Court of Appeal File No. C57775

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

Applicants/
(Appellants and Respondents by Cross-appeal)

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent
(Respondent in appeal and Appellant by Cross-appeal)

FACTUM OF THE APPELLANTS AS RESPONDENTS TO THE CROSS-APPEAL

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LSUC #: 25319U

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PART I: THE ISSUE ON THE CROSS-APPEAL

1. The only issue raised on the cross-appeal is whether the application judge erred in finding that the impugned portion of the oath contravened the Appellants' rights pursuant to section 2(b) of the *Charter*. The Appellants (Respondents on the cross-appeal) submit that the impugned portion of the oath clearly violates section 2(b).

2. The Respondent's position that 2(b) is not violated purports to be based on the judgment of Wilson J. in *Lavigne*. In *Lavigne*, the applicant had argued that compulsory payment of union dues violated his freedom of expression because some of the monies paid were used

to support causes that he did not believe in. It is submitted that the essence of the several judgments in *Lavigne* is that payment of dues does not engage section 2(b) because it cannot be said to be an attempt to convey meaning. However, as the Respondent acknowledges in her factum (at paragraph 60), "there is no issue that an oath is expressive activity and one that falls within the scope of the section 2(b) guarantee." Thus the present case is very different from *Lavigne*.

Lavigne v. OPSEU, [1991] 2 S.C.R. 211

3. At paragraph 63 of her factum, the Respondent underlines certain parts of the quoted passage but does not consider the impact of other parts. In particular, the last sentence of the passage quoted at paragraph 63 implies that a law must "not effectively associate one with a message with which one disagrees" to avoid contravening section 2(b). Taking the oath clearly would associate the Appellants with a message with which they disagree.

4. Therefore, the judgment of Wilson J. in *Lavigne* does not support the Respondent's argument. Moreover, only two other Supreme Court justices concurred with that judgment of Madam Justice Wilson.

Lavigne v. OPSEU, [1991] 2 S.C.R. 211

5. It is true, as the Respondent points out, that citizenship applicants are legally free to disavow the oath. However, the Appellants have affirmed that they would feel morally bound not to do so. In addition, to acquire citizenship they must be seen to be taking the oath to the Queen in a public ceremony. Thus disavowal would be a public display of

hypocrisy. In any event, disavowal does not cure the violation of being forced to affirm the oath.

6. The Respondent argues (in paragraph 65 of her factum) that the Appellants have the choice of taking the oath or remaining permanent residents. This is like saying to tobacco companies that they have the choice of putting health warnings on their packages or manufacturing a different product. Compelling such a choice violates freedom of expression.

RJR McDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199

7. The Respondent cites *Hutterian Brethren* in paragraph 67 of her factum. However, in that case the violation of section 2(b) was conceded, so the argument was restricted to section 1 of the *Charter*. It is submitted that, while the balancing discussed in the Respondent's factum could be considered in a section 1 analysis, it is irrelevant to determining whether section 2(b) is violated.

Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567

8. The Respondent relies on the conclusion that the oath to the Queen has a specific meaning. It is submitted that it is not reasonable to come to that conclusion: the oath to the Queen has very different meanings for different people.

9. In addition to the above, the Appellants rely on their factum on this appeal and on paragraphs 21 through 34 of the decision of the court below.

10. It is submitted that requiring the Appellants to take the oath to the Queen clearly violates section 2(b) of the *Charter*; the more debatable question is whether it can be saved by section 1.

PART II: ORDER REQUESTED

11. The Appellants respectfully request an order dismissing the cross-appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto this 4th day of February, 2014.

Peter Rosenthal (LSUC no. 33044O)

Michael Smith (LSUC no. 14557M)

Selwyn Pieters (LSUC no. 50303Q)

Reni Chang (LSUC no. 59476F)

Counsel for the Appellants as Respondents to the Cross-appeal

CERTIFICATE

Counsel, on behalf of the appellant, certifies that:

(i) An order under subrule 61.09(2) is not required; and

(ii) One and a half hours (1 ½ hours) will be required for their oral argument.

Peter M. Rosenthal, Counsel for the Appellant,
Respondents by Cross-Appeal

SCHEDULE "A": LIST OF AUTHORITIES

1. *Lavigne v. OPSEU*, [1991] 2 S.C.R. 211
2. *RJR McDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199
3. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567

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Proceeding commenced at TORONTO

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