Handwritten annotations by Dror Bar-Natan.

AG statement about renouncing the oath: paragraph 65.

C57775

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Applicants/

Appellants and Respondents by Cross-appeal

and

ATTORNEY GENERAL OF CANADA

Respondent/

Respondent in appeal and Appellant by Cross-appeal

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FACTUM OF THE ATTORNEY GENERAL OF CANADA, RESPONDENT AND APPELLANT BY CROSS-APPEAL

PART I -- CONCISE OVERVIEW STATEMENT

1. The appellants appeal a decision of Justice Morgan (the application judge) of the Ontario Superior Court in which he dismissed their application challenging

the constitutionality of the requirement to swear an oath to the Queen as a condition of acquiring Canadian citizenship.

2. Each of the appellants objects to taking the oath because of their subjective belief that the Queen, Canada's constitutional head of state, is a symbol of tyranny, colonial oppression, racial prejudice and similar attributes. The Court below found that these views were mistaken and were based on a misinterpretation of the meaning of the oath to the Queen. It is, in fact, the Queen, at the apex of Canada's constitutional order, who represents the right to dissent. According to Justice Morgan, "the oath to the Queen is in fact an oath to a domestic institution that represents egalitarian governance and the rule of law", and "the [a]pplicants have adopted an understanding that is the exact opposite of what the sovereign has come to mean in Canadian law."

> Respondent's Compendium, Tab 1, at paras. 65 and 67 respectively – Reasons for judgment of Justice Morgan dated September 20, 2013 (hereafter 'Reasons')

3. The application judge held that the appellants' claim to a violation of their freedom under s. 2(a) and equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms* was not made out. The respondent Attorney General submits that the application judge did not err in his decision on these points.

4. The application judge held that the oath as "compelled speech" constituted a *prima facie* violation of the appellants' freedom of expression guaranteed by s. 2(b) of the *Charter,* but that the "limit" was justified by s. 1. The respondent submits that the application judge did not err in law in his findings in respect of s.

1. However, he erred in law in failing to consider and apply the framework of analysis required for a finding of a violation of s. 2(b). Rather, the application judge conflated the finding of "compelled speech" with his conclusion that the appellants' s. 2(b) freedom was violated, without any analysis as set out by the Supreme Court as to whether the "compulsion" to take an oath to which they object strikes at the heart of freedoms represented by s. 2(b) and therefore constitutes a violation of s. 2(b).

5. Furthermore, the application judge's findings on the meaning of the oath to the Queen – as a rights-enhancing symbol of equality and the rule of law -- would support a conclusion that the oath protects those very freedoms and does not inhibit the appellants in any meaningful way from expressing a contrary view. The evidence before the Court indeed proves that taking the oath has not prevented certain affiants in this proceeding from acquiring citizenship while expressing their beliefs at or after the taking of the oath.

BS.

BS.

If the oath does nothing at all, what is the point of it beyond hazing?

6. The overarching theme in Justice Morgan's reasons for decision stems from the notion that it is inherently unacceptable to use the Constitution as an instrument to strike out mention of a key symbol of Canada's constitutional structure and of the rule of law itself, when it is animated by the misguided notion that the symbol represents tyranny -- the contrary of the rights-enhancing nature of the Constitution's apex. This theme does not raise a question of justiciability, but rather highlights the contradiction inherent in the appellants' claim which in

not what I said.

turn militates against the grant of any constitutional remedy in this case. Drawing on Justice Morgan's findings, particularly regarding s. 1, the appellants' claims must fail as it is not the oath, taken in its true sense, which restricts their stated inability to obtain citizenship; rather it is their mistaken belief as to its meaning which stands in their way. Such mistaken notions do not warrant *Charter* relief.

Who decides the meaning? ?

PART I – STATEMENT OF FACTS THAT THE RESPONDENT ACCEPTS, DISAGREES WITH, AND ANY ADDITIONAL FACTS

Facts that are accepted by the respondent

7. The respondent accepts the facts as set out in the appellants' factum in Part A ("The Canadian Citizenship Oath") and Part B ("The Appellants").

8. While certain of the "facts" listed in Part C ("Charles Roach and the History of the Proceedings") are not controversial, it should be noted that they are largely based on the reasons for decision of Justice Cullity refusing to certify the proceeding as a class action, under the heading "Evidence", and are not findings of fact. As the merits of the proposed class action are not relevant at the certification stage (only the viability of the cause of action), these assertions remain untested. Mr. Roach passed away in October 2012, before there could be any cross-examination on the merits of his claim.

9. The "facts" set out in Parts D, E and F ("Origins of the Citizenship Oath", "Does the Oath to the Queen have a clear meaning?" and "The Present Political and Cultural Context", respectively) constitute argument and are to that extent improperly pled in this Part.

10. Furthermore, the "fact" stated at paragraph 31 (Part D) is inaccurate. While it is the case that the concept of Canadian citizenship did not come into existence until the 1947 *Canadian Citizenship Act*, it is not true that "some British subjects continued to be exempted from taking the citizenship oath". As properly noted by the application judge (at paragraph 15), and as pled by the respondent, all British subjects who sought Canadian citizenship as of 1947 were required to swear the oath of allegiance, including the oath to the monarch. The sole exception was a time-limited grandfathering clause for British subjects who had accumulated five years domicile in Canada at the time of passage of the Act.

Respondent's Compendium, Tab 5B, pages 266-272

Additional facts relied upon by the respondent/appellant in cross-appeal, the Attorney General of Canada

History of the citizenship oath

11. Taking the oath to the Queen as Canada's head of state has existed as a condition of acquiring membership in the Canadian polity since Confederation. While the concept of Canadian citizenship itself did not come into existence until

many things have changed and it's time to change this one too

the 1947 *Canadian Citizenship Act*, the laws of Canada governing naturalization have maintained the requirement of swearing an oath of allegiance to Canada's constitutional head of state, even when that status was originally that of British subject. It has been a constant – regardless of other legislative changes that have been made over time to the process for becoming a naturalized Canadian. In fact, when Parliament resolved to create "Canadian citizenship" as a distinct status by way of the 1947 legislation, it made a deliberate choice to maintain such requirement for all candidates applying for Canadian citizenship, including British subjects.

> Respondent's Compendium, Tab 5A – Excerpts from Canada's naturalization laws beginning in 1868 ending prior to the 1947 *Canadian Citizenship Act;* and Tab 5B, see note at paragraph 10 supra.
> Respondent's Compendium Tab 5G, pages 282-283, Standing Senate Committee on Foreign Affairs, May 13, 1976, regarding Bill C-20 (the 1977 *Citizenship Act*), Statement by Mr. R.M. Nichols, Registrar, Citizenship Registration, Department of the Secretary of State.

12. Canadian citizenship is entirely a creature of federal statute. In order to be a Canadian citizen, a person must satisfy the applicable statutory requirements.

> *Solis v. Canada (M.C.I.)*, (2000), 186 D.L.R. (4th) 512 (F.C.A.); leave to appeal to the S.C.C. denied, [2000] S.C.C.A. 249.
> *Taylor v. Canada (M.C.I.)*, [2008] 3 F.C.R. 324 (F.C.A.)

13. The final step in the acquisition of Canadian citizenship is the swearing of the oath of citizenship:

> I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfill my duties as a Canadian citizen.
>
> *Schedule to the Citizenship Act*, R.S. 1985, c. C-29.

14. There is no constitutionally protected right to become a Canadian citizen. It is within Parliament's powers to set requirements for citizenship by legislation.

Constitution Act, 1867, s. 91 (25).

15. The respondent relies upon the legislative history of the oath of citizenship, which is partially summarized in Justice Morgan's reasons for decision at paragraphs 13 to 20.

Respondent's Compendium, Tabs 5A, 5B and 5C

PART II – RESPONDENT'S SUBMISSIONS WITH RESPECT TO THE APPELLANTS' ARGUMENTS

A. *Standard of appellate review*

16. This issue is not addressed by the appellants. The respondent relies upon *Housen v. Nikolaisen* for the applicable standard. On a pure question of law, the appellate standard is correctness in that an appellate court is free to replace the opinion of the trial judge with its own. Where the issue is one of mixed fact and law, and the error lies in the standard applied or similar error of principle, again, the appellate court may substitute its own view. A finding of fact is subject to review only where a palpable and overriding error is found. This case turns mainly on the first two principles.

Housen v. Nikolaisen, [2002] 2 S.C.R. 235, at paras. 8 and 37.

B. *Appellate review of the adequacy of reasons of the application judge*

17. Much of the appellants' argument consists of repeating almost verbatim their written submissions made in the court below, with the attendant argument that the application judge erred in failing to mention these submissions. It is well-established by the Supreme Court that the adequacy of reasons must be viewed from a functional standpoint: reading the reasons as a whole, has the application judge seized the substance of the matter? It is presumed that the judge knows the law. There is no formal requirement that the judge list all of the arguments or deal with all of the evidence. Consequently, the appellants' arguments, where framed in this manner and without more, must fail.

> *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41, at paras. 100-101.
> *F. H. v. McDougall*, 2008 SCC 53 at para. 54.
> *Sagl v. Chubb Insurance*, 2009 ONCA 388, at paras. 91, 95.
> And see: *R. v. R.E.M.*, 2008 SCC 51 at para. 35.

C. *Section 2(a)*

18. The application judge properly rejected the claim under s. 2(a) on several interrelated bases:

> a) The applicants failed to prove an objective basis for their claimed violation [para. 94]. In other words, they failed to establish a non-trivial and non-insubstantial interference with their sincerely held religious (or conscientious) beliefs, as required by Supreme Court jurisprudence;
>
> > See: *S.L. and D.J. v. Commission scolaire des Chênes*, [2012] 1 SCR 235.
> > *Syndicat Northcrest v. Amselem*, 2004 SCC 47.

b) The oath is a law of general application, and is strictly secular in purpose and application [paras. 85, 87 – 89];

See: *Alberta v. Hutterian Brethren of Wilson Colony,* 2009 SCC 37.

and

c) The basis for the objection to the oath runs counter to the "very object of holding up constitutional values for new citizens" [paras. 89-93].

Bruker v. Markovitz, [2007] 3 SCR 607, at para. 2.
Reference re Same-Sex Marriage, [2004] 3 SCR 698.

19. Significantly, the appellants misunderstand Justice Morgan's reasons insofar as they assert that a recognition of the appellant, Simone Topey's religious rights does not imply support for her religion nor does it amount to discrimination against others (at para. 59 of the appellants' factum). This does not accurately reflect the tenor of Justice Morgan's reasons, and in fact misapprehends a key element. The thrust of Justice Morgan's reasons on this point is that a claim based on religion cannot be used to strike out the very symbol of Canada's constitutionally entrenched commitment to equality and the rule of law.

20. As stated by Justice Morgan at paragraphs 90-92 of his reasons, the oath to the Queen "is not only a unifying statement but a rights-enhancing one", and "an oath of citizenship that references a symbol of national values enriches the society as a whole, and does not undermine the rights and freedoms that the society and its head of state foster and represent" [emphasis added]. The comment that the rights of some cannot be a platform from which to strike down the rights of others must be taken in that context. Holding a subjective religious

view (or conscientious view) that in fact mischaracterizes the symbolic representative of those very values enshrined in Canada's constitutional and rights-enhancing order, is constitutionally insufficient to strike down legislative reference to that symbol in Canada's citizenship oath. Giving sway to the appellants' claim would itself "undermine the values enshrined in section 2(a) of the Charter."

21. Furthermore, the findings of the Supreme Court in *Hutterian Brethren* on the issue of proportionality are apposite in this context. The Supreme Court concluded that although the costs imposed on the religious community in that case by reason of not having a driver's licence, were not trivial, they were not substantial: "they did not rise to the level of seriously affecting the claimants' right to pursue their religion. They do not negative the choice that lies at the heart of freedom of religion." In this case, the appellants not only may continue acting on their religious or conscientious beliefs, but it is precisely within Canada's constitutional structure, represented by the Queen at its apex, that their right to manifest their beliefs is enshrined.

Hutterian Brethren, supra, paras. 95-96 and 99.
And see*:* *Reasons* para. 92

22. All of the foregoing grounds apply equally to claims based on conscientious belief as well as religious belief, such that the application judge's failure to mention the claims of the appellants Michael McAteer and Dror Bar-Natan under this heading does not constitute a legal error justifying appellate intervention. The analysis of their claims under s. 2(a) would follow the identical principles as Ms

Topey's claim. Had their claims been specifically mentioned, they would inevitably have been rejected on identical grounds. Their genuine but mistaken belief as to what the Queen represents in Canada's constitutional order is equally insufficient to ground a constitutional violation. None of the appellants have met the test set down by the Supreme Court for infringement of s. 2(a). No error of law is shown in that respect.

D. *Section 15*

23. The application judge did not err in rejecting the claim under s. 15 of the *Charter.*

24. The claim that the appellants are discriminated against in relation to individuals born in Canada is clearly without merit for the reasons of the application judge. The discrimination they claim, which they describe as based on "national origin" and "citizenship", is in fact not based on their status as permanent residents *per se,* as opposed to native-born Canadians, but on their particular objections to the oath. In asserting that they are treated in a discriminatory manner based on the requirement to submit to a naturalization process, which includes taking the oath, they are challenging the fact of citizenship itself which, for the reasons set out by the application judge, is impermissible.

Reasons paras. 101-108
Lavoie v Canada, 2002 SCC 23, at paras. 57 and 58.

25. Their claims of discrimination based on political opinion (without conceding that such analogous ground exists), race and religion were also properly rejected. As stated by the application judge, there was no objective evidence that any particular political movement or group has been disadvantaged by the oath.

Reasons, paras. 98-100

26. An individual alleging a violation of s. 15 of the *Charter* must establish both that: (1) the impugned law creates a distinction on an enumerated or analogous ground of discrimination, and that (2) the distinction is discriminatory, taking into account contextual factors such as pre-existing disadvantage of the claimant group, the nature of the interests affected, correspondence between the differential treatment and the claimant group's reality, and the ameliorative effects of the law in question. The perpetuation of historical disadvantage, prejudice and false stereotyping are indicia of discrimination.

Québec (A.G.) v. A., 2013 SCC 5, at paras. 325, 331-332 and 418.
Withler v. Canada (A.G.), 2011 SCC 12, at paras. 29-40.

27. The oath of citizenship does not draw any distinction on prohibited grounds. It applies equally to all eligible candidates for citizenship.

28. The requirement to take the oath does not cause or perpetuate any stereotyping. There is no evidence in the record that groups to which the appellants belong, namely republicans and Rastafarians, suffer from societal stereotyping or similar disadvantage for any reason.

29. In the context of the entirety of the citizenship scheme and the purpose of the oath (adherence to Canadian constitutional principles), there is no evidence that the legislation perpetuates a "historical disadvantage, prejudice or stereotype". This case bears a similarity to the situation in *Hutterian Brethren* in that respect. The Supreme Court held that any discriminatory effect in that case did not arise from any demeaning stereotype, but from a constitutionally defensible policy choice.

> *Withler*, *supra*, para. 35.
> *Hutterian Brethren*, *supra*, para 108.

30. Furthermore, reliance on *dicta* in *Andrews* for a description of permanent residents in Canada is misguided. As stated above, the appellants' claim is not that they are discriminated against because they are permanent residents but because they object to the oath for reasons of religion or conscientious belief.

E. *Section 1 justification analysis*

31. If this court were to find an infringement of a *Charter* right, such limitation is justified under s. 1. Justice Morgan did not err in adopting the respondent's statement of the pressing and substantial purpose of the oath.

> The purpose of the oath requirement including an oath of allegiance to the Queen is to ensure a public, symbolic avowal of commitment to this country's constitutionally entrenched political structure and history, during the solemnities of the citizenship ceremony, as a condition of acceding to full membership in the Canadian polity. The language of the oath reflects Canada's current political reality and constitutional order.
>
> Reasons, para. 38

yet the oath concentrates on just one especially silly and insignificant part of the Canadian constitutional order, rather on the many much more important principles Canadians believe in.

32. The Supreme Court has indicated that a "theoretical objective" asserted as pressing and substantial is sufficient for purposes of the s. 1 analysis. In *Harper*, the Supreme Court held that the "proper question at this stage [the pressing and substantial objective stage] of the analysis is whether the Attorney General has asserted a pressing and substantial objective" [emphasis in the original]. This objective and the question of whether it has been furthered is considered in the proportionality analysis of s. 1.

A. G. (Canada) v. Harper, [2004] 1 S.C.R. 827, at paras. 25-26.

33. The Supreme Court of Canada has had occasion to comment that the taking of the oath in order to acquire citizenship as a means of establishing a commitment to Canada is a pressing and substantial objective.

check

Benner v. Canada (Secretary of State), [1997] 1 SCR 358, at para. 94.

34. Requiring new Canadians to express a commitment, publicly, to fundamental principles going to the root of our political system and history, which includes the development of Canada's particular model of democracy, is pressing and substantial. This commitment represents a collective goal of fundamental importance. Canada wishes to ensure that citizenship is granted to those who are indeed committed to their new country. Moreover, the requirement that all citizenship candidates take the same oath relates to the fundamental objectives of citizenship as creating a "community of status" which helps to bind Canadians together as members of the same political community.

BS.

Fair. Now why the Queen??

Quebec ?

R. v. Oakes, [1986] 1 S.C.R. 103, para. 65.
A.-G.(Canada) v. Harper, [2004] 1 S.C.R. 823, at para. 103.
Lavoie, at para. 24 *supra*.

35. It bears noting that a principal purpose of the 1947 legislation which introduced the concept of Canadian citizenship, was to provide "an underlying community of status" for all people in the country, that will "help to bind them together as Canadians".

> Respondent's Compendium, Tab 5D, page 279, House of Commons, Official Report of Debates (Hansard), March 20, 1946, page 131, (Hon. Paul Martin, introducing the Bill that was to become the 1947 *Canadian Citizenship Act*).
>
> *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at paras. 57–58: "Since [the enactment of the 1947 legislation], Canada's citizenship policy has embodied two distinct objectives: to enhance the meaning of citizenship as a unifying bond for Canadians, and to encourage and facilitate naturalization...it fosters a sense of unity and shared civic purpose among a diverse population..."

36. The Parliamentary debates contained in the legislative history of the oath of citizenship reflect very clearly that citizenship has been maintained both in theory and in law, as the achievement of full political status in Canada:

> It is the act of participating in a political system. Participation in Canada's economic and social systems are granted by residency, by simply being here legally. Very roughly stated, Canadian citizenship enables one to do several things: to vote; to run for public office; to carry a Canadian passport; to exercise certain activities where citizenship is a statutory prerequisite. It also allows one to enjoy an almost indefinable sense of belonging to, contributing to and participating in Canada. The conferring of citizenship is an enabling gesture on the part of the government to lift all barriers which stand in the way of the full political participation of an individual.
>
> Citizenship is not a reward for good behaviour. It is not a prize to be awarded only to the more meritorious. [emphasis added]
>
> Respondent's Compendium, Tab 5E, page 280, House of Commons, Official Report of Debates (Hansard), at 5986, Hon. James Hugh Faulkner, Secretary of State, introducing the 1977 *Citizenship Act.*

37. In other words, in enacting our most recent (1977) citizenship legislation, Parliament has clearly enunciated the policy that Canadian citizenship should bear symbolic and real consequences in the political sphere.

Yet the oath carries the wrong symbolism.

38. The oath of citizenship, which includes an oath of allegiance to Canada's constitutionally entrenched head of state, symbolizes a citizenship candidate's willingness to adhere to and to participate unreservedly in Canada's political order, in a manner in common with all Canadians. The *Charter* protects an individual's right to disagree (within the bounds of the law) but does not provide for a right to access the status of citizenship on one's own preferred terms.

39. The oath of citizenship forms an integral part of the process of acquisition of Canadian citizenship and is inseparable from Canadian history and its Constitution. The reference in the oath to Canada's head of state was deliberated upon by Parliament and affirmed as a necessary component when significant changes to citizenship legislation were presented in the House of Commons. In debates concerning the proposed 1977 legislation (the current *Citizenship Act*), the Secretary of State, the Hon. James Hugh Faulkner, commented on the oath as follows:

> We are developing here the citizenship law for Canadians. The Queen is the constitutional head of this country, and in my judgment oaths of this kind should reflect that political reality. If Canadians decided to change that reality they would change the oath. But what always has struck me is that we play around with symbols, often in contradiction to the existing political reality, and I think that does not make a great deal of sense. That is leaving apart altogether the sensitivity of a great number of Canadians who feel very strongly on the other side of the question.

> What this proposed oath does is combine the reality of the fact that Queen Elizabeth II is the Queen of Canada plus the reality that any affirmation or oath of citizenship implies the observation of the laws of Canada and the duties of a Canadian citizen. [emphasis added]
>
> Respondent's Compendium, Tab 5F, page 281, House of Commons, Standing Committee on Broadcasting, Films and Assistance to the Arts, Official Report of Debates (Hansard), Feb. 24, 1976, at page 34:38, Hon. James Hugh Faulkner.

40. Other aspects of the process of acquiring citizenship have been changed over time to recognize societal changes, but the impugned aspect of the oath has remained invariable for 146 years.

> Respondent's Compendium, Tab 5G, pages 282-283, Standing Senate Committee on Foreign Affairs, May 13, 1976, regarding Bill C-20, Statement by Mr. R.M. Nichols, Registrar, Citizenship Registration, Department of Secretary of State outlining various changes.

41. The appellants argue that in light of opinion polls and the increasing diversity of Canada's population, the relevance of swearing an oath to the Queen is attenuated. However, up to the present day, hundreds of thousands of eligible individuals apply for and obtain Canadian citizenship. The appellants adduce no evidence to establish that these hundreds of thousands of individuals who take the oath of citizenship and acquire citizenship, do so *despite* their personal beliefs or based on weak personal beliefs in favour of the constitutional order. Furthermore, 86 per cent of eligible permanent residents in Canada obtain citizenship, according to Statistics Canada. In fact, Canada has the highest "take-up" rate of citizenship when compared to similar countries (Australia, the US and the UK) -- the 'take-up' rate referring to the percentage of eligible permanent residents in Canada who obtain Canadian citizenship. Indeed,

Statistics Canada has conducted studies to determine the reasons for which otherwise eligible individuals did not become Canadian citizens. Individuals whose countries of origin did not permit dual citizenship were the least likely to obtain Canadian citizenship, particularly if the country in question was an economically developed one.

Respondent's Compendium, Tab 2A, pages 28-29
Respondent's Compendium, Tab 2B, page 31
Respondent's Compendium, Tab 4A, pages 220-225

42. As stated by the application judge, it is difficult to argue with the pressing and substantial nature of the objective – of making a public, symbolic avowal of commitment to one's new country of citizenship and its established order (at para. 40). The appellants take issue with the means of doing so, as noted by the application judge, but not with the objective itself.

F. *Proportionality* -- (1) *Introduction*

43. The proportionality stage of the s. 1 analysis requires that the alleged limit on the *Charter* right be rationally connected to its objective, that it impair the right no more than reasonably necessary to substantially achieve the objective, and that the salutary benefits of the limit outweigh its deleterious effects on the right. The proportionality analysis in *Hutterian Brethren* is directly apposite to the proportionality analysis in this case:

> By their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature has no capacity or legal obligation to engage in such an individualized determination, and in many cases would have no advance notice of a law's potential to infringe Charter rights. It cannot be expected to tailor a law to every possible future contingency, or every

> sincerely held religious belief. Laws of general application affect the general public, not just the claimants before the court. The broader societal context in which the law operates must inform the s. 1 justification analysis. A law's constitutionality under s. 1 of the Charter is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of Charter rights is directed at an important objective and is proportional in its overall impact. ...the court's ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned. [emphasis added]

Hutterian Brethren, *supra*, para. 69.

(2) *Rational connection*

44. As stated by the application judge at para. 46 of the Reasons: "It is certainly rational for Parliament to have embraced an oath that references in a direct way Canada's official head of state. Whatever problems the Applicants think are associated with the monarchy, it is not irrational for Parliament to have selected a figure that has been throughout the country's history, and continues to be until the present day, a fixture of its constitutional structure". The logical basis for the symbol chosen is the very fact of the Queen's place as the head of Canada's constitutional structure.

No clear meaning of the oath argument and principles of statutory interpretation

45. The appellants repeat the arguments made in the court below, that the oath to the Queen does not have a clear meaning, that all possible interpretations should be given equal weight and that it is therefore irrational to include mention

But the oath is not a "law". It is a public declaration that I am required to make against my beliefs.

of the Queen in the oath of citizenship. These arguments run counter to the rule of law: subjective, personal interpretations of the law would render the law inchoate, particularly if given constitutional primacy. Certainly the fact that the appellants attribute a different, subjectively-based meaning to the Queen cannot alter the constitutional symbols and structure of Canada.

The Queen in itself is almost meaningless; this I agree. The problem is with an oath to the Queen.

yet in as much as it does have a symbolic meaning, it is wrong.

46. The appellants claim that the term "*heirs and successors*" contained in the oath of citizenship has no clear meaning. This argument is entirely misguided. As this Court held in an earlier case, it is "*axiomatic*" that the rules of succession governing the accession to the throne of "*heirs*" or "*successors*" are essential to the proper functioning of the monarch and are part of our constitutional fabric:

> [I]t is axiomatic that the rules of succession for the monarchy must be shared and be in symmetry with those of the United Kingdom and other Commonwealth countries. One cannot accept the monarch but reject the legitimacy or legality of the rules by which this monarch is selected.
>
> *O'Donoghue v. Her Majesty*, [2003] O.J. 2764 (Ont.S.Ct.J.) at para. 27, per Rouleau J.; aff'd by the Ontario Court of Appeal [2005] O.J. No. 965.

Did women vote back then?

47. Those rules of succession originate in the *Act of Settlement (1700)*, a British law, which is incorporated into Canada's Constitution. The *Act* settled that succession to the British throne should be through a given line of succession. It therefore establishes the heir to the throne by statute. The *Act* is furthermore subject to amendment by the British Parliament, in which case a "successor" as opposed to an "heir" could be chosen. Accordingly, the Queen of Canada who symbolizes the Crown in Canada, is the object of the oath as are her legally named heirs and her successors, if they accede to the throne. Furthermore, it

Were gays allowed to marry?

They have a point here (47).

may be noted that any amendment to the *Act of Settlement* must be assented to by Canada, pursuant to the provisions of the *Statute of Westminster, 1931*.

> *O'Donoghue*, supra, paras. 3, 17-21
>
> See for example: *The Succession to the Crown Act, 2013*, which was enacted in Britain to change the rules of succession by altering the rule of primogeniture, and which *Act* was duly assented to in Canada through the *Succession to the Throne Act, 2013.*

48. Lastly, and contrary to their argument, the appellants have failed to point to any place in the cross-examination of Rell DeShaw in which the affiant states that the oath implies an obligation to the individual monarch and to her individual heirs and successors.

Appellants' incorrect reliance on the "plain meaning" doctrine

49. As stated by Justice Morgan, Canadian law has long departed from the presumptive view that the plain or literal meaning of a statute prevails. The Supreme Court, in *Rizzo Shoes*, held that limiting statutory interpretation to the "plain words" of the provision was an inadequate approach, and that statutory interpretation must be viewed in light of the legislative context:

A. B.S. B. An oath is not a statute.

> Although much has been written about the interpretation of legislation [references omitted], Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [emphasis added]
>
> *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21.

50. As explained at some length by the application judge, the appellants' objections to the oath are based on a mistaken understanding of what the Queen and the Crown actually represent in Canada's Constitution. The Queen is not a "foreign" monarch, nor does the Queen represent arbitrary authority – quite the opposite in fact, in that she represents the "*rule of law as a fundamental postulate of our constitutional structure*" (at para. 62). The Queen has come to represent the antithesis of status privilege. The application judge elaborates that:

> [T]he oath to the Queen is in fact an oath to a domestic institution that represents egalitarian governance and the rule of law [para. 65];

and:

> In interpreting the oath in a literalist manner, the Applicants have adopted an understanding that is the exact opposite of what the sovereign has come to mean in Canadian law"; the Queen should be understood to represent "an equality-protecting Canadian institution rather than as an aristocratic English overlord. [paras. 67-68]

51. In light of the foregoing incontrovertible findings of the application judge, and given that the appellants' beliefs are based on an erroneous interpretation of the oath to the Queen, there is no error in concluding that such mistaken, albeit genuine beliefs, do not justify constitutional protection. At a minimum, there is a rational connection between the Queen as Canada's head of state, and the oath of citizenship.

(3) *Minimal impairment*

52. The appellants argue that the applications judge failed to make a finding as to whether the impugned *legislation* impairs their right as little as possible. While the applications judge comments that the impairment of their *right* is minimal, given the appellants' misapprehension of the meaning of the oath (at para. 68), it is evident that this is intended to provide a response to the question stated at the outset of this part of his inquiry, at paragraph 49: "While the citizenship oath is a rational choice, is it one that impairs expression as little as possible?". The question thus posed, and the discussion in the reasons at paragraphs 50 to 52 reflect a proper understanding of this aspect of the proportionality analysis. The ensuing discussion in the Reasons focuses on the appellants' erroneous attribution of meaning to the oath. The clear inference from this discussion is that the application judge considered the oath to be minimally impairing. Rather than impairing the rights and freedoms claimed by the appellants, it in fact embodies those rights and freedoms. Orwellian again.

53. The application judge rejected the appellants' contention that the oath should be modified to adjust to their religious or conscientious beliefs, largely on the basis that their understanding of the oath of citizenship is wrong: "In interpreting the oath in a literalist manner, the Applicants have adopted an understanding that is the exact opposite of what the sovereign has come to mean in Canadian law" [emphasis added] (para. 67). To permit modifications of legislated requirements or "opting out" procedures, based on misconceived, although genuinely held, notions of what the requirement actually means would run counter to the notion that a less impairing means must not significantly compromise the stated

what the sovereign means in Canadian law is irrelevant for the purpose of the oath. (And BTW, it means nothing)

objective. If the unifying symbol chosen by Parliament to bind all new Canadians is to be eroded at all, it should not be eroded by subjectively held erroneous notions of what that symbol represents.

54. In *Edwards Books*, the Supreme Court cautioned against such an opting out process as part of a minimal impairment analysis. It expressed a concern with the "undesirability of state-sponsored inquiries into religious beliefs", because they expose an individual's most personal and private beliefs to public airing and testing in a judicial or quasi-judicial setting. The inquiry is all the worse when it is demanded only of members of a non-majoritarian faith, who may have good reason for reluctance about so exposing and articulating their non-conformity.

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, paras. 133, 137.

54: That's actually a cool argument against "opting out". I agree, it should just be removed...

55. Accordingly, based on the application judge's reasoning, it is clear that a less impairing means for the appellants' acquisition of Canadian citizenship would, in effect, endorse a misconceived interpretation of the *Charter* and the constitutional status of Canada's head of state. Consequently, any infelicity of phrasing in this part of the application judge's analysis does not amount to an error of law. He clearly understood the test to be applied and applied it correctly.

(4) *Balancing of salutary and deleterious effects*

56. The appellants quote from Justice Morgan's reasons to state that "evidence" is required to demonstrate the salutary effects of the impugned legislation and

claim that the he erred in making a finding without any evidence. However, the application judge himself acknowledges Supreme Court jurisprudence to the effect that the court is to apply common sense, logic and empirically discernible facts in this branch of the analysis (at paras. 69, 70), and that the justification analysis can only be properly carried out with close attention to context (at para. 50). Supreme Court jurisprudence has confirmed that "experience and common sense" or "reason and logic" may bridge the "empirical gap". In the case at hand, what is at issue is the choice made by Parliament, from Canada's very first Parliament on, as to the symbol of its constitutional order to be included in the oath of citizenship. Such choice is not amenable to "proof" in the scientific or empirical manner noted in some of the jurisprudence, but is based on reason, logic, and common sense as well as constitutional and political reality.

> *Thomson Newspapers Co. v. Canada*, [1998] 1 S.C.R. 877 at paras. 87 to 91; and see *Harper*, *supra,* at para. 29.

57. Given the application judge's findings that 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 (at para. 80), and the deleterious effects are close to nil, in light of the appellants' mistaken belief as to what the Queen represents, his conclusion that the benefit outweighs the harm is unassailable.

58. In fact, as far as "evidence" and "empirically discernible facts" are concerned, the application judge specifically finds at paragraph 70 that the "risk of empirical uncertainty with respect to the s. 1 evidence is, in effect, shared by both parties".

In light of the findings noted above, the risk clearly fell squarely against the appellants.

PART III – SUBMISSIONS OF THE RESPONDENT WITH RESPECT TO ITS CROSS-APPEAL

G. *Section 2(b) of the Charter*

59. The application judge erred in his interpretation and application of the test for finding a violation of the appellants' freedom of expression under s. 2(b). Had the application judge analysed the factors set out by the Supreme Court in *Lavigne*, a different result would have followed, based on the evidentiary record before the Court.

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

60. There is no issue that an oath is an expressive activity and one that falls within the scope of the s. 2(b) guarantee (and no argument to the contrary has been raised). There is also no issue that the *purpose* of the impugned legislative provision is not to restrict expression. However, in finding that the oath requirement constitutes "forced expression", which, pursuant to *Lavigne*, was contrary to the appellants' right to say nothing at all, the application judge erred in law in failing to pursue the analysis for determining whether a violation has been made out.

61. In *Lavigne,* Justice Wilson held that where the legislation's incidental effect is to restrain freedom of expression (by way of 'forced expression'), the claimants

must show that the expression they wish to engage in "feeds the purpose" behind the guarantee. They must demonstrate that the effect of limiting expression in those circumstances warrants constitutional disapprobation. These statements recall the Supreme Court's earlier statements in *Irwin Toy*, and apply them to instances of forced expression:

> Because the word "expression" in s. 2(b) has been broadly construed, most laws will have some impact on expression, intended or otherwise. Given this, it makes very good sense to ensure that unintended effects do not receive constitutional protection unless they strike at the heart of s. 2(b).
>
> *Lavigne v. OPSEU*, [1991] 2 S.C.R. 211 at page 267 and see pages 272, 267.

62. In other words, although the scope or definition of expression is broad enough to encompass even expression which is inimical to the "preservation and promotion of other Charter values" (*Lavigne*, at page 268), the nature of the expression becomes relevant when considering the constitutional viability of a provision which has as an unintended effect the restriction of certain expression.

63. Justice Wilson elaborated on the framework of analysis for a finding of a s. 2(b) violation, drawing on the Court's earlier decision in *Slaight Communications*:

> On the basis of the foregoing authorities [*Slaight Communications* and *National Bank of Canada v. Retail Clerks International Union*], it seems to me that this Court has already accepted that public identification and opportunity to disavow are relevant to the determination of whether s. 2(b) has been violated....Quite apart from these decisions it would be my view that as a matter of principle concerns over public identification and opportunity to disavow should form part of the s. 2(b) calculus. ...I favour the inclusion of these factors because both are directed to preserving and promoting the fundamental purpose of the s. 2(b) guarantee, namely to ensure that everyone has a meaningful opportunity to express

The oath does.

> themselves. If a law does not really deprive one of the ability to speak one's mind or does not effectively associate one with a message with which one disagrees, it is difficult to see how one's right to pursue truth, participate in the community, or fulfil oneself is denied. *[emphasis added]*
>
> *Lavigne, supra*, at pages 278, 279.

64. Had Justice Morgan taken into consideration the test to be applied where the legislation's effect is to impair expression by "forcing" a certain message, it is evident that he would have come to the conclusion, based on the record, that the appellants have had ample opportunity to disavow publicly any association with the message which they attribute to the oath, and are not publicly identified with any such message. One need only refer to the affidavits of Mr. Gomberg and Mr. Ashok Charles to substantiate such finding in the context of persons who have taken the oath of citizenship. Had the proper test been applied, the application judge would necessarily have found that the appellants are not deprived of a meaningful opportunity to express themselves, and that despite the finding that the oath is "forced expression", no violation of s. 2(b) is made out. As the application judge commented in the context of s. 1, the oath itself is a "statement that embraces constitutional values" and "is a rights-enhancing measure". It is by virtue of these very constitutional principles that the appellants would have a meaningful opportunity to disavow any imputed message, were they to take the oath, and their freedom of expression would in fact not be infringed.

Then all that remains of the oath is a public humiliation.

> Appeal Book and Compendium of the Appellants, Affidavit of Howard Jerome Gomberg, Tab 13, paras. 8-14; and Affidavit of Ashok Charles, Tab 12, paras. 5-16.

65. It remains the respondent's position that the appellants, unlike the appellant in *Slaight Communications,* for example, have the choice as to whether to take the oath, or to remain in Canada as permanent residents. Their choice is not one subject to legal sanction or a contempt finding should they choose not to become citizens, or alternatively, to take the oath "under protest" for example. They may in fact take the oath and express their disagreement concurrently, without legal disapprobation, and continue to express their views subsequently.

Isn't this the stupidest thing in the world?

66. In summary, the appellants' claim under this provision should fail, whether it is for failure to establish that they are denied the right to disavow and dissociate publicly from the "message" of the oath, whether it is for lack of an objective basis for their claimed violation (given that the violation is based on a mistaken idea of what the Queen represents), or whether it is because they are claiming in effect a "positive" right which s. 2 of the *Charter* generally does not provide, as opposed to a negative one.

> *S.L. v. Commission Scolaire, supra* at paras. 23-24.
> *Baier v. Alta.*, [2007] 2 S.C.R. 673, at para. 20, *and see Haig v. Canada,* [1993] 2 S.C.R. 995.

67. The inability to access conditional benefits or privileges conferred by law may be among the costs that are incidental to the practice of religion or conscientious belief. In this case, should the appellants choose not to take the oath, the resultant inability to enjoy the benefits of citizenship – to hold a Canadian passport and to vote – are among the costs reasonably borne by individuals whose personal beliefs run contrary to Canada's foundational

My beliefs don't run contrary to anything foundational about Canada – they only run contrary to something silly and superficial about Canada.

If my beliefs were fundamentally different than Canadian beliefs, I wouldn't be here.

constitutional structure. Should they choose to take the oath, their right to express dissentient views continues to be protected by the *Charter*.

See *Hutterian Brethren*, *supra*, at para. 95.

PART IV – ORDER SOUGHT

68. The respondent requests that this appeal be dismissed and that the cross-appeal be allowed.

69. No costs are claimed in this proceeding.

70. Should the result of this court's rulings be to strike down the oath to the Queen, the respondent requests that the order be stayed pending its application for leave to the Supreme Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this Wednesday the 8th day of January 2014.

Of Counsel for the Respondent

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CERTIFICATE

Counsel, on behalf of the respondent , 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 her oral argument.

Kristina Dragaitis, Counsel for the respondent

Schedule "A" – List of Authorities

Solis v. Canada (M.C.I.), (2000), 186 D.L.R. (4th) 512 (F.C.A.), leave to appeal to the S.C.C. denied, [2000] 2 S.C.C.A. 249.

Taylor v. Canada (M.C.I.), [2008] 3 F.C.R. 324 (F.C.A.).

Housen v. Nikolaisen, [2002] 2 S.C.R. 235 ; 2002 SCC 33.

Hill v. Hamilton-Wentworth Police Services Board, 2007 SCC 41; [2007] 3 S.C.R. 129.

F.H. v. McDougall, 2008 SCC 53; [2008] 3 S.C.R. 41.

Sagl v. Chubb Insurance, 2009 ONCA 288.

R. v. R.E.M., 2008 SCC 51; [2008] 3 S.C.R. 3.

S.L. v. Commission scolaire des Chênes, [2012] 1 S.C.R. 235; 2012 SCC 7.

Syndicat Northcrest v. Amselem, 2004 SCC 47; [2004] 2 S.C.R. 551.

Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37; [2009] 2 S.C.R. 567.

Bruker v. Markovitz, [2007] 3 S.C.R. 607; 2007 SCC 54.

Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698; 2004 SCC 79.

Lavoie v. Canada, 2002 SCC 23; [2002] 1 S.C.R. 769.

Québec (A.G.) v. A., 2013 SCC 5.

Withler v. Canada (A.G.), 2011 SCC 12; [2011] 1 S.C.R. 396.

Attorney General (Canada) v. Harper, [2004] 1 S.C.R. 827; 2004 SCC 33.

Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358.

R. v. Oakes, [1986] 1 S.C.R. 103.

O'Donoghue v. Her Majesty, [2003] O.J. 2764 (Ont.S.C.J.), aff'd [2005] O.J. 965 (Ont.C.A.).

Rizzo and Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27.

R. v. Edwards Books and Art Ltd. [1986] 2 S.C.R. 713.

Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877.

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

Baier v. Alberta, [2007] 2 S.C.R. 673; 2007 SCC 31.

Haig v. Canada, [1993] 2 S.C.R. 995.

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Schedule "B" – Text of relevant statutes not listed in the appellants' factum

Constitution Act, 1867, s. 91(25)

POWERS OF THE PARLIAMENT

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

25. Naturalization and Aliens.

FORM 4C – BACKSHEET - Rules of Civil Procedure, Rule 4.02(3)

C57775

MCATEER ET AL.
Appellants

AND **THE ATTORNEY GENERAL OF CANADA**
Respondent

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at Toronto

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