H. Moubayed*, for the intervener the Canadian Civil Liberties Association.

Jean-Pierre Bélisle, for the intervener Coalition pour la liberté en éducation.

Québec. Groupe de travail sur la place de la religion à l'école. *Laïcité et religions : Perspective nouvelle pour l'école québécoise* (rapport). Québec : Ministère de l'Éducation, 1999.

Québec. Ministère de l'Éducation, du Loisir et du Sport. *Éthique et culture religieuse*. Québec : Le Ministère, 2007 (en ligne : http://collections.banq.qc.ca/ark:/52327/1561560 et http://collections.banq.qc.ca/ark:/52327/1561572).

Québec. Ministère de l'Éducation, du Loisir et du Sport. *La mise en place d'un programme d'éthique et de culture religieuse : Une orientation d'avenir pour tous les jeunes du Québec*. Québec : Le Ministère, 2005.

Woehrling, José. « La place de la religion dans les écoles publiques du Québec » (2007), 41 *R.J.T.* 651.

Woehrling, José. « Les principes régissant la place de la religion dans les écoles publiques du Québec », dans Myriam Jézéquel, dir., *Les accommodements raisonnables : quoi, comment, jusqu'où? Des outils pour tous*. Cowansville, Qué. : Yvon Blais, 2007, 215.

POURVOI contre des arrêts de la Cour d'appel du Québec (les juges Beauregard, Morissette et Giroux), 2010 QCCA 346 (CanLII), SOQUIJ AZ-50610874, [2010] J.Q. nº 1357 (QL), 2010 CarswellQue 1362, 2010 QCCA 348 (CanLII), SOQUIJ AZ-50610876, [2010] J.Q. nº 1355 (QL), et 2010 QCCA 349 (CanLII), SOQUIJ AZ-50610877, [2010] J.Q. nº 1356 (QL), qui ont confirmé une décision du juge Dubois, 2009 QCCS 3875, [2009] R.J.Q. 2398, SOQUIJ AZ-50573325, [2009] J.Q. nº 8619 (QL), 2009 CarswellQue 8647. Pourvoi rejeté.

Mark Phillips et *Guy Pratte*, pour les appelants.

Bernard Jacob, *René Lapointe* et *Mélanie Charest*, pour l'intimée la Commission scolaire des Chênes.

Benoît Boucher, *Amélie Pelletier-Desrosiers* et *Caroline Renaud*, pour l'intimé le procureur général du Québec.

Robert E. Reynolds et *Ruth Ross*, pour l'intervenante l'Alliance des chrétiens en droit.

Jean-Philippe Groleau, *Guy Du Pont* et *Léon H. Moubayed*, pour l'intervenante l'Association canadienne des libertés civiles.

Jean-Pierre Bélisle, pour l'intervenante la Coalition pour la liberté en éducation.

Albertos Polizogopoulos, *Don Hutchinson* and *Faye Sonier*, for the intervener the Evangelical Fellowship of Canada.

Jean-Yves Côté, for the intervener Regroupement Chrétien pour le droit parental en éducation.

Iain T. Benson, for the interveners the Canadian Council of Christian Charities and the Canadian Catholic School Trustees' Association.

Written submissions only by *Alain Guimont*, for the intervener Fédération des commissions scolaires du Québec.

English version of the judgment of McLachlin C.J. and Binnie, Deschamps, Abella, Charron, Rothstein and Cromwell JJ. delivered by

[1] Deschamps J. — The societal changes that Canada has undergone since the middle of the last century have brought with them a new social philosophy that favours the recognition of minority rights. The developments in the area of education that have taken place in Quebec and that are at issue in this appeal must be situated within this larger context. Given the religious diversity of present-day Quebec, the state can no longer promote a vision of society in public schools that is based on historically dominant religions.

[2] The appellants, S.L. and D.J., are parents of school-aged children. They submit that the refusal of the respondent Commission scolaire des Chênes ("school board") to exempt their children from the Ethics and Religious Culture ("ERC") course infringes their freedom of conscience and religion, which is protected by s. 2(*a*) of the *Canadian Charter of Rights and Freedoms* (the "*Canadian Charter*") and s. 3 of the *Charter of human rights and freedoms*, R.S.Q., c. C-12 (the "*Quebec Charter*"). Their arguments cannot succeed. Although the sincerity of a person's belief that a religious practice must be observed is relevant to whether the person's right to freedom of religion is at issue, an infringement of this right

Albertos Polizogopoulos, *Don Hutchinson* et *Faye Sonier*, pour l'intervenante l'Alliance évangélique du Canada.

Jean-Yves Côté, pour l'intervenant le Regroupement Chrétien pour le droit parental en éducation.

Iain T. Benson, pour les intervenants le Conseil canadien des œuvres de charité chrétiennes et l'Association canadienne des commissaires d'écoles catholiques.

Argumentation écrite seulement par *Alain Guimont*, pour l'intervenante la Fédération des commissions scolaires du Québec.

Le jugement de la juge en chef McLachlin et des juges Binnie, Deschamps, Abella, Charron, Rothstein et Cromwell a été rendu par

[1] La juge Deschamps — Les changements sociaux qu'a connus le Canada depuis le milieu du siècle dernier ont apporté avec eux une nouvelle philosophie sociale qui met de l'avant la reconnaissance des droits des minorités. Les développements survenus dans le domaine de l'éducation au Québec et dont il est question dans le présent pourvoi s'insèrent dans ce contexte plus vaste. Compte tenu de la diversité religieuse du Québec contemporain, l'État ne peut plus offrir dans les écoles publiques une vision sociétale fondée sur les religions historiquement dominantes.

[2] Les appelants, S.L. et D.J., sont parents d'enfants d'âge scolaire. Ils soutiennent que le refus de l'intimée, la Commission scolaire des Chênes (« Commission scolaire »), d'exempter leurs enfants du cours d'éthique et de culture religieuse (« ÉCR ») porte atteinte à leur liberté de conscience et de religion, que protègent l'al. 2*a*) de la *Charte canadienne des droits et libertés* (la « *Charte canadienne* ») et l'art. 3 de la *Charte des droits et libertés de la personne*, L.R.Q., ch. C-12 (la « *Charte québécoise* »). Leurs prétentions ne peuvent être retenues. Si la sincérité de la croyance d'une personne en l'obligation de se conformer à une pratique religieuse est pertinente pour établir que son droit à la liberté de religion est en jeu, la preuve de

in *Big M Drug Mart*, Dickson J. had stated that "the diversity of belief and non-belief, the diverse socio-cultural backgrounds of Canadians make it constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion" (p. 351). In the same way, the Ontario Court of Appeal held in *Canadian Civil Liberties Assn.* that imposing a religious practice of the majority had the effect of infringing the freedom of religion of the minority and was incompatible with the multicultural reality of Canadian society (p. 363).

[22] That being said, it was in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, that the elements of a definition of freedom of religion were outlined. In that case, Iacobucci J. explained that a person does not have to show that the practice the person sincerely believes he or she must observe or the belief the person endorses corresponds to a religious precept recognized by other followers. If the person believes that he or she has an obligation to act in accordance with a practice or endorses a belief "having a nexus with religion", the court is limited to assessing the sincerity of the person's belief (paras. 39, 43, 46 and 54).

[23] At the stage of establishing an infringement, however, it is not enough for a person to say that his or her rights have been infringed. The person must prove the infringement on a balance of probabilities. This may of course involve any legal form of proof, but it must nonetheless be based on facts that can be established objectively. For example, in *Edwards Books*, the legislation required retailers who were Saturday observers to close a day more than Sunday observers. In *Amselem*, the infringement resulted from a prohibition against erecting any structure on the balconies of a building held in co-ownership, while the appellants believed that their religion required them to dwell in their own succahs.

[24] It follows that when considering an infringement of freedom of religion, the question is not whether the person sincerely believes that a

protection des minorités. Déjà, dans *Big M Drug Mart*, le juge Dickson avait déclaré ceci : « . . . étant donné la diversité des formes que prennent la croyance et l'incroyance ainsi que les différences socio-culturelles des Canadiens, le Parlement fédéral n'a pas compétence en vertu de la Constitution pour adopter une loi privilégiant une religion au détriment d'une autre » (p. 351). De même, dans *Canadian Civil Liberties Assn.*, la Cour d'appel de l'Ontario a jugé que le fait d'imposer une pratique religieuse de la majorité avait pour effet d'enfreindre la liberté de religion de la minorité et était incompatible avec la réalité multiculturelle de la société canadienne (p. 363).

[22] Cela dit, c'est dans l'arrêt *Syndicat Northcrest c. Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551, qu'ont été posés les jalons de la définition de la liberté de religion. Le juge Iacobucci y explique qu'une personne n'a pas à démontrer que la pratique qu'elle se croit sincèrement obligée de suivre ou la croyance qu'elle fait valoir correspond à un précepte religieux reconnu par les autres adeptes. Si cette personne croit être tenue de se conformer à une pratique ou si elle fait valoir une croyance « ayant un lien avec une religion », le tribunal doit se limiter à évaluer la sincérité de cette croyance (par. 39, 43, 46 et 54).

[23] À l'étape de la preuve de l'atteinte, cependant, il ne suffit pas que la personne déclare que ses droits sont enfreints. Il lui incombe de prouver l'atteinte suivant la prépondérance des probabilités. Cette preuve peut certes prendre toutes les formes reconnues par la loi, mais elle doit néanmoins reposer sur des faits objectivement démontrables. Par exemple, dans *Edwards Books*, la loi obligeait les détaillants qui observaient le samedi à fermer un jour de plus que ceux qui observaient le dimanche. Dans *Amselem*, l'atteinte résultait d'une interdiction d'ériger toute construction sur les balcons d'un immeuble détenu en copropriété alors que les appelants croyaient que leur religion les obligeait à habiter leur propre souccah.

[24] Il s'ensuit que, dans l'examen d'une atteinte à la liberté de religion, la question n'est pas de savoir si la personne croit sincèrement qu'il y a une

religious practice or belief has been infringed, but whether a religious practice or belief exists that has been infringed. The subjective part of the analysis is limited to establishing that there is a sincere belief that has a nexus with religion, including the belief in an obligation to conform to a religious practice. As with any other right or freedom protected by the *Canadian Charter* and the *Quebec Charter*, proving the infringement requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom. To decide otherwise would allow persons to conclude themselves that their rights had been infringed and thus to supplant the courts in this role.

[25] Furthermore, the following comment of Wilson J. in *R. v. Jones*, [1986] 2 S.C.R. 284, at pp. 313-14, which Iacobucci J. quoted in *Amselem*, para. 58, bears repeating: s. 2(*a*) of the *Canadian Charter* "does not require the legislature to refrain from imposing any burdens on the practice of religion" (emphasis omitted; see also *Edwards Books*). "The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises" (*Amselem*, at para. 62). No right is absolute.

VI. Application

[26] The appellants sincerely believe that they have an obligation to pass on the precepts of the Catholic religion to their children (A.F., at para. 66). The sincerity of their belief in this practice is not challenged by the respondents in this case. The only question at issue is whether the appellants' ability to observe the practice has been interfered with.

[27] To discharge their burden at the stage of proving an infringement, the appellants had to show that, from an objective standpoint, the ERC Program interfered with their ability to pass their faith on to their children. This is not the approach they took. Instead, they argued that it was enough for them to say that the program infringed their right (A.F., at para. 126). As I have already

atteinte à sa pratique ou croyance religieuse, mais celle de savoir s'il existe une pratique ou croyance religieuse à laquelle il est porté atteinte. La partie subjective de l'analyse concerne uniquement l'établissement d'une croyance sincère ayant un lien avec la religion, incluant la croyance en une obligation de se conformer à une pratique religieuse. Comme pour tous les autres droits et libertés protégés par la *Charte canadienne* et la *Charte québécoise*, la preuve de l'atteinte requiert une analyse objective des règles, faits ou actes qui en entravent l'exercice. Décider autrement aurait pour effet de permettre à la personne de conclure elle-même à l'existence d'une atteinte à ses droits et de se substituer ainsi au tribunal dans ce rôle.

[25] Il convient de rappeler de plus les propos de la juge Wilson dans l'arrêt *R. c. Jones*, [1986] 2 R.C.S. 284, p. 314, repris par le juge Iacobucci dans *Amselem*, par. 58 : l'al. 2*a*) de la *Charte canadienne* « n'oblige pas le législateur à n'entraver d'aucune manière la pratique religieuse » (soulignement omis; voir aussi *Edwards Books*). « La protection ultime accordée par un droit garanti par la *Charte* doit être mesurée par rapport aux autres droits et au regard du contexte sous-jacent dans lequel s'inscrit le conflit apparent » (*Amselem*, par. 62). Aucun droit n'est absolu.

VI. Application

[26] Les appelants croient sincèrement avoir l'obligation de transmettre à leurs enfants les préceptes de la religion catholique (m.a., par. 66). La sincérité de la croyance des appelants en cette pratique n'est, en l'espèce, pas contestée par les intimés. La seule question en litige consiste donc à se demander s'il y a eu ou non atteinte à la capacité des appelants de se conformer à cette pratique.

[27] Pour s'acquitter de leur fardeau à l'étape de la preuve de l'atteinte, les appelants devaient démontrer que le programme ÉCR constituait, objectivement, une entrave à leur capacité de transmettre leur foi à leurs enfants. Ce n'est pas l'approche qu'ils ont adoptée. Ils ont plutôt prétendu qu'il leur suffisait d'affirmer que le programme portait atteinte à leur droit (m.a., par. 126). Comme je l'ai

explained, it is not enough for the appellants to say that they had religious reasons for objecting to their children's participation in the ERC course. Dubois J. of the Superior Court was therefore correct in rejecting that interpretation. He stated the following: [TRANSLATION] "To claim that the general presentation of various religions may have an adverse effect on the religion one practises, it is not enough to state with sincerity that one is a practising Catholic" (para. 51).

[28] In their requests for exemption made to the school board on May 12, 2008, the appellants had alleged that the ERC course was liable to cause the following harm:

[TRANSLATION]

1. Losing the right to choose an education consistent with one's own moral and religious principles; interfering with the fundamental freedom of religion, conscience, opinion and expression of children and their parents by forcing children to take a course that does not reflect the religious and philosophical beliefs with which their parents have the right and duty to bring them up.
2. Being put in the situation of learning from a teacher who is not adequately trained in the subject matter and who has been deprived of freedom of conscience by being forced to perform this task.
3. Upsetting children by exposing them at too young an age to convictions and beliefs that differ from the ones favoured by their parents.
4. Dealing with the phenomenon of religion in a course that claims to be "neutral".
5. Being exposed, through this mandatory course, to the philosophical trend advocated by the state, namely relativism.
6. Interfering with children's faith. [A.R., vol. III, at pp. 499-500]

[29] The principal argument that emerges from the reasons given by the appellants in their requests for an exemption is that the obligation they believe they have, namely to pass on their faith to their children, has been interfered with. In this regard, the freedom of religion asserted by the appellants is their own freedom, not that of the children. The common theme that runs through the

expliqué ci-dessus, l'affirmation des appelants que des motifs religieux sont à l'origine de leur objection à la participation de leurs enfants au cours ÉCR ne suffit pas. C'est donc à bon droit que le juge Dubois de la Cour supérieure a rejeté cette interprétation. Il s'est exprimé ainsi : « Il n'est pas tout de dire avec sincérité qu'on est catholique pratiquant pour prétendre qu'une présentation globale de différentes religions puisse nuire à celle que l'on pratique » (par. 51).

[28] Dans leurs demandes d'exemption soumises le 12 mai 2008 à la Commission scolaire, les appelants avaient allégué que les préjudices suivants étaient susceptibles d'être causés par le cours ÉCR :

1. Perte du droit de choisir une éducation conforme à ses propres principes moraux et religieux; brimer les libertés fondamentales de religion, de conscience, d'opinion et d'expression de l'enfant et de ses parents en forçant l'enfant à suivre un cours qui ne correspond pas aux convictions religieuses et philosophiques dans lesquelles ses parents ont le droit et le devoir de l'éduquer.
2. Être mis en situation d'apprentissage par un enseignant non adéquatement formé en cette matière et qui a été dépouillé de sa liberté de conscience, parce qu'on l'oblige à effectuer cette tâche.
3. Perturber l'enfant en l'exposant trop jeune à des convictions et croyances différentes de celles privilégiées par ses parents.
4. Aborder le phénomène religieux dans le cadre d'un cours qui prétend à la « neutralité ».
5. Être exposé, dans le cadre de ce cours obligatoire, au courant philosophique mis de l'avant par l'État : le relativisme.
6. Porter atteinte à la foi de l'enfant. [d.a., vol. III, p. 499-500]

[29] L'argument principal qui ressort des motifs invoqués par les appelants dans leurs demandes d'exemption est l'existence d'une entrave au respect de l'obligation qu'ils estiment avoir, soit celle de transmettre leur foi à leurs enfants. À cet égard, la liberté de religion que les appelants font valoir est la leur, non celle des enfants. Les objections des appelants reposent sur un thème commun, à savoir

appellants' objections is that the ERC Program is not in fact neutral. According to the appellants, students following the ERC course would be exposed to a form of relativism, which would interfere with the appellants' ability to pass their faith on to their children. Insofar as certain of the appellants' complaints focus on the children's freedom of religion by referring to the "disruption" that would result from exposing them to different religious facts, I will discuss this in my analysis of the alleged infringement of the appellants' freedom of religion.

[30] We must recognize that trying to achieve religious neutrality in the public sphere is a major challenge for the state. The author R. Moon has clearly described the difficulty of implementing a legislative policy that will be seen by everyone as neutral and respectful of their freedom of religion:

> If secularism or agnosticism constitutes a position, worldview, or cultural identity equivalent to religious adherence, then its proponents may feel excluded or marginalized when the state supports even the most ecumenical religious practices. But by the same token, the complete removal of religion from the public sphere may be experienced by religious adherents as the exclusion of their worldview and the affirmation of a non-religious or secular perspective . . . .
>
> . . . Ironically, then, as the exclusion of religion from public life, in the name of religious freedom and equality, has become more complete, the secular has begun to appear less neutral and more partisan. With the growth of agnosticism and atheism, religious neutrality in the public sphere may have become impossible. What for some is the neutral ground on which freedom of religion and conscience depends is for others a partisan anti-spiritual perspective.

("Government Support for Religious Practice", in *Law and Religious Pluralism in Canada* (2008), 217, at p. 231)

[31] We must also accept that, from a philosophical standpoint, absolute neutrality does not exist. Be that as it may, absolutes hardly have any place in the law. In administrative law, for example, the concept of impartiality calls for an assessment

que la neutralité du programme ÉCR ne serait pas réelle. Selon les appelants, le relativisme auquel seraient exposés les élèves qui suivent le cours ÉCR entraverait leur capacité de transmettre leur foi à leurs enfants. Dans la mesure où certains des griefs des appelants mettent de l'avant la liberté de religion des enfants, en évoquant la « perturbation » résultant de l'exposition à différents faits religieux, j'en traiterai au sein de mon analyse de l'atteinte alléguée à la liberté de religion des appelants.

[30] Il faut reconnaître que la recherche de la neutralité religieuse dans la sphère publique constitue un défi important pour l'État. L'auteur R. Moon a bien exprimé la difficulté que pose la mise en œuvre d'une politique législative qui serait considérée par tous comme étant neutre et respectueuse de leur liberté de religion :

> [TRADUCTION] Si la laïcisation ou l'agnosticisme constitue une position, une vision du monde ou une identité culturelle équivalente à une appartenance religieuse, ses adeptes pourraient se sentir exclus ou marginalisés au sein d'un État qui appuie les pratiques religieuses, même les moins confessionnelles. Par ailleurs, il est possible que les croyants interprètent le retrait intégral de toute religion de la sphère publique comme le rejet de leur vision du monde et l'affirmation d'une perspective laïque . . .
>
> . . . Ainsi, de manière ironique, alors que la religion se retire de plus en plus de la place publique au nom de la liberté et de l'égalité religieuses, la laïcité paraît moins neutre et plus partisane. Compte tenu de la croissance de l'agnosticisme et de l'athéisme, la neutralité religieuse dans la sphère publique est peut-être devenue impossible. Ce que certains considèrent comme le terrain neutre essentiel à la liberté de religion et de conscience constitue pour d'autres une perspective antispiritualiste partisane.

(« Government Support for Religious Practice », dans *Law and Religious Pluralism in Canada* (2008), 217, p. 231)

[31] Il faut aussi accepter que, d'un point de vue philosophique, la neutralité absolue n'existe pas. Quoi qu'il en soit, l'absolu est une notion dont s'accommode difficilement le droit. En droit administratif, par exemple, la notion d'impartialité fait

Slaight Communications Incorporated (operating as Q107 FM Radio) *Appellant*

v.

Ron Davidson *Respondent*

INDEXED AS: SLAIGHT COMMUNICATIONS INC. *v.* DAVIDSON

File No.: 19412.

1987: October 8; 1989: May 4.

Present: Dickson C.J. and Beetz, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Freedom of expression — Adjudicator ordering employer to give unjustly dismissed employee letter of recommendation with specified content — Adjudicator also ordering employer to answer request for information about employee only by sending letter — Whether orders infringe employer's freedom of expression guaranteed by s. 2(b) of Canadian Charter of Rights and Freedoms — If so, whether limitation on freedom of expression justifiable under s. 1 of Charter — Canada Labour Code, R.S.C. 1970, c. L-1, s. 61.5(9)(c).

Labour relations — Unjust dismissal — Jurisdiction of adjudicator — Adjudicator ordering employer to give unjustly dismissed employee letter of recommendation with specified content — Adjudicator also ordering employer to answer request for information about employee only by sending letter — Whether s. 61.5(9)(c) of Canada Labour Code authorizes adjudicator to make such orders — Whether orders infringe employer's freedom of expression guaranteed by s. 2(b) of Canadian Charter of Rights and Freedoms — If so, whether limitation on freedom of expression justifiable under s. 1 of Charter — Whether orders unreasonable in administrative law sense.

Respondent had been employed by appellant as a "radio time salesman" for three and a half years when he was dismissed on the ground that his performance

* Le Dain J. took no part in the judgment.

Slaight Communications Incorporated (exploitée sous le nom de station de radio Q107 FM) *Appelante*

c.

Ron Davidson *Intimé*

RÉPERTORIÉ: SLAIGHT COMMUNICATIONS INC. *c.* DAVIDSON

N° du greffe: 19412.

1987: 8 octobre; 1989: 4 mai.

Présents: Le juge en chef Dickson et les juges Beetz, Lamer, Wilson, Le Dain*, La Forest et L'Heureux-Dubé.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Liberté d'expression — Arbitre ordonnant à l'employeur de remettre à l'employé congédié injustement une lettre de recommandation ayant un contenu déterminé — Arbitre ordonnant également à l'employeur de ne répondre à une demande de renseignements concernant l'employé que par l'envoi de cette lettre — Les ordonnances portent-elles atteinte à la liberté d'expression de l'employeur garantie par l'art. 2b) de la Charte canadienne des droits et libertés — Dans l'affirmative, la restriction à la liberté d'expression est-elle justifiable en vertu de l'article premier de la Charte — Code canadien du travail, S.R.C. 1970, chap. L-1, art. 61.5(9)c).

Relations de travail — Congédiement injuste — Juridiction de l'arbitre — Arbitre ordonnant à l'employeur de remettre à l'employé congédié injustement une lettre de recommandation ayant un contenu déterminé — Arbitre ordonnant également à l'employeur de ne répondre à une demande de renseignements concernant l'employé que par l'envoi de cette lettre — L'article 61.5(9)c) du Code canadien du travail autorise-t-il l'arbitre à rendre de telles ordonnances? — Les ordonnances portent-elles atteinte à la liberté d'expression de l'employeur garantie par l'art. 2b) de la Charte canadienne des droits et libertés — Dans l'affirmative, la restriction à la liberté d'expression est-elle justifiable en vertu de l'article premier de la Charte — Les ordonnances sont-elles déraisonnables au sens du droit administratif?

L'intimé était à l'emploi de l'appelante à titre de «vendeur de temps d'antenne» depuis trois ans et demi lorsqu'il a été congédié au motif que son rendement était

* Le juge Le Dain n'a pas pris part au jugement.

was inadequate. Respondent filed a complaint and an adjudicator appointed by the Minister of Labour under s. 61.5(6) of the *Canada Labour Code* held that respondent had been unjustly dismissed. Based on s. 61.5(9)(*c*) of the Code, the adjudicator made an initial order imposing on appellant an obligation to give respondent a letter of recommendation certifying (1) that he had been employed by the radio station from June 1980 to January 20, 1984; (2) the sales quotas he had been set and the amount of sales he actually made during this period; and (3) that an adjudicator had held that he was unjustly dismissed. The order specifically indicated the amounts to be shown as sales quotas and as sales actually made. A second order prohibited appellant from answering a request for information about respondent except by sending the letter of recommendation. The Federal Court of Appeal dismissed an application by appellant to review and set aside the adjudicator's decision. The purpose of the appeal at bar is to determine whether s. 61.5(9)(*c*) of the Code authorizes an adjudicator to make such orders; and in particular, whether the orders infringed appellant's freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*.

Held (Beetz J. dissenting and Lamer J. dissenting in part): The appeal should be dismissed. The orders infringe s. 2(*b*) of the *Charter* but are justifiable under s. 1.

The *Charter* applies to orders made by the adjudicator. The adjudicator is a creature of statute. He is appointed pursuant to a legislative provision and derives all his powers from statute. The Constitution is the supreme law of Canada, and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect. It is thus impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require this Court to declare the legislation to be of no force or effect, unless it could be justified under s. 1 of the *Charter*. It follows that an adjudicator, who exercises delegated powers, does not have the power to make an order that would result in an infringement of the *Charter*.

The word "like" in the English version of s. 61.5(9)(*c*) of the *Canada Labour Code* does not have the effect of limiting the powers conferred on the adjudicator by allowing him to make only orders similar to the orders expressly mentioned in paras. (*a*) and (*b*) of that subsection. Interpreting this provision in this way would mean

insuffisant. À la suite d'une plainte de l'intimé, un arbitre désigné par le ministre du Travail en vertu du par. 61.5(6) du *Code canadien du travail* a statué que l'intimé avait été congédié injustement. Se fondant sur l'al. 61.5(9)*c*) du Code, l'arbitre a rendu une première ordonnance qui impose à l'appelante l'obligation de remettre à l'intimé une lettre de recommandation attestant (1) que ce dernier a été à l'emploi de la station radiophonique de juin 1980 au 20 janvier 1984; (2) quels étaient les objectifs de vente qui lui avaient été assignés ainsi que le montant des ventes qu'il a effectivement réalisées durant cette période; et (3) qu'un arbitre a jugé qu'il avait été congédié injustement. L'ordonnance prévoit précisément les montants devant apparaître au chapitre des objectifs de vente et au chapitre des ventes effectivement réalisées. Une deuxième ordonnance interdit à l'appelante de répondre à une demande de renseignements concernant l'intimé autrement que par l'envoi de la lettre de recommandation. La Cour d'appel fédérale a rejeté la demande d'examen et d'annulation de la décision de l'arbitre présentée par l'appelante. Le présent pourvoi vise à déterminer si l'al. 61.5(9)*c*) du Code autorise un arbitre à rendre de telles ordonnances; et en particulier, si les ordonnances violent la liberté d'expression de l'appelante garantie par l'al. 2*b*) de la *Charte canadienne des droits et libertés*.

Arrêt (le juge Beetz est dissident et le juge Lamer est dissident en partie): Le pourvoi est rejeté. Les ordonnances violent l'al. 2*b*) de la *Charte* mais elles sont justifiables en vertu de l'article premier.

La *Charte* est applicable aux ordonnances rendues par l'arbitre. L'arbitre est une créature de la loi. Il est nommé en vertu d'une disposition législative et il tire tous ses pouvoirs de la loi. La Constitution, qui est la loi suprême du pays, rend inopérantes les dispositions incompatibles de toute autre règle de droit. On ne peut donc interpréter une disposition législative attributrice de discrétion comme conférant le pouvoir de violer la *Charte*, à moins, bien sûr, que le pouvoir soit expressément conféré ou encore qu'il soit nécessairement implicite. Une telle interprétation obligerait cette Cour, à défaut de pouvoir justifier cette disposition législative en vertu de l'article premier de la *Charte*, à la déclarer inopérante. Il s'ensuit qu'un arbitre, qui exerce des pouvoirs délégués, n'a pas le pouvoir de rendre une ordonnance entraînant une violation de la *Charte*.

Le mot «*like*» dans la version anglaise de l'al. 61.5(9)*c*) du *Code canadien du travail* n'a pas pour effet de limiter les pouvoirs conférés à l'arbitre en l'autorisant seulement à rendre des ordonnances similaires aux ordonnances expressément mentionnées aux al. *a*) et *b*) du même paragraphe. Interpréter ainsi cette disposition

applying the *ejusdem generis* rule. It is impossible to apply this rule in the case at bar since one of the conditions essential for its application—the presence of a common characteristic or common genus—has not been met. The interpretation according to which the word "like" in the English version of para. (*c*) does not have the effect of limiting the general power conferred on the adjudicator is also more consistent with the general scheme of the Code, and in particular with the purpose of Division V.7, which is to give non-unionized employees a means of challenging a dismissal they feel to be unjust and at the same time to equip the adjudicator with the powers necessary to remedy the consequences of such a dismissal.

Per Dickson C.J. and Wilson, La Forest and L'Heureux-Dubé JJ.: The adjudicator's orders were reasonable in the administrative law sense. Administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact, in the realm of value inquiry the courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*.

The adjudicator's first order infringed s. 2(*b*) of the *Charter* but is saved under s. 1.

The adjudicator's second order also infringed s. 2(*b*) of the *Charter*. It was an attempt to prevent the appellant from expressing its opinion as to the respondent's qualifications beyond the facts set out in the letter. But this order, too, was justifiable under s. 1. First, the objective was of sufficient importance to warrant overriding appellant's freedom of expression. Like the first order, the objective of the second order was to counteract the effects of the unjust dismissal by enhancing the ability of the employee to seek new employment without being lied about by the previous employer. The adjudicator's remedy was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. The governmental objective, in a general sense, was that of protection of a particularly vulnerable group, or members thereof. To constitutionally protect freedom of expression in this case would be tantamount to condoning the continuation of an abuse of an already unequal relationship. Second, the means chosen were reasonable. Like the first order, the second order was rationally

signifierait l'application de la règle *ejusdem generis*. Or, cette règle est inapplicable à l'espèce puisqu'une des conditions essentielles à son application—la présence d'une caractéristique commune ou d'un genre commun—n'est pas remplie. L'interprétation selon laquelle le mot «*like*» de la version anglaise de l'al. *c*) ne limite pas le pouvoir conféré à l'arbitre est également plus conforme à l'économie générale du Code et en particulier au but de la division V.7 qui est d'offrir à l'employé non syndiqué un moyen de contester un congédiement qu'il juge injuste et parallèlement d'offrir à l'arbitre les pouvoirs nécessaires pour remédier aux effets d'un tel congédiement.

Le juge en chef Dickson et les juges Wilson, La Forest et L'Heureux-Dubé: Les deux ordonnances de l'arbitre sont raisonnables au sens du droit administratif. La norme préliminaire de contrôle que représente le caractère déraisonnable en droit administratif ne devrait pas imposer au gouvernement une norme plus exigeante que ne le ferait l'examen fondé sur la *Charte*. Certes, il importe de maintenir la norme du caractère déraisonnable manifeste pour les questions non touchées par la *Charte*, telles que le contrôle des conclusions de fait; mais, en matière d'examen des valeurs, les tribunaux devraient recourir à cette norme seulement dans les cas les plus évidents où une décision ne saurait être justifiée en vertu de l'article premier de la *Charte*.

La première ordonnance de l'arbitre va à l'encontre de l'al. 2*b*) de la *Charte* mais elle est sauvegardée par l'article premier.

La seconde ordonnance de l'arbitre viole également l'al. 2*b*) de la *Charte*. Il s'agit d'une tentative d'empêcher l'appelante d'exprimer son opinion quant aux qualifications de l'intimé au-delà des faits prouvés énoncés dans la lettre. Mais cette ordonnance est, elle aussi, justifiable sous le régime de l'article premier. En premier lieu, l'objectif est d'une importance suffisante pour justifier l'atteinte à la liberté d'expression de l'appelante. Comme la première ordonnance, la deuxième vise à neutraliser les conséquences du congédiement injuste en accroissant la possibilité pour l'employé de chercher un nouvel emploi sans faire l'objet de mensonges de la part de l'employeur précédent. Le redressement accordé par l'arbitre constitue une tentative, que sanctionne le législateur, de remédier à l'équilibre inégal des forces qui existe normalement entre l'employeur et l'employé. En général, l'objectif gouvernemental réside dans la protection d'un groupe particulièrement vulnérable, ou des membres de celui-ci. Accorder une protection constitutionnelle à la liberté d'expression en l'espèce équivaudrait à fermer les yeux sur la continuation d'un abus de

linked to the objective. With the proven history of promoting a fabricated version of the quality of respondent's service and the concern that the employer would continue to treat him unfairly if he went back to work for the employer, it was rational for the adjudicator to attach a rider to the order for a reference letter so as to ensure that the employer's representatives did not subvert the effect of the letter by unjustifiably maligning its previous employee in the guise of giving a reference. Further, no less intrusive measure could have been taken and still achieved the objective with any likelihood. Monetary compensation would not have been an acceptable substitute because it would only have been compensation for the economic, not the personal, effects of unemployment. Labour should not be treated as a commodity and every day without work as exhaustively reducible to some pecuniary value. The letter was tightly and carefully designed to reflect only a very narrow range of facts which were not really contested. The appellant was not forced to state opinions which were not its own. The prohibition was also very circumscribed. It was triggered only in cases when the appellant was contacted for a reference and there was no requirement to send the letter to anyone other then prospective employers. In short, the adjudicator went no further than was necessary to achieve the objective. Finally, the effects of the measures were not so deleterious as to outweigh the objective of the measures. The objective in this case was a very important one, especially in light of Canada's international treaty commitment to protect the right to work in its various dimensions. For purposes of this final stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.

Per Lamer J. (dissenting in part): The adjudicator did not exceed his jurisdiction by ordering appellant to give respondent a letter of recommendation with a specified content. Apart from the *Charter*, the only limitation imposed by s. 61.5(9)(*c*) is that the order must be designed to "remedy or counteract any consequence of the dismissal". That is the case here. The order prevents appellant's decision to dismiss respondent from having negative consequences for the latter's chances of finding new employment. Ordering an employer to give a former employee a letter of recommendation containing

relations de travail déjà inégales. En deuxième lieu, les moyens choisis sont raisonnables. Comme la première ordonnance, la deuxième est rationnellement liée à l'objectif. Étant donné l'histoire prouvée consistant à favoriser une version fabriquée de la qualité des services de l'intimé et la crainte que l'employeur continue de le traiter injustement s'il revenait travailler pour lui, il était logique que l'arbitre prescrive dans l'ordonnance une lettre de recommandation pour s'assurer que les représentants de l'employeur ne détruiraient pas l'effet de la lettre en disant, sans justification, du mal de son employé antérieur sous prétexte de donner des références. De plus, il n'y avait aucune autre mesure moins envahissante qu'on aurait pu prendre et qui aurait vraisemblablement permis d'atteindre quand même l'objectif. Une indemnisation monétaire n'aurait pas constitué un substitut acceptable parce qu'elle n'aurait réglé que les conséquences économiques du chômage et non les conséquences personnelles. Le travail ne peut être assimilé à un produit et chaque jour de chômage considéré comme étant parfaitement réductible à une valeur monétaire. La lettre a été fermement et soigneusement conçue pour exposer seulement une variété très étroite de faits qui n'étaient pas véritablement contestés. On n'a pas forcé l'appelante à exprimer des opinions différentes des siennes. L'interdiction est également très circonscrite. Elle ne s'applique que dans les cas où on communique avec l'appelante en vue d'obtenir des références, et la lettre doit être envoyée uniquement aux employeurs éventuels. En bref, l'arbitre a fait le strict nécessaire pour atteindre l'objectif. En dernier lieu, les effets des mesures ne sont pas préjudiciables au point de l'emporter sur leur objectif. En l'espèce, l'objectif est très important, en particulier à la lumière de l'engagement du Canada dans les traités internationaux de protéger le droit du travail sous ses divers aspects. Aux fins de cette étape de l'examen de la proportionnalité, le fait qu'une valeur ait le statut d'un droit de la personne international, soit selon le droit international coutumier, soit en vertu d'un traité auquel le Canada est un État partie, devrait en général dénoter un degré élevé d'importance attaché à cet objectif.

Le juge Lamer (dissident en partie): L'arbitre n'a pas excédé sa juridiction en ordonnant à l'appelante de remettre à l'intimé une lettre de recommandation ayant un contenu déterminé. Abstraction faite de la *Charte*, la seule limite imposée par l'al. 61.5(9)*c*) est que l'ordonnance vise à «contrebalancer les effets du congédiement ou d'y remédier». C'est le cas en l'espèce. L'ordonnance empêche que la décision de l'appelante de congédier l'intimé puisse avoir des effets négatifs sur les chances de ce dernier de se trouver un nouvel emploi. Le fait d'ordonner à un employeur de remettre à un ancien

only objective facts that are not in dispute is not as such unreasonable and there is nothing to indicate that the adjudicator was pursuing an improper objective or acting in bad faith or in a discriminatory manner.

However, the adjudicator exceeded his jurisdiction by prohibiting appellant from answering a request for information about respondent other than by sending the letter of recommendation. Though the order is also meant to remedy or counteract the consequences of the dismissal, its effect, by prohibiting appellant from adding any comments whatever, is to create circumstances in which the letter could be seen as the expression of appellant's opinions. This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada. Parliament therefore cannot have intended to authorize such an unreasonable use of the discretion conferred by it. The adjudicator lost this jurisdiction when he made a patently unreasonable order.

The first order limits appellant's freedom of expression but this limitation, which is prescribed by law—the order made by the adjudicator is only an exercise of the discretion conferred on him by statute—can be justified under s. 1 of the *Charter*. The purpose of the order is clearly, as required by the Code, to counteract the consequences of the unjust dismissal. Such an objective is sufficiently important to warrant a limitation on freedom of expression. It is essential for the legislator to provide mechanisms to restore equilibrium in employer/employee relations so the employee will not be subject to arbitrary action by the employer. Additionally, the means chosen to attain the objective are reasonable in the circumstances. The order is fair and was carefully designed. The purpose of the letter of recommendation is to correct the false impression given by the fact of the dismissal and it contains only facts that are not in dispute. It is rationally connected to the dismissal since in certain cases it is the only way of effectively remedying the consequences of the dismissal. Finally, the consequences of the order are proportional to the objective sought. The latter is important in our society. The limitation on freedom of expression is not what could be described as very serious. It does not abolish that freedom, but simply limits its exercise by requiring the employer to write something determined in advance.

Per Beetz J. (dissenting): Except for the attestation relating to the unjust dismissal, the first order violated

employé une lettre de recommandation ne contenant que des faits objectifs incontestés n'est pas déraisonnable en soi et rien ne démontre que l'arbitre a poursuivi une finalité impropre ou agi de mauvaise foi ou de façon discriminatoire.

L'arbitre a toutefois excédé sa juridiction en interdisant à l'appelante de répondre à une demande de renseignements concernant l'intimé autrement que par l'envoi de la lettre de recommandation. Bien que l'ordonnance vise également à contrecarrer les effets du congédiement ou à y remédier, elle a pour effet, en interdisant à l'appelante d'ajouter quelques commentaires que ce soit, de créer des circonstances susceptibles de faire en sorte que la lettre soit perçue comme l'expression des opinions de l'appelante. Ce type de sanctions est totalitaire et par conséquent étranger à la tradition de pays libres comme le Canada. Le Parlement ne peut donc pas avoir eu l'intention d'autoriser un usage si déraisonnable de la discrétion qu'il a conférée. L'arbitre a perdu cette juridiction en rendant une ordonnance manifestement déraisonnable.

La première ordonnance restreint la liberté d'expression de l'appelante mais cette restriction, qui provient d'une règle de droit—l'ordonnance prononcée par l'arbitre n'est que l'exercice de la discrétion qui lui est accordée par la loi—, est justifiable en vertu de l'article premier de la *Charte*. L'ordonnance vise nettement, comme l'exige la loi, à contrecarrer les effets du congédiement injuste. Un tel objectif est suffisamment important pour justifier une certaine restriction à la liberté d'expression. Il est en effet essentiel que le législateur prévoie des mécanismes destinés à rétablir un certain équilibre dans la relation employeur/employé de façon à éviter que ce dernier soit soumis à l'arbitraire du premier. De plus, le moyen choisi pour atteindre l'objectif est raisonnable dans les circonstances. L'ordonnance est équitable et a été soigneusement conçue. La lettre de recommandation vise à corriger la fausse impression causée par le fait du congédiement et ne contient que des faits objectifs incontestés. Elle a un lien rationnel avec le congédiement puisque dans certains cas elle est la seule mesure susceptible de remédier efficacement aux effets du congédiement. Finalement, les effets de cette ordonnance sont proportionnels à l'objectif poursuivi. Ce dernier est important dans notre société. Or, la restriction apportée à la liberté d'expression n'est pas de celle qu'on peut qualifier de très grave. Elle ne supprime pas cette liberté mais se borne plutôt à en restreindre l'exercice en obligeant l'employeur à écrire quelque chose de prédéterminé.

Le juge Beetz (dissident): Excepté l'attestation relative au congédiement injuste, la première ordonnance

the appellant's freedoms of opinion and of expression and could not be justified under s. 1 of the *Charter*. This order forced the employer to write, as if they were his own, statements of facts in which, rightly or wrongly, he may not believe, or which he may ultimately find or think to be inaccurate, misleading or false. In short, the order may force the appellant to lie. To order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them constitutes a *prima facie* violation of the freedoms of opinion and expression. Such a violation was totalitarian in nature and could never be justified under s. 1 of the *Charter*.

The second order, coupled with the first, also violated the former employer's freedoms of opinion and of expression in a manner which was not justified under s. 1 of the *Charter*. The sending of the letter as drafted by the adjudicator, coupled with the prohibition to say or write anything else could lead to the implication that the former employer had no further comment to make upon the performance of the respondent and that, accordingly, the letter reflected the opinion of the former employer. In any event, the second order was disproportionate and unreasonable. One should view with extreme suspicion an administrative order or even a judicial order which has the effect of preventing the litigants from commenting upon and even criticizing the rulings of the deciding board or court.

Further, in cases of unjust dismissal, the issuance by an adjudicator of a blanket and perpetual prohibition against a former employer to write or say anything to a prospective employer but what the adjudicator has dictated in the letter of recommendation can lead to absurd and even counter-productive results. The adjudicator cannot foresee all the possible types of exchanges which are susceptible to occur between former and prospective employers. The absurdity which results from the adjudicator's second order is sufficient to warrant its reversal. If it is disproportionate and unreasonable from a practical point of view, then it has to be unreasonable from an administrative law point of view and it is difficult to conceive how it could be reasonable within the meaning of s. 1 of the *Charter*.

Cases Cited

By Dickson C.J.

Distinguished: *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269; **referred to**: *Blanchard v. Control Data Canada Ltd.*,

viole les libertés d'opinion et d'expression de l'appelante et ne peut être justifiée en vertu de l'article premier de la *Charte*. Cette ordonnance force l'employeur à rédiger des exposés des faits comme s'il s'agissait d'exposés de faits de son propre cru, auxquels, à tort ou à raison, il ne croit peut-être pas, ou qu'il peut en fin de compte trouver ou estimer inexacts, trompeurs ou faux. En bref, l'ordonnance peut forcer l'appelante à mentir. Ordonner la confirmation de faits, sans tenir compte de la croyance à leur exactitude par la personne qui a reçu l'ordre de les confirmer, viole à première vue les libertés d'opinion et d'expression. Une telle violation revêt un caractère totalitaire et ne peut jamais être justifiée en vertu de l'article premier de la *Charte*.

La deuxième ordonnance, jointe à la première, viole également les libertés d'opinion et d'expression de l'ancien employeur d'une manière qui ne saurait être justifiée en vertu de l'article premier de la *Charte*. L'envoi de la lettre telle qu'elle a été rédigée par l'arbitre, accompagné de l'interdiction de dire ou d'écrire quoi que ce soit pourrait laisser insinuer que l'ancien employeur n'a pas d'autres remarques à faire au sujet du rendement de l'intimé et que, par conséquent, la lettre traduit l'opinion de l'ancien employeur. En tout état de cause, la deuxième ordonnance est disproportionnée et déraisonnable. On devrait se méfier énormément d'une ordonnance administrative ou même une ordonnance judiciaire qui a pour effet d'empêcher les justiciables de commenter et même de critiquer les décisions d'une commission ou d'une cour.

De plus, dans les cas de congédiement injuste, la délivrance par un arbitre d'une interdiction générale et perpétuelle, à l'encontre d'un ancien employeur, d'écrire ou de dire quoi que ce soit à l'exception de ce que l'arbitre a dicté dans la lettre de recommandation peut conduire à des résultats absurdes et qui vont à l'encontre du résultat recherché. L'arbitre ne peut prévoir tous les types possibles d'échanges qui sont susceptibles d'avoir lieu entre les anciens employeurs et les employeurs éventuels. L'absurdité qui découle de la deuxième ordonnance de l'arbitre suffit à justifier son annulation. Dès lors qu'elle est disproportionnée et déraisonnable du point de vue pratique, elle doit être déraisonnable sur le plan du droit administratif, et il est difficile d'imaginer qu'elle puisse être raisonnable au sens de l'article premier de la *Charte*.

Jurisprudence

Citée par le juge en chef Dickson

Distinction d'avec l'arrêt: *Banque Nationale du Canada c. Union internationale des employés de commerce*, [1984] 1 R.C.S. 269; **arrêts mentionnés**: *Blan-*

[1984] 2 S.C.R. 476; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

By Lamer J. (dissenting in part)

National Bank of Canada v. Retail Clerks' International Union, [1984] 1 S.C.R. 269; *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *R. v. Oakes*, [1986] 1 S.C.R. 103.

By Beetz J. (dissenting)

National Bank of Canada v. Retail Clerks' International Union, [1984] 1 S.C.R. 269; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66; *Reference re Alberta Statutes*, [1938] S.C.R. 100.

Statutes and Regulations Cited

Canada Labour Code, R.S.C. 1970, c. L-1, s. 61.5(6) [ad. 1977-78, c. 27, s. 21], 61.5(9)(*a*), (*b*), (*c*) [*idem*].
Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*).
Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 52(*d*).
International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, Doc. A/6316 U.N. (1966), s. 6.

Authors Cited

Beatty, David M. "Labour is not a Commodity". In Barry J. Reiter and John Swan, eds. *Studies in Contract Law*. Toronto: Butterworths, 1980.
Côté, Pierre-André. *The Interpretation of Legislation in Canada*. Cowansville: Yvon Blais Inc., 1984.
Hogg, Peter W. *Constitutional Law of Canada*, 2nd ed. Toronto: Carswells, 1985.
Kahn-Freund, Sir Otto. *Kahn-Freund's Labour and the Law*, 3rd ed. By Paul Davies and Mark Freedland. London: Stevens & Sons, 1983.
Maxwell, Sir Peter B. *Maxwell on the Interpretation of Statutes*, 12th ed. London: Sweet & Maxwell, 1969.
Wade, H. W. R. *Administrative Law*, 4th ed. Oxford: Clarendon Press, 1977.

APPEAL from a judgment of the Federal Court of Appeal, [1985] 1 F.C. 253, 58 N.R. 150, 85 C.L.L.C. ¶ 14,053, dismissing appellant's application pursuant to s. 28 of the *Federal Court Act* to

chard c. Control Data Canada Ltée, [1984] 2 R.C.S. 476; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313.

Citée par le juge Lamer (dissident en partie)

Banque Nationale du Canada c. Union internationale des employés de commerce, [1984] 1 R.C.S. 269; *Blanchard c. Control Data Canada Ltée*, [1984] 2 R.C.S. 476; *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *R. c. Oakes*, [1986] 1 R.C.S. 103.

Citée par le juge Beetz (dissident)

Banque Nationale du Canada c. Union internationale des employés de commerce, [1984] 1 R.C.S. 269; *Procureur général du Québec c. Quebec Association of Protestant School Boards*, [1984] 2 R.C.S. 66; *Reference re Alberta Statutes*, [1938] R.C.S. 100.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2*b*).
Code canadien du travail, S.R.C. 1970, chap. L-1, art. 61.5(6) [aj. 1977-78, chap. 27, art. 21], 61.5(9)*a*), *b*), *c*) [*idem*].
Loi sur la Cour fédérale, S.R.C. 1970 (2e supp.), chap. 10, art. 52*d*).
Pacte international relatif aux droits économiques, sociaux et culturels, A.G. Rés. 2200 A (XXI), 21 N.U. GAOR, Supp. (nº 16) 49, Doc. A/6316 N.U. (1966), art. 6.

Doctrine citée

Beatty, David M. «Labour is not a Commodity». In Barry J. Reiter and John Swan, eds. *Studies in Contract Law*. Toronto: Butterworths, 1980.
Côté, Pierre-André. *Interprétation des lois*. Cowansville: Yvon Blais Inc., 1982.
Hogg, Peter W. *Constitutional Law of Canada*, 2nd ed. Toronto: Carswells, 1985.
Kahn-Freund, Sir Otto. *Kahn-Freund's Labour and the Law*, 3rd ed. By Paul Davies and Mark Freedland. London: Stevens & Sons, 1983.
Maxwell, Sir Peter B. *Maxwell on the Interpretation of Statutes*, 12th ed. London: Sweet & Maxwell, 1969.
Wade, H. W. R. *Administrative Law*, 4th ed. Oxford: Clarendon Press, 1977.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1985] 1 C.F. 253, 58 N.R. 150, 85 C.L.L.C. ¶ 14,053, qui a rejeté la demande de l'appelante, fondée sur l'art. 28 de la *Loi sur la*

set aside an order made by an adjudicator under s. 61.5(9)(*c*) of the *Canada Labour Code*. Appeal dismissed, Beetz J. dissenting and Lamer J. dissenting in part.

Brian A. Grosman, Q.C., and *John Martin*, for the appellant.

Morris Cooper and *Fern Weinper*, for the respondent.

The judgment of Dickson C.J. and Wilson, La Forest and L'Heureux-Dubé JJ. was delivered by

THE CHIEF JUSTICE—

I

The respondent, Mr. Ron Davidson, a radio time salesman, was dismissed by his employer, the appellant, Slaight Communications Incorporated, operating as Q107 FM Radio. A complaint was filed by Mr. Davidson under the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended by S.C. 1977-78, c. 27, s. 21, and an inquiry undertaken. As the matter could not be resolved or settled, Mr. Edward B. Joliffe, Q.C., was appointed by the Minister of Labour to act as adjudicator and to render a decision in accordance with the provisions of subss. (6) to (9) of s. 61.5, Division V.7, Part III of the *Canada Labour Code*. Two days of hearings were held in Toronto. Twelve days later, Mr. Joliffe received a letter, written on behalf of the employer, requesting Mr. Joliffe to consider reopening the adjudication because, the letter read in part, ". . . our client has advised us that it is in possession of certain material which may indicate that Mr. Davidson perjured his testimony before you in one or more respects." Mr. Joliffe demanded particulars of this very serious allegation. The company's counsel failed to comply. The application for another hearing was dismissed.

Adjudicator Joliffe reviewed at length the evidence of Ms. Stitt. Ms. Stitt was the sole witness on behalf of the employer and at the relevant time she was general sales manager of the

Cour fédérale, qui visait l'annulation d'une ordonnance rendue par un arbitre en vertu de l'al. 61.5(9)*c*) du *Code canadien du travail*. Pourvoi rejeté, le juge Beetz est dissident et le juge Lamer est dissident en partie.

Brian A. Grosman, c.r., et *John Martin*, pour l'appelante.

Morris Cooper et *Fern Weinper*, pour l'intimé.

Version française du jugement du juge en chef Dickson et des juges Wilson, La Forest et L'Heureux-Dubé rendu par

LE JUGE EN CHEF—

I

L'intimé, M. Ron Davidson, vendeur de temps d'antenne à la radio, a été congédié par son employeur, l'appelante Slaight Communications Incorporated, exploitée sous le nom de station de radio Q107 FM. Monsieur Davidson s'est fondé sur le *Code canadien du travail*, S.R.C. 1970, chap. L-1, modifié par S.C. 1977-78, chap. 27, art. 21, pour déposer une plainte, et une enquête a été tenue. Comme la question ne pouvait être tranchée ou réglée, le ministre du Travail a désigné Me Edward B. Joliffe, c.r., comme arbitre chargé de rendre une décision conformément aux dispositions des par. (6) à (9) de l'art. 61.5, division V.7, partie III du *Code canadien du travail*. L'audience s'est déroulée pendant deux jours à Toronto. Douze jours plus tard, Me Joliffe a reçu une lettre rédigée au nom de l'employeur, dans laquelle on lui demandait d'envisager la possibilité de réexaminer le renvoi en question pour le motif que, selon ce que précisait notamment la lettre, [TRADUCTION] «. . . notre cliente nous a informés qu'elle détient certains documents indiquant que M. Davidson a peut-être fait un faux témoignage concernant un ou plusieurs points». Me Joliffe a demandé des détails sur cette allégation très grave. L'avocat de la société ne s'est pas exécuté. La demande visant à obtenir une autre audition a été rejetée.

L'arbitre Joliffe a longuement examiné le témoignage de Mme Stitt. Celle-ci était le seul témoin pour le compte de l'employeur et, à l'époque en cause, elle était la directrice générale des ventes de

company, though later dismissed. The adjudicator noted:

> In Ms. Stitt's letter to Labour Canada of February 27, 1984 ... she specified that the "major complaint" was Mr. Davidson's failure to achieve "monthly sales budgets since October of 1983." To select four months (or less) from a total of 43 months of service as evidence of unsatisfactory service is obviously specious.

Later in his ruling the adjudicator stated:

> From first to last Ms. Stitt's attitude faithfully reflected the advice she attributes to Mr. Gary Slaight: "If he failed to make budget, I'd hear about it. If he made it, the complaint would be that he could do more." By this perverse logic it appears that the more Mr. Davidson sold, the more unacceptable his performance. Such absurd statements led this adjudicator to suggest disclosure of "the real reason for dismissal," but there was no response.

He concluded:

> An attempt has been made in this case to prove unsatisfactory performance as just cause for dismissal. The attempt has failed. I find that Mr. Davidson was dismissed without just cause.

Mr. Joliffe then turned his attention to the question of an appropriate remedy, quoting subs. (9) of s. 61.5 as follows:

> **61.5.** ...
>
> (9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to
>
> (*a*) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
>
> (*b*) reinstate the person in his employ; and
>
> (*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

He ordered payment of $46,628.96 plus interest and legal costs of $2,500. He made a further order, which is central to this appeal, reading:

la société, bien qu'elle fût congédiée plus tard. L'arbitre a noté ce qui suit:

> Dans sa lettre du 27 février 1984 à Travail Canada [...] Mme Stitt a précisé que le «principal grief» qu'on a fait à M. Davidson c'est de ne pas avoir atteint «depuis octobre 1983 les niveaux de vente prévus dans les budgets mensuels». Il est évidemment spécieux de choisir quatre mois (ou moins) sur un total de 43 mois de service pour prouver que le plaignant a eu un rendement insatisfaisant.

Plus loin, dans sa décision, l'arbitre s'est prononcé en ces termes:

> Du début à la fin, l'attitude de Mme Stitt a traduit fidèlement le conseil suivant qu'elle attribue à M. Gary Slaight: «S'il n'exécutait pas son budget, j'en entendrais parler. Si, au contraire, il l'exécutait, il faudrait lui faire savoir alors qu'il peut en faire davantage.» En vertu de cette logique perverse, il semble que plus M. Davidson vendrait, plus son rendement serait inacceptable. Des déclarations d'une telle absurdité m'ont conduit à proposer qu'on divulgue enfin «le véritable motif du congédiement», mais cela n'a eu aucun écho.

Il a tiré cette conclusion:

> On a tenté ici de démontrer qu'un rendement insatisfaisant pouvait constituer un motif valable de congédiement. La tentative a échoué. Je juge que M. Davidson a été congédié sans motif valable.

Me Joliffe s'est alors penché sur la question de l'établissement d'une réparation appropriée, et il a cité le par. (9) de l'art. 61.5:

> **61.5.** ...
>
> (9) Lorsque l'arbitre décide conformément au paragraphe (8) que le congédiement d'une personne a été injuste, il peut, par ordonnance, requérir l'employeur
>
> *a*) de payer à cette personne une indemnité ne dépassant pas la somme qui est équivalente au salaire qu'elle aurait normalement gagné si elle n'avait pas été congédiée;
>
> *b*) de réintégrer la personne dans son emploi; et
>
> *c*) de faire toute autre chose qu'il juge équitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier.

Il a ordonné le versement d'une somme de 46 628,96 $ plus les intérêts, et de 2 500 $ au titre de frais de justice. Il a rendu une autre ordonnance, qui fait l'objet principal du présent pourvoi. Celle-ci est ainsi rédigée:

Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:

That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:

(1) Mr. Ron Davidson was employed by Station Q107 from June, 1980, to January 20, 1984, as a radio time salesman;

(2) That his sales "budget" or quota for 1981 was $248,000 of which he achieved 97.3 per cent;

(3) That his sales "budget" or quota for 1982 was $343,500 of which he achieved 100.3 per cent;

(4) That his sales "budget" or quota for 1983 was $402,200 of which he achieved 114.2 per cent;

(5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

An appeal by the employer to the Federal Court of Appeal was dismissed (Urie and Mahoney JJ., Marceau J. dissenting): [1985] 1 F.C. 253.

The question to be decided by this Court is whether para. (*c*) of s. 61.5(9) of the *Canada Labour Code* authorizes the adjudicator to order the employer to give the employee a letter of reference of specified content and to order the employer to say nothing further about the employee. Paragraph (*c*), it will be recalled, reads:

(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

En vertu du pouvoir que me confère l'alinéa *c*) du paragraphe (9) de l'article 61.5, j'ordonne également ce qui suit:

Que l'employeur remette au plaignant, avec un double à moi-même, une lettre de recommandation attestant:

(1) Que M. Ron Davidson a été engagé par la station Q107 à titre de vendeur de temps d'antenne à la radio, et ce de juin 1980 au 20 janvier 1984;

(2) Que son «budget» ou quota de ventes pour 1981 s'élevait à 248 000 $ et qu'il a atteint 97,3 % de ce même budget;

(3) Que son «budget» ou quota de ventes pour 1982 se montait à 343 500 $ et qu'il a atteint 100,3 % de ce budget;

(4) Que son «budget» ou quota de ventes pour 1983 était de 402 200 $ et qu'il a atteint 114,2 % de ce budget;

(5) Qu'à la suite de son congédiement survenu en janvier 1984, un arbitre (nommé par le ministre du Travail), après avoir entendu les témoignages et les observations des deux parties, a décrété que le congédiement en question avait été injuste.

J'ordonne en outre que toute demande de renseignements par voie de communication épistolaire, téléphonique ou autre faite à la station Q107, à sa direction ou à son personnel par une personne ou compagnie relativement à l'emploi de M. Ron Davidson à ladite station doit donner lieu pour toute réponse à l'envoi d'un double de la lettre de recommandation susmentionnée.

L'employeur a interjeté appel devant la Cour d'appel fédérale, et son appel a été rejeté (les juges Urie et Mahoney, le juge Marceau étant dissident): [1985] 1 C.F. 253.

La question que cette Cour doit trancher est de savoir si l'al. *c*) du par. 61.5(9) du *Code canadien du travail* autorise l'arbitre à enjoindre à l'employeur de donner à l'employé une lettre de recommandation à contenu spécifié et à ordonner à l'employeur de ne pas tenir d'autres propos au sujet de l'employé. L'alinéa *c*), on s'en souvient, est ainsi conçu:

(*c*) de faire toute autre chose qu'il juge équitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier.

(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

(*c*) de faire toute autre chose qu'il juge équitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier.

Resolution of the problem involves (1) the construction and the true meaning and effect of para. (*c*), (2) whether the adjudicator's order in this case infringed freedom of expression under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, and (3) if so, whether the infringement is justified under s. 1 of the *Charter*.

Two constitutional questions were stated in this appeal as follows:

1. Do the provisions of the adjudicator's order, pursuant to s. 61.5(9) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended, whereby the appellant was ordered to provide the respondent with a letter of recommendation of specified content combined with the further stipulation that any communication to the appellant relating to the respondent's employment with the appellant be answered exclusively by sending or delivering a copy of the letter of recommendation, infringe or deny the rights and freedoms guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?
2. If the provisions of the adjudicator's order infringe or deny the rights and freedoms guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, are they justified by s. 1 of the *Charter* and therefore not inconsistent with the *Constitution Act, 1982*?

II

The Relationship Between Administrative Law Review and Review Under the *Charter*

I have had the benefit of reading the opinion of Justice Lamer and I am in complete agreement with his discussion of the applicability of the *Charter* to administrative decision-making. I also agree with his conclusion that the positive order made by adjudicator Joliffe (to draw up and to give the respondent a specified letter of reference) infringes s. 2(*b*) of the *Charter* but is saved by s. 1. However, with regard to the negative order (that any inquiry about the respondent's employment at Q107 be answered exclusively by the letter of reference which is the subject of the positive order), I must respectfully disagree with the conclusion of Lamer J. that it is patently unreasonable, thereby obviating the need to consider the *Charter*. Furthermore, not only am I of the view that the negative order is reasonable in

La solution du problème est fonction (1) de l'interprétation et du sens et de l'effet véritables de l'al. *c*), (2) de la question de savoir si l'ordonnance de l'arbitre en l'espèce viole la liberté d'expression garantie à l'al. 2*b*) de la *Charte canadienne des droits et libertés*, et (3) dans l'affirmative, de la question de savoir si la violation est justifiée en vertu de l'article premier de la *Charte*.

Deux questions constitutionnelles ont été formulées en l'espèce:

1. Les dispositions de l'ordonnance de l'arbitre, rendue conformément au par. 61.5(9) du *Code canadien du travail*, S.R.C. 1970, chap. L-1 et ses modifications, par lesquelles on a ordonné à la requérante de fournir à l'intimé une lettre de recommandation à contenu spécifié assortie de l'obligation supplémentaire de répondre exclusivement aux demandes de renseignements au sujet de l'emploi de l'intimé en envoyant ou en remettant une copie de la lettre de recommandation, violent-t-elles ou nient-elles les droits et libertés garantis par l'al. 2*b*) de la *Charte canadienne des droits et libertés*?
2. Si les dispositions de l'ordonnance de l'arbitre violent ou nient les droits et libertés garantis par l'al. 2*b*) de la *Charte canadienne des droits et libertés*, sont-elles justifiées par l'article premier de la *Charte* et donc compatibles avec la *Loi constitutionnelle de 1982*?

II

Le rapport entre le contrôle en matière de droit administratif et l'examen fondé sur la *Charte*.

J'ai pris connaissance de l'opinion exprimée par le juge Lamer et je suis parfaitement d'accord avec son analyse de l'applicabilité de la *Charte* au processus décisionnel administratif. Je suis également d'accord avec sa conclusion que l'ordonnance positive rendue par l'arbitre Joliffe (celle de rédiger une lettre de recommandation à contenu spécifié et de la remettre à l'intimé) viole l'al. 2*b*) de la *Charte*, mais qu'elle est sauvegardée par l'article premier. Toutefois, pour ce qui est de l'ordonnance négative (celle de répondre exclusivement aux demandes de renseignements au sujet de l'emploi de l'intimé à la station Q107 en envoyant la lettre de recommandation visée par l'ordonnance positive), je me vois, en toute déférence, dans l'obligation d'exprimer mon désaccord avec la conclusion du juge Lamer selon laquelle elle est manifeste-

the administrative law sense but I also believe that it is reasonable and demonstrably justified in the sense of s. 1 of the *Charter*.

I agree with Mahoney J. of the Federal Court of Appeal, at pp. 260-61, that:

> The ordering of provision of a totally factual letter of recommendation and foreclosing the undermining of its effect which, in the circumstances disclosed by the evidence, was patently foreseeable, seems to me to be an equitable remedial requirement. It is not punitive. It is appropriate redress to the wronged employee without, in any way, injuring the employer. In my view, the order was authorized by paragraph 61.5(9)(*c*).

The precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases. A few comments nonetheless may be in order. A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact (see *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, at pp. 494-95), in the realm of value inquiry the courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*. In contrast to s. 1, patent unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis. It seems to me that had Lamer J. gone on to conduct a s. 1 inquiry, his excellent analysis of the contending values in the context of the positive order would have been equally applicable to the negative order which he has instead found to be patently unreasonable.

ment déraisonnable, ce qui pare à la nécessité d'examiner la *Charte*. De plus, j'estime non seulement que l'ordonnance négative est raisonnable au sens du droit administratif, mais aussi qu'elle est raisonnable et que sa justification peut se démontrer au sens de l'article premier de la *Charte*.

Je souscris aux propos tenus par le juge Mahoney de la Cour d'appel fédérale dans l'arrêt précité, aux pp. 260 et 261:

> Le fait d'ordonner l'envoi d'une lettre de recommandation portant uniquement sur des faits et d'empêcher que son effet ne soit sapé, éventualité manifestement prévisible dans les circonstances révélées par la preuve, me semble être un redressement équitable et non punitif. Il s'agit d'un redressement approprié accordé à l'employé lésé et qui ne porte d'aucune façon préjudice à l'employeur. À mon avis, l'alinéa 61.5(9)*c*) autorisait l'ordonnance.

Le rapport précis entre la norme traditionnelle de contrôle, en droit administratif, du caractère déraisonnable manifeste et la nouvelle norme constitutionnelle de contrôle va se dégager de la jurisprudence à venir. Néanmoins, il y a lieu de faire quelques commentaires. Une proposition minimale semblerait être que la norme préliminaire de contrôle que représente le caractère déraisonnable en droit administratif ne devrait pas imposer au gouvernement une norme plus exigeante que ne le ferait l'examen fondé sur la *Charte*. Certes, il importe de maintenir la norme du caractère déraisonnable manifeste pour les questions non touchées par la *Charte*, telles que le contrôle des conclusions de fait (voir *Blanchard c. Control Data Canada Ltée*, [1984] 2 R.C.S. 476, aux pp. 494 et 495); mais, en matière d'examen des valeurs, les tribunaux devraient recourir à cette norme seulement dans les cas les plus évidents où une décision ne saurait être justifiée en vertu de l'article premier de la *Charte*. Par opposition à l'article premier, le caractère déraisonnable manifeste repose, dans une large mesure, sur des valeurs ambiguës et non établies et n'a pas le même degré de structure et de subtilité d'analyse. À mon avis, si le juge Lamer avait procédé à un examen fondé sur l'article premier, son excellente analyse des valeurs opposées dans le contexte de l'ordonnance positive aurait été également applicable à l'ordonnance négative qu'il a plutôt jugée manifestement déraisonnable.

I agree with Lamer J. that the order in this case is considerably different from that at issue in *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269, and, therefore, the determination by Beetz J. that the letter in question in *National Bank* was patently unreasonable is not applicable to the facts of this case. The focus of condemnation in *National Bank* was on the "compelling [of] anyone to utter opinions that [were] not his own" (*per* Beetz J., at p. 296) which was exacerbated by the wide publication of the letter—to all employees and management staff of the bank. That is not this case. As the adjudicator noted here, there was no real conflict of evidence about the accounts and reports.

III

The Negative Order and Section 2(*b*) of the *Charter*

Adjudicator Joliffe's order that Slaight Communications Inc. answer any reference inquiry exclusively by sending the specified letter is an infringement of s. 2(*b*) freedom of expression. The government is attempting to prevent Q107 from expressing its opinion as to the qualifications of Mr. Davidson beyond the facts set out in the letter. The harm that it was aiming to prevent, decreased job prospects for Mr. Davidson, is only relevant to s. 1 analysis and not to s. 2(*b*) analysis.

IV

Section 1 of the *Charter*

The basic test for s. 1 analysis formulated in *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-39, has been reviewed in the reasons of Lamer J. and need not be reproduced here.

Je conviens avec le juge Lamer que l'ordonnance en l'espèce diffère considérablement de celle en cause dans l'arrêt *Banque Nationale du Canada c. Union internationale des employés de commerce*, [1984] 1 R.C.S. 269, et que, par conséquent, la conclusion du juge Beetz selon laquelle la lettre en cause dans l'affaire *Banque Nationale* était manifestement déraisonnable ne s'applique pas aux faits de l'espèce. La condamnation dans l'arrêt *Banque Nationale* visait surtout le fait «que l'on contraigne quiconque à professer des opinions peut-être différentes des siennes» (le juge Beetz, à la p. 296), fait qui a été aggravé par une large diffusion de la lettre à tous les employés et au personnel de direction de la banque. Tel n'est pas le cas en l'espèce. Comme l'arbitre l'a souligné en l'espèce, il n'y avait pas de véritable conflit au sujet des comptes et des rapports.

III

L'ordonnance négative et l'al. 2*b*) de la *Charte*

L'ordonnance de l'arbitre Joliffe qui enjoignait à Slaight Communications Inc. de répondre aux demandes de renseignements exclusivement en envoyant la lettre à contenu spécifié viole la liberté d'expression garantie à l'al. 2*b*). Le gouvernement tente d'empêcher Q107 de pousser l'expression de son opinion quant aux qualifications de M. Davidson au-delà des faits énoncés dans la lettre. Le préjudice qu'il voulait prévenir, c'est-à-dire la diminution des perspectives d'emploi de M. Davidson, n'est pertinent que pour les fins d'une analyse fondée sur l'article premier et non pour celles d'une analyse fondée sur l'al. 2*b*).

IV

L'article premier de la *Charte*

Le critère de base applicable à une analyse fondée sur l'article premier, qui a été formulé dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, aux pp. 138 et 139, a été examiné dans les motifs du juge Lamer et il n'est pas nécessaire de le reproduire en l'espèce.

1. *Importance of the Objective*

I am in firm agreement with the conclusions of Lamer J. about the importance of the objective sought to be achieved by the positive order, namely, counteracting the effects of the unjust dismissal by enhancing the ability of the employee to seek new employment without being lied about by the previous employer. This is also the objective of the negative order which, in the words of Mahoney J. in the Federal Court of Appeal, at p. 260, was designed to "forclos[e] the undermining of [the] effect" of the positive order. Both orders seek to achieve the same goal, the negative order complementing and reinforcing the positive order.

It cannot be overemphasized that the adjudicator's remedy in this case was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. Thus, in a general sense, this case falls within a class of cases in which the governmental objective is that of protection of a particularly vulnerable group, or members thereof. In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, I stated for the majority at p. 779:

> In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons. When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the Legislature for determining that the protection of the employees ought to prevail.

Consistent with the above view of the place of the *Charter*, I can think of no better way to describe the employment relationship than as expressed in Davies and Freedland, *Kahn-Freund's Labour and the Law* (3rd ed. 1983), at p. 18:

> [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it

1. *L'importance de l'objectif*

Je suis parfaitement d'accord avec les conclusions tirées par le juge Lamer au sujet de l'importance de l'objectif visé par l'ordonnance positive, savoir la neutralisation des conséquences du congédiement injuste en accroissant les possibilités pour l'employé de chercher un nouvel emploi sans faire l'objet de mensonges de la part de son employeur précédent. C'est également l'objectif de l'ordonnance négative qui, pour reprendre les mots employés par le juge Mahoney de la Cour d'appel fédérale, à la p. 260, visait à «empêcher que . . . ne soit sapé [l'effet]» de l'ordonnance positive. Les deux ordonnances tendent au même but, la négative complétant et renforçant la positive.

On ne saurait trop insister sur le fait que le redressement accordé par l'arbitre en l'espèce constituait une tentative, sanctionnée par le législateur, de remédier à l'inégalité des forces qui existe normalement entre l'employeur et l'employé. Ainsi donc, en général, l'espèce relève d'une catégorie d'affaires où l'objectif gouvernemental est de protéger un groupe particulièrement vulnérable, ou des membres de ce groupe. Dans l'arrêt *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, à la p. 779, j'ai affirmé au nom de la Cour à la majorité:

> Je crois que lorsqu'ils interprètent et appliquent la *Charte*, les tribunaux doivent veiller à ce qu'elle ne devienne pas simplement l'instrument dont se serviront les plus favorisés pour écarter des lois dont l'objet est d'améliorer le sort des moins favorisés. Lorsque l'intérêt de plus de sept salariés vulnérables à jouir d'un congé dominical est opposé à l'intérêt qu'a leur employeur à faire des affaires le dimanche, je ne saurais blâmer le législateur de décider que la protection des employés doit l'emporter.

Conformément au point de vue exprimé ci-dessus au sujet de la place qu'occupe la *Charte*, je ne vois aucune meilleure façon de décrire les relations employeur-employé que celle exprimée dans Davies et Freedland dans *Kahn-Freund's Labour and the Law* (3e éd. 1983), à la p. 18:

> [TRADUCTION] [L]a relation entre un employeur et un employé ou un travailleur isolé est typiquement une relation entre une personne qui est en situation d'autorité et une personne qui ne l'est pas. À son début, il

trative or judicial) which depends for its validity on statutory authority.

Section 61.5(9)(*c*) must therefore be interpreted as conferring on the adjudicator a power to require the employer to do any other thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal, provided however that such an order, if it limits a protected right or freedom, only does so within reasonable limits that can be demonstrably justified in a free and democratic society. It is only if the limitation on a right or freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the *Charter*. The *Charter* does not provide an absolute guarantee of the rights and freedoms mentioned in it. What it guarantees is the right to have such rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. There is thus no reason not to ascribe to Parliament an intent to limit a right or freedom mentioned in the *Charter* or to allow a protected right or freedom to be limited when the language used by Parliament suggests this.

It would be useful, in my view, to describe the steps that must be taken to determine the validity of an order made by an administrative tribunal, which are as follows.

First, there are two important principles that must be borne in mind:

—an administrative tribunal may not exceed the jurisdiction it has by statute; and

—it must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication.

The application of these two principles to the exercise of a discretion leads to one of the following two situations:

ves ou judiciaires) dont la validité dépend d'un pouvoir statutaire.

Il faut donc interpréter l'al. 61.5(9)*c*) comme conférant à l'arbitre le pouvoir de requérir l'employeur de faire toute autre chose qu'il juge équitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier sous réserve toutefois que cette ordonnance, si elle restreint un droit ou une liberté protégés, ne les restreigne que dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique. Ce n'est en effet que si la restriction apportée à un droit ou à une liberté n'est pas contenue dans des limites qui soient raisonnables et justifiables que l'on peut parler de violation de la *Charte*. La *Charte* ne garantit pas d'une façon absolue les droits et les libertés qu'elle énonce. Elle garantit plutôt le droit de ne pas voir ces droits ou ces libertés restreints autrement que par une règle de droit dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique. Rien ne s'oppose donc à ce que l'on impute au Parlement, lorsque les termes qu'il emploie le laissent croire, l'intention de restreindre un droit ou une liberté énoncés dans la *Charte* ou de permettre qu'un droit ou une liberté protégés soient restreints.

Il me semble utile de décrire la démarche qui doit être effectuée afin de déterminer la validité d'une ordonnance prononcée par un tribunal administratif de la façon suivante.

Il faut tout d'abord garder en vue l'existence de deux principes importants:

—un tribunal administratif ne peut excéder la compétence qui lui est dévolue par la loi; et

—il faut présumer qu'un texte législatif attribuant une discrétion imprécise ne confère pas le pouvoir de violer la *Charte* à moins que ce pouvoir ne soit expressément conféré ou qu'il le soit par implication nécessaire.

L'application de ces deux principes à l'exercice d'une discrétion nous mène alors à l'une ou l'autre des situations suivantes:

1. The disputed order was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right.

—It is then necessary to subject the legislation to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

2. The legislation pursuant to which the administrative tribunal made the disputed order confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*.

—It is then necessary to subject the order made to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society;

—if it is not thus justified, the administrative tribunal has necessarily exceeded its jurisdiction;

—if it is thus justified, on the other hand, then the administrative tribunal has acted within its jurisdiction.

There is no doubt in the case at bar that the part of the order dealing with the issuing of a letter of recommendation places, in my opinion, a limitation on freedom of expression. There 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. The order directing appellant to give respondent a letter containing certain objective facts in my opinion unquestionably limits appellant's freedom of expression.

However, this limitation is prescribed by law and can therefore be justified under s. 1. The adjudicator derives all his powers from statute and can only do what he is allowed by statute to do. It is the legislative provision conferring discretion

1. L'ordonnance contestée a été rendue en vertu d'un texte qui confère expressément ou par implication nécessaire le pouvoir de porter atteinte à un droit protégé.

—Il faut alors soumettre le texte législatif au test énoncé à l'article premier en vérifiant s'il constitue une limite raisonnable dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

2. Le texte législatif en vertu duquel le tribunal administratif a prononcé l'ordonnance contestée confère une discrétion imprécise et ne prévoit, ni expressément, ni par implication nécessaire, le pouvoir de limiter les droits garantis par la *Charte*.

—Il faut alors soumettre l'ordonnance prononcée au test énoncé à l'article premier en vérifiant si elle constitue une limite raisonnable dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique;

—si elle n'est pas ainsi justifiée le tribunal administratif a nécessairement commis un excès de juridiction;

—si au contraire elle est ainsi justifiée alors le tribunal administratif a agi à l'intérieur de sa juridiction.

En l'espèce la partie de l'ordonnance relative à la remise d'une lettre de références apporte, à mon avis, une restriction à la liberté d'expression. On ne peut nier, en effet, que la liberté d'expression comporte nécessairement le droit de ne rien dire ou encore le droit de ne pas dire certaines choses. Le silence est en soi une forme d'expression qui peut, dans certaines circonstances, exprimer quelque chose plus clairement que des mots ne pourraient le faire. L'ordonnance enjoignant à l'appelante de remettre à l'intimé une lettre comportant certaines données objectives restreint, selon moi, incontestablement la liberté d'expression de l'appelante.

Cette restriction provient toutefois d'une règle de droit et, de ce fait, peut être justifiée aux termes de l'article premier. L'arbitre tire en effet tous ses pouvoirs de la loi et il ne peut faire plus que ce que la loi lui permet. C'est la disposition législative

which limits the right or freedom, since it is what authorizes the holder of such discretion to make an order the effect of which is to place limits on the rights and freedoms mentioned in the *Charter*. The order made by the adjudicator is only an exercise of the discretion conferred on him by statute.

To determine whether this limitation is reasonable and can be demonstrably justified in a free and democratic society, therefore, one must examine whether the use made of the discretion has the effect of keeping the limitation within reasonable limits that can be demonstrably justified in a free and democratic society. If the answer is yes, we must conclude that the adjudicator had the power to make such an order since he was authorized to make an order reasonably and justifiably limiting a right or freedom mentioned in the *Charter*. If on the contrary the answer is no, then one has to conclude that the adjudicator exceeded his jurisdiction since Parliament has not delegated to him a power to infringe the *Charter*. If he has exceeded his jurisdiction, his decision is of no force or effect.

The test that must be applied in such an assessment has been largely defined by my brother Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103. According to that test, the objective to be served by the disputed measures must first be sufficiently important to warrant limiting a right or freedom protected by the *Charter*. Second, the party seeking to maintain the limitation must show that the means selected to attain this objective are reasonable and justifiable. To do this, it will be necessary to apply a form of proportionality test involving three separate components: the disputed measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. The means chosen must also be such as to impair the right or freedom as little as possible, and finally, its effects must be proportional to the objective sought.

attributrice de discrétion qui restreint le droit ou la liberté puisque c'est elle qui autorise le détenteur de ladite discrétion à rendre une ordonnance ayant pour effet d'apporter des limites aux droits et libertés énoncés dans la *Charte*. L'ordonnance prononcée par l'arbitre n'est que l'exercice de la discrétion qui lui est accordée par la loi.

Pour déterminer si cette restriction est contenue dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique, il faut donc évaluer si l'utilisation qui fut faite de la discrétion a pour effet de contenir la restriction dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique. Si la réponse est positive nous devons conclure que l'arbitre avait le pouvoir de rendre une telle ordonnance puisqu'il était autorisé à rendre une ordonnance restreignant un droit ou une liberté énoncés à la *Charte* dans des limites qui soient raisonnables et justifiables. Si la réponse est au contraire négative il faut alors conclure que l'arbitre a excédé sa juridiction puisque le Parlement ne lui a pas délégué le pouvoir de violer la *Charte*. Ayant excédé sa juridiction sa décision est donc nulle et sans effet.

Le test qui doit être appliqué dans le cadre de cette évaluation a été énoncé principalement par mon collègue le juge en chef Dickson dans l'affaire *R. c. Oakes*, [1986] 1 R.C.S. 103. Selon ce test, il faut, dans un premier temps, que l'objectif poursuivi par la mesure contestée soit suffisamment important pour justifier la restriction d'un droit ou d'une liberté garantis par la *Charte*. Dans un second temps, la partie qui demande le maintien de cette restriction doit démontrer que les moyens choisis pour atteindre cet objectif sont raisonnables et justifiables. Pour ce faire, il doit y avoir application d'une espèce de critère de proportionnalité comportant trois éléments distincts: les mesures contestées doivent être équitables et non arbitraires, être soigneusement conçues pour atteindre l'objectif poursuivi et avoir un lien rationnel avec celui-ci. Le moyen choisi doit de plus être de nature à restreindre le moins possible le droit ou la liberté et ses effets doivent finalement être proportionnels avec l'objectif poursuivi.

Moïse Amselem, Gladys Bouhadana, Antal Klein and Gabriel Fonfeder *Appellants*

v.

Syndicat Northcrest *Respondent*

and

Evangelical Fellowship of Canada, Seventh-day Adventist Church in Canada, World Sikh Organization of Canada and Ontario Human Rights Commission *Interveners*

and

Miguel Bernfield and Edith Jaul *Mis en cause*

and between

League for Human Rights of B'Nai Brith Canada *Appellant*

v.

Syndicat Northcrest *Respondent*

and

Evangelical Fellowship of Canada, Seventh-day Adventist Church in Canada, World Sikh Organization of Canada and Ontario Human Rights Commission *Interveners*

and

Miguel Bernfield and Edith Jaul *Mis en cause*

Moïse Amselem, Gladys Bouhadana, Antal Klein et Gabriel Fonfeder *Appelants*

c.

Syndicat Northcrest *Intimé*

et

Alliance évangélique du Canada, Église adventiste du septième jour au Canada, World Sikh Organization of Canada et Commission ontarienne des droits de la personne *Intervenantes*

et

Miguel Bernfield et Edith Jaul *Mis en cause*

et entre

Ligue des droits de la personne de B'Nai Brith Canada *Appelante*

c.

Syndicat Northcrest *Intimé*

et

Alliance évangélique du Canada, Église adventiste du septième jour au Canada, World Sikh Organization of Canada et Commission ontarienne des droits de la personne *Intervenantes*

et

Miguel Bernfield et Edith Jaul *Mis en cause*

INDEXED AS: SYNDICAT NORTHCREST *v.* AMSELEM

Neutral citation: 2004 SCC 47.

File Nos.: 29253, 29252.

2004: January 19; 2004: June 30.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

RÉPERTORIÉ : SYNDICAT NORTHCREST *c.* AMSELEM

Référence neutre : 2004 CSC 47.

N^{os} du greffe : 29253, 29252.

2004 : 19 janvier; 2004 : 30 juin.

Présents : La juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Civil rights — Freedom of religion — Definition of freedom of religion — Exercise of religious freedoms — Orthodox Jews setting up succahs in pursuit of their religious beliefs on balconies of their co-owned property — Syndicate of co-owners requesting removal of succahs because declaration of co-ownership prohibits decorations, alterations and constructions on balconies — Whether freedom of religion infringed by declaration of co-ownership — If so, whether refusal to permit setting up of succahs justified by reliance on right to enjoy property and right to personal security — Whether Orthodox Jewish residents waived their right to freedom of religion by signing declaration of co-ownership — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 1, 3, 6.

Constitutional law — Charter of Rights — Freedom of religion — Definition of freedom of religion — Proper approach for freedom of religion analyses — Canadian Charter of Rights and Freedoms, s. 2(a).

The appellants A, B, K and F, all Orthodox Jews, are divided co-owners of units in luxury buildings in Montréal. Under the terms of the by-laws in the declaration of co-ownership, the balconies of individual units, although constituting common portions of the immovable, are nonetheless reserved for the exclusive use of the co-owners of the units to which they are attached. The appellants set up "succahs" on their balconies for the purposes of fulfilling the biblically mandated obligation of dwelling in such small enclosed temporary huts during the annual nine-day Jewish religious festival of Succot. The respondent requested their removal, claiming that the succahs violated the by-laws, which, *inter alia*, prohibited decorations, alterations and constructions on the balconies. None of the appellants had read the declaration of co-ownership prior to purchasing or occupying their individual units. The respondent proposed to allow the appellants to set up a communal succah in the gardens. The appellants expressed their dissatisfaction with the proposed accommodation, explaining that a communal succah would not only cause extreme hardship with their religious observance, but would also be contrary to their personal religious beliefs, which, they claimed, called for the setting up of their own succahs on their own balconies. The respondent refused their request and filed an application for a permanent injunction prohibiting

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Libertés publiques — Liberté de religion — Définition de la liberté de religion — Exercice de la liberté de religion — Juifs orthodoxes installant des souccahs sur les balcons de l'immeuble où ils sont copropriétaires, afin de se conformer à leurs croyances religieuses — Syndicat de copropriétaires demandant le démantèlement des souccahs parce que la déclaration de copropriété interdit d'installer des décorations sur les balcons, d'apporter des modifications à ceux-ci et d'y faire des constructions — La déclaration de copropriété porte-t-elle atteinte à la liberté de religion? — Dans l'affirmative, le refus de permettre l'installation de souccahs est-il justifié par l'argument fondé sur le droit à la jouissance des biens et sur le droit à la sûreté de la personne? — Les résidents juifs orthodoxes ont-ils renoncé à leur droit à la liberté de religion en signant la déclaration de copropriété? — Charte des droits et libertés de la personne, L.R.Q., ch. C-12, art. 1, 3, 6.

Droit constitutionnel — Charte des droits — Liberté de religion — Définition de la liberté de religion — Méthode à adopter pour analyser les questions relatives à la liberté de religion — Charte canadienne des droits et libertés, art. 2a).

Les appelants A, B, K et F, qui sont tous des Juifs orthodoxes, détiennent en copropriété divise des appartements dans de luxueux immeubles situés à Montréal. Comme le précise le règlement incorporé dans la déclaration de copropriété, bien que les balcons des appartements soient des parties communes de l'immeuble, l'usage exclusif du balcon attenant à un appartement est néanmoins réservé au copropriétaire de cet appartement. Les appelants ont installé des « souccahs » sur leur balcon respectif pour se conformer à l'obligation d'habiter dans ces petites huttes temporaires closes, obligation que leur impose la Bible pendant la fête religieuse juive du Souccoth. L'intimé a demandé le démantèlement de ces souccahs, affirmant qu'elles contrevenaient au règlement qui interdit notamment d'installer des décorations sur les balcons, d'apporter des modifications à ceux-ci et d'y faire des constructions. Aucun des appelants n'avait lu la déclaration de copropriété avant d'acheter son appartement respectif ou d'y emménager. L'intimé a proposé de permettre aux appelants d'installer une souccah commune dans les jardins. Les appelants ont exprimé leur insatisfaction quant à la mesure d'accommodement, expliquant qu'une souccah commune aurait pour effet non seulement de leur créer des difficultés excessives dans l'observance de leur religion, mais également d'aller à l'encontre de leurs croyances religieuses personnelles

the appellants from setting up succahs and, if necessary, permitting their demolition. The application was granted by the Superior Court and this decision was affirmed by the Court of Appeal.

Held (Bastarache, Binnie, LeBel and Deschamps JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Iacobucci, Major, Arbour and Fish JJ.: Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to his or her self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

Freedom of religion under the Quebec *Charter of Human Rights and Freedoms* (and the *Canadian Charter of Rights and Freedoms*) consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. This understanding is consistent with a personal or subjective understanding of freedom of religion. As such, a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. The State is in no position to be, nor should it become, the arbiter of religious dogma. Although a court is not qualified to judicially interpret and determine the content of a subjective understanding of a religious requirement, it is qualified to inquire into the sincerity of a claimant's belief, where sincerity is in fact at issue. Sincerity of belief simply implies an honesty of belief and the court's role is to ensure that a presently asserted belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Assessment of sincerity is a question of fact that can be based on criteria including the credibility of a claimant's testimony, as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices. Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but what the claimant

qui, ont-ils affirmé, requièrent qu'ils installent chacun leur propre souccah, sur leur propre balcon. L'intimé a rejeté leur demande et sollicité une injonction permanente interdisant aux appelants d'installer des souccahs et, au besoin, autorisant la démolition des souccahs existantes. La demande a été accueillie par la Cour supérieure, dont la décision a été confirmée par la Cour d'appel.

Arrêt (les juges Bastarache, Binnie, LeBel et Deschamps sont dissidents) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Iacobucci, Major, Arbour et Fish : Selon une définition générale, une religion s'entend typiquement d'un système particulier et complet de dogmes et de pratiques. Essentiellement, la religion s'entend de profondes croyances ou convictions volontaires, qui se rattachent à la foi spirituelle de l'individu et qui sont intégralement liées à la façon dont celui-ci se définit et s'épanouit spirituellement, et les pratiques de cette religion permettent à l'individu de communiquer avec l'être divin ou avec le sujet ou l'objet de cette foi spirituelle.

La liberté de religion garantie par la *Charte des droits et libertés de la personne* du Québec (et la *Charte canadienne des droits et libertés*) s'entend de la liberté de se livrer à des pratiques et d'entretenir des croyances ayant un lien avec une religion, pratiques et croyances que l'intéressé exerce ou manifeste sincèrement, selon le cas, dans le but de communiquer avec une entité divine ou dans le cadre de sa foi spirituelle, indépendamment de la question de savoir si la pratique ou la croyance est prescrite par un dogme religieux officiel ou conforme à la position de représentants religieux. Cette interprétation est compatible avec une conception personnelle ou subjective de la liberté de religion. Par conséquent, le demandeur qui invoque cette liberté n'est pas tenu de prouver l'existence de quelque obligation, exigence ou précepte religieux objectif. C'est le caractère religieux ou spirituel d'un acte qui entraîne la protection, non le fait que son observance soit obligatoire ou perçue comme telle. L'État n'est pas en mesure d'agir comme arbitre des dogmes religieux, et il ne devrait pas le devenir. Bien qu'un tribunal judiciaire ne soit pas qualifié pour interpréter et déterminer le contenu d'une conception subjective d'une exigence religieuse, il l'est pour statuer sur la sincérité de la croyance du demandeur, lorsque cette sincérité est effectivement une question litigieuse. Une croyance sincère s'entend simplement d'une croyance honnête et le tribunal doit s'assurer que la croyance religieuse invoquée est avancée de bonne foi, qu'elle n'est ni fictive ni arbitraire et qu'elle ne constitue pas un artifice. L'appréciation de la sincérité est une question de fait qui repose sur des critères, notamment la crédibilité du témoignage du demandeur et la question de savoir si la croyance invoquée par le demandeur est en

views these personal religious "obligations" to be, it is inappropriate to require expert opinions. It is also inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Because of the vacillating nature of religious belief, a court's inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom.

Freedom of religion is triggered when a claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion. Once religious freedom is triggered, a court must then ascertain whether there has been non-trivial or non-insubstantial interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) *Charter*. However, even if the claimant successfully demonstrates non-trivial interference, religious conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.

Here, the impugned stipulations in the declaration of co-ownership infringe upon the appellants' freedom of religion under s. 3 of the Quebec *Charter*. The trial judge's approach to freedom of religion was incorrect. First, he chose between two competing rabbinical authorities on a question of Jewish law. Second, he seems to have based his findings with respect to freedom of religion solely on what he perceived to be the objective obligatory requirements of Judaism, thus failing to recognize that freedom of religion under the Quebec (and the Canadian) *Charter* does not require a person to prove that his or her religious practices are supported by any mandatory doctrine of faith. Furthermore, any incorporation of distinctions between "obligation" and "custom" or, as made by the respondent and the courts below, between "objective obligation" and "subjective obligation or belief" within the framework of a religious freedom analysis is dubious, unwarranted and unduly restrictive. On the issue of sincerity, the trial judge correctly concluded that the appellant A sincerely believed that he was obliged to set up a succah on his own property. The appellants K and F submitted expert evidence of their sincere individual belief as to the inherently personal nature of fulfilling the commandment of

accord avec les autres pratiques religieuses courantes de celui-ci. Comme l'examen ne porte pas sur la perception qu'ont les autres des obligations religieuses du demandeur, mais sur ce que ce dernier considère subjectivement comme étant ces « obligations » religieuses, il ne convient pas d'exiger qu'il produise des opinions d'expert. Il ne convient pas non plus que le tribunal analyse rigoureusement les pratiques antérieures du demandeur pour décider de la sincérité de ses croyances courantes. Vu le caractère mouvant des croyances religieuses, l'examen par le tribunal de la sincérité de la croyance doit s'attacher non pas aux pratiques ou croyances antérieures de la personne, mais plutôt à ses croyances au moment de la prétendue atteinte à la liberté de religion.

La liberté de religion entre en jeu lorsqu'un demandeur démontre qu'il croit sincèrement à une pratique ou à une croyance ayant un lien avec la religion. Dès que la liberté de religion entre en jeu, le tribunal doit déterminer si l'exercice de ce droit a fait l'objet d'une entrave non négligeable ou non insignifiante constituant une atteinte à la liberté de religion garantie par la *Charte* québécoise (ou la *Charte* canadienne). Cependant, même si le demandeur parvient à prouver l'existence d'une entrave non négligeable, une conduite religieuse susceptible de causer préjudice aux droits d'autrui ou d'entraver l'exercice de ces droits n'est pas automatiquement protégée. La protection ultime accordée par un droit garanti par la *Charte* québécoise doit être mesurée par rapport aux autres droits et au regard du contexte sous-jacent dans lequel s'inscrit le conflit apparent.

En l'espèce, les clauses contestées de la déclaration de copropriété portent atteinte à la liberté de religion garantie aux appelants par l'art. 3 de la *Charte* québécoise. La démarche retenue par le juge de première instance était erronée. Premièrement, il a à tort choisi entre deux autorités rabbiniques avançant des opinions opposées sur une question concernant la loi juive. Deuxièmement, il semble avoir fondé ses conclusions relativement à la liberté de religion uniquement sur ce qu'il estimait être des exigences objectivement obligatoires du judaïsme, omettant ainsi de reconnaître que, suivant la *Charte* québécoise (et la *Charte* canadienne), la personne qui invoque liberté de religion n'a pas à démontrer que ses pratiques religieuses reposent sur une doctrine de foi obligatoire. De plus, le fait d'intégrer dans l'analyse relative à la liberté de religion des distinctions entre « obligation » et « coutume » ou, comme l'ont fait l'intimé et les tribunaux inférieurs, entre « obligation objective » et « obligation ou croyance subjective » constitue une mesure discutable, injustifiée et indûment restrictive. Quant à la question de la sincérité, le juge de première instance a à juste titre conclu que l'appelant A croyait sincèrement être tenu d'installer une souccah sur sa propriété. Les appelants K et F ont produit

dwelling in a succah. Such expert testimony, although not required, suffices in positively assessing the sincerity and honesty of their belief. Lastly, the interference with their right to freedom of religion is more than trivial and thus, leads to an infringement of that right. It is evident that in respect of A the impugned clauses of the declaration of co-ownership interfere with his right in a substantial way, as a prohibition against setting up his own succah obliterates the substance of his right. In the case of K and F, they have proven that the alternatives of either imposing on friends and family or celebrating in a communal succah as proposed by the respondent will subjectively lead to extreme distress and thus impermissibly detract from the joyous celebration of the holiday. In any event, there is no doubt that all the appellants sincerely believe they must fulfill the biblically mandated obligation, perhaps not of setting up one's own succah, but of "dwelling in" a succah for the entire nine-day festival of Succot. Although the declaration of co-ownership does not overtly forbid the appellants to dwell in a succah — in that they are free to celebrate the holiday with relatives or in a proposed communal succah —, the burdens placed upon them as a result of the operation of the impugned clauses are evidently substantial. Preventing them from building their own succah therefore constitutes a non-trivial interference with and thus an infringement of their protected rights to dwell in a succah during the festival of Succot.

The alleged intrusions or deleterious effects on the co-owners' rights to peaceful enjoyment of their property and to personal security guaranteed by ss. 6 and 1 respectively of the Quebec *Charter* are, under the circumstances, at best minimal and thus cannot be reasonably considered as imposing valid limits on the exercise of the appellants' religious freedom. The respondent has not adduced enough evidence to conclude that allowing the appellants to set up such temporary succahs would cause the value of the units, or of the property, to decrease. Similarly, protecting the co-owners' enjoyment of the property by preserving the aesthetic appearance of the balconies and thus enhancing the harmonious external appearance of the building cannot be reconciled with a total ban imposed on the appellants' exercise of their religious freedom. The potential annoyance caused by a few succahs being set up for a period of nine days each year would undoubtedly be quite trivial. Finally, the appellants' offer to set up their succahs in such a way that they would not block any doors, would not obstruct fire lanes

un témoignage d'expert étayant leur croyance sincère que le respect du commandement d'habiter dans une souccah revêt un caractère intrinsèquement personnel. Ce témoignage d'expert — bien que non requis — permet de conclure à la sincérité et à l'honnêteté de leur croyance. Enfin, l'entrave à leur droit à la liberté de religion est plus que négligeable et en conséquence entraîne une atteinte à ce droit. Il est évident que, dans le cas de A, les clauses contestées de la déclaration de copropriété empiètent de façon importante sur son droit, étant donné que l'interdiction qui lui est faite de construire sa propre souccah vide de toute substance le droit qui lui est reconnu. En ce qui concerne K et F, ils ont prouvé que les solutions de rechange — soit imposer leur présence à des amis et à des parents, soit célébrer dans la souccah commune proposée par l'intimé — leur causeraient subjectivement d'intenses difficultés et, partant, enlèveraient de manière inacceptable à la fête son caractère joyeux. Quoi qu'il en soit, il est clair que tous les appelants croient sincèrement être tenus de se conformer à l'obligation qu'impose la Bible — peut-être pas nécessairement l'obligation de disposer de leur propre souccah, mais celle d'« habiter » dans une souccah pendant toute la durée de la fête du Souccoth, soit neuf jours. Bien que la déclaration de copropriété n'interdise pas ouvertement aux appelants d'habiter dans une souccah — ceux-ci demeurant libres de célébrer la fête chez des parents ou dans la souccah commune proposée —, les contraintes qui leur sont imposées par suite de l'application des clauses contestées sont manifestement considérables. Empêcher les appelants d'installer leur propre souccah constitue donc dans les faits une entrave non négligeable à l'exercice de leur droit protégé d'habiter dans une souccah pendant la fête du Souccoth, et entraîne de ce fait une atteinte à ce droit.

Les atteintes ou effets préjudiciables qui seraient causés aux droits des copropriétaires à la jouissance paisible de leurs biens et à la sûreté de leur personne, droits que leur garantissent respectivement les art. 6 et 1 de la *Charte* québécoise, sont, dans les circonstances, tout au plus minimes et ne sauraient raisonnablement être considérés comme ayant pour effet d'imposer des limites valides à l'exercice par les appelants de leur liberté de religion. L'intimé n'a pas produit suffisamment d'éléments de preuve pour permettre de conclure que le fait d'autoriser les appelants à construire de telles souccahs temporaires ferait baisser la valeur des appartements ou de la propriété dans son ensemble. De même, il est impossible de concilier le fait de protéger la jouissance par les copropriétaires de leur bien en préservant l'apparence esthétique des balcons et en rehaussant ainsi l'harmonie externe de l'immeuble avec l'interdiction totale frappant l'exercice par les appelants de leur liberté de religion. La contrariété que pourrait causer l'installation de quelques souccahs pendant neuf jours chaque année

and would pose no threat to safety or security obviated any security concerns under the circumstances. In order to respect the co-owners' property interests, however, the appellants should set up their succahs in a manner that conforms, as much as possible, with the general aesthetics of the property.

Whether one can waive a constitutional right like freedom of religion is a question that is not free from doubt. However, even assuming that an individual can theoretically waive his or her right to freedom of religion, a waiver argument, or an argument analogous to waiver, cannot be maintained on the facts of this case. First, the prohibitions can properly be construed as falling under s. 9.3 of the declaration of co-ownership, which does not absolutely prohibit, but rather, simply requires soliciting the consent of the co-owners to enclose one's balcony. Second, the appellants did not voluntarily, clearly and expressly waive their rights to freedom of religion. They had no choice but to sign the declaration of co-ownership if they wanted to reside at that complex. It would be both insensitive and morally repugnant to intimate that the appellants simply move elsewhere if they take issue with a clause restricting their right to freedom of religion. Further, there is no evidence that the appellants were aware that signing the declaration amounted to a waiver of their rights to freedom of religion. Not only would a general prohibition on constructions, such as the one in the declaration of co-ownership, be insufficient to ground a finding of waiver, but arguably so would any document lacking an explicit reference to the affected *Charter* right.

Per Bastarache, LeBel and Deschamps JJ. (dissenting): Since a religion is a system of beliefs and practices based on certain religious precepts, a nexus between the believer's personal beliefs and the precepts of his or her religion must be established. To rely on his or her conscientious objection a claimant must demonstrate (1) the existence of a religious precept, (2) a sincere belief that the practice dependent on the precept is mandatory, and (3) the existence of a conflict between the practice and the rule.

The claimant must first show that the precept in question is genuinely religious and not secular. The test is reasonable belief in the existence of a religious

serait sans doute bien insignifiante. Enfin, l'offre des appelants d'installer leur souccah respective de manière à ne bloquer aucune porte ni voie d'évacuation en cas d'incendie et à ne compromettre d'aucune façon la sécurité, a permis, dans les circonstances, de dissiper toute inquiétude à cet égard. Toutefois, les appelants devraient installer les souccahs de la manière la plus harmonieuse possible avec l'apparence générale de l'immeuble, afin de respecter les droits de propriété des copropriétaires.

La question de savoir si quelqu'un peut renoncer à un droit constitutionnel comme la liberté de religion soulève encore des interrogations. Cependant, même à supposer qu'il soit théoriquement possible à une personne de renoncer légitimement à son droit à la liberté de religion, les faits de la présente affaire ne permettent pas d'accueillir un argument fondé sur la renonciation ou un argument analogue. Premièrement, on peut à juste titre considérer que la prohibition repose sur l'art. 9.3 de la déclaration de copropriété, qui ne constitue pas une prohibition absolue mais requiert seulement que l'intéressé demande aux copropriétaires l'autorisation de fermer son balcon. Deuxièmement, les appelants n'ont pas renoncé de façon claire, expresse et volontaire à leur droit à la liberté de religion. Ils n'avaient pas d'autre choix que de signer la déclaration de copropriété s'ils voulaient résider dans cet ensemble immobilier. Ce serait un geste à la fois indélicat et moralement répugnant que de suggérer que les appelants aillent tout simplement vivre ailleurs s'ils ne sont pas d'accord avec la clause restreignant leur droit à la liberté de religion. En outre, rien ne démontre que les appelants savaient qu'en signant la déclaration ils renonçaient à leur droit à la liberté de religion. Non seulement une interdiction générale prohibant toute construction, interdiction comme celle prévue par la déclaration de copropriété, serait-elle insuffisante pour justifier un tribunal de conclure à l'existence d'une renonciation, mais on peut également soutenir qu'il en serait de même pour tout document ne mentionnant pas expressément le droit garanti par la *Charte* qui est visé.

Les juges Bastarache, LeBel et Deschamps (dissidents) : Puisque la religion est un système de croyances et de pratiques basées sur certains préceptes religieux, il faut établir un lien entre les croyances personnelles du fidèle et les préceptes de sa religion. Pour faire valoir son objection de conscience, un requérant devra démontrer (1) l'existence d'un précepte religieux, (2) la croyance sincère dans le caractère obligatoire de la pratique découlant de ce précepte, et (3) l'existence d'un conflit entre la pratique et la règle.

Le requérant doit d'abord démontrer qu'est en cause un précepte de nature vraiment religieuse et non séculière. Le critère est celui de la croyance raisonnable en

precept. To this end, expert testimony will be useful, as it can serve to establish the fundamental practices and precepts of a religion the individual claims to practise. In the second step, the claimant must establish that he or she has a sincere belief and that this belief is objectively connected to a religious precept that follows from a text or another article of faith. It is not necessary to prove that the precept objectively creates an obligation, but it must be established that the claimant sincerely believes he or she is under an obligation that follows from the precept. The inquiry into the sincerity of beliefs must be as limited as possible, since it will expose an individual's most personal and private beliefs to public airing and testing in a judicial or quasi-judicial setting. The sincerity of a belief is examined on a case-by-case basis and must be supported by sufficient evidence, which comes mainly from the claimant. Although consistency in religious practice may be indicative of the sincerity of a claimant's beliefs, it is the claimant's overall personal credibility and evidence of his or her current religious practices that matter. The essential test must be the claimant's intention and serious desire to obey the fundamental precepts of his or her religion. Finally, unless the impugned provisions or standards infringe the claimant's rights in a manner that is more than trivial or insubstantial, the freedom of religion guaranteed by the *Charters* is not applicable.

Even if all religious conduct, practices or expression that could infringe or affect the rights of others in a private law context are protected *a priori* by the purpose of freedom of religion, they are not necessarily protected under the right to freedom of religion. According to the first paragraph of s. 9.1 of the Quebec *Charter*, the rights and freedoms subject to s. 9.1, including the right to freedom of religion, must be exercised in relation to one another while maintaining proper regard for democratic values, public order and the general well-being of citizens. The *Civil Code of Québec* is the most important instrument for defining the principles governing public order and the general well-being of the citizens of Quebec. The first paragraph of s. 9.1 requires not merely a balancing of the respective rights of the parties; it is necessary to reconcile all the rights and values at issue and find a balance and a compromise consistent with the public interest in the specific context of the case. The court must ask itself two questions: (1) Has the purpose of the fundamental right been infringed? (2) If so, is this infringement legitimate, taking into account democratic values, public order, and the general well-being? A negative answer to the second question would indicate that a fundamental right has been violated. In the first step of the analysis, the person alleging the infringement must prove that it has occurred.

l'existence d'un précepte religieux. À cet égard, une preuve d'expert s'avère utile, puisqu'elle peut servir à établir les pratiques et préceptes fondamentaux de la religion dont le requérant se réclame. À la deuxième étape, le requérant doit établir qu'il a une croyance sincère, et que cette croyance est objectivement liée à un précepte religieux qui découle d'un texte ou d'un autre article de foi. Il n'est pas nécessaire de prouver que le précepte crée objectivement une obligation, mais il est nécessaire d'établir que le requérant croit sincèrement qu'il a une obligation qui découle de ce précepte. L'enquête sur la sincérité des croyances doit être limitée le plus possible puisqu'elle a pour effet d'exposer les croyances les plus personnelles et les plus intimes d'une personne à la connaissance et au contrôle publics dans un contexte judiciaire ou quasi-judiciaire. La sincérité d'une croyance est examinée au cas par cas et doit s'appuyer sur une preuve suffisante provenant principalement du requérant lui-même. Bien que la constance de la pratique religieuse puisse constituer une indication de la sincérité des croyances du requérant, c'est l'ensemble de la crédibilité personnelle de celui-ci qui importe et la preuve de ses pratiques religieuses courantes. Le critère essentiel doit être celui de l'intention et du désir sérieux de suivre les préceptes fondamentaux de sa religion. Enfin, à moins que les dispositions ou normes contestées n'enfreignent les droits du requérant d'une façon qui est plus que négligeable ou insignifiante, la liberté de religion protégée par les *Chartes* n'entre pas en jeu.

Toutes conduites, pratiques ou manifestations religieuses qui pourraient léser ou affecter les droits d'autrui dans un contexte de droit privé, même si a priori protégées par l'objet de la liberté de religion, ne sont pas nécessairement protégées en vertu du droit à la liberté de religion. Selon l'art. 9.1, al. 1, de la *Charte* québécoise, les droits et libertés assujettis à cet article, y compris le droit à la liberté de religion, doivent s'exercer les uns par rapport aux autres dans le respect des valeurs démocratiques, de l'ordre public et du bien-être général. Le *Code civil du Québec* est l'instrument le plus important pour définir les conditions de l'ordre public et du bien-être général des citoyens du Québec. Le texte de l'art. 9.1, al. 1, ne prescrit pas simplement de soupeser les droits respectifs des parties. Il faut plutôt concilier tous les droits et valeurs en cause et trouver un équilibre et un compromis conformes à l'intérêt général dans le contexte précis de l'affaire. Le tribunal doit se poser les deux questions suivantes : (1) Y a-t-il atteinte à l'objet du droit fondamental? (2) Dans l'affirmative, cette atteinte est-elle licite, compte tenu des valeurs démocratiques, de l'ordre public et du bien-être général? Une réponse négative à cette deuxième question indique qu'il y a violation d'un droit fondamental. À la première étape de l'analyse, celui qui allègue l'atteinte doit la démontrer. Il appartient au

In the second step, the onus is on the defendant to show that the infringement is consistent with the principles underlying s. 9.1. The reconciliation of rights is clearly different from the duty to accommodate in the context of an infringement of the right to equality guaranteed by s. 10 of the *Charter*.

In the case at bar, the prohibition against erecting their own succahs does not infringe the appellants' right to freedom of religion. Based on the evidence that was adduced and accepted, the appellants sincerely believe that, whenever possible, it would be preferable for them to erect their own succahs; however, it would not be a divergence from their religious precept to accept another solution, so long as the fundamental obligation of eating their meals in a succah was discharged. It cannot therefore be accepted that the appellants sincerely believe, based on the precepts of their religion that they are relying on, that they are under an obligation to erect their own succahs on their balconies. It is, rather, the practice of eating or celebrating Succot in a succah that is protected by the guarantee of freedom of religion set out in s. 3 of the Quebec *Charter*. The declaration of co-ownership does not hinder this practice, as it does not bar the appellants from celebrating in a succah, in that they can celebrate Succot at the homes of friends or family or even in a communal succah, as proposed by the respondent.

Assuming that the belief of the appellant A that he must erect a succah on his own balcony is sincere and that it is based on a precept of his religion, the infringement of his right to freedom of religion is legitimate, since the right to erect succahs on balconies cannot be exercised in harmony with the rights and freedoms of others and the general well-being of citizens. The rights of each of the other co-owners to the peaceful enjoyment and free disposition of their property and to life and personal security under ss. 6 and 1, respectively, of the Quebec *Charter* are in conflict with the appellant's freedom of religion. In the case at bar, the right to the peaceful enjoyment and free disposition of one's property is included in the purpose of the restrictions provided for in the declaration of co-ownership. The restrictions are aimed first and foremost at preserving the market value of the dwelling units held in co-ownership. They also protect the co-owners' right to enjoy the common portions reserved for exclusive use while preserving the building's style and its aesthetic appearance of a luxury building and permitting the balconies to be used to evacuate the building in a dangerous situation. The restrictions are justified, in conformity with art. 1056 C.C.Q., by the immovable's destination, characteristics and location. Also, preventing the obstruction of routes between balconies so that they can be used as emergency exits protects the co-owners' right to life and personal security. The argument that succahs can be

défendeur, à la deuxième étape, de démontrer que l'atteinte est conforme aux principes qui sous-tendent l'art. 9.1. L'exercice de conciliation se distingue nettement de l'obligation de trouver un accommodement dans le contexte d'une atteinte au droit à l'égalité garanti par l'art. 10 de la *Charte*.

En l'espèce, l'interdiction de construire sa propre souccah ne porte pas atteinte au droit à la liberté de religion des appelants. D'après la preuve présentée et retenue, les appelants croient sincèrement que, lorsque c'est possible, il est préférable de construire sa propre souccah; cependant, ce ne serait pas un écart par rapport à leur précepte religieux que d'accepter une autre solution, pourvu que l'on respecte l'obligation fondamentale, soit celle de prendre ses repas dans une souccah. On ne peut donc accepter que les appelants croient sincèrement, suivant les préceptes de leur religion qu'ils invoquent, qu'ils ont l'obligation d'avoir leur propre souccah sur leur balcon. C'est plutôt leur pratique de manger ou de célébrer la Souccoth dans une souccah qui est protégée par la liberté de religion à l'art. 3 de la *Charte* québécoise. La déclaration de copropriété ne fait pas obstacle à cette pratique puisqu'elle n'empêche pas les appelants de fêter dans une souccah, en ce sens qu'ils peuvent célébrer la Souccoth chez des parents ou amis, ou même dans une souccah commune, comme l'a proposé l'intimé.

Dans l'hypothèse où la croyance de l'appelant A qu'il doit construire une souccah sur son propre balcon est sincère et qu'elle découle d'un précepte de sa religion, l'atteinte à son droit à la liberté de religion est licite puisque le droit d'ériger des souccahs sur les balcons ne peut s'exercer en harmonie avec les droits et libertés d'autrui et du bien-être en général. Le droit de chacun des autres copropriétaires à la jouissance paisible et à la libre disposition de ses biens et le droit à la vie et à la sûreté, prévus respectivement aux art. 6 et 1 de la *Charte* québécoise, entrent en conflit avec la liberté de religion de l'appelant. Le droit à la jouissance paisible et à la libre disposition de ses biens se manifeste, en l'espèce, dans l'objet des restrictions prévues dans la déclaration de copropriété. D'abord, ces restrictions visent à préserver la valeur marchande des unités de logement détenues en copropriété. Elles protègent également le droit des copropriétaires à la jouissance des parties communes à usage privé en assurant la préservation du cachet de l'immeuble et son esthétisme extérieur comme immeuble luxueux, et en permettant l'utilisation des balcons pour l'évacuation de l'immeuble en cas de danger. Les restrictions sont justifiées par la destination de l'immeuble, ses caractères et sa situation, conformément à l'art. 1056 C.c.Q. De plus, l'empêchement d'obstruer les voies de passage entre les balcons tenant lieu de sortie de secours protège le droit à la vie et à la sûreté de chacun des copropriétaires.

erected without blocking access routes too much if certain conditions are complied with cannot be accepted at this point in the analysis, as it is based on the concept of reasonable accommodation, which is inapplicable in the context of s. 9.1.

The obligation imposed on the appellants to exercise their rights of ownership in harmony with the rights of the other co-owners is not unfair. The declaration of co-ownership was drafted in an effort to preserve the rights of all the co-owners, without distinction. It must also be borne in mind that the erection, as proposed by the respondent, of a communal succah would have had the desired result of upholding not only the parties' contractual rights, but also of the rights guaranteed by ss. 6, 1 and 3 of the Quebec *Charter*. Such a solution would be consistent with the principle that freedom of religion must be exercised within reasonable limits and with respect for the rights of others, subject to such limitations as are necessary to protect public safety, order and health and the fundamental rights and freedoms of others.

Per Binnie J. (dissenting): While freedom or religion as guaranteed by s. 3 of the Quebec *Charter* should be broadly interpreted, the Quebec *Charter* is also concerned in s. 9.1 with a citizen's responsibilities to other citizens in the exercise of their rights and freedoms. Here, the threshold test of bringing the s. 3 claim within the protected zone of religious freedom has been met but, in the circumstances of this case, the appellants cannot reasonably insist on a personal succah.

The succah ritual exists as an article of the Jewish faith and at least one of the appellants sincerely believes that dwelling in his own succah is part of his faith, subject to a measure of flexibility when a personal succah is not available. The construction of a succah on the commonly owned balconies of the building, however, is clearly prohibited by the declaration of co-ownership. Weight must fairly be given to the private contract voluntarily made among the parties to govern their mutual rights and obligations, including the contractual rules contained in the declaration of co-ownership, as well as on the co-owners' offer of accommodation. Buried at the heart of this fact-specific case is the issue of the appellants' acceptance, embodied in the contract with their co-owners, that they would not insist on construction of a personal succah on the communally owned balconies of the building. A person's right to the peaceful enjoyment of his property is one of the rights guaranteed by s. 6 of the Quebec *Charter* and the primary right asserted by the co-owners. Although s. 9.1 does not specifically impose a duty on

L'argument selon lequel les souccahs peuvent être construites sans trop bloquer les voies d'accès si certaines conditions sont respectées ne saurait être retenu à cette étape de l'analyse puisqu'il est fondé sur la notion de l'accommodement raisonnable, qui n'est pas applicable dans le contexte de l'art. 9.1.

L'obligation imposée aux appelants d'exercer leurs droits de propriété en harmonie avec les droits des autres copropriétaires n'est pas inéquitable. La déclaration de copropriété a été rédigée en vue de préserver les droits de tous les copropriétaires sans distinction. Il faut également tenir compte du fait que la construction d'une souccah commune, tel que proposé par l'intimé, aurait permis de parvenir au résultat voulu, soit non seulement le respect des droits contractuels des parties, mais aussi le respect des droits garantis par les art. 6, 1 et 3 de la *Charte* québécoise. Une telle solution est conforme au principe de l'exercice de la liberté de religion dans les limites raisonnables et le respect des droits d'autrui, sujet aux restrictions nécessaires pour que soient préservés la sécurité, l'ordre, la santé et les libertés et droits fondamentaux d'autrui.

Le juge Binnie (dissident) : Bien que la liberté de religion garantie par l'art. 3 de la *Charte* québécoise doive recevoir une interprétation large, l'art. 9.1 de ce texte précise que les citoyens doivent tenir compte de leurs responsabilités envers leurs concitoyens dans l'exercice de leurs droits et libertés. En l'espèce, la revendication fondée sur l'art. 3 satisfait au critère préliminaire permettant d'invoquer la liberté de religion, mais, eu égard à toutes les circonstances, les appelants ne peuvent raisonnablement insister pour avoir leur propre souccah.

Le rituel de la souccah constitue un article de la foi juive et au moins un des appelants croit sincèrement qu'habiter dans sa propre souccah fait partie de sa foi, sous réserve du besoin de manifester une certaine souplesse lorsqu'il n'est pas possible de disposer de sa propre souccah. Toutefois, la déclaration de copropriété interdit clairement l'installation de souccahs sur les balcons de l'immeuble, qui sont des parties communes. Il faut accorder l'importance qu'il convient, d'une part, au contrat privé dont ont volontairement convenu les parties et qui régit leurs obligations et droits respectifs, notamment les règles contractuelles énoncées dans la déclaration de copropriété, et, d'autre part, à la mesure d'accommodement proposée par les copropriétaires. Au cœur du présent litige, qui est particulièrement tributaire des faits qui lui sont propres, se pose la question de l'engagement des appelants, constaté dans le contrat conclu avec les autres copropriétaires, de ne pas insister pour construire des souccahs individuelles sur les balcons de l'immeuble, balcons qui sont des parties communes. Le droit de

third parties to accommodate a claimant, as a practical matter, the reasonableness of the claimant's conduct will be measured, at least to some extent, in light of the reasonableness of the conduct of the co-owners. The text of s. 9.1 puts the focus on the claimant, who must have regard to the facts of communal living, which includes the rights of third parties. Lastly, the reasonableness of a claimant's objection must be viewed from the perspective of a reasonable person in the position of the claimant with full knowledge of the relevant facts. When all the relevant facts of this case are considered, especially the pre-existing rules of the immovable accepted by the appellants as part of the purchase of their units, the appellants have not demonstrated that their insistence on a personal succah and their rejection of the co-owner's accommodation of a group succah show proper regard for the rights of others within the protection of s. 9.1. The appellants themselves were in the best position to determine their religious requirements and must be taken to have done so when entering into the co-ownership agreement in the first place. They cannot afterwards reasonably insist on their preferred solution at the expense of the countervailing legal rights of their co-owners. As found by the trial judge, the accommodation offered by the co-owners was not inconsistent with the appellants' sense of religious obligation in circumstances where a personal succah is simply not available.

Cases Cited

By Iacobucci J.

Referred to: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Re Funk and Manitoba Labour Board* (1976), 66 D.L.R. (3d) 35; *R. v. Jones*, [1986] 2 S.C.R. 284; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989); *R. v. Laws* (1998), 165 D.L.R. (4th) 301; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141;

toute personne à la jouissance paisible de ses biens, qui est l'un des droits garantis par l'art. 6 de la *Charte* québécoise, est le principal droit invoqué par les copropriétaires. Bien que l'art. 9.1 de la *Charte* québécoise n'impose pas expressément à des tiers l'obligation de prendre des mesures d'accommodement en faveur du plaignant, en pratique le caractère raisonnable de la conduite de ce dernier sera, dans une certaine mesure au moins, appréciée au regard du caractère raisonnable de la conduite des copropriétaires. Le texte de l'art. 9.1 fait bien ressortir que le plaignant doit exercer ses droits en tenant compte des réalités de la vie en société, y compris évidemment les droits des tiers. Enfin, la « raisonnabilité » de l'objection du plaignant doit être considérée du point de vue d'une personne raisonnable placée dans la situation de ce dernier et parfaitement informée des faits pertinents. À la lumière de toutes les circonstances, particulièrement les règles de l'immeuble qui existaient et qui ont été acceptées par les appelants lors de l'achat de leur appartement respectif, ceux-ci n'ont pas démontré que leur insistance à pouvoir disposer d'une souccah personnelle et leur rejet de la souccah commune proposée en guise de mesure d'accommodement respectent suffisamment les droits d'autrui protégés par l'art. 9.1. Les appelants eux-mêmes étaient les mieux placés pour déterminer leurs obligations religieuses et il faut supposer qu'ils l'ont fait lorsqu'ils ont conclu la convention de copropriété. Ils ne sauraient insister par la suite pour que la solution qu'ils privilégient soit retenue au détriment des droits opposés des autres copropriétaires. Comme a conclu le juge de première instance, la mesure d'accommodement proposée par les copropriétaires n'était pas incompatible avec ce que les appelants considéraient être leurs obligations religieuses dans les cas où il ne leur est tout simplement pas possible de disposer de leur propre souccah.

Jurisprudence

Citée par le juge Iacobucci

Arrêts mentionnés : *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Colombie-Britannique (Public Service Employee Relations Commission) c. BCGSEU*, [1999] 3 R.C.S. 3; *Colombie-Britannique (Superintendent of Motor Vehicles) c. Colombie-Britannique (Council of Human Rights)*, [1999] 3 R.C.S. 868; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Re Funk and Manitoba Labour Board* (1976), 66 D.L.R. (3d) 35; *R. c. Jones*, [1986] 2 R.C.S. 284; *Ross c. Conseil scolaire du district n^{o} 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825; *Thomas c. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Frazee c. Illinois Department of Employment Security*, 489 U.S. 829 (1989); *R. c. Laws* (1998), 165 D.L.R. (4th) 301; *P. (D.)*

B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202; *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Richard*, [1996] 3 S.C.R. 525; *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844.

By Bastarache J. (dissenting)

Québec (Procureur général) v. Lambert, [2002] R.J.Q. 599; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Bowman v. Secular Society, Ltd.*, [1917] A.C. 406; *R. v. Registrar General, Ex parte Segerdal*, [1970] 2 Q.B. 697; *Barralet v. Attorney General*, [1980] 3 All E.R. 918; *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *R. v. Jones*, [1986] 2 S.C.R. 284; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591; *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, 2002 SCC 85; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Desroches v. Québec (Commission des droits de la personne)*, [1997] R.J.Q. 1540.

By Binnie J. (dissenting)

B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31; *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990); *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 2(*a*).

c. S. (C.), [1993] 4 R.C.S. 141; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315; *Université Trinity Western c. British Columbia College of Teachers*, [2001] 1 R.C.S. 772, 2001 CSC 31; *Insurance Corp. of British Columbia c. Heerspink*, [1982] 2 R.C.S. 145; *Commission ontarienne des droits de la personne c. Municipalité d'Etobicoke*, [1982] 1 R.C.S. 202; *Newfoundland Association of Public Employees c. Terre-Neuve (Green Bay Health Care Centre)*, [1996] 2 R.C.S. 3; *Parry Sound (district), Conseil d'administration des services sociaux c. S.E.E.F.P.O., section locale 324*, [2003] 2 R.C.S. 157, 2003 CSC 42; *R. c. Mills*, [1999] 3 R.C.S. 668; *R. c. Rahey*, [1987] 1 R.C.S. 588; *R. c. Richard*, [1996] 3 R.C.S. 525; *Frenette c. Métropolitaine (La), cie d'assurance-vie*, [1992] 1 R.C.S. 647; *Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844.

Citée par le juge Bastarache (dissident)

Québec (Procureur général) c. Lambert, [2002] R.J.Q. 599; *Colombie-Britannique (Public Service Employee Relations Commission) c. BCGSEU*, [1999] 3 R.C.S. 3; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Bowman c. Secular Society, Ltd.*, [1917] A.C. 406; *R. c. Registrar General, Ex parte Segerdal*, [1970] 2 Q.B. 697; *Barralet c. Attorney General*, [1980] 3 All E.R. 918; *Wisconsin c. Yoder*, 406 U.S. 205 (1972); *Université Trinity Western c. British Columbia College of Teachers*, [2001] 1 R.C.S. 772, 2001 CSC 31; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315; *P. (D.) c. S. (C.)*, [1993] 4 R.C.S. 141; *Ross c. Conseil scolaire du district nº 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825; *R. c. Jones*, [1986] 2 R.C.S. 284; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712; *Aubry c. Éditions Vice-Versa inc.*, [1998] 1 R.C.S. 591; *Prud'homme c. Prud'homme*, [2002] 4 R.C.S. 663, 2002 CSC 85; *Devine c. Québec (Procureur général)*, [1988] 2 R.C.S. 790; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *Desroches c. Québec (Commission des droits de la personne)*, [1997] R.J.Q. 1540.

Citée par le juge Binnie (dissident)

B. (R.) c. Children's Aid Society of Metropolitan Toronto, [1995] 1 R.C.S. 315; *Ross c. Conseil scolaire du district nº 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825; *Université Trinity Western c. British Columbia College of Teachers*, [2001] 1 R.C.S. 772, 2001 CSC 31; *Employment Division, Department of Human Resources of Oregon c. Smith*, 494 U.S. 872 (1990); *Aubry c. Éditions Vice-Versa inc.*, [1998] 1 R.C.S. 591; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 2*a*).

Charter of Human Rights and Freedoms, R.S.Q., c. C-12, preamble, ss. 1, 3, 6, 9.1, 10, 13.
Civil Code of Québec, S.Q. 1991, c. 64, preliminary provision, arts. 1039, 1056, 1063.
United States Constitution, First Amendment.

Authors Cited

Brun, Henri. "Un aspect crucial mais délicat des libertés de conscience et de religion des articles 2 et 3 des Chartes canadienne et québécoise: l'objection de conscience" (1987), 28 *C. de D.* 185.
Brun, Henri, et Guy Tremblay. *Droit constitutionnel*, 4e éd. Cowansville, Qué.: Yvon Blais, 2002.
Chevrette, François. "La disposition limitative de la Charte des droits et libertés de la personne: le dit et le non-dit" (1987), 21 *R.J.T.* 461.
Macklem, Timothy. "Faith as a Secular Value" (2000), 45 *McGill L.J.* 1.
Mill, John Stuart. *On Liberty and Considerations on Representative Government*. Edited by R. B. McCallum. Oxford: Basil Blackwell, 1946.
Quebec. Assemblée nationale. *Journal des débats: Commissions parlementaires*, 3e sess., 32e lég., 16 décembre 1982, p. B-11609.
Shorter Oxford English Dictionary, vol. 2, 5th ed. Oxford: Oxford University Press, 2002, "precept".
Tancelin, Maurice. "L'acte unilatéral en droit des obligations ou l'unilatéralisation du contrat", dans N. Kasirer, dir., *La solitude en droit privé*. Montréal: Thémis, 2002, 214.
Tribe, Laurence H. *American Constitutional Law*, 2nd ed. Mineola, N.Y.: Foundation Press, 1988.
Woehrling, José. "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse" (1998), 43 *McGill L.J.* 325.

APPEAL from judgments of the Quebec Court of Appeal, [2002] R.J.Q. 906, [2002] Q.J. No. 705 (QL), and [2002] Q.J. No. 707 (QL), affirming a judgment of the Superior Court, [1998] R.J.Q. 1892, [1998] Q.J. No. 1959 (QL). Appeal allowed, Bastarache, Binnie, LeBel and Deschamps JJ. dissenting.

Julius H. Grey, *Lynne-Marie Casgrain*, *Elisabeth Goodwin* and *Jean-Philippe Desmarais*, for the appellants Moïse Amselem, Gladys Bouhadana, Antal Klein and Gabriel Fonfeder.

David Matas and *Steven G. Slimovitch*, for the appellant the League for Human Rights of B'Nai Brith Canada.

Charte des droits et libertés de la personne, L.R.Q., ch. C-12, préambule, art. 1, 3, 6, 9.1, 10, 13.
Code civil du Québec, L.Q. 1991, ch. 64, disposition préliminaire, art. 1039, 1056, 1063.
Constitution des États-Unis, Premier amendement.

Doctrine citée

Brun, Henri. « Un aspect crucial mais délicat des libertés de conscience et de religion des articles 2 et 3 des Chartes canadienne et québécoise : l'objection de conscience » (1987), 28 *C. de D.* 185.
Brun, Henri, et Guy Tremblay. *Droit constitutionnel*, 4e éd. Cowansville, Qué. : Yvon Blais, 2002.
Chevrette, François. « La disposition limitative de la Charte des droits et libertés de la personne : le dit et le non-dit » (1987), 21 *R.J.T.* 461.
Macklem, Timothy. « Faith as a Secular Value » (2000), 45 *R.D. McGill* 1.
Mill, John Stuart. *On Liberty and Considerations on Representative Government*. Edited by R. B. McCallum. Oxford : Basil Blackwell, 1946.
Nouveau Petit Robert : Dictionnaire alphabétique et analogique de la langue française. Paris : Dictionnaires Le Robert, 2003, « précepte ».
Québec. Assemblée nationale. *Journal des débats : Commissions parlementaires*, 3e sess., 32e lég., 16 décembre 1982, p. B-11609.
Tancelin, Maurice. « L'acte unilatéral en droit des obligations ou l'unilatéralisation du contrat », dans N. Kasirer, dir., *La solitude en droit privé*. Montréal : Thémis, 2002, 214.
Tribe, Laurence H. *American Constitutional Law*, 2nd ed. Mineola, N.Y. : Foundation Press, 1988.
Woehrling, José. « L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse » (1998), 43 *R.D. McGill* 325.

POURVOI contre les arrêts de la Cour d'appel du Québec, [2002] R.J.Q. 906, [2002] J.Q. nº 705 (QL), et [2002] J.Q. nº 707 (QL), qui ont confirmé un jugement de la Cour supérieure, [1998] R.J.Q. 1892, [1998] A.Q. nº 1959 (QL). Pourvoi accueilli, les juges Bastarache, Binnie, LeBel et Deschamps sont dissidents.

Julius H. Grey, *Lynne-Marie Casgrain*, *Elisabeth Goodwin* et *Jean-Philippe Desmarais*, pour les appelants Moïse Amselem, Gladys Bouhadana, Antal Klein et Gabriel Fonfeder.

David Matas et *Steven G. Slimovitch*, pour l'appelante la Ligue des droits de la personne de B'Nai Brith Canada.

Pierre-G. Champagne and *Yves Joli-Coeur*, for the respondent.

Dale Fedorchuk, *Bradley Minuk* and *Dave Ryan*, for the interveners the Evangelical Fellowship of Canada and the Seventh-day Adventist Church in Canada.

Palbinder K. Shergill, for the intervener the World Sikh Organization of Canada.

Prabhu Rajan, for the intervener the Ontario Human Rights Commission.

The judgment of McLachlin C.J. and Iacobucci, Major, Arbour and Fish JJ. was delivered by

IACOBUCCI J. —

I. Introduction

An important feature of our constitutional democracy is respect for minorities, which includes, of course, religious minorities: see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 79-81. Indeed, respect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy. But respect for religious minorities is not a stand-alone absolute right; like other rights, freedom of religion exists in a matrix of other correspondingly important rights that attach to individuals. Respect for minority rights must also coexist alongside societal values that are central to the make-up and functioning of a free and democratic society. This appeal requires the Court to deal with the interrelationship between fundamental rights both at a conceptual level and for a practical outcome.

More specifically, the cases which are the subject of this appeal involve a religious claim by the appellants for the setting up of a "succah" for nine days a year in the pursuit of their religious beliefs on their co-owned property under the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 (the

Pierre-G. Champagne et *Yves Joli-Coeur*, pour l'intimé.

Dale Fedorchuk, *Bradley Minuk* et *Dave Ryan*, pour les intervenantes l'Alliance évangélique du Canada et l'Église adventiste du septième jour au Canada.

Palbinder K. Shergill, pour l'intervenante World Sikh Organization of Canada.

Prabhu Rajan, pour l'intervenante la Commission ontarienne des droits de la personne.

Version française du jugement de la juge en chef McLachlin et des juges Iacobucci, Major, Arbour et Fish rendu par

LE JUGE IACOBUCCI —

I. Introduction

1 Un aspect important de notre démocratie constitutionnelle est le respect des minorités, parmi lesquelles on compte bien sûr les minorités religieuses : voir *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 79-81. De fait, une attitude respectueuse et tolérante à l'égard des droits et des pratiques des minorités religieuses est une des caractéristiques essentielles d'une démocratie moderne. Cependant le respect des minorités religieuses ne constitue pas un droit autonome et absolu; à l'instar des autres droits, la liberté de religion fait partie d'un ensemble d'autres droits individuels tout aussi importants. Le respect des droits des minorités doit également coexister avec des valeurs sociales qui sont au cœur de la composition et du fonctionnement d'une société libre et démocratique. Dans le présent pourvoi, la Cour est appelée à examiner l'interrelation entre certains droits fondamentaux, tant d'un point de vue conceptuel que d'un point de vue pratique.

2 Plus précisément, dans les affaires qui font l'objet du présent pourvoi les appelants revendiquent, en vertu de la *Charte des droits et libertés de la personne* du Québec, L.R.Q., ch. C-12 (la « *Charte* québécoise »), le droit d'installer une « souccah » pendant neuf jours chaque année dans l'immeuble

Amendment to the U.S. Constitution, I believe that it is equally applicable to delimiting the court's role in interpreting religious freedom under the Quebec (or the Canadian) *Charter*. Indeed, the court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Otherwise, nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings.

53 Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony (see Woehrling, *supra*, at p. 394), as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices. It is important to underscore, however, that it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Over the course of a lifetime, individuals change and so can their beliefs. Religious beliefs, by their very nature, are fluid and rarely static. A person's connection to or relationship with the divine or with the subject or object of his or her spiritual faith, or his or her perceptions of religious obligation emanating from such a relationship, may well change and evolve over time. Because of the vacillating nature of religious belief, a court's inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom.

54 A claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. While such evidence may be relevant to a demonstration of sincerity, it is not necessary. Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to

Law (2e éd. 1988), p. 1245-1246. Bien que cette remarque concerne le Premier amendement de la Constitution américaine, j'estime qu'elle permet également de délimiter le rôle des tribunaux dans l'interprétation de la liberté de religion garantie par la *Charte* québécoise (ou la *Charte* canadienne). De fait, dans l'appréciation de la sincérité, le tribunal doit uniquement s'assurer que la croyance religieuse invoquée est avancée de bonne foi, qu'elle n'est ni fictive ni arbitraire et qu'elle ne constitue pas un artifice. Autrement, il faudrait rien de moins qu'une inquisition religieuse pour parvenir à découvrir les convictions les plus intimes des êtres humains.

L'appréciation de la sincérité est une question de fait qui repose sur une liste non exhaustive de critères, notamment la crédibilité du témoignage du demandeur (voir Woehrling, *loc. cit.*, p. 394) et la question de savoir si la croyance invoquée par le demandeur est en accord avec les autres pratiques religieuses courantes de celui-ci. Cependant il est important de souligner qu'il ne convient pas que le tribunal analyse rigoureusement les pratiques antérieures du demandeur pour décider de la sincérité de ses croyances courantes. Tout comme une personne change au fil des ans, ses croyances peuvent elles aussi changer. De par leur nature même, les croyances religieuses sont fluides et rarement statiques. Il peut fort bien arriver que le lien ou les rapports d'une personne avec le divin ou avec le sujet ou l'objet de sa foi spirituelle, ou encore sa perception de l'obligation religieuse découlant de ces rapports changent et évoluent avec le temps. Vu le caractère mouvant des croyances religieuses, l'examen par le tribunal de la sincérité de la croyance doit s'attacher non pas aux pratiques ou croyances antérieures de la personne, mais plutôt à ses croyances au moment de la prétendue atteinte à la liberté de religion.

Le demandeur peut présenter une preuve d'expert pour démontrer que ses croyances correspondent aux pratiques et croyances des autres disciples de sa religion. Bien qu'une telle preuve puisse être pertinente pour établir la sincérité de la croyance, elle n'est pas nécessaire. Comme l'examen ne porte pas sur la perception qu'ont les autres des obligations religieuses du demandeur, mais sur ce que ce dernier considère subjectivement comme étant ces

require expert opinions to show sincerity of belief. An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.

This approach to freedom of religion effectively avoids the invidious interference of the State and its courts with religious belief. The alternative would undoubtedly result in unwarranted intrusions into the religious affairs of the synagogues, churches, mosques, temples and religious facilities of the nation with value-judgment indictments of those beliefs that may be unconventional or not mainstream. As articulated by Professor Tribe, *supra*, at p. 1244, "an intrusive government inquiry into the nature of a claimant's beliefs would in itself threaten the values of religious liberty".

Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

(2) Infringement of Religious Freedom

Once an individual has shown that his or her religious freedom is triggered, as outlined above, a court must then ascertain whether there has been enough of an interference with the exercise of the

« obligations » religieuses, il ne convient pas d'exiger qu'il produise des opinions d'expert pour établir la sincérité de sa croyance. Un « expert » ou une autorité en droit religieux ne saurait remplacer l'affirmation par l'intéressé de ses croyances religieuses. Celles-ci ont un caractère éminemment personnel et peuvent facilement varier d'une personne à l'autre. Exiger la preuve des pratiques établies d'une religion pour apprécier la sincérité de la croyance diminue la liberté même que l'on cherche à protéger.

55 Cette interprétation de la liberté de religion permet dans les faits d'éviter que l'État et ses tribunaux ne s'ingèrent de façon indue dans les croyances religieuses. La solution inverse donnerait indubitablement lieu à des intrusions injustifiées dans les affaires religieuses des synagogues, églises, mosquées, temples et autres lieux du culte du pays et la condamnation de croyances minoritaires ou non traditionnelles à partir de jugements de valeur. Comme l'a exprimé le professeur Tribe, *op. cit.*, p. 1244, [TRADUCTION] « une enquête envahissante de l'État dans la nature des croyances d'un demandeur mettrait en péril les valeurs fondant la liberté de religion ».

56 Par conséquent, à la première étape de l'analyse de la liberté de religion, la personne qui présente un argument fondé sur cette liberté doit démontrer (1) qu'elle possède une pratique ou une croyance qui est liée à la religion et requiert une conduite particulière, soit parce qu'elle est objectivement ou subjectivement obligatoire ou coutumière, soit parce que, subjectivement, elle crée de façon générale un lien personnel avec le divin ou avec le sujet ou l'objet de sa foi spirituelle, que cette pratique ou croyance soit ou non requise par un dogme religieux officiel ou conforme à la position de représentants religieux; (2) que sa croyance est sincère. Ce n'est qu'une fois cette démonstration faite que la liberté de religion entre en jeu.

(2) Atteinte à la liberté de religion

57 Dès que l'intéressé a démontré, suivant les étapes que je viens de décrire, que sa liberté de religion était en jeu, le tribunal doit déterminer si l'entrave à l'exercice de ce droit est suffisante pour constituer

implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) *Charter*.

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

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

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

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

59 It consequently suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs in a

une atteinte à la liberté de religion garantie par la *Charte* québécoise (ou la *Charte* canadienne).

De façon plus particulière, comme l'a indiqué la juge Wilson dans ses motifs de dissidence dans l'arrêt *Jones*, précité, p. 314 :

> L'alinéa 2*a*) n'oblige pas le législateur à n'entraver d'aucune manière la pratique religieuse. L'action législative ou administrative dont l'effet sur la religion est négligeable, voire insignifiant, ne constitue pas à mon avis une violation de la liberté de religion. [Je souligne.]

L'alinéa 2*a*) de la *Charte* canadienne n'interdit que les entraves ou obstacles à une pratique religieuse qui ne sont pas négligeables. Cette position a été confirmée et adoptée par le juge en chef Dickson, qui s'exprimait pour la majorité dans *Edwards Books*, précité, p. 759 :

> Toute entrave coercitive à l'exercice de croyances religieuses relève potentiellement de l'al. 2*a*).
>
> Cela ne veut pas dire cependant que toute entrave à certaines pratiques religieuses porte atteinte à la liberté de religion garantie par la Constitution. [. . .] L'alinéa 2*a*) n'exige pas que les législatures éliminent tout coût, si infime soit-il, imposé par l'État relativement à la pratique d'une religion. Autrement, la *Charte* offrirait une protection contre une mesure législative laïque aussi inoffensive qu'une loi fiscale qui imposerait une taxe de vente modeste sur tous les produits, y compris ceux dont on se sert pour le culte religieux. À mon avis, il n'est pas nécessaire d'invoquer l'article premier pour justifier une telle mesure législative. [. . .] La Constitution ne protège les particuliers et les groupes que dans la mesure où des croyances ou un comportement d'ordre religieux pourraient être raisonnablement ou véritablement menacés. Pour qu'un fardeau ou un coût imposé par l'État soit interdit par l'al. 2*a*), il doit être susceptible de porter atteinte à une croyance ou pratique religieuse. Bref, l'action législative ou administrative qui accroît le coût de la pratique ou de quelque autre manifestation des croyances religieuses n'est pas interdite si le fardeau ainsi imposé est négligeable ou insignifiant : voir à ce sujet l'arrêt *R. c. Jones*, [1986] 2 R.C.S. 284, le juge Wilson, à la p. 314. [Je souligne.]

Par conséquent, le demandeur n'a qu'à démontrer que la disposition législative ou contractuelle (ou la conduite) contestée entrave d'une manière plus que négligeable ou insignifiante sa capacité

manner that is more than trivial or insubstantial. The question then becomes: what does this mean?

At this stage, as a general matter, one can do no more than say that the context of each case must be examined to ascertain whether the interference is more than trivial or insubstantial. But it is important to observe what examining that context involves.

In this respect, it should be emphasized that not every action will become summarily unassailable and receive automatic protection under the banner of freedom of religion. No right, including freedom of religion, is absolute: see, e.g., *Big M*, *supra*; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at p. 182; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 226; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 29. This is so because we live in a society of individuals in which we must always take the rights of others into account. In the words of John Stuart Mill: "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it": *On Liberty and Considerations on Representative Government* (1946), at p. 11. In the real world, oftentimes the fundamental rights of individuals will conflict or compete with one another.

Freedom of religion, as outlined above, quite appropriately reflects a broad and expansive approach to religious freedom under both the Quebec *Charter* and the Canadian *Charter* and should not be prematurely narrowly construed. However, our jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of

d'agir en conformité avec ses croyances religieuses. Il faut maintenant déterminer ce que cela signifie.

60 À ce stade-ci, on doit généralement se contenter de dire que chaque cas doit être examiné au regard du contexte qui lui est propre pour déterminer si l'entrave est plus que négligeable ou insignifiante. Il importe toutefois de se demander ce qu'implique l'examen du contexte.

61 À cet égard, il convient de souligner qu'un acte ne devient pas inattaquable ni protégé d'office du seul fait qu'on invoque la liberté de religion. Aucun droit — y compris la liberté de religion — n'est absolu : voir notamment *Big M*, précité; *P. (D.) c. S. (C.)*, [1993] 4 R.C.S. 141, p. 182; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, par. 226; *Université Trinity Western c. British Columbia College of Teachers*, [2001] 1 R.C.S. 772, 2001 CSC 31, par. 29. Il en est ainsi parce que nous vivons dans une société où chacun doit toujours tenir compte des droits d'autrui. Pour reprendre les propos de John Stuart Mill : [TRADUCTION] « La seule liberté digne de ce nom est de travailler à notre propre avancement à notre gré, aussi longtemps que nous ne cherchons pas à priver les autres du leur ou à entraver leurs efforts pour l'obtenir » : *On Liberty and Considerations on Representative Government* (1946), p. 11. Dans la réalité, il arrive souvent que les droits fondamentaux d'une personne entrent en conflit ou en opposition avec ceux d'autrui.

62 La liberté de religion, telle qu'elle a été définie plus haut, correspond bien à l'interprétation large et libérale de cette liberté garantie par la *Charte* québécoise et la *Charte* canadienne et ne devrait pas être prématurément interprétée de façon restrictive. Toutefois, notre jurisprudence n'autorise pas les gens à accomplir n'importe quel acte en son nom. Par exemple, même si une personne démontre qu'elle croit sincèrement au caractère religieux d'un acte ou qu'une pratique donnée crée subjectivement un lien véritable avec le divin ou avec le sujet ou l'objet de sa foi, et même si elle parvient à prouver l'existence d'une entrave non négligeable à cette pratique, elle doit en outre tenir compte de l'incidence de l'exercice de son droit sur ceux d'autrui.

WEST VIRGINIA STATE BOARD OF EDUCATION ET AL. v. BARNETTE ET AL.

No. 591

SUPREME COURT OF THE UNITED STATES

319 U.S. 624; 63 S. Ct. 1178; 87 L. Ed. 1628; 1943 U.S. LEXIS 490; 147 A.L.R. 674

March 11, 1943, Argued
June 14, 1943, Decided

PRIOR HISTORY: APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

APPEAL from a decree of a District Court of three judges enjoining the enforcement of a regulation of the West Virginia State Board of Education requiring children in the public schools to salute the American flag.

DISPOSITION: 47 F.Supp. 251, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant board of education enacted a regulation that required children in public schools to salute the American flag. Appellee religious organization sought an injunction to restrain enforcement of the regulation. The United States District Court for the Southern District of West Virginia enjoined the enforcement of the board's regulation. The board of education appealed.

OVERVIEW: The religious organization considered the flag to be an "image," and the act of saluting constituted a type of worship forbidden by their religious beliefs. Children of the religious organization had been expelled from school for failing to salute the American flag. Parents of such children were threatened with prosecutions for causing delinquency. The board asserted that it had the power to impose such a regulation and that it was not unconstitutional. The court held that the flag salute was a form of utterance protected by the First Amendment. The board's actions compelling the flag salute and pledge transcended the constitutional limitations of their power. The board was unable to restrict the religious organization's freedoms as expressed under the First Amendment. The court held that the action of the local authorities in compelling the flag salute and pledge transcended constitutional limitations on their power and invaded the sphere of intellect and spirit which was the purpose of the First Amendment to reserve from all official control.

OUTCOME: The court affirmed the judgment of the district court.

CORE TERMS: religious, flag, conscience, salute, flag salute, public schools, religion, scruples, symbol, educational, pledge, compulsion, religious freedom, compulsory, allegiance, ceremony, obedience, offend, prescribe, immunity, wisdom, unity, citizenship, pupils, evil, religious beliefs, national unity, clear and present danger, conscientious, attendance

LexisNexis(R) Headnotes

Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Authority
Education Law > Departments of Education > State Departments of Education > Authority
[HN1] See W. Va. Code ß 1734 (1941).

Education Law > Departments of Education > State Departments of Education > Authority

[HN2] See W. Va. Code ß 1851(1) (1941).

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Education Law > Administration & Operation > Boards of Elementary & Secondary Schools > Authority
[HN3] The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures, Boards of Education not excepted.

Civil Procedure > Justiciability > Standing > General Overview
Governments > Legislation > Interpretation
Governments > Legislation > Types of Statutes
[HN4] Section 7 of House Joint Resolution 359, 36 U.S.C.S. ß 172, prescribes no penalties for nonconformity but provides: That the pledge of allegiance to the flag, I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all, be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Assembly
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > General Overview
Governments > Legislation > Vagueness
[HN5] The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First Amendment, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

LAWYERS' EDITION HEADNOTES:

CONSTITUTIONAL LAW, ß525 ;

guaranty of liberty -- requiring public school pupils to salute the flag. -- ;

Headnote:[1]

The action of a State Board of Education in requiring public school pupils to salute the flag of the United States while reciting a pledge of allegiance, under penalty of expulsion entailing a liability of both pupil and parents to be proceeded against for unlawful absence, transcends constitutional limitations and invades the sphere of intellect and spirit of which it is the purpose of the First and Fourteenth Amendments of the Constitution to reserve from all official control.

CONSTITUTIONAL, LAW, ß925;

freedom of speech, press, assembly, and worship -- when may be restricted. -- ;

Headnote:[2]

Freedoms of speech and of press, and of assembly, and of worship, are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

[3]

Minersville School District v. Gobitis, 310 US 586, 60 S Ct 1010, 127 ALR 1493, 84 L ed 1375, overruled.

SYLLABUS

1. State action against which the Fourteenth Amendment protects includes action by a state board of education. P. 637.

2. The action of a State in making it compulsory for children in the public schools to salute the flag and pledge allegiance -- by extending the right arm, palm upward, and declaring, "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all" -- violates the First and Fourteenth Amendments. P. 642.

So *held* as applied to children who were expelled for refusal to comply, and whose absence thereby became "unlawful," subjecting them and their parents or guardians to punishment.

3. That those who refused compliance did so on religious grounds does not control the decision of this question; and it is unnecessary to inquire into the sincerity of their views. P. 634.

4. Under the Federal Constitution, compulsion as here employed is not a permissible means of achieving "national unity." P. 640.

5. *Minersville School Dist*. v. *Gobitis*, 310 U.S. 586, overruled; *Hamilton* v. *Regents*, 293 U.S. 245, distinguished. Pp. 642, 632.

COUNSEL: Mr. W. Holt Wooddell, Assistant Attorney General of West Virginia, with whom Mr. Ira J. Partlow was on the brief, for appellants.

Mr. Hayden C. Covington for appellees.

Briefs of amici curiae were filed on behalf of the Committee on the Bill of Rights, of the American Bar Association, consisting of Messrs. Douglas Arant, Julius Birge, William D. Campbell, Zechariah Chafee, Jr., L. Stanley Ford, Abe Fortas, George I. Haight, H. Austin Hauxhurst, Monte M. Lemann, Alvin Richards, Earl F. Morris, Burton W. Musser, and Basil O'Connor; and by Messrs. Osmond K. Fraenkel, Arthur Garfield Hays, and Howard B. Lee, on behalf of the American Civil Liberties Union, -- urging affirmance; and by Mr. Ralph B. Gregg, on behalf of the American Legion, urging reversal.

JUDGES: Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge

OPINION BY: JACKSON

OPINION

[*625] [1179] [***1630]** MR. JUSTICE JACKSON delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in *Minersville School District* v. *Gobitis*, 310 U.S. 586, **[***1631]** the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government." Appellant **[*626]** Board of Education was directed, with advice of the State Superintendent of Schools, to "prescribe the courses of study covering these subjects" for public schools. The Act made it the duty of private, parochial and denominational schools to prescribe courses of study "similar to those required for the public schools." [1]

1 [HN1] ß 1734, West Virginia Code (1941 Supp.):

"In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the State of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government of the United States and of the state of West Virginia. The state board of education shall, with the advice of the state superintendent of schools, prescribe the courses of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools."

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's *Gobitis* opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public

schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly." [2]

2 The text is as follows:

"WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

"WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

"WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

"WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitution; that the Flag is the symbol of the Nation's power; that emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

"WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

"Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States -- the right hand is placed upon the breast and the following pledge repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all' -- now becomes a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute, honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly."

[*627] The resolution originally required the " **[**1180]** commonly accepted salute **[***1632]** to the Flag" which it defined. Objections to the salute as "being too much like Hitler's" were raised by the Parent and Teachers Association, the Boy and Girl **[*628]** Scouts, the Red Cross, and the Federation of Women's Clubs. [3] Some modification appears to have been made in deference to these objections, but no concession was made to Jehovah's Witnesses. [4] What is now required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up **[**1181]** while the following is repeated: "I pledge allegiance to the Flag of the United States of **[*629]** America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

3 The National Headquarters of the United States Flag Association takes the position that the extension of the right arm in this salute to the flag is not the Nazi-Fascist salute, "although quite similar to it. In the Pledge to the Flag the right arm is extended and raised, palm UPWARD, whereas the Nazis extend the arm practically *straight to the front* (the finger tips being about even with the eyes), *palm* DOWNWARD, and the Fascists do the same except they raise the arm slightly higher." James A. Moss, The Flag of the United States: Its History and Symbolism (1914) 108.

4 They have offered in lieu of participating in the flag salute ceremony "periodically and publicly" to give the following pledge:

"I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.

"I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.

"I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible."

Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is "unlawfully absent" [5] and may be proceeded against **[***1633]** as a delinquent. [6] His parents or guardians are liable to prosecution, [7] and if convicted are subject to fine not exceeding $ 50 and jail term not exceeding thirty days. [8]

5 [HN2] ß 1851 (1), West Virginia Code (1941 Supp.):

"If a child be dismissed, suspended, or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and/or state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from school during the time he refuses to comply with such requirements and regulations, and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school."

6 ß 4904 (4), West Virginia Code (1941 Supp.).

7 See Note 5, *supra*.

8 ßß 1847, 1851, West Virginia Code (1941 Supp.).

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it.

[*630] Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.

The Board of Education moved to dismiss the complaint setting forth these facts and alleging that the law and regulations are an unconstitutional denial of religious freedom, and of freedom of speech, and are invalid under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Federal Constitution. The cause was submitted on the pleadings to a District Court of three judges. It restrained enforcement as to the plaintiffs and those of that class. The Board of Education brought the case here by direct appeal. [9]

9 ß 266 of the Judicial Code, 28 U. S. C. ß 380.

[1]This case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do. [10] Before turning to the *Gobitis* case, however, it is desirable to notice certain characteristics by which this controversy is distinguished.

10 See authorities cited in *Helvering* v. *Griffiths*, 318 U.S. 371, 401, note 52.

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce **[*631]** attendance by punishing both

parent and child. The latter stand on a right **[**1182]** of self-determination in matters that touch individual opinion and personal attitude.

As the present CHIEF JUSTICE said in dissent in the *Gobitis* case, the State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including **[***1634]** the guaranties of civil liberty, which tend to inspire patriotism and love of country." 310 U.S. at 604. Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected [11] route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan. [12] This issue is not prejudiced by **[*632]** the Court's previous holding that where a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. It was held that those who take advantage of its opportunities may not on ground of conscience refuse compliance with such conditions. *Hamilton* v. *Regents*, 293 U.S. 245. In the present case attendance is not optional. That case is also to be distinguished from the present one because, independently of college privileges or requirements, the State has power to raise militia and impose the duties of service therein upon its citizens.

11 See the nation-wide survey of the study of American history conducted by the New York Times, the results of which are published in the issue of June 21, 1942, and are there summarized on p. 1, col. 1, as follows:

"82 per cent of the institutions of higher learning in the United States do not require the study of United States history for the undergraduate degree. Eighteen per cent of the colleges and universities require such history courses before a degree is awarded. It was found that many students complete their four years in college without taking any history courses dealing with this country.

"Seventy-two per cent of the colleges and universities do not require United States history for admission, while 28 per cent require it. As a result, the survey revealed, many students go through high school, college and then to the professional or graduate institution without having explored courses in the history of their country.

"Less than 10 per cent of the total undergraduate body was enrolled in United States history classes during the Spring semester just ended. Only 8 per cent of the freshman class took courses in United States history, although 30 per cent was enrolled in European or world history courses."

12 The Resolution of the Board of Education did not adopt the flag salute because it was claimed to have educational value. It seems to have been concerned with promotion of national unity (see footnote 2), which justification is considered later in this opinion. No information as to its educational aspect is called to our attention except Olander, Children's Knowledge of the Flag Salute, 35 Journal of Educational Research 300, 305, which sets forth a study of the ability of a large and representative number of children to remember and state the meaning of the flag salute which they recited each day in school. His conclusion was that it revealed "a rather pathetic picture of our attempts to teach children not only the words but the meaning of our Flag Salute."

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 **[*633]** **[***1635]** symbol the meaning he puts into it, and **[**1183]** what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. *Stromberg* v. *California*, 283 U.S. 359. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights. [13]

13 Early Christians were frequently persecuted for their refusal to participate in ceremonies before the statute of the emperor or other symbol of imperial authority. The story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat is an ancient one. 21 Encyclopedia Britannica (14th ed.) 911-912. The Quakers, William Penn included, suffered punishment rather than uncover their

heads in deference to any civil authority. Braithwaite, The Beginnings of Quakerism (1912) 200, 229-230, 232-233, 447, 451; Fox, Quakers Courageous (1941) 113.

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion **[*634]** is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. [14] If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

14 For example: Use of "Republic," if rendered to distinguish our government from a "democracy," or the words "one Nation," if intended to distinguish it from a "federation," open up old and bitter controversies in our political history; "liberty and justice for all," if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement.

Nor does the issue as we see it turn on one's possession of particular **[***1636]** religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views **[*635]** hold such a compulsory rite to infringe constitutional liberty of the individual. [15] It is not necessary to inquire whether non-conformist beliefs will exempt **[**1184]** from the duty to salute unless we first find power to make the salute a legal duty.

15 Cushman, Constitutional Law in 1939-40, 35 American Political Science Review 250, 271, observes: "All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public." For further criticism of the opinion in the *Gobitis* case by persons who do not share the faith of the Witnesses see: Powell, Conscience and the Constitution, in Democracy and National Unity (University of Chicago Press, 1941) 1; Wilkinson, Some Aspects of the Constitutional Guarantees of Civil Liberty, 11 Fordham Law Review 50; Fennell, The "Reconstructed Court" and Religious Freedom: The Gobitis Case in Retrospect, 19 New York University Law Quarterly Review 31; Green, Liberty under the Fourteenth Amendment, 27 Washington University Law Quarterly 497; 9 International Juridical Association Bulletin 1; 39 Michigan Law Review 149; 15 St. John's Law Review 95.

The *Gobitis* decision, however, *assumed*, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. [16] The question which underlies the **[*636]** flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, reexamine specific grounds assigned for the *Gobitis* decision.

16 The opinion says "That the flag-salute is an allowable portion of a school program *for those who do not invoke conscientious scruples* is *surely not debatable*. But for us to insist that, *though the ceremony may be required, exceptional immunity must be given to dissidents*, is to

maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise." (Italics ours.) 310 U.S. at 599-600. And elsewhere the question under consideration was stated, "When does the constitutional guarantee *compel exemption* from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good?" (Italics ours.) *Id*. at 593. And again, ". . . whether school children, like the Gobitis children, must be *excused from conduct required of all the other children* in the promotion of national cohesion. . . ." (Italics ours.) *Id*. at 595.

1. It was said that the flag-salute controversy confronted the Court with "the problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?'" and that the answer must be in favor of strength. *Minersville School District* v. *Gobitis, supra*, at 596.

We think these issues may be examined free of pressure or restraint growing out of such considerations.

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the State to expel a handful of children from school. Such oversimplification, so handy in political debate, **[***1637]** often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by **[**1185]** making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is **[*637]** doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

The subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.

2. It was also considered in the *Gobitis* case that functions of educational officers in States, counties and school districts were such that to interfere with their authority "would in effect make us the school board for the country." *Id*. at 598.

[HN3] The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account. **[*638]** The action of Congress in making flag observance voluntary [17] and respecting the conscience of the objector in a matter so vital as raising the Army [18] contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.

17 [HN4] Section 7 of House Joint Resolution 359, approved December 22, 1942, 56 Stat. 1074, 36 U. S. C. (1942 Supp.) ß 172, prescribes no penalties for nonconformity but provides:

"That the pledge of allegiance to the flag, 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all,' be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress . . ."

18 ß 5 (a) of the Selective Training and Service Act of 1940, 50 U. S. C. (App.) ß 307 (g).

3. The *Gobitis* opinion reasoned that this is a field "where courts possess no marked and certainly no controlling competence," that it is committed to the legislatures as well as the courts to guard cherished liberties and that it is constitu-

tionally **[***1638]** appropriate to "fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena," since all the "effective means of inducing political changes are left free." *Id*. at 597-598, 600.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted **[**1186]** to vote; they depend on the outcome of no elections.

[*639] [2]In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. [HN5] The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision **[*640]** over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

4. Lastly, and this is the very heart of the *Gobitis* opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures **[***1639]** toward "national unity" are constitutional. *Id*. at 595. Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. **[*641]** As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson **[**1187]** of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal

opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism **[*642]** and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. [19]

19 The Nation may raise armies and compel citizens to give military service. *Selective Draft Law Cases*, 245 U.S. 366. It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life.

We think the action of the local **[***1640]** authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

[3]The decision of this Court in *Minersville School District* v. *Gobitis* and the holdings of those few *per curiam* decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is

Affirmed.

MR. JUSTICE ROBERTS and MR. JUSTICE REED adhere to the views expressed by the Court in *Minersville School* **[*643]** *District* v. *Gobitis*, 310 U.S. 586, and are of the opinion that the judgment below should be reversed.

CONCUR BY: BLACK; DOUGLAS; MURPHY

CONCUR

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, concurring:

We are substantially in agreement with the opinion just read, but since we originally joined with the Court in the *Gobitis* case, it is appropriate that we make a brief statement of reasons for our change of view.

Reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare was the controlling influence which moved us to consent to the *Gobitis* decision. Long reflection convinced us that although the principle is sound, its application **[**1188]** in the particular case was wrong. *Jones* v. *Opelika*, 316 U.S. 584, 623. We believe that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the First and Fourteenth Amendments.

The statute requires the appellees to participate in a ceremony aimed at inculcating respect for the flag and for this country. The Jehovah's Witnesses, without any desire to show disrespect for either the flag or the country, interpret the Bible as commanding, at the risk of God's displeasure, that they not go through the form of a pledge of allegiance to any flag. The devoutness of their belief is evidenced by their willingness to suffer persecution and punishment, rather than make the pledge.

No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave **[*644]** and pressingly imminent dangers or which, without any general

prohibition, merely regulate time, place or manner of religious activity. Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and in meeting it we cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United States.

Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints **[***1641]** consistent with a society of free men.

Neither our domestic tranquillity in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose.

MR. JUSTICE MURPHY, concurring:

I agree with the opinion of the Court and join in it.

The complaint challenges an order of the State Board of Education which requires teachers and pupils to participate in the prescribed salute to the flag. For refusal to conform with the requirement, the State law prescribes expulsion. **[*645]** The offender is required by law to be treated as unlawfully absent from school and the parent or guardian is made liable to prosecution and punishment for such absence. Thus not only is the privilege of public education conditioned on compliance with the requirement, but noncompliance is virtually made unlawful. In effect compliance is compulsory and not optional. It is the claim of appellees that the regulation is invalid as a restriction on religious freedom and freedom of speech, secured to them against State infringement by the First and Fourteenth Amendments to the Constitution of the United States.

A reluctance to interfere with considered state action, the fact that the end sought is a desirable one, the emotion aroused by the flag as a symbol for which we have fought and are now fighting again, -- all of these are understandable. But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches.

The right of freedom of thought and of religion as guaranteed by the Constitution **[**1189]** against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society, -- as in the case of compulsion to give evidence in court. Without wishing to disparage the purposes and intentions of those who hope to inculcate sentiments of loyalty and patriotism by requiring a declaration of allegiance as a feature of public education, or unduly belittle the benefits that may accrue therefrom, I am impelled to conclude that such a requirement is not essential to the maintenance of effective government and orderly society. To many it is deeply distasteful to join in a public chorus of affirmation of private belief. By some, including **[*646]** the members of this sect, it is apparently regarded as incompatible with a primary religious obligation and therefore a restriction on religious freedom. Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the "severest contests in which I have ever been engaged." [1]

1 See Jefferson, Autobiography, vol. 1, pp. 53-59.

I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination. The trenchant words in the preamble to the Virginia Statute for Religious Freedom **[***1642]** remain unanswerable: ". . . all attempts to influence [the mind] by temporal punishments, or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, . . ." Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshad-

owed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.

DISSENT BY: FRANKFURTER

DISSENT

MR. JUSTICE FRANKFURTER, dissenting:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and **[*647]** action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, **[**1190]** namely, the promotion of good citizenship, by employment of the means here chosen.

Not so long ago we were admonished that "the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government." **[*648]** *United States* v. *Butler*, 297 U.S. 1, 79 (dissent). We have been told that generalities do not decide concrete cases. But the intensity with which a general principle is held may determine a particular issue, and whether we put first things first may decide a specific controversy.

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power when dealing with one phase of "liberty" than with another, or when dealing with grade school regulations than with college regulations that offend conscience, as was the case in *Hamilton* v. *Regents*, 293 U.S. 245. In neither situation is our function comparable to that of a legislature **[***1643]** or are we free to act as though we were a super-legislature. Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court's authority for attributing different roles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. In no instance is this Court the primary protector of the particular liberty that is invoked. This Court has recognized, what hardly could be denied, that all the provisions of the first ten Amendments are "specific" prohibitions, *United States* v. *Carolene Products Co*., 304 U.S. 144, 152, n. 4. But each specific Amendment, in so far as embraced within the Fourteenth Amendment, must be equally respected, and the function of this **[*649]** Court does not differ in passing on the constitutionality of legislation challenged under different Amendments.

When Mr. Justice Holmes, speaking for this Court, wrote that "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts," *Missouri, K. & T. Ry. Co*. v. *May*, 194 U.S. 267, 270, he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and role of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that

responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.

The framers of the federal Constitution might have chosen to assign an active share in the process of legislation to this Court. They had before them the well-known example of New York's Council of Revision, which had been functioning since 1777. After stating that "laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed," the state constitution made the judges of New York part of the legislative process by providing that "all bills which have passed the senate and assembly shall, before they become laws," be presented to a Council of which the judges constituted a majority, "for their revisal and consideration." Art. III, New York Constitution of 1777. Judges exercised this legislative function in New York **[*650]** for nearly fifty years. See Art. I, ß 12, New York Constitution of 1821. But the framers of the Constitution denied such legislative powers to the federal judiciary. **[**1191]** They chose instead to insulate the judiciary from the legislative function. They did not grant to this Court supervision over legislation.

The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, **[***1644]** as this Court has frequently recognized, for the greatest caution in its use.

The precise scope of the question before us defines the limits of the constitutional power that is in issue. The State of West Virginia requires all pupils to share in the salute to the flag as part of school training in citizenship. The present action is one to enjoin the enforcement of this requirement by those in school attendance. We have not before us any attempt by the State to punish disobedient children or visit penal consequences on their parents. All that is in question is the right of the State to compel participation in this exercise by those who choose to attend the public schools.

We are not reviewing merely the action of a local school board. The flag salute requirement in this case comes before us with the full authority of the State of West Virginia. We are in fact passing judgment on "the power of the State as a whole." *Rippey* v. *Texas*, 193 U.S. 504, 509; *Skiriotes* v. *Florida*, 313 U.S. 69, 79. Practically we are passing upon the political power of each of the forty-eight states. Moreover, since the First Amendment has been read into the Fourteenth, our problem is precisely the same as it would be if we had before us an Act of Congress for the District of Columbia. To suggest that we are here concerned **[*651]** with the heedless action of some village tyrants is to distort the augustness of the constitutional issue and the reach of the consequences of our decision.

Under our constitutional system the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand. But it by no means follows that legislative power is wanting whenever a general non-discriminatory civil regulation in fact touches conscientious scruples or religious beliefs of an individual or a group. Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation. It is, of course, beyond our power to rewrite the State's requirement, by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations and that school administration would not find it too difficult to make them and yet maintain the ceremony for those not refusing to conform, is outside our province to suggest. Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature?

This is no dry, technical matter. It cuts deep into one's conception of the democratic process -- it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. A court can only strike down. It can only say "This or that law is void." It cannot modify or qualify, it cannot make exceptions to a general requirement. **[*652]** And it strikes down not merely for a day. At least the finding of unconstitutionality ought not to have ephemeral significance unless the Constitution is to be reduced to the fugitive importance of mere legislation. When we are dealing with the Constitution of the United States, and more particularly with the great safeguards of the Bill of Rights, we are dealing with principles of liberty and justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental" -- something without which " **[***1645]** a fair and enlightened system of justice would be impossible." *Palko* v. *Connecticut*, 302 U.S. 319, 325; *Hurtado* v. *California*, 110 U.S. 516, 530, 531. **[**1192]** If the function of this Court is to be essentially no different from that of a legislature, if

the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate. There have been many but unsuccessful proposals in the last sixty years to amend the Constitution to that end. See Sen. Doc. No. 91, 75th Cong., 1st Sess., pp. 248-51.

Conscientious scruples, all would admit, cannot stand against every legislative compulsion to do positive acts in conflict with such scruples. We have been told that such compulsions override religious scruples only as to major concerns of the state. But the determination of what is major and what is minor itself raises questions of policy. For the way in which men equally guided by reason appraise importance goes to the very heart of policy. Judges should be very diffident in setting their judgment against that of a state in determining what is and what is not a major concern, what means are appropriate to proper ends, and what is the total social cost in striking the balance of imponderables.

What one can say with assurance is that the history out of which grew constitutional provisions for religious equality **[*653]** and the writings of the great exponents of religious freedom -- Jefferson, Madison, John Adams, Benjamin Franklin -- are totally wanting in justification for a claim by dissidents of exceptional immunity from civic measures of general applicability, measures not in fact disguised assaults upon such dissident views. The great leaders of the American Revolution were determined to remove political support from every religious establishment. They put on an equality the different religious sects -- Episcopalians, Presbyterians, Catholics, Baptists, Methodists, Quakers, Huguenots -- which, as dissenters, had been under the heel of the various orthodoxies that prevailed in different colonies. So far as the state was concerned, there was to be neither orthodoxy nor heterodoxy. And so Jefferson and those who followed him wrote guaranties of religious freedom into our constitutions. Religious minorities as well as religious majorities were to be equal in the eyes of the political state. But Jefferson and the others also knew that minorities may disrupt society. It never would have occurred to them to write into the Constitution the subordination of the general civil authority of the state to sectarian scruples.

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalties may be exercised without hindrance from the state, not the state may not exercise that which except by leave of religious loyalties is within the domain of temporal power. Otherwise each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.

The prohibition against any religious establishment by the government placed denominations on an equal footing -- it **[*654]** assured freedom from support by the government to any mode of worship and the freedom of individuals to support any mode of worship. Any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order. But the lawmaking authority is not circumscribed by the **[***1646]** variety of religious beliefs, otherwise the constitutional guaranty would be not a protection of the free exercise of religion but a denial of the exercise of legislation.

The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. Much that is the concern of temporal authority affects the spiritual interests of men. But it is not enough to strike down a non-discriminatory **[**1193]** law that it may hurt or offend some dissident view. It would be too easy to cite numerous prohibitions and injunctions to which laws run counter if the variant interpretations of the Bible were made the tests of obedience to law. The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong.

An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many **[*655]** claims of immunity from civil obedience because of religious scruples.

That claims are pressed on behalf of sincere religious convictions does not of itself establish their constitutional validity. Nor does waving the banner of religious freedom relieve us from examining into the power we are asked to deny the states. Otherwise the doctrine of separation of church and state, so cardinal in the history of this nation and for the lib-

erty of our people, would mean not the disestablishment of a state church but the establishment of all churches and of all religious groups.

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples. Compulsory vaccination, see *Jacobson* v. *Massachusetts*, 197 U.S. 11, food inspection regulations, see *Shapiro* v. *Lyle*, 30 F.2d 971, the obligation to bear arms, see *Hamilton* v. *Regents*, 293 U.S. 245, 267, testimonial duties, see *Stansbury* v. *Marks*, 2 Dall. 213, compulsory medical treatment, see *People* v. *Vogelgesang*, 221 N. Y. 290, 116 N. E. 977 -- these are but illustrations of conduct that has often been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction.

Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. The individual conscience **[*656]** may profess what faith it chooses. It may affirm and promote that faith -- in the language of the Constitution, it may "exercise" it freely -- but it cannot thereby restrict **[***1647]** community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way either openly or by stealth. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs. Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue and with ample opportunity for seeking its change or abrogation.

In *Hamilton* v. *Regents*, 293 U.S. 245, this Court unanimously held that one attending a state-maintained university cannot refuse attendance on courses that offend his religious scruples. That decision is not overruled today, but is distinguished on the ground that attendance at the institution for higher education was voluntary and therefore a student could not refuse compliance with its conditions and yet take advantage of its opportunities. But West Virginia does not compel the attendance at its public schools of the children here concerned. West Virginia does not so compel, for it cannot. This Court denied the right of a state to require its children to attend public schools. *Pierce* v. *Society of Sisters*, 268 U.S. 510. As to its public schools, West Virginia imposes conditions **[**1194]** which it deems necessary in the development of future citizens precisely as California deemed necessary the requirements that offended the student's conscience in the *Hamilton* case. The need for higher education and the duty of the state to provide it as part of a public educational system, are part of the democratic faith of most of our states. The right to secure such education in institutions not maintained by public funds is unquestioned. **[*657]** But the practical opportunities for obtaining what is becoming in increasing measure the conventional equipment of American youth may be no less burdensome than that which parents are increasingly called upon to bear in sending their children to parochial schools because the education provided by public schools, though supported by their taxes, does not satisfy their ethical and educational necessities. I find it impossible, so far as constitutional power is concerned, to differentiate what was sanctioned in the *Hamilton* case from what is nullified in this case. And for me it still remains to be explained why the grounds of Mr. Justice Cardozo's opinion in *Hamilton* v. *Regents, supra*, are not sufficient to sustain the flag salute requirement. Such a requirement, like the requirement in the *Hamilton* case, "is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history during days of peace and war." 293 U.S. 245, 266. The religious worshiper, "if his liberties were to be thus extended, might refuse to contribute taxes . . . in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government." *Id*., at 268.

Parents have the privilege of choosing which schools they wish their children to attend. And the question here is whether the state may make certain requirements that seem to it desirable or important for the proper education of those future citizens who go to schools maintained by the states, or whether the pupils in those schools may be relieved from those requirements if they run counter to the consciences of their parents. Not only have parents the right to send children to schools of their own choosing but **[***1648]** the state has no right to bring such schools "under a strict governmental control" or give "affirmative direction **[*658]** concerning the intimate and essential details of such schools, entrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum, and textbooks." *Farrington* v. *Tokushige*, 273 U.S. 284, 298. Why should not the state likewise

have constitutional power to make reasonable provisions for the proper instruction of children in schools maintained by it?

When dealing with religious scruples we are dealing with an almost numberless variety of doctrines and beliefs entertained with equal sincerity by the particular groups for which they satisfy man's needs in his relation to the mysteries of the universe. There are in the United States more than 250 distinctive established religious denominations. In the State of Pennsylvania there are 120 of these, and in West Virginia as many as 65. But if religious scruples afford immunity from civic obedience to laws, they may be invoked by the religious beliefs of any individual even though he holds no membership in any sect or organized denomination. Certainly this Court cannot be called upon to determine what claims of conscience should be recognized and what should be rejected as satisfying the "religion" which the Constitution protects. That would indeed resurrect the very discriminatory treatment of religion which the Constitution sought forever to forbid. And so, when confronted with the task of considering the claims of immunity from obedience to a law dealing with civil affairs because of religious scruples, we cannot conceive religion more narrowly than in the terms in which Judge Augustus N. Hand recently characterized it:

"It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason **[*659]** as a means of relating the individual to his fellowmen **[**1195]** and to his universe. . . . [It] may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse." *United States* v. *Kauten*, 133 F.2d 703, 708.

Consider the controversial issue of compulsory Bible-reading in public schools. The educational policies of the states are in great conflict over this, and the state courts are divided in their decisions on the issue whether the requirement of Bible-reading offends constitutional provisions dealing with religious freedom. The requirement of Bible-reading has been justified by various state courts as an appropriate means of inculcating ethical precepts and familiarizing pupils with the most lasting expression of great English literature. Is this Court to overthrow such variant state educational policies by denying states the right to entertain such convictions in regard to their school systems, because of a belief that the King James version is in fact a sectarian text to which parents of the Catholic and Jewish faiths and of some Protestant persuasions may rightly object to having their children exposed? On the other hand the religious consciences of some parents may rebel at the absence of any Bible-reading in the schools. See *Washington ex rel. Clithero* v. *Showalter*, 284 U.S. 573. Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching of biology that contradicts **[***1649]** such Biblical account. Compare *Scopes* v. *State*, 154 Tenn. 105, 289 S. W. 363. What of conscientious **[*660]** objections to what is devoutly felt by parents to be the poisoning of impressionable minds of children by chauvinistic teaching of history? This is very far from a fanciful suggestion for in the belief of many thoughtful people nationalism is the seed-bed of war.

There are other issues in the offing which admonish us of the difficulties and complexities that confront states in the duty of administering their local school systems. All citizens are taxed for the support of public schools although this Court has denied the right of a state to compel all children to go to such schools and has recognized the right of parents to send children to privately maintained schools. Parents who are dissatisfied with the public schools thus carry a double educational burden. Children who go to public school enjoy in many states derivative advantages such as free textbooks, free lunch, and free transportation in going to and from school. What of the claims for equality of treatment of those parents who, because of religious scruples, cannot send their children to public schools? What of the claim that if the right to send children to privately maintained schools is partly an exercise of religious conviction, to render effective this right it should be accompanied by equality of treatment by the state in supplying free textbooks, free lunch, and free transportation to children who go to private schools? What of the claim that such grants are offensive to the cardinal constitutional doctrine of separation of church and state?

These questions assume increasing importance in view of the steady growth of parochical schools both in number and in population. I am not borrowing trouble by adumbrating these issues nor am I parading horrible examples of the consequences of today's decision. I am aware that we must decide the case before us and not some other case. But that does not mean that a case is dissociated from the past and unrelated to the future. We must decide this **[*661]** case with due regard for what went before and no less regard for what may come after. Is it really a fair construction of such a fundamental concept as the right freely to exercise one's religion that a state cannot choose to require all children who attend public school to make the same gesture of allegiance to the symbol of our national life because it may offend the con-

science of some children, but that it may compel all children to attend public school to listen to the King James version although it may offend the consciences of their parents? And what of the larger issue of claiming immunity from obedience to a general civil regulation that has a reasonable **[**1196]** relation to a public purpose within the general competence of the state? See *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535. Another member of the sect now before us insisted that in forbidding her two little girls, aged nine and twelve, to distribute pamphlets Oregon infringed her and their freedom of religion in that the children were engaged in "preaching the gospel of God's Kingdom." A procedural technicality led to the dismissal of the case, but the problem remains. *McSparran* v. *Portland*, 318 U.S. 768.

These questions are not lightly stirred. They touch the most delicate issues and their solution challenges the best wisdom of political and religious statesmen. But it presents awful possibilities to try to encase the solution of these problems within the rigid prohibitions of unconstitutionality.

We are told that a flag salute is a doubtful substitute for adequate understanding of our institutions. The states that require such a school exercise do not have to justify it as the only means for promoting good **[***1650]** citizenship in children, but merely as one of diverse means for accomplishing a worthy end. We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfill its purpose. Only if there be no doubt that any reasonable **[*662]** mind could entertain can we deny to the states the right to resolve doubts their way and not ours.

That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority.

We are told that symbolism is a dramatic but primitive way of communicating ideas. Symbolism is inescapable. Even the most sophisticated live by symbols. But it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the state happens to see fit to utilize the symbol that represents our heritage and our hopes. And surely only flippancy could be responsible for the suggestion that constitutional validity of a requirement to salute our flag implies equal validity of a requirement to salute a dictator. The significance of a symbol lies in what it represents. To reject the swastika does not imply rejection of the Cross. And so it bears repetition to say that it mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader. To deny the power to employ educational symbols is to say that the state's educational system may not stimulate the imagination because this may lead to unwise stimulation.

The right of West Virginia to utilize the flag salute as part of its educational process is denied because, so it is argued, it cannot be justified as a means of meeting a "clear and present danger" to national unity. In passing it deserves to be noted that the four cases which unanimously **[*663]** sustained the power of states to utilize such an educational measure arose and were all decided before the present World War. But to measure the state's power to make such regulations as are here resisted by the imminence of national danger is wholly to misconceive the origin and purpose of the concept of "clear and present danger." To apply such a test is for the Court to assume, however unwittingly, a legislative responsibility that does not belong to it. To talk about "clear and present danger" as the touchstone of allowable educational policy by the states whenever school curricula may impinge upon the boundaries of individual conscience, is to take a felicitous phrase out of the context of the particular situation where it arose and for which it was adapted. Mr. Justice Holmes used the phrase "clear and present danger" in a case involving mere speech as a means by which alone to accomplish sedition in time of war. By that phrase he meant merely to indicate that, in view of the protection given to utterance by the First Amendment, in order that mere utterance may **[**1197]** not be proscribed, "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck* v. *United States*, 249 U.S. 47, 52. The "substantive evils" about which he was speaking were inducement of insubordination in the military and naval forces of the United States and obstruction of enlistment while **[***1651]** the country was at war. He was not enunciating a formal rule that there can be no restriction upon speech and, still less, no compulsion where conscience balks, unless imminent danger would thereby be wrought "to our institutions or our government."

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. **[*664]** Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the

requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.

I am fortified in my view of this case by the history of the flag salute controversy in this Court. Five times has the precise question now before us been adjudicated. Four times the Court unanimously found that the requirement of such a school exercise was not beyond the powers of the states. Indeed in the first three cases to come before the Court the constitutional claim now sustained was deemed so clearly unmeritorious that this Court dismissed the appeals for want of a substantial federal question. *Leoles* v. *Landers*, 302 U.S. 656; *Hering* v. *State Board of Education*, 303 U.S. 624; *Gabrielli* v. *Knickerbocker*, 306 U.S. 621. In the fourth case the judgment of the district court upholding the state law was summarily affirmed on the authority of the earlier cases. *Johnson* v. *Deerfield*, 306 U.S. 621. The fifth case, *Minersville District* v. *Gobitis*, 310 U.S. 586, was brought here because the decision of the Circuit Court of Appeals for the Third Circuit ran counter to our rulings. They were reaffirmed after full consideration, with one Justice dissenting.

What may be even more significant than this uniform recognition of state authority is the fact that every Justice -- thirteen **[*665]** in all -- who has hitherto participated in judging this matter has at one or more times found no constitutional infirmity in what is now condemned. Only the two Justices sitting for the first time on this matter have not heretofore found this legislation inoffensive to the "liberty" guaranteed by the Constitution. And among the Justices who sustained this measure were outstanding judicial leaders in the zealous enforcement of constitutional safeguards of civil liberties -- men like Chief Justice Hughes, Mr. Justice Brandeis, and Mr. Justice Cardozo, to mention only those no longer on the Court.

One's conception of the Constitution cannot be severed from one's conception of a judge's function in applying it. The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures. We are dealing with matters as to which legislators and voters have conflicting views. Are we as judges to impose our strong convictions on where wisdom lies? That which three years ago had seemed to five successive Courts to lie within permissible **[***1652]** areas of legislation is now outlawed by the deciding shift of opinion of two Justices. What reason is there to believe that they or their successors may not have another view a few years hence? Is that which was **[**1198]** deemed to be of so fundamental a nature as to be written into the Constitution to endure for all times to be the sport of shifting winds of doctrine? Of course, judicial opinions, even as to questions of constitutionality, are not immutable. As has been true in the past, the Court will from time to time reverse its position. But I believe that never before these Jehovah's Witnesses **[*666]** cases (except for minor deviations subsequently retraced) has this Court overruled decisions so as to restrict the powers of democratic government. Always heretofore, it has withdrawn narrow views of legislative authority so as to authorize what formerly it had denied.

In view of this history it must be plain that what thirteen Justices found to be within the constitutional authority of a state, legislators can not be deemed unreasonable in enacting. Therefore, in denying to the states what heretofore has received such impressive judicial sanction, some other tests of unconstitutionality must surely be guiding the Court than the absence of a rational justification for the legislation. But I know of no other test which this Court is authorized to apply in nullifying legislation.

In the past this Court has from time to time set its views of policy against that embodied in legislation by finding laws in conflict with what was called the "spirit of the Constitution." Such undefined destructive power was not conferred on this Court by the Constitution. Before a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction upon political authority in the Constitution. Equally inadmissible is the claim to strike down legislation because to us as individuals it seems opposed to the "plan and purpose" of the Constitution. That is too tempting a basis for finding in one's personal views the purposes of the Founders.

The uncontrollable power wielded by this Court brings it very close to the most sensitive areas of public affairs. As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantably enter social and political domains wholly outside our concern. I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably **[*667]** differ appears to me to be intolerance. And since men may so reasonably differ, I

deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia.

Jefferson's opposition to judicial review has not been accepted by history, but it still serves as an admonition against confusion between judicial and political functions. As a rule of judicial self-restraint, it is still as valid as Lincoln's admonition. For those who pass laws not only are under duty to pass laws. They are also under duty to observe the Constitution. And even though legislation relates to civil liberties, our duty of deference to those who have the responsibility for making the laws is no less relevant or less exacting. And this is so especially when we consider the accidental contingencies by which one man may determine constitutionality and thereby confine the political power of the Congress of the United States and the legislatures of forty-eight states. The attitude of judicial humility which these considerations enjoin is not an abdication of the judicial function. It is a due observance of its limits. Moreover, it is to be borne in mind that in a question like this we are not passing on the proper distribution of political power as between the states and the **[***1653]** central government. We are not discharging the basic function of this Court as the mediator of powers within the federal system. To strike down a law like this is to deny a power to all government.

The whole Court is conscious that this case reaches ultimate questions of judicial power and its relation to our scheme of government. It is appropriate, therefore, to recall an utterance as wise as any that I know in analyzing what is really involved when the theory of this Court's function is put to the test of practice. The analysis is that of James Bradley Thayer:

". . . there has developed a vast and growing increase of judicial interference with legislation. This is a very different **[*668]** state of things from what our fathers contemplated, a century and more ago, in framing the new system. Seldom, indeed, as they imagined, under our system, **[**1199]** would this great, novel, tremendous power of the courts be exerted, -- would this sacred ark of the covenant be taken from within the veil. Marshall himself expressed truly one aspect of the matter, when he said in one of the later years of his life: 'No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.' And again, a little earlier than this, he laid down the one true rule of duty for the courts. When he went to Philadelphia at the end of September, in 1831, on that painful errand of which I have spoken, in answering a cordial tribute from the bar of that city he remarked that if he might be permitted to claim for himself and his associates any part of the kind things they had said, it would be this, that they had 'never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required.'

"That is the safe twofold rule; nor is the first part of it any whit less important than the second; nay, more; today it is the part which most requires to be emphasized. For just here comes in a consideration of very great weight. Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence, -- the power of the judiciary to disregard unconstitutional legislation, -- it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. If the decision in Munn *v.* Illinois and the 'Granger Cases,' twenty-five years ago, and in the 'Legal Tender Cases,' nearly thirty years **[*669]** ago, had been different; and the legislation there in question, thought by many to be unconstitutional and by many more to be ill-advised, had been set aside, we should have been saved some trouble and some harm. But I venture to think that the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience that came out of it all, -- that all this far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature.

"The tendency of a common and easy resort to this great function, **[***1654]** now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

"What can be done? It is the courts that can do most to cure the evil; and the opportunity is a very great one. Let them resolutely adhere to first principles. Let them consider how narrow is the function which the constitutions have conferred on them -- the office merely of deciding litigated cases; how large, therefore, is the duty intrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions generally give them no authority to call upon a court for advice; they must decide for

themselves, and the courts may never be able to say a word. Such a body, charged, in every State, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators, but of the legislature -- the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a coordinate department of the government, **[*670]** charged with the greatest functions, and invested, in contemplation of law, with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires.

" **[**1200]** To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. The judiciary, today, in dealing with the acts of their coordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it. For that course -- the true course of judicial duty always -- will powerfully help to bring the people and their representatives to a sense of their own responsibility. There will still remain to the judiciary an ample field for the determinations of this remarkable jurisdiction, of which our American law has so much reason to be proud; a jurisdiction which has had some of its chief illustrations and its greatest triumphs, as in Marshall's time, so in ours, while the courts were refusing to exercise it." J. B. Thayer, John Marshall, (1901) 104-10.

Of course patriotism can not be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focussing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance **[*671]** for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions **[***1655]** and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

Let Your Yea be Yea:

The Citizenship Oath, the *Charter*, and the Conscientious Objector*

BRYCE EDWARDS

* The author wishes to thank David Wilken, Elisa Vicencio, Trish McMahon, Sarah Armstrong, Colin Grey, David Sunday, and Professor Lorraine Weinrib for their assistance and inspiration in the preparation of this article.

This article argues that the current Canadian citizenship oath, which contains an oath of allegiance to the Queen, is constitutionally infirm. Specifically, the article argues that the citizenship oath violates subsection 2(a), subsection 2(b), and section 15 of the Charter. *It violates freedom of conscience and religion, if not in purpose, then in effect, because those who object to taking the oath for conscientious reasons are forced to choose between citizenship or being true to their conscience. The oath requirement violates freedom of expression by limiting the range of available options. It constitutes discrimination under section 15 because it is based in part on prejudice against outsiders and implies disloyalty. The article then argues that none of these* Charter *right violations are justified under section 1. Canada's citizenship policy aims to enhance the meaning of citizenship as a unifying bond for Canadians and to encourage and facilitate naturalization by permanent residents. The oath is not rationally connected to these objectives. It has the effect of excluding a sub-set of people from Canadian citizenship. The oath is, in the context of the entire citizenship application, superfluous, and the present wording is only tenuously connected with its aims. The oath is not minimally impairing. It could be made optional, or replaced with a less burdensome process. If the oath were optional, the state would be treating potential citizens, at the end of the citizenship process, equally to how it treats citizens: with respect for their personal views. The principles served would then be personal choice and liberty—values that are clearly central and unifying in Canadian life.*

Cet article soutient que le serment de citoyenneté canadien actuel, qui comprend un serment d'allégeance à la Reine, est constitutionnellement boiteux. La thèse spécifique est que le serment de citoyenneté contrevient aux paragraphes 2(a) et 2(b) ainsi qu'à l'article 15 de la Charte. *Il contrevient à la liberté de conscience et de religion, dans la lettre sinon dans l'esprit, parce que les personnes qui s'objectent à prêter serment pour des raisons de conscience doivent choisir entre la citoyenneté et leurs principes. L'obligation de prêter serment contrevient à la liberté d'expression en restreignant les choix possibles. Le serment constitue une discrimination aux termes de l'article 15 parce qu'il est fondé en partie sur un préjugé envers les étrangers et présume la déloyauté. L'article soutient par la suite que l'article 1 ne légitime aucune de ces violations des droits. La politique de citoyenneté du Canada vise à rehausser l'importance de la citoyenneté en tant que lien unissant les Canadiens et à encourager*

et faciliter la naturalisation des résidents permanents. Il n'existe pas de rapport logique entre le serment et ces objectifs. Il a pour effet d'exclure un sous-groupe de personnes du statut de citoyen canadien. Le serment est superflu dans le cadre global de la demande de citoyenneté et sa formulation actuelle n'a qu'un infime rapport avec son but. Le serment n'est pas seulement marginalement déficient. Il pourrait devenir facultatif ou être remplacé par une procédure moins lourde. Si le serment était facultatif, l'État traiterait les éventuels citoyens, au terme de la procédure de demande de citoyenneté, de la même façon qu'il traite ses citoyens: en respectant leurs opinions personnelles. Les principes mis en valeur serait alors celui du choix personnel et de la liberté—des valeurs qui sont clairement essentielles et unificatrices dans la vie des Canadiens.

I INTRODUCTION

Every landed immigrant seeking to become a Canadian citizen ends their quest taking the citizenship oath before a citizenship judge. The oath is a performative act of tremendous symbolic importance. It is both personal and political. The individual, before everyone, must speak the oath personally—make it their own—and is thereafter conscience-bound to honour it. The taking of an oath is inextricably woven up with human dignity and autonomy. It is a manifest representation of the individual's will in the public sphere.

Presumably, that will ought not to be coerced. If the individual's will is bound, then both the oath and the individual are devalued. Afterall, the oath is imbued with meaning only because the public trusts that the speaker has spoken truly and voluntarily. A synergy of the individual's will and the public good, is created through the performative act of swearing the oath. Without free will, the synergy does not exist and the oath becomes meaningless.

Like many symbolic acts, the oath in practice is quite modest—a raised hand, a few words, and the oath is complete. Despite these modest physical demands, requiring prospective Canadians to take the oath has raised objections over the years. This article examines these objections, and their potential for success in court. I argue that the current oath is constitutionally infirm, a position that raises new and challenging questions that must be addressed by any reform of the current *Citizenship Act*.[1] Section II outlines the present laws and regulations in Canada regarding the citizenship oath. Section III looks at the legal context of citizenship and the legal history of cases challenging the oath. Section IV investigates some of the various political and extra-

---

1 *Citizenship Act*, R.S.C. 1985, c. C-29. For an example of an attempt to reform this act, see Bill C-16, *The Citizenship of Canada Act*, 2nd Session, 36th Parliament, online: Library of Parliament, Parliamentary Research Branch <http://www.parl.gc.ca/common/Bills_ls.asp?lang=E&Parl=36&Ses=2&ls=C16&source=Bills_House_Government> (date accessed: 1 April 2002). This bill died on the order paper and has not yet been revived, but there is a Private Senator's Public Bill proposing a reform to the oath at the moment: Bill S-36, 1st Session, 37th Parliament, 49-50 Elizabeth II, 2001. The Senate of Canada, online: <http://www.parl.gc.ca/37/1/parlbus/chambus/senate/bills/public/S-36/S-36_1/S36_text-e.htm> [hereinafter *Bill S-36*]. For more on this bill and other bills, see Section IV.A, below.

legal wrangles surrounding the oath in the past decades. Section V provides an analysis of the oath requirement under the *Canadian Charter of Rights and Freedoms*,[2] and argues that the citizenship oath, as it currently stands, violates several *Charter* freedoms, and is not justifiable under section 1.

II THE CURRENT LAW AND REGULATIONS

Under Canadian law, the oath is the last in a long series of requirements that must be met in order to become a Canadian citizen. It can be sworn or affirmed, the latter act having been adopted to accommodate many religious groups.[3] The citizenship oath presently sworn or affirmed by new Canadians is 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.[4]

The oath is crucial because a certificate of citizenship does not become effective until the oath has been sworn in a public ceremony, and the individual has signed the certificate attesting that he took the oath. Paragraph 3(1)(c) mandates that "a person is a citizen if ... 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*."[5] The oath must be sworn or affirmed using the words above.[6] There is no alternative wording available.

There is some flexibility in the *Citizenship Act*, but not much. Pursuant to subsection 5(3), the Minister may waive certain requirements on compassionate grounds. These include the requirements of having knowledge of an official language,[7] having knowledge of Canada as well as of the responsibilities and privileges of citizenship,[8] and the swearing of the citizenship oath. However, the Minister's discretion to waive these requirements is strictly limited by the legislation. Only if the person is a minor[9] or is

---

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

3 An affirmation is a solemn promise, but not one made before God. Swearing is prohibited by some religious groups. See *e.g. Christian Faith and Practice in the Experience of the Society of Friends* (Headley Brothers: Britain, 1960), a book of collected writings by Quakers over the centuries, in which the following passage, numbered 570 and dated 1782, appears: "[O]f the apostle James... 'But above all things, my brethren, swear not; neither by heaven, neither by earth, neither by any other oath; but let your yea be yea; and your nay, nay; lest ye fall into damnation." Another passage, numbered 571 and dated 1911 and 1959, reads "We regard the taking of oaths as contrary to the teaching of Christ, and as setting up a double standard of truthfulness, whereas sincerity and truth should be practiced in all dealings of life."

4 *Citizenship Act, supra* note 1, s. 24, schedule 1.

5 *Ibid.*, s. 3(1)(c). [emphasis added].

6 *Ibid.*, s. 24.

7 *Ibid.*, s. 5(1)(d).

8 *Ibid.*, s. 5(1)(e).

9 *Ibid.*, s. 5(3)(b).

unable to understand the significance of the oath because of mental disability[10] can the oath requirement be waived.

Cabinet has the authority to make regulations "respecting the taking of the oath of citizenship,"[11] and generally, "to carry out the purposes and provisions of [the] Act."[12] The *Regulations Respecting Citizenship* determine in more detail how the oath is to be taken.[13] According to the regulations, the new Canadian "shall take the oath of citizenship by swearing or solemnly affirming it before a citizenship judge at a citizenship ceremony."[14] The citizenship judges are instructed to use ceremonial procedures that are "appropriate to impress on new citizens the responsibilities and privileges of citizenship."[15] They are to "emphasize the significance of the ceremony as a milestone in the lives of the new citizens,"[16] and to "administer the oath of citizenship with dignity and solemnity."[17] The judges are also told to allow "the greatest possible freedom in the religious solemnization or the solemn affirmation"[18] of the oath. Once the oath has been sworn or affirmed, the new citizen must "sign a certificate in prescribed form certifying that the person has taken the oath."[19]

Violation of the requirements of the *Citizenship Act* carries stiff penalties. Any person who "for any purpose of this Act makes any false representation,[20] commits fraud or knowingly conceals any material circumstances"[21] has committed an offence. The punishments range from summary conviction,[22] to "a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding one year or to both."[23] Needless to say, the person's application for citizenship would also be gravely imperiled.[24] Not taking the oath, for instance by covertly speaking different words, is thus a dangerous proposition. If it were discovered that the person had not honestly spoken, he could lose his citizenship, and face fines or imprisonment. Of course, if a person objected to the oath on principle, it would likely be unacceptable for him to have appeared to take it, even if in his heart he knew he had not. The person would want to take a different version of the oath, one that did not violate his conscience, beliefs, freedom of expression and right to equality.

---

10 *Ibid.*, s. 5(3)(c).
11 *Ibid.*, s. 27(h)
12 *Ibid.*, s. 27(l).
13 *Citizenship Regulations*, 1993, S.O.R./93-246.
14 *Ibid.*, s. 19(1), 19(2).
15 *Ibid.*, s. 17(1).
16 *Ibid.*, s. 17(1)(a).
17 *Ibid.*, s. 17(1)(b).
18 *Ibid.*
19 *Ibid.*, s. 21.
20 Presumably, if a person simply kept quiet while others were being administered the oath, he would fall afoul of this provision if he signed the certificate required by section 21 of the *Citizenship Regulations*, *supra* note 13, certifying that he took the oath.
21 *Citizenship Act*, *supra* note 1, s. 29(2)(a).
22 *Ibid.*, s. 29(2).
23 *Ibid.*
24 Sections 19 and 22 exclude people from citizenship if they are involved in various types of offences under Canadian or international law. See *infra* note 62 for more detail.

III THE CASE LAW ON THE *CITIZENSHIP ACT*, CITIZENSHIP AND THE OATH

The Case Law on the *Citizenship Act* and the Meaning of Citizenship

History

The oath of citizenship is best understood in the broader context of both the *Citizenship Act*,[25] and the theories of citizenship that inform the courts' decisions in this area. The aim of this article is not to resolve the ongoing debates in this area, but merely to provide an account of the various positions and of how the courts have approached this problem in recent decisions.

Citizenship and the correlative law of immigration have been the subject of debate in the English tradition for at least eight centuries. For instance, article 41 of the *Magna Carta* of 1215 allowed merchants access to England. Countless laws since have set the terms and conditions of aliens' entry[26] and eventual naturalization. Canadian citizenship did not exist as a discrete legal category until after World War II, when Canada passed *The Canadian Citizenship Act*.[27] Prior to this Act, the 1910 *Immigration Act* defined a Canadian citizen as a "British subject who has Canadian domicile."[28] All Canadians were thus legally British subjects.

Throughout the history of citizenship, courts have maintained a deferential attitude towards decisions made by the state regarding citizenship and immigration, viewing authority over these decisions as "an integral aspect of [state] sovereignty,"[29]and treating citizenship and immigration decisions as located in the political realm.[30] Parliament has not discouraged this attitude: the various Acts in this area have had strong privative clauses restricting judicial oversight.[31]

Despite the privative clauses, the courts have on occasion had an impact on federal policy direction with regard to citizenship and immigration. For example, in the case of *Ulin* v. *Canada*,[32] the court essentially created the category of dual citizenship.[33] In the

---

25 *Supra* note 1.

26 See generally D. Galloway, *Immigration Law* (Concord: Irwin Law, 1997) at 3-24.

27 S.C. 1946, c. 15.

28 *Immigration Act*, S.C. 1910, c. 27 [hereinafter 1910 *Immigration Act*].

29 Galloway, *supra* note 26 at 6. For further discussion, see Galloway *supra* note 26 at 3-7.

30 The federal government has jurisdiction over "naturalization and aliens" pursuant to subsection 91(25) of the *British North America Act*, 1867.

31 An early example of this was the 1910 *Immigration Act*, *supra* note 28, s. 23, which ousted the courts' jurisdiction over the boards in inquiry that were charged with deciding if an alien was to be permitted to enter Canada. See also Galloway, *supra* note 26 at 15. The tradition of strong privative clauses has lessened somewhat since then. Section 14(5) of the current *Citizenship Act* allows appeal to the Federal Court Trial Division on decisions of citizenship judges. However, section 14(6) prevents further appeal from a decision of the Court under section 14(5). *Citizenship Act*, *supra* note 1. Also, the summary of *Bill S-36* clearly sets the citizenship process apart from the courts, stating "the process for dealing with applications for citizenship is administrative rather than judicial." *Bill S-36*, *supra* note 1.

32 (1973) F.C. 319 [hereinafter *Ulin*].

33 To this day, Canadians are allowed to hold dual citizenship, though there was a suggestion in the *Report of the Standing Committee on Citizenship and Immigration* "that the government explore the possibility of divesting Canadian citizenship from those who voluntarily become citizens of another country."

1985 case of *Singh* v. *Canada (Minister of Employment & Immigration)*, the court once again trumped sovereign discretion in the field of citizenship and immigration.[34] In that case, the Supreme Court of Canada found that the applicant's section 7 *Charter* rights were violated by the procedures that were used in the refugee determination process, resulting in an overhaul of that process. Since then, however, the courts have been unwilling to grant large and liberal *Charter* rights to immigrants and non-citizens, showing instead "a marked reluctance to scrutinize, critique, and reshape the policies of the federal government ... [and] a rather narrow and restrictive approach to the rights of immigrants and refugee claimants."[35]

In dealing with the *Citizenship Act*, the courts have given much scope to the government to determine its actions, even after the *Charter* came into effect. Most importantly for the purposes of this article, courts have repeatedly held that citizenship is a privilege, not a right, for those born outside of Canada,[36] and have been willing, in cases like *Almaas (Re),*[37] *Jensen (Re),*[38] *In re Citizenship Act and in re Werner Willi Peter Heib,*[39] *Roach* v. *Canada (Minister of State for Multiculturalism and Culture)(FCTD),*[40] *Roach* v. *Canada (Minister of State for Multiculturalism and Culture)(FCA),*[41] *Tobiass,*[42] and others to give considerable room to the federal government to set the terms and conditions of attaining (and losing) citizenship.

The Supreme Court has made many references to citizenship[43] and engaged in prolonged discussions of its meaning in such cases as *Law Society British Columbia* v.

[*Report of the Standing Committee on Citizenship and Immigration: Canadian Citizenship: A Sense of Belonging* (Ottawa: Canada Communication Group, 1994) as discussed in Galloway, *supra* note 26 at 107.] This suggestion is not surprising, given the concerns about loyalty and allegiance which animate many of the discussions of citizenship, but in spite of it, it is not at all clear that the government sees dual citizenship as a threat or concern. This ambiguity is mirrored on the bench. Linden J.A., writing in dissent in *Lavoie (FCA), infra* note 46 at paras. 218-21, dismissed concerns about loyalty as "remnants from an earlier era," (*ibid.* at para. 218) noting that Canada "[recognizes] that people do not have to choose between countries and allegiances to be good Canadians" (*ibid.* at para. 221).

34 [1985] 1 S.C.R. 177 [hereinafter *Singh*].

35 Galloway, *supra* note 26 at 47.

36 See *e.g. Canada (Minister of Citizenship and Immigration)* v. *Obodzinsky*, [2000] F.C.J. No. 1675 at para. 28; *Canada (Minister of Citizenship and Immigration)* v. *Dueck*, [1998] 2 F.C. 614, F.C.J. No. 1829 at 633; *Canada (Minister of Citizenship and Immigration)* v. *Obynsky*, [2001] F.C.J. No. 286, 2001 F.C.T. 138 at para. 122; *Canada (Minister of Citizenship and Immigration)* v. *Tobiass*, [1997] 3 S.C.R. 391, [1997] S.C.J. No. 82 [hereinafter *Tobiass*] at paras. 108-109. Interestingly enough, even Canadians born in the country get their citizenship by operation of section 3 of the *Citizenship Act* (*supra* note 1). So strictly speaking, citizenship is not an inherent right for anyone, whether born here or abroad. The operation of the *Citizenship Act* is to accord this privilege to some people by virtue of place of birth, and to ask others who do not happen to have been born here to go through several steps to attain citizenship. As will be seen below in Section V, this disparate treatment puts the *Citizenship Act* at risk of a challenge under the equality provisions of section 15 of the *Charter*.

37 [1968] 2 Ex. C.R. 391 [hereinafter *Almaas*].

38 [1976] 2 F.C. 665 [hereinafter *Jensen*].

39 [1980] 1 F.C. 254 [hereinafter *Heib*].

40 [1992] 2 F.C. 173 (T.D.); 88 D.L.R. (4th) 225 [hereinafter *Roach (FCTD)*].

41 [1994] 2 F.C. 406 (C.A.); 113 D.L.R. (4th) 67 [hereinafter *Roach (FCA)*].

42 *Tobiass, supra* note 36.

43 For instance, Rand J. wrote in *Winner* v. *S.M.T.*, [1951] S.C.R. 887 at 918, "citizenship is membership in a state; and in the citizen inhere those rights and duties, the correlatives of allegiance and protection, which are basic to that status."

Andrews[44] and *Lavoie* v. *Canada (SCC)*.[45] There is also an informative discussion of citizenship at the Federal Court of Appeal in *Lavoie* v. *Canada (FCA)*.[46]

Law Society British Columbia *v.* Andrews

In *Andrews*, the Supreme Court unanimously found that non-citizens were a group entitled to protection from discrimination under section 15 of the *Charter*. Wilson J, writing for herself and two others, said that "non-citizens are a group lacking in political power,... vulnerable to having their interests overlooked and their right to equal concern and respect violated."[47] Both she and La Forest J. (writing for himself) also quoted with approval the words of McLachlin J.A. (as she then was): "citizenship offers no assurance that a person is conscious of the fundamental traditions and rights of our society."[48] Wilson J. also agreed with McLachlin J.A.'s holding that citizenship was not a reliable indicator of commitment to Canada, as "only those citizens who are not natural-born Canadians can be said to have made a conscious choice to establish themselves here permanently."[49]

McIntyre J., writing for himself and Lamer C.J.C., agreed that non-citizens are "a good example of a 'discrete and insular minority' who come within the protection of s. 15."[50] La Forest J., writing for himself, wrote, "non-citizens are an example without parallel of a group of persons who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions."[51] He also noted, "citizenship is a very special status that not only incorporates rights and duties but serves a highly important symbolic function as a badge identifying people as members of the Canadian polity."[52]

Lavoie *v.* Canada *(Federal Court of Appeal)*

The significance of citizenship was again at issue in *Lavoie*. As the case is the Supreme Court's most recent statement on citizenship, any assessment of the oath requirement must fit within its framework. Both the Federal Court of Appeal and the Supreme Court were divided in *Lavoie,* demonstrating how problematic the category of citizenship has become in the past few years.

---

44 [1989] 1 S.C.R. 143 [hereinafter *Andrews*].
45 [2002] S.C.J. No. 24 [hereinafter *Lavoie (SCC)*].
46 [2000] 1 F.C. 3 [hereinafter *Lavoie (FCA)*].
47 *Andrews, supra* note 44 at para. 5.
48 *Ibid.* at para. 13, citing McLachlin J.A. in *Law Society British Columbia* v. *Andrews,* (1986), 27 D.L.R. (4th) 600 at 612.
49 *Ibid.* at para. 15; citing McLachlin J.A., *ibid.* at 612-13.
50 *Ibid.* at para. 49.
51 *Ibid.* at para. 68.
52 *Ibid.* at para. 70.

Lavoie involved a section 15 challenge to the provision of the *Public Service Employment Act* (*PSEA*) that gives preferential treatment to citizens for some government positions.[53] In dismissing the challenge, the trial judge wrote, "citizenship is an inherently political and social status which clearly is a matter of important public policy. It is also a matter of growing debate, particularly in a global economy."[54] The Federal Court of Appeal, in a 2-1 decision, upheld the impugned section of the *PSEA*.

The judgment of Marceau J.A. provides a clear instance of the court's hands-off approach to citizenship and immigration. The status of immigrants, he wrote, "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."[55] Challenges to legislation must take place "within the political rather than the judicial arena."[56] If an immigrant and a citizen were to be treated equally by the Canadian political apparatus, the concept of citizenship would be abolished altogether.[57] Thus there is no breach of section 15, for "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."[58]

Both Marceau and Desjardins JJ.A. noted that American jurisprudence is singularly deferential to the federal state in the area of aliens and citizenship. In her concurring judgment, Desjardins J.A. wrote that citizenship in the US is "an area of authority that has been committed to the political branches of government ... [S]uch concepts [as national allegiance and citizenship], including the rights and duties attached, are in the political field. They are not defined by courts of law."[59] She noted the unifying aim of citizenship,[60] and despite having found a violation of section 15, upheld the citizenship preference in the *PSEA,* which seeks to "enhance the value and importance of citizenship."[61] The impugned law is an instance where "rights and duties are to be balanced"[62] and thus a margin of appreciation is granted to legislators.[63]

---

53 R.S.C., 1985, c. P-33, s. 16(4)(c) [hereinafter *PSEA*].

54 *Lavoie* v. *Canada,* [1995] 2 F.C. 623 (T.D.) at 657-658.

55 *Lavoie (FCA), supra* note 46 at para. 11.

56 *Ibid.* at para. 15. In distinguishing *Andrews,* he noted that it entailed legislation by a provincial body, rather than a federal one, and that the federal body is constitutionally competent to set "the terms and conditions upon which immigrants are admitted and allowed to live in Canada," *ibid.* at para. 12.

57 *Ibid.*

58 *Ibid.* at para. 9.

59 *Ibid.* at para. 99.

60 *Ibid.* at para. 77. Citizenship is a way for the government to "create common bonds to join together its diverse peoples," by creating a "logical common symbol" to which "Canadians of all backgrounds are capable of relating."

61 *Ibid.*

62 *Ibid.* at paras. 41-49. Desjardins J.A. provided a thorough list of the rights and duties of citizens, noting that "[t]he Charter itself embodies a number of important constitutional rights that only citizens are entitled to," including the right to vote, the right to "enter, remain in and leave Canada," the ability to "qualify for the office of senator" and the right to minority language education. As well, citizens are given preference for many jobs, including the public service and law enforcement. Citizens are given greater protections under such legislation as the *Transfer of Offenders Act,* which allows those convicted of crimes in other countries to request transfer to serve their sentences in Canada, and the *Criminal Code,* which makes it an offence to "take a Canadian citizen hostage even though that hostage taking occurs abroad." Desjardins J.A. also pointed out that citizens have unique duties under Canadian law. For instance, they are subject to prosecution under the *Criminal Code* for offences committed

There is one brief reference to the oath requirement in *Lavoie*: Desjardins J.A. wrote that "citizenship, as demonstrated by the oath or affirmation, requires attachment to Canadian laws and institutions and a commitment to the duties of Canadian citizens."[64] Interestingly, she did not mention that the oath also requires faithful allegiance to Queen Elizabeth, her heirs and successors—a similar but not identical duty.

Linden J.A., dissenting in *Lavoie,* stated that "[the use of] citizenship as a tool for exclusion denies the dignity of those who are excluded and rebukes that which is uniquely Canadian."[65] According to Linden J.A., "Canada's modern position as a multicultural society has redefined, and in some ways curtailed, more traditional, exclusionary views of citizenship."[66] He cited an article by Robert Sharpe (now a judge with the Ontario Court of Appeal) with approval: after the advent of the *Charter* and the decision in *Andrews,* "not only is citizenship eliminated as a prerequisite for asserting a claim to most *Charter* rights: citizenship itself is rendered a highly suspect legislative classification."[67] Linden J.A. was also aware of the positive value of citizenship, noting that it "is a cherished privilege, not for the pecuniary benefits which accrue to its holders, but for the bonds that it creates."[68] Among the decisions, only his cannot be characterized as deferential to the state on matters of citizenship.

---

abroad, such as polygamous marriage, treason and disclosing secret information, whereas permanent residents are not. She also noted that "[a]llegiance, historically, has been linked with the duty to bear arms," (though this has not been insisted on for some time in Canada - for an interesting discussion of this duty, see J.L. Granatstein, "The 'Hard' Obligations of Citizenship: The Second World War in Canada," in W. Kaplan, ed., *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal: McGill-Queen's University Press, 1993)) and that only citizens can be called to serve on juries in the provinces of Canada.

63 *Ibid.* at para. 98.

64 *Ibid.* at para. 50 [emphasis added].

65 *Ibid.* at para. 165.

66 *Ibid.* at para. 121. In the course of his judgment, Linden J.A. spent some time discussing the theories underlying citizenship. He began by noting, "from bitter debates over conscription to debates over the composition of Canadian society, citizenship has never during our history had a single purposive meaning." Rather, there has been "a plurality of views" about citizenship in Canada, from the three-nations view (French-Aboriginal-English, as described by A.C. Cairns in "The Fragmentation of Canadian Citizenship" in D.E. Williams, ed., *Reconfigurations: Canadian Citizenship and Constitutional Change: Selected Essays by Alan C. Cairns* (Toronto: McClelland & Stewart, 1995) at 157) to the view that citizenship debate "is polarized around ideas of individualism...and pluralism," to Francisco Colom-González's theory that "Canadians, through a delicate balance, have fashioned a national identity" from "four 'patterns' of citizenship – republican, liberal, ethnocultural, and multicultural." Linden J.A. noted that regardless of what theory of citizenship we subscribe to, there is no doubt that "citizenship has often been used to exclude," both in Canada and in other countries, *ibid.* at paras. 188-120.

67 *Ibid.* at para. 122, citing Robert J. Sharpe, "Citizenship, the Constitution Act, 1867,and the Charter" in W. Kaplan, ed., *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal and Kingston: McGill-Queen's University Press, 1993) [hereinafter *Belonging*]. Paras. 130 and 131 expand on this point, and proffer *Pearkes* v. *Canada,* (1993), 72 F.T.R. 90 (F.C.T.D.) at 95 and *Austin* v. *British Columbia,* (1990) 66 D.L.R. (4th) 33 (B.C.S.C.) as support. Linden J.A. also noted that Desmond Morton wrote, "[t]he *Charter of Rights and Freedoms* deliberately left citizens with few advantages over other residents of Canada." See D. Morton, "Divided Loyalties? Divided Country?" in *Belonging, ibid.* at 60.

68 *Ibid.* at para. 125. Concurrent to this, Linden J.A. found that not all distinctions between citizens and non-citizens will be discriminatory—in fact, some distinctions come from the *Charter* itself, and are thus acceptable.

Lavoie *v.* Canada *(Supreme Court of Canada)*

After the decision in the Federal Court of Appeal, the appellants in *Lavoie* sought and were granted leave to appeal to the Supreme Court. The judgment from the Supreme Court came down on 8 March 2002. In a 6-3 decision, the citizenship preference in the *PSEA* was upheld under section 1 as a reasonable limit on the right to equality. More relevant for the purposes of this article, though, was the court's treatment of the concept of citizenship, and of the federal government's power to grant privileges to citizens while witholding those privileges from non-citizens.

Bastarache J., writing for himself and three others, agreed in principle with one of the core points of Linden J.A.'s dissent: the *Charter* has occasioned a paradigm shift in the way the court thinks about citizenship. The federal government argued that to disallow such things as citizenship preference would be to abolish citizenship altogether. Bastarache J. wrote,

> In my view, the respondents argument promises a return to the days when federalism, not *Charter* principles, governed the constitutionality of citizenship laws.... The modern approach is to scrutinize differential treatment according to entrenched rights and freedoms, and in the s. 15(1) context, the concept of essential human dignity and freedom.[69]

Bastarache J. wrote that non-citizens "are equally vital members of Canadian society and deserve tantamount concern and respect."[70] Differential treatment of non-citizens would be in violation of section 15 of the *Charter* and would require justification unless it is derived from a constitutional provision.[71]

Though this holding may be thought to lessen the court's deference to Parliament in the area of citizenship, the deferential approach taken in the section 1 analysis by Bastarache J. substantially reduces much of the protection afforded to non-citizens under section 15. About the broader context, Bastarache J. wrote,

> Canada's citizenship policy [embodies] two distinct objectives: to enhance the meaning of citizenship as a unifying bond for Canadians, and to encourage and facilitate naturalization by permanent residents."[72]

Despite the concerns the category of citizenship raises about equality, the courts must keep in mind that "citizenship serves important political, emotional and motivational purposes ... it fosters a sense of unity and shared civic purpose amongst a diverse population."[73] Bastarache J. noted that though Canada seeks to be respectful of its

---

69 *Ibid.* at para. 40.

70 *Ibid.* at para. 44.

71 *Ibid.* Section 3 of the *Charter, supra* note 2, guarantees voting rights to Canadian citizens only, hence no action lies under the *Charter* for differential treatment on that ground.

72 *Ibid.* at para. 57.

73 *Ibid.*

multicultural nature through allowing dual citizenship, minimizing the privileges afforded to citizens, and making naturalization easier, "it only makes sense for a country as open and diverse as Canada to enact a policy that integrates its population."[74] Parliament has to show that it has chosen a law that "falls within the "range of reasonable alternatives" permitted by section 1 of the *Charter*."[75] The citizenship preference in the *PSEA*, Bastarache J. found, was carefully considered by Parliament, and "the role of this Court is not to order that Parliament should have decided otherwise."[76] To do so, in this context, would be "policy review ... [and] particularly [inappropriate] given the delicate balancing that is required in this area of the law."[77] He concluded that the law is justified under section 1, and hence not a violation of the *Charter*.

Arbour J., concurring in the result, disagreed with Bastarache J. about the construction of the section 15 test, preferring instead a stricter test that would find that the citizenship preference in this instance would not violate section 15. On the topic of citizenship, she wrote, "it is the essence of the concept of citizenship that it distinguishes between citizens and non-citizens and treats them differently."[78] She quoted with approval testimony from Professor Schick,

> ... the political, emotional and motivational purposes of citizenship cannot be fully achieved unless there is a difference in legal status.... 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.[79]

In differentiating citizens from non-citizens, Arbour J. was sensitive to some of the concerns raised by Desjardins and Marceau JJ.A. at the Federal Court of Appeal, noting "citizenship law is about defining not just the rights of citizens but also their correlative duties towards the state."[80] The federal government must find a way to entice non-citizens to naturalize, and "take on [the] more burdensome incidents, or duties, of citizenship,"[81] such as jury duty and voting. To achieve this, the government must be allowed to make unequal distributions of benefits;[82] such inequality is justified, and not in violation of section 15 of the *Charter*, because those who benefit from the privileges of citizenship are those who "have taken on correlative or reciprocal duties in exchange."[83]

Though she did not undertake a full section 1 analysis (there was, after all, no need), Arbour J.'s judgment was deferential towards government action in setting the terms and conditions of citizenship. She noted that Canada has a conception of citizenship that leaves considerable liberty to its citizens as individuals, and added that "[i]n such

---

74 *Ibid.* at para. 58.
75 *Ibid.* at para. 61.
76 *Ibid.* at para. 69.
77 *Ibid.*
78 *Ibid.* at para. 110.
79 *Ibid.*
80 *Ibid.* at para. 114.
81 *Ibid.* at para. 115.
82 *Ibid.*
83 *Ibid.*

circumstances, we might reasonably accord the state a similarly wide latitude in determining some of the special rights of citizenship."[84] Arbour J. also noted that a non-citizen must assess any purported violation to his human dignity at least in part based on how the rest of the countries in the world treat non-citizens.

The dissent in *Lavoie,* delivered by McLachlin C.J.C. and L'Heureux-Dubé J. for themselves and one other, concurred with Bastarache J. that the citizenship preference in the *PSEA* is a violation of section 15, but held that the infringement is not justified under section 1. In addressing section 15, they wrote, "Parliament need not choose between legislating with respect to citizenship and discrimination. Rather, it is Parliament's task to draft laws in relation to citizenship that comply with s. 15(1)."[85] They also had little concern for the fact that some of the appellants could have chosen to change their citizenship and hence gain the benefits of the *PSEA*: "the fact that a person could avoid discrimination by modifying his or her behaviour does not negate the discriminatory effect."[86] Forcing non-citizens to choose between keeping their prior nationalities and becoming Canadian is a violation of human dignity and "inherently discriminatory."[87] This point may equally be made with respect to those whose religion or beliefs make them unwilling to swear an oath of allegiance to the Queen, as will be seen below.

Under section 1, the dissent held that the law failed the rational connection test. Though the stated aim of the citizenship preference is to enhance the value of citizenship, McLachlin C.J.C. and L'Heureux-Dubé J. held that they "fail to see how the value of Canadian citizenship can in any way be enhanced by a law that the majority concedes discriminates against non-citizens."[88] They expressly endorsed Linden J.A.'s dissent and his "evolutionary view of Canadian citizenship,"[89] which posits that citizenship in present-day Canada has become "a tool of equality, not exclusion."[90]

The dissent also found that the citizenship preference is not connected to the other aim of the legislation, to encourage naturalization, because encouraging naturalization by denigrating the rights of non-citizens contradicts "the values of tolerance, equality and respect that the government acknowledges lie at the heart of Canadian citizenship."[91] Throughout the section 1 analysis, the dissent did not follow the majority in taking a deferential stance towards Parliament, holding instead that "it is incumbent on the government to offer at least some evidence that the impugned law furthers the objective."[92]

---

84 *Ibid.* at para. 116.
85 *Lavoie (SCC), supra* note 45 at para. 3.
86 *Ibid.* at para. 5.
87 *Ibid.*
88 *Ibid.* at para. 11.
89 *Ibid.*
90 *Ibid.*, citing Linden J.A. in *Lavoie (FCA), supra* note 46 at para. 121.
91 *Ibid.* at para. 15.
92 *Ibid.* at para. 13.

Conclusions

We know from the broader context of citizenship following *Lavoie (FCA)* and *Lavoie (SCC)* that there are distinctive divisions on the bench. For the time being, the majority of judges favour a deferential approach, allowing Parliament wide latitude in defining and regulating citizenship. However, the influence of the *Charter* has transformed the previously muted dialogue about the rights of non-citizens. As the dissenting views of McLachlin C.J.C., L'Heureux-Dubé J., and Linden J.A. show, citizenship is an area of law in which the discretion of the state, though still largely protected, is no longer beyond question. Specifically, the ability of the state to discriminate against non-citizens is questionable.

Citizenship is a well-established category in Canadian law, and one that brings with it tangible benefits.[93] One aspect of current Canadian law is the birthright rule from section 3 of the *Citizenship Act*,[94] which grants Canadian citizenship automatically to people born on Canadian soil. One privilege this confers lies in not having to take an oath of allegiance in order to gain the legal benefits of citizenship.

The History and Case Law on the Citizenship Oath

The story of the oath of allegiance began over one thousand years ago, in the time of the coronation of Anglo-Saxon kings. At that time the oath was not taken by subjects, whose loyalty was presumed. Rather, it was taken by the sovereign upon coronation. The oath was part of "the Church's attempt to ensure that the King would defend and advance the orthodox Catholic faith, guarantee the rights of the Church, and do justice to and preserve peace."[95] It was not until the Reformation that monarchs began to demand an oath of allegiance from people of the realm in return. This tradition, which began under Henry VIII, led to today's citizenship oath.

The oath, in its beginnings, was not abstract. Rather, it created a personal relationship between sovereign and subject.[96] It was initially only required of Members of Parliament, and then electors, who swore allegiance "to the Sovereign in his claimed religious capacity."[97] The specifically religious content of the oath dwindled over time,[98] and has now been eliminated, although religious objections to the oath are still possible.

---

93 The preamble of *Bill S-36* describes citizenship as "a special treasure of inestimable value to be nurtured and promoted." *Bill S-36, supra* note 1.

94 *Citizenship Act, supra* note 1.

95 "Queen or Country? Does it Matter? Understanding a Crucial Issue," online: The Monarchist League of Canada <http://www.monarchist.ca/oath/oathques.htm> (date accessed: 26 March 2002) [hereinafter *Monarchist League*].

96 *Ibid.*, "[L]oyalty [was] owed to a person in a personal relationship."

97 *Ibid.*, "In 1562 Elizabeth I required members of the House of Commons to swear to her spiritual as well as temporal supremacy.... To this James I in 1609 added an oath of allegiance, expressly requiring members of Parliament to swear that the Pope had no power to depose him."

98 *Ibid.*, "Oaths originally intended under William and Mary and the House of Hanover to guarantee loyalty to the persons of those sovereigns and to destroy support for Catholic claimants to the Throne have now become, since the nineteenth century, affirmations of our earthly allegiance and loyalty to our

The oath was first used in naturalization ceremonies in Canada in 1870. The current citizenship oath is similar to oaths from the past, although its precise wording did not come into effect until 1977 under Trudeau's Liberal government. According to some commentators, the current oath represents a compromise. While the previous oath only mentioned allegiance to the Queen, the current oath mentions Canada three times, and includes promises to uphold the law of Canada and fulfill one's duties as a Canadian citizen.[99]

Cases dealing directly with the oath requirement for citizenship are not common in Canadian jurisprudence.[100] The oath was addressed directly, however, in *Ulin.*[101] A challenge was issued in *Ulin* to the power of Cabinet to make regulations requiring a new Canadian to renounce his previous nationality. The court agreed that Cabinet did not have the authority to demand renunciation, and in so doing also stated that, given the wording of the 1970 *Citizenship Act,*[102] "the legislator intended to *require an oath of allegiance only* as a qualification for the issuance of a certificate of citizenship."[103]

The Federal Court of Appeal also discussed the oath in *Benner* v. *Canada (Secretary of State).*[104] Linden J.A. stated that the oath requirement was "an appropriate way to determine an individual's allegiance to this country."[105] He pointed out that many other countries in the world had the same or similar requirements.[106] The oath was, in essence, a call for the citizenship applicant to submit to "a simple inquiry as to whether he is committed to the country and shares the basic principles or ideals upon which the country was founded."[107] *Benner (FCA)* was overturned at the Supreme Court, but its reasoning regarding the purpose of the oath was not directly addressed, except to say that its discussion was not relevant to the question the court should have been addressing.[108]

---

lawful Sovereign.... In 1868, [[the] parliamentary oath was shorn of all references to the Queen's spiritual supremacy, the Pope and the defence of the succession as fixed by the Act of Settlement, 1700, and became simply, 'I swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, her heirs and successors according to law.'"

99 *Ibid.* Not surprisingly, the Monarchist League of Canada urges against any further compromise, preferring to leave the oath as it is now.

100 Dozens, if not hundreds, of cases address whether a person is entitled to take the citizenship oath and become a citizen or not, but these cases do not problematize the oath itself. Rather, they are challenges to the decisions made regarding qualification for citizenship. Questions arising from ineligibility of people who may constitute a threat to security (*Citizenship Act, supra* note 1, s. 19(2)(a)), are "part of a pattern of criminal activity" (*ibid.*, s. 19(2)(b)), are on parole, probation or incarcerated (*ibid.*, s. 22(1)(a)), are on trial for indictable offences (*ibid.*, s. 22(1)(b)), or have been convicted or are under investigation for certain offences under the *Crimes Against Humanity and War Crimes Act* (*ibid.*, s. 22(1)(c),(d)), form the bulk of the case law. The claimants in such cases would presumably be delighted to take the oath, in any form, but have been unable to get so far.

101 *Ulin, supra* note 32.

102 R.S.C. 1970 c. C-19.

103 *Ulin, supra* note 32 at para. 15 [emphasis added].

104 [1994] 1 F.C. 250 [hereinafter *Benner (FCA)*].

105 *Ibid.*

106 *Ibid.*

107 *Ibid.*

108 In *Benner* v. *Canada (Secretary of State)*, [1997] 1 S.C.R. 358 at para. 95 [hereinafter *Benner (SCC)*], Iacobucci J. wrote:

In perhaps the clearest statement on the significance of the citizenship oath, Linden J.A. (in dissent, though uncontradicted on this point) stated in *Roach (FCA)*[109] that a public oath or solemn affirmation "performs the social function of publicly committing the speaker to something in the strongest possible way."[110] Oaths are a "solemn matter"[111] that assist society in attaining "truth, justice, good government and national security."[112] By taking an oath, a person is publicly promising that "he or she is bound in conscience to perform an act or to hold an ideal faithfully and truly."[113] This link between the conscience of the speaker and the oath has been affirmed in many Supreme Court decisions.[114] Affirming an oath is "not a matter to be taken lightly,"[115] according to Linden J.A. The gravity of undertaking an oath is equaled in the public sphere "only by vows."[116] If a person refuses to take an oath on grounds of conscience, the courts must "carefully consider the position, for it shows that that person takes the oath seriously."[117]

We know from *Ulin* and *Benner* that taking the oath is non-negotiable. But what is an oath taker actually promising to do? And to whom or to what is the person committing, the Queen, or Canada? The collection of cases that have addressed such questions about the oath is limited. To date there have been four cases directly on point: *Almaas (Re),*[118] *Jensen (Re),*[119] *In re Citizenship Act and in re Werner Willi Peter Heib,*[120] and *Roach.*[121] Though their reasons have varied, all of them have upheld the oath requirement, and have not let the claimant change the wording or withhold assent.

In both *Almaas* and *Jensen,* the court was faced with potential citizens who objected on religious grounds to some duties of citizenship, including "serving in the armed services and ... voting."[122] In *Almaas*, the court considered what the oath of allegiance meant, and concluded that it did not require military service. The applicants were granted Canadian citizenship, given that "persons who refuse to serve in the armed forces because of religious beliefs may still serve Canada well in other ways in peace and war."[123]

> The respondent submitted that requiring an oath... [is a] perfectly rational [way] of ensuring that those who become citizens share our commitment to Canada. ... Linden J.A. accepted this argument in the Federal Court of Appeal. With respect, I must disagree. The relevant question is whether the discrimination [of requiring the oath from the born-abroad children of Canadian mothers but not of born-abroad children of Canadian fathers] is rationally connected to the legislative objectives.

109 *Roach (FCA), supra* note 41.

110 Linden J.A. in *Roach (FCA), supra* note 41 at para. 41, citing M. Gochnauer, *"Oaths, Witnesses and Modern Law"* (1991), 4 Can. J. Law & Jur. 67 at 99.

111 *Ibid.*

112 *Ibid.*

113 *Ibid.* at para. 36.

114 See *e.g. R.* v. *Khan,* [1990] 2 S.C.R. 531; *R.* v. *B. (K.G.),* [1993] 1 S.C.R. 740.

115 *Ibid.* at para. 42.

116 Gochnauer, *supra* note 53 at 99; cited with approval by Linden J.A. in *Roach (FCA), supra* note 41 at para. 41.

117 *Ibid.* at para. 42.

118 *Almaas, supra* note 37.

119 *Jensen, supra* note 38.

120 *Heib, supra* note 39.

121 Trial: *Roach (FCTD) supra* note 40. Appeal: *Roach (FCA), supra* note 41.

122 *Almaas, supra* note 37 at para. 11.

123 *Ibid.* at para. 22.

The facts of *Jensen* were nearly identical to those of *Almaas,* though they led the court to the opposite result. Addy J. noted that it is a "very basic principle that an oath of allegiance always includes a pledge to bear arms in defence of the realm."[124] He distinguished *Almaas,* saying it dealt only with the question of whether the oath included a duty to join the armed forces, and not with whether the oath included a duty to serve in some capacity if called by the Canadian state to participate in a legitimate war effort. According to Addy J., while it may be that religious freedoms are weighty, the applicants' complete refusal to participate in the defense of Canada "amount[ed] to a categorical refusal to recognize the right of Parliament to legislate on the subject."[125] This was in contravention of the portion of the oath that stated, "I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen."[126] The applicants could not change the wording of the oath, nor receive an exemption; if they would not take the oath without reservation, then they could not become Canadian citizens.[127]

Four years later in *Heib,* the Federal Court was once again confronted with a potential citizen who met all the criteria and had been issued a certificate of citizenship, but refused to take the oath in its present form. *Heib* presented a new objection to the oath, namely the objection to swearing allegiance to the Queen. The appellant argued that it was against his conscience "to swear allegiance to any living person."[128] The judge wrote in response to this that the oath:

> [could] 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.[129]

Mr. Heib refused the court's interpretation of the words. For him it was not the Queen specifically who presented the problem. Swearing allegiance to any person at all would engender the same objection. The judge concluded—as did the judges in *Almaas* and *Jensen*—that "[t]he appellant must take the oath in the form in which it appears. Failing the taking of the oath, he cannot become a citizen of Canada."[130] Despite the disposition in *Heib*, however, there is an undercurrent of sympathy for the conscientious objector that was less apparent in the previous two judgments. In *Heib,* the judge stated that he respected Mr. Heib for his convictions,[131] and he mentioned that Mr. Heib could seek special leave from Cabinet for a grant of citizenship.[132]

Before we turn to the last case, I wish to sketch out briefly two types of objection to the citizenship oath that can be gleaned from the previous three cases. These will be discussed in more detail at the outset of Section V below. The first is the objection to

---

124 *Ibid.* at para. 9.
125 *Ibid.* at para. 22.
126 *Ibid.* at para. 21.
127 Whether the duties of a citizen include assisting in a war to defend the realm is not, obviously, decided definitively merely by this judgment, and the question would be interesting if raised today under the *Charter.* Be that as it may, I will not be dealing with the question in this article.
128 *Heib, supra* note 39 at para. 7.
129 *Ibid.* at para. 8.
130 *Ibid.* at para. 29.
131 *Ibid.* at para. 8, Collier J. wrote, "I respect and salute [Mr. Heib] for his convictions."
132 *Ibid.* at para. 32.

swearing allegiance to a person or to the British monarchy. This objection only takes issue with the Queen's presence in the oath. Swearing allegiance to a person is unacceptable to many on religious grounds. Similarly, swearing allegiance to the monarchy is objectionable to many on conscientious grounds. The second type of objection is an objection to *anything* but God as a fit subject of allegiance. For people who have these or similar convictions, swearing an oath to Canada would be a form of idolatrous nationalism[133] and equally objectionable. For these people, then, the solution proposed by the court of defining the Queen *qua* theoretical apex is wholly unsatisfactory.

In the twelve years following *Heib*, no cases dealt directly with the citizenship oath. During this time, the *Canadian Charter of Rights and Freedoms*[134] came into effect. In 1992, Charles Roach brought a new case.[135] Roach was born in Trinidad, and came to Canada in 1955. He never became a citizen because he refused to swear or affirm allegiance to the Queen. He went to the Ministers involved to seek an exemption from the oath, but was refused.[136] When he was granted a certificate of citizenship, he filed an action for declaratory judgment with the Federal Court Trial Division, asking that he be granted citizenship without having to take the citizenship oath in its present form.

The media reported that Roach saw the oath "as a symbol of centuries of colonialism during which his black ancestors were subjected to slavery."[137] In the courtroom, Roach argued that the requirement of an oath violated several of his *Charter* rights, including the right to freedom of conscience and religion,[138] the right to freedom of speech[139] and the right to equality.[140] His statement of claim was struck out by the Prothonotary because it "disclosed no reasonable cause of action."[141] He appealed this decision to the Federal Court.

At the trial level, Joyal J. dismissed Roach's appeal, agreeing with the Prothonotary that there was no cause of action with a chance of success. Joyal J. pointed out that "[t]he Queen's presence as Canada's Head of State is an integral part of our Constitution."[142] Following the path of Collier J. in *Heib,* Joyal J. held that the oath of allegiance was not to the Queen as the Queen herself but in her capacity as Canadian head of state. He pointed out that the head of state could be anyone: "a Muslim, or an Atheist, ... [or] someone picked at random from a 6/49 kind of lottery."[143] According to Joyal J., the Queen in the oath is "the very embodiment of the freedoms and liberties which the appellant has inherited and which he now enjoys."[144] Joyal J. held that

---

133 For an example of religious beliefs that might be characterized as such see "95 Theses On the Nationalistic Idolatry of Churches in the United States" online: Kingdom Now <http://www.kingdomnow.org/ 95Theses.html > (date accessed: 26 March 2002).

134 *Charter, supra* note 2.

135 *Roach (FCTD), supra* note 40.

136 *Roach (FCA), supra* note 41 at para. 22.

137 *The Financial Post* (21 January 1994).

138 *Charter, supra* note 2, s. 2(a).

139 *Ibid.*, s. 2(b).

140 *Ibid.*, s. 15(1).

141 *Roach (FCTD), supra* note 40 at para. 6.

142 *Ibid.* at para. 11.

143 *Ibid.* at para. 17.

144 *Ibid.* at para. 16.

"Canada is a secular state,"[145] and for that reason the demand for an exemption from the oath on the grounds of religion or conscience could not succeed, as it "would be to permit the imposition of private beliefs, religious or otherwise, on laws of general application."[146]

Roach appealed the decision of the trial division. The Federal Court of Appeal rejected his appeal in a 2-1 decision. His subsequent application for appeal to the Supreme Court was denied.[147] In upholding the judgment of the court below, MacGuigan J.A. for the majority reaffirmed Joyal J.'s holding that the Queen in the oath of allegiance is the Queen *qua* Canadian head of state, and that another person or entity could fill the role, should Canadians undertake the appropriate constitutional amendments.[148] MacGuigan J.A. made the court's position explicit: pledging allegiance is the Canadian state's way of requiring new citizens to "express agreement with the fundamental structure of our country as it is."[149] The words of the oath do not actually *say* "I express my agreement with the fundamental structure of Canada," but rather "I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, her heirs and successors." MacGuigan J.A. did not consider this to be a problem.

In dismissing the freedom of speech arguments under subsection 2(b) of the *Charter*, MacGuigan J.A. wrote:

> Given that the appellant does not advocate revolutionary change (i.e., change contrary to the Constitution itself), his freedom of expression ... cannot conceivably be limited by the oath of allegiance, since the oath of allegiance in no way diminishes [that freedom].[150]

The note to the above passage did not clarify matters: MacGuigan J.A. stated, "if [Roach] did advocate revolutionary change, such advocacy could not, of course, receive constitutional protection, since it would be by definition anti-constitutional."[151]

In addressing section 15 equality arguments, Macguigan J.A. held that comparing non-citizens, who have to take the oath, to natural-born citizens, who do not, is "meaningless,"[152] as natural-born citizens are not exempt from the duties the oath entails. Furthermore, to hold that the oath is a burden, when all that is involved is "the miniscule [burden] of the time and the effort involved in the uttering of the twenty-four words of allegiance,"[153] would, in Macguigan J.A.'s estimation, "trivialize the Charter."[154]

---

145 *Ibid.* at para. 20.

146 *Ibid.*

147 Application for leave to appeal to the Supreme Court refused by the Federal Court of Appeal (Heald, Marceau and Decary JJ.A.) 24 June 1994. *Roach* v. *Minister of State for Multiculturalism and Culture*, 113 D.L.R. (4th) 67.

148 *Roach (FCA)*, *supra* note 41 at para. 4.

149 *Ibid.*

150 *Ibid.* at para. 7.

151 *Ibid.* at note 2, para. 7.

152 *Ibid.* at para. 13.

153 *Ibid.* at para. 14.

154 *Ibid.* at para. 14. MacGuigan J.A. wrote this despite having also written, in para. 2, that he agreed with Linden J.A. (writing in dissent) on "the nature of an oath."

Linden J.A. dissented in *Roach,* writing that there were several issues that disclosed a cause of action with a reasonable chance of success at trial. A person's freedom of conscience could be burdened if they had "a conscientious objection to the content of the oath or affirmation."[155] He did not find that the oath could restrict Roach's freedom of religion, because the connection between the allegiance to the Queen as head of state and Mr. Roach's religious views was too remote,[156] but under section 2 of the *Charter,* Linden J.A. found that a person might feel inhibited in working towards the abolition of the monarchy after having sworn an oath promising allegiance. A person who takes the oath seriously may legitimately conclude that he "was being made to choose between his political principles and his enjoyment of Canadian citizenship, something the *Charter* is supposed to prevent."[157]

Linden J.A. rejected the notion that it was merely the appellant's personal inhibitions that presented a problem. He gave an example of two republicans who object to the monarchy. They might both become citizens without the oath, one by birth and the other by naturalization. But when the government enacts a legal requirement for an oath, the republican born abroad might feel he must choose between remaining true to his conscience and not becoming Canadian, or violating the oath once he had taken it by actively working for the abolition of the institution to which he promised allegiance. Forcing a person to make this choice may violate the his freedom of thought, belief or expression.[158] Under section 15, Linden J.A. found that if a person feels, for conscientious reasons, that he cannot swear the oath, the person is denied the benefits of citizenship because of his place of birth or present (non-Canadian) citizenship. The fact that natural-born Canadians do not have to take the oath of allegiance, but persons seeking naturalization do, could constitute a violation of the right to equality.

Last, the meaning of the oath was characterized differently by Linden J.A. Though he agreed that MacGuigan J.A.'s interpretation was sensible, he found that the semantic solution ignored the plain and obvious meaning of the words. The plain meaning is allegiance to the monarchy, and "[i]t must be recalled that there was a time when criticism of the monarchy was viewed as treason."[159] Though the Constitution now clearly allows for criticism, it is nonetheless possible, given the presence of the monarchy in the oath, that steps could be taken "to cancel the citizenship of someone who, after swearing allegiance to the Crown, engages in activity to abolish it totally."[160] In what might be called a *cri de coeur,* Linden J.A. then asked a series of rhetorical questions:

> If the oath of loyalty permits one to demonstrate that loyalty to the Crown by advocating its abolition, what is the point of that oath? Is that loyalty or is it disloyalty? Is the oath merely a meaningless formality? Is there any commitment to its content

---

155 *Ibid.* at para. 48.

156 *Ibid.* at para. 51.

157 *Ibid.* at para. 57.

158 *Ibid.* at para. 66. Linden J.A. noted that Dickson C.J.C. refuted the "self-imposed-restriction" argument in *Edwards Books,* in the case of Sunday closing laws. By comparing the two groups, Dickson C.J.C. found that the religious merchants faced "a choice between breaking their Sabbath or suffering a competitive disadvantage." *Ibid.* at para. 65.

159 *Ibid.* at para. 56.

160 *Ibid.*

> required? Does it have any purpose at all? If all the oath of allegiance achieves is to get someone to promise not to violate the criminal law and to avoid subversive and illegal political methods, something they are already obligated to do, is it of any value?[161]

The majority judgment in *Roach (FCA)* represents the current state of the law in Canada. Unsympathetic to the religious or conscientious objector, the main thrust of the holding is that the words of the oath do not refer to the Queen as a person, but rather as Canada's head of state, and that a person cannot protest when the state they wish to join asks for express agreement with its fundamental structure. Given the effect of inertia, and the strength of our constitutional tradition (which includes the monarchy), the outlook is not favourable for conscientious objectors who, in spite of the court's rulings, still feel the oath violates their conscience or religion and hence will not agree to take it.

It must be noted that the court's insistence on loyalty to the Queen is not a product of happenstance, or of an untoward attachment to the English monarchy on the part of individual judges. The monarchy remains fundamental to the political and judicial systems in Canada. The Queen is present in the citizenship oath because she remains the Canadian head of state, the single highest authority in the country. The role of the monarchy as Canada's head of state dates back to the beginnings of Canada itself, and is entrenched in our history, traditions and most importantly for our purposes, in our Constitution, both in the *British North America Act, 1867* and in the *Canada Act, 1982*.[162]

The Queen's representative in Canada, the Governor-General, signs all bills into law. The same is true of provincial laws, which are signed into law by the Queen's provincial representative, the Lieutenant-Governor. The Queen's representatives call to order the sessions of all the provincial legislatures and the federal parliament. The Queen's powers, at least in abstract constitutional terms, are still enormous. Decisions such as when to call an election and whom to appoint to cabinet are within the Queen's mandate.[163] As commentators have noted, however, "no one expects ... that she will actually make such decisions,"[164] and all of the powers outlined above are far more symbolic than actual. The actual existence of the Queen or any particular preferences she may have is essentially irrelevant to the *de facto* operations and decisions of the modern Canadian political state. Nonetheless, the monarchy forms the symbolic foundation for government authority and the rule of law in Canada. The Canadian Forces, the civil service, and the postal service all "function in the Queen's name, not on behalf of the Prime Minister and Cabinet of the day."[165] The judiciary is thus understandably resistant to suggestions that reference to the Queen be summarily removed from the citizenship oath ceremony.

Judges have thus sought to define the words "the Queen, her heirs and successors" by reference to this nexus of symbolic functions, and not by reference to the actual

---

161 *Ibid.* at para. 56.

162 *Canada Act 1982* (U. K.), 1982, c. 11.

163 S. Brooks, *Canadian Democracy: An Introduction.* 3rd ed. (Toronto: Oxford University Press, 2000) at 88.

164 *Ibid.*

165 "Arguments for the Maple Crown" online: The Monarchist League of Canada <http://www.monarchist.ca/menu/arguments.html> (date accessed: 26 March 2002).

person of Her Majesty Queen Elizabeth the Second. It is difficult to overstate the importance of this semantic move. In making this link, the court tries to define away the objections of a large number of people who object on religious grounds to venerating a person. This will succeed, however, only if those people can accept the court's definition in good conscience.

IV CRACKS IN THE ARMOUR?

Challenges to the citizenship oath have failed thus far, but there are some reasons to believe the language involving the Queen may change. There is an argument to be made on *Charter* grounds that the oath requirement is unconstitutional.[166] Added to this are several Canadian legal and political developments, which when taken together suggest that change to the oath may eventually occur. I will address some aspects of the broader Canadian political and legal context in this Section, and then turn to some potential *Charter* arguments in Section V.

Domestic Political Developments

Some local political antipathy to the current citizenship oath exists. A new oath is proposed in Bill S-36, a Private Senator's Public Bill which aims to reform the *Citizenship Act*.[167] It is described in the summary as "a modern form of oath of loyalty,"[168] and reads:

> I pledge my loyalty to Canada and Her Majesty Elizabeth the Second, Queen of Canada. I promise to respect our country's rights and freedoms, to uphold our democratic values, to faithfully observe our laws and to fulfill my duties and obligations as a Canadian citizen.[169]

The changes of note are that the new citizen pledges loyalty, rather than affirming he will be faithful and bear true allegiance, and the promise is made to Canada first, and then to Queen Elizabeth alone, and not to her heirs and successors.

There have been attempts to change the oath in the House of Commons as well. On 19 September 2001, a Liberal backbencher, John Bryden,[170] introduced a Private Member's Bill, Bill C-391, entitled *An Act to Amend the Citizenship Act (Oath or Affirmation of Citizenship)*.[171] When introducing the bill in Parliament, he noted that he

---

166 This will be discussed in more detail in Section V, below.

167 *Bill S-36, supra* note 1.

168 Summary of Bill S-36, 1st Session, 37th Parliament, 49-50 Elizabeth II, 2001. "Summary" online: The Senate of Canada <http://www.parl.gc.ca/37/1/parlbus/chambus/senate/bills/public/S-36/S-36_1/S36-e.htm> (date accessed: 26 March 2002).

169 *Bill S-36, supra* note 1.

170 Ancaster-Dundas-Flamborough-Aldershot, Lib.

171 Bill C-391, 1st Session, 37th Parliament, 49-50 Elizabeth II, 2001, House of Commons of Canada. Placed in order of precedence 28 February 2002.

had tried to change the citizenship oath many times, so that it might better reflect "the values that we hold dear as Canadians."[172] Bryden's proposed citizenship oath reads as follows:

> 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.

Bills S-36 and C-391 are not likely to become law, but they are not unique. In fact, over the last decade political attention has periodically focussed on the oath and speculation about its amendment has been a recurring feature of life in our nation's capital. In 1994, the Commons Citizenship Committee recommended that the citizenship oath be changed, but nothing was done.[173] In 1996, Lucienne Robillard, the Citizenship Minister, commented that a new oath was needed, and in doing so provoked an uproar from the Monarchist League of Canada.[174] A Private Member's Bill was introduced in the same year, again by a Liberal backbencher, asking the House of Commons Citizenship Committee to ask all Canadians, through nationwide hearings, what the oath should be.[175] A poll a few months later indicated that most Canadians "would rather swear allegiance to Canada than to Queen Elizabeth."[176] Again, nothing was done.

The stasis in Ottawa with respect to the oath is perhaps due to the potential it has to inflame debate surrounding Québec separatism. A secessionist group[177] has already asked that immigrants being naturalized in Québec swear allegiance to *both* Québec and Canada, "so there will be no misunderstanding about their right to work to break up the country in a future referendum."[178] This demand arose after a heated exchange between former Defense Minister Doug Young and then-Bloc Québécois MP Osvaldo Nunez, wherein Young suggested to Nunez that "[he] should not have immigrated to Canada from his native Chile if he planned to work to break [the country] up."[179] It could be that the federal government is unwilling to open up debate on the wording of the citizenship oath, because if they did they would have to attend to the separatists' concerns, while trying at the same time to appease the many remaining monarchists in Canada.[180]

---

172 Hansard, (19 September 2001).

173 *Bar and Bench Daily News Digest*, (24 June 1994) Vol. IV – Issue 124.

174 *Bar and Bench Daily News Digest*, (29 January 1996) Vol. VI – Issue 20.

175 *Bar and Bench Daily News Digest*, (12 June 1996) Vol. VI – Issue 113.

176 *Bar and Bench Daily News Digest*, (9 September 1996) Vol. VI – Issue 173.

177 Société St-Jean Baptiste, Montreal.

178 *Bar and Bench Daily News Digest*, (23 April 1999) Vol. IX – Issue 78.

179 *Ibid.*

180 A large number of Canadians are opposed to removing the monarchy. A recent National Post/COMPAS poll found that 58% of Canadians thought that the Monarchy should keep its role in Canada. This is up from 37% in 1997. Conversely, only 30% thought the Monarchy should be abolished, down from 53% in 1997. *National Post* (4 February 2002) A4.

Domestic Legal Developments

There have been some shifts in Ontario regarding oath requirements. For instance, all prospective lawyers being called to the Ontario Bar were previously required to take an oath of allegiance to the Queen. A challenge was made to the requirement by Aboriginal members of the bar, including Patricia Monture-Angus,[181] who were appalled by the thought of swearing allegiance to the monarch, whom they regarded as the head of a colonizing nation.

Spence J. directed the effort of the Law Society of Upper Canada to deal with the question. The Law Society sought outside counsel. The opinion came back promptly, and by the recollection of Spence J., said, "it would be a brave band of Benchers who would seek to continue this requirement."[182] The opinion was from Ian Binnie, now on the Supreme Court, but then a lawyer at McCarthy Tétrault. The vote of the Benchers was taken, and the rule was changed. The oath of allegiance to the Queen is now optional for lawyers upon admission to the Ontario Bar.

Tension between individual conscience and the state's demand of an oath has led, even in the *Citizenship Regulations* themselves, to a loosening of the requirements over the years. The current regulations include the *caveat* that judges, while performing the citizenship ceremony, should "[allow] the greatest possible freedom in the religious solemnization or the solemn affirmation thereof."[183] What this means is not entirely clear, though from the case law it seems that exemptions or selective rewriting are not currently possible.

Another notable change is that the regulations now allow a potential citizen to make an affirmation rather than swear an oath.[184] The inclusion of this option, when viewed from the vantage point of history, is a major development.[185] If nothing else, the notion that further, incremental change may be possible can be drawn from the fact that the citizenship oath has already changed once, from a religious declaration made in the fear of an exclusively Christian God (the "avenger of falsehood")[186] to a more inclusive ceremony that allows for an element of religious freedom through affirmation. The remaining question is whether that change will more likely take place in the political sphere or the legal sphere. Though it is certainly possible that the politicians will take this problem on, a change in the citizenship oath could also come about through the legal system, as a result of a successful *Charter* challenge.

---

181 "Mohawk law student plans court challenge of oath of allegiance" *The Globe and Mail*, (2 August 1988) A1. Ms. Monture-Angus is now a professor at the University of Saskatchewan.

182 Transcript of speech by Mr. Justice Spence, (Spring 1998) 17 Advocates Soc. J. 5.

183 *Citizenship Regulations, supra* note 13, s. 17(1)(b).

184 This is of profound religious significance to many. See *supra* note 3.

185 Linden J.A. in his dissent in *Roach (FCA), supra* note 41, described the decision to allow affirmations instead of oaths in various public ceremonies as "a major human rights achievement for our society." Prior to the change, the oath requirement effectively excluded religious minorities from public life. Linden J.A. recounted the story of Lionel de Rothschild in England, who "had to be elected six times between 1847 and 1858 in the city of London before he was finally allowed to take his seat in the House of Commons," because, being of Jewish faith, he refused to swear an oath on the Bible (*ibid.* at para. 37).

186 *Omychund* v. *Barker* (1744), 26 E.R. 15, cited by Linden J.A. in *Roach* v. *Canada (FCA), ibid.* at para. 36.

The judiciary may be ready for such a challenge, or at least ready to consider explicitly what the oath is and what it signifies, as there is currently some instability in the jurisprudence around oaths. In evidence law, for instance, the court has begun to look for circumstantial guarantees of trustworthiness, rather than demand that statements sought to be entered as evidence be made under oath. The reason for this devaluation of the oath was stated most plainly in Cory J.'s dissent in *R.* v. *B. (K.G.)*: "the taking of an oath is frequently no more than a meaningless ritualistic incantation for many witnesses ... the oath adds nothing to the reliability of their evidence."[187] Lamer C.J.C., for the majority, agreed "the oath will not motivate all witnesses to tell the truth,"[188] but held that "there remain compelling reasons to prefer statements made under oath,"[189] including the fact that it would impress upon an honest witness the gravity of their testimony.[190]

If the oath is not as important as it once was, then the court may be more willing to let individual rights triumph over the interest of the state in the citizenship oath context. The state has no interest in violating an individual's freedom of conscience, religion and expression over a few words that signify little. But the strongest argument against requiring an oath is not that it is insignificant, but rather that it is a symbolically crucial act that engages the public honour of the individual. Viewed from this perspective, the colonial, monarchist, and nationalist implications of Canada's current oath constitute unacceptable infringements of fundamental rights and freedoms guaranteed to each individual under the *Charter.*

V THE CITIZENSHIP OATH AND THE *CHARTER*

I want to explore how the citizenship oath in its present form infringes the *Charter.* In doing so, I will rely in part on the dissent by Linden J.A. in *Roach (FCA)*, as discussed above, which outlines some ways a challenge to the oath might succeed at trial.[191] There are at least two basic sets of objections to the present oath. The first includes the various problems a person may have with swearing allegiance to any person, or the Queen or British monarchy in particular. The second set of objections includes all the objections a person might have to the oath in general, nation-states in general, or Canada in particular.

The first set of objections—those to either taking an oath to a person in general or the Queen or monarchy in particular—can be grounded in either religious or conscientious reasons. For instance, a religious person could believe that the oath is a form of idolatry, as it pledges faithfulness and allegiance to an earthly person, despite

---

187 *Supra* note 114 at para. 140.

188 *Ibid.* at para. 89.

189 *Ibid.*

190 *Ibid.*

191 I will not address applicability questions in any sustained way within this article. The *Charter* applies to non-citizens on Canadian soil, save for the sections that specifically address the rights of citizenship. See *Singh* v. *Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177, and Galloway, *supra* note 26 at 47-67. The interposition of the oath between an otherwise qualified applicant and the benefits of citizenship is, I argue, a state action sufficient to warrant *Charter* scrutiny.

her transitory nature. Treating a person (in the current instance the Queen, but any other person who might be substituted for her would be equally objectionable) as the appropriate subject of faith and loyalty, is, for some, an indication that a person has forsaken God.[192] It is worth mentioning that this objection need not be religious; a person could simply have a deeply held moral belief that another person is not an appropriate object of allegiance, which would lead to the same conclusion.

Objections can also be made against the Queen or monarchy in particular. Perhaps the best example of these are the objections put forward by the Aboriginal law students who were unwilling to swear allegiance to the Queen because of firm moral objections to the colonial history of the monarchy, and the oppressive effect it has had on their peoples. People with strong republican convictions also fit this category.

Under the current law in Canada, a person who wishes to become Canadian must publicly promise to "be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors." In other words, would-be Canadians must promise allegiance to a person. Despite the compunctions people might have about doing such a thing, the law leaves no loopholes, unless one is willing to accept the semantic solution proposed by the judges in *Heib* and *Roach,* and believe that the words "Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors" refer to the office—a theoretical construct or symbol—rather than to a person. Were Canada to adopt a more abstract citizenship oath that made no mention of allegiance to any person,[193] these concerns about venerating a person likely would be resolved.

The second set of objections includes those that go against either the state in general or Canada in particular. For example, a person could have misgivings about the Canadian state, and want to work for significant changes.[194] Such a person may feel burdened by having promised allegiance to a state he then seeks to reinvent. There are also the objections of those whose religions hold that you cannot venerate anything but God, so you cannot venerate a state.[195] For a person who objects to nations, and sees attachments to them as idolatrous, any oath at all is problematic.

Refusing to swear loyalty to anything puts the problem of the oath into its sharpest relief. It is difficult to see how a person can attain citizenship while denying the nation state, which is fundamental to the very existence of the category citizen. It may be that this objection reaches the point of absurdity, at least within the context of citizenship. No matter how pliable the definition of citizenship, it does not seem that there is any way to separate it from the state. The two concepts, citizen and state, arise in symbiosis. Each gains existence from the other and neither can exist without the other. This type of objection to the oath requirement could fail simply because of the immanent or

---

192 Support for such views can be found, for instance, in the book of the prophet Samuel. 1 Samuel 8 recounts how the elders of Israel asked Samuel for a king to rule them: "6. But the thing displeased Samuel, when they said, Give us a king to judge us. And Samuel prayed unto the LORD. 7. And the LORD said unto Samuel, Hearken unto the voice of the people in all that they say unto thee: for they have not rejected thee, but they have rejected me, that I should not reign over them." *The Bible*, King James Version, I Samuel VIII, verses 6 and 7.

193 Such as the one proposed by Bryden. See Section IV.A above.

194 As in the example above of Nunez, who immigrated from Chile and later ran for the Bloc Québéçois.

195 See *supra* note 133.

definitional limits of citizenship. Yet this result seems unsatisfactory, because *Charter* values favour tolerance, inclusion and respect for all views, including views like these, which lie well outside the political mainstream.

Keep in mind, an objection to nations seems absurd only *within* a context of citizenship. It is perfectly rational for oppressed or marginalized people to work within the order of nation-states to secure benefits, while at the same time not agreeing with the basic or fundamental premises of that order. It is thus understandable that a dissident would still seek the benefits of citizenship. He would wish to minimize his exclusion from society and to be better able to work for his notion of a better world. People with such convictions who were born in Canada do not have to choose between the benefits of citizenship and loyalty to their consciences, but immigrants do.

Subsection 2(a) – Freedom of Conscience and Religion

Of the two freedoms protected under subsection 2(a), there is far less written on freedom of conscience than on freedom of religion. This is unfortunate because the citizenship oath purports to bind the conscience of the individual.[196] In *R.* v. *Morgentaler,*[197] Wilson J. commented:

> ... in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality.[198]

Freedom of conscience encompasses more than freedom of religion;[199] it does not require adherence to any organized religion, but rather "is aimed at protecting views based on strongly held moral ideas of right and wrong."[200]

How could swearing the citizenship oath violate freedom of conscience? The answers lie in the various objections outlined above. A person could believe strongly that the Queen, or a person in general, is not a fit subject of allegiance. He could be an unwavering republican, and want to abolish the monarchy or change the structure of Canada. Despite personal convictions that the Canadian state should change radically, his conscience is burdened by the current oath because he must proclaim publicly his loyalty to the Queen, and that he will faithfully observe the laws of Canada and his duties as a citizen.

The citizenship oath violates freedom of conscience in effect if not in purpose, because the oath requirement burdens those who have conscientious objections. It puts a barrier between them and citizenship. This barrier is not faced by those with mainstream beliefs, who would be willing to take the oath without objection. By insisting on an oath before citizenship is granted, those whose deeply held beliefs run counter to the oath are

---

196 *R.* v. *Khan* and *R.* v. *B. (K.G.), supra* note 114. Recall the Supreme Court's description of the two as "inextricably linked."

197 [1988] 1 S.C.R. 30.

198 *Ibid.*, cited with approval by Linden J.A. in *Roach (FCA), supra* note 41 at para. 45.

199 *Roach (FCA), supra* note 41 at para. 45.

200 *Ibid.*

forced to decide between living according to their consciences and becoming citizens. This choice is a burden similar to the one faced by the Jewish merchants subjected to Sunday closing laws: the individual must choose between abiding by his conscience, or forgoing a benefit available to others. Putting pressure on an individual to act contrary to his conscience and to affirm the oath in order to have access to civic rights and privileges may be justifiable under section 1, but it is a violation of subsection 2(a) of the *Charter*. The fact that the process is voluntary is not a license for the Canadian state to make the demands and process unconstitutional.

The oath also violates freedom of conscience because it leaves no room for individual choice on a matter of utmost importance. According to the unanimous Federal Court of Appeal, the oath is a "solemn matter"[201] that commits the speaker to the values and promises made, not lightly but rather in "the strongest possible way."[202] In dissent, though not contradicted on this point, Linden J.A. stated plainly that the oath is meant to bind the conscience.[203] Yet the content of the oath—the substance to which the speaker must bind his conscience—is not negotiable. It is dictated, word for word, by statute.[204] If the individual refuses to take it, then he is barred by the state from access to the benefits of citizenship.[205] Hence, a subsection 2(a) violation is made out.[206]

The right to freedom of religion is also violated by the citizenship oath requirement. Freedom of religion has been discussed at greater length than freedom of conscience in the Supreme Court, and was last addressed in *Trinity Western University* v. *British Columbia College of Teachers*.[207] In the decision, the court restated Dickson C.J.C.'s seminal judgment in *R.* v. *Big M Drug Mart*:[208]

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.[209]

The freedom guaranteed by subsection 2(a) includes freedom from both direct and indirect coercion. Even limiting a person's options or ability to pursue "alternative courses of conduct"[210] is coercive.

In discussing the history and purpose of subsection 2(a), Dickson C.J.C. in *Big M* noted that it arose from the conviction of our political forebears that "belief itself was

---

201 *Ibid.* at para. 41.

202 Linden J.A. in *Roach (FCA), supra* note 41 at para. 41, citing M. Gochnauer, *"Oaths, Witnesses and Modern Law"* (1991), 4 Can. J. Law & Jur. 67 at 99.

203 *Roach (FCA), supra* note 41 at para. 36.

204 See *Citizenship Act*, *supra* note 1, and the discussion in Section II.

205 See *Andrews, supra* note 44, *Lavoie (FCA), supra* note 46, and *Lavoie (SCC), supra* note 45; see generally the discussion in Section III.A above.

206 In addition to imposing a burden on those who conscientiously disagree, the mandatory nature of the oath also greatly devalues it for those who do agree with it. They cannot establish that they mean it, because they were not given the choice *not* to take it. This will be discussed below, in the rational connection section of the section 1 analysis.

207 [2001] S.C.J. No. 32 [hereinafter *TWU*].

208 [1985] 1 S.C.R. 295 [hereinafter *Big M*].

209 Dickson C.J.C. in *Big M, ibid.* at para. 95, cited with approval in *TWU, supra* note 207 at para. 28.

210 *Big M, supra* note 208.

not amenable to compulsion."[211] The subsection offers freedom *from* religion, as well as freedom *of* religion. The presence or absence of religious belief is a matter that must be left to the individual—it is not the proper subject of state interference. As a result, a belief in the supremacy of God could mean that the citizenship oath violates a person's freedom of religion. Depending on the religious faith of the person, swearing the oath could reasonably be seen as idolatry, treating as divine that which is only human (whether Queen or state). The oath requirement forces him to choose between public blasphemy and citizenship. A non-citizen without the same religious convictions, all other things being equal, would become a citizen. Since there are no exemptions available to the objector, a subsection 2(a) violation is made out.

It may be true that many of the objections a claimant raises can be met by careful definition of the meaning of the words "Queen Elizabeth" in the citizenship oath. As noted above, this strategy was employed by the trial judges in *Heib* and *Roach (FCTD)* and by the majority in *Roach (FCA)*. However, it seems that adjusting the legal significance of the words is untenable, as Linden J.A. noted in his dissent in *Roach (FCA)*. The words, in their plain meaning, indicate a person, Queen Elizabeth. The legal history of oaths of allegiance shows that they arose explicitly in order to bind the conscience of the individual to the sovereign, not to concepts.[212] The definition in *Black's Law Dictionary* lends credence to this interpretation. It defines *oath of allegiance* as "an oath by which one promises to maintain fidelity to a particular sovereign or government."[213] It also notes:

> [T]he person making the oath implicitly invites punishment if the statement is untrue or the promise is broken. The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false.[214]

It is far from obvious that the meaning of the oath has changed, given that the words have not. The oath taken today is nearly identical to one taken in 1689.[215] Regardless of what judges say, the public and political nature of both citizenship and the citizenship ceremony means that the judiciary is hard-pressed to set the meaning of words in any authoritative way. Not only is it fairer to all involved that the words be given their clear, plain and popularly held meaning, it also is in keeping with the canons of statutory interpretation. The ceremony is more than just a legal one; it is a public ceremony, with personal, religious, social and political ramifications. In this light, the present wording of the oath falls afoul of the objections outlined above and is not saved by semantics.

The acceptable limits on the right of freedom of conscience and religion are few, comprising only those necessary "to protect public safety, order, health, or morals or the

---

211 *Ibid.* at para. 120.

212 See *Monarchist League, supra* note 95.

213 *Black's Law Dictionary*, 7th ed. (West Group: St. Paul, Minnesota, 1999) at 1099 [hereinafter *Black's Law Dictionary*].

214 *Ibid.*

215 "By the reign of William and Mary in 1689, ... allegiance was expressed in the now familiar words, "I swear that I will be faithful and bear true allegiance to King William and Queen Mary", and the oaths of allegiance and supremacy were required of electors as well as of members of Parliament." *Monarchist League, supra* note 95.

fundamental rights and freedoms of others."[216] In *TWU,* the court noted that freedom of religion is not absolute.[217] The limit of the subsection 2(a) right to freedom of religion is met when it "is called upon to protect activity that threatens the physical or psychological well-being of others."[218] As there is no clear harm or threat of harm to others if the oath is not taken in its current form, this bar will not affect a subsection 2(a) claim made by a religious or conscientious objector to the oath.

There is one other hurdle for a claimant under subsection 2(a): the triviality test. The claimant must demonstrate that the practice or coercive burden required by the state is enough to actually interfere with religious belief or practice.[219] The triviality test was fatal to the claimant's 2(a) objection to the citizenship oath in *Roach (FCA).*[220] The majority in *Roach (FCA)* held that the mere "twenty-four words"[221] required by the oath did not constitute even a trivial burden. However, it was held by the dissent that the oath is a serious and symbolically important event, and the majority agreed with the dissent's characterization of the oath.[222] If a claimant could provide the court with evidence that an important event like swearing the oath would interfere with his religious belief or practice, the triviality test would be met. It seems that for a person of serious religious belief, providing such evidence would be possible. As Dickson C.J.C. stated in *Big M,* "an emphasis on individual conscience and individual judgment ... lies at the heart of our democratic political tradition."[223] A claim that the individual's understanding of the effect of the words on his religious faith and practice is not important would thus run counter to the protection of individual rights embodied in subsection 2(a).

To conclude, a successful subsection 2(a) claim could be made by a claimant, for either religious reasons (for example, refusal to bear allegiance to a monarch, or any earthly potentate, or a state), or for reasons of the conscience (for example, moral objections to the Queen, the monarchy or Canada). The claimant would argue that the oath currently required by law is coercive, as it withholds access to benefits that the person is otherwise entitled to. The burden is not trivial, and there are no pressing state concerns about public safety, order, health or morals, or the fundamental rights and freedoms of others which would preclude the claim from *Charter* protection at this stage. The analysis would then proceed to section 1, where the government must demonstrate the reasonableness of the infringement.[224]

---

216 *Big M, supra* note 208 at para. 95.

217 *TWU, supra* note 207 at para. 29, citing L'Heureux-Dubé J. in *P.(D.)* v. *S.(C.),* [1993] 4 S.C.R. 141 at 182.

218 *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315 at para. 226 *per* Iacobucci and Major JJ., cited with approval in *TWU, supra* note 207 at para. 30.

219 *R.* v. *Edwards Books and Art,* [1986] 2 S.C.R. 713 [hereinafter *Edwards*] at para. 97 *per* Dickson C.J.C.: "Legislative or administrative action which increases the cost of practicing or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial."

220 *Roach (FCA), supra* note 41 at para. 46.

221 *Ibid.* at para. 14.

222 *Ibid.* at para. 2.

223 *Big M, supra* note 208 at para. 122.

224 All arguments under section 1 will be dealt with together in Section V.D below.

Subsection 2(b) – Freedom of Expression[225]

In the recent case of *R.* v. *Sharpe*,[226] the Supreme Court reaffirmed the ruling in *Irwin Toy Ltd.* v. *Quebec*[227] that freedom of expression is guaranteed in order to "ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream."[228] The scope of the freedom of expression guarantee, then, is quite broad. In *Irwin Toy,* Dickson C.J.C. wrote, "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee."[229]

The purpose and effect of a law are both relevant to the subsection 2(b) inquiry. If a law's purpose is "to control the ability of the one conveying the meaning to do so,"[230] then the law violates the subsection 2(b) guarantee. In the case of the citizenship oath, one could argue that the purpose of the requirement is to control what a new citizen in the citizenship ceremony may express. However, even if one were to take a more generous construction of the government's purpose, (for example, "to ascertain whether the new citizen agrees with the fundamental structure of the country"), it may be that the oath requirement still runs afoul of the expression guarantee, as any law that has the effect of controlling or limiting expression is also a subsection 2(b) violation.[231] Furthermore, as asserted by Linden J.A. in dissent in *Roach (FCA),* the oath requirement could be characterized as compelled speech, which violates the *Charter*: freedom of expression, according to the Supreme Court, "necessarily entails the right to say nothing or the right not to say certain things."[232]

The oath, which requires a person to say particular words publicly, is clearly a type of expressive activity. It also, as noted above, binds the speaker's conscience to the particular set of values instantiated in the words. There is no question, then, that the effect of the oath requirement is to control the speaker's expression at that instance.[233] Of course, the requirement is not entirely arbitrary; the government, in exchange for the oath, will grant the person the privilege of citizenship, presumably something the person wants and is willing to make sacrifices for.

The burden of proof is on the claimant to demonstrate that the effect of the law is to limit expression. In doing so, the claimant must show both that his expression is limited, and that the expression in question furthers at least one of the three principles underlying

---

225 There are persuasive arguments to be made under the subsection 2(b) freedoms of thought, belief, and opinion, though in the body of the article I will confine myself to freedom of expression. Linden J.A. ably outlined the arguments in his dissent in *Roach (FCA), supra* note 41 in paras. 52-58.

226 [2001] 1 S.C.R. 45 [hereinafter *Sharpe*].

227 [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*].

228 *Sharpe, supra* note 226 at para. 23, citing *Irwin Toy, supra* note 227 at 976.

229 *Irwin Toy, supra* note 227 at 969.

230 *Ibid.* at para. 49.

231 *Ibid.*

232 *Slaight Communications* v. *Davidson,* [1989] 1 S.C.R. 1038 at 1080 [hereinafter *Slaight Communications*]; aff'd *RJR MacDonald Inc* v. *Canada (Attorney-General),* [1995] 3 S.C.R. 199; 127 D.L.R. (4th) 1.

233 Depending on how much significance the oath is given, it could even be argued that it is a violation of thought and belief as well, as it binds the conscience, and the government determines the content to which the individual's conscience is bound.

the freedom of expression guarantee: the pursuit of truth in all its forms, participation in political and social life, or individual self-fulfillment and self-actualization.[234] If the effect of the oath requirement is to control expression by limiting the range of available options, then it seems that any deviation from the words, either by substituting other words, or by simply not speaking at all, would further the goal of individual self-fulfillment. It is also likely that individual control over the wording or the speaking of the oath would constitute a political act on the part of the speaker, demonstrating personal political convictions in a symbolically important way.

The government may argue that the new Canadian freely chose to join the country, and hence ought to be estopped from challenging the methods the state uses to grant citizenship. Having asked for citizenship, the argument goes, it does not lie in a person's mouth to complain about how the benefit is given. This is an interesting argument, but one that is most appropriate to section 1. It is no answer to a subsection 2(b) claim to point out that, because attaining citizenship is a voluntary process, the oath requirement is not actually coercive or a violation of freedom of expression. Although the government is free to choose its process for naturalizing new citizens, it is not free to choose a process that contravenes constitutionally guaranteed freedoms without justification.[235]

There are some other responses that might be made to a subsection 2(b) claim. The first is the aforementioned semantic solution, in which the words of the oath are redefined. If the oath is to the apex of the Canadian political state, then it can be argued that the expression contained in the oath is a declaration of support for, among other things, freedom of expression itself.[236] However, even if we allow the strongest case for the government, and say that the oath is merely a declaration of fealty to the Constitution (which includes a guarantee of freedom of expression), the question remains: is it a violation of freedom of expression for the state to compel a person to speak out in favour of freedom of expression?

The answer, paradoxically, is yes. It is a violation of freedom of expression to compel speech.[237] In *R.* v. *Keegstra*,[238] the Supreme Court held that speech that is unpopular, incorrect, even speech that is hateful or harmful, is still protected by the freedom of expression guarantee.[239] The only type of expressive activity excluded from the protection of subsection 2(b) at the initial inquiry is expression achieved through acts of violence. Even threats of violence are protected.[240]

---

234 *Irwin Toy, supra* note 227.

235 See *Lavoie (SCC), supra* note 45, at para. 3 *per* McLachlin C.J.C. and L'Heureux-Dubé J. (dissenting).

236 This seemed to be Joyal J.'s assertion in *Roach (FCTD), supra* note 40 at para. 16: "[t]he Head of State, as Her Majesty is so defined, is the very embodiment of the freedoms and liberties which the appellant has inherited and which he now enjoys."

237 See *Slaight Communications, supra* note 232.

238 [1990] 3 S.C.R. 697 [hereinafter *Keegstra*].

239 *Ibid.*

240 *Ibid.* See also *Roach (FCA), supra* note 41 at para. 64, where Linden J.A. makes a similar point in his dissent, citing with approval the following statement by Jackson J. of the US Supreme Court in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 at 642 (1943): "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, [or] religion."

The majority holding in *Roach (FCA)* that "if [Roach] did advocate revolutionary change, such advocacy could not, of course, receive constitutional protection, since it would be by definition anti-constitutional" appears to have been in error.[241] As *Keegstra* established and *Sharpe* confirmed, anti-constitutional, iconoclastic, anarchic, or harmful speech is initially protected by subsection 2(b), though it may be that state interference to limit such expression will be justified under section 1. Hence a refusal to swear allegiance to the Queen or promise to obey the laws of Canada, even in the context of a citizenship ceremony, is constitutionally protected expression under subsection 2(b). As such, the onus falls on the state to justify the oath requirement.

Another possible response the government could make to a subsection 2(b) challenge is to claim that the embodiment of the Queen as the head of the Canadian political apparatus is constitutionally determined, just like the *Charter* right of freedom of expression.[242] It is well established that a claimant may not use one part of the Constitution to attack another part.[243] If the Queen is part of the Constitution, as are *Charter* rights, then a person cannot object to an oath of allegiance to the Queen on *Charter* grounds. However, it is worth noting that any potential claimant would not be challenging the presence of the Queen in the Constitution, as Canadian head of state, or the existence of the monarchy in Canadian law. Rather, he would merely be challenging the requirement to take the oath.

The last response the government might make would be to suggest that a person who refuses to swear an oath to the Queen or to uphold the laws of Canada limits himself internally. Though an individual is free to think, believe and express what he chooses, he must bear the responsibility for his choices. However, as Linden J.A. said in his dissent in *Roach (FCA)*, aside from the fact that the state ought to avoid forcing the individual to "choose between his political principles and his enjoyment of Canadian citizenship,"[244] it seems that asserting that a person is burdened by their beliefs and not by the oath requirement is akin to saying that the Sunday closing laws only burdened Jewish merchants because of their beliefs,[245] an argument rejected by the Supreme Court in *Edwards*.

None of the potential government responses manage to dislodge a claim under subsection 2(b) freedom of expression. The state, through the mechanism of the oath, coerces an individual to make an expressive statement, despite his disagreement with its content. Should he refuse to take the oath, he cannot access the benefits of citizenship to which he is otherwise entitled. The state has imposed a burden, in violation of the non-citizen's freedom of expression, and so the analysis moves to section 1.

---

241 *Roach (FCA), supra* note 41 at note 2, para. 7.

242 See *Roach (FCTD), supra* note 40 at para. 11.

243 *Reference re An Act to Amend the Education Act*, (1986) 53 O.R. (2d) 513; 25 D.L.R. (4th) 1; 13 O.A.C. 241 (C.A.) at 566.

244 *Roach (FCA), supra* note 41 at para. 57.

245 *Ibid.* at para. 65.

Section 15 – Equality Rights

Canadians by birth are free to hold whatever beliefs they like, be they anarchist, violent, revolutionary, iconoclastic or otherwise. Though they are subject to the same laws and have the same duties of citizenship, they are never asked to stand up in a public ceremony and declare that they will be faithful and bear true allegiance to the Queen, nor are they asked to promise to observe the laws of Canada and the duties of citizenship. On the other hand, non-citizens are asked to do these things if they want to become Canadian citizens. At least some of these non-citizens are unwilling to take an oath they do not agree with, and so these people are precluded from the benefits of citizenship, not because of any difference in action, belief or worth from any Canadian citizen, but solely because they have a different national origin.

Citizenship and differential treatment of non-citizens is a thorny issue in Canada's equality rights jurisprudence. As commentators have noted, "the Enlightenment rejected the idea that a person's worth, identity, and destiny should be overwhelmingly bound up in birth and kinship."[246] Despite these aims, which illuminate the history and purpose of the equality rights provision, non-citizens, even if they are resident in Canada, employed, married, working, etc., are treated differently because of their place of birth. In the process of becoming citizens, they are subject to tests and requirements to which natural-born Canadians are not. Thus, non-citizens are treated differently under the law. Whether this differential treatment constitutes discrimination is the subject of this Section.

The Supreme Court set out the test for a section 15 inquiry in *Law.* v. *Canada*,[247] which was subsequently reaffirmed in *Therrien (Re)*.[248] In *Lavoie (SCC)*,[249] Arbour J. argued for a much stricter section 15 test, and concurrent higher levels of scrutiny under section 1, but she was alone on this point. Though the debate will no doubt continue, for the time being *Law* remains good law.

Iacobucci J., writing for a unanimous court in *Law*, held that the inquiry under section 15 should be sensitive to the context in which the complaint is made, and should be undertaken with the remedial purpose of section 15 in mind. Formalistic or mechanical analysis is to be avoided.[250] In doing the analysis, the court focuses on three central issues:

A. whether a law imposes differential treatment between the claimant and others, in purpose or effect;
B. whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and

---

246 M. Schwarzschild, "Constitutional Law and Equality" in D. Patterson, ed., *A Companion to Philosophy of Law and Legal Theory* (Cambridge, MA: Blackwell, 1996) 156.
247 (1999), 170 D.L.R. (4th) 1 [hereinafter *Law*].
248 [2001] S.C.J. No. 36.
249 *Lavoie (SCC)*, *supra* note 45 .
250 *Law*, *supra* note 247 at para. 88.

C. whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.[251]

Issue A

In addressing the first issue in the citizenship oath context, it is clear that the law requiring an oath of allegiance from a non-citizen makes a distinction between the non-citizen and citizens based on a personal characteristic—in this case national origin. Further, the law does not take into account "the claimant's already disadvantaged position within Canadian society."[252] The disadvantages include, among other things, political marginalization (the non-citizen cannot vote or run for office), greater vulnerability to deportation, and the risk of being refused re-entry into the country. It is safe to presume these are disadvantages an individual with roots in Canada would rather not suffer. The placement of the oath in the path to citizenship means that, should an individual disagree, he will likely be tempted to affirm it nonetheless. This exacerbates the non-citizen's vulnerability to state coercion regarding the political and moral convictions instantiated in the oath.

The non-citizen who must take the oath is treated differently from other Canadians, and required to do more, all in order to be entitled to what natural-born citizens are granted by birth. The court has repeatedly held that choosing the appropriate comparator group is "the claimants prerogative"[253] and this first step is merely "a threshold test."[254] The oath requirement differentiates the claimants from the comparison group of citizens. Even if the comparison is made instead to other non-citizens who do not have religious or conscientious objections to the oath, the oath requirement creates differential burdens. As such, it falls afoul of the first inquiry: differential treatment.

Issue B

The second issue, as mentioned above, is whether the differential treatment is based on one or more of the enumerated or analogous grounds in section 15. It has been established that non-citizenship is an analogous ground for the purposes of section 15,[255] and the differential treatment—in this case requiring an oath—is based on the individual's membership in the group of non-citizens qualifying for citizenship. It is not based on any individual merits or demerits. Citizenship is an analogous ground.[256] Thus the oath requirement runs afoul of the second branch of the equality inquiry as well.

---

251 *Ibid.*

252 *Ibid.*

253 *Lavoie (SCC), supra* note 45 at para. 40.

254 *Ibid.*

255 *Andrews, supra* note 44.

256 See *Lavoie (SCC), supra* note 45 at para. 41: "As citizenship was recognized as an analogous ground in *Andrews*, I can find no authority for qualifying this finding according to the context of a given case." The court then reaffirmed that "once a ground is found to be analogous, it is permanently enrolled as

Issue C

Finally, an individual challenging a law on section 15 grounds must establish, at the third step, that the differential treatment is discriminatory. A law is discriminatory if the state:

> ... impos[es] a burden upon or withhold[s] a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration.[257]

In performing this third and final inquiry under section 15, the court must keep the purpose of section 15 in mind, which according to *Law* is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice."[258] The claimant must show that there is tension between the purpose or effect of the impugned law and the remedial purpose of section 15. Essentially, he must show that the law is demeaning to his dignity, either in purpose or in effect.[259]

This will be the most difficult portion of the test for any claimant that wishes to challenge the citizenship oath. Legislation that sets the terms for becoming a citizen cannot help treating non-citizens differently. Further, it is part of a process wherein the new citizen and the state exchange reciprocal promises and obligations. It is not an outlier. In exchange for the promise of allegiance, the Canadian state grants the full rights of citizenship to the new Canadian.

One of the contextual factors to be used in the inquiry under the third branch of the section 15 test is "correspondence between the ground claimed and the actual needs, capacity or circumstances of the claimant or others."[260] In the context of a citizenship application, the government might plausibly argue that the actual situation of the claimant—a person applying for citizenship—is addressed by the law. The differential treatment is relevant to the process at hand. In fact, that process could not exist without it, and the claimant has agreed to the process in exchange for the benefits of citizenship.

A similar argument failed at the Supreme Court in *Lavoie (SCC)*. The second contextual factor, the majority held, "has traditionally functioned to uphold special treatment for groups disadvantaged by disability ... as well as gender."[261] To use it to uphold legislation like the citizenship preference, which differentiates between citizens

---

analogous for other cases." It thus seems that distinctions based on non-citizenship will always qualify under the second step of the *Law* test.

257 *Law, supra* note 247 at para. 88.

258 *Ibid.*

259 *Ibid.*

260 *Lavoie (SCC), supra* note 45 at para. 38.

261 *Ibid.* at para. 42.

and non-citizens, is to "[go] beyond what is contemplated by the second contextual factor in *Law.*"[262] However, if the government can show that the citizenship oath does "take into account the particular situation of those affected, including any relative advantage or disadvantage"[263] then it may be able to convince the court that the oath requirement is not discriminatory under section 15. It seems unlikely, however, that the government will be able to satisfy the court that the oath requirement takes into account the claimant's situation. The blanket requirement of the oath shows that the state is not asking for a public display of fealty because of anything personal about the non-citizen.

The reasons a claimant might feel the oath violates his human dignity are multifold, and many have already been brought up in the previous Sections of this article. The oath demeans human dignity because it is based on prejudice and implies disloyalty. There seems to be a presumption that without an oath a new citizen's loyalty is in question, that he is a threat, an outsider, and not to be trusted. This could be understood, subjectively and objectively, as demeaning to the dignity of citizenship applicants, especially considering the number of other hurdles that they would have had to surmount to get a certificate of Canadian citizenship. The purpose of section 15 is to protect difference and promote a society of equality and respect for human dignity. The effect of the oath requirement is to treat one class of people as less worthy of trust because of their birthplace.

It also disadvantages those outside the mainstream. It is insensitive to people who disagree with the current Canadian state and want to work for its change. The oath at least implicitly suggests that they should not become citizens unless they are willing to agree to Canada's fundamental political structure, including the presence of the monarchy. It also creates a distinction between religious or conscientious non-citizens and other non-citizens. All other things being equal,[264] non-citizens without religious or conscientious objections to the oath will be able to become citizens, whereas the objecting non-citizens will not, unless they are willing to compromise their deeply-help beliefs. This unduly burdens and adversely affects those with different religious or political beliefs.

Another demeaning aspect of the oath requirement is that the relevant comparator group does not have to do it. Natural-born citizens do not have their allegiance to Canada tested by the state before they can access civic rights like voting, or gain such benefits as guaranteed re-entry. They are never required to swear publicly that they agree with the fundamental structure of the country. In fact, because they are citizens and receive full protection under the *Charter,* natural-born citizens can stand up in public and condemn the Canadian state in any number of ways. In doing so, they are exercising their *Charter* freedoms that are given to them because of their place of birth. If Canadians do not believe in Canada, they can say so. Non-citizens can as well, before and after the oath, but regardless of what they believe, in affirming the oath they must promise allegiance to the Queen, which arguably promises allegiance to a person, and according to the court symbolizes fundamental agreement with the structure or values of the country. The oath may thus require them to suspend their conscientious beliefs.

---

262 *Ibid.* at para. 43.

263 *Ibid.*

264 That is, assuming that the members of the two groups otherwise qualify for citizenship.

The oath demeans human dignity. A person with fundamental objections must bind his conscience in a public ceremony. Aside from vows, there is not a more socially significant act. Also, compelling the oath demeans the speaker. Even for those immigrants who are proud to say the oath as it is now written, the present regime is unacceptable. The oath cannot be seen as a true and voluntary manifestation of each individual's will when there are serious and long-lasting repercussions for not saying it.

The oath as presently administered creates adverse effects discrimination. Regardless of the purpose of the oath, a sub-set of people with religious or conscientious beliefs counter to the oath are excluded from Canadian citizenship. The *Charter* protects a person's right to hold such contrary beliefs, but the process of citizenship, so long as it includes the present oath, does not. Fundamental Canadian values such as equality and human dignity are compromised by this situation.

The Canadian government will likely say in response that though the oath requirement is in part due to loyalty concerns, these concerns are appropriate when a person is not a Canadian citizen. Just as we assume natural-born Canadians are loyal to their country, we assume people who are citizens elsewhere are loyal to their home countries, which may preclude loyalty to Canada. Citizenship is a political status and the government will thus advert to its jurisdiction to set the terms and conditions of naturalization.[265]

The government will argue that individual difference is protected, because though the oath is not voluntary, it is part of a process of naturalization that is voluntary. Though the oath binds the conscience of the individual, it is not requested arbitrarily, but rather as a natural and sensible part of a ceremony whereby the state and the individual create mutually binding rights and obligations. One of the obligations is agreement with the fundamental structure of the country, and this includes the ability to execute profound change through constitutional amendment. A person could honestly swear the oath and still hold contrary political convictions. The government would also likely argue that citizens are not a relevant comparator group when the law involves the procedure for naturalization, as there will necessarily be differences. Citizens have the same duties of allegiance, even though they are not required to affirm them publicly.

These arguments would likely be of little strength against those whose religious or conscientious beliefs mandate that they not offer allegiance to a person, or to anything besides God. When compared either against citizens or non-citizens without the same religious or conscientious objections, these people face a burden the others do not. The inescapable fact is that as long as the Queen remains in the oath, such people face a choice between the benefits of citizenship and adhering to their religion and conscience. It might be easier if they were not so firm in their beliefs or were willing to accept that the Queen in the oath is not a person, but rather an office or idea. But history and the plain meaning of the words both lend credence to the belief that the Queen in the oath is a person to whom loyalty is owed.

All the contextual factors under the third step of the *Law* test—pre-existing disadvantage, correspondence between the ground of differentiation and the actual circumstances of the claimant, any ameliorative purpose and the nature of the interest affected—work in favour of finding a violation of equality rights in such a situation. The

---

[265] See Section III.A above.

group is already at a pre-existing disadvantage. They are not presumptively inferior citizens simply because they believe as they do. There is no ameliorative purpose to the law. The interest in citizenship that is affected is significant.

As noted in *Lavoie (SCC)*, "what is required is a contextualized look at how a non-citizen legitimately feels when confronted by a particular enactment."[266] The claimant has the burden of proof under section 15; the subjective-objective test under step three of the *Law* analysis will be met if he can show "a rational foundation for [the] experience of discrimination in the sense that a reasonable person similarly-situated would share that experience."[267] If a reasonable person—prevented from joining the Canadian polity due to an irreconcilable conflict between his religious or conscientious beliefs and the citizenship oath—would feel discriminated against, then a violation of section 15 will be made out. The analysis then moves to section 1.

Section 1 – Justifiable Limits

In the case of the citizenship oath, the government is on much stronger ground under section 1 of the *Charter*, and may persuade the court that the oath requirement is justified. However, the contrary argument, that the oath requirement is not rationally connected, or does not minimally impair in its present form, is also persuasive.

Under section 1, the onus is on the state to show that the impugned law is reasonably and demonstrably justified in a free and democratic society. As the court reaffirmed in *Vriend*,[268] a law that infringes *Charter* guarantees will be struck down unless the two steps of the *Oakes* test[269] are met:

> First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the Charter guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right.[270]

Pressing and Substantial Objective

First, the government must show a sufficiently important objective. The Supreme Court wrote in *Lavoie (SCC)*, "the concept of citizenship serves important political, emotional and motivational purposes."[271] Canada's citizenship policy, according to the majority in

---

266 *Lavoie (SCC)*, *supra* note 45 at para. 46

267 *Ibid.* at para. 47.

268 *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 [hereinafter *Vriend*].

269 *R.* v. *Oakes*, [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

270 *Vriend*, *supra* note 268 at para. 108, citing *Egan* v. *Canada*, [1995] 2 S.C.R. 513 at para. 182.

271 *Lavoie (SCC)*, *supra* note 45 at para. 57.

that judgment, has two fundamental objectives: "to enhance the meaning of citizenship as a unifying bond for Canadians, and to encourage and facilitate naturalization by permanent residents."[272] In pursuing that policy, Canada faces the challenge of integrating an "open and diverse" population[273] while at the same time being "respectful of cultural and linguistic differences."[274] I will treat these two objectives as sufficient for the oath requirement to meet the pressing and substantial step of the *Oakes* test. Citizenship, and the process of naturalization, is fundamental to the existence of the nation state. How the state inducts its new citizens into the body politic is a matter of symbolic importance and the government is likely to convince the court that the citizenship ceremony, including the oath, is a legislative objective that is sufficiently important to justify infringing a *Charter* right.

What the particular objective of the oath requirement will be is a matter of conjecture at this point, but it will likely be similar to what previous decisions, such as *Almaas, Jensen* and *Roach*, have stated it to be: namely, to determine the potential citizen's agreement with the fundamental structure of the country. Other objectives may be to provide a unified reference point for all new citizens, to create a national community by asking all to subscribe to the same oath, and fostering a sense of civic pride in new Canadians. One could concede that the objective of the *Citizenship Act* is pressing and substantial, but question whether the particular objective of the oath requirement is similarly pressing and substantial. There is no evidence to suggest that people who take the oath are more likely to be good citizens, aside from the court's statement that an oath impresses on the speaker the "serious and significance" of his words.[275]

Rational Connection

The next stage of the *Oakes* analysis is to examine the rational connection of the impugned provision to its objectives. The applicant in a citizenship ceremony has applied for membership. It makes sense, then, for the government to set out the conditions of that membership. In fact, doing so is an essential exercise of sovereign authority. Further, it is rational for the government to ask for something from the applicant to demonstrate their willingness to take on the duties and responsibilities of citizenship, and requiring a public affirmation is thus a reasonable step for the government to take. It serves the first objective of Canada's citizenship policy as set out in *Lavoie (SCC),* by giving tangible form to the promise the new citizen makes. Further, because all new citizens swear the same oath, it arguably serves the unifying purpose. Everyone is yoked evenly.

However, the oath is likely not rationally connected to the objective of unification. It is part of Canada's supreme law that everyone has the right to equality. It has often

---

272 *Ibid.* at para. 56.
273 *Ibid.* at para. 58.
274 *Ibid.*
275 See Lamer C.J.C. in *R* v. *B. (K.G.), supra* note 114.

been said that that there is no greater inequality than to treat unlikes alike. Not all prospective citizens are alike. Some come with strong religious or conscientious objections, for instance, to the monarchy, or to venerating a person. To treat them the same as immigrants who do not have these convictions is not a unifying measure. Rather, it is one that works against unity, having the effect of excluding people with these convictions. The unifying aim of the oath is further undermined by the fact that it is not required of all citizens. As Wilson J. held in *Andrews,* there is no causal connection between citizenship and patriotism.[276] The state ought not to suspect that non-citizens are disloyal or are more likely to fail to observe the laws of Canada. There is no reason to require an oath of non-citizens that is not required of the rest of the population. The imposition of the oath on non-citizens seeking to become citizens thus may be regarded as arbitrary, not rational.

There are at least four other problems under rational connection. The second objective, encouraging naturalization, is not served by the oath requirement either. For permanent residents who object to the oath on any of the grounds set out in this article, the oath requirement provides a disincentive to naturalize. Due to its blanket application, permanent residents who might otherwise become citizens will simply never apply, because they know that they would not be able to complete the process.

The second problem under rational connection comes from the mandatory nature of the oath. Most public declarations, such as wedding vows, are meaningful because they express the true will of the person speaking. However, the benefits of citizenship are such that many people are probably willing to take the oath despite personal misgivings. By creating a situation where a person can only access great public goods by taking the oath, the government has put a coercive burden on a non-citizen to naturalize, and hence robbed the oath of much of its significance. There is every reason to suspect that at least some people that swear the oath do so in order to be able to be citizens and participate fully in Canadian civic life, and not out of any actual intention to be faithful and bear true allegiance to the Queen.

The third potential problem under rational connection is that the oath may be seen, in the context of the entire citizenship application, as superfluous. There are many steps to becoming a citizen, including knowledge tests and language requirements, fees and residency requirements. Given the complexity of the naturalization process, the state has no further interest in a public declaration. The actions of the applying citizen speak loudly enough.

The fourth reason the citizenship oath could fail the rational connection test is because the present wording appears to be only tenuously connected with its aims. The oath of allegiance to the Queen has a long history and a clear public meaning, but it is *not* loyalty to the Canadian constitutional structure. It is loyalty to Queen Elizabeth, her heirs and successors.[277] The words of the oath thus do not clearly achieve the purpose of the oath. Instead, they have the wholly unintended effect of requiring all new Canadians to swear allegiance to the monarchy, an institution that has only symbolic value to the modern Canadian state. Further, even the symbolic value is attenuated in the *Charter*

---

[276] See Wilson J. in *Andrews, supra* note 44 at paras. 12-15.

[277] See *e.g.* the definition of *allegiance* in *Black's Law Dictionary, supra* note 213: "an oath by which one promises to maintain fidelity to a particular sovereign." See also Section III.B above.

era. If there is any symbolic item that could be said to reside at the heart of Canadian political, social and civic life today, it is the Constitution, not the Queen.

Minimal Impairment

Turning to the next step of the *Oakes* test, minimal impairment, the government is similarly hard-pressed to justify the oath requirement. One possible argument the government could make is that the oath is a symbol of national unity, and hence any flexibility in its application (for example, making it optional for religious or conscientious objectors) would undercut its central aim. The blanket application is not negotiable without robbing the process of its value.

The level of deference given to Parliament is critical here. There are several factors militating in favour of deference in the citizenship oath context, including the majority judgment in *Lavoie (SCC),* which held that with respect to citizenship, laws that seek to balance interests between competing groups are entitled to deference.[278] Even in the context of a law that violated section 15, the majority, in keeping with past judgments, allowed a large measure of discretion to the government to set the terms and conditions of citizenship due to the political nature of citizenship and the delicate balancing involved. Furthermore, the oath is part of a voluntary process, suggesting the government ought to be given more flexibility to determine the rules. Another factor in favour of deference is the fact that citizenship has been characterized as a privilege and not a right by the courts.[279]

However, deference is not appropriate in dealing with the citizenship oath. The oath is exclusively aimed at non-citizens who are becoming Canadians. It does not exist in balance against the rights of citizens in the Canadian polity. It exists to bind the consciences of those joining Canada to bear true allegiance to the Queen, to be good citizens, to respect the government and to uphold the law. Seen in this way, the oath is a case where the state is, if not quite the singular antagonist of the individual, at least the singular interlocutor. Others in society have no interest to be balanced in the equation, as there is no risk of harm to other social groups should the oath not be required.[280]

Sovereign authority may not be a factor in deciding deference after the dictum of the Supreme Court majority in *Lavoie (SCC).* There the court stated that courts must "scrutinize differential treatment according to entrenched rights and freedoms and, in the s. 15(1) context, the concept of essential human dignity and freedom,"[281] rather than "[returning] to the days when federalism, not *Charter* principles, governed the constitutionality of citizenship laws."[282] The court will exercise substantive oversight of

---

278 *Ibid.*

279 See *supra* note 36.

280 It is possible to argue that the state has a competing interest in assuring that new citizens agree to uphold Canadian laws and values, but non-citizens have to uphold the laws regardless and Canadian values include the conviction that each individual can decide for himself what to value.

281 *Lavoie (SCC), supra* note 45 at para. 40.

282 *Ibid.*

the constitutionality of citizenship laws, unlike the pre-*Charter* days of unfettered federal discretion.

The citizenship oath requirement may be justified by complex social science evidence, but at the moment it seems unlikely that such evidence has been gathered, so whether the government would be owed deference in assessing it is unknown. If the court continues to treat decisions about naturalization as a political question that goes to the heart of state sovereignty, then it may simply find that the oath is a reasonable alternative amongst those possible, and refuse to scrutinize it further.

In order for a law to fail under minimal impairment, the court must find that there is another way to achieve the objective that is less burdensome on *Charter* rights. Though the onus is on the government, the tactical burden will be on the claimant to show that the process could be changed. There are several ways of doing this. One way is to refute the government's claim that the unifying purpose cannot be achieved unless everyone swears the oath. This could be done by offering affidavit or social science evidence showing that an optional oath would not undermine the unity new Canadians feel upon becoming citizens. Under this approach to the oath, the government could say they are reasonably imputing a desire to join Canada and a willingness to take on the duties of citizenship from the individual's willingness to go through all the expense, difficulty, tests, and complications of the citizenship process. If the oath were optional, the state would be treating potential citizens, at the end of the citizenship process, equally to how it treats citizens: with respect for their personal views. The principles served would then be personal choice and liberty—values that are clearly central, and unifying, in Canadian life.

A second way of showing that the present oath requirement is not minimally impairing would be to show how it could be replaced with a more flexible system—for example, one that would allow those with religious or conscientious objections to still become Canadian citizens. For instance, in addition to the tests for linguistic proficiency, the citizenship process could include a short interview wherein the applicant is asked to express his desire to join the ranks of Canadian citizens. Though there would be added administrative costs, they would be offset by the savings incurred by eliminating the oath from the ceremony. Furthermore, as *Singh* has made clear, administrative expediency is often not enough to justify infringing a *Charter* right.

Another way the oath could be made less impairing would be either to issue a declaration as to the meaning of the words in the oath or to rewrite the oath. The first option would at least go some way to assuage the consciences of those who would otherwise feel they had promised allegiance to a person. The declaration would state that no person is involved in the words "Her Majesty Queen Elizabeth the Second" and that the words only refer to the symbolic, historical Canadian head of state. This might satisfy some of those who are unwilling to venerate a person, but it would still leave those who objected to the monarchy without any form of redress. The second option, rewriting the oath, is more attractive in that it could potentially address the concerns of all except those who object to any oath of allegiance to any figure but God. For instance, the court could change the oath to require allegiance to the Constitution, rather than the Queen. The court, however, is not likely to rewrite the oath, given the highly political nature of the naturalization process. A more plausible result is that the court would insist

that Parliament rewrite the oath in a way that does not violate the *Charter*. Another option would be for the court to make the oath optional, as the Law Society of Upper Canada did for lawyers being called to the bar.

The government may respond to the minimal impairment arguments by claiming that if the naturalization process had to be minimally impairing, we simply would not have a naturalization process. Put another way, too much court scrutiny might make the category of citizenship evaporate. However, this argument is weak. The state is clearly free to set the terms and conditions of naturalization, but the point of a challenge to the citizenship oath is to insist that the state do so while following its own supreme law. The citizenship process can exist, but it may not be unjustifiably discriminatory.

Salutary versus Deleterious Effects

The last step of the *Oakes* test is the balancing between salutary and deleterious effects. According to the majority in *Lavoie (SCC)*, this step

> should not ... be conflated with the first three stages. If the first three stages weight the reasonableness of the legislation itself, the fourth examines the nature of the infringement and asks whether its costs outweigh its benefits."[283]

The benefits of the citizenship oath as it now stands do not outweigh the detriments. This is not to say that no benefits accrue from the present oath. It is a symbol of national unity of a certain type, and it expresses a large part of our national history and present identity—after all, our head of state is still the Queen of England. We have considered and thus far rejected becoming a republic. Our history, which includes the monarchy, is not something we should hide or turn away from. The question, perhaps, is how far the benefits of holding to that history take us when compared to the costs. The court in *Lavoie (SCC)*, wrote:

> [T]he implication of finding a violation at the fourth stage is that even a minimum level of impairment is too much: the costs to the claimant so outweigh the benefits that no solace can be found in the fact that the legislation violates the Charter "as little as reasonably possible."[284]

Certainly for the conscientious objector left on the sidelines of the Canadian polity, the costs are high. This person must choose between becoming a full citizen of the nation in which they live, and having a clear conscience. The value of citizenship is considerable, as is the value of personal integrity. It arguably harms Canada as a nation that these people are left with this choice. We suffer the moral failing of having been unwilling to find a way to include those born abroad who have alternative beliefs and convictions.

---

283 *Lavoie (SCC), supra* note 45 at para. 70.

284 *Ibid.* [internal citation omitted in source].

VI CONCLUSION

Thus far, the court has not heard a challenge to the citizenship oath. At both the Federal Court Trial Division and the Federal Court of Appeal in *Roach*, the judges struck out the cause of action, and the case never reached trial. Nevertheless, the issues raised are serious and require serious deliberation from the bench.

In the past, the duties and rights of a citizen were well-delineated: the citizen had the right to protection from and by the state according to the rule of law, and the duty to defend the realm in case of a threat to national security. The citizen owed *allegiance*, which was generally understood as the "obligation of fidelity and obedience to the government or sovereign in return for the benefits of the protection of the state."[285] The concept of loyalty in this historical notion of citizenship stemmed from "a vassal's obligation to the liege lord."[286] The loyalty relation was directly between the subject and the person of the sovereign.

Traces of this conception are still visible in the present, archaic, citizenship oath, which has remained essentially unchanged since 1689.[287] As it stands, the oath demands fidelity and obedience to Queen Elizabeth the Second, her heirs and successors. But the relationship between the citizen and the state (and even more so between subject and sovereign) has shifted radically. There is a palpable dissonance between the values of the *Charter* and the values of the allegiance portion of the citizenship oath. The modern developments encapsulated in the *Charter*—the right of the individual to pursue his own development through increased liberty, and the concurrent devaluation of the state or sovereign as a provider of either meaning or thick values—reorganized the relationship between the individual and the state. We cannot avoid the conclusion that the values of loyalty as they are instantiated in the present oath clash with the *Charter's* understanding of the individual within a community of rights-bearers as the seat of both rational judgment and moral values. The monarchy, though undoubtedly an important part of our history, is now largely symbolic. It is an important symbol, and not one we should lightly cast aside, but its presence in the citizenship oath unwittingly contradicts core Canadian *Charter* values of equality, dignity and inclusion. It is thus incumbent on either the government or the courts to modernize the oath, and find a way to allow new Canadians to become citizens in a manner respectful both of their conscience and religion, and at the same time of our country's history. It will not be an easy task.

---

285 *Black's Law Dictionary, supra* note 213.
286 *Ibid.*
287 See *supra* note 215.

The Heredity Oath in Canada's *Citizenship Act* Must Be Declared Optional On Appeal: The Fatal Errors Made in *McAteer v Attorney General of Canada*, 2013 ONSC 5895

by Derek Smith[1]

Published on March 31, 2014 (SSRN)

CONTENTS

[1] B.A. (Pennsylvania), Joint J.D.-M.A. (Ottawa and Carleton). Member of the Ontario bar since 2002. I have no connection to any of the litigation parties. For media interviews: twitterdsmithto@gmail.com.

> [T]he refusal of these persons to participate in [the forced pledge of allegiance to the flag] does not interfere with or deny rights of others…. Symbols of State often convey political ideas…. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another man's jest and scorn…. [H]ere the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger ... in matters relatively trivial to the welfare of the nation.
>
> - *West Virginia State Board of Education v Barnette* [2]

> 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.
>
> - Canada's forced speech by new citizens (challenged part underlined) [3]

I. Introduction

On June 22, 2012, the Conservative government of Stephen Harper appointed Toronto law professor Edward Morgan to Ontario's Superior Court of Justice. On September 20, 2013, in *McAteer v Attorney General of Canada*,[4] Justice Morgan ruled with the government that the challenged words underlined above are a justifiable limit on free speech under section 1 of the *Canadian Charter of Rights and Freedoms*.[5]

The *McAteer* applicants, now appellants at the Ontario Court of Appeal, meet every requirement for becoming Canadian citizens except one: they refuse to swear the heredity oath because, as a matter of conscience, religion, thought, belief or opinion, they consider an oath to hereditary rule wrong.[6] The appellants have no problem with the rest of the oath. They would happily say that they will observe the laws of Canada and fulfil their duties as a Canadian citizen.

Justice Morgan erred at each stage of his section 1 analysis, partly because of his glaringly incomplete discussion of the legislative history of the heredity oath and similar Ontario oaths in the Charter era. In this paper, I explain why he should have found the heredity oath unjustifiable and declared it optional, effective immediately. Before doing that, we must first review the disconnect between the Harper government and the people of Canada on the Charter and the hereditary British monarchy, and set out the missing history of the heredity oath and similar Ontario oaths in the Charter era.

---

2 319 US 624 at 630, 632-633 and 638 (1943) [*Barnette*].

3 *Citizenship Act*, RSC 1985, c C-29, Schedule. Even though an affirmation is allowed, I call the challenged words the heredity oath in this paper for the sake of simplicity.

4 2013 ONSC 5895 [*McAteer*].

5 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the Charter].

6 As the applicant Dror Bar-Natan said at paragraphs 12-13 of his affidavit, the heredity oath is rooted in a belief "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 … a symbol that we aren't all equal and that some of us have to bow to others for reasons of ancestry alone." (online at drorbn.net)

Although this paper may seem partisan in places, that is not my goal. Like most Canadians, I am a centrist and am happily not a member of any political party. The most important contrast in this paper is not between the federal Liberal Party and the Harper Conservatives, but within the conservative movement, between progressive conservatives and regressive conservatives.

II. The disconnect between the Harper government and the people of Canada on the Charter and the monarchy

In the 20th century, and the start of the 21st, the federal Liberals were the party of Canada. Their Canada was a modern, progressive Canada with historical ties to Britain but owing no allegiance to it. In the 20th century, the Liberals created Canadian citizenship out of a country of British subjects. They created the Canadian flag over the loud opposition of John Diefenbaker, the former western conservative Prime Minister. Liberal Prime Minister Lester Pearson, Diefenbaker's nemesis, won the Nobel Peace Prize by creating peacekeeping as part of a foreign policy that gave Canada a distinct role beyond playing, in Pearson's words, 'colonial choirboy' to Britain.[7] The Liberals brought Canada's constitution home from Britain, while codifying personal freedoms in a written Charter that they entrenched into the supreme law of Canada.

One of the apparent priorities of the Harper government has been to dismantle Liberal achievements and send Canada back to the days of Diefenbaker, when a hereditary monarch was entrenched in our constitution and the Liberals' Charter was not. The Harper Conservatives have done this absent any pressing or substantial reason for it, or any real demand from Canadians.

In the summer of 2011, the Harper government announced that it would rename Canada's navy and air force as the Royal Canadian Navy and the Royal Canadian Air Force, despite the opposition of veterans who had fought for Canada and had wanted the focus to remain on Canada.[8] In doing so, the Harper government undid a progressive decision that had been made in 1968 by the Pierre Trudeau Liberals and had been left in place by the Progressive Conservative governments of Joe Clark, Brian Mulroney and Kim Campbell. Historian Jack Granatstein, normally a self-admitted supporter of the Harper government, reacted to the regal change by saying: "[N]obody was pushing for this. The idea of rolling back the national symbols to make them more British is just loony. Who does Harper think he's appealing to?"[9]

That same summer, in the lobby of the Pearson Building, home to Canada's foreign affairs department, the government removed the paintings "Canada West" and "Canada East" by modern Quebec painter Alfred Pellan, and put up a massive portrait of the Queen, on what the government now called The Sovereign's Wall.[10] Pellan's paintings had been in the lobby since the Liberals opened the building with the Queen present in 1973, and the paintings had been left

---

7 Scott Staring, "Harper's History" (2013), 33:2 Policy Options 42 at 44 [Staring].

8 Robert Hiltz, "Canadian navy, air force to regain 'Royal' moniker; designation was dropped in 1968" *Calgary Herald* (16 August 2011) A4.

9 Jane Taber, "Harper spins a new brand of patriotism" *Globe and Mail* (20 August 2011) A3.

10 Jennifer Ditchburn, "Foreign Minister orders Quebec paintings replaced by Queen's portrait" *Canadian Press* (26 July 2011).

in place during the Clark, Mulroney and Campbell years. The paintings feature quintessential images of Canada including totem poles, the Rocky Mountains, moose, sailboats and fishermen. Shortly after the Queen's portrait was put in the lobby of the Pearson Building, the government ordered all Canadian embassies to hang the Queen's portrait too.[11] A few weeks later, the Minister of Foreign Affairs ordered new business cards without the name of the Pearson Building in which he works, "thereby erasing the name of a former Liberal prime minister."[12]

In 2012, in a move that "prompted British officials to make remarks about Canada once again assuming the position of a junior partner in the colonial relationship,"[13] the Harper government announced that Canada would share embassy space and resources with the British government.[14] Paul Heinbecker, former chief foreign policy advisor for Brian Mulroney, warned that the move would create security risks for Canadian diplomats in many parts of the world, because Canada has a brand that is "incompatible" overseas with Britain's colonial history.[15]

In addition to spending almost $8 million of hardworking taxpayers' money celebrating the hereditary Queen's diamond jubilee,[16] the Harper government has spent a $28 million fund to celebrate the success of the British redcoats in the War of 1812.[17] Predictably, the 1812 spending has not increased the national pride of Canadians.[18]

In contrast, on the 30th anniversary of the day that the Liberals brought the Charter into force, the Harper government only issued a short and tepid press release. It stressed that the Charter built on Diefenbaker's *Canadian Bill of Rights*.[19] Asked by TV Ontario's Steve Paikin how celebrating a milestone of the Charter with a tepid press release could be justified, especially because Ontario Progressive Conservative Premier Bill Davis had championed the Charter, former Harper speechwriter Michael Taube agreed that it could not be justified:

> Whether or not the Harper government likes or dislikes the Charter of Rights and Freedoms – and I think we know what the answer is to that – and what most [Harper] Conservatives think of it,

---

[11] "Canadian embassies ordered to hang the Queen's portrait" *Canadian Press* (7 September 2011).

[12] "Baird's Business Cards" *Globe and Mail* (1 October 2011) A9.

[13] Staring, above note 7 at 44-45.

[14] Erin Anderssen and Campbell Clark, "Canada, U.K. to share embassies" *Globe and Mail* (24 September 2012) A1.

[15] Ibid.

[16] Randy Boswell, "Tories dig into coffers for Queen's jubilee; $7.5 million set aside for February bash" *Calgary Herald* (7 December 2011) A9.

[17] Catherine Ford, "Harper out of touch with War of 1812 spending" *The Province* (18 October 2011) A14; and Barbara Yaffe, "Spending on 1812 anniversary odd in an era of cuts" *Vancouver Sun* (5 December 2012) B2.

[18] Nanos Research, "2013-01 – Nanos/IRPP Survey – Stat Sheet – Draft" at 8, online at www.nanosresearch.com [Nanos].

[19] "Statement by the Honourable James Moore, Minister of Canadian Heritage and Official Languages, and the Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada, on the 30th Anniversary of the Proclamation of the Constitution Act of 1982" (17 April 2012), online at www.pch.gc.ca.

> you still have to honour it, because it means something to other Conservatives, and other Canadians.[20]

Despite years of trying, and despite spending millions of dollars from taxpayers who were not born into their station in life, the Harper Conservatives have been unable to turn today's Canada into something it is not. British birthright is entrenched in a moldy part of our constitution, but today's Canada is not a country of birthright. Entitlement at birth is a British idea, not a Canadian one. Canada today is a country of hope and hard work, of fundamental freedoms and merit, of the equality of all people at birth. People come here to leave behind the anachronistic heredity of the old world for the modern opportunity of the new. We are the country of the Charter, not heredity, and we have been telling this to every major Canadian polling company.

In November 2012, Leger Marketing asked people if any of 16 items, including the Charter and the monarchy, was important to them as a source of personal or collective pride in Canada. 90% said the Charter was important, with 60% saying it was very important. The monarchy finished dead last. Only 39% said it was important, with only 10% saying it was very important.[21]

In January 2013, Nanos Research asked people if they supported celebrating seven events including the anniversary of the Charter and the Queen's diamond jubilee.[22] 79% supported celebrating the Charter, with 47% strongly supporting it, the highest amount of strong support of any of the seven items. The Charter also had the lowest strong opposition, at only 3%. In contrast, only 55% supported celebrating the Queen's diamond jubilee, with only 26% strongly supporting it. It had the highest amount of strong opposition, at 16%.

In February 2013, Harris/Decima asked people if they wanted Canada's head of state to remain a member of the British royal family or be a Canadian-born person chosen by Canadians. 55% chose a Canadian-born person, beating hereditary British rule in every age category.[23]

In April 2013, Angus Reid asked people if the wording of the citizenship oath should be changed or stay the same. 48% said it should be changed, versus 45% who said it should stay the same.[24] Angus Reid also asked if Canada should have an elected head of state or remain a monarchy, a question Angus Reid has asked for years. 40% supported an elected head of state, versus 27% who supported monarchy.[25] The 40% was the latest in an ongoing steady increase, from 30% in July 2010, to 32% in December 2010, to 37% in March 2012 and 40% in April 2013. Opposition to British heredity was so strong that when Angus Reid asked people if they would support

---

[20] "Stephen Harper's History of Canada" (13 June 2013) at 27:46-27:57, online at theagenda.tvo.org.

[21] Bruce Cheadle, "Poll shows lagging support for monarchy and universal pride in medicare" *Canadian Press* (25 November 2012); Jack Jedwab, "Pride in Canadian Symbols and Institutions" (slide presentation, 26 November 2012, online at www.acs-aec.ca); "Public opinion: national symbols" *Globe and Mail* (26 November 2012) A7.

[22] Nanos, above note 18 at 2 and 7.

[23] "Harris/Decima Televox National Telephone Omnibus" (13 February 2013) at 3, online at ycyc-vcvc.ca.

[24] "Canadians Lukewarm on Monarchy, Would Pick William as Next King" (30 April 2013) at 7, online at www.angus-reid.com. The disclosed margin of error was +/- 3.1%, creating a range of 44.9% - 51.1% support for changing the oath.

[25] Ibid at 3.

reopening Canada's constitutional debate to replace the monarch with an elected head of state, a staggering 49% supported reopening the debate, versus 33% who were opposed.[26]

In July 2013, when *McAteer* was being argued before Justice Morgan, Forum Research asked people if new Canadians should have to swear allegiance to the Queen. 47% said yes, 43% said no, and 10% were undecided.[27] Neither side had majority support, making personal freedom especially important.

III. The missing history of the heredity oath and similar Ontario oaths

In a disconnected history lesson that paid little attention to the Charter era, Justice Morgan noted that the government's recent *Succession to the Throne Act, 2013* said that Canada is one of "the Realms of which Her Majesty is Sovereign."[28] Justice Morgan conceded that Canadian citizenship was created by a 1946 act of Canada's Parliament,[29] but emphasized that the heredity oath is a tradition that dates back to 1869 for naturalization as a British subject.[30] Noticeably absent from Justice Morgan's history lesson were several key developments of the 20th and 21st centuries, especially in the Charter era. I discuss these developments below.

1. Before the Charter

In 1910, the Liberal government of Wilfrid Laurier introduced a rudimentary definition of Canadian citizenship into Canadian law. The key part was that a Canadian citizen was a person naturalized under the laws of Canada.[31] An identity separate from Britain did not, however, simultaneously make its way into the *Naturalization Act*.[32] A person naturalized under the laws of Canada was still being naturalized as a British subject.

Before the First and Second World Wars, the idea that British subjects in dominions like Canada and Australia had an identity separate from Britain was too novel for the political and legal establishments. Writing for the High Court of Australia in 1906, Chief Justice Griffith ruled that the court was "not disposed to give any countenance to the novel doctrine that there is an Australian nationality as distinguished from a British nationality."[33]

In Canada, war changed that view. Canadians went overseas to fight as part of the British Empire but forged a separate identity in the crucible of war, taking places like Vimy Ridge, Ortona and

---

[26] Ibid at 6.

[27] "More favour monarchy now than in spring: Even split on swearing Oath to the Queen" (24 July 2013) at 9, online at www.forumresearch.com. The disclosed margin of error was +/- 2%, creating a range of 41-45% support for changing the oath.

[28] *McAteer*, above note 4 at para 20; SC 2013, c 6, Preamble.

[29] *McAteer*, ibid at para 13.

[30] Ibid at para 14.

[31] *The Immigration Act*, SC 1910, c 27, s 2(f)(iii).

[32] RSO 1906, c 77.

[33] *Attorney-General for the Commonwealth v Ah Sheung* (1906), 4 CLR 949 at 951.

Juno Beach and paying for those gains in Canadian blood. By the end of the two world wars, more Canadians saw themselves as distinct from Britain. Canadians were proud that the word on their soldiers' uniforms was not Britain, but Canada.

During the Second World War, an important case about forced expressions of allegiance to the monarch came before the Ontario Court of Appeal.[34] At the time, Ontario's *Public Schools Act* required teachers to inculcate the highest regard for loyalty and love of country, and to suspend any student guilty of conduct injurious to the moral tone of the school.[35] The related regulations forced students to sing O Canada or God Save The King as Canada's national anthem, as part of daily opening or closing exercises.[36] The regulations also required each school to have maps of the British Isles and the British Empire, and to devote the morning of the last school day before the 24th of May every year to "a study of the greatness of the British Empire."[37] However, much like the Charter today, the act concurrently said that no student "shall be required … to join in any exercise of devotion or religion."[38] Under the regulations, before starting any religious exercise, a teacher had to give dissenting students the chance to leave the room, or stay and maintain "decorous behaviour" during their silent dissent.[39]

Hamilton's board of education forced its students to sing God Save The King, repeat a pledge of allegiance to the monarch and salute the Union Jack.[40] Robert and Graham Donald, brothers in grades eight and four at a Hamilton school, were Jehovah's Witnesses who refused to give the regal expressions because "the prayer voiced in [God Save The King] is not compatible with the belief and hope which they hold in the early coming of the new world, in the government of which present temporal states can have no part."[41] The school's principal suspended the students for not providing the regal expressions. Their father went to court for a declaration that his sons were entitled to go to school without expressing allegiance to the King.

Justice Hope upheld the principal's decision. Without any evidence, he concluded that "the conduct of the pupils in so refusing to participate, as directed, had a serious and injurious influence on the moral tone or welfare of their respective classes."[42] He noted that the dissenters

---

[34] *Donald v Hamilton (Board of Education)*, [1945] OR 518 (CA) [*Donald CA*], rev'g [1944] OR 475 (HC) [*Donald HC*].

[35] RSO 1937, c 357, s 103.

[36] Ontario Department of Education, *General Regulations, Public and Separate Schools, 1939* (Toronto: King's Printer, 1939), s 14 [Education Regulations]; and *Zylberberg v Sudbury Board of Education* (1988), 65 OR (2d) 641 at 649 (CA) [*Zylberberg*].

[37] Education Regulations, ibid, ss 3(1)(a) and 8(2).

[38] *Public Schools Act*, above note 35, s 7(1).

[39] Education Regulations, above note 36, s 13(1). The freedoms of expression and religion were so vital that if only one student wanted to leave the room during the forced expression, and bad weather prevented there from being another suitable room in which the dissenting student could wait, the teacher had to postpone the forced expression for the entire class until the end of the day: ibid.

[40] *Donald HC*, above note 34 at 476; Daniel Francis, *National Dreams: Myth, Memory and Canadian History* (Vancouver: Arsenal Pulp Press, 1997) at 52.

[41] *Donald CA*, above note 34 at 525.

[42] *Donald HC*, above note 34 at 478.

"stood respectfully during such exercises, and in no way, other than the refusal to participate, showed any disrespect or caused any outward disturbance by their conduct" but concluded, without regard for the act's protection from forced expressions of devotion: "I can conceive of no more certain way of creating confusion, uncertainty and even friction amongst the pupils of a class as to their love of country, and duty to their country, than by permitting haphazard compliance with the singing of [God Save The King] at the whim of any particular pupil."[43]

The Ontario Court of Appeal overturned the ruling and declared with immediate effect that the boys could go to school and not express allegiance to the monarch. Writing for the Court, Justice Gillanders adopted the U.S. Supreme Court's *Barnette* comments about the subjective meaning of symbols,[44] and noted that the dissenting view taken by the Donald boys:

> has been conscientiously held by others.... The regulations … contemplate that a pupil who objects to joining in religious exercises may be permitted to retire or to remain, provided he maintains decorous conduct during the exercises. To do just that could not, I think, be viewed as conduct injurious to the moral tone of the school or class.[45]

When the war ended in 1945, the oath of allegiance that had been required for aspiring Canadian citizens under the *Naturalization Act* was to British heredity only:

> I, A.B., swear by Almighty God that I will be faithful and bear true allegiance to His Majesty King George the Sixth, his Heirs and Successors, according to law. So help me God.[46]

The following year, the victorious wartime Liberals replaced the *Naturalization Act* with a *Canadian Citizenship Act*[47] that made Canadian citizenship an identity separate from Britain for the first time. The minister responsible for the *CCA*, Paul Martin, Sr., explained that the new act arose from "common pride in the achievements of *our* country, based upon the great exploits of *our* people."[48]

The *CCA* set out the qualifications for an applicant being granted Canadian citizenship by a local judge.[49] Once the qualifications were met and citizenship granted, the new citizen had to swear an updated oath for the grant to take effect.[50] The updated oath is essentially what is in dispute in the *McAteer* appeal:

---

43 Ibid at 484.

44 *Donald CA*, above note 34 at 529, adopting *Barnette*, above note 2 at 632.

45 *Donald CA*, ibid at 530.

46 RSC 1927, c 138, ss 4 and 33 and Sch. 2.

47 SC 1946, c 15 [*CCA*].

48 *House of Commons Debates*, 20th Parl, 2d Sess, vol 1 (2 April 1946) at 502 [my emphasis].

49 Above note 47, s 10.

50 Ibid, s 12.

> I, A.B., swear that I will be faithful and bear true allegiance to His Majesty King George the Sixth, his Heirs and Successors, according to law, and that I will faithfully observe the laws of Canada and fulfill my duties as a Canadian citizen. So help me God.[51]

Viewing the monarchy as British rather than Canadian, Minister Martin said the following about the Canadian addition: "When it is Canadian status that is being given to a new citizen upon naturalization it would be absurd, it is submitted, to have in the oath no reference whatever to Canada."[52] He did not say why the old heredity wording was retained.

In *McAteer*, Justice Morgan ruled with the Harper government that the heredity oath exists as "a public, symbolic avowal of commitment to [Canada's] constitutionally entrenched political structure and history."[53] The legislative evidence from 1946 does not support that finding, especially about promoting Canadian history. As for Canada's political structure, an intended public commitment to 'government as presently organized' was very unlikely in 1946, as the U.S. Supreme Court had ruled that objective unconstitutional three years earlier in *Barnette*.[54]

At first glance, keeping the old wording might suggest an intention to keep the moldy contractual model of citizenship from the 1608 ruling in *Calvin's Case*, where the 17th-century court upheld the feudal view that a monarch's protection brings with it allegiance to the monarch, and allegiance brings with it the monarch's protection.[55] Treason is a breach of allegiance, and allegiance is enforceable by the Crown through a treason prosecution for the breach.[56]

That intention is pure speculation though. Nothing in Hansard explains why the old wording was retained alongside the new wording, and no specific purpose is disclosed on the face of the heredity oath. It is impossible to say with any assurance what Parliament's goal was in 1946 for five main reasons. First, *Calvin's Case* made forced expressions of allegiance unnecessary. Naturalized citizens already had to avoid treason and otherwise obey the law of the land "whether or not allegiance is included in citizenship ceremonies."[57] Second, the Liberals' wider

---

[51] Ibid, Sch 2 [my emphasis]. The revised oath was so compelling that Australia's legislature adopted it two years later: *Naturalization and Citizenship Act* (Cth), No 83 of 1948, Sch 2.

[52] *House of Commons Debates*, 20th Parl, 2d Sess, vol 1 (2 April 1946) at 509. During second reading of the bill, a powerful rejection of old-world heredity came from Toronto's David Croll, the member for Spadina. Croll was born in Russia and had been naturalized under the old legislation. He emphasized that people come to Canada for "the opportunity to be accepted on our abilities, not on the basis of the class or group to which birth has assigned us": *House of Commons Debates*, 20th Parl, 2d Sess, vol 1 (9 April 1946) at 693 [Croll]. He went on to become Canada's first Jewish senator. Croll's rejection of heredity is similar to the view expressed by the appellant Dror Bar-Natan, above note 6.

[53] *McAteer*, above note 4 at para 40.

[54] Above note 2 at 633 and 639, where the Court said that freedom of speech "may not be infringed on such slender grounds."

[55] (1608), 7 Co. 1a, 77 ER 377 at 382: "Ligeance is a true and faithful obedience of the subject due to his Sovereign. … [A]s the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects …. *protectio trahit subjectionem, et subjectio protectionem*."

[56] Jean Teillet, "Exoneration for Louis Riel: Mercy, Justice or Political Expediency?" (2004), 67 Sask L Rev 359 at 370; and A J Arkelin, "The Right to a Passport in Canadian Law" (1983) 21 Can YB Intl L 284 at 290.

[57] David Wishart, "Allegiance and Citizenship as Concepts in Constitutional Law" (1986) 15 Melbourne U L Rev 662 at 688 n71 [Wishart].

1946 addition about observing the laws of Canada, which prohibited treason,[58] made it unnecessary to keep a duplicative promise about not committing treason and otherwise obeying the law. Third, it is unclear what specific mischief, if any, the old wording was targeting in 1946. There was no apparent abundance of treason or lawlessness by applicants for naturalization as British subjects in 1945 that required legislative attention in 1946, and was not already covered by the commitment to observe the laws of Canada. Fourth, although section 26 of the *CCA* said that Canadian citizens were concurrently British subjects, section 3 made clear that being a Canadian citizen was more important than being a British subject: "Where a person is required to state or declare his national status, any person who is a Canadian citizen under this Act shall state or declare himself to be a Canadian citizen." Fifth, as a carveout for minors made clear, even the revised oath was not that important: in response to a question from opposition leader John Diefenbaker, Minister Martin confirmed that a parent or guardian would not have to swear the oath on behalf of a minor, nor would the minor have to swear it later upon becoming an adult.[59]

Accordingly, despite the normal presumption that Parliament avoids superfluous words, the evidence shows that the heredity oath was retained, at most, as a duplicate public, symbolic acknowledgment of the existing obligation to not commit treason and to otherwise obey the law, possibly because Canadian citizens were concurrently British subjects. The evidence does not support any wider objective, especially not the abstract one endorsed by Justice Morgan. However, Parliament's intention remains pure speculation, as no reason was given.[60]

Consistent with the oath's new reference to the duties of a Canadian citizen, one of the citizenship requirements set out in the *CCA* was that the applicant have "an adequate knowledge of the responsibilities and privileges of Canadian citizenship."[61] In 1958, in an attempt "to make it clear that a person who does not take the oath of allegiance in good faith … is liable to have his citizenship revoked,"[62] the new conservative government of John Diefenbaker amended the knowledge requirement so that citizenship judges would peer into the applicant's mind and determine if the applicant "intends to comply with the oath of allegiance set forth."[63] This was a recipe for disaster. In committee, Liberal opposition member Leon Crestohl warned: "[W]hen the granting of citizenship is going to depend upon whoever will sit in judgment saying, I do not believe the intention, that is a dangerous spot."[64]

---

[58] *Criminal Code*, RSC 1927, c 146, s 74. Treason under the section included killing His Majesty, or the eldest son and heir apparent of His Majesty, or the Queen consort.

[59] *CCA*, above note 47, s 12. *House of Commons Debates*, 20th Parl, 2d Sess, vol 1 (2 May 1946) at 1148.

[60] The precept that redundant interpretation should be avoided does not give courts a basis to assign a motive where none was offered, in order to avoid calling the heredity oath redundant: *Chrysler Canada Ltd v Canada (Competition Tribunal)*, [1992] 2 SCR 394 at 434-435, per Justice McLachlin (as she then was).

[61] *CCA*, above note 47, s 10(1)(f).

[62] *House of Commons Debates*, 24th Parl, 1st Sess, vol 4 (22 August 1958) at 3930.

[63] *An Act to amend the Canadian Citizenship Act*, SC 1958, c 24, s 1. The Diefenbaker government seemed to think the oath was legally substantive, but it has always been merely symbolic.

[64] *House of Commons Debates*, 24th Parl, 1st Sess, vol 4 (6 September 1958) at 4758.

Crestohl would soon be proven right. The *Canada Evidence Act* said that anyone required to make an affidavit touching on a matter for which an oath was required, and who is unwilling to swear based on "conscientious scruples", must be given an affirmation alternative.[65] The federal *Oaths of Allegiance Act* said that everyone who is allowed by law in a provincial civil case to affirm instead of swearing an oath must be given an affirmation alternative.[66] For Ontario civil cases, the *Evidence Act* said that an affirmation alternative must be given to anyone who "objects to be sworn from conscientious scruples, or on the ground of his religious belief, or on the ground that the taking of an oath would have no binding effect on his conscience."[67] An Ontario atheist named Ernest Bergsma applied for citizenship and appeared before Justice Leach to have his intention to comply with the oath assessed. When Mr. Bergsma indicated that he does not believe in God, Justice Leach concluded that someone who does not believe in God cannot intend to comply with the oath, which includes "So help me God", and therefore is unqualified to become a Canadian citizen, because Canada "is a Christian country."[68] On appeal to the High Court, Justice Schatz affirmed the ruling. He acknowledged what the three other acts said, but concluded that "nothing in the *Canadian Citizenship Act* has relaxed [the requirement set out in that act]."[69]

The Ontario Court of Appeal reversed the rulings below. It ruled that: (i) the other acts were relevant and give someone a choice depending on conscientious scruples or religion; (ii) "conscientious scruples" should be defined broadly; and (iii) "[l]ack of religious beliefs, alone, is not a ground upon which a Citizenship Court should decide against an application for citizenship."[70]

In 1976, the Pierre Trudeau Liberals passed an updated *Citizenship Act*[71] that included eight changes relevant to the present *McAteer* appeal.

First, the new act repealed the 1946 statement that every Canadian citizen was concurrently a British subject. In the new act and in every other federal act, Canadian citizens would now be Canadian citizens only.[72]

Second, the reference to Queen Elizabeth in the symbolic heredity oath would now mention that she was Queen of Canada. When a Quebec member asked about this, the minister responsible for the legislation said: "we play around with symbols, often in contradiction to the existing political

---

65 RSC 1952, c 307, s 15(1).

66 RSC 1952, c 197, s 5(1).

67 RSO 1950, c 119, s 15(1).

68 Quoted in *R v Leach, ex p Bergsma*, [1965] 2 OR 200 at 203 (HC).

69 Ibid at 210.

70 *R v Leach, ex p Bergsma*, [1966] 1 OR 106 at 110-112 (CA).

71 SC 1974-75-76, c 108, ss 5 and 11 and Sch 2 [*1976 Citizenship Act*].

72 Ibid, s 31(2). A few years later, the British government echoed this change and ended the status of British subject throughout the Commonwealth: *British Nationality Act 1981* (UK), c 61, s 35.

reality, and I think that does not make a great deal of sense."[73] The heredity oath would now acknowledge the status quo, but would remain merely symbolic.

Third, reinforcing that Parliament's objective was something more important than the Queen, the oath's name was changed from the oath of allegiance to the oath of citizenship.[74]

Fourth, the act repealed the Diefenbaker government's futile requirement that a judge assess the applicant's intention to comply with the oath.

Fifth, the act required an applicant to have an adequate knowledge of Canada but gave the minister discretion to exempt the applicant from the requirement. The regulations issued a few months later made clear that an adequate knowledge of Canada did not include the monarchy.[75] In that section, the government also ousted an aberrant court ruling[76] and restored the Canada's longstanding legal view that conscientious objection does not detract from good citizenship.[77]

Sixth, the oath carveout for minors became part of a wider carveout for people with mental disabilities. The citizenship minister could waive the oath requirement for a minor or any other person with a mental disability.[78]

Seventh, to respect the fundamental freedoms of conscience, religion and expression, 'So help me God' was removed. The oath would now reflect the *Bergsma* ruling and no longer force aspiring citizens who do not believe in God to ask for help from a god they do not believe in.

Eighth, reinforcing Parliament's focus on observing the laws of Canada, the new act prevented an applicant from being granted citizenship or taking the oath if the applicant is (a) under a prohibition order, a paroled inmate or confined in or an inmate of any penitentiary, jail, reformatory or prison pursuant to any enactment in force in Canada, or (b) charged with, on trial for, subject to or a party to an appeal relating to an indictable offence under any federal act.[79]

---

[73] House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts, 30th Parl, 1st Sess, Issue No 34 (24 February 1976) at 34:38.

[74] *1976 Citizenship Act*, above note 71, s 11(3).

[75] *Citizenship Regulations*, SOR/77-127, s 15. The act and regulations, drafted shortly after each other by the same government, were an integrated scheme. The regulations therefore can be used to assess Parliament's intention in amending the act: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 370; *Monsanto Canada Inc v Ontario (Superintendent of Financial Services)*, 2004 SCC 54 at para 35.

[76] *Re Jensen*, [1976] 2 FC 665 (Citizenship App Ct) [*Jensen*].

[77] House of Commons, Minutes of Proceedings and Evidence of the Standing Joint Committee on Regulations and other Statutory Instruments, 32nd Parl, 1st Sess, Issue No 21 (5 February 1981) at 21:10 [the 1976 wording "was designed to assist conscientious objectors"]. Protection of conscientious objectors began in the *Militia Act*, SC 1883, 46 Vict c 11, s 15, and had been upheld before *Jensen* in *Re Almaas*, [1969] 2 Ex CR 391 at 399.

[78] *1976 Citizenship Act*, above note 71, s 5(3)(b). The two concepts were separated later (S.C. 1992, c 21, s 7), with the disability part revised to refer to a person whose mental disability prevents them from understanding the significance of taking the oath of citizenship. No justification was offered for what that alleged significance was, or which part of the oath was significant.

[79] *1976 Citizenship Act*, above note 71, s 20(1).

Subject to the rules on criminal records, a related section prevented an applicant from being granted citizenship if during the three years before the citizenship application, the applicant was convicted of an indictable offence under any federal act.[80]

In the new act, one of the requirements for being granted citizenship was that the applicant not be the subject of a declaration by the federal cabinet that granting the application "would be prejudicial to the security of Canada or contrary to public order in Canada."[81] In 1984, this was revised into a belief that the applicant will not engage in an activity that is a threat to the security of Canada.[82] The fourth of four listed categories of security threats was an activity "directed toward or intended ultimately to lead to the destruction or overthrow by violence of the constitutionally established system of government in Canada," but did not include "lawful advocacy, protest or dissent" unless the expression occurred in conjunction with violence.[83] In making clear that peaceful public dissent is not a security threat to Canada, the Trudeau government adopted the approach that had been taken in New Zealand[84] and had been advocated in Canada by Justice McDonald, who in 1981 had written:

> Liberal democracies face a unique challenge in maintaining the security of the state. Put very simply, that challenge is to secure democracy against both its internal and external enemies, without destroying democracy in the process.... Only liberal democratic states are expected to make sure that the investigation of subversive activity does not interfere with the freedoms of political dissent and association which are essential ingredients of a free society.... [W]e regard ... the right to dissent as among the essential requirements of our system of democracy.... [T]he right of democratic dissent requires that the advocacy of unpopular ideas not be confused with attempts to subvert democracy. A democracy is not liberal unless it permits those of its citizens who seek ... constitutional change within the democratic system to expound their viewpoint in public and seek adherents to their cause.... The political freedom essential to our democratic system requires that security measures properly distinguish between democratic dissent and true subversion. Those who are responsible for carrying out Canada's security measures must constantly bear in mind that the right to dissent is a constitutional requirement in Canada.[85]

Justice McDonald's view would be echoed in Ontario during the Charter era.

2. The Charter era

In 1982, the Charter entrenched into the supreme law of Canada the fundamental freedoms of conscience, religion, thought, opinion, belief and expression. A government could still force someone to express words they otherwise would choose not to express, but any forced speech would now have to be a reasonable limit on free speech that is demonstrably justifiable within

---

[80] Ibid, s 20(2). The *Statute Law Amendment Act, 1978*, SC 1978, c 22, s 8 expanded the prohibition to include taking the oath, and extended the prohibition period to include the period between the date of the application and the date on which the applicant would otherwise be granted citizenship or administered the oath.

[81] *1976 Citizenship Act*, ibid, s 5(1) and 18(1).

[82] *Canadian Security Intelligence Service Act*, SC 1984, c 21, s 75.

[83] Ibid, s 2.

[84] *New Zealand Security Intelligence Service Amendment Act 1977* (NZ), 1977/50, s 3.

[85] Royal Commission of Inquiry into Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security Under the Law*, vol 1 (Ottawa: The Commision, 1981) at 43, 44 and 46.

the constraint of a free and democratic society.[86] As the first version of the Charter presented in Parliament explained:

> The provisions of this division, which may be cited collectively as the *Canadian Charter of Rights and Freedoms*, are founded on the conviction and belief, affirmed by this Act, that in a free and democratic society there are certain rights and freedoms which must be assured … to people within that society individually … and which must, if they are to endure, be incapable of being alienated by the ordinary exercise of such legislative or other authority[.][87]

Since 1982, to remove unjustifiable limits on speech, a wide range of forced oaths of allegiance to undemocratic British heredity have been repealed or made optional.

In March 1991, Bob Rae's New Democratic Party (NDP) government replaced a forced oath to the Queen with a modern oath to both Canada and the Constitution of Canada, for the ceremony for Ontario police officers, special constables, First Nations constables and members of the Police Services board:

> I solemnly swear (affirm) that I will be loyal to Canada, 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.*)[88]

The following year, the Law Society of Upper Canada (the Law Society) changed its call-to-the-bar ceremony for new lawyers, and made optional the previously mandatory oath of allegiance to the Queen and her hereditary successors. Darrell Doxtdator, a Mohawk, had refused to take the oath on the basis that Mohawks were not subjects of the Queen, but allies. Independent legal advice from Ian Binnie and Donald Brown told the Law Society that the mandatory oath was an unjustifiable Charter breach.[89] The benchers made the oath optional by a strong vote of 30-5. With Doxtdator present, one of the monarchist benchers, Barry Pepper, expressed disdain at the result: "I'm surprised we hinged our decision upon this Indian."[90] Another monarchist bencher, Ron Cass, sneered: "The Queen is the head of state in Canada, and that is not subject to change

---

[86] The constraining nature of the English words "in a free and democratic society" is clear from "cadre" in the French version ("dans le cadre d'une société libre et democratique"). Dictionaries often define "cadre" as a framework or structure, each of which is a constraining boundary. Parliament could have simply ended section 1 with "demonstrably justified". Parliament included the final words intentionally. They reiterate that personal actions rooted in freedom and democracy are not to be restrained by governments for illegitimate reasons.

[87] Bill C-60, *An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada, and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain other matters*, 3d Sess, 30th Parl, 1978, cl 5 (first reading 20 June 1978). See also the comments of Justice Morden of the Ontario Court of Appeal quoted in *Hislop v Canada (Attorney General)* (2003), 234 DLR (4th) 465 at para 17 (SCJ), endorsing *Barnette*, above note 2.

[88] *Oaths and Affirmations*, O Reg 144/91, s 2.

[89] Lila Sarick, "Law society votes to make oath optional" *Globe and Mail* (25 January 1992) A9; and Tracey Tyler, "Vote ends mandatory royal oath for lawyers" *Toronto Star* (25 January 1992) A8 [Tyler].

[90] Tyler, ibid.

or consideration.[91] There are a few [Mohawks] who would like to have their own country, where they can sell cigarettes … and shoot each other … but they are not in the majority."[92]

Today, the Law Society's optional oath for its ceremony is in section 22 of By-Law 4:

> An applicant for the issuance of a licence to practise law in Ontario as a barrister and solicitor ... may take the following oath:
>
> I swear or 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.

When I became a lawyer over a decade ago, I exercised my Charter freedom and chose not to swear the oath. I am part of the first generation of my family to go to university, and the first member of my family to become a lawyer. Hope and hard work got me to that ceremony. I owe no expression of allegiance to anyone who thinks they are entitled to hold office by their allegedly royal birth.

In 1948, Australia had followed Canada's lead in creating a new postwar oath. On December 17, 1992, Australian Prime Minister Paul Keating moved ahead of Canada. He announced that Australia's oath would be replaced with a pledge that did not include allegiance to the Queen and that focused on, among other things, Australia's democratic beliefs and liberties to "better reflect the contemporary reality of Australia."[93] The pledge became law the following year:

> 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.[94]

In 1995, the Progressive Conservative government of Ontario Premier Mike Harris inserted an optional police oath that included the Queen, but otherwise kept the NDP's 1991 oath as an option. The two choices at the ceremony for new police officers, special constables, First Nations constables and members of the Police Services board would now be:

> I solemnly swear (affirm) that I will be loyal to Her Majesty the Queen and 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.*)

---

[91] Ibid. Justice Morgan made a similar comment in *McAteer*, above note 4 at para 44: "[I]n 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."

[92] Ibid.

[93] Prime Minister Statement 148/92 (17 December 1992), online at pmtranscripts.dpmc.gov.au.

[94] *Australian Citizenship Amendment Act, 1993*, s 8. Like the Ontario changes, Australia's pledge reflects the modern definition of allegiance – allegiance to the country instead of its monarch: Wishart, above note 57 at 706; Genevieve Ebbeck, "A Constitutional Concept of Australian Citizenship" (2004) 25 Adelaide L Rev 137 at 161.

or

> 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.*) [95]

If not already clear from the original NDP wording, the Progressive Conservative options made clear that loyalty to hereditary British rule and to the Constitution of Canada are separate things despite the Queen's presence in the Constitution. A new police officer who reached the ceremony through hard work and merit can swear to uphold the Constitution without having to feign allegiance to British birthright.

In 2000, the *Public Service Employment Act* had required Canadian federal public servants to swear an oath to British heredity:

> I, A.B., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors. So help me God. [96]

A public servant of Acadian descent named Pierre Vincent was a conscientious objector to the oath because, in the 18th century, the British had expelled over 10,000 Acadians, seized their property and destroyed their farms after they refused to swear an oath of allegiance to the British king.[97] Mr. Vincent had joined the federal public service in Hull, Québec, where no one had required him to swear the oath. He transferred to Alberta and was ordered to swear it. He refused, and Ian McClelland, his Member of Parliament from Stephen Harper's Canadian Alliance, wrote to Ottawa: "The notion of firing someone because they won't give an oath to the Queen is offensive."[98] Senior managers apparently agreed and considered the oath immaterial, as they let Mr. Vincent keep his job. He was told that their decision reflects "your years of service to the public service and your contribution to Natural Resources Canada."[99]

In 2000, as part of the Ontario education reforms enacted by the Mike Harris government,[100] the government required that every public school's opening or closing exercises include the singing of *O Canada* "[t]o instill pride and respect."[101] For an unstated purpose, possibly the same one,

---

[95] *Oaths and Affirmations*, O Reg 499/95, s 2, now located in O Reg 268/10, s 2.

[96] RSC 1985, c P-33, s 23; and *Oaths of Allegiance Act*, RSC 1985, c O-1, subs 2(1).

[97] In addition, as former Supreme Court Justice Michel Bastarache has explained, "the Acadians had been British subjects since 1713, and there was no law that authorized the Lieutenant Governor to require an oath of allegiance to preserve this status": "The Opinion of the Chief Justice of Nova Scotia Regarding the Deportation of the Acadians" (2011), 42 Ott L Rev 261 at 263.

[98] "Alberta federal worker who refuses pledge would have no problem in Britain" *Canadian Press* (1 June 2000).

[99] Geoffrey Vanderburg, "No need to swear allegiance to Queen" *Edmonton Journal* (6 January 2001) B1.

[100] *Safe Schools Act, 2000*, SO 2000, c 12, s 3, creating the current section 304 of the *Education Act*, RSO 1990, c E.2; and *Opening or Closing Exercises*, O Reg 435/00, ss 2-4 [*Harris Regulations*].

[101] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 37th Parl, 1st Sess, No 67B (6 June 2000) at 3494 (Education Minister Janet Ecker).

the government gave school boards the option to also require a prescribed pledge of citizenship "or some other such reading or recitation":[102]

> I affirm that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, and to her heirs and successors, and that I will faithfully observe the laws of Canada and fulfill my duties as a Canadian citizen.[103]

The power of school boards to force an expression of allegiance to British heredity came with three safeguards that protected free political speech. First, a board could choose not to force any expression. Second, if the board forced an expression, it could choose a different recitation. Based on the Harris options for police oaths, the different recitation could leave out British heredity and instill Canadian pride and respect for Canadian laws by having students only affirm that they will observe the laws of Canada and fulfill the duties of a Canadian citizen. Third, if the school board chose to require the prescribed recitation, a student 18 years or older could opt out of expressing it, and a parent or guardian could opt out on behalf of a student under 18.[104]

In 2002, just as the Acadian public servant Pierre Vincent had refused to earlier, a group of First Nations teachers employed by the federal government refused to swear the mandatory public servant oath to the Queen, for reasons similar to those of the Ontario Mohawk lawyer Darrell Doxtdator.[105] The teachers' union challenged the forced expression before the Public Service Staff Relations Board, which ruled that the forced expression was an immaterial "technicality" that "is not fatal" and has "no legal consequence" if not expressed.[106] The federal Liberals responded to the ruling, and to Pierre Vincent's continued employment, by eliminating the forced heredity oath altogether, rather than just making it optional.[107]

Later in 2002, reiterating the lack of harm from not having a ceremony celebrating the Queen, the federal Liberals passed reforms to the process of royal assent that had been led by Progressive Conservative Senator John Lynch-Staunton. As between facilitating the work of Parliament and having a ceremony celebrating the Queen, the ceremony was not pressing or substantial. Assent could now be signified without a ceremony through a written declaration, including on the important first bill of the session appropriating sums for the public service.[108]

In 2009, cementing the Ontario political consensus that had begun with the left-wing NDP government of Bob Rae and the right-wing Progressive Conservative government of Mike

---

[102] Ibid.

[103] *Harris Regulations*, above note 100, s 3. The reference to "my duties as a Canadian citizen" is awkward in many Ontario schools, because a lot of students are not yet Canadian citizens, especially in an arrival city like Toronto.

[104] Ibid, s 4.

[105] *Public Service Alliance of Canada v Treasury Board (Indian and Northern Affairs Canada)*, 2002 PSSRB 31 at para 17.

[106] Ibid at paras 172, 173, 175 and 182.

[107] *Public Service Modernization Act*, SC 2003, c 22, s 12.

[108] *Royal Assent Act*, SC 2002, c 15, ss 2, 3 and 7.

Harris, the centrist Liberal government of Dalton McGuinty amended the *Education Act* to make the previously mandatory oath to the Queen optional for school board members:

> Every person elected or appointed to a board, before entering on his or her duties as a board member, may take and subscribe ... the oath or affirmation of allegiance in the following form, in English or French:
>
> I swear (*affirm*) that I will be faithful and bear true allegiance to Her Majesty, Queen Elizabeth II (*or the reigning sovereign for the time being*).[109]

In 2010, the Harper Conservatives repealed the monarchy-free definition of an adequate knowledge of Canada which had existed substantially unamended in the *Citizenship Regulations* during not only Liberal governments but also the Progressive Conservative governments of Joe Clark, Brian Mulroney and Kim Campbell. The Harper Conservatives rejected that consensus and said that "a person is considered to have an adequate knowledge of Canada if they demonstrate ... that they know the national symbols of Canada and have a general understanding" of several prescribed subjects, including "the chief characteristics of the Canadian system of government as a constitutional monarchy."[110]

This loony change weakens the position of the Harper Conservatives on the heredity oath in two key ways. First, under their own definition, the hereditary British monarchy is only a subject an applicant should have a general understanding of; it is not a national symbol of Canada. Second, even as a subject an applicant should have an understanding of, applicants can be exempted from knowing about it.[111] A forced oath that can be made with no knowledge has no value.

Having told the 1945-2010 history that Justice Morgan noticeably left out in *McAteer*, I will now summarize the key provisions of the current act and regulations, then deal with his flawed conclusion that the heredity oath is a demonstrably justifiable limit on free speech today.

IV. The key provisions of the current act and regulations

With the roots described above, the provisions of today's *Citizenship Act* and *Citizenship Regulations* that are most relevant to the *McAteer* appeal are as follows.

The citizenship minister must grant citizenship to any person who: (a) applies; (b) is 18 years or older; (c) is a permanent resident who has lived in Canada for three of the four years before the application date; (d) has an adequate knowledge of French or English; (e) has an adequate knowledge of Canada and the responsibilities and privileges of citizenship; and (f) is not under a removal order nor the subject of a declaration by the Governor in Council that the applicant is a threat to the security of Canada under the *Canadian Security Intelligence Service Act*.[112] The

---

[109] *An Act to amend the Education Act with respect to student achievement, school board governance and certain other matters*, SO 2009, c 25, s 23, creating the current subsection 209(3) of the *Education Act*, above note 100. The Education Minister at the time was Kathleen Wynne, the current Premier of Ontario.

[110] SOR/2010-209, s 1, replacing s 15 of the *Citizenship Regulations*, SOR/93-246, which came from SOR/77-127.

[111] *Citizenship Act*, above note 3, ss 5(1)(e) and (3)(a).

[112] *Citizenship Act*, above note 3, s 5(1).

CSIS Act says that activities directed toward or intended ultimately to lead to the destruction or overthrow by violence of Canada's constitutionally established system of government are a threat to the security of Canada, and that non-violent advocacy, protest and dissent are not.[113]

Despite meeting the requirements and being granted citizenship, the grant does not automatically take effect. For that to happen, the applicant must take the oath of citizenship and express all of the prescribed words.[114] The citizenship minister may waive the oath requirement for a minor or anyone who is prevented from understanding the significance of taking the oath by reason of a mental disability.[115] The act claims that taking the oath is significant, but does not say why, or which part.

Making clear Parliament's focus on observing the laws of Canada, the act prohibits an applicant from being granted citizenship or taking the oath:

> (a) while the person is, pursuant to any enactment in Canada,[116] under a probation order, a paroled inmate, or confined in or an inmate of any penitentiary, jail, reformatory or prison;
>
> (b) while the person is charged with, on trial for, or subject to or a party to an appeal relating to various offences under the act or an indictable offence under any other Canadian act, other than a contravention under the *Contraventions Act*;
>
> (c) while the person is under investigation by Canada's Minister of Justice, the Royal Canadian Mounted Police or the Canadian Security Intelligence Service for, or is charged with, on trial for, convicted of, subject to or a party to an appeal relating to, various offences under Canada's *Crimes Against Humanity and War Crimes Act*;
>
> (d) if the person was subject to a removal order, was removed, and has not obtained authorization to return under Canada's *Immigration and Refugee Protection Act*; or
>
> (e) subject to Canada's *Criminal Records Act*, if: (i) during the three years before the application date, or (ii) during the period between the application date and the date that the person would otherwise be granted citizenship or take the oath, the person has been convicted of any of the specified offences or an indictable offence under any Canadian act, other than a contravention under the *Contraventions Act*. [117]

Where the applicant is allowed to take the oath and has not received an exemption, the person must take the oath in front of: (a) the citizenship minister or any appointee anywhere in the world; (b) any foreign service officer outside of Canada; or (c) a citizenship judge in Canada.[118]

---

[113] *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, s 2 [*CSIS Act*].

[114] *Citizenship Act*, above note 3, ss 3(1)(c) and 24.

[115] Ibid, s 5(3).

[116] This includes the treason section of the *Criminal Code*, RSC 1985, c C-46, s 46.

[117] *Citizenship Act*, above note 3, s 22.

[118] *Citizenship Regulations*, above note 110, ss 20(1) and 22(1).

Just as the citizenship minister has discretion to exempt minors and people with mental disabilities from swearing the oath, the minister also has discretion to exempt anyone from the default requirement to take the oath at a citizenship ceremony.[119] If a ceremony occurs and it is before a citizenship judge, the judge must administer the oath with dignity and solemnity while allowing the greatest possible freedom in the religious solemnization or the solemn affirmation of the oath.[120] The judge must impress on the pending citizens the responsibilities and privileges of citizenship, and must promote good citizenship, including respect for the law, the exercise of the right to vote, participation in community affairs and intergroup understanding; the monarchy does not have to be mentioned at any point.[121] This is consistent with the view expressed in the act and regulations that the monarchy is not a national symbol of Canada, and is something an applicant can be exempted from knowing anything about.[122]

With that proper understanding of the regulatory regime, I now turn to Justice Morgan's flawed justification of the heredity oath.

V. Justice Morgan erred in ruling that the forced heredity oath is a reasonable limit on free speech that can be demonstrably justified in a free and democratic society

The forced heredity oath unquestionably breaches the freedom of expression entrenched in section 2(b) of the Charter. As then-Justice McLachlin emphasized in declaring the forced speech in *RJR* invalid, freedom of expression includes the freedom to stay silent.[123] The heredity oath takes away that freedom by forcing opponents of British heredity to express words they otherwise would choose not to express. As a result, the only valid issue before the Ontario Court of Appeal is whether the forced speech is justifiable under section 1 of the Charter.

The appellants do not have to prove why they should have free political speech; it is their fundamental freedom under our constitution. The Harper government must prove that taking away freedom is a reasonable limit that is demonstrably justifiable today. Neither common sense nor the lack of evidence offered by the government fulfills that burden of proof.

Based on the events from 1945-2010 discussed earlier, and the Charter case law discussed below, Justice Morgan should have concluded that: (1) the heredity oath is made to an abstract symbol, without a discernable objective, and no pressing or substantial harm would arise without it; (2) the heredity oath is not rationally connected to the alleged objective; (3) the heredity oath impairs freedom more than is needed to achieve the alleged objective; and (4) the harmful effects outweigh the non-existent benefits. I discuss each of these four points below.

---

[119] Ibid, s 19(2).

[120] Ibid, s 17(1)(b).

[121] Ibid, s 17(1)(d).

[122] Ibid, s 15; *Citizenship Act*, above note 3, s 5(3)(a).

[123] *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 124 [*RJR*].

1. The heredity oath is made to an abstract symbol, without a discernable objective, and no pressing or substantial harm would arise without it

Without much analysis, and without acknowledging that freedom of expression is constitutionally entrenched, Justice Morgan ruled in favour of the Harper government that the objective of the forced heredity oath is "a public, symbolic avowal of commitment to this country's constitutionally entrenched political structure and history."[124] Without examining the evidence from 1945-2010, Justice Morgan lectured the applicants that "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."[125]

Early in the Charter era, in declaring invalid the traditional ban on Sunday shopping, Chief Justice Dickson emphasized that "not every government interest or policy objective is entitled to s. 1 consideration. Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom."[126] He set out those principles the next year in *R v Oakes*,[127] in the course of striking down an unjustifiable limit of a Charter right. Echoing the sentiment that had been set out in the first version of the Charter presented to Parliament, Dickson noted that the reference to a free and democratic society:

> refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few ... commitment to ... equality [and] accommodation of a wide range of beliefs.... The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.[128]

He added that determining if a collective goal was of fundamental importance required a court to assess "the consequences of ... not imposing the limit."[129] He invoked his earlier comment that not every objective is sufficiently important and wrote:

> The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial[.][130]

---

[124] *McAteer*, above note 4 at para 40. As noted above in note 54, the comparable objective in *Barnette* was a public commitment to "government as presently organized" and the U.S. Supreme Court ruled that freedom of speech "may not be infringed on such slender grounds."

[125] *McAteer*, ibid at para 41.

[126] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 139 [*Big M Drug Mart*].

[127] [1986] 1 SCR 103 [*Oakes*].

[128] Ibid at paras 64-65.

[129] Ibid at para 68.

[130] Ibid at para 69.

A few years later, in rejecting an anachronistic objective and declaring invalid a limit on free speech, Justice Cory wrote:

> [W]hat then are the objectives of this legislation? There were three put forward by the Attorney General for Alberta. First, it was said that the aim of the legislation ... was to safeguard public morals. Undoubtedly this was the primary basis for the enactment of the legislation in 1935. However, it must be reviewed by current standards and it cannot be accepted that this objective remains pertinent in today's society. Although allegations of adultery and the misconduct of the parties may have been the height of scandal at the time of the passage of the legislation they can hardly raise an eyebrow today.[131]

A few years after that, in declaring invalid a ban on political speech in federally owned airports in a case involving anti-monarchist speech, Justice McLachlin found no pressing or substantial objective, and wrote:

> The government's objective in imposing the limit amounts to little more than the assertion -- more as an article of faith than a rationally supported proposition -- that an airport is not an appropriate place for this type of communication. The Crown points to nothing in the function or the purpose of an airport which is incompatible with the respondents' conduct.[132]

The following year, in declaring invalid a conviction that was based on the anachronistic 13th-century offence of spreading false news – a limit on free speech that was created to prevent people from saying false things about the monarch – Justice McLachlin wrote:

> In determining the objective of a legislative measure for the purposes of s. 1, the Court must look at the intention of Parliament when the section was enacted or amended. <u>It cannot assign objectives, nor invent new ones according to the perceived current utility of the impugned provision</u>[.] [...]
>
> If the simple identification of the (content-free) goal of protecting the public from harm constitutes a "pressing and substantial" objective, virtually any law will meet the first part of the onus imposed upon the Crown under s. 1. I cannot believe that the framers of the *Charter* intended s. 1 to be applied in such a manner. Justification under s. 1 requires ... a specific purpose so pressing and substantial as to be capable of overriding the *Charter*'s guarantees. [...]
>
> It is impossible to say with any assurance what Parliament had in mind when it decided ... to leave [the false news offence in section 181 of the *Criminal Code*] as part of our criminal law.... The difficulty in assigning an objective to s. 181 lies in two factors: the absence of any documentation explaining why s. 181 was enacted and retained and the absence of any specific purpose disclosed on the face of the provision. We know that its original purpose in the 13th century was to preserve political harmony in the state by preventing people from making false allegations against the monarch and others in power. This ostensibly remained the purpose through to the 19th century. However, in the 20th century, Parliament removed the offence from the political "Sedition" section of the Code and placed it in the "Nuisance" section, suggesting that Parliament no longer saw it as serving a political purpose. [...]
>
> The lack of any ostensible purpose for s. 181 led the Law Reform Commission in 1986 ... to recommend repeal of the section, labelling it as "anachronistic", a conclusion which flies in the face of the suggestion that s. 181 is directed to a pressing and substantial social concern. [...]

---

[131] *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1343 [*Edmonton Journal*].

[132] *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at 250 [*Commonwealth of Canada*].

> Can it be said in these circumstances that the Crown has discharged the burden upon it of establishing that the objective ... is pressing and substantial, in short, of sufficient importance to justify overriding the constitutional guarantee of freedom of expression? I think not. It may be that s. 181 is capable of serving legitimate purposes. But no objective of pressing and substantial concern has been identified in support of its retention in our *Criminal Code*. Other provisions, such as s. 319(2) of the *Criminal Code*, deal with hate propaganda more fairly and more effectively. […]
>
> In the absence of an objective of sufficient importance to justify overriding the right of free expression, the state's interest in suppressing expression which may potentially affect a public interest cannot outweigh the individual's constitutional right of freedom of expression and s. 181 cannot be upheld under s. 1 of the *Charter*.[133]

A few years later, in declaring invalid the forced speech at issue in *RJR*, she emphasized that:

> In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the actual objective of the law.... Care must be taken not to overstate the objective. The objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised.[134]

In declaring invalid a ban on political expression at the ballot box by inmates serving sentences of at least two years, now Chief Justice McLachlin wrote:

> [T]his Court has held that broad, symbolic objectives are problematic.... The objectives must not be "trivial", and they must not be "discordant with the principles integral to a free and democratic society": *Oakes*…. Because s. 1 serves first and foremost to protect rights, the range of constitutionally valid objectives is not unlimited. For example, the protection of competing rights might be a valid objective. However, a simply majoritarian political preference for abolishing a right altogether would not be a constitutionally valid objective. Section 51(3) denying penitentiary inmates the right to vote was not directed at a specific problem or concern. Prisoners have long voted, here and abroad, in a variety of situations without apparent adverse effects to the political process, the prison population, or society as a whole. In the absence of a specific problem, the government asserts two broad objectives as the reason for this denial of the right to vote: (1) to enhance civic responsibility and respect for the rule of law; and (2) to provide additional punishment, or "enhanc[e] the general purposes of the criminal sanction". The record leaves in doubt how much these goals actually motivated Parliament. […]
>
> Vague and symbolic objectives such as these almost guarantee a positive answer to this question.... Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy.... A court faced with vague objectives may well conclude, as did Arbour J.A. (as she then was) ... that "the highly symbolic and abstract nature of th[e] objective ... detracts from its importance as a justification for the violation of a constitutionally protected right."[135] If Parliament can infringe a crucial right such as the right to vote simply by offering symbolic and abstract reasons, judicial review either becomes vacuously constrained or reduces to a contest of "our symbols are better than your symbols". Neither outcome is compatible with the vigorous justification analysis required by the Charter. […]

---

[133] *R v Zundel*, [1992] 2 SCR 731 at 761-765, 767 [*Zundel*; my emphasis].

[134] *RJR*, above note 123 at para 144 [her emphasis].

[135] *Sauvé v Canada (Attorney General)* (1992), 7 OR (3d) 481 at 487 (CA), aff'd [1993] 2 SCR 438.

> To establish 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. Without this, it is difficult if not impossible to weigh whether the infringement of the right is justifiable or proportionate…. [T]he government has failed to identify particular problems that require denying the right to vote.[136]

Freedom of expression is integral to a free and democratic society,[137] especially when it relates to something as undemocratic as hereditary rule. In declaring invalid the limit on free political speech in airports, Justice L'Heureux-Dubé emphasized:

> The liberty to comment on and criticize existing institutions and structures is an indispensable component of a 'free and democratic society'. It is imperative for such societies to benefit from a multiplicity of viewpoints which can find fertile sustenance through <u>various</u> media of communication.[138]

Long before the Charter, in declaring invalid an unconstitutional limit on free expression, Justice Abbott stressed that "[t]he right of free expression of opinion and of criticism, upon matters of public policy and public administration ... are essential."[139] In throwing out a seditious libel conviction a few years earlier, Justice Rand wrote that "[f]reedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are the essence of our life," and that a modern view of sedition was needed "to eviscerate the older concept of its anachronistic elements."[140]

Because of its importance, any attempt to limit freedom of expression "must be subjected to the most careful scrutiny."[141] Justice Morgan had to look at the events of 1945-2010 in detail. He was not allowed to assign an objective that is not supported by the evidence, including an objective invented afterwards. As shown earlier in this paper, his conclusion that the heredity oath exists as a public, symbolic avowal of commitment to Canada's constitutionally entrenched political structure and history is not supported by the evidence. Even if it were, the highly symbolic and abstract nature of that objective detracts from its importance as a justification for violating a constitutionally entrenched freedom.

---

[136] *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at paras 16, 20-24, 26 [*Sauvé*]. For another Ontario example of an unjustifiable limit on expression for lack of harm, see *Xentel DM Inc v Newmarket (Town)* (2009), 67 MPLR (4th) 211 at para 5 (Ont SCJ).

[137] *RJR*, above note 123 at para 175.

[138] Above note 132 at 172 [my emphasis]. At 174, citing *Barnette*, above note 2, she wrote that freedom of expression "serves to anchor the very essence of our democratic political and societal structure."

[139] *Switzman v Elbing and AG of Quebec*, [1957] SCR 285 at 326. Later, in *Jazairi v Ontario Human Rights Commission* (1999), 122 OAC 356 at para 29 (CA), the Court of Appeal said that the freedom to express a political opinion is fundamental under the Charter. In *R v Batista*, 2008 ONCA 804, the lower court had convicted Mr. Batista of uttering a death threat after he wrote a disparaging poem about his city councillor. The Court of Appeal threw out the conviction and stressed at para 37 that "freedom of expression, even offensive expression, functions to ensure open debate."

[140] *Boucher v The King*, [1951] SCR 265 at 288, 290.

[141] Chief Justice McLachlin in *R v Sharpe*, 2001 SCC 2 at para 22.

The heredity oath is anachronistic. The feudal model of allegiance endorsed in 1608 in *Calvin's Case*, the model that was apparently behind the oaths of allegiance that Quebecers and Acadians were forced to swear in the 1700s, has no place in Canada today:

> If the old common-law duty of allegiance belongs to the past, as indeed it does, this is … because it is incompatible with the political and legal justifications of the modern democratic state. The duty of allegiance, and similar notions such as loyalty, fidelity, and fealty, presuppose the hierarchical subordination of subjects to the sovereign, an idea alien to democratic principles. The notion that citizens are passive subjects, who offer their allegiance in exchange [for] protection, is at odds with the modern notion of democratic politics and self-government. Admittedly, some common-law countries, including the United Kingdom and Canada, are constitutional monarchies rather than constitutional democracies and require ... naturalized citizens to take an oath of fealty to the monarch, but these should be seen as relics[.][142]

If, during wartime in America, arguably the most expressively patriotic country in the world, there was no clear and present danger that justified a forced pledge of allegiance to 'government as presently organized', making the grounds too slender to limit free speech, then the alleged objective of Canada's forced oath to British birthright is equally trivial and discordant with the principles integral to a free and democratic society.

At most, since 1946, the heredity oath has existed as a duplicate public, symbolic acknowledgment of the existing obligation to not commit treason and to otherwise obey the law. If there is a pressing and substantial concern about obeying the laws of Canada, the words added in 1946 fully address the policy concern. The heredity oath involves no residual pressing or substantial concern.

Neither the Harper government nor Justice Morgan have pointed to any negative consequences that would arise from not requiring the heredity oath. There are none. The modern Ontario oaths for police officers, lawyers, school children and school board members have shown, in the province with the most immigrants, that our society does not face any adverse effects, much less any "grave ills,"[143] if people are not forced to swear allegiance to British birthright.

The decisions to continue the employment of Pierre Vincent and the First Nations teachers because the oath is immaterial reinforce that a pressing and substantial objective does not exist here. So does the fact that no one is required to swear the heredity oath on behalf of a minor or a person with a mental disability. The hereditary monarch mentioned in the oath is not a national symbol of Canada, and is something people can be exempted from knowing about. If a public expression of allegiance to an unelected British monarch were of fundamental importance in today's Canada, Ian McClelland from Stephen Harper's Canadian Alliance would have said that the heredity oath Mr. Vincent was forced to swear was of fundamental importance, not offensive.

---

[142] Shai Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and their Criminal Breach" (2011) 61 UTLJ 783 at 795.

[143] *Oakes*, above note 127 at para 76.

2. The heredity oath is not rationally connected to the alleged objective

Based on his flawed view of the objective, Justice Morgan concluded that the oath is "certainly rational.... It would be entirely rational for Parliament, if it so desired, to fashion an oath of citizenship that referenced any ... defining element established by the country's most fundamental law."[144] In support of his self-evident view, he invoked the Federal Court's flawed support of forcing Canadian soldiers to sing God Save The Queen in *Chainnigh v Canada (Attorney General)*, where Justice Barnes wrote: "our present ties to the British monarchy are constitutionally entrenched and unless that is changed there is legitimacy ... for demanding, in appropriate circumstances, expressions of respect and loyalty to the Crown."[145] Justice Morgan noticeably left out the Ontario Court of Appeal's *Donald* ruling that rejected the forced singing of the God Save The King and other forced expressions of allegiance to the monarch.[146]

Chainnigh must be distinguished from *McAteer*, and it was an inherently flawed ruling. It must be distinguished because Captain Chainnigh was challenging an aspect of military life that he willingly accepted when he joined the military in 1975,[147] which the *McAteer* applicants have never done in their quest to become citizens. *Chainnigh* was inherently flawed for two main reasons. First, Justice Barnes conceded that the Queen's supremacy over Canada's soldiers is merely "emblematic",[148] in other words only symbolic. Second, neither the evidence nor common sense supported Justice Barnes' irrational view that singing God Save The Queen was "critical to the maintenance of good order and discipline,"[149] and that a "chaotic and unworkable situation" would result if Canada's soldiers were not forced to sing the royal anthem.[150] Soldiers in other Commonwealth countries who are not forced to sing it are not any less orderly or disciplined than our soldiers, nor are their armies chaotic or unworkable.

In declaring invalid the limit on free political speech in airports, Chief Justice Lamer and Justice Sopinka wrote that the public forum of an airport "can accommodate expression without the effectiveness or function of the place being in any way threatened."[151]

In declaring invalid the ban on free expression in *RJR*, Justice McLachlin noted that:

> [T]here does not appear to be any causal connection between the objective of decreasing tobacco consumption and the absolute prohibition on the use of a tobacco trade mark on articles other than tobacco products which is mandated by s. 8 of the [*Tobacco Products Control Act*].... It is hard to

---

144 *McAteer*, above note 4 at paras 46, 48.

145 2008 FC 69 at para 49 [*Chainnigh*].

146 Above note 34.

147 *Chainnigh*, above note 145 at para 35.

148 Ibid at para 38.

149 Ibid.

150 Ibid at para 43.

151 *Commonwealth of Canada*, above note 132 at 158-159.

> imagine how the presence of a tobacco logo on a cigarette lighter, for example, would increase consumption; yet, such use is banned. I find that s. 8 of the Act fails the rational connection test.[152]

As Chief Justice, in declaring invalid the voting ban in *Sauvé*, she wrote:

> The government argues that disenfranchisement will "educate" and rehabilitate inmates. However, disenfranchisement is more likely to become a self-fulfilling prophecy than a spur to reintegration. Depriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity, while the right to participate in voting helps teach democratic values.... If modern democratic history has one lesson to teach it is this: enforced conformity to the law should not come at the cost of our core democratic values.[153]

In declaring invalid a ban on political speech on the side of public buses, Justice Deschamps wrote that unless a political advertisement on the side of a bus advocates violence or terrorism, the ban is not rationally connected to the alleged objective of passenger safety.[154]

Even if a court were to attribute to the heredity oath the fictitious objective of "a public, symbolic avowal of commitment to this country's constitutionally entrenched political structure and history," and manage the further leap of concluding that that objective was so pressing and substantial as to be capable of overriding the constitutionally entrenched freedom of expression, the Harper government's case under section 1 must still fail due to the lack of a rational connection. No part of our political structure or history requires a forced, and often fake,[155] expression of allegiance to British heredity by new citizens, or by Ontario's police officers, lawyers, school children or school board members. Our political structure requires royal assent to laws, but as Liberal and Progressive Conservative parliamentarians have agreed, a ceremony celebrating the Queen is not needed; written assent is enough.

Since 1883, Canadian law has recognized that conscientious objection does not detract from good citizenship. Being forced to publicly express something that is contrary to the expresser's conscience, thought, opinion or belief does not show that the expresser is committed to Canada's political structure. Ontario's police officers, lawyers, school children and school board members, and Australia's new citizens, are no less committed to their country's political structure than anyone on whom a heredity oath is forced.

On the Canadian history part of the alleged objective, our history includes the Charter. It includes a long line of Supreme Court rulings striking down unjustifiable limits on free speech. If the forced heredity oath somehow honours one part of our history, it does so only by dishonouring another. These moves offset each other, causing no net improvement, reinforcing

---

[152] *RJR*, above note 123 at para 159.

[153] *Sauvé*, above note 136 at paras 38-40.

[154] *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at para 76 [*Greater Vancouver*].

[155] When Sergio Marchi attended citizenship ceremonies as citizenship minister, new Canadians who opposed British heredity would often swear allegiance to the monarch's hairs instead of heirs: Colin Perkel, "Chrétien considered scrapping oath to Queen while PM" *Globe & Mail* (13 July 2013) A8.

that the heredity oath is not rationally connected to the already fictitious objective. The unjust expulsion of the Acadians shows that a forced oath of regal allegiance is something to eliminate, not celebrate.

Even on the narrower objective of not committing treason and otherwise obeying the law, the heredity oath makes no legal contribution. Everyone in Canada, including permanent residents, naturalized citizens and citizens by birth, must avoid treason and otherwise observe the laws of Canada regardless of the content of a citizenship ceremony.[156] It is hard to imagine how swearing only an oath to observe the laws of Canada and fulfill the duties of a Canadian citizen would foster treason or other lawlessness, yet that shorter option is banned through the mandatory heredity oath.

Our public citizenship ceremony can accommodate free speech about British heredity while preserving the stated commitment to observe the supreme and other laws of Canada. Understood rationally, the choice to speak or stay silent about British birthright is not a source of harm, but a teachable moment offering an excellent chance to put our Charter freedoms and Canadian values into practice and prove that they are not mere platitudes.[157] One of those values is that morally legitimate power is earned through hard work, rather than from the family you were born into. Values like it are one reason why people leave behind the anachronistic barriers of the old world and begin a new life of opportunity in Canada.[158]

3. The heredity oath impairs freedom more than is needed to achieve the alleged objective

In concluding that any impairment of rights is minimal, Justice Morgan noted in passing the applicants' argument about Australia's citizenship pledge,[159] then ignored it. He instead reached the perverse conclusion that a monarch entitled to power at birth "represents the antithesis of status privilege," and that an oath to a hereditary monarch the Supreme Court has labelled "the reigning monarch of the United Kingdom"[160] is in fact "an oath to a domestic institution that represents egalitarian governance" because the reigning monarch is not a British aristocrat but "an equality-protecting Canadian institution."[161]

In declaring invalid a ban on expression that mandated French on all commercial signs in Quebec, the Court ruled that banning expression in English was not needed to enhance the status of French.[162]

---

[156] *Criminal Code*, above note 116; Wishart, above note 57.

[157] Accord *Barnette*, above note 2 at 637, where the U.S. Supreme Court declared the pledge of allegiance optional at school and emphasized the need for "scrupulous protection of Constitutional freedoms of the individual, if we are not to … teach youth to discount important principles of our government as mere platitudes."

[158] Croll, above note 52.

[159] *McAteer*, above note 4 at para 52.

[160] *R v Eldorado Nuclear Ltd*, [1983] 2 SCR 551 at 562.

[161] *McAteer*, above note 4 at paras 63, 65 and 68.

[162] *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at para 73.

In declaring invalid limits on commercial speech by Ontario dentists, Justice McLachlin noted that a number of banned expressions, such as a dentist's hours and languages, presented "no serious danger" to the objective of the ban.[163]

In declaring invalid the restrictions on political speech by federal public servants, Justice Sopinka ruled that the restrictions "go beyond what is necessary to achieve the objective."[164]

In declaring invalid the forced speech in *RJR*, speech which could be taken as reflecting the expresser's view, Justice McLachlin wrote that a limit on free speech "must go no further than reasonably required to achieve the legislative goal."[165] She looked to the approach taken in another country, and concluded that the Canadian government had failed to prove the need for an unattributed warning about the dangers of smoking tobacco, compared to a U.S.-style warning attributed to a health official, to achieve the objective of reducing tobacco use.[166]

In declaring invalid limits on political speech by Quebec public servants, the Court ruled that the government had gone beyond what was needed to advance the objective, and had to choose one of several "alternative solutions far better than the limits imposed."[167]

In declaring invalid a ban on publishing poll results in the final days of an election campaign, Justice Bastarache ruled that the restriction on political speech did not minimally impair because it was based on no evidence of an existing problem. Nor did the evidence or common sense suggest "that voters have suffered from any misapprehensions regarding the accuracy of any single poll," and he emphasized that courts should not invoke common sense as cover for unfounded assumptions.[168]

In declaring invalid the ban on political speech on the side of public buses in *Greater Vancouver*, Justice Deschamps ruled that "excluding advertisements which 'create controversy' is unnecessarily broad. Citizens, including bus riders, are expected to put up with some controversy in a free and democratic society."[169]

As the choices for Ontario police officers, lawyers, school children and school board members show, the forced heredity oath in the *Citizenship Act* goes beyond what is needed to achieve its already fictitious objective.

---

[163] *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 at 250.

[164] *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 at 100.

[165] *RJR*, above note 123 at para 149.

[166] Ibid at para 174. For an example of the Ontario Court of Appeal declaring forced speech invalid for lack of minimal impairment, see *Zylberberg*, above note 36 at 663.

[167] *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569 at para 77.

[168] *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at paras 112 and 116 [*Thomson Newspapers*].

[169] Above note 154 at para 77.

Three main alternatives exist in the Charter era. Each of them minimally impairs, with the first one removing the Charter breach altogether:

1. Eliminate the heredity oath completely, like Australia did for new citizens and the federal Liberals did for federal public servants. This option is good for democrats but it denies monarchists a chance to express words that echo their love of hereditary privilege.

2. Have two versions of the oath, and require aspiring Canadians to say one of them, like the Mike Harris government did for Ontario police officers. The two versions would be:

   Version 1: I swear (or affirm) that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen.

   Version 2: 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.

3. Have a mandatory oath for everyone and then an optional heredity oath. This is what the Law Society, the Harris government and the McGuinty government did for lawyers, school children and school board members. The mandatory and optional wording would be:

   Mandatory: I swear (or affirm) that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen.

   Optional: 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.

Each of these alternatives would be controversial for monarchists, but monarchists have to put up with some controversy in a free and democratic society. They live in the Charter era, not the days of Diefenbaker, whether they like it or not.

4. The harmful effects outweigh the non-existent benefits

Much like the rest of Justice Morgan's reasons, his discussion of the final step of the *Oakes* test seems to have been an attempt by the former law professor to lecture the applicants about what the true value of the heredity oath is for him, and therefore what it should be for them. Earlier in his reasons, he implied that he thinks the forced words are a socially positive message.[170] In the final step of the *Oakes* test, he ignored the lessons of *Barnette* and *Donald* [171] and held that the applicant Topey's belief that hereditary rule is morally wrong "is doubtless sincere, but it is premised on a mistake."[172] He incorporated his earlier error and ruled that "the salutary effect of an expression of fidelity to a head of state symbolizing ... equality ... is substantive," and taking away free political expression is in fact "a rights-enhancing measure."[173]

[170] *McAteer*, above note 4 at para 24.

[171] Above in the text accompanying notes 2 and 45.

[172] *McAteer*, above note 4 at para 78.

[173] Ibid at para 81.

As with freedom of religion, a judge is in no position to criticize the wisdom of a sincere moral belief held by a large number of Canadians, such as the belief that hereditary rule is wrong. It is not for a judge to say what a forced expression on heredity should mean to the expresser. In dismissively labelling the premise behind Ms. Topey's belief a mistake, Justice Morgan erred and "did not further an enlightened resolution of the dispute."[174] The same error was made in *Chainnigh*, where Justice Barnes dismissively called Captain Chainnigh's opposition to singing God Save The Queen "misguided."[175]

In a free and democratic society, judges do not get to dispute the premises behind a person's views in order to set out the 'true' foundation on which the judge believes the person's views should be based. Justice Morgan's opinion on what Ms. Topey should believe was as irrelevant as if the former president of the Canadian Jewish Congress had opposed the religious views of another member of the Jewish faith because of what Justice Morgan considers the true teachings of Judaism. Our constitutionally entrenched freedoms of conscience, thought, opinion, belief and expression have little value if a lecturing judge can set them aside just by telling someone what a forced expression should mean to them.

In declaring invalid a ruling of the Canada Labour Relations Board that had forced an employer and its president to express views that were not theirs, Justice Beetz called the forced expression:

> totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes. I cannot be persuaded that the Parliament of Canada intended to confer on the Canada Labour Relations Board the power to impose such extreme measures, even assuming that it could confer such a power bearing in mind the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of thought, belief, opinion and expression. These freedoms guarantee to every person the right to express the opinions he may have: a fortiori they must prohibit compelling anyone to utter opinions that are not his own.[176]

In declaring invalid the traditional ban on Sunday shopping, Justice Dickson wrote:

> A truly free society is one which can accommodate a wide range of beliefs.... A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter.... Freedom in a broad sense embraces both the absence of coercion and constraint.... Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[177]

Emphasizing "the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation," Dickson added that:

---

[174] *Syndicat Northcrest v Anselem*, 2004 SCC 47 at paras. 43-44 and 87.

[175] Above note 145 at para 40.

[176] *National Bank of Canada v Retail Clerks' International Union*, [1984] 1 SCR 269 at 295-296.

[177] *Big M Drug Mart*, above note 126 at paras 94-95. These lessons were followed in the conscience case of *Maurice v Canada (Attorney General)*, 2002 FCT 69 at paras 10-16, where the court set aside an administrative ruling that the court concluded was an unjustifiable limit on Mr. Maurice's freedom of conscience.

> The values that underlie our political and philosophic traditions demand that every individual be free ... to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.[178]

In upholding the freedom to criticize judges, Justice Cory echoed his earlier comments as a judge of the Ontario Court of Appeal[179] and wrote:

> It 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. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.[180]

In declaring invalid the ancient prohibition of spreading false news about the monarch, Justice McLachlin wrote:

> The value of liberty of speech, one of the most fundamental freedoms protected by the Charter, needs no elaboration. By contrast, the objective of [the ancient prohibition], in so far as an objective can be ascribed, falls short of constituting a countervailing interest of the most compelling nature.... It is, as the Law Reform Commission concluded, "anachronistic".[181]

In declaring invalid a municipal by-law that banned postering on public property to reduce litter, Justice Iacobucci noted that "the benefits of the by-law are limited while the abrogation of freedom is total," and he agreed with the Ontario Court of Appeal that "[a]s between a total restriction of this important right [of free speech] and some litter, surely some litter must be tolerated."[182]

In declaring invalid the forced speech at issue in *RJR*, Justice McLachlin wrote that if Parliament wants to infringe the fundamental democratic tenet of free speech, it "must be prepared to offer good and sufficient justification for the infringement and its ambit. This is has not done."[183]

---

[178] Ibid at paras 121, 123.

[179] *R v Kopyto* (1987), 62 OR (2d) 449 at 462-463 (CA): "A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. These opinions may be critical … of the institutions themselves…. [D]isrespectful language may be the necessary touchstone to fire the interest and imagination of the public to the need for reform."

[180] *Edmonton Journal*, above note 131 at 1336.

[181] *Zundel*, above note 133 at 776-777.

[182] *Ramsden v Peterborough (City)*, [1993] 2 SCR 1084 at 1107, aff'g (1991), 5 OR (3d) 289 at 294 (CA), and later followed in the Ontario Court of Appeal by Justice Abella (as she then was) in *Toronto (City) v Quickfall* (1994), 16 OR (3d) 665 (CA). See also *R v Behrens*, [2001] OJ No 245 at paras 68 and 103-104 (CJ), where the court ruled that publicizing a dissenting political viewpoint in a public setting in a non-violent way "is a value cherished in a democratic society." The court emphasized the importance of dissenting views, and ruled that the government's objective was not important enough to outweigh freedom of expression. Accord *Barnette*, above note 2 at 642, where the U.S. Supreme Court stressed the importance of protecting expressions of "eccentricity and abnormal attitudes."

[183] *RJR*, above note 123 at para 175.

In declaring invalid a disproportionate limit on obtaining Canadian citizenship, Justice Iacobucci wrote that he could not imagine "an interest more fundamental to full membership in Canadian society than Canadian citizenship."[184]

In declaring invalid the *Thomson Newspapers* ban on free political speech, Justice Bastarache ruled that in this final stage, the question again is:

> whether there is a significant harm which the government is addressing.... [T]he postulated harm will seldom occur. The benefits of the ban are, therefore, marginal. The deleterious effects are substantial.... [T]he doubtful benefits of this ban are outweighed by its ... deleterious effects.[185]

In declaring invalid the voting ban in *Sauvé*, Chief Justice McLachlin wrote:

> The government's plea of no demonstrated harm to penitentiary inmates rings hollow when what is at stake is the denial of the fundamental right of every citizen to vote.... The prospect of someday participating in the political system is cold comfort to those whose rights are denied in the present.... [I]t is difficult to avoid the trial judge's conclusion … that "the salutary effects upon which the defendants rely are tenuous in the face of the denial of the democratic right to vote, and are insufficient to meet the civil standard of proof."[186]

In weighing the alleged benefits of the heredity oath against the harmful effects of limiting free political speech, there are no benefits. People in Canada have to avoid treason and otherwise observe the laws of Canada regardless of the content of the citizenship ceremony. Forcing an expression that is contrary to the expresser's view devalues Canadian citizenship instead of enhancing it. Forcing an expression of allegiance that is not required from the much larger number of natural-born Canadians does not make Canada noticeably better. It does not advance a pressing or substantial objective, and does not prove commitment to Canada's political structure. When a newcomer is willing to express that they will observe the laws of Canada, which includes a prohibition on treason, withholding citizenship until the newcomer also swears allegiance to British birthright does not protect public safety, order, health or morals, or the fundamental rights and freedoms of others. Letting newcomers express their conscience, thought, opinion or belief through silence does not injure their neighbours or the parallel rights of their neighbours to hold and manifest their own view of hereditary rule.[187] If it did any of these things, forced heredity oaths would not have been made optional in Ontario across the political spectrum for more than 20 years.

---

[184] *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at para 68.

[185] *Thomson Newspapers*, above note 168 at paras 125, 129-130.

[186] *Sauvé*, above note 136 at paras 58-61. Dissenting earlier in *R v Keegstra*, [1990] 3 SCR 697 at 812, she cited *Barnette*, above note 2, as analogous and noted the U.S. view that free speech is "the cornerstone of all other democratic freedoms". At 851-865, she wrote that the *Keegstra* limit on free speech was not rationally connected to its objective, did not minimally impair, and had harmful effects that outweighed the alleged benefits because "the claims of gains to be achieved at the cost of the infringement of free speech ... are tenuous."

[187] Accord *Barnette*, ibid at 630, 641: "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual.... [T]he refusal of these persons to participate in the [pledge of allegiance] ceremony does not interfere with or deny rights of others to do so.... [W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."

There is no interest more fundamental to full membership in Canadian society than Canadian citizenship. In addition to the harmful effects Justice Morgan noted,[188] non-citizens face taxation without a vote on the representatives who impose those taxes. The ability to denounce British heredity later as a citizen is cold comfort to those who wish to do so in the present, during an irreplaceable moment in their Canadian citizenship.

VI. Remedy: The heredity oath must be declared optional, effective immediately

The forced heredity oath is an unreasonable limit on free speech that cannot be demonstrably justified in a free and democratic society. The Ontario Court of Appeal must therefore declare it to be of no force or effect to the extent of the inconsistency.[189] Limiting the declaration to the extent of the inconsistency is important. The freedom of democrats to express the view that British heredity is morally wrong must exist alongside the parallel freedom of monarchists to express the view that it is morally right. Declaring the heredity oath invalid in all situations would go beyond the inconsistency. Accordingly, the heredity oath must only be declared of no force or effect for people who does not wish to express it.

In their appeal factum, the lawyers for the aspiring citizens have said that the declaration of invalidity can be suspended for a year to give Parliament time to fix the deficiency. They are wrong. No such delay is appropriate. In 2009, in *Greater Vancouver*, the Court declared the unjustifiable limit on free political speech invalid immediately. As Justice Fish explained:

> Little change is needed to remove the infringing restrictions…. [A] claim under the Charter can hardly be defeated on the ground that the infringing law or policy would have to be modified in order to end the infringement.... The three other "active steps" invoked ... require no meaningful expenditure of funds.... They require no new operating initiatives of significance. And they involve no administrative reorganization, restructuring or expansion that can reasonably be characterized as "burdensome".[190]

For the same reason, the heredity oath declaration must take effect immediately. The ceremonies for new Ontario police officers and lawyers show the Harper government how to respect the Charter with no meaningful cost or burden. None existed when Ontario education law let Jehovah's Witnesses who did not want to express allegiance to the monarch stand silently while others provided the forced expressions. Any pending citizen who is willing to swear or affirm that they will observe the laws of Canada and fulfill the duties of a Canadian citizen must be allowed to have their citizenship take effect on that basis immediately.

---

[188] *McAteer*, above note 4 at paras 12 and 26.

[189] *Constitution Act, 1982*, above note 5, s 52.

[190] *Greater Vancouver*, above note 154 at paras 116-117. *Greater Vancouver* was closer to the *McAteer* facts than the Supreme Court's subsequent rulings in the non-expression cases of (i) *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 at paras 40-41, where the Court declared an entire act invalid and for that reason suspended the declaration for a year to let the legislature draft an entire new act; and (ii) *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 164-169, where the court declared several complex, detailed and intertwined provisions invalid but suspended the declaration for a year to avoid creating a regulatory vacuum. In contrast, the present case requires only half of one sentence within the schedule to the *Citizenship Act* to be declared invalid, with the rest of the act left untouched.

VII. Conclusion

As Justice Morgan noted, the heredity oath is a tradition that dates back to 1869. During the Progressive Conservative government of Brian Mulroney, Baltej Singh Dillon had the courage to challenge the requirement that would have forced him, as a new member of the Royal Canadian Mounted Police, to remove his Sikh turban and put on the traditional tan Stetson hat that had been part of the Mounties' uniform since 1873.

A reporter with the Canadian Broadcasting Corporation interviewed a number of Canadians for their views on the hat dispute, including a number of people who were clinging fervently to yesterday's Canada. As one middle-aged white woman said, "What [Sikhs] have to do is *adapt* to our customs. We don't have much left of our tradition. Adapt to *us*." [191] Another simply said, dismissively, "You want to join the RCMP, you wear their hat."[192]

But there were also tolerant people who believed in the Charter and knew that diversity is our strength. A younger woman said: "If someone wants to wear something that's important to them, to their nationality or their beliefs, and it doesn't interfere with what they're doing, then let them."[193] An elderly man was asked: "How do you feel about the traditional image of the Mounties, you know, with the hats and that sort of thing?" He diplomatically replied: "It's a nice thing for the history books."[194]

The Progressive Conservatives concluded that Constable Dillon's Charter freedom was more important than a tradition or symbol. They supported the aspiring Mountie's freedom to express himself through a tan-coloured turban. In announcing the decision, Solicitor General Pierre Cadieux called it "not only correct in law, but … the right decision to make."[195] A group of rabid traditionalists tried to block it in court. The court upheld Constable Dillon's freedom, and reminded the traditionalists that respecting a person's constitutional freedom does not force others to share that person's beliefs.[196]

The Superior Court of Justice denied the *McAteer* applicants justice. Justice must now be granted on appeal. The appeal is not a contest between two parts of our constitution; the appellants are not asking to have any part of the *Constitution Act, 1867* [197] declared invalid. The contest here is between the entrenched Charter and an ordinary piece of legislation, the *Citizenship Act*. The heredity oath set out in that ordinary act must be declared optional, effective immediately.

---

[191] Canadian Broadcasting Corporation, *Canada: A People's History - Episode 17: In an Uncertain World* (2001) at 51:45-51:53, online: www.youtube.com [her emphasis].

[192] Ibid at 51:54-51:56. Equally dismissive comments have been made about the *McAteer* appellants.

[193] Ibid at 52:11-52:20.

[194] Ibid at 52:24-52:31.

[195] *House of Commons Debates*, 34th Parl, 2d Sess, vol 7 (15 March 1990) at 9307.

[196] *Grant v Canada (Attorney General)*, [1995] 1 FC 158 at 201 (TD).

[197] 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

True Allegiance: The Citizenship Oath and the *Charter*

Léonid Sirota[*]

ABSTRACT:

Would-be Canadian citizens are required to swear an oath, which includes a promise of "true allegiance" to the Queen. For some, swearing allegiance to a what they regard as a person embodying inequality, colonialism, and oppression goes against their deeply-held republican or egalitarian values. However, Canadian courts have so far rejected Charter challenges to the citizenship oath.

This article argues that the oath is, nevertheless, unconstitutional, albeit on a basis different from that mostly canvassed by the courts which have considered it. Rather than an infringement of freedom of expression, the citizenship oath should be analyzed as a violation of the freedom of conscience of those required to take it. Like most oaths, it is an attempt not only to impress the importance of the obligation it imposes on those who take it, but also to enlist their sense of right and wrong — that is to say, their conscience — in the service of the state's objectives.

Because the citizenship oath is a violation of freedom of conscience, it is irrelevant that those who object to it may be misunderstanding its true significance, or the real nature of "the Queen" in Canadian law. As in freedom of religion cases, courts must recognize their subjective conception of their conscientious obligations, and the extent to which taking the oath conflicts with them. With this in mind, it becomes apparent that the reasons advanced to justify the oath under s. 1 of the Charter cannot do so.

Introduction

Before their certificate of citizenship becomes effective, would-be new Canadians are required to swear an oath of allegiance.[1] Would-be citizens of many other countries face the same obligation.[2] The Canadian oath, however, is peculiar in that it requires those who swear it to pledge that they "will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors."[3] What does it mean, in the twenty-first century, to be "faithful and bear true allegiance" to the Queen?

---

[*] B.C.L./LL.B. (Hons.)(McGill), LL.M., J.S.D. Candidate (NYU). I am grateful to Paul Daly, Benjamin Oliphant, Michael Plaxton, and Max Reed for very helpful comments on earlier drafts, and to Fabien Gélinas for spurring and encouraging my interest in the issue of freedom of conscience. All the sins of commission or omission in this paper must, of course, fall on me alone.

[1] *Citizenship Act*, RSC 1985 c C-29, subs 12(3); the requirement to take the oath is set out in par. 3(1)(c), *ibid*. The prescribed statement can be made as an affirmation rather than an oath, but I will only refer to it as "an oath" for convenience.

[2] See Liav Orgad, "Liberalism, Allegiance, and Obedience: The Inappropriateness of Loyalty Oaths in a Liberal Democracy", (2014) 27:1 Can JL & Jurisprudence 99 at (3-6).

[3] *Citizenship Act*, *supra* note 1, Schedule; the oath also requires one to "faithfully observe the laws of Canada and fulfil [one's] duties as a Canadian citizen."

For some, the reference to the Queen is only a symbol. The Queen represents the Canadian state or its constitution, and the oath is an expression of commitment to our constitutional values: freedom, equality, the Rule of Law. Others are merely perplexed. Steven Muerrens, an immigration lawyer, writes that "most" of his clients who must take this oath "find the requirement simply bemusing."[4] For others still, the oath seems a personal commitment to the monarch and to the monarchy; they may feel that, having taken it, they will assume a conscientious duty to not to oppose the monarchy.

Indeed, this disagreement about what it means to be loyal to "the Queen" is a long-running one. If the authority of a novelist can be accepted in these matters, it was already present in the early 19th century. In *Hornblower and the* Atropos, C.S. Forester describes Captain Hornblower's meditation upon having been presented to the King—and the difference between his own feelings and those of his wife:

> Hornblower himself fought for his country; it might be better said that he fought for the ideals of liberty and decency against the unprincipled tyrant who ruled across the Channel; the hackneyed phrase "for King and Country" hardly expressed his feelings at all. If he was ready to lay down his life for his King that really had no reference to the kindly pop-eyed old gentleman with whom he had been speaking this morning; it meant that he was ready to die for the system of liberty and order that the old gentleman represented. But to Maria the King was representative of something other than liberty and order; he had received the blessing of the Church; he was somebody to be spoken about with awe.[5]

To be sure, it may be that this is not an accurate description of the feelings of the era of Napoleonic wars. Perhaps Forester projects the ideas of his own age on that which he describes. But even if that is so, the rift between those who see the monarch as a symbol of a "system of liberty and order," and those who consider him or her only as a person is an old one.

What is different now, or at least more visible, is the fact that some of those who, like the fictional Maria Hornblower, consider the monarch first and foremost as an individual, and thus the reference to her in the citizenship oath as a pledge of personal loyalty, regard that monarch with nothing like Mrs. Hornblower's reverence. On the contrary, to them, the Queen symbolizes privilege, inequality, colonialism, or worse. Republicans, some egalitarians, and members of certain religious groups are neither amused nor even bemused by the prospect of pledging allegiance to a person representing these things. For them, the citizenship oath is a real concern and burden.

Over the last two decades, the requirement to take an oath of allegiance to the Queen has twice been challenged as unconstitutional. The first challenge was dismissed by the then-Appellate

[4] Steven Meurrens, Ontario Superior Court upholds Constitutionality of Citizenship Oath Requirement, Meurrens on Immigration, September 29, 2013, online: <http://www.stevenmeurrens.com/2013/09/ontario-superior-court-upholds-constitutionality-of-citizenship-oath-requirement/>. "Bemused" is probably an apt description of my own state of mind when I took the oath a dozen years ago.

[5] CS Forester, *Hornblower and the* Atropos, (London: Michael Joseph, 1953) at 87-88.

Division of the Federal Court (now the Federal Court of Appeal) in 1994.[6] A second challenge was recently rejected by the Superior Court of Ontario.[7] In the latter case, the court held that although the oath requirement infringed the applicants' freedom of expression protected by the *Canadian Charter of Rights and Freedoms*,[8] the infringement was justified under section 1 of the *Charter*. According to Justice Morgan, the applicants misinterpreted the oath they are refusing to take; understood correctly, it is not much of a burden on their republican and egalitarian views, and that slight burden is outweighed by the oath's benefits. The Court also found that the oath requirement did not infringe either the applicants' freedom of religion or their equality rights.

I will argue that this decision is mistaken. The requirement that would-be citizens swear allegiance to the Queen is an infringement of their freedom of conscience. The fact that the those who, like the applicants in *McAteer*, think that taking the oath prevents them from holding or acting on republican views misunderstand the oath's significance and the nature and role of the Crown in Canadian law is immaterial. Because the oath is an attempt to bind the conscience of those who take it, their subjective views as to the obligations that it imposes are determinative. The oath of allegiance to the Queen is unjustified in a free and democratic society such as Canada, and ought to be struck down.

This essay will proceed as follows. In Part I, I will review the two judicial decisions to have considered the constitutionality of the oath so far, *Roach* and *McAteer*. In Part II, I will inquire into a question which received little consideration in these cases—that of the nature an oath—and argue that once we understand the oath's nature, it becomes apparent that what is really wrong with the oath of allegiance is its infringement of the freedom of conscience of those who take it, rather than an infringement of freedom of expression. In Part III, I will examine the possibility of justifying the oath under s. 1 of the *Charter*, and argue that no such justification can succeed. A brief conclusion will follow.

I. Challenges to the Citizenship Oath

A. Roach

The first *Charter* challenge against the reference to the Queen in the citizenship oath was brought by Charles Roach, a lawyer and long-time republican. He argued that being required to take an oath of allegiance to the Queen breached his fundamental freedoms of conscience and religion, expression, assembly, and association, as well his right not to be subject to cruel and unusual treatment, and his equality rights, and the various provisions of the *Charter* protecting these rights and freedoms.

The case came to the Federal Court, Appeal Division, as an appeal from a decision granting the government's motion to strike on the basis that it was plain and obvious that the challenge had no chance of success. The Court was unanimous that this was indeed the case with respect to alleged infringements of freedoms of conscience and religion and of assembly, and the protection

[6] *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, 113 DLR (4th) 67 [*Roach*, cited to FC].
[7] *McAteer v. Canada (Attorney General)*, 2013 ONSC 5895.
[8] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 2(b).

against cruel and unusual treatment. On other issues, the majority (Justices MacGuigan and McDonald), was in favour of granting the motion to strike. Justice Linden dissented.

The dissent is rather more elaborate than the brief majority judgment, so it is worth starting with it. Justice Linden's observed that

> [a]n oath or affirmation … is not a matter to be taken lightly; when, for reasons of conscience, a person feels he or she cannot swear a certain oath or make a certain affirmation, one must carefully consider that position, for it shows that that person takes the oath seriously, something we wish to support.[9]

Justice Linden would have held that it is not "plain and obvious" that the oath of allegiance to the Queen does not prevent its taker from holding, expressing, and acting on anti-monarchist beliefs, even though such an interpretation "make[s] sense."[10] There was, in his view, at least a chance that a claim based s. 2(*b*) of the *Charter*, would succeed. Similarly, Justice Linden thought that there was at least a chance that Mr. Roach would prevail on his freedom of association claim, on the basis that taking the oath would prevent him from associating with fellow republicans. Finally, Justice Linden would also have let stand the claim that the oath breached the *Charter*'s equality guarantee,[11] because it is only required of would-be naturalized citizens, and not of people born in Canada.

The majority, however, concluded that none of Mr. Roach's claims had any chance of success. It held that

> the oath of allegiance has to be understood to be binding in the same way as the rest of the Constitution of Canada not forever, nor in some inherent way, but only so long as the Constitution is unamended in that respect [and that] [i]t is a matter of common sense and common consent that it is neither unconstitutional, nor illegal, nor inappropriate to advocate the amendment of the Constitution.[12]

For the majority, the oath only binds the person who takes it to respect the constitution as it stands at the time the oath is taken, while leaving him or her entirely free to advocate change, at least so long as the change would be done in accordance with the constitution itself. Thus the "fundamental freedoms" claims had no chance of success. The majority also rejected the equality claim. In its view, since the oath does not curtail one's freedom to work for constitutional change, "what our country may come to be … is for millions of Canadian citizens to work out over time, a process in which the appellant can himself share, if he only allows himself to do so."[13] Mr. Roach's misunderstanding the oath did not make it unconstitutional; he had only himself to blame.

The disagreement between majority and dissent, then, is largely about the import of the oath. What does it mean to "be faithful and bear true allegiance to Her Majesty Queen Elizabeth the

[9] *Roach*, *supra* note 6, at 425.
[10] *Ibid* at 430.
[11] *Charter*, *supra* note 8, s. 15.
[12] *Roach*, *supra* note 6, at 413.
[13] *Ibid* at 416.

Second"? And, importantly, does it matter that the person who refuses to take the oath takes a different view of what it entails than Parliament or the judiciary? The same questions would again be at the forefront in *McAteer*, almost two decades later.

B. McAteer

The applicants in *McAteer* argued that the oath requirement infringed their freedom of conscience and religion, their freedom of speech, and their equality rights. Justice Morgan, of Ontario's Superior Court of Justice, accepted the freedom of speech claim, but held that the infringement was justified under s. 1 of the *Charter*. He rejected the claims based on freedom of conscience and religion and on equality.

Justice Morgan accepted that the citizenship oath requirement imposes a real burden on those who meet all the other statutory criteria for citizenship, but refuse to take the oath and are thus prevented from becoming citizens. The government's claim that this is not a real burden at all, since such people can live in Canada indefinitely as permanent residents, seemed to him "surprising."[14] Justice Morgan also accepted that applicants' opposition to the oath, in its current form, was sincere, and that they would have to make a statement with which they deeply disagreed in order to become citizens.

Furthermore, Justice Morgan held that it did not matter that there is no "right" to citizenship, or that obtaining citizenship is not something people would be free to do but for the government's interfering with their freedom. The applicants were not claiming an entitlement to citizenship, but only asking for the removal of an obstacle to their getting something for which they would otherwise be qualified. The government, he held, cannot make Canadian citizenship "a prize" for giving up a *Charter* right.[15]

In Justice Morgan's view, the right compromised by the citizenship oath is freedom of expression, which includes not only being able to say what one pleases, but the ability to refrain from saying something one doesn't want to say. By forcing the applicants to say something they would rather not say in order to obtain citizenship, Parliament has infringed their freedom of expression guaranteed by s. 2(*b*) of the *Charter*.

Justice Morgan set the stage for his s. 1 justification analysis by asserting that, although the burden of proof at this stage is on the government, it is not proof "in the usual courtroom sense of the word."[16] Moreover, as the case was not one of criminal law, and no one's freedom from incarceration was at stake, the government's measure "need not, and probably could not, be 'tuned with great precision to withstand judicial scrutiny.'"[17]

Applying the first stage of the s. 1 justification test, Justice Morgan accepted the government's submission that the objective of the oath of allegiance, including the reference to the Queen, is to express a symbolic commitment to Canada and its constitution. As for the applicants' claim that the reference to the Queen did nothing to achieve that objective, Justice Morgan pointed out that

[14] *McAteer*, *supra* note 7, at par. 26.
[15] *Ibid*.
[16] *Ibid*, at par 35.
[17] *Ibid*, at par 36, quoting *R v Edwards Books and Art Ltd*., [1986] 2 SCR 713 at 776.

it was an argument about whether the oath was rationally connected to this objective, not the objective itself.

At the second stage of the justification test, the existence of a rational connection between making a commitment to the constitution, and pledging allegiance to the Queen, the applicants argued that there was none, because the Queen is an alien, inegalitarian, and undemocratic figure. However, Justice Morgan pointed out that although the applicants might want this to change, the fact remains that the monarchy is a part of the constitution. Therefore, "it is certainly rational for Parliament to have embraced an oath that references in a direct way Canada's official head of state,"[18] just as it would have been rational for Parliament to chosen to referenced any other distinctive element of the constitution—bilingualism, bijuridicalism, federalism, etc.

The next stage in the analysis is whether the oath of allegiance is a "minimal impairment" of the applicants' freedom of expression. The applicants claimed the Queen represents inequality and colonialism, and is at odds with the ideals of modern Canadian society. Furthermore, other democratic states, including Australia, of which the Queen is also the head, make do without oaths to their heads of state. But the applicants, Justice Morgan says, misunderstand the meaning of the reference to the Queen and the significance of the oath. The oath of allegiance is neither an expression of loyalty to Elizabeth II as a person nor even an unbreakable commitment to the monarchy as an institution. The Queen to which the oath refers is only a symbolic representation of the constitution itself, not the physical person living in Buckingham palace. She represents the Rule of Law, not arbitrariness; equality, not privilege; Canada, not the United Kingdom. The applicants argued they simply took the "plain meaning" of the citizenship oath seriously, but Justice Morgan finds that their "problem is not so much that they take the oath seriously. Rather, their problem is that they take it literally,"[19] in a manner "that is the exact opposite of what the sovereign has come to mean in Canadian law."[20] It is because of this that the applicants perceived the oath as a serious infringement of their freedom of expression. Understood correctly, the oath is minimally impairing of this right.

Similar considerations applied at the last stage of the s. 1 analysis, a comparison between the salutary and the deleterious effects of the oath of allegiance. The applicants contended that its deleterious effects were great, because taking the oath prevented them, in conscience, from continuing their anti-monarchist activities. But that too, according Justice Morgan, is a misunderstanding. Justice Morgan pointed out that political dissent and opposition were always part of the Canadian tradition. Those taking the oath of allegiance can oppose the monarchy, provided only that theirs remain a "loyal opposition." In Justice Morgan's view, the applicants' beliefs, however sincere, are misguided, so that the harm to their freedom of expression is outweighed by the benefits of requiring new citizens to affirm "fidelity to a head of state symbolizing the rule of law, equality, and freedom of dissent."[21]

Finally, Justice Morgan held that the citizenship oath infringes neither the applicants' freedom of religion nor their equality rights. Because the Queen symbolizes equality and the Rule of Law,

[18] *McAteer*, *ibid*, at par 46.
[19] *Ibid* at par 59.
[20] *Ibid* at par 67.
[21] *Ibid* at par 80.

the oath of allegiance is "rights-enhancing."[22] The freedom of religion claim, in his view, "runs up against the settled notion that the rights of some cannot be a platform from which to strike down the rights of others."[23] The oath itself is secular, and accommodating religious beliefs in the context of a secular ceremony would be tantamount to state sponsorship of religion, which is itself contrary to the *Charter* guarantee of religious freedom. As for equality, to the extent that it is religious or racial equality that is at issue, there is no evidence of any disparate effect that the current oath might have on minorities. And insofar as the allegation is one of discrimination on the basis of citizenship status, it cannot succeed because it is the very definition of citizenship status that is at issue.

II. The Oath and Freedom of Conscience

The first question one must address in considering the constitutionality of the citizenship oath is that of the right which it might be said to infringe. As we have seen, Justice Morgan in *McAteer* focused on freedom of expression. This is understandable since, at first glance, what the requirement to take the oath does is to force would-be citizens to make a statement, conveying a meaning which they do not wish to convey. However, in my view, treating the oath as merely a statement, a declaration, does not capture what is really distinctive about it.

The citizenship oath is not merely a statement of fact. It is not, for example, reducible to an acknowledgment of the uncontestable facts that Elizabeth II is the Queen of Canada or that the Canadian constitution is a monarchical rather than a republican one. Rather, whatever its precise meaning,[24] it is a commitment, a promise, and as such it reaches much deeper into the conscience of the individual making it than a mere statement of fact does.

Before considering the significance of the oath's nature as a promise or expression of commitment, it is useful to note that even the Supreme Court's jurisprudence treats compelled expressions of *opinion*—which are not bound up with individual conscience to quite the same degree as oaths—somewhat differently from compelled statements of fact. This distinction explains the difference of the outcomes between two otherwise very similar cases involving orders by labour arbitrators that employers sign and present as their own letters in reality prepared by the arbitrator. Writing for the majority of the Court in *Slaight Communications Inc. v. Davidson*,[25] Chief Justice Dickson distinguished that case, in which the letter at issue "was tightly and carefully designed to reflect only a very narrow range of facts which … were not really contested,"[26] from *National Bank of Canada v. Retail Clerks' International Union*,[27] where the letter ordered by the arbitrator express approval of the *Canada Labour Code* and its objectives. Compelling a person to state a mere fact, the Chief Justice found, is "a much less serious infringement"[28] of freedom of expression than forcing him or her to express an opinion.

It is worthwhile also to consider Justice Beetz's dissenting opinion in *Slaight*. Justice Beetz (who had authored the concurring opinion in *National Bank* from which Chief Justice Dickson was

[22] *Ibid* at par 90.
[23] *Ibid* at par 90.
[24] I will return to this question in Part III.
[25] [1989] 1 SCR 1038, 59 DLR (4th) 416 [*Slaight*, cited to SCR].
[26] *Ibid* at 1055 (underlining in the original).
[27] [1984] 1 SCR 269, 9 DLR (4th) 10 [*National Bank*, cited to SCR].
[28] *Slaight*, *supra* note 25, at 1057.

distinguishing *Slaight*), argued that the two cases were indistinguishable. Even though the arbitrator in *Slaight* had only ordered the employer to state facts, rather than obvious opinions, these were facts which "rightly or wrongly, [the employer] may not believe, or which he may ultimately find or think to be inaccurate, misleading or false. In other words, the … order may force the former employer to tell a lie."[29] Whatever the facts found by the arbitrator, it will not do to say that the employer is being told merely to state "the truth," because in his subjective view, the truth is something else altogether: "the former employer cannot be forced to acknowledge and state [the facts] as the truth apart from his belief in their veracity. If he states these facts in the letter, as ordered, but does not believe them to be true, he does not tell the truth, he tells a lie."[30] In other words, stating facts entails also expressing, albeit implicitly, an opinion as to their truth.[31] Being forced to do so against one's will is, according to Justice Beetz, as much a violation of freedom of expression as the forced expression of an opinion in *National Bank*; indeed, "[i]t does not differ, essentially, from the command given to Galileo by the Inquisition to abjure the cosmology of Copernicus."[32]

Justice Beetz's dissent suggests—although he himself does not raise or entertain the suggestion—that freedom of conscience, as well as freedom of expression, is at stake in a case such as *Slaight*. The analogy to Galileo's persecution by the Inquisition is telling in this regard, for the Holy Office specifically concerned itself with matters of conscience. The freedom of conscience, Lord Acton tells us, is precisely that which made an individual's subjective belief supreme over that of authority, first ecclesiastical and then that of the state: "[w]ith the decline of coercion the claim of conscience rose, and the ground abandoned by the inquisitor was gained by the individual. … The knowledge of good and evil was not an exclusive and sublime prerogative assigned to states, or nations, or majorities."[33] To tolerate the state's dictating or overriding a person's own beliefs is to go back on that all-important development.

It may be objected that this logic simply conflates the freedom of expression and the freedom of conscience, contrary both to the text of the *Charter* and to our legal and philosophical tradition which always considered them as distinct liberties. In my view, this is not so, because not all restrictions of freedom of expression actually reach the person's conscience and belief. Prohibitions on the disclosure of facts, as Justice Beetz suggested in *Slaight*,[34] or restrictions on the amount of expression one may engage in, or even compelled statements of opinion that are clearly identified as being required by the state rather than being those of the person required to make them, arguably do not.

Be that as it may, it is not necessary for me to consider the precise relationship between freedom of expression and freedom of conscience in cases involving the compelled expression of an opinion any further. Cases involving the making of an oath are rather easier in this regard. An oath or an affirmation involves individual conscience in ways statements of facts, or even of opinion, do not. I

[29] *Ibid* at 1060.
[30] *Ibid* at 1061.
[31] See Myron Gochnauer, Swearing, Telling the Truth, and Moral Obligation", (1983) 9:1 Queen's LJ 199 at 202 (asserting that "[t]he duty to tell the truth is a precondition of the propositional or descriptive use of language in ordinary human society").
[32] *Slaight*, *supra* note 25, at 1061.
[33] John Neville Figgis and Reginald Vere Laurence, eds, John Emerich Edward, Baron Acton, *Lectures on Modern History* (London, New York: MacMillan, 1906) at 31.
[34] *Slaight*, *supra* note 25, at 1061.

will presently turn to the question of what swearing an oath or making an affirmation means, which, I will then argue, is crucial to assessing the constitutionality of the oath of allegiance, and which the courts that decided *Roach* and *McAteer* failed to consider. Before doing so, however, I will briefly discuss the concept of freedom of conscience, which remains one of the least theorized and least applied of the rights protected by the *Charter*.

Historically, the freedom conscience meant the freedom of *religious* conscience. As Noah Feldman observes, "[t]he idea of conscience has roots in early Christian thought,"[35] and a possible germ of the idea of liberty of conscience is to be found in the philosophy of Aquinas, for whom conscience was a judgment, informed by a person's innate understanding of natural law, as to the right thing to do, so that acting against one's conscience was sinful.[36] In 17th-century England, freedom of conscience was invoked as an argument for religious toleration,[37] a connection most elaborated in John Locke's *A Letter Concerning Toleration*.[38]

Since then, religious liberty has occupied an important place in constitutional discourse, while the idea of freedom of conscience remained in its shadow. The two rights remain closely associated. Both the *Charter* and other rights-protecting instruments tend to mention them together[39]—if, that is, they mention conscience at all.[40] In *R. v. Big M Drug Mart Ltd.*,[41] Chief Justice Dickson spoke of a "the single integrated concept of 'freedom of conscience and religion.'"[42] Instances of the application of the right of freedom of conscience, separate from freedom of religion, remain few.

Probably the best known such instance in Canadian law is to be found in Justice Wilson's concurring opinion in *R. v. Morgentaler*.[43] Although she did not approach the impediments to access to abortion at issue in that case purely as a freedom of conscience issue, Justice Wilson took the view that they were an infringement of women's rights to liberty to the security of the person which *also* infringed their right to freedom of conscience, and were, for this reason, not in accordance with principles of fundamental justice. According to Justice Wilson, "the decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of conscience."[44] The link between conscience and morality—individual conscience and individual morality—means that conscience is central not only to our heritage of respect for individual rights, but also to our democratic tradition, which depends on "[t]he ability of each citizen to make free and informed decisions."[45] And freedom of conscience, although historically linked to religion, also protects

[35] Noah Feldman, "The Intellectual Origins of the Establishment Clause", (2002) 77:2 NYU LR 346 at 355.
[36] *Ibid*, at 356-57.
[37] *Ibid*, at 363-64.
[38] See *ibid*, at 368-72.
[39] *Charter*, supra note 8, para 2(a) (guaranteeing the "freedom of conscience and religion"); see also *eg Universal Declaration of Human Rights*, art 18 ("freedom of thought, conscience and religion"); *International Covenant on Civil and Political Rights*, art 18 (idem); Basic Law of the Federal Republic of Germany, art 4 ("freedom of faith and conscience"); Constitution of the Republic of South Africa, art 15 ("freedom of conscience, religion, thought, belief and opinion").
[40] The First Amendment of the United States Constitution does not, speaking only of "establish[ment of] religion" and of "the free exercise thereof."
[41] [1985] 1 S.C.R. 295, 60 AR 161 [Big M, cited to SCR].
[42] *Ibid*, at 345.
[43] [1988] 1 SCR 30, 63 OR (2d) 281 [Morgentaler, cited to SCR].
[44] *Ibid*, at 175-76.
[45] *Ibid*, at 177.

"conscientious beliefs which are not religiously motivated,"[46] for reasons both philosophical and textual.

This is consistent with what Feldman describes as "the modem understanding of liberty of conscience," which "seems to be that every person is entitled not to be coerced into performing actions or subscribing to beliefs that violate his most deeply held principles."[47] Morality, judgment about right and wrong generally, rather than about the beliefs and acts required for or conducive to salvation, is what freedom of conscience protects.

However, the historical, conceptual, and textual connection between the freedoms of religion and of conscience has at least one important implication. In the religious context, the Supreme Court has endorsed this principle of the supremacy of individual's understanding of his conscientious obligations over that of the authorities. Writing for the majority in *Syndicat Northcrest v. Amselem*,[48] Justice Iacobucci concluded "that freedom of religion consists of the freedom to undertake practices and harbour beliefs … in which an individual demonstrates he or she sincerely believes or is sincerely undertaking … irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials."[49] Established practice can serve as an indication of the sincerity of personal belief, but nothing more.[50] It stands to reason that courts ought to take the same subjective approach to matters of (non-religious) conscience as they take to matters of religious belief. If anything, conscience is an even more personal matter than religion, which is, to some extent at least, necessarily "a social enterprise,"[51] although—as *Amselem* rightly recognizes—the beliefs of the participants in this enterprise will not always exactly coincide. What one believes one's duty to be, as a matter of conscience, is a strictly personal matter.

This approach, needless to say, opens the door to subjectivity. A person might have all manner of conscientious beliefs, and it may seem worrisome that beliefs grounded in idiosyncratic or demonstrably incorrect interpretations of reality are entitled to constitutional protection. Yet that is what the Supreme Court's jurisprudence requires, and for good reason. Just as the liberal "State is in no position to be, nor should it become, the arbiter of religious dogma,"[52] it cannot be, nor should it become, the arbiter of ethical precepts.

Of course, the state imposes on its citizens rules grounded in certain ethical conceptions. A welfare state obviously does not share the ethics of a libertarian anarchist. Yet the existence of such laws does not tell those who hold beliefs which would not support them that they are wrong; only that the majority of their fellow citizens disagrees with them, for the time being. A law that one disagrees with, albeit for ethical reasons, is not a violation of one's freedom of conscience unless it actually requires one to do, or prohibits one from doing, something that one's conscientious beliefs respectively prohibit or command. Libertarian anarchists may believe

[46] *Ibid*, at 178.
[47] Feldman, *supra* note 35, at 424.
[48] 2004 SCC 47, [2004] 2 SCR 551.
[49] *Ibid*, at para 46.
[50] *Ibid*, at para 54.
[51] Timothy Mackelm, "Faith as a Secular Value", (2000) 45 McGill LJ 1 at 25; see also *R (Hodkin) v Registrar of Births, Deaths and Marriages*, [2013] UKSC 77 at para 57 ("describe[ing] religion … as a spiritual or non-secular belief system, *held by a group of adherents* …" (emphasis mine)).
[52] *Amselem*, *supra* note 49, at para 50.

that taxation is illegitimate, but their freedom of conscience is not infringed unless they believe not only that the state acts illegitimately in taxing them, but also that they have a personal duty not to pay taxes. And even people holding such a belief can be found, the state can justify its laws under the familiar framework of section 1 of the *Charter*. Giving effect to freedom of conscience claims in the rare appropriate cases is thus unlikely to open the proverbial floodgates of constitutional litigation, and still less to compromise the integrity of the legal system.[53]

However, it does not follow from the fact that much legislation will have (some) ethical underpinning, and will be valid and generally applicable notwithstanding the disagreement of those who contest this ethical underpinning, that the state is entitled categorically to dismiss contrary ethical beliefs as wrong, and therefore outside the scope of the constitutional guarantee of freedom of conscience. Indeed, if subjective, personal beliefs were outside the scope of this guarantee, it would hardly deserve a place in the *Charter* or in any rights-protecting document, because, unlike religious beliefs, conscientious ones are seldom those of groups and authorities.

To come back to the issue of the citizenship oath, it is important to observe that an oath—any oath—is "a method of binding"[54] or "getting a hold on [the] conscience"[55] of the person who takes it. Much like the idea of conscience itself, the concept of an oath in modern law has been cut off from its religious roots. Canadian law no longer associates the concept of the oath with the "belief in divine retribution" for oath-breakers which originally underpinned it.[56] Yet it still regards an oath as having a special importance. Speaking of the witnesses' oath, the Supreme Court observed that "[w]hile the oath will not motivate all witnesses to tell the truth …, its administration may serve to impress on more honest witnesses the seriousness and significance of their statements."[57] The value of an oath thus resides, in part, in that it is an appeal to the morality of the person who takes, an attempt to impose on him or her a conscientious obligation, one that it would be morally wrong to breach.

However, an oath often also involves the conscience of the person taking in a way that goes beyond merely impressing on him or her the moral duty to do the thing sworn to. The performance of an obligation incurred as a result of swearing an oath tends to require moral judgment. This might not be a conceptual truth—one could imagine, say, swearing an oath to show up on time for work, or to pay one's taxes. And indeed Canadian laws do sometimes require oaths of a fairly specific nature, whether it is a stenographer's oath to "truly and faithfully report the evidence"[58] or a civil servant's oath (among other things) not to "disclose or give to any person any information or document that comes to [his or her] knowledge or possession by reason of [his or her] being a public servant."[59] These examples, however, are exceptions.

---

[53] I have argued elsewhere that it would even enhance the quality of the legal system, because the values underpinning respect for the freedom of conscience and religion are inextricably linked to those that explain our commitment to the Rule of Law: see Léonid Sirota, "Storm and Havoc: Religious Exemptions and The Rule of Law", (2013) 47 RJTUM 247 at 292-95.
[54] *Roach*, *supra* note 6, at 424 (per Linden J, dissenting).
[55] *R. v. Khan*, [1990] 2 SCR 531 at 532; the formulation goes back to R. v. Bannerman (1966) 55 WWR 257 (Man CA) (par Dickson J, as he then was).
[56] *R. v. B. (K.G.)*, [1993] 1 SCR 740 at 788.
[57] *Ibid*, at 789.
[58] *Criminal Code*, RSC 1985 c C-46, subs 540(4).
[59] *Oaths and Affirmations*, O Reg 373/07 subs 3(1).

For the most part, oaths tend to be used in situations where performance requires, or at least may well require, discernment and inquiry into just what one's duty is. Even the oath of a witness in a courtroom, to tell the truth, is in reality an undertaking to tell what the witness, in conscience, believes to be the truth. It is not, and could not be, a promise to tell some objective truth, a truth that exists apart from the witness's belief in it. To return to Justice Beetz's point in *Slaight*, a witness who told as the truth something he or she did not believe in (whether because asked to do so by someone else or even because, in good faith, he or she concluded that others must know better) would not, in fact, be telling the truth. That witness would be telling a lie. Other situations when Canadian law requires a person to swear an oath are even clearer examples of the fact that, for the law, an oath is usually an appeal not just to a sense of duty, but also to moral judgment.

Consider, for instance, the oath that lawyers swear upon entering the profession. The Ontario version of that oath[60] requires lawyers, among other things, to "protect and defend the rights of interests" of their clients; to "conduct all cases faithfully"; not to "refuse causes of complaint reasonably founded, nor [to] promote suits upon frivolous pretences"; to "seek to ensure access to justice"; and to "champion the rule of law and safeguard the rights and freedoms of all persons."[61] These (and the other requirements of the oath) are not straightforward obligations. Discharging them requires lawyers to think about just what their duties are. This is partly an intellectual judgment (what is this rule of law that lawyers must champion?). But, to a considerable degree, the judgment required is a moral one. In some cases, that is because the lawyers' duties are couched in moral terms (like "faithfulness" in the conduct of a case). In other cases, the degree to which one can and ought to fulfill these duties must necessarily be left to individual conscience. (How far must one go to "ensure access to justice": does it require one to limit one's fees? How much *pro bono* work need one do? Can one "ensure access to justice" while being a member of a state-enforced cartel devoted to raising the cost of legal services?) In other cases still, it is because the lawyers' duties can conflict (for instance, when the defence of a client's interests might suggest launching a "suit upon frivolous pretences"), requiring moral judgment about which is to prevail. In short, a lawyer must constantly, or at least frequently, rely on his or her conscience to determine just what it is that his or her oath requires.

The same is arguably true of other situations where the law requires a person—whether a police officer,[62] a civil servant,[63] or a judge[64]—to swear an oath. To a greater or lesser extent, these offices require their holders to weigh priorities and competing duties, to balance loyalty to the law and common sense, to combine obedience and independence. Their execution is a matter of skill, but not an exact science. And it requires moral, as well as intellectual judgment, not only an understanding of the most efficient or effective way of getting at a result, but also a sense of right and wrong. The oath of office, in these cases, is not only a reminder of the importance of the duties it refers to, but also an appeal to the conscience of the oath-taker in the exercise of these duties.

---

[60] Law Society of Upper Canada, By-Law 4, *Licensing*, s 21; available online: <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485805> [*Licensing By-Law*].
[61] *Id*, subs 21(1).
[62] See *eg Police Oath/Solemn Affirmation Regulation*, BC Reg 136/2002, s 1 (to "faithfully, honestly and impartially perform my duties").
[63] *Oaths of Office Regulations*, CRC, c 1242, Schedule (to "truly and faithfully and to the best of my skill and knowledge execute and perform the duties that devolve upon me").
[64] *Courts of Justice Act*, RSO 1990, c C.43 (to "faithfully, impartially and to the best of my skill and knowledge execute the duties").

The citizenship oath—the promise to "be faithful and bear true allegiance" to the Queen—is similar to these other oaths in that it too is requires the person who takes it to exercise moral judgment. The ideas of faithfulness and allegiance both appeal to one's sense of loyalty: the *Oxford English Dictionary* defines "faithful" as "remaining loyal and steadfast," and "allegiance" as "loyalty or commitment to a superior or to a group or cause," while "loyal" (in a somewhat circular fashion) is defined as "giving or showing firm or constant support or allegiance to a person or institution." The oath does not define what it means to be loyal to the Queen, regardless of whether the Queen is understood to refer to a specific person, to the monarchical institution, or to the Canadian constitution. People's notions of loyalty differ. What is perfectly acceptable behaviour to some would be disloyalty to others. People could disagree about whether one is being disloyal to one's country or its constitution by taking out another country's citizenship, or voting in a foreign election, or subscribing to an ideology at odds with one's country's founding principles.[65] The position one takes on these questions depends on one's personal sense of right and wrong, and not (only) on what the law, whether in the form of legislation or of a judicial pronouncement has to say about them. This personal sense of right and wrong is nothing other than conscience.

The law (such as the limited scope of the criminalization of sedition, the permission of dual citizenship, the constitutional guarantee of freedom of speech) can, to be sure, serve as an indication of what the majority thinks of these matters. Yet majority opinion of right and wrong cannot be dispositive, for, as Lord Acton pointed out, the very idea of freedom of conscience as it developed since the Middle Ages is predicated on an understanding that "[t]he knowledge of good and evil [is] not an exclusive and sublime prerogative assigned to states, or nations, or majorities,"[66] but the right of the individual. In the words of another Catholic thinker, "there are extreme cases in which Conscience may come into collision with the word of a Pope, and is to be followed in spite of that word."[67]

For this reason, it will not do to say, as the courts in *Roach* and *McAteer* did, that persons who claim that their freedom of conscience is being infringed are mistaken in their understanding of their obligations. While this argument can work under the Supreme Court's freedom of speech jurisprudence, which, as I explained above, considers that forcing a person to tell the truth is a lesser evil that forcing him or her to state an opinion he or she disagrees with, it is out of place under the Court's approach to the freedom of conscience and religion.

The oath of allegiance is, in short, an attempt to enlist the conscience of those who take it in the pursuit of the state's objectives, and not only to make them say something they do not wish to say. Freedom of conscience ought to be understood as an immunity not only against being coerced into acting contrary to one's moral principles, but also, at a most basic level, against the state's attempts to conscript individual conscience in the service of the state's own purposes. The citizenship oath is a violation of the freedom of conscience of would-be citizens in this basic sense, and not only (or even, in my view, not so much) of their freedom of expression. It is a breach of paragraph 2(*a*) of the *Charter*, which must be justified under its section 1 in order to be constitutional.

---

[65] These examples are not chosen at random; they were all grounds for denaturalization or even denationalization in the United States in the 20th century: see Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* (Philadelphia: University of Pennsylvania Press, 2013).
[66] John Emerich Edward Acton, *Lectures on Modern History* (London: MacMillan, 1906) at 31.
[67] *Dr. John Henry Newman's Reply to Mr. Gladstone's Pamphlet*, (Toronto: AS Irving, 1875) at 37.

Before turning to the question of justification, however, it is worth briefly to address an argument Justice Morgan makes in rejecting the (freedom of religion) paragraph 2(*a*) claim in *McAteer*. In Justice Morgan's view,

> [t]o 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. … [T]he position that the mere recitation of the oath is an infringement of [a] subjectively held religious belief … runs up against the settled notion that the rights of some cannot be a platform from which to strike down the rights of others.[68]

Now my argument is not that "the mere recitation of the oath is an infringement of a subjectively held belief," but that the oath impermissibly enlists individual conscience in the service of the state. However, it would be no less vulnerable to Justice Morgan's objection—if there were any force to it. Indeed, although Justice Morgan seems oblivious to this, the claim that the oath infringes the freedom of expression of those required to take it is vulnerable to the same objection. Yet the objection is unfounded. The oath to a rights-enhancing institution (assuming that the monarchy is one) does not actually protect anyone's rights. No one's rights are harmed because the vast majority of Canadians, who acquire their citizenship at birth, never swear the citizenship oath. No one's rights are harmed when a permanent resident forgoes the acquisition of citizenship, whether because of a disinclination to swear the oath or for any other reason. Similarly, no one's rights would be infringed if it were possible to become a naturalized citizen without swearing the oath.

III. Justifying the Citizenship Oath

In order to justify it under section 1 of the *Charter*, the government must prove that an infringement of the freedom of conscience (or of any other right or freedom guaranteed by the Charter) must pursue a pressing and substantial objective; it must be rationally connected to that objective; it must be as little impairing of Charter rights as possible; and its benefits must outweigh its deleterious effects.[69] Before considering whether the requirement that would-be citizens swear an oath of allegiance to the Queen passes this test, however, I will say a few words about Justice Morgan's comments to the effect that, since the applicants' physical freedom was not at stake, a relaxed scrutiny of its justification was in order.[70]

The passage from the Supreme Court's decision in *Edwards Books*, on which Justice Morgan purported to rely, is inapposite. The passage Justice Morgan quotes deals with "[l]egislative choices regarding alternative forms of business regulation [which] do not generally impinge on the values and provisions of the Charter"[71]; not any and all government action outside the criminal law context. The citizenship oath is almost as far from business regulation as criminal law is.

Admittedly, the Supreme Court has recognized that "the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned

[68] *McAteer*, *supra* note 7, at para 90.
[69] *R v Oakes*, [1986] 1 SCR 103.
[70] See *McAteer*, supra note 7, at par 36 (asserting that it "need not, and probably could not, be 'tuned with great precision to withstand judicial scrutiny" (quoting *Edwards Books*, supra note 17, at 776).
[71] *Edwrards Books*, *ibid* at 772.

than the courts to choose among a range of alternatives."[72] However, this is a rather narrower range of situations than that described by Justice Morgan. The citizenship oath, in particular, arguably does not fall within the category of "complex social issues." It does not require balancing the potentially conflicting rights of different groups of citizens (as, for instance, the problem of religious exemptions from measures intended to prevent identity theft, at issue in *Hutterian Brethren*, did). In the case of the oath, there is no reason not to hold the government to its usual burden of proof on all the elements of the *Oakes* test.

A. Objective

What is the objective of the citizenship oath generally, and of the reference to the Queen specifically? In *McAteer*, Justice Morgan accepted the government's assertion that it was a symbolic expression of commitment to Canada and to its constitution on the part of new citizens. He also accepted that it was pressing and substantial, wondering "how anyone could argue with the pressing and substantial nature of that objective, given the context of the [*Citizenship*] *Act* in which the oath is set out and the ceremony at which it is administered."[73] Indeed, in *Benner v. Canada (Secretary of State)*,[74] Justice Iacobucci, writing for a unanimous court, found that "[e]nsuring that potential citizens are committed to Canada"[75] is a pressing and substantial objective, albeit in the context a challenge against the differential application of the Citizenship Act to children of Canadian fathers and mothers born abroad, rather than an examination of the citizenship oath itself.

Yet there is good reason to doubt the importance of a symbolic expression of commitment, as Liav Orgad's recent investigation of the loyalty oaths exacted of naturalized citizens across the world suggests. As Orgad observes, it is by no means clear why a purely symbolic affirmation of a person's commitment to his or her country is necessary. The oath of allegiance to the King was first required of all English subjects by Henry VIII, at a time when his throne was shaken, or at least when the legitimacy of his rule might have been called into question, by his break from the Papacy and the Catholic Church.[76] Although the oath of allegiance, in various forms, has since then been a constant feature of English, and eventually Canadian, legislation, Orgad notes that it was relied on "especially in time of public hysteria."[77] As Orgad notes, "[t]o a great extent, the history of the oath is a history of fear. Oaths were a sign of weakness and were used by the side who perceived a threat to its power."[78] When there exists a universal commitment to a certain ideal, there is no need to buttress it by requiring an oath.

---

[72] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567, at para 53.
[73] McAteer, *supra* note 7, at para 41.
[74] [1997] 1 S.C.R. 358
[75] *Ibid* at para 94.
[76] Orgad, *supra* note 2, at 108-09.
[77] *Ibid* at 109.
[78] *Ibid* at 110; an eloquent illustration of the fears that motivated oaths of allegiance can be found in the version of the oath that members of the legislative council of the Province of Canada were required to swear pursuant to the *Act Respecting the Legislative Council*, cons. Stat. of Canada, 1859, title 1 c. 1, s. 16: "I, A. B., do sincerely promise and swear that I will be faithful and bear true Allegiance to Her Majesty Queen Victoria … ; and that l will defend Her to the utmost of my power against all traitorous conspiracies and attempts whatever, against Her Person, Crown and Dignity; and that I will do my utmost endeavour to disclose and make known to Her Majesty, Her Heirs and Successors, all treasons and traitorous conspiracies and attempts which I shall know to be against Her or any of

The use of oaths in Canadian law—not just in the citizenship context—arguably confirms this insight. Witnesses are asked to swear to tell the truth because of a sense that the general duty to tell the truth as part of the ordinary use of language is not strong enough, that the commitment to truth-telling does not have enough of a hold over a witness (especially one who may have an interest in not telling the truth). Civil servants are asked to swear an oath of office because of a fear—reasonable given the difficulties of monitoring an office-holder's performance—that they will prefer their own interests, or their own leisure, to the public good which they are expected to serve. Lawyers are asked to swear an oath because of the fear that, without this admonition, they will engage in the sorts of unethical behaviour the oath proscribes.

To be sure, perjured witnesses, misbehaving civil servants, and unethical lawyers can be sanctioned in criminal or disciplinary proceedings. The law does not rely on oaths alone to ensure their compliance with their obligations. The case of the citizenship oath is different in that no legal sanction attaches specifically to its violation. (Criminal sanctions for treason are applicable in the same way to those who have and those who have not sworn the oath.[79]) But the potential availability of criminal or disciplinary sanctions probably matters less than one might suppose. Few witnesses—even witnesses who are found not to be credible—are ever prosecuted for perjury.[80] Nor are many civil servants or lawyers disciplined for breaching their oaths. If anything, lawyers are probably much more frequently disciplined for breaching specific ethical rules (say, about the handling of their clients' money) that are not the subject of their oath than for failing to live up to the oath's somewhat uncertain standards. In reality, then, the difference between the citizenship oath and the other ones is not that significant. Oaths are meant to ensure the fulfilment of obligations whose performance is difficult to monitor, whether or not sanctions are theoretically available to reinforce these obligations. It is precisely because these obligations do not lend themselves to practicable enforcement, yet their non-performance is thought to be fraught with serious undesirable consequences, that oaths seem necessary to ensure that they will be fulfilled. The enlistment of individual conscience takes the place occupied in much of the legal system by the fear of a sanction.

But what exactly is the worry that justifies the imposition of the oath of allegiance on new citizens (and, perhaps *a fortiori*, on those citizens required to swear it—for example office-holders and, in many provinces, lawyers)? Are Parliament and, in other cases, provincial legislatures, actually concerned about their potential disloyalty? Is the worry that they—all of them—do not, in fact, support the Canadian constitution and system of government? Whatever it might be, under the section 1 framework, the government bears the burden of justifying its assertions regarding the pressing and substantial character of its objectives.

To be sure, courts seldom (if ever) rigorously insist on such a justification. Whether they are generally wrong not to is a question far beyond the scope of this essay. However, in most cases, "reason or logic," which in the Supreme Court's view can constitute sufficient evidence for the

---

them; and all this I do swear without any equivocation, mental evasion or secret reservation, and renouncing all pardons and dispensations from any person or persons whatever to the contrary" (ibid, Schedule D).

[79] Indeed, non-citizens can be punished for high treason or treason, although only for actions committed in Canada, whereas Canadian citizens can be punished for the same actions whether committed in or outside Canada: see *Criminal Code*, RSC 1985 c C-46 subss 46(1)-(3).

[80] Needless to say, it is much easier to find that a witness is not telling the truth on a balance of probabilities than it is to prove beyond a reasonable doubt that he or she knowingly lied.

purposes of section 1 analysis,[81] should suffice to establish the validity of a legislative objective, and it can be assumed that the courts are at least implicitly relying on them. Yet if there is an implicit logic that can justify imposing the oath of allegiance on all would-be naturalized citizens, it is that they are all people whose commitment to Canada is doubtful (their decision to seek Canadian citizenship notwithstanding!), if not potential traitors. The Supreme Court has cautioned against "stereotypes cloaked as common sense,"[82] and this warning is apposite, in case one is inclined to accept this "logic." Unfortunately, beyond such stereotyping, all we have to justify the imposition of the oath of allegiance is Justice Morgan's conclusory assertion that its importance is indubitable. This is not enough to constitute "the reasoned demonstration required by s. 1" even in the absence of solid evidence.[83]

Now, perhaps the objective of the citizenship oath is not, in fact, the expression of commitment to Canada, as Justice Morgan found and as one ought to conclude from Orgad's paper. It might, for instance, serve a pedagogical function, informing new citizens of "the way we do things around here."[84] Yet it seems doubtful that this is the purpose of the oath, not least because it is already fulfilled by a guide informing naturalized citizens about the Canadian political and constitutional system and "the rights and responsibilities of citizenship",[85] "adequate knowledge" of which the *Citizenship Act* makes one of the criteria for naturalization.[86] Significantly, the government seems not to have asserted this educational purpose to justify the oath, even though it would surely be recognized as pressing and substantial. Perhaps the purpose of the oath is something other still, but again, the government has not asserted this, much proven that the oath has any purpose other than the symbolic expression of commitment to Canada.

To be fair, the applicants in *McAteer* did not contest the government's claims about the importance of the oath of allegiance. Indeed, they made a point of stating that they would be happy to swear such an oath in order to become citizens, provided it made no reference to the Queen. The real focus of their complaint against the current wording of the oath was, as Justice Morgan correctly pointed out, on the issue of the rational connection between the oath's purpose and the reference to the Queen, to which I now turn.

B. Rational Connection

The second stage of the *Oakes* test is the question whether the impugned infringement of a *Charter* right is rationally connected to the objective which the government pursues through the infringing measure. In other words, does the infringement serve to attain the objective? In *McAteer*, Justice Morgan concluded that the reference to the Queen in the oath of allegiance was "certainly rational,"[87] as would have been a reference to "any … defining element established by

[81] See *Harper v Canada (Attorney General)*, 2004 SCC 33, [2004] 1 SCR 827.
[82] *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519, at para 18.
[83] *Ibid*.
[84] I am grateful to Paul Daly for putting this suggestion to me.
[85] Citizenship and Immigration Canada, *Discover Canada: The Rights and Responsibilities of Citizenship*, 2012, online: <http://www.cic.gc.ca/english/pdf/pub/discover.pdf> [CIC, *Discover Canada*].
[86] *Citizenship Act*, *supra* note 1, para 5(1)(e).
[87] *McAteer*, *supra* note 7, at para 46.

the country's most fundamental law," whether the monarchy, bilingualism, aboriginal rights, federalism, etc.[88]

Now this seems a somewhat strange, or at least an entirely speculative assertion. Did Justice Morgan actually imagine an oath—just as rational, on his view, as the one actually created by the *Citizenship Act*—to bear true allegiance (or, perhaps somewhat more plausibly, to uphold and support) bilingualism and bijuridicalism? There is, presumably, some reason for the choice of the Queen as the focal point of the oath of allegiance; it seems unlikely to be random, as Justice Morgan comes close to suggesting it is.

Philippe Lagassé provides a reason for the choice of the Queen, rather than any other "defining element" of the Canadian constitution, as the focal point of the oath. "The Crown," he points out, "is the state and the source of all sovereign authority," "the fount of executive, legislative, and judicial authority in Canada."[89] The "Queen" to which the oath refers is, then, not just one of the "defining elements" of the constitution, whatever exactly those are. It is something more—it is the state itself, and pledging loyalty and allegiance to the Queen is really no different from pledging allegiance to Canada.

This may well be enough to conclude that the reference to the Queen is rationally connected to the purpose of the citizenship oath, which is to express commitment to Canada. Yet there remains a puzzle. If Parliament simply wanted new citizens to express a commitment to Canada as a state, why did it not say that in so many words? To a Crown law expert like Lagassé, the synonymy between "Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors" on the one hand, and "Canada" on the other is clear. Yet it is not so clear to many others, including—as Lagassé admits—even some Canadian judges,[90] and indeed the authors of *Discover Canada*. The government-issued study guide for citizenship applicants proclaims, under the heading "Understanding the Oath," that "[i]n 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."[91] It adds, rather confusingly, that "Canada is personified by the Sovereign just as the Sovereign is personified by Canada,"[92] but the assertion, in the first sentence, that the oath is to a person, not to a country, is striking. This confusion suggests that a metonymical expression the import of which escapes judges and the civil servants in charge of explaining the meaning of the oath, never mind "ordinary" Canadians, cannot really be a rational means of expressing commitment to Canada.

C. Minimal Impairment

At the third stage of the *Oakes* test, the government must prove that the rights-infringing measure is a "minimal impairment" of the right, in the sense that less impairing alternatives would fail to achieve its objective. In fact, it is enough for the government to show that the measure it chose is

[88] *Ibid* at para 48.
[89] Philippe Lagassé, "The Citizenship Oath and the Nature of the Crown in Canada", September 21, 2013, online <http://lagassep.wordpress.com/2013/09/21/the-citizenship-oath-and-the-nature-of-the-crown-in-canada/>
[90] See *ibid* (mentioning "the confusion certain judges show regarding the nature of the Crown in Canada").
[91] CIC, *Discover Canada*, *supra* note 85, at 2.
[92] *Ibid*.

one of "a range of reasonable alternatives."[93] However, if there are "alternative, less drastic means of achieving the objective in a real and substantial manner"—not necessarily "to *exactly* the same extent or degree as the impugned measure"—the government's justificatory effort will fail.[94]

Unfortunately, in *McAteer*, Justice Morgan failed to consider whether alternative measures could have achieved the purpose of the citizenship oath. Had he done so, he would have concluded that both Canadian and foreign examples are evidence of the existence of alternative that restrict the applicants' rights less than the current oath. Instead, Justice Morgan's reasons are limited to an argument that, properly understood, the oath is not much of an impairment of the applicants' rights—an argument that, even if well-founded (which, as I will argue in the next section, it is not), more properly belongs to the next (and last) stage of the *Oakes* test.

Despite Justice Morgan's failure to consider them, there are a number of alternatives that can achieve the objective of having new citizens publicly express their commitment to Canada or its constitution at least as well as the current wording of the oath. The most obvious such alternative would surely be to replace the reference to the Queen by one to Canada itself or to the Canadian constitution. To the extent that, as Lagassé argues, the reference to the Queen is in fact a reference to the Canadian state, such a substitution would actually have no effect on what the oath accomplishes. If, as Justice Morgan suggests, "the oath to the Queen is in fact an oath to a domestic institution that represents egalitarian governance and the rule of law,"[95] the oath of allegiance to the Queen could be replaced by an oath to uphold equality and the Rule of Law. Again, the government's purposes would not be realized to any lesser degree than with the current wording of the oath. It is useful to observe here that Australia, where the position and role of the Crown is in relevant respects the same as in Canada, makes do with a "pledge of commitment" that makes no reference to the Queen.[96]

Indeed, it seems almost certain that replacing the reference to the Queen in the citizenship oath would help better realize the purpose of having new citizens express their commitment to Canada. At present, it is most likely that, although they do not object to it, a considerable number—perhaps the vast majority—of those who are required to take the oath do not understand it in the way Justice Morgan argues they ought to. Indeed, if the citizenship applicants rely on the official study guide which the government provides to them, there is little reason why they should do so. A differently worded oath would be clearer, and those who take it would better understand its significance, making their expression of commitment less ambiguous.

There also exists a further alternative to requiring every would-be citizen to swear an oath of allegiance to the Queen—providing an exemption to those who object to doing so for reasons of conscience. Those availing themselves of the exemption could even be required to take an alternative oath, along the lines suggested in the previous paragraph. Even if, contrary to what I

[93] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para 160; see also *eg Hutterian Brethren*, *supra* note 72, at paras 53-54.
[94] *Hutterian Brethren*, *ibid*, at para 55.
[95] *McAteer*, *supra* note 7, at para 65.
[96] See *Australian Citizenship Act*, *2007*, Schedule 1 (the text of the pledge, not including an optional reference to God, is as follows: "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.").

have just argued, this alternative does not achieve the government's purposes to quite the same extent as does the current mandatory oath, this is itself is not dispositive. As the Supreme Court held in *Hutterian Brethren*, the question is whether the government's purpose would be achieved "in a real and substantial manner"[97] (or, in Jeremy Waldron's words, whether there is "room for exemption,"[98] in the context of the statute at issue). Although the government will, no doubt, argue that it is important that each and every new citizen take the oath, it is not clear what evidence, if any, it might adduce in support of this position.[99]

It is noteworthy that in Ontario, both the government and the Law Society have concluded that there was room for exemption from oaths of allegiance to the Queen. Thus the *Oaths and Affirmations* regulation provides that "[a] public servant who is not a citizen of Canada but is a citizen of another country is exempt from the requirement … to swear or affirm his or her allegiance to the Crown if the public servant asserts that making the oath or affirmation could result in the loss of that citizenship."[100] As for the Law Society of Upper Canada, it has chosen to make the oath of allegiance to the Queen optional. After concerns were raised (including by the future Justice Ian Binnie) about the oath's compatibility with the Charter,[101] its by-laws were amended to provide that a would-be barrister and solicitor "may take" it.[102]

Whatever the merits of the arguments regarding the (lack of) pressing and substantial objective pursued by the citizenship oath and the (lack of) a rational connection between that objective and the text of the oath, the existence of alternatives which can achieve, to a substantial degree or even better, the purposes of the oath should be enough to conclude that, in its current form, it is unconstitutional.

A more difficult question is whether *any* loyalty can pass the minimal impairment stage of the section 1 analysis. At first glance, it might seem that there is no real alternative to an oath as a symbolic expression of commitment. Yet this might not be so. After all, probably the best-known public expression of commitment—the marriage ceremony—does not rely on an oath or indeed any type of promise. In contrast to the vows that the spouses take at a religious marriage, the civil ceremony does not involve the persons getting married making any promise, whether to each other or to the person solemnizing their marriage.[103] (Interestingly, to the extent that the objective of the citizenship oath is pedagogical, the Québec civil marriage ceremony also provides an example of the superfluity of an oath. It requires the person celebrating the marriage

[97] *Hutterian Brethren*, *supra* note 72, at paras 55.
[98] Jeremy Waldron, "One Law for All? The Logic of Cultural Accommodation", (2002) 59:1 Wash & Lee L Rev 3, 18.
[99] Indeed, it is not even clear—nor does anyone seriously attempt to ensure—that every participant in the group oath-taking ceremonies now taking place does, in fact, speak the words of the oath.
[100] *Oaths and Affirmations*, *supra* note 59, s 2.
[101] See Lila Sarick, "Law society votes to make oath optional", *The Globe and Mail*, January 25, 1992 at A9 (noting that "Two independent legal opinions were that the oath of allegiance violates the Canadian Charter of Rights and Freedoms") and Tracey Tyler, "Vote ends mandatory royal oath for lawyers", *Toronto Star*, January 25, 1992 at A8 (noting that "the law society had received expert opinions from Toronto counsel Ian Binnie and Don Brown").
[102] *Licensing By-Law*, *supra* note 60, s 22.
[103] See *eg Marriage Act*, RSO 1990, c M.3, subs 24(3), which only involves statements: by both spouses, to the effect that they know of no impediment to their marriage and take the other spouse as "wife," "husband," "partner," or "spouse," and by the person solemnizing the marriage, pronouncing the spouses married.)

to inform the spouses of their obligations, but involves no promise-making on their part.[104]) Needless to say, mere statements, as opposed to promises, do not implicate the conscience of a person required to make them to anything like the same extent as an oath, if at all. It is not at all clear what difference there is between the public commitment to a spouse at a marriage ceremony and the public commitment to a country at a citizenship ceremony that would warrant the imposition of the onerous requirement of an oath for the latter but not the former. Thus it is at least questionable whether *any* loyalty oath can pass the minimal impairment test of the *Charter*.

D. Benefits and Deleterious Effects

The final stage of the *Oakes* test consists in a balancing of the beneficial and deleterious effects of the rights-infringing measure. As Chief Justice Dickson explained, "[t]he more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."[105] It is at this stage of the test that the impact of the rights-infringing policy on those subject to it becomes once more the centre of attention.[106] It is, therefore, at this stage that we must take into account the fact that the citizenship oath infringes the freedom of conscience of those required to take it.

In *McAteer*, Justice Morgan argued that the impact of the oath on those required to take it is minimal—so long as they understand the oath correctly. Once one understands that the reference to the Queen stands for the constitution, the Rule of Law, equality, etc., rather than colonialism and privilege, it is not too much to ask new citizens to commit to these things. The fact that those who disagree with this interpretation of the reference to the Queen see the oath as a great burden carries little weight, because they are under "a fundamental misapprehension,"[107] perhaps as a result of their belief in the "loyalist myth"[108] narrative of Canadian history. By contrast, "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,"[109] and easily outweighs the entirely subjective misgivings of those who fail to see the Queen in this way.

This reasoning is utterly unconvincing. Even in a freedom of expression analysis, the correctness or even reasonableness of the views of the person whose rights are infringed is not determinative. Holocaust deniers are free to express their views,[110] even though these views are not only despicable and pernicious, but also demonstrably, factually wrong. But the irrelevance of the rightness of the understanding of the citizenship oath by those forced to take becomes even clearer once one recalls that the oath is not merely a brief instance compelled expression, but a violation of freedom of conscience. This is so for two reasons.

First, as I argued above, when freedom of conscience is at stake, it is inappropriate to make light of the infringement of the claimant's liberty by pointing to some objective standard on which his

[104] See *Civil Code of Québec*, LRQ c C-1991, s. 374 ("In the presence of the witnesses, the officiant reads articles 392 to 396 to the intended spouses.
He requests and receives, from each of the intended spouses personally, a declaration of their wish to take each other as husband and wife. He then declares them united in marriage.")
[105] *Oakes*, *supra* note 69 at 140.
[106] *Hutterian Brethren*, *supra* note 72, at para 76.
[107] *McAteer*, *supra* note 7, at para 80.
[108] *Ibid*, at para 74.
[109] *Ibid*, at para 80.
[110] *R. v. Zundel*, [1992] 2 S.C.R. 731, 95 DLR (4th) 202

or her conscientious beliefs turn out to be mistaken. The state is not authorized to discriminate between "correct" and "incorrect" conscientious belief. Those who are, for reasons of conscience, opposed to taking the citizenship oath may be, in the eyes of Crown law experts and judges, misunderstanding the facts about the monarchy that underlie their beliefs, but courts are no more entitled to treat these beliefs as not deserving of their solicitude than they were entitled so to do with the beliefs of the defendants in *Amselem* on the basis that these beliefs resulted from an interpretation of the Scripture which a religious authority considered mistaken.

One might object that, even if this is so as a general proposition, the case of the citizenship oath is different because the beliefs which it involves rest not on deeply controversial "facts" (if they are facts at all) about, say, human nature and the relationships between a person and his or her fellows, but on legal rules, which the courts can (and indeed must) interpret authoritatively. But that objection misses the crucial point that the citizenship oath, like many other oaths, operates by requiring the oath-taker to work out, over time, the obligations that are incumbent on him or her as a result of having taken the oath. This reliance on the naturalized citizens doing the duties imposed by their oaths of allegiance autonomously makes it absurd to tell them that, in the exercise of this autonomous responsibility, they must nevertheless substitute the state's understanding of their duties to their own. For the same reason, it will not do to say that the oath does not really impose any duty at all, for example because compliance with it is not in any way monitored, and no sanction attaches to non-compliance.

Indeed, the second reason why the strategy of discounting the interference with the oath-takers' conscience in order to conclude that the citizenship oath's deleterious effects are insignificant cannot succeed is that it fails to take into account this enlistment of the naturalized citizens self-imposition of the duty of loyalty. The oath's interference with freedom of expression is but brief—it lasts the few seconds it takes to pronounce the oath. But, having pronounced it, naturalized citizens are expected to live by it for the rest of their days. And, at any point during their lifetimes, they might have to ask themselves how their "true allegiance" to the Queen requires them to act. Republicans involved in anti-monarchical activities will presumably face this question especially often. And the oath of allegiance imposes itself on their conscience time and time again. It is thus far from a trivial interference with their freedom; its effects on them are considerable.

As for the "benefits" side of the scale, all we have to weigh on it is Justice Morgan's assertion that the oath's are "substantial." In fact, it is not at all clear what those benefits are. As Orgad observes, "[e]mpirically, one can reasonably argue that loyalty oaths are a fallacy"[111]—they may not work. Noah Webster, he notes, argued that "ten thousand oaths do not increase the obligation upon [a man] to be a faithful subject."[112] Now Webster thought that all oaths were essentially useless, being at best reminders of pre-existing moral obligations. But even without being such a thoroughgoing skeptic, one can wonder about the efficacy of an oath sworn by a person who either does not understand it, or actively misunderstands it, as is the case of a great many, quite possibly most, would-be Canadians who are made to swear the citizenship oath.

[111] Orgad, *supra* note 2, at 109.
[112] Noah Webster, "On Test Laws, Oaths of Allegiance and Abjuration, and Partial Exclusions from Office", in Philip B Kurland and Ralph Lerner (eds), *The Founders' Constitution*, (Chicago: University of Chicago Press, 1987) vol 4, at 636.

The oath's purpose is for naturalized citizens to express support of the great constitutional ideals for which it stands. But some would-be citizens, perhaps many, believe—mistakenly—that swearing the oath requires them to be personally faithful to the resident of Buckingham Palace, or to foreswear anti-monarchist activities. The government does not try to ascertain, and cannot force them to change their beliefs—indeed, it encourages them through the *Discover Canada* guide. So they can do one of two things. Either they swear the oath, whether because they do not mind subscribing such obligations or because they are willing to be insincere; or, like the applicants in *McAteer*, they refuse to swear and do not become Canadian citizens. What does the government gain, in either case? In the former, the oath sworn is hollow; it is not the assertion of support for freedom, equality, and the Rule of Law that the government desires. In the latter, Canada is deprived of citizens whose only shortcoming is, for all we know, to misunderstand the nature of the Crown, a shortcoming which they share with any number of native-born Canadians.

The current wording of the citizenship oath—specifically, its reference to the Queen—fails every stage of the *Oakes* test. Because justification under section 1 of the *Charter* requires proof rather than assertion, it cannot be "demonstrably justified in a free and democratic society." As I have suggested above, moreover, it is very doubtful that any alternative citizenship oath, that does not refer to the Queen, can be so justified. It is questionable, in my view, whether the objective of making naturalized citizens affirm their commitment to Canada is really "pressing and substantial" and, even if it is, whether it is necessary to make them swear an oath in order to realize it. However, a court could take a different view of these matters, adopting as often happens, a position more deferential to the government. If a court concludes that an oath is, in fact, necessary to ensure naturalized citizens' commitment to Canada, then it could also find that an exemption that would allow objectors not to take an oath at all is not a reasonable alternative. It could also find that an oath which does not refer to the Queen and makes the commitments it involves and duties it imposes intelligible to those required to take it has sufficient positive effects to outweigh the negative effect of the conscription of the oath-takers' conscience. To be clear, I am not arguing that this would be the correct outcome. It would, however, be both a more defensible and a more rights-respecting one than that reached by Justice Morgan in *McAteer*.

Conclusion

The oath Canada requires naturalized citizens to swear, with its promise of "true allegiance to Her Majesty Queen Elizabeth the Second," is, for many, a perplexing one. What does it mean, in 2014, to bear true allegiance to the Queen? Who—or what—is the Queen, anyway? An elderly British woman, or a symbol of liberty under democratically enacted law? In law, these questions might have clear answers. The Queen to whom the oath refers is a symbolic one; not the reigning monarch but the constitutional monarchy; not the oppressor but the guarantee of our rights and freedoms. But the legal answers contradict beliefs which have always been held by non-negligible numbers of people, both those for whom the Queen is an object of reverence and those who for whom she is a tyrant. Indeed, with its insistence on displaying the Queen's portraits all over the world,[113] the current Canadian government may be reasonably supposed to fall in the category of those for whom the Sovereign is not a mere abstraction, whether positive or negative.

[113] See *eg* CBC News: Politics, "Embassies ordered to display Queen's portrait", September 8, 2011, online <http://www.cbc.ca/news/politics/embassies-ordered-to-display-queen-s-portrait-1.1054848>

For those, in that category, who oppose the monarchy, taking the citizenship oath means not expressing support for constitutional principles with which they agree, but subscribing a duty of loyalty to a person they would like to replace as the head of state. Some of them have, therefore, challenged the constitutionality of the citizenship oath, and specifically of its reference to the Queen. So far, these challenges have not succeeded, having been rejected by the Federal Court of Appeal and by the Superior Court of Ontario.

I have argued that these decisions were mistaken, and that the citizenship oath is in fact unconstitutional. However, contrary to the approach taken by the courts which have heard the challenges to the constitutionality of the oath and, it seems, by the challengers themselves, I have contended that the constitutional problem with the citizenship oath is not (so much) that it is a violation of the freedom of expression, but that it is an infringement of freedom of conscience.

The citizenship oath, like many oaths, is an attempt by the state to gain a hold of the conscience of the person who takes it. The obligation imposed by the oath—to be loyal to the Queen—is not well-defined. Its execution depends on a good-faith effort by the naturalized citizen to work out its implications, to think about right and wrong in light of this state-imposed duty. It is this conscription of the citizen's conscience which constitutes an infringement of the constitutional guarantee of freedom of conscience.

This infringement cannot be justified in a free and democratic society. Although the imposition of the citizenship oath is ostensibly motivated by the need to have naturalized citizens make a public commitment to Canada, it is not clear why this is necessary. Indeed, there is good reason to believe that the imposition of the oath results from fear of disloyalty—yet there is no evidence to justify the fear that naturalized citizens will be disloyal. But even assuming that the purpose of requiring an expression of commitment to Canada is important enough to justify the infringement of constitutional rights, the citizenship oath's reference to the Queen, liable as it is to be misunderstood, does nothing to further this objective. Nor is the imposition of an oath a minimal infringement of the naturalized citizens' rights. The citizenship oath easily be reformulated to avoid the reference to the Queen, and perhaps even be made optional, as the oath of allegiance already is in some situations. Indeed, an expression of commitment need not take the shape of an oath at all. Finally, the costs of the citizenship oath for those who object to taking it are considerable, because of the oath's permanent enlistment of their moral judgment in the service of the state's purposes, while the benefits of any citizenship oath, and especially of one which is being misunderstood by those required to take it, are not obvious, to say the least.

As Webster recognized, the person arguing for the abolition of an oath of allegiance "will be asked, how shall we distinguish between the friends and enemies of the government?"[114] His answer was perhaps a little optimistic: "A good constitution, and good laws, make good subjects. I challenge the history of mankind to produce an instance of bad subjects under a good government."[115] There will be, our jaundiced age will say, bad subjects under any government. But will those who are bad subjects in spite of good laws become good subjects because of a bad oath?

[114] Webster, *supra* note 112, at 636.
[115] *Ibid*.

THE "SUPREMACY OF GOD", HUMAN DIGNITY AND THE *CHARTER OF RIGHTS AND FREEDOMS*

Lorne Sossin*

> "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:"[1]

I. Introduction

While the *Canadian Charter of Rights and Freedoms* is now two decades old, and past its natural adolescence, we have yet to grapple with some of the most fundamental precepts, premises and principles which animate it. This essay is intended to explore two of these: the concept of human dignity, which does not appear in the *Charter*, and the concept of the supremacy of God, which are the first words to appear in the *Charter*.

Is human dignity a judicially cognizable concept? No evidence can prove or disprove its existence and no doctrinal test can precisely define its boundaries. It is a construction of personal conviction, individual belief, culture and social relations. As Oscar Schachter once observed,

> references to human dignity are to be found in various resoultions and declarations of international bodies. National constitutions and proclamations, especially those recently adopted, include the ideal or goal of human dignity in their references to human rights. Political leaders, jurists and philosophers have increasingly alluded to the dignity of the human person as a basic ideal so generally recognized so as to require no independant support. It has acquired a resonance that leads it to be invoked widely as a legal and moral ground for protest against degrading and abusive treatment. No other ideal seems so clearly accepted as a universal social good.[2]

It reflects, in short, a leap of faith. The Supreme Court has stated on several

---

* Associate Professor, Faculty of Law, University of Toronto. I have had helpful discussions with a number of colleagues about the ideas in this essay. I am particularly grateful to Harry Arthurs, Alan Brudner, Julia Hanigsberg, Gerald Kernerman, Lorraine Weinrib & Ernest Weinrib. I would also like to acknowledge the excellent research assistance of Douglas Sanderson and Caroline Libman in the preparation of this essay.

[1] Preamble to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 [Charter].

[2] Oscar Schachter, "Human Dignity as a Normative Concept" (1983) 77 A.J.I.L. 848 at 848-849.

occasions that the *Charter* and the rights it guarantees are "inextricably bound" to "concepts of human dignity."[3] Human dignity, the Court has observed more broadly, is an underlying principle upon which our society is based.[4] It is, however, nowhere to be found in the *Charter*. It is a judicial contrivance, albeit a welcome one. It is welcome because it hints at a moral infrastructure to the *Charter*, supporting and welding together the various freedoms, rights and obligations outlined in the *Charter*. Thus far, though, this moral infrastructure has lacked coherence and clarity. In other words, what the *Charter* needs is a more express and better justified moral architecture.

If human dignity represents the concept outside the actual terms of the *Charter* about which the Court has said the most, the reference in the Preamble of the *Charter* to the "supremacy of God" represents the actual term in the *Charter* about which the Court has said the least. The supremacy of God, like human dignity, is difficult to concieve as a justiciable concept. It cannot be substantiated nor can it be disproven. Unlike human dignity, however, the supremacy of God has not been the subject of creative judicial elaboration. Not even the most basic questions about its place and purpose in the *Charter* have been addressed. Whose God is supreme and supreme in what way? Are the supremacy of God and the rule of law intended to be complementary constitutional principles, or distinct? How can and should the supremacy of God be reconciled with the freedom of conscience and religion provisions under s. 2 of the *Charter*?

The argument I advance in this essay is as follows. The reference to the supremacy of God in the *Charter*'s Preamble should be given meaning as an animating principle of constitutional interpretation, on par with the rule of law with which it is paired. To embrace the rule of law while abandoning the supremacy of God is to neglect the governing premise of the *Charter*. The supremacy of God, in turn, can only play a meaningful role in constitutional interpretation if it is taken as a general statement regarding the universal, normative aspirations of the *Charter*, rather than as 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*. The concept of human dignity represents a key normative aspiration of *Charter* jurisprudence. It has rarely been justified or elaborated, however, on normative terms. Rather, the Supreme Court has tended to treat its articulation of the scope and content of human dignity as an article of faith, simply to be invoked along the way to what the Court has deemed a just outcome of a *Charter* challenge. I argue that if the concept of human dignity was linked with the supremacy of God in the *Charter*'s Preamble, it would be incumbent on courts to justify their claims regarding human dignity as a leap of faith, and a more coherent and robust elaboration of the *Charter*'s moral architecture would result.

---

[3] See the discussion of human dignity and the jurisprudence of the Court in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 76.

[4] *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 at 592.

II. Human Dignity as the Unity of Faith and Reason

Joel Bakan has observed, "constitutional argument may best be understood as a call to faith rather than persuasion by reason."[5] The Preamble to the *Charter* proposes that Canada was founded "upon principles that recognize the supremacy of God and the rule of law". It contains an explicit paradox by which our constitution recognizes both the sovereignty of God and of law.[6]

I suggest that the Preamble contains not so much a paradox as a "call to faith" regarding the nature of the *Charter*. The reference to the supremacy of God in the *Charter* should not be construed so as to suggest one religion is favoured over another in Canada, nor that monotheism is more desirable than polytheism, nor that the God-fearing are entitled to greater rights and privileges than atheists or agnostics. Any of these interpretations would be at odds with the purpose and orientation of the *Charter*, as well as with the specific provisions regarding freedom of religion and conscience under s. 2.[7] Rather, I argue that the supremacy of God should be seen as a twin pillar to the "rule of law" – as a moral complement to the descriptive protections and rights contained in the *Charter*. The concept of human dignity may serve to bridge these pillars and unite faith with reason in constitutional discourse. Because the Court's articulation of human dignity has been disconnected from any appeal to moral authority, however, it has served as a shifting, ineffective, and often incoherent constitutional norm.

In *Law v. Canada (Minister of Employment and Immigration)*, the Court offered the following articulation of human dignity as a constitutional norm in the context of the equality analysis under s.15 of the *Charter*:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of difference individuals, taking into account the context of their underlying differences. Human dignity is harmed when individuals and groups are marginalized, ignited or devalued, and is enhanced when laws recognize the full place of individuals and groups within Canadian society.[8]

While many may agree that human dignity ought to be a cornerstone of Canada's system of justice, there is far less agreement as to what constitutes human

---

[5] Joel C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) Osgoode Hall L.J. 123 at 193.

[6] For a consideration of the *Charter*'s paradoxes more generally, see R. A. MacDonald, "Postscript and Prelude – The Jurisprudence of the Charter: Eight Theses" (1982) 4 Supreme Court L.R. 321.

[7] Interestingly, however, the *Constitution Act* of 1867 expressly privileges certain religious groups (Catholics and Protestants) over others with respect to educational rights in particular provinces.

[8] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 53.

dignity and what role it should play in constitutional interpretation. Does human dignity encompass only negative freedoms, such as the right not to have one's bodily integrity or privacy violated or may it extend to positive freedoms, such as the right to adequate food, shelter, clothing, health care, legal assistance and education? The concept of human dignity is inherently subjective, informed by personal predilection, community values, religious doctrine, ethnic identity, gender, race, age and ideological conviction, just to scratch the surface. It is also expressly normative. Every attempt to describe its essence or apply it as a constitutional principle embodies a claim regarding morally good and socially just relations between individuals, groups and the state. In short, adopting a particular understanding of human dignity requires a leap of faith.

A review of the major Supreme Court decisions featuring a discussion of human dignity and the *Charter* discloses that it has been invoked by the Court most often in six legal settings: psychological integrity; physical security; privacy; personal autonomy; professional reputation; and personal affiliation or group identity.[9] What links together these concerns? In most of these categories, human dignity appears as a manifestation of the liberal, individual ethos – in other words, human dignity is about what makes individuals unique and self-contained. The Court, however, does not justify its use of this concept on those or any terms. Human dignity appears to the Court as an organizing principle of Canadian society – as the underpinning of what some observers have identified as "legal humanism."[10]

If one looks at human dignity through the lens of the supremacy of God, a different set of claims regarding its content and scope may emerge. For example, if I take the supremacy of God to reflect the conviction that all people have equal moral worth, then human dignity is not just what separates us as individuals but also rather what binds us together as a community of mutual obligation. On this view of human dignity, it would be untenable to see the loss of professional reputation as an issue of human dignity, but not the right to a roof over your head, or food to feed your family, or adequate health care. Human dignity, if taken as a social as well as individual norm, renders untenable the sharp line between negative and positive constitutional liberties.

To illustrate the shortcoming of the present paradigm, consider the recent decision of the Supreme Court in *Gosselin v. Quebec*.[11] In this case, the Court considered, *inter alia*, whether the state owed a positive obligation of providing social welfare as a result of the right to life, liberty and the security of the person under s. 7 of the *Charter*. The majority concluded that no person had a right to welfare under the *Charter*. Earlier case law from the Court had left open the possibility of "economic rights fundamental to human...survival" being protected

[9] This is drawn from a "human dignity database" of approximately 60 cases. This database is on file with the author and will form the basis of a larger research project on the content and scope of human dignity as a constitutional principle in Canada.

[10] See David Feldman, "Human Dignity as a Legal Value – Part 1" (1999) Pub. L. 682.

[11] 2002 SCC 84.

by the *Charter*.[12] In *Gosselin*, the majority held that this section related at its core to protecting the individual in the administration of justice. While they did not close the door on recognizing positive obligations on the state in "special circumstances," a duty on the government to ensure the economic survival of vulnerable citizens was, in the majority's view, beyond the scope of the *Charter*.

Thus, the concept of human dignity has been harnessed thus far by the Court, as often to underscore the limitations of the *Charter* as to extend its grasp. There is no discussion of where human dignity comes from, except to say that it is "fundamental" and "essential" to the operation of the *Charter*. It is in precisely these circumstances, where the animating principles of a constitutional document are at issue, that a Preamble may take on special significance.

III. The Significance of the *Charter*'s Preamble

Preambles serve as an important interpretive tool, but they do not have the force of law. For this reason, they enjoy uneven influence over courts in the interpretation of statutes. While not all preambles attract judicial attention or reflect legislative aspiration,[13] it is fair to observe that Constitutional preambles often do. Indeed, the Preamble to the *Constitution Act of 1867*, which establishes that Canada's Constitution is "similar in principle" to that of the United Kingdom, has been the foundation for a variety of judicial innovations from the "implied bill of rights" to "judicial independence".[14]

Preambles are arguably even more significant when the object of a constitutional document is to protect rights and freedoms rather than apportion political and legislative authority. While God does not make an appearance in the preamble of the *Constitution Act of 1867*, the reference to the supremacy of God in the Canadian *Bill of Rights* is instructive. It reads, in part:

> The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions...

The Preamble to the Bill of Rights goes on to assert that "men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;..." Thus, the connection between human dignity and the supremacy of God, between moral and spiritual values on the one hand and the rule

---

[12] *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927 at 1003.

[13] For a recent study, see Kent Roach, "The Uses and Audiences of Preambles in Legislation" (2001) 47 McGill L.J. 129.

[14] See Mark D. Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51 U.T.L.J. 91.

of law on the other, which I suggest is implicit in the *Charter*, was set out explicitly in the *Bill of Rights*. Or, put differently, the conception of God as a constitutional concept in Canada is intimately bound up with our affirmation of the moral worth and inherent dignity of all people. As Polka has written: "The supremacy of God is not merely compatible with but fundamental to the rule of law, just as the rule of law (including the rule of lawful interpretation) is not merely compatible with but fundamental to conceiving of God as supreme."[15]

IV. The Supremacy of God

Where did the "supremacy of God" come from and how did it find its way into the *Charter*? On the one hand, the provenance of the term is an important issue. Its inclusion was advocated by religious groups and linked by those groups with a particular conservative social agenda (hostile to gay and lesbian rights, staunchly pro-life, etc.). This conservative agenda also had political overtones, as those who supported the amendment justified it as a bulwark against Soviet Union style atheistic tendencies. The term "supremacy of God" was inserted as an amendment to the *Charter*'s Preamble as a result of a motion late in the process made in the House of Commons by the Honourable Jake Epp, MP, in February, 1981. It was accepted by Prime Minister Trudeau (albeit, one must imagine, reluctantly). Thus, the first words of the *Charter* were more or less the last to be drafted.

Perhaps in part because of its inglorious origins, the "supremacy of God" reference in the *Charter*'s preamble has been all but ignored by the Supreme Court,[16] and by most constitutional observers as well.[17] David Brown observed that, "[a]lthough the Preamble suggests that all other rights and freedoms set out in the *Charter* are founded on these two principles, courts and academics have treated the Preamble, especially in its reference to the "supremacy of God," as an embarrassment to be ignored." Peter Hogg has referred to the Preamble as "of little assistance". Dale Gibson maintains the view that "its value as an interpretative aid is seriously to be doubted." The British Columbia Court of Appeal recently characterized the Preamble's reference to the "supremacy of God" as a "dead letter."[18] Below, I briefly summarize the treatment of the Preamble by Canadian courts and commentators.

---

[15] Brayton Polka, "The Supremacy of God and the Rule of Law in the Canadian *Charter of Rights and Freedoms*: A Theologico-Political Analysis" (1987) 32 McGill L.J. 854 at 857.

[16] The rule of law component of the Preamble has been cited more often: see, for example, *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486, and *Reference re: Manitoba Language Rights (Man.)*, [1985] 1 S.C.R. 721.

[17] *Supra* note 15.

[18] *R. v. Sharpe*, [1999] B.C.J. No. 1555 at paras. 78-80, per Justice Southin.

1) The Jurisprudence

At a conference some years ago, I asked a Supreme Court Justice about what he thought the supremacy of God's role was in *Charter* analysis. He looked visibly uncomfortable. He stammered something about the importance of freedom of religion in s. 2 of the *Charter* and invited the next question as soon as he could. This seems to me to sum up the collective orientation of the Court. What can a secular Court in a multicultural society say about the supremacy of God except to look away and ask for the next question? And yet, how can the Court sidestep the principles on which rest the "supreme law" to which they are charged with giving life?

The one notable instance where the Supreme Court has opined on the meaning of the "supremacy of God" revealed a fairly one-dimensional approach to its meaning, focussing on the question of the primacy of Christian values in Canada's legal order. The case was *Big M Drug*,[19] in which a drug store sought to have the Sunday closing provisions of the *Lord's Day Act* struck down as offending the freedom of religion guaranteed under s. 2 of the *Charter*. A dissenting judge of the Alberta Court of Appeal had defended the legislation by recourse to, *inter alia*, the "supremacy of God" provision in the Preamble. About this, Chief Justice Dickson had the following to say:

> Mr. Justice Belzil said it was realistic to recognize that the Canadian nation is part of "Western" or "European" civilization, moulded in and impressed with Christian values and traditions, and that these remain a strong constituent element in the basic fabric of our society. The judge quoted a passage from The Oxford Companion to Law (1980) expatiating on the extent of the influence of Christianity on our legal and social systems and then appears the *cri du coeur* central to the judgment at pp. 663-64:
>
> > I do not believe that the political sponsors of the *Charter* intended to confer upon the courts the task of stripping away all vestiges of those values and traditions, and the courts should be most loath to assume that role. With the Lord's Day Act eliminated, will not all reference in the statutes to Christmas, Easter, or Thanksgiving be next? What of the use of the Gregorian Calendar? Such interpretation would make of the *Charter* an instrument for the repression of the majority at the instance of every dissident and result in an amorphous, rootless and godless nation contrary to the recognition of the Supremacy of God declared in the preamble. The "living tree" will wither if planted in sterilized soil.[20]

Ultimately Chief Justice Dickson declined to offer his own interpretation of the "supremacy of God" clause in the *Charter*'s Preamble, although, of course, the impugned provision in the *Lord's Day Act* was in fact struck down. Importantly, *Big M Drug* was also the case in which the Court affirmed that the *Charter* was to

---

[19] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

[20] *Ibid.* at paras. 30-31.

be given generous and liberal interpretation.

Later references by the Supreme Court to the Preamble have been to contrast the Preamble with substantive guarantees under s. 2 of the *Charter*. Take, for example, the judgment of Justice Wilson in *R. v. Morgentaler*,[21] in which she observed that conscientious beliefs which are not religiously motivated enjoy the same constitutional protection under s. 2(a) of the *Charter* as those which may be religiously motivated. She then added, "In so saying I am not unmindful of the fact that the *Charter* opens with an affirmation that "Canada is founded upon principles that recognize the supremacy of God...." But I am also mindful that the values entrenched in the *Charter* are those which characterize a free and democratic society."[22] Justice Wilson offered no explanation for the apparent conflict between the supremacy of God on the one hand and the values of a free and democratic society on the other.[23]

Almost universally, and without serious inquiry, Canadian lower courts have equated the "supremacy of God" with a claim to religious orientations generally and Christian ones specifically. For example, in *McBurney v. Canada (Minister of National Revenue – M.N.R.)*,[24] Justice Muldoon referred to the support religious institutions receive from the state in the form of charitable deductions and concluded that:

> [t]hose Canadians who profess atheism, agnosticism or the philosophy of secularism are just as secure in their civil rights and freedoms as are those who profess religion. So it is that while Canada may aptly be characterized as a secular State, yet, being declared by both Parliament and the Constitution to be founded upon principles which recognize "the supremacy of God," it cannot be said that our public policy is entirely neutral in terms of "the advancement of religion."[25]

Revealingly, tax litigation has been the most common forum for the "supremacy of God" to be discussed. To take another example, in *O'Sullivan v. Canada (Minister of National Revenue – M.N.R.)*,[26] the Federal Court dismissed a taxpayer's claim to withhold $50 from his income tax return because such money might ultimately fund abortions. The taxpayer urged the Court to consider the "supremacy of God" clause in its analysis. The Federal Court responded by tracing the

---

[21] [1988] 1 S.C.R. 30.

[22] *Ibid.* at para. 251.

[23] The scholarly literature has often equated the two as well. William Klassen points out: "To mention God with a capital letter in the preamble to the *Charter* and then to go on to say that the *Charter* provides a fundamental freedom of conscience and religion, is a contradiction which even a theologian, to say nothing of all the lawyers, must surely recognize." William Klassen, "Religion and the Nation: An Ambiguous Alliance" (1991) 40 U.N.B.L.J. 87 at 95.

[24] [1984] C.T.C. 466.

[25] *Ibid.* at 468-69.

[26] [1992] 1 F.C. 522.

importance of religion in the development of Canada and then offered the following conclusion:

> [T]he late amendment to the *Charter* in 1981 cannot be construed to have converted Canada into a Roman Catholic theocracy, a Mennonite theocracy, an Anglican theocracy or a Jehovah's Witnesses' theocracy any more than Canada was thereby converted into an Islamic theocracy (whether Sunnite or Shiite), a Hindu theocracy, a Sikh theocracy, or a Buddhist theocracy.
>
> What then is meant by this preamble? Obviously it is meant to accord security to all believers in God, no matter what their particular faith and no matter in what beastly manner they behave to others. In assuring that security to believers, this recognition of the supremacy of God means that, unless or until the Constitution be amended – the best of the alternatives imaginable – Canada cannot become an officially atheistic State, as was the Union of Soviet Socialist Republics or as the Peoples' Republic of China is understood to be.[27]

On this view, the significance of the "supremacy of God" provision is to preclude any official recognition of atheism by the state, but not to preclude the secular nature of the state.[28] This narrow and literalistic approach does not seem in keeping with either the purpose or spirit of the *Charter*. Suffice it to say that, to date, Canadian courts have not brought the vigor to the elaboration of the supremacy of God that has been directed to enlarging concepts such as the rule of law.

2) The Commentary

While the dividing line between the sacred and the profane has rarely been an object of great interest among constitutional law scholars in Canada, it is fair to say that interest in this area is picking up as the *Charter* matures. This emerging literature, moreover, has been far more creative in approaching the Preamble than has the more literal-minded judiciary. For example, in his article, "Notes Towards a (Re)definition of the "Secular,""[29] Iain Benson criticizes the use of "secular" by Canadian courts in relation to the *Charter*:

> The term "secular" has come to mean a realm that is neutral or, more precisely, "religion-free." Implicit in this religion free neutrality is the notion that the secular is a realm of facts distinct from the realm of faith. This understanding, however, is in error. Parse historically the word "secular" and one finds that secular means something like non-sectarian or focused on this world, not "non-faith." States cannot be neutral towards metaphysical claims. Their very inaction towards certain claims operates as an affirmation of others. This realization of the faith-based nature of all

---

[27] *Ibid.* at paras. 17-18.

[28] See also *Canada (Canadian Human Rights Commission) v. Canada (Department of Indian and Northern Affairs Development) (Re Prince)*, [1994] F.C.J. No. 1998.

[29] (2000) 33 U.B.C. L. Rev. 519.

> decisions will be important as the courts seek to give meaning to terms such as secular in statutes written some time ago.[30]

In a similar vein, David Brown suggests the Preamble itself may help to reconcile the tension between the *Charter*'s secular and sacred claims.What the Preamble instructs, according to Brown, is that "legal freedoms must be interpreted with humility stemming from man's "creatureliness", as well as with the objective of ensuring all human beings enjoy fundamental legal protection for their human dignity as creatures. The supremacy of God thus mandates that all humans be treated in accordance with the rule of law."[31] A similar view of the complementary nature of the supremacy of God and rule of law was espoused by David Crombie, then an MP, during the debate on the Preamble in 1981. He observed, "...when legal orders relate to spiritual principles, it allows for diversity and dissent. The roots of democratic dissent have always begun with religious dissent; laws imposed by government were always fought on the basis of an appeal to God."[32]

If supremacy of God is seen as the place where normative claims about *Charter* rights take on moral legitimacy (again, the example I focus upon in this essay is the concept of human dignity), one might well question what remains of God at all in this analysis. Is not God, cleansed of religious particularity, simply the embodiment of general and metaphysical claims about the sources and scope of law? The answer, I think, is probably "yes". Moreover, I would argue that this is precisely the reading of the term most compatible with the values of the *Charter*. Thus, ironically, the process of breathing life into the idea of the supremacy of God in the *Charter* may well alienate precisely those groups seeking the advancement of religion or religious agendas through the courts.

William Klassen concludes his analysis of the Preamble by suggesting that it would have been preferable to leave God out of the *Charter* altogether, and assert instead that Canada was founded on "transcendent principles" and the rule of law.[33] While inelegant, I agree that this more precisely captures the approach to interpreting the Preamble advocated in this essay. Precise language, however, is far from the norm in the *Charter*. Indeed, in its ambiguities have been found, arguably, its most expansive and progressive protections. To take but one example, consider the "principles of fundamental justice" under s. 7 of the *Charter*. The term had a largely uneventful history as an adjunct to the "fair hearing" right under s. 2(e) of the *Bill of Rights*, and was selected by the drafters of the *Charter*, in large part, to

---

[30] *Ibid.* at 520. Benson takes issue with Chief Justice Lamer's characterization in his dissent in *Rodriguez* (*supra* note 4), that the *Charter* has established the essentially secular nature of Canadian society and therefore ensures a central place for freedom of conscience in public institutions. The dichotomy between secular as conscience enhancing and non-secular as conscience undermining is, in Benson's view, both unsupported and counterintuitive.

[31] David M. Brown, "Freedom from or Freedom for?: Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 U.B.C.L. Rev. 551 at 563.

[32] Excerpted in Klassen, *supra* note 23 at 94.

[33] *Ibid.* at 95.

distance the *Charter*, and s. 7 specifically, from the substantive due process jurisprudence of the US (which led to, among other maelstroms, *Roe v. Wade*).[34] Faced with an ambiguous term, the Supreme Court of Canada gave the legislative history of the *Charter* a vote but not a veto over the content of "fundamental justice". In *Re B.C. Motor Vehicle Act*,[35] the Court affirmed that, notwithstanding the intent of the drafters as expressed in Parliamentary debates and other records of the time, the principles of fundamental justice indeed contained a substantive as well as procedural content. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, the Court held that this content is informed not just by the "basic tenets of our legal system" but also by international law.[36] Just as the principles of fundamental justice could be read as a repository for the tenets of our legal system, so I contend the supremacy of God should be read as a repository for the tenets of our moral system and commitments to social justice (notwithstanding that the drafters' intent for this clause in the Preamble may have been something quite different).

In light of this alternative view of the Preamble's effect, it is clearly necessary to move beyond religious sectarianism in order to understand God as a constitutional paradigm. It is to a brief sketch of the contours of such a paradigm, and the proper place of human dignity within it, that I now turn by way of conclusion.

V. Dignifiying the *Charter* by Constitutionalizing God

I have suggested that there is a larger role for the supremacy of God in the Preamble to the *Charter* that has nothing whatever to do with religious convictions or particular religious traditions but, rather with universal aspirations to moral good and social justice. No one religious or secular or political or judicial leader has unique or superior insight into the meaning or mandate of God; rather, this term's incorporation in the *Charter* should be seen as an invitation to contest and engage in dialogue about the normative foundations of *Charter* rights, and first among these foundations is the content of human dignity. In short, claims on the scope and content of human dignity are leaps of faith, not in the name of a supernatural deity, but rather in the name of our own collective moral aspirations.

This is not to say that spirituality and religious conviction are irrelevant to the enterprise of constitutional interpretation. Interpretations of human dignity may, and in my view, should include perspectives derived from religious literatures. My own interest has been in the development of human dignity as a legal norm in Jewish law,[37] but it may just as easily flow from the cosmological implications of

---

[34] A. Gold, "The Legal Rights Provision: A New Vision or Deja Vu?" (1982) 4 Supreme Court L. R. 107 at 110-11.

[35] *Re B.C. Motor Vehicle Act*, *supra* note 16.

[36] 2002 SCC 1 at paras. 45-47.

[37] See, for example, N. Rakover, *Human Dignity in Jewish Law* (Jerusalem: The Library of Jewish Law - Ministry of Justice - The Jewish Legal Heritage Society, 1998).

aboriginal justice, the philosophies of Kant or Levinas, or the revelations of artists, physicists or mathematicians. To do justice to the Preamble's "call to faith", all must agree only that a set of justifiable, moral convictions must reside alongside the rule of law and animate the rights and freedoms guaranteed in the *Charter*. David Brown attempted to capture this distinction between the positive and normative dimensions of the Preamble in the following terms:

> Now the *Charter* is very much the product of positive law; but, in addition to setting out some political principles particular to Canadian government, the *Charter* purports to articulate certain universal principles and import them into Canadian law – freedom of religion, equality before the law, *etc.* By pointing to certain universal freedoms which positive law is required to protect, the *Charter* (intentionally or unwittingly) draws on sources which lie outside of positive law. Part of the task which Canadian courts must undertake when interpreting the content of those universal freedoms is to explore and understand the principles which flow from those other sources. Theology and philosophy are those other sources; faith and reason are the methods by which their principles are discerned. Looked at in this way, "the supremacy of God" and "the rule of law" are the principles upon which Canada is founded, *and the Preamble demarks the point from which courts must depart in their efforts to interpret and apply the general principles of the Charter to the particular acts of Canadian governments. The Preamble challenges courts to engage in the politically necessary analysis of the relationship between the transcendental and the temporal in democratic life.*[38]

The supremacy of God, in other words, is what infuses the *Charter*'s provisions, its "supreme" laws, with a claim to social justice and a foundation of moral legitimacy. It is from this aspirational quality of *Charter* interpretation, I would suggest, that the primacy of human dignity derives. This connection is not unknown to *Charter* jurisprudence. For example, in *R. v. Beare,*[39] Chief Justice Bayda for the Saskatchewan Court of Appeal elaborated the concept of human dignity with reference to the supremacy of God as set out in the Preamble.

> It would be incongruous if a *Charter* which expressly recognizes the supremacy of God (in the preamble) and impliedly (no less than the Canadian Bill of Rights, R.S.C. 1970, App. III, expressly in its preamble) the dignity and worth of the human person were to shield a person from the loss of a finger but not from the loss of his self respect. (I note that the inherent dignity of a person has at least two aspects: first, that threshold level of dignity and worth which defines humanness and which is the birthright of every individual regardless of societal perceptions of human worth and regardless of individual perceptions of self-worth; second, that dignity and self-worth that an individual derives from his own sense of self-respect).[40]

---

[38] *Supra* note 30 at 563 [emphasis added].

[39] 56 Sask. R. 173 (C.A.).

[40] *Ibid.* at 181.

Of course, such judicial experimentations with the possible meaning of the Preamble have been the exception and not the rule. To return to the problem posed at the outset, how would the Court's elaboration of human dignity as a constitutional norm differ if it were primarily rooted in the supremacy of God as a normative framework? For one thing, I believe dignity could no longer be understood solely as individual autonomy, but also as social interdependency. In *Gosselin*, such a view would tend to cast suspicion on the majority judgment of Chief Justice McLachlin, discussed above.

More kindred with the perspective on human dignity advanced through the lens of the supremacy of God is the vigorous dissent Justice Arbour offered in *Gosselin* (although, unsurprisingly, no reference to the Preamble is found in her reasons). She focused on the right to life contained in s. 7 as a necessary prerequisite to all other *Charter* rights and concluded:

> One should not readily accept that the right to life in s. 7 means virtually nothing. To begin with, this result violates basic standards of interpretation by suggesting that the *Charter* speaks essentially in vain in respect of this fundamental right. More importantly, however, it threatens to undermine the coherence and purpose of the *Charter* as a whole. After all, the right to life is a prerequisite – a *sine qua non* – for the very possibility of enjoying all the other rights guaranteed by the *Charter*. To say this is not to set up a hierarchy of *Charter* rights. No doubt a meaningful right to life is reciprocally conditioned by these other rights: they guarantee that human life has dignity, worth and meaning. Nevertheless, the centrality of the right to life to the *Charter* as a whole is obvious. Indeed, it would be anomalous if, while guaranteeing a complex of rights and freedoms deemed to be necessary to human fulfilment within society, the *Charter* had nothing of significance to say about the one right that is indispensable for the enjoyment of all of these others.[41]

As a further and related example of this different approach to human dignity, consider the case of Kimberley Rogers, the Ontario welfare recipient who, while in the third trimester of a pregnancy, was sentenced to house arrest for fraud because she had received student loans and failed to disclose these amounts to the welfare authorities. Rogers' case gained notoriety because she died while confined to her apartment of an apparent overdose of medications. Rogers succeeded in obtaining a constitutional exemption from the effect of a ban on receiving welfare which would have left her confined to her apartment with no source of income whatsoever. In granting this exemption, Justice Epstein offered the following rationale based on a social notion of human dignity:

> [i]f the applicant is exposed to the full three-month suspension of her benefits, a member of our community carrying an unborn child may well be homeless and deprived of basic sustenance. Such a situation would jeopardize the health of Ms. Rogers and the fetus, thereby adversely affecting not only mother and child but also the public – its dignity, its human rights commitments and its health care resources.

---

[41] *Supra* note 11 at para. 346.

> For many reasons, there is overwhelming public interest in protecting a pregnant woman in our community from being destitute.[42]

The implications of this approach to human dignity are far reaching. If our collective dignity is undermined by members of our community being "deprived of basic sustenance" by the failure of the state to provide sufficient support through welfare benefits, then the *Charter* may require of the state proactive obligations to care for its most vulnerable citizens. As Oscar Schachter has asserted,

> [f]ew will dispute that a person in abject condition, deprived of adequate means of subsistence, or denied the opportunity to work, suffers s profound affront to his sense of dignity and intrinsic worth. Economic and social arrangments can not therefore be excluded from a consideration of the demands of dignity. At the least, it requires recognisiton of a minimal concept of distributive justice that would require satisfaction of the essential needs of everyone.[43]

What could justify this judicial intrusion into the sovereignty of Parliament to decide how it wishes to allocate resources? The answer likely would not be the rule of law, which restrains government action rather than compelling it. In my view, the supremacy of God provides a basis for subsuming the will of Parliament to certain, higher constitutional obligations – obligations of the kind Epstein alludes to in *Rogers*, and Justice Arbour emphasizes in *Gosselin*. While recourse to the Preamble and the supremacy of God is not necessary to achieve this interpretation of s. 7 or of the *Charter* generally, it serves to focus the debate on the universal aspirations contained in the concept of human dignity. It provides the moral architecture of the *Charter* with a series of possible blueprints.

Finally, while I have strong convictions about the relationship between the "supremacy of God", human dignity and the obligations which ought to be imposed on the state by virtue of the *Charter*, it is important to reiterate that such interpretive conclusions always will remain a leap of faith. The blueprint is not complete and waiting to be uncovered – rather, it is a collaborative work in progress. My advocacy for a rejuvenated role for the supremacy of God in constitutional jurisprudence does not depend on a court adopting my own version of its content – rather, my position depends on courts acknowledging that *all* interpretive conclusions regarding the content and meaning of the *Charter* embody moral claims which, to be accepted, must derive from conviction and be susceptible to justification. While personal, spiritual convictions may rest on faith alone, constitutional principles require justification and can only be sustained, in the long run, by social consensus. A leap of faith regarding the moral content of human dignity requires reasons. The leap of faith which I find most compelling, for example, is that human dignity as a *Charter* norm ought to encompass and elaborate the claim that all human beings merit equal moral worth and recognition by the

---

[42] *Rogers v. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 460 at para. 19.

[43] *Supra* note 2 at 851.

state, and that this imposes positive obligations on governments to meet the basic needs of those dependant on state assistance (whether this conviction springs from secular or spiritual sources seems to me to be beside the point). What the Supreme Court of Canada has failed to do, in my view, is precisely this – subject its faith in, and claims regarding, the content of human dignity to the test of reason and justification. What I have suggested in this essay is that until the Court does so, the purposes of human dignity will remain unrevealed, and the edifice of the *Charter* will remain a façade.

THE "SUPREMACY OF GOD", HUMAN DIGNITY AND THE *CHARTER OF RIGHTS AND FREEDOMS*

Lorne Sossin*

> "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:"[1]

I. Introduction

While the *Canadian Charter of Rights and Freedoms* is now two decades old, and past its natural adolescence, we have yet to grapple with some of the most fundamental precepts, premises and principles which animate it. This essay is intended to explore two of these: the concept of human dignity, which does not appear in the *Charter*, and the concept of the supremacy of God, which are the first words to appear in the *Charter*.

Is human dignity a judicially cognizable concept? No evidence can prove or disprove its existence and no doctrinal test can precisely define its boundaries. It is a construction of personal conviction, individual belief, culture and social relations. As Oscar Schachter once observed,

> references to human dignity are to be found in various resoultions and declarations of international bodies. National constitutions and proclamations, especially those recently adopted, include the ideal or goal of human dignity in their references to human rights. Political leaders, jurists and philosophers have increasingly alluded to the dignity of the human person as a basic ideal so generally recognized so as to require no independant support. It has acquired a resonance that leads it to be invoked widely as a legal and moral ground for protest against degrading and abusive treatment. No other ideal seems so clearly accepted as a universal social good.[2]

It reflects, in short, a leap of faith. The Supreme Court has stated on several

---

* Associate Professor, Faculty of Law, University of Toronto. I have had helpful discussions with a number of colleagues about the ideas in this essay. I am particularly grateful to Harry Arthurs, Alan Brudner, Julia Hanigsberg, Gerald Kernerman, Lorraine Weinrib & Ernest Weinrib. I would also like to acknowledge the excellent research assistance of Douglas Sanderson and Caroline Libman in the preparation of this essay.

[1] Preamble to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 [Charter].

[2] Oscar Schachter, "Human Dignity as a Normative Concept" (1983) 77 A.J.I.L. 848 at 848-849.

occasions that the *Charter* and the rights it guarantees are "inextricably bound" to "concepts of human dignity."[3] Human dignity, the Court has observed more broadly, is an underlying principle upon which our society is based.[4] It is, however, nowhere to be found in the *Charter*. It is a judicial contrivance, albeit a welcome one. It is welcome because it hints at a moral infrastructure to the *Charter*, supporting and welding together the various freedoms, rights and obligations outlined in the *Charter*. Thus far, though, this moral infrastructure has lacked coherence and clarity. In other words, what the *Charter* needs is a more express and better justified moral architecture.

If human dignity represents the concept outside the actual terms of the *Charter* about which the Court has said the most, the reference in the Preamble of the *Charter* to the "supremacy of God" represents the actual term in the *Charter* about which the Court has said the least. The supremacy of God, like human dignity, is difficult to concieve as a justiciable concept. It cannot be substantiated nor can it be disproven. Unlike human dignity, however, the supremacy of God has not been the subject of creative judicial elaboration. Not even the most basic questions about its place and purpose in the *Charter* have been addressed. Whose God is supreme and supreme in what way? Are the supremacy of God and the rule of law intended to be complementary constitutional principles, or distinct? How can and should the supremacy of God be reconciled with the freedom of conscience and religion provisions under s. 2 of the *Charter*?

The argument I advance in this essay is as follows. The reference to the supremacy of God in the *Charter*'s Preamble should be given meaning as an animating principle of constitutional interpretation, on par with the rule of law with which it is paired. To embrace the rule of law while abandoning the supremacy of God is to neglect the governing premise of the *Charter*. The supremacy of God, in turn, can only play a meaningful role in constitutional interpretation if it is taken as a general statement regarding the universal, normative aspirations of the *Charter*, rather than as 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*. The concept of human dignity represents a key normative aspiration of *Charter* jurisprudence. It has rarely been justified or elaborated, however, on normative terms. Rather, the Supreme Court has tended to treat its articulation of the scope and content of human dignity as an article of faith, simply to be invoked along the way to what the Court has deemed a just outcome of a *Charter* challenge. I argue that if the concept of human dignity was linked with the supremacy of God in the *Charter*'s Preamble, it would be incumbent on courts to justify their claims regarding human dignity as a leap of faith, and a more coherent and robust elaboration of the *Charter*'s moral architecture would result.

---

[3] See the discussion of human dignity and the jurisprudence of the Court in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 76.

[4] *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 at 592.

II. Human Dignity as the Unity of Faith and Reason

Joel Bakan has observed, "constitutional argument may best be understood as a call to faith rather than persuasion by reason."[5] The Preamble to the *Charter* proposes that Canada was founded "upon principles that recognize the supremacy of God and the rule of law". It contains an explicit paradox by which our constitution recognizes both the sovereignty of God and of law.[6]

I suggest that the Preamble contains not so much a paradox as a "call to faith" regarding the nature of the *Charter*. The reference to the supremacy of God in the *Charter* should not be construed so as to suggest one religion is favoured over another in Canada, nor that monotheism is more desirable than polytheism, nor that the God-fearing are entitled to greater rights and privileges than atheists or agnostics. Any of these interpretations would be at odds with the purpose and orientation of the *Charter*, as well as with the specific provisions regarding freedom of religion and conscience under s. 2.[7] Rather, I argue that the supremacy of God should be seen as a twin pillar to the "rule of law" – as a moral complement to the descriptive protections and rights contained in the *Charter*. The concept of human dignity may serve to bridge these pillars and unite faith with reason in constitutional discourse. Because the Court's articulation of human dignity has been disconnected from any appeal to moral authority, however, it has served as a shifting, ineffective, and often incoherent constitutional norm.

In *Law v. Canada (Minister of Employment and Immigration)*, the Court offered the following articulation of human dignity as a constitutional norm in the context of the equality analysis under s.15 of the *Charter*:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of difference individuals, taking into account the context of their underlying differences. Human dignity is harmed when individuals and groups are marginalized, ignited or devalued, and is enhanced when laws recognize the full place of individuals and groups within Canadian society.[8]

While many may agree that human dignity ought to be a cornerstone of Canada's system of justice, there is far less agreement as to what constitutes human

---

[5] Joel C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) Osgoode Hall L.J. 123 at 193.

[6] For a consideration of the *Charter*'s paradoxes more generally, see R. A. MacDonald, "Postscript and Prelude – The Jurisprudence of the Charter: Eight Theses" (1982) 4 Supreme Court L.R. 321.

[7] Interestingly, however, the *Constitution Act* of 1867 expressly privileges certain religious groups (Catholics and Protestants) over others with respect to educational rights in particular provinces.

[8] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 53.

dignity and what role it should play in constitutional interpretation. Does human dignity encompass only negative freedoms, such as the right not to have one's bodily integrity or privacy violated or may it extend to positive freedoms, such as the right to adequate food, shelter, clothing, health care, legal assistance and education? The concept of human dignity is inherently subjective, informed by personal predilection, community values, religious doctrine, ethnic identity, gender, race, age and ideological conviction, just to scratch the surface. It is also expressly normative. Every attempt to describe its essence or apply it as a constitutional principle embodies a claim regarding morally good and socially just relations between individuals, groups and the state. In short, adopting a particular understanding of human dignity requires a leap of faith.

A review of the major Supreme Court decisions featuring a discussion of human dignity and the *Charter* discloses that it has been invoked by the Court most often in six legal settings: psychological integrity; physical security; privacy; personal autonomy; professional reputation; and personal affiliation or group identity.[9] What links together these concerns? In most of these categories, human dignity appears as a manifestation of the liberal, individual ethos – in other words, human dignity is about what makes individuals unique and self-contained. The Court, however, does not justify its use of this concept on those or any terms. Human dignity appears to the Court as an organizing principle of Canadian society – as the underpinning of what some observers have identified as "legal humanism."[10]

If one looks at human dignity through the lens of the supremacy of God, a different set of claims regarding its content and scope may emerge. For example, if I take the supremacy of God to reflect the conviction that all people have equal moral worth, then human dignity is not just what separates us as individuals but also rather what binds us together as a community of mutual obligation. On this view of human dignity, it would be untenable to see the loss of professional reputation as an issue of human dignity, but not the right to a roof over your head, or food to feed your family, or adequate health care. Human dignity, if taken as a social as well as individual norm, renders untenable the sharp line between negative and positive constitutional liberties.

To illustrate the shortcoming of the present paradigm, consider the recent decision of the Supreme Court in *Gosselin v. Quebec*.[11] In this case, the Court considered, *inter alia*, whether the state owed a positive obligation of providing social welfare as a result of the right to life, liberty and the security of the person under s. 7 of the *Charter*. The majority concluded that no person had a right to welfare under the *Charter*. Earlier case law from the Court had left open the possibility of "economic rights fundamental to human...survival" being protected

[9] This is drawn from a "human dignity database" of approximately 60 cases. This database is on file with the author and will form the basis of a larger research project on the content and scope of human dignity as a constitutional principle in Canada.

[10] See David Feldman, "Human Dignity as a Legal Value – Part 1" (1999) Pub. L. 682.

[11] 2002 SCC 84.

by the *Charter*.[12] In *Gosselin*, the majority held that this section related at its core to protecting the individual in the administration of justice. While they did not close the door on recognizing positive obligations on the state in "special circumstances," a duty on the government to ensure the economic survival of vulnerable citizens was, in the majority's view, beyond the scope of the *Charter*.

Thus, the concept of human dignity has been harnessed thus far by the Court, as often to underscore the limitations of the *Charter* as to extend its grasp. There is no discussion of where human dignity comes from, except to say that it is "fundamental" and "essential" to the operation of the *Charter*. It is in precisely these circumstances, where the animating principles of a constitutional document are at issue, that a Preamble may take on special significance.

III. The Significance of the *Charter*'s Preamble

Preambles serve as an important interpretive tool, but they do not have the force of law. For this reason, they enjoy uneven influence over courts in the interpretation of statutes. While not all preambles attract judicial attention or reflect legislative aspiration,[13] it is fair to observe that Constitutional preambles often do. Indeed, the Preamble to the *Constitution Act of 1867*, which establishes that Canada's Constitution is "similar in principle" to that of the United Kingdom, has been the foundation for a variety of judicial innovations from the "implied bill of rights" to "judicial independence".[14]

Preambles are arguably even more significant when the object of a constitutional document is to protect rights and freedoms rather than apportion political and legislative authority. While God does not make an appearance in the preamble of the *Constitution Act of 1867*, the reference to the supremacy of God in the Canadian *Bill of Rights* is instructive. It reads, in part:

> The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions...

The Preamble to the Bill of Rights goes on to assert that "men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;..." Thus, the connection between human dignity and the supremacy of God, between moral and spiritual values on the one hand and the rule

---

[12] *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927 at 1003.

[13] For a recent study, see Kent Roach, "The Uses and Audiences of Preambles in Legislation" (2001) 47 McGill L.J. 129.

[14] See Mark D. Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51 U.T.L.J. 91.

of law on the other, which I suggest is implicit in the *Charter*, was set out explicitly in the *Bill of Rights*. Or, put differently, the conception of God as a constitutional concept in Canada is intimately bound up with our affirmation of the moral worth and inherent dignity of all people. As Polka has written: "The supremacy of God is not merely compatible with but fundamental to the rule of law, just as the rule of law (including the rule of lawful interpretation) is not merely compatible with but fundamental to conceiving of God as supreme."[15]

IV. The Supremacy of God

Where did the "supremacy of God" come from and how did it find its way into the *Charter*? On the one hand, the provenance of the term is an important issue. Its inclusion was advocated by religious groups and linked by those groups with a particular conservative social agenda (hostile to gay and lesbian rights, staunchly pro-life, etc.). This conservative agenda also had political overtones, as those who supported the amendment justified it as a bulwark against Soviet Union style atheistic tendencies. The term "supremacy of God" was inserted as an amendment to the *Charter*'s Preamble as a result of a motion late in the process made in the House of Commons by the Honourable Jake Epp, MP, in February, 1981. It was accepted by Prime Minister Trudeau (albeit, one must imagine, reluctantly). Thus, the first words of the *Charter* were more or less the last to be drafted.

Perhaps in part because of its inglorious origins, the "supremacy of God" reference in the *Charter*'s preamble has been all but ignored by the Supreme Court,[16] and by most constitutional observers as well.[17] David Brown observed that, "[a]lthough the Preamble suggests that all other rights and freedoms set out in the *Charter* are founded on these two principles, courts and academics have treated the Preamble, especially in its reference to the "supremacy of God," as an embarrassment to be ignored." Peter Hogg has referred to the Preamble as "of little assistance". Dale Gibson maintains the view that "its value as an interpretative aid is seriously to be doubted." The British Columbia Court of Appeal recently characterized the Preamble's reference to the "supremacy of God" as a "dead letter."[18] Below, I briefly summarize the treatment of the Preamble by Canadian courts and commentators.

---

[15] Brayton Polka, "The Supremacy of God and the Rule of Law in the Canadian *Charter of Rights and Freedoms*: A Theologico-Political Analysis" (1987) 32 McGill L.J. 854 at 857.

[16] The rule of law component of the Preamble has been cited more often: see, for example, *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486, and *Reference re: Manitoba Language Rights (Man.)*, [1985] 1 S.C.R. 721.

[17] *Supra* note 15.

[18] *R. v. Sharpe*, [1999] B.C.J. No. 1555 at paras. 78-80, per Justice Southin.

1) The Jurisprudence

At a conference some years ago, I asked a Supreme Court Justice about what he thought the supremacy of God's role was in *Charter* analysis. He looked visibly uncomfortable. He stammered something about the importance of freedom of religion in s. 2 of the *Charter* and invited the next question as soon as he could. This seems to me to sum up the collective orientation of the Court. What can a secular Court in a multicultural society say about the supremacy of God except to look away and ask for the next question? And yet, how can the Court sidestep the principles on which rest the "supreme law" to which they are charged with giving life?

The one notable instance where the Supreme Court has opined on the meaning of the "supremacy of God" revealed a fairly one-dimensional approach to its meaning, focussing on the question of the primacy of Christian values in Canada's legal order. The case was *Big M Drug*,[19] in which a drug store sought to have the Sunday closing provisions of the *Lord's Day Act* struck down as offending the freedom of religion guaranteed under s. 2 of the *Charter*. A dissenting judge of the Alberta Court of Appeal had defended the legislation by recourse to, *inter alia*, the "supremacy of God" provision in the Preamble. About this, Chief Justice Dickson had the following to say:

> Mr. Justice Belzil said it was realistic to recognize that the Canadian nation is part of "Western" or "European" civilization, moulded in and impressed with Christian values and traditions, and that these remain a strong constituent element in the basic fabric of our society. The judge quoted a passage from The Oxford Companion to Law (1980) expatiating on the extent of the influence of Christianity on our legal and social systems and then appears the *cri du coeur* central to the judgment at pp. 663-64:
>
> > I do not believe that the political sponsors of the *Charter* intended to confer upon the courts the task of stripping away all vestiges of those values and traditions, and the courts should be most loath to assume that role. With the Lord's Day Act eliminated, will not all reference in the statutes to Christmas, Easter, or Thanksgiving be next? What of the use of the Gregorian Calendar? Such interpretation would make of the *Charter* an instrument for the repression of the majority at the instance of every dissident and result in an amorphous, rootless and godless nation contrary to the recognition of the Supremacy of God declared in the preamble. The "living tree" will wither if planted in sterilized soil.[20]

Ultimately Chief Justice Dickson declined to offer his own interpretation of the "supremacy of God" clause in the *Charter*'s Preamble, although, of course, the impugned provision in the *Lord's Day Act* was in fact struck down. Importantly, *Big M Drug* was also the case in which the Court affirmed that the *Charter* was to

---

[19] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

[20] *Ibid.* at paras. 30-31.

be given generous and liberal interpretation.

Later references by the Supreme Court to the Preamble have been to contrast the Preamble with substantive guarantees under s. 2 of the *Charter*. Take, for example, the judgment of Justice Wilson in *R. v. Morgentaler*,[21] in which she observed that conscientious beliefs which are not religiously motivated enjoy the same constitutional protection under s. 2(a) of the *Charter* as those which may be religiously motivated. She then added, "In so saying I am not unmindful of the fact that the *Charter* opens with an affirmation that "Canada is founded upon principles that recognize the supremacy of God...." But I am also mindful that the values entrenched in the *Charter* are those which characterize a free and democratic society."[22] Justice Wilson offered no explanation for the apparent conflict between the supremacy of God on the one hand and the values of a free and democratic society on the other.[23]

Almost universally, and without serious inquiry, Canadian lower courts have equated the "supremacy of God" with a claim to religious orientations generally and Christian ones specifically. For example, in *McBurney v. Canada (Minister of National Revenue – M.N.R.)*,[24] Justice Muldoon referred to the support religious institutions receive from the state in the form of charitable deductions and concluded that:

> [t]hose Canadians who profess atheism, agnosticism or the philosophy of secularism are just as secure in their civil rights and freedoms as are those who profess religion. So it is that while Canada may aptly be characterized as a secular State, yet, being declared by both Parliament and the Constitution to be founded upon principles which recognize "the supremacy of God," it cannot be said that our public policy is entirely neutral in terms of "the advancement of religion."[25]

Revealingly, tax litigation has been the most common forum for the "supremacy of God" to be discussed. To take another example, in *O'Sullivan v. Canada (Minister of National Revenue – M.N.R.)*,[26] the Federal Court dismissed a taxpayer's claim to withhold $50 from his income tax return because such money might ultimately fund abortions. The taxpayer urged the Court to consider the "supremacy of God" clause in its analysis. The Federal Court responded by tracing the

---

[21] [1988] 1 S.C.R. 30.

[22] *Ibid.* at para. 251.

[23] The scholarly literature has often equated the two as well. William Klassen points out: "To mention God with a capital letter in the preamble to the *Charter* and then to go on to say that the *Charter* provides a fundamental freedom of conscience and religion, is a contradiction which even a theologian, to say nothing of all the lawyers, must surely recognize." William Klassen, "Religion and the Nation: An Ambiguous Alliance" (1991) 40 U.N.B.L.J. 87 at 95.

[24] [1984] C.T.C. 466.

[25] *Ibid.* at 468-69.

[26] [1992] 1 F.C. 522.

importance of religion in the development of Canada and then offered the following conclusion:

> [T]he late amendment to the *Charter* in 1981 cannot be construed to have converted Canada into a Roman Catholic theocracy, a Mennonite theocracy, an Anglican theocracy or a Jehovah's Witnesses' theocracy any more than Canada was thereby converted into an Islamic theocracy (whether Sunnite or Shiite), a Hindu theocracy, a Sikh theocracy, or a Buddhist theocracy.
>
> What then is meant by this preamble? Obviously it is meant to accord security to all believers in God, no matter what their particular faith and no matter in what beastly manner they behave to others. In assuring that security to believers, this recognition of the supremacy of God means that, unless or until the Constitution be amended – the best of the alternatives imaginable – Canada cannot become an officially atheistic State, as was the Union of Soviet Socialist Republics or as the Peoples' Republic of China is understood to be.[27]

On this view, the significance of the "supremacy of God" provision is to preclude any official recognition of atheism by the state, but not to preclude the secular nature of the state.[28] This narrow and literalistic approach does not seem in keeping with either the purpose or spirit of the *Charter*. Suffice it to say that, to date, Canadian courts have not brought the vigor to the elaboration of the supremacy of God that has been directed to enlarging concepts such as the rule of law.

2) The Commentary

While the dividing line between the sacred and the profane has rarely been an object of great interest among constitutional law scholars in Canada, it is fair to say that interest in this area is picking up as the *Charter* matures. This emerging literature, moreover, has been far more creative in approaching the Preamble than has the more literal-minded judiciary. For example, in his article, "Notes Towards a (Re)definition of the "Secular,""[29] Iain Benson criticizes the use of "secular" by Canadian courts in relation to the *Charter*:

> The term "secular" has come to mean a realm that is neutral or, more precisely, "religion-free." Implicit in this religion free neutrality is the notion that the secular is a realm of facts distinct from the realm of faith. This understanding, however, is in error. Parse historically the word "secular" and one finds that secular means something like non-sectarian or focused on this world, not "non-faith." States cannot be neutral towards metaphysical claims. Their very inaction towards certain claims operates as an affirmation of others. This realization of the faith-based nature of all

---

[27] *Ibid.* at paras. 17-18.

[28] See also *Canada (Canadian Human Rights Commission) v. Canada (Department of Indian and Northern Affairs Development) (Re Prince)*, [1994] F.C.J. No. 1998.

[29] (2000) 33 U.B.C. L. Rev. 519.

> decisions will be important as the courts seek to give meaning to terms such as secular in statutes written some time ago.[30]

In a similar vein, David Brown suggests the Preamble itself may help to reconcile the tension between the *Charter*'s secular and sacred claims.What the Preamble instructs, according to Brown, is that "legal freedoms must be interpreted with humility stemming from man's "creatureliness", as well as with the objective of ensuring all human beings enjoy fundamental legal protection for their human dignity as creatures. The supremacy of God thus mandates that all humans be treated in accordance with the rule of law."[31] A similar view of the complementary nature of the supremacy of God and rule of law was espoused by David Crombie, then an MP, during the debate on the Preamble in 1981. He observed, "...when legal orders relate to spiritual principles, it allows for diversity and dissent. The roots of democratic dissent have always begun with religious dissent; laws imposed by government were always fought on the basis of an appeal to God."[32]

If supremacy of God is seen as the place where normative claims about *Charter* rights take on moral legitimacy (again, the example I focus upon in this essay is the concept of human dignity), one might well question what remains of God at all in this analysis. Is not God, cleansed of religious particularity, simply the embodiment of general and metaphysical claims about the sources and scope of law? The answer, I think, is probably "yes". Moreover, I would argue that this is precisely the reading of the term most compatible with the values of the *Charter*. Thus, ironically, the process of breathing life into the idea of the supremacy of God in the *Charter* may well alienate precisely those groups seeking the advancement of religion or religious agendas through the courts.

William Klassen concludes his analysis of the Preamble by suggesting that it would have been preferable to leave God out of the *Charter* altogether, and assert instead that Canada was founded on "transcendent principles" and the rule of law.[33] While inelegant, I agree that this more precisely captures the approach to interpreting the Preamble advocated in this essay. Precise language, however, is far from the norm in the *Charter*. Indeed, in its ambiguities have been found, arguably, its most expansive and progressive protections. To take but one example, consider the "principles of fundamental justice" under s. 7 of the *Charter*. The term had a largely uneventful history as an adjunct to the "fair hearing" right under s. 2(e) of the *Bill of Rights*, and was selected by the drafters of the *Charter*, in large part, to

---

[30] *Ibid.* at 520. Benson takes issue with Chief Justice Lamer's characterization in his dissent in *Rodriguez* (*supra* note 4), that the *Charter* has established the essentially secular nature of Canadian society and therefore ensures a central place for freedom of conscience in public institutions. The dichotomy between secular as conscience enhancing and non-secular as conscience undermining is, in Benson's view, both unsupported and counterintuitive.

[31] David M. Brown, "Freedom from or Freedom for?: Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 U.B.C.L. Rev. 551 at 563.

[32] Excerpted in Klassen, *supra* note 23 at 94.

[33] *Ibid.* at 95.

distance the *Charter*, and s. 7 specifically, from the substantive due process jurisprudence of the US (which led to, among other maelstroms, *Roe v. Wade*).[34] Faced with an ambiguous term, the Supreme Court of Canada gave the legislative history of the *Charter* a vote but not a veto over the content of "fundamental justice". In *Re B.C. Motor Vehicle Act*,[35] the Court affirmed that, notwithstanding the intent of the drafters as expressed in Parliamentary debates and other records of the time, the principles of fundamental justice indeed contained a substantive as well as procedural content. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, the Court held that this content is informed not just by the "basic tenets of our legal system" but also by international law.[36] Just as the principles of fundamental justice could be read as a repository for the tenets of our legal system, so I contend the supremacy of God should be read as a repository for the tenets of our moral system and commitments to social justice (notwithstanding that the drafters' intent for this clause in the Preamble may have been something quite different).

In light of this alternative view of the Preamble's effect, it is clearly necessary to move beyond religious sectarianism in order to understand God as a constitutional paradigm. It is to a brief sketch of the contours of such a paradigm, and the proper place of human dignity within it, that I now turn by way of conclusion.

V. Dignifiying the *Charter* by Constitutionalizing God

I have suggested that there is a larger role for the supremacy of God in the Preamble to the *Charter* that has nothing whatever to do with religious convictions or particular religious traditions but, rather with universal aspirations to moral good and social justice. No one religious or secular or political or judicial leader has unique or superior insight into the meaning or mandate of God; rather, this term's incorporation in the *Charter* should be seen as an invitation to contest and engage in dialogue about the normative foundations of *Charter* rights, and first among these foundations is the content of human dignity. In short, claims on the scope and content of human dignity are leaps of faith, not in the name of a supernatural deity, but rather in the name of our own collective moral aspirations.

This is not to say that spirituality and religious conviction are irrelevant to the enterprise of constitutional interpretation. Interpretations of human dignity may, and in my view, should include perspectives derived from religious literatures. My own interest has been in the development of human dignity as a legal norm in Jewish law,[37] but it may just as easily flow from the cosmological implications of

---

[34] A. Gold, "The Legal Rights Provision: A New Vision or Deja Vu?" (1982) 4 Supreme Court L. R. 107 at 110-11.

[35] *Re B.C. Motor Vehicle Act*, *supra* note 16.

[36] 2002 SCC 1 at paras. 45-47.

[37] See, for example, N. Rakover, *Human Dignity in Jewish Law* (Jerusalem: The Library of Jewish Law - Ministry of Justice - The Jewish Legal Heritage Society, 1998).

aboriginal justice, the philosophies of Kant or Levinas, or the revelations of artists, physicists or mathematicians. To do justice to the Preamble's "call to faith", all must agree only that a set of justifiable, moral convictions must reside alongside the rule of law and animate the rights and freedoms guaranteed in the *Charter*. David Brown attempted to capture this distinction between the positive and normative dimensions of the Preamble in the following terms:

> Now the *Charter* is very much the product of positive law; but, in addition to setting out some political principles particular to Canadian government, the *Charter* purports to articulate certain universal principles and import them into Canadian law – freedom of religion, equality before the law, *etc.* By pointing to certain universal freedoms which positive law is required to protect, the *Charter* (intentionally or unwittingly) draws on sources which lie outside of positive law. Part of the task which Canadian courts must undertake when interpreting the content of those universal freedoms is to explore and understand the principles which flow from those other sources. Theology and philosophy are those other sources; faith and reason are the methods by which their principles are discerned. Looked at in this way, "the supremacy of God" and "the rule of law" are the principles upon which Canada is founded, *and the Preamble demarks the point from which courts must depart in their efforts to interpret and apply the general principles of the Charter to the particular acts of Canadian governments. The Preamble challenges courts to engage in the politically necessary analysis of the relationship between the transcendental and the temporal in democratic life.*[38]

The supremacy of God, in other words, is what infuses the *Charter*'s provisions, its "supreme" laws, with a claim to social justice and a foundation of moral legitimacy. It is from this aspirational quality of *Charter* interpretation, I would suggest, that the primacy of human dignity derives. This connection is not unknown to *Charter* jurisprudence. For example, in *R. v. Beare,*[39] Chief Justice Bayda for the Saskatchewan Court of Appeal elaborated the concept of human dignity with reference to the supremacy of God as set out in the Preamble.

> It would be incongruous if a *Charter* which expressly recognizes the supremacy of God (in the preamble) and impliedly (no less than the Canadian Bill of Rights, R.S.C. 1970, App. III, expressly in its preamble) the dignity and worth of the human person were to shield a person from the loss of a finger but not from the loss of his self respect. (I note that the inherent dignity of a person has at least two aspects: first, that threshold level of dignity and worth which defines humanness and which is the birthright of every individual regardless of societal perceptions of human worth and regardless of individual perceptions of self-worth; second, that dignity and self-worth that an individual derives from his own sense of self-respect).[40]

---

[38] *Supra* note 30 at 563 [emphasis added].

[39] 56 Sask. R. 173 (C.A.).

[40] *Ibid.* at 181.

Of course, such judicial experimentations with the possible meaning of the Preamble have been the exception and not the rule. To return to the problem posed at the outset, how would the Court's elaboration of human dignity as a constitutional norm differ if it were primarily rooted in the supremacy of God as a normative framework? For one thing, I believe dignity could no longer be understood solely as individual autonomy, but also as social interdependency. In *Gosselin*, such a view would tend to cast suspicion on the majority judgment of Chief Justice McLachlin, discussed above.

More kindred with the perspective on human dignity advanced through the lens of the supremacy of God is the vigorous dissent Justice Arbour offered in *Gosselin* (although, unsurprisingly, no reference to the Preamble is found in her reasons). She focused on the right to life contained in s. 7 as a necessary prerequisite to all other *Charter* rights and concluded:

> One should not readily accept that the right to life in s. 7 means virtually nothing. To begin with, this result violates basic standards of interpretation by suggesting that the *Charter* speaks essentially in vain in respect of this fundamental right. More importantly, however, it threatens to undermine the coherence and purpose of the *Charter* as a whole. After all, the right to life is a prerequisite – a *sine qua non* – for the very possibility of enjoying all the other rights guaranteed by the *Charter*. To say this is not to set up a hierarchy of *Charter* rights. No doubt a meaningful right to life is reciprocally conditioned by these other rights: they guarantee that human life has dignity, worth and meaning. Nevertheless, the centrality of the right to life to the *Charter* as a whole is obvious. Indeed, it would be anomalous if, while guaranteeing a complex of rights and freedoms deemed to be necessary to human fulfilment within society, the *Charter* had nothing of significance to say about the one right that is indispensable for the enjoyment of all of these others.[41]

As a further and related example of this different approach to human dignity, consider the case of Kimberley Rogers, the Ontario welfare recipient who, while in the third trimester of a pregnancy, was sentenced to house arrest for fraud because she had received student loans and failed to disclose these amounts to the welfare authorities. Rogers' case gained notoriety because she died while confined to her apartment of an apparent overdose of medications. Rogers succeeded in obtaining a constitutional exemption from the effect of a ban on receiving welfare which would have left her confined to her apartment with no source of income whatsoever. In granting this exemption, Justice Epstein offered the following rationale based on a social notion of human dignity:

> [i]f the applicant is exposed to the full three-month suspension of her benefits, a member of our community carrying an unborn child may well be homeless and deprived of basic sustenance. Such a situation would jeopardize the health of Ms. Rogers and the fetus, thereby adversely affecting not only mother and child but also the public – its dignity, its human rights commitments and its health care resources.

---

[41] *Supra* note 11 at para. 346.

> For many reasons, there is overwhelming public interest in protecting a pregnant woman in our community from being destitute.[42]

The implications of this approach to human dignity are far reaching. If our collective dignity is undermined by members of our community being "deprived of basic sustenance" by the failure of the state to provide sufficient support through welfare benefits, then the *Charter* may require of the state proactive obligations to care for its most vulnerable citizens. As Oscar Schachter has asserted,

> [f]ew will dispute that a person in abject condition, deprived of adequate means of subsistence, or denied the opportunity to work, suffers s profound affront to his sense of dignity and intrinsic worth. Economic and social arrangments can not therefore be excluded from a consideration of the demands of dignity. At the least, it requires recognisiton of a minimal concept of distributive justice that would require satisfaction of the essential needs of everyone.[43]

What could justify this judicial intrusion into the sovereignty of Parliament to decide how it wishes to allocate resources? The answer likely would not be the rule of law, which restrains government action rather than compelling it. In my view, the supremacy of God provides a basis for subsuming the will of Parliament to certain, higher constitutional obligations – obligations of the kind Epstein alludes to in *Rogers*, and Justice Arbour emphasizes in *Gosselin*. While recourse to the Preamble and the supremacy of God is not necessary to achieve this interpretation of s. 7 or of the *Charter* generally, it serves to focus the debate on the universal aspirations contained in the concept of human dignity. It provides the moral architecture of the *Charter* with a series of possible blueprints.

Finally, while I have strong convictions about the relationship between the "supremacy of God", human dignity and the obligations which ought to be imposed on the state by virtue of the *Charter*, it is important to reiterate that such interpretive conclusions always will remain a leap of faith. The blueprint is not complete and waiting to be uncovered – rather, it is a collaborative work in progress. My advocacy for a rejuvenated role for the supremacy of God in constitutional jurisprudence does not depend on a court adopting my own version of its content – rather, my position depends on courts acknowledging that *all* interpretive conclusions regarding the content and meaning of the *Charter* embody moral claims which, to be accepted, must derive from conviction and be susceptible to justification. While personal, spiritual convictions may rest on faith alone, constitutional principles require justification and can only be sustained, in the long run, by social consensus. A leap of faith regarding the moral content of human dignity requires reasons. The leap of faith which I find most compelling, for example, is that human dignity as a *Charter* norm ought to encompass and elaborate the claim that all human beings merit equal moral worth and recognition by the

---

[42] *Rogers v. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 460 at para. 19.

[43] *Supra* note 2 at 851.

state, and that this imposes positive obligations on governments to meet the basic needs of those dependant on state assistance (whether this conviction springs from secular or spiritual sources seems to me to be beside the point). What the Supreme Court of Canada has failed to do, in my view, is precisely this – subject its faith in, and claims regarding, the content of human dignity to the test of reason and justification. What I have suggested in this essay is that until the Court does so, the purposes of human dignity will remain unrevealed, and the edifice of the *Charter* will remain a façade.

The Opinion of the Chief Justice of Nova Scotia Regarding the Deportation of the Acadians

INTRODUCTION BY THE HONOURABLE MICHEL BASTARACHE, C.C.*

On October 29, 1754, the Lords of Trade wrote to the Lieutenant Governor of Nova Scotia, Charles Lawrence,[1] and advised him that before deciding to deport the Acadians, it would be preferable to consult the colony's Chief Justice in order to determine the legality of dispossessing the Acadians of their lands if they did not pledge allegiance to the Crown of Great Britain. In other words, the Lords of Trade were asking that the Chief Justice be the one to rule as to the legality of deporting the Acadians. The Chief Justice at the time, to whom the Lords of Trade turned, was none other than Jonathan Belcher,[2] the first Chief Justice of the Supreme Court of Nova Scotia.[3] The application was made by the Lords of Trade after receiving numerous letters from Charles Lawrence proposing that the Acadians be deported because of their refusal to pledge allegiance, among other reasons.[4]

---

* Counsel at Heenan Blaikie LLP. Formerly a judge of the Supreme Court of Canada (1997-2008) and of the Court of Appeal of New Brunswick (1995-1997). The author thanks Jean-Pierre Hachey, Stéphanie Drisdelle and Mark Power.

1 Following the decision to deport the Acadians in 1755, Charles Lawrence was promoted to Governor of Nova Scotia in 1756.

2 Jonathan Belcher was a native of Boston, Massachusetts. He studied at Harvard and Princeton Universities and received his law diploma in England. He first came to Nova Scotia in October 1754 when the Lords of Trade named him Chief Justice of the Supreme Court of that colony. Jonathan Belcher likely did not know about the conflicts and the political issues of that colony. According to some, his legal analysis regarding the deportation of the Acadians is very weak and the majority of his conclusions can be found in the correspondence of the Lords of Trade.

3 The governor who preceded Charles Lawrence, namely Colonel Edward Cornwallis, had established a new legal system under which the Chief Justice was to be named by the English authorities.

4 Letter from Lawrence to the Board of Trade, March 14, 1749, cited in NES Griffiths, *From Migrant to Acadian: A Noth America Border People 1604-1755* (Montreal, McGill-Queen's University Press, 2004) at 3 [Griffiths, *From Migrant*]; Letter from Lawrence to the Board of Trade, August 1, 1754, reprinted in KH Ledward, ed, "Journal, October 1754: Volume 61, Part 2" online: (1933) 10 Journals of the Board of Trade and Plantations at 68-76 <http://www.british-history.ac.uk/report.aspx?compid=77338>; Letter from Lawrence to the Board of Trade, July 19, 1755, reprinted in KH Ledward, ed, "Journal, October 1755: Volume 62 " online: (1933) 10 Journals of the Board of Trade and Plantations at 175-82 <http://www.british-history.ac.uk/report.aspx?compid=77350>.

Chief Justice Belcher ruled as to the legality of the deportation of the Acadians in a decision that was read at the Council meeting in Halifax, at which the Lieutenant Governor was present. This decision was then recorded in the minutes dated July 28, 1755.[5] In the opinion of Chief Justice Belcher, by refusing to pledge allegiance to Great Britain, the Acadians automatically lost their right to possess their lands. Consequently, according to Chief Justice Belcher, the deportation was justified and had sound basis in law. On April 14, 1756, a copy of Chief Justice Belcher's opinion was sent by the Lords ofTrade to Henry Fox, Leader of the House of Commons and Secretary of State for the Southern Department (which included the colonies in America) in Cabinet.

Despite the historical importance of Chief Justice Belcher's decision, which undeniably and irreversibly transformed the region, only a few historians and lawyers who specialize in minority rights are familiar with it. Chief Justice Belcher's decision also enhances our understanding of the role of the law in the political evolution of the region during the pre-Confederation period.

On November 6, 1886, the Archbishop of Halifax, Monsignor Cornelius O'Brien, published a letter in *The Morning Herald* in which he denounced the deportation of the Acadians as "a deliberate act, executed after mature consideration, under no excitement of provocation, and carried out in a barbarous manner."[6] Even more noteworthy, however, is the Archbishop's statement that the deportation was illegal because no Acadian was brought to trial for treason, that being the ground actually relied on to justify the deportation. Chief Justice Belcher was nonetheless of the opinion that the Acadians were the authors of their own misfortune in that they had refused to sign a sixth oath of allegiance,[7] under which they would have been obliged to renounce their faith and agree to bear arms against the French army.[8] To my knowledge, the Archbishop's letter was the first challenge to the legality of the deportation.

---

5 Placide Gaudet, *Acadian Genealogy and Notes*, reprinted in *Report Concerning Canadian* Archives, vol 2, App A, part III, (Ottawa : SE Dawson, 1906) at 63-65. Historians have not identified the source of Chief Justice Belcher's opinion, and so people have wondered if it was a judicial decision or simply an opinion. It seems, from a letter addressed to Lieutenant-Governor Lawrence in 1754, that the Lords of Trade, in essence the members of the Cabinet in London acting for the colonies, had asked for Chief Justice Belcher's opinion. According to others, members of the executive in London had asked for the opinion of the Attorney General and not of the Chief Justice.

6 Monsignor Cornelius O'Brien, "Expulsion of the Acadians", Letter to the Editor, *The Morning Herald* (Halifax, NS), Ottawa, National Archives of Canada, microform no FC2346.

7 Placide Gaudet, *Le grand dérangement : Sur qui retombe la responsabilité de l'expulsion des Acadiens* (Ottawa: Ottawa Printing Company, 1922) at 34.

8 Letter from the Governor of Québec, James Murray, to the Governor of Massachusetts, Francis Bernard, in 1766, in which he states that the Acadians "formerly refused to take the oath of allegiance and abjuration", reprinted in John Greenleaf Whittier "The Neutral French in Massachusetts" Editorial, *The National Era Newspaper* (21 September 1854) VIII : 400, online: Acadian and French-Canadian Ancestral Home <http://acadian-home.org/National-Era.html>.

It is noteworthy that France and England were not at war in 1755; the expulsion could therefore not be justified under the laws of war (*jus in bello*), particularly since the deportation affected women and children. As well, there was no immediate danger of insurrection or apprehension of invasion. Even more importantly, under the Treaty of Utrecht, the Acadians had been British subjects since 1713, and there was no law that authorized the Lieutenant Governor to require an oath of allegiance to preserve this status.[9] The other question that must be asked is what legal principle allowed the Lieutenant Governor to ignore the commitments made at the time the earlier oaths of allegiance were taken. It should also be noted that the foreign Protestants of Lunenburg who rebelled against the British authorities in 1754 were granted a trial in the spring of 1755 and were sentenced to prison, even though they were not British subjects. However, none of them was deported.[10]

Anyone who might be inclined to think that the prohibition on expelling a subject is something new need only read the decision *Bancoult v Secretary of State for the Foreign and Commonwealth Office*,[11] in which the High Court of Justice (Queen's Bench) stated, at paragraph 39, that there is a constitutional right to reside in one's country, a rule which is also recognized in international law. In fact, the Court cited *Magna Carta* as the basis for that right in England (paragraph 34) and added that local authorities have no power under the *Colonial Laws Validity Act* to enact contrary laws (paragraph 48), and that neither the powers that derive from the royal prerogative (paragraphs 57, 61) nor the monarch's power to make laws for "peace, order and good government" (paragraphs 55, 57) can justify abrogating the freedom to reside in one's country.

I thought worth suggesting that anyone interested read the opinion of Chief Justice Belcher, while awaiting a complete analysis of the legality of the deportation.[12]

---

9 See Letter from Queen Anne to the Governor of Nova Scotia, Francis Nicholson, dated June 23, 1713, reprinted in Corinne LaPlante, *Le Traité d'Utrecht et l'Acadie* (MA Thesis, Université de Moncton, 1974) at 124-25 [unpublished].

10 See Wintrop P Bell, *The Foreign Protestants and the Settlement of Nova Scotia: the history of a piece of arrested British colonial policy in the eighteenth century* (Victoria: Morriss Printing, 1990).

11 [2000] EWJ No 5772, [2001] 2 WLR 1219. The decision was not appealed. The order that was the subject of the decision was revoked and replaced by a new order that recognized the right of abode for citizens of the colony. The new order was then challenged. In *R v Secretary of State for Foreign and Commonwealth Affairs*, [2008] UKHL 61, [2009] AC 453, many of the Lords reaffirmed the fundamental nature of the right of abode and its recognition in the common law by stating that such a right was so fundamental that it could not be affected except through a clear and specific Act of Parliament. Today, any attempt to affect such a right would be subject to the *Human Rights Act, 1998*.

12 Many parts of Belcher's text have already been analyzed by historians although these did not take into account the illegality of the deportation; see John Mack Faragher, *A Great and Noble Scheme: The Tragic Story of the Expulsion of the French Acadians from Their American Homeland* (New York: WW Norton & Company, 2005); NES Griffiths, *The Acadian Deportation: Deliberate Perfidy or Cruel Necessity?* (Toronto: The Copp Clark Publication Company, 1969); Griffiths, *From Migrant*, *supra* note 4.

OPINION OF JONATHAN BELCHER[13]

July 28,1755[14]

Enclosure in Letter of 14th April 1756—Lords of Trade to Fox

1755, July 28th

The Question now depending before the Governor and Council as to the Residence or removal of the French Inhabitants from the Province of Nova Scotia, is of the highest moment to the Honour of the Crown and the Settlement of the Colony, and as such a juncture as the present may never occur for considering this question to any effect, I esteem it my duty to offer my reasons against receiving any of the French Inhabitants take the oaths and for their not being permitted to remain in the Province.

1. By their conduct from the Treaty of Utrecht to this day they have appeared in no other light than that of Rebels to His Majesty, whose Subjects they became by virtue of the Cession of the Province and the Inhabitants of it under that Treaty.
2. That it will be contrary to the Letter and Spirit of His Majesty's Instruction to Governor Cornwallis & in my humble apprehension would incur the displeasure of the Crown and the Parliament.
3. That it will defeat the intent of the Expedition to *Beau Séjour*.
4. That it will put a total stop to the Progress of the Settlement and disappoint the expectations from the vast Expence of Great Britain in the Province.
5. That when they return to their Perfidy and Treacheries as they unquestionably will, and with more rancour than before, on the removal of the Fleet and Troops, the Province will be in no condition to drive them out of their Possessions.

1. As to their conduct since the Treaty of Utrecht in 1713—Tho it was stipulated that they should remain on their lands on Condition of their taking the Oaths, within a year from the date of the Treaty, They not only yet refused to take the Oath but continued in Acts of Hostility against the British Garrison, and in conjunction with the Indians in that very year killed a party of English consisting of eighty Men, and for the space of three years from the Treaty committed many other acts of Hostility.

---

13 Jonathan Belcher was the Chief Justice of Nova Scotia. This document was read before the Governor and his Council in Halifax on July 28, 1755.

14 Placide Gaudet, *Acadian Genealogy and Notes*, reprinted in *Report Concerning Canadian Archives*, vol 2, App A, part III, (Ottawa: SE Dawson, 1906) at 63-65. Reprinted with the permission of Library and Archives Canada. All errors are as they appear in the original document.

In 1725 when General Phillipps sent a Force to require them to take the Oaths they for some time refused but at last consented upon condition that they should not be obliged to bear Arms against the King of France, upon this condition some swore Allegiance, but many others refused, and they have since presumed to style themselves Neutrals tho' they are the Subjects of His Majesty.

By their Instigation the Settlement at the Coal Mines at Chignectou by a Company of English Gentlemen at an expence of £3000 was broken up by the Indians, and by order of the Inhabitants they drove off the Settlers, burnt their Houses and Storehouses, robbed them of their Stock and goods which were shared between the Indians and Inhabitants.

In 1724 they spirited up and joined with the Indians in destroying the English Fishery and killed above 100 Fishermen, a few English and French were taken for this fact—and hanged afterwards in Boston.

In 1744 under Le Loutre 300 Indians supported by these Neutral French, marched thro' all their districts, and lodged within a quarter of a mile of that garrison, and no Inhabitants gave any intelligence to the Government.

They in like manner supported and maintained in the same year M. Duvivier who had near surprised the Garrison and only one Inhabitant gave Intelligence which put them on their guard and prevented it.

In 1746 they maintained 1700 Canadians in their districts the whole Summer waiting for the Arrival of Duke Danville's Fleet and when part of the Forces came before the Fort, they assisted them, and made all their Fascines, and were to have joined in the attempt, being all Armed by the French.

The winter following when the English with about 500 Troops were Canton'd at *Mines*, by advice of the situation of the English Troops given by the French Inhabitants to the French Troops, they drew them to attack the English, and even brought the French Officers into the English Quarters before the attack was made, and they joined with the French in the Attack, whereby 70 of His Majesty's subjects lost their lives, above two thirds of whom were sick Persons and were murdered by the French Inhabitants. This was attested by some of the Soldiers who escaped. They were afterwards before the Capitulation in Arms, and kept Guard over the English Prisoners and Treated them with more severity, than the French King's Subjects themselves did.

They very frequently afterwards Received and maintain'd different parties of the French during the continuance of the war.

When the English first made the Settlement at Halifax and ever since they have spirited up the Indians to commit Hostilities against the English, always maintaining, supporting and giving Intelligence to them, where they might distress the Settlement to the best advantage, it having been always noted that before any Indian attempts, a number of French Inhabitants have been found hovering about those places:

They have constantly since the Settlement obstinately refused to take the Oath of Allegiance, and have induced many of our Foreign Settlers to desert over

to the French, and have always supplied the French Troops who have intruded upon this Province with Provisions, giving them a constant intelligence of all the Motions of the English, and have thereby forced the English to live in Garrison Towns, and they were unable to cultivate and improve lands at any distance, which has been the Principal cause of the great expense to the British Nation, and a means of more than half the Inhabitants who came here with an intent to settle, quitting the Province and settling in other Plantations, where they might get their Bread without resigning their lives.

From such Series of Facts for more than 40 years, it was evident that the French Inhabitants are so far from being disposed to become good Subjects that they are more and more discovering their inveterate enmity to the English and their affection to the French, of which we have recent Instances in their Insolence to Captain Murrey hiding the best of their Arms and surrendering only their useless musquets, and in their present absolute refusal to take the Oaths of Allegiance.

Under these circumstances, I think it cannot consist with the Honour of the Government, or the safety and prosperity of this Province, to permit any of the Inhabitants now to take the Oaths.

2. It will be contrary to the letter and spirit of His Majesty's Instructions.

The Instruction took its rise from the Governors representation of the Hostilities of the French Inhabitants, and from the recitals in the Instruction it was plainly intended to Secure a better obedience of the French, and to strengthen the hands of the Government against them, and when they have declared as they have implicitly, by refusing to take the oaths, that they will not be subject to His Majesty, the Instruction by the proposal from the Governor and Council for taking the Oaths and their refusal, will be literally observed by their removal from the Province, nor can there be any confidence in their Fidelity after an absolute refusal of allegiance to the Crown, and for this reason persons are declared recusants if they refuse on a summons to take the Oaths at the Sessions and can never after such refusal be permitted to take them, as by once disavowing their allegiance their future professions of Fidelity ought to receive no credit.

The Instruction was sent at a time when the Government was not in a capacity to assert its rights against the French forfeiting Inhabitants, and it is hardly to be doubted that if the present circumstances of the Province were known to the Crown, that the Instruction if it is now in Force would be annulled.

Governor Cornwallis, according to this Instruction, summoned the French Inhabitants to swear allegiance, and as they refused, the Instruction seems to be no longer in Force, and that therefore the Government now have no power to tender the Oaths, as the French Inhabitants had by their non-compliance with the condition of the Treaty of Utrecht forfeited their Possessions to the Crown.

I would put the case. That His Majesty had required the answer of the French Inhabitants to be transmitted to the Secretary of State, to be subject to His Majesty's further pleasure, and the present answer of all the French Inhabitants

should be accordingly transmitted "That they would not take the Oath unless they were permitted not to bear arms against the King of France, and that otherwise they desired Six Months to remove themselves and their effects to Canada, and that they openly desired to serve the French King that they might have Priests," it is to be presumed that instead of examining the Instruction, orders and possibly a Force would be immediately sent for banishing such Insolent and dangerous Inhabitants from the Province.

As to the consequences of permitting them to take the Oaths after their refusal.

3. It must defeat the Intention of the Expedition to *Beau Séjour*.

The advantages from the success of that Expedition, are the weakening the power of the Indians and curbing the Insolence of the French Inhabitants, but if after our late reduction of the French Forts, and while the Troops are in their Borders and the British Fleet in our Harbour, and even in the presence of His Majesty's Admirals and to the highest contempt of the Governor and Council, they presume to refuse allegiance to His Majesty, and shall yet be received and trusted as Subjects, we seem to give up all the advantages designed by the Victory [.]

and

If this be their Language while the Fleet and Troops are with us, I know not what will be their style, and the event of their insolence and Hostilities when they are gone.

4. It may retard the Progress of the Settlement and possibly be a means of breaking it up.

The Proportion of French to English Inhabitants is deemed to be as follows:

At Annapolis, 200 Families at 5 in each Family is	1000
Mines, 300 at 5	1500
Piziquid, 300	1500
Chignectou, 800	4000
	8000
600 English Families at 5	3000
Ballance of the French against the English Inhabitants	5000

Besides the French at Lunenburgh and the Lunenburghers themselves who are more disposed to the French than to the English.

Such a superiority of numbers and of Persons who have avowed that they will not be Subject to the King will not only distress the present Settlers but deter others from coming as adventurers into the Province, for if they should take the Oaths, it is well known, that they will not be influenced by them after a Dispensation.

5. As no Expedient can be found for removing them out of the Province when the present Armament is withdrawn, as will be inevitably requisite, for they will, unquestionably resume their Perfidy and Treacheries and with more arts and rancour than before.

And as the residence of the French Inhabitants in the Province attached to France occasions all the Schemes of the French King, and his attempts for acquiring the Province.

I think myself obliged for these Reasons from the highest necessity which is *Lex temporis*, to the interests of His Majesty in the Province, humbly to advise that all the French inhabitants may be removed from the Province.

JONATHAN BELCHER
Halifax, 28th July 1755.

* * * * *

From Migrant to Acadian

A North American Border People 1604–1755

N.E.S. GRIFFITHS

ISBN 0-7735-2699-4

Legal deposit first quarter 2005
Bibliothèque nationale du Québec

Printed in Canada on acid-free paper

This book has been published with the help of a contribution from Lord Black of Cross Harbour.

McGill-Queen's University Press acknowledges the financial support of the Canada Council for the Arts for its publishing program. We also acknowledge the financial support of the Government of Canada through the Book Publishing Industry Development Program (BPIDP) for our publishing activities.

Library and Archives Canada Cataloguing in Publication

Griffiths, N.E.S. (Naomi Elizabeth Saundaus), 1934–
From migrant to Acadian : a North American border people, 1604–1755 / N.E.S. Griffiths.

Includes bibliographical references and index.
ISBN 0-7735-2699-4

1. Acadia – History. 2. Acadians – History.
3. Acadians – Ethnic identity. I. Title.

FC2043.G74 2005 971.6'004114 c2004-903565-7

This book was typeset by True to Type in 10/12 Baskerville

The Council members having been informed of the general outlines of what the home government expected, the oath that the Acadians had accepted in the past was read out: "Je ... promets and Jure sincerèment en foi de Chrétien que Je serai entièrement fidele et obéirai vraiment Sa Majesté Le Roi George le Second que je reconnais pour le Souverain Seigneur de l'Accadie ou nouvelle Ecosse. Ainsi Dieu me soit en Aide."[66] Mascarène then explained that "the French pretended that when they took this Oath it was upon condition that it should be understood that they should always be exempted from bearing Arms." There was some debate as to whether, therefore, the words "ce serment Je prens sans reserve" be added but the general opinion was that the oath, in its present form, was "as strong as any Oath of Allegiance can be." It was decided that "it would only be necessary to let the French know that they must take the Oath without any reservation whatever."

At this point, three Acadian deputies, Jean Melanson from Rivière-aux-Canards, Claude LeBlanc from Grand Pré, and Phillippe Melanson from Pisiquid, were called in. Cornwallis assured them of "all Protection and Encouragement" but informed them that he expected that "the Inhabitants would take the Oath of Allegiance to his Majesty in the same manner as all" England's subjects did. He asked them whether they had any comment and received the reply that they had come solely "to pay their respects to His Excellency & to know what was their Condition henceforth, & particularly whether they should still be allowed their Priests." Cornwallis stated that, provided the priests obtained a licence from the Council first, there would be no difficulty with this matter. The meeting ended with the deputies being given copies of a general declaration for the information of the Acadian population and copies of the oath.[67] The deputies left with instructions to return within a fortnight with the "Resolutions of their several Departments" and to inform the other settlements that His Excellency wished to meet with their deputies as soon as possible.

The declaration in question was consistent with the attitude shown by Cornwallis and the Council during the meeting. Its underlying assumption was that the Acadians had yet to become good British subjects but that this transformation was perfectly possible. Its tone was one of reasonable command. It opened with the announcement that a number of British subjects were to be settled in Nova Scotia for the improvement and extension of its trade and fisheries. It went on to state that in the past the Acadians had been treated with great indulgence, being allowed "the entirely free exercise of their Religion and the quiet and reasonable possession of their Lands." However, it was remarked that this treatment had not been met with appropriate loyalty and that, in future, they could not expect similar leniency unless "the said Inhabitants do within Three months from the date of the Declaration take the Oaths of Allegiance." In the meantime, it was emphasized, the Acadians were to extend all possible aid and comfort