05-CV-301832PD3

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA

OVERVIEW

Taking the oath to the Queen, Canada's head of state, has existed as a condition of acquiring membership in the Canadian polity since Confederation.[1] While the concept of Canadian citizenship itself did not come into existence until the 1947 *Canadian Citizenship Act*,[2] the laws of Canada governing naturalization have

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[1] *An Act respecting Aliens and Naturalization*, 31 V., c. 66 (1868) - Canada's first session of its first Parliament, s. 3 and s. 4 (Tab 3 of the Legislative History Binder, "Binder").

[2] *The Canadian Citizenship Act*, S.C. 1946, c. 16, s. 1 (Tab 16 of the Binder) and see s. 26 specifying that a Canadian citizen is a British subject. However, a British subject not otherwise a Canadian citizen was required to take the oath to the monarch as a condition of acquiring citizenship – see ss. 10(1), 10(2) and 12.

maintained the requirement of swearing an oath of allegiance to Canada's constitutional head of state, even when the status was originally and simply that of British subject .[3] That is to say, the swearing of an oath to Canada's head of state has been a constant - regardless of other legislative changes that have been made over time in 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 for citizenship without exception,[4] including British subjects applying for Canadian citizenship.[5]

The applicants, who are permanent residents in Canada, seek to strike down the portion of the oath relating to the Queen of Canada, on various grounds. The applicants claim that the their personal beliefs alone, that a "monarchy" is anathema to a democracy, demonstrates the constitutional infirmity of such oath. At the same time, while holding such views, the applicants nonetheless wish full membership in the Canadian polity.

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[3] For a succinct summary, see the Commons Debates, comments of the Hon J. H Faulkner, Secretary of State relating to Bill C-20, the 1977 legislation; And see Tabs 3, 4 5, 6,7,9A, 10A, 10B, 11C, 13A in the Binder for specific legislative provisions relating to the oath prior to 1947.

[4] Over the years, up to the present day, there have been discretionary statutory exemptions, for minors and persons under a mental disability which are not relevant to the within proceedings.

[5] *The Canadian Citizenship Act*, supra, note 2, (the 1947 Act) s. 10(2), s. 12 – the requirement to take an oath to the Queen as a condition of acquiring Canadian citizenship was imposed on all candidates, whether a British subject or not, unless the British subject had Canadian domicile, defined in the Act as five years of permanent residence prior to passage of the Act. (Tab 16, Binder). The applicants, and their affiant Randall White are therefore wrong on this point. See para. 34 of the Applicants' Factum relying on para. 32 of the 'White' affidavit. At best, a defined group of British subjects who had five years of permanent residency by the time of the Act's passage benefited from a 'grand-fathering' provision in that they were 'deemed' to be Canadian citizens (see s. 9) but British subjects were otherwise compelled to take the same oath as other candidates for Canadian citizenship. It was the obligation to attend a ceremony which was not imposed upon British subjects. See also Tab 30A, p. 5985, Binder. The term 'British subject' disappeared entirely in the current 1977 Citizenship Act. (Tab 24, Binder).

Acquiring citizenship is intended to be a significant step, both symbolic and substantive, enabling full participation in Canada's political life and its institutions. The applicants object to swearing allegiance, to one of the fundamental principles of Canada's political and constitutional institutions, because of a belief that a different form of government is better, a belief that Canada's constitutional order demands allegiance to a "*repulsive*" or "*repugnant*" head of state and because the '*symbol*' is '*wrong*'. There are no constitutional grounds that would permit the applicants' acquisition of citizenship in face of such fundamental objections to a central aspect of Canada's constitutional order.

PART I – STATEMENT OF FACTS

Background to the Litigation

1. This application has its roots in a Federal Court application brought in 1991 by the late Mr.Roach, formerly an applicant in these proceedings, which raised the identical issues and which challenge failed.[6]

2. Eleven years after dismissal of the final appeal from those proceedings, the late Mr. Roach brought these proceedings in the Superior Court, by way of application in which he also sought certification as a class proceeding.

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[6] Roach v. Canada (Minister of State for Multiculturalism and Culture), [1992] 2 F.C. 173 (T.D.),, on appeal from an earlier decision of the Prothonotary striking out his pleading; Appeal to the F.C.A. was dismissed: Roach v. Canada, [1994] 2 F.C. 406 (F.C.A.). Application for leave to appeal to the Supreme Court of Canada dismissed: Roach v. Canada (June 27, 1994), A-249-92 (F.C.A.).

3. The application was permitted to proceed pursuant to the decision of Mr. Justice Belobaba despite the fact that it was in essence the same claim that was dismissed by the Federal Court eleven years ago. Justice Belobaba held that this proceeding was different in that it was brought as a proposed class proceeding and that with the elapse of time, the *Charter* arguments and evidence will be different.[7] Justice Kiteley dismissed the Attorney General's motion for leave to appeal that decision to the Divisional Court. [8]

4. Mr. Roach then applied to certify his *Charter* challenge to the oath as a class proceeding. The motion was dismissed by Justice Cullity in thorough reasons issued on February 23, 2009.[9] For purposes of this proceeding, the findings relating to remedy are key: Justice Cullity found that the sole constitutional remedy available to the applicant was under s. 52 of the *Constitution Act, 1982* – for declaratory relief striking down the legislative provision containing the oath. He found specifically that neither damages nor a constitutional exemption were available to the applicants. These findings were upheld by the Divisional Court, dismissing Mr. Roach's appeal.[10] Leave to appeal to the Ontario Court of Appeal was denied. [11]

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[7] Roach v. Canada (A. G.), (May 17, 2007) 05-CV-301832PD3 at paras. 23-27.
[8] Roach v. Canada (A.G.) (October 10, 2007), per Kiteley J. at para. 19: '*Much of the content of the allegations of Charter violations is similar between the statement of claim in Federal Court in 1991 and the notice of application in the Superior Court in 2005. However, the Charter analysis is more sophisticated in the latter document….There is now jurisprudence on matters relating to the issues in this application…*".
[9] Roach v. Canada (A.G.), (February 23, 2009), Cullity J. at paras. 47-59.
[10] Roach v. Canada (A.G.), [2009] O.J. no. 5286 (Divisional Court), per Wilson, Lederman and Swinton
[11] Endorsement of the Ontario Court of Appeal (June 9, 2010), per Weiler, Blair and Rouleau JJ.A.

5. In Mr. Roach's application to continue the proceedings pursuant to s. 7 of the *Class Proceedings Act*, he once again requested the remedy of damages and a constitutional exemption. This was expressly denied by Madam Justice Horkins who considered that she was bound by the decision of Mr. Justice Cullity, upheld on appeal.[12] Thus, the applicants' remedy is circumscribed by this previous litigation, to that of a declaration of constitutional invalidity pursuant to s. 52 of the *Constitution Act*.

6. Furthermore, the arguments advanced by the applicants rely largely upon jurisprudence (and indeed many facts) which existed at the time of the earlier litigation which ended in 1994. Accordingly, the rationale for permitting this *Charter* challenge to proceed has all but fallen away – it is not a class proceeding, and it raises no arguments that are based on 'evolving' *Charter* jurisprudence.[13]

The Applicants and their Position

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[12] Roach v. Canada (A.G.) (erroneously named Ontario A.G.), [2012 O.J. no. 2824 (June 18, 2012), per Horkins J.

13 The Ontario Court of Appeal has affirmed that for a *Charter* challenge that seeks in effect to reverse an earlier Supreme Court precedent, there should be some indication, either in the facts pleaded or in the decisions of the Supreme Court itself, that a prior decision is open to re-consideration. This principle underlies the decisions of Mr. Justice Belobaba and Madam Justice Kiteley, cited above. However, as noted in the preceding paragraphs, there is no such new evidence nor indication of substantive change in the law. See Bedford v. Canada (A.G.) 2012 ONCA 186 at para. 77, relying upon the decision of Madam Justice Swinton in Wakeford v. Canada (A.-G.), [2001] O.J. no. 390, at paras. 14-15. Nonetheless, the respondent will respond to the various arguments on their merits

7. The Attorney General acknowledges that none of the applicants have taken the oath of citizenship and are not Canadian citizens. In fact, none of the applicants except Mr. Bar-Natan have applied for Canadian citizenship.[14] Additionally, for purposes of this proceeding, the respondent has no reason to doubt the subjectively based reasons each gives for being unwilling to take the oath of citizenship. Simone E.A Topey, a Rastafarian, believes that the "*current society is Babylon*" and that the Queen is therefore the "*head of Babylon*" to whom she is unwilling for religious reasons to take the oath. It appears moreover that Ms. Topey would be against swearing an oath to any head of state. Mr. Dror Bar-Natan, an Israeli and American citizen, finds the oath "*repulsive*" and "*repugnant*". Mr. McAteer, an Irish citizen, is unwilling because of his republican and "democratic" beliefs.

SUBMISSIONS

Introduction – Citizenship Defined

8. Canadian citizenship is entirely a creature of federal statute. In order to be a Canadian citizen, a person must satisfy the applicable statutory requirements.[15]

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

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[14] The respondent does not necessarily accept that any of the applicants are eligible for Canadian citizenship,that they meet the requirements under s. 5 of the *Citizenship Act*, apart from their avowed unwillingness to take the oath. Based on records held by Citizenship and Immigration, Mr. Bar-Natan submitted his application for citizenship at around the same time that he swore the affidavit in support of this application.

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

> 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.[16]

10. There is no constitutionally protected right to become a Canadian citizen. It is within Parliament's powers to set requirements for citizenship by legislation.[17]

11. One principal purpose of the 1947 legislation introducing 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*".[18]

12. The Parliamentary debates contained in the legislative history of the oath of citizenship reflect one theme very clearly – 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.* "[19]

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[16] Schedule to the Citizenship Act, R.S. 1985, c. C-29.

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

[18] House of Commons debates, per the Hon. Paul Martin introducing the Bill that was to become the 1946 Citizenship Act, Tab 29A, page 131, Binder, (the other purpose being to clarify the ambiguity caused by differing definitions in different statutes).

[19] House ofCommons Debates, the Hon James Hugh Faulkner, Secretary of State introducing Bill C-20, concerning the 1977 citizenship legislation, (Tab 30A, page 5986, Binder) [emphasis added]

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

14. Citizenship is, moreover, a status to be sought for its own sake, and is not required simply to access social or economic rights in Canada which are available to permanent residents:

> *" It is a great characteristic of Canadian citizenship that so far we have resisted the temptation to provide advantages in the law if a person becomes a citizen. In other words, we have kept Canadian citizenship pure, as a thing to be desired if you want to have it: we have not said a person will not be entitled to or will not have access to certain services and to certain things in society that are desirable. We have resisted that temptation and treated landed immigrants and citizens virtually alike, with very few exceptions"*[20]

15. Here, there is no substantive prejudice shown to any of the applicants, if they choose to remain true to their beliefs and not take the oath of citizenship. The applicants have freely chosen to immigrate to Canada and to remain here as permanent residents, in some cases, for decades. Indeed, they attest to no such prejudice in their affidavits filed in support of this application.

16. As clearly stated in their affidavits, the main benefit the applicants seek is a Canadian passport[21] – or, tellingly, in their own words, the "*convenience*" of a

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[20] House of Commons debates, supra, per the Hon. Chas. L. Caccia, Tab 30A at page 9807, Binder [emphasis added]

[21] The passport itself carries on its cover the symbol of the Crown – the 'Royal Arms of Canada', which are the arms of Her Majesty the Queen in Right of Canada' (Heritage Canada' s web-site – www.pch.ca 'A Crown of Maples', at page 2).

Canadian passport.[22] To obtain that passport, each applicant wishes to obtain Canadian citizenship, but on their own terms – citizenship without any avowed commitment to Canada's historical and constitutionally entrenched political structure. The *Charter* certainly protects the applicants' right to disagree with Canada's constitution, but does not provide them with the right to overstep Parliament's clearly expressed will regarding the oath of citizenship, as a condition of acquiring such status, for the convenience of acquiring a passport.[23]

17. The applicants also say that want to be able to vote. Eligibility for voting is set by legislation.[24] Section 3 of the *Charter* which guarantees citizens the right to vote does not preclude the possibility of permanent residents having the right to vote. In any event, it is not constitutionally inconsistent that the applicants who find Canada's foundational democratic political structure to be "repugnant" at least in parts, are not accorded the right to vote within that political system. The applicants are nonetheless free to engage in republican or Rastafarian or other political or religious activities (within the bounds of the law) which freedoms are protected by the *Charter*.

18. The oath of citizenship, which includes an oath of allegiance to Canada's constitutionally entrenched head of state is equally a matter of symbolizing a

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[22] Affidavit of Simone Topey, Applicants' Record.
[23] It bears noting that one of the two affiants (and a former party), Mr. Charles, took out Canadian citizenship, took the oath, and attests to having experienced "ideological discomfort and distress" at having done so. He claims to have taken steps to "recant" his oath of citizenship. At no point however did Mr. Charles undertake proceedings available under the *Citizenship Act* to renounce citizenship, which were specifically pointed out to him in the response letter sent to him by a Citizenship and Immigration official.
[24] Canada Elections Act, S.C. 2000, c. 9; Election Act, R.S.O. 1990, c.E.6.

citizenship candidate's willingness to adhere to Canada's political order. Accordingly, taking the oath of citizenship symbolizes a willingness 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.

Oath of Citizenship

19. The oath of citizenship forms an integral part of the process of acquisition of Canadian citizenship[25] and is inseparable from Canadian history and its constitution. The oath to Canada's head of state has been deliberated upon and affirmed as a necessary component of the oath by Canada's Parliament when significant changes to citizenship legislation were presented to 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.*
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> *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.*[26]

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[25] See notes 1-5 above.
[26] Tab 30B, page 34:38; Binder [emphasis added].

20. 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. [27]

21. The very possibility of exemptions to the taking of the oath was raised during Senate debates as a potential problem. A senator expressed a concern that the new legislation might permit exemptions from the oath by regulation; however, this concern was resolved during debates.[28] It was clarified that the exemptions could only be created by statute.

22. Up to the present day, hundreds of thousands of eligible individuals apply for and obtain Canadian citizenship.[29] The applicants adduce no evidence to establish that these hundreds of thousands of individuals who take the oath of citizenship annually and acquire citizenship do so <u>despite</u> their personal beliefs or based on weak personal beliefs in favour of the constitutional order. Furthermore, in Canada 86 per cent of eligible permanent residents obtain citizenship, according to statistics prepared by 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

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[27] Statement by Mr. R.M. Nichols, Registrar, Citizenship Registration, Department of Secretary of State, Evidence before the Standing Senate Committee on Foreign Affairs, May 13, 1976, regarding Bill C-20, Tab 30D page 34:6, Binder.

[28] The concern, raised by Senator Forsey, was that regulations could be enacted to permit exemptions for individuals from taking the oath. The answer was provided by legal counsel that the enabling provisions would not permit exemptions to be created by way of regulation, ibid., pages 34:38, 34:39.

[29] Affidavit of Rell Deshaw, Exhibit A.

citizenship.[30] Indeed, Statistics Canada has conducted studies to determine the reasons for which otherwise eligible individuals did not become Canadian citizens.[31] The statistics were telling in that 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.

23. The applicants raise the argument that the term "*heirs and successors*" contained in the oath of citizenship has no clear meaning. This argument is entirely misguided. As this Court has held, 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:

> *...it 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."* [32]

24. The *Act of Settlement (1700)*, a British law, is incorporated into Canada's constitution and thus forms part of Canadian constitutional law.[33] The *Act* settled

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[30] Affidavit of Rell Deshaw, Exhibit B.

[31] Supplementary affidavit of K. Dean, Exhibit "A" – 'Becoming Canadian: Intent, process and outcome", Spring 2005, document prepared by Statistics Canada, provided further to the undertaking given on behalf of Rell Deshaw, affiant for the respondent on her cross-examination. Amongst other conclusions, the authors of the report determined that with time, up to 90 per cent of immigrants become citizens. The report finds that it is citizens of countries that do not allow dual citizenship and that are economically developed (Japan, the US), who tend to retain their pre-migration citizenship status and do not become naturalized Canadians.

[32] Per Rouleau J. in O'Donoghue v. Her Majesty, [2003] O.J. no. 2764 (Ont.S.Ct.J.) at para. 27; aff'd by the Ontario Court of Appeal [2005] O.J. No. 965.

[33] O'Donoghue, supra, at paras. 3, 17-21.

that succession to the British throne should be through a given line of succession. It establishes the heir to the throne by statute. The *Act* is 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.[34]

25. In any event, none of the applicants or affiants raise an objection to the oath on the basis that they do not understand it and for that reason object to it. Their objection is simply stated that they do not wish to swear (or affirm) allegiance to the Queen as a condition of acquiring Canadian citizenship.

26. Contrary to statements in the Notice of Application, there is no evidence at all that the 'main concrete effect' of the oath is to "discourage republican thought and action", that it conscripts oath-takers to the "monarchist system of government as opposed to republican causes" or "promotes strong institutional prejudice against anti-monarchists, republicans, descendants of colonized people and persons belonging to certain religious faiths."[35] The applicants extrapolate meaning from the oath which is in fact not substantiated in either its content or by other evidence. The oath simply reflects the current constitutional order in

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[34] Any amendment to the *Act of Settlement (1700)* by the British Parliament would not be legally binding on Canada or other Commonwealth countries unless assented to by Canada and those countries, pursuant to the provisions of the *Statute of Westminster, 1931*; See for example the *Succession to the Crown Act, 2013* enacted in Britain and assented to in Canada through the *Succession to the Throne Act, 2013* which changes the rules of succession altering the rules of primogeniture. The *Statute of Westminster 1931* was incorporated into the Canadian constitution by way of the *Constitution Act, 1982*, ss. 52(2) and Schedule Item 17.

[35] Amended Fresh as Amended Notice of Application, paras. 39, 43, 56, 57.

Canada. There is no reason that the oath itself should enable the advocating of an alternative constitutional or political structure.

27. The applicants' position suggests that as long as an individual prefers a different political system, they can exempt themselves from legal obligations which they believe are inconsistent with those views. The applicants' arguments assume that any individual who wants to change our system of government (from within) would object to taking the oath. An individual could take the oath in good conscience and still fight for changing our system of government.

Canadian Charter of Rights and Freedoms -- Section 2 of the Charter Generally

28. The applicants have proven no violation of any right guaranteed by s. 2 of the *Charter*. Supreme Court jurisprudence has stated that the freedoms guaranteed by s. 2 generally do not provide positive rights, nor do they require that a platform for expression be provided, nor access to benefits or to status. Rather, the freedom s. 2 represents is freedom from state coercion to express oneself in a particular manner. As otherwise phrased by the Supreme Court, in reference to s. 2(b), it protects against "gags" but does not serve to provide a "megaphone".[36]

[36] See Haig v. Canada, [1993] 2 S.C.R. 995 and R. v. Edwards Books, [1986] 2 S.C.R. 713, para. 94, citing *Big M Drug Mart*: "One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint".

29. The applicants are not in any way coerced into taking the oath – it is a matter of personal choice. They may remain in Canada as permanent residents or they may choose to take the oath of citizenship and become citizens. The purpose of section 2 is not to guarantee 'access' to the status of citizenship. There is therefore no aspect of coerced speech or expression that is under challenge.

30. Furthermore, while the applicants claim that taking the oath would violate their beliefs, and would prevent them from engaging in unspecified political activities, were they to take it, they fail to put into evidence exactly what those activities are or how the taking the oath would interfere with those activities. These applicants are free to engage in all manner of republican or Rastafarian political or religious activity, but attest to engaging in none even at the present time. There is no evidence of specific activities in which they would feel restrained from engaging, were they to take the oath. There is therefore no evidence that taking the oath (even assuming that this is 'coerced' expression or coerced adherence to a particular belief, (which the respondent disputes)), would lead to any burden at all.

Section 2 (a) – Freedom of Conscience and Religion

31. The applicants must prove both a subjective and objective basis for the alleged *Charter* violation.[37] In particular, they must prove: (1) the sincerity of their religious (or conscientious) beliefs; and (2) that the oath interferes with their

[37] S.L.and D.J. v. Commission Scolaire des Chênes, 2012 S.C.C. 7, at paras. 2 and 24.

ability to act in accordance with their beliefs in a manner that is more than trivial or insubstantial.[38] While sincerity of belief is relevant to whether freedom of religion (or conscience) is engaged at all, a claimant must establish, by way of objective proof that there has been an interference with the observance of the practice. As the Supreme Court recently underlined in *S.L.*, it is not enough simply to assert that one's s. 2 rights have been infringed. Furthermore, the onus of proof of such violation rests solely on the applicants, and the standard of proof is a balance of probabilities.[39]

32. In *Edwards Books* for example, the Supreme Court said

> " ...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" [40]

33. In this case, the applicants have asserted their subjective beliefs as the reason for being unwilling to take the oath of citizenship; however, there is no objective evidence at all of what expression or activities might be threatened or interfered with if they took the oath. Notably, the affiant Ashok Charles attests that he felt free to engage in republican activities, even after having taken the oath of citizenship and having become a Canadian citizen. This *Charter*

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[38] Alta. V. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567 at para. 32.
[39] Canada v. Khadr, [2010] 1 S.C.R. 44 at para. 21, relying on R. v Collins, [1897] 1 S.C.R. 265 at p. 277.
[40] R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713 at para. 97.

challenge is left to be determined at an abstract level at best, which the Supreme Court has cautioned against.[41]

34. In upholding the striking out of Mr. Roach's original application, the majority of the Federal Court of Appeal,[42] noted that taking the oath does not diminish the freedoms that are embodied in the *Charter.* The fact that the oath contains an oath of allegiance to the Queen – which reference is to be taken as both personal and symbolic – does not mean that individuals taking the oath are barred from advocating for political change. The oath itself does not diminish the exercise of those freedoms.

35. Much of the applicants' argument rests entirely on the dissenting judgment of Linden J.A. in the Federal Court of Appeal. The majority of the Federal Court of Appeal rejected all of the applicant's arguments.

36. A fundamental flaw in the applicants' arguments rests on the proposition that they are 'forced' to choose between republican or religious or other similar views – and obtaining Canadian citizenship. There is no legally relevant compulsion to make that choice. As noted in the Supreme Court's decision in *Hutterian Brethren,*[43] the evidence showed that members of that religious group were indeed required to choose between two of their religious beliefs – either they could have their photos taken in order to renew their driver's licences (the photos

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[41] Moysa v. Alta., [1989] 1 S.C.R. 1572, at para. 1572; Bell ExpressVu, [2002] 2 S.C.R. 559; 2002 SCC 42 at para. 62 per Iacobucci J.
[42] Roach v. Canada, (1994), 113 D.L.R. (4th) 67 (F.C.A.) at page 72.
[43] Alta v. Hutterian Brethren of Wilson Colony, supra, para. 34.

being against one of their religion's tenets) or they could lose their communal lifestyle (another religious tenet). This required at least some members to have driver's licences in order to permit their commune to function properly.

37. In the case at bar, there is no choice that engages a constitutional conflict: the applicants may continue to reside in Canada as permanent residents and hold, express and act on their beliefs, if they are unwilling to take the oath by reason of those beliefs. Not being a citizen does not interfere in any way, that is more than trivial or insubstantial, with the exercise by the applicants of their beliefs or expression.

38. As further noted in *Hutterian Brethren*, the provincial Crown conceded the religious nexus in that case; however, there was no concession on the second element – whether the universal photo requirement interfered with their religious freedom in a manner that was more than trivial or insubstantial. As the courts assumed that part of the test had been met, the majority of the Supreme Court decided to proceed on this same basis. The majority returned to this issue at the proportionality stage of the s. 1 analysis, and concluded that the costs imposed on the community in finding ways around the lack of driver's licences while not trivial were not substantial: "*...they do not rise to the level of seriously affecting the claimants' right to pursue their religion. They do not negate the choice that lies at the heart of freedom of religion.*" [44] The majority of the Supreme Court

[44] Supra, para. 99.

accordingly concluded that the limit on religious freedom in that case was justified under s. 1 of the *Charter*.

39. If the costs imposed upon a religious group forced to choose between two opposing religious tenets (in the context of generally applicable provincial law) does not unjustifiably offend their right to freedom of religion, then the applicants in this case cannot lay claim to any better right. They are not forced to choose between two aspects of their beliefs. In fact, not being a citizen is arguably more consistent with their beliefs, which run counter to Canada's foundational constitutional order.

Section 2(b) of the Charter

40. As stated above, the general approach to s. 2 of the *Charter*, which applies equally to the analysis of a claim under s. 2(b) is that the freedom which is protected by the *Charter* is the freedom from coercion.[45] The Supreme Court has differentiated between a positive rights approach – which s. 2 of the *Charter* does not generally provide, and a negative rights approach which is what s. 2 of the *Charter* protects against.[46] This has been applied by the Supreme Court in the context of voting rights[47] and eligibility for the office of school trustees.[48] As stated by the Supreme Court in *Baier*, s. 2(b) is <u>not</u> engaged when what is

[45] Haig v. Canada, supra in which the Supreme Court of Canada found that the right to vote in the Quebec referendum did not have constitutional status and that s. 2 did not serve to create a platform for expression.
[46] Baier v. Alta., [2007] 2 S.C.R. 673, at para. 20.
[47] Haig, supra, note 36.
[48] Baier, supra

sought is '*positive government legislation or action as opposed to freedom from government restrictions on activity in which people could otherwise freely engage without government enablement*".[49] Here, what the applicants seek is to use the *Charter* to have the Court strike down legislation in order to enable them to access the status of Canadian citizen. However there is nothing coercive in the impugned legislation, as acquisition of the status of citizenship is not an 'activity' in which they could otherwise freely engage without government enablement. [50]

Section 15 of the Charter

41. The applicants' arguments under s. 15 have no merit. An individual alleging a violation of s. 15 of the *Charter* must establish that: (1) the impugned law creates a distinction on an enumerated or analogous ground of discrimination, and (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.[51]

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[49] Baier, supra, para. 41 emphasis added.

[50] While the applicants assert a violation of sections 2(c) and 2(d) of the Charter, in their Amended Fresh as Amended Notice of Application, they do not advance any evidence or arguments to support a violation of these provisions. In fact, their evidence appears to say the contrary: only their affiant Mr. Ashok Charles, who took the oath of citizenship, claims to participate as a member of a republican organization.

[51] Quebec (A.G.) v. A., 2013 SCC 5 at paras. 325, 331-332 and 418; Whithler v. Canada (A.G.), 2011 SCC 12 at paras. 29-40.

42. The oath of citizenship does not draw any distinction on prohibited grounds. It applies equally to all eligible candidates for citizenship. Hundreds of thousands of eligible permanent residents take the oath of citizenship and acquire the status of Canadian citizens every year, and have since the inception of Canadian citizenship.[52] There is no evidence that the reasons for which a small percentage of individuals who are otherwise eligible for citizenship but do not obtain it, do not because of a conscientious or religious objection to the oath,[53] apart from these three applicants.

43. The fact that the requirement to take an oath of citizenship applies only to permanent residents seeking to acquire citizenship and not to those born in Canada is not a relevant distinction for purposes of s. 15. Parliament is constitutionally empowered to establish criteria for the admission of permanent residents to citizenship. By definition, the criteria established by statute that apply to permanent residents, do not apply to those who are already citizens by birth.

44. The applicants for their part are not challenging the entirety of the scheme or process of acquiring citizenship – it is only the oath that they challenge. Their reason for not taking the oath is not because they are permanent residents or non-citizens as such, but because of their stated political or religious beliefs.

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[52] Affidavit of Rell Deshaw, Exhibit "A".
[53] Supplementary affidavit of K. Dean, Exhibit "A" – Statistics Canada report provided further to an undertaking at the cross-examination of Rell Deshaw.

45. Canadian law does not require permanent residents to renounce other citizenships in order to become a Canadian citizen. One may be a dual national of Canada and another state. Requiring such individuals to take an oath of allegiance to the Canadian head of state, for acquisition of Canadian citizenship, corresponds to their actual circumstances as individuals who wish to join the Canadian polity as full members.

46. Further, the requirement to take the oath, or to refrain from it does not cause or perpetuate any stereotyping.[54] There is no evidence at all[55] that groups such as republicans or Rastafarians suffer from societal stereotyping or similar disadvantage for any reason.[56]

47. If one has regard to 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".[57] Refusing to take the oath does not worsen the situation of any of the applicants assuming that they are in a disadvantaged position in society. Additionally, there is correspondence between the actual characteristics and the

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[54] See also the decision of the Federal Court of Appeal in Toussaint v. Canada (A.G.), 2011 FCA 213 finding that 'immigration status' is not an analogous ground under s. 15 of the Charter.

[55] In lieu of evidence, the applicants appear to rely on certain dicta in the Supreme Court decision in *Andrews* describing permanent residents as an insular and otherwise vulnerable group. As stated however, the oath draws no distinction amongst candidates for citizenship and applies equally to all. The fact that it does not apply to Canadians who are born in Canada is not a relevant distinction.

[56] The application raises the issue of s. 35 of the *Citizenship Act* although this argument is not pursued in the applicants' factum. Suffice to say that subsection 35(3) provides a complete answer to the suggestion that the provision permits provinces to discriminate against permanent residents and their land holdings. See also the House of Commons Debates, Tab 30A page 9808, Binder.

[57] Withler, supra, para. 35.

law – it is their very objection to the constitutional order which stands in the way of their acquiring citizenship.

Expert Evidence

48. In supporting their arguments under the *Charter*, the applicants rely on the affidavit of Randall White. The respondent takes issue with the affidavit being admitted as an "expert" report. It does not comply with Rule 4.4.01 of the *Rules of Civil Procedure,* which requires an expert to provide evidence that is "fair, objective and non-partisan". It is abundantly clear that Mr. White has one clear view point which is that a republican government is superior to that of a constitutional monarchy. The main subject of his 2001 book was the abolition of the monarchy in Canada. Mr. White is an advocate for the applicants, not an "expert".[58]

49. Furthermore, Mr. White's area of expertise is not clearly asserted or established. He has no stated area of expertise and no peer-reviewed publications to his name.[59] In brief, he appears to be little more than a "blogger" with a particular point of view.

50. In an event, the conclusion that Mr. White arrives at - that Canada is increasingly diverse in its population - is hardly one for which the court would require an expert opinion. It is likely a matter of judicial notice. Accordingly, neither his expertise, nor the court's need for his evidence are established.

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[58] Fraser River Pile & Dredge Ltd. v. Empire Tug Boats, [1995] F.C.J. no. 436.
[59] R. v. Mohan, [1994] 2 S.C.R. 9 and see Rule 53.03.

51. Additionally, the thrust of Mr. White's opinion is that Canada should re-think its constitutional and political structure and abolish any ties to the monarchy. This aspect of our constitutional structure is not justiciable as the issue is not amenable to *Charter* review.[60] The proper locus of the debate raised in Mr. White's affidavit, which seeks to justify the political contents of the applicants' objections to the oath, is in the political realm.

52. Moreover, Mr. White's affidavit discloses many errors of fact which are contradicted in the record before the court, which also points to either a lack of expertise or to his partisanship. For example, contrary to his paragraph 18, stating that it was the Canadian Citizenship Act of 1977 which "effectively took away Mr. Roach's political rights", it was in fact amendments to *the Canada Elections Act*[61] which over time grand-fathered British subjects into the electorate, permitting them five years to become Canadian citizens. Mr. White is also wrong in stating at his paragraph 32 that "not all immigrants were required to take the oath" in the 1947 legislation.[62]

53. Mr. White delineates events purporting to demonstrate Canada's weakening ties to Britain. Some actually point to an increasing Canadianization of the Crown. Significantly, the repatriation of the Constitution (referred to at his

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[60] O'Donoghue, supra, at paragraph 24.

61 Canada Elections Act, R.S.C. 1870, c. 14 (1st Supp.). Section 14(3) provided that British subjects ordinarily resident in Canada had until 1975 to vote without becoming a Canadian citizen.

62 Debates of the House of Commons, comments of the Secretary of State, Paul Martin, Tab 29(a) page 1114 and page 1147 (Binder) – There was a simplified procedure, but British subjects still had to take the oath! (and see the comments of the Hon. Faulkner, Tab 30A, page 5985 Binder when addressing the introduction of the 1977 legislation). See the explanation provided at footnote 5.

paragraph 46) in fact entrenched the role of the constitutional monarchy in our political system, as opposed to reducing it, as changing it now requires concurrence of Parliament and all ten provincial legislatures.[63]

54. As for Mr. White's demographic-based arguments, it is often unclear whether he is talking about "Canadians" or all individuals subject to the census in question. Clearly, to be methodologically correct, one would assume that Mr. White would be consistent in the characterization of the data he is relying upon, for example, the Table at paragraph 55 of his affidavit refers to the 'Canadian Population - 2001' but the conclusions he draws deal with "Canadians". Obviously, the Table refers to a larger body of information than just that of "Canadians".

Section 1 - Pressing and Substantial Objective

55. If the Court were to find an infringement of a *Charter* right, such limitation is justified under s. 1. 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. Requiring new Canadians to

63 See the "Patriation Reference", Manitoba (A. G) v. Canada (A. G.), [1981] 1 S.C.R. 752. Prior to patriation of the Canadian Constitution, Parliament could approach the British Parliament with a request to amend the constitution without provincial consent.

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. Such commitment represents a collective goal of fundamental importance.[64] Canada wishes to ensure that citizenship is granted to those who are indeed loyal and committed to their new country. Moreover, the requirement that all citizenship candidates take the same oath relates back to the fundamental objectives of citizenship as creating a "community of status", and as helping to bind Canadians together as members of the same political community.

56. The Supreme Court of Canada has had occasion to comment that the taking of the oath as a condition of acquiring citizenship, as a means of establishing a '*commitment to Canada*' is a pressing and substantial objective.

> "Ensuring that potential citizens are committed to Canada and do not pose a risk to the country [which relates to the security screening component of access to citizenship, relevant in that case] are pressing and substantial objectives". [65]

57. A paradoxical element in this case, is that the applicants seek through this application to join the Canadian polity as full members, the institutions of which they view as rooted in "repugnant" and "undemocratic" principles, on the very

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64 R. v. Oakes, [1986] 1 S.C.R. 103, para. 65, and A.-G. v. Harper, [2004] 1 S.C.R. 823 at para. 103.

65 Benner v. Canada (Secretary of State), [1997] 1 SCR 358 at para. 94. See also Chainnigh v. Canada (A. G.), 2008 FC 69 at para. 49, where the Federal Court concluded, in upholding the Charter validity of the oath of allegiance in that case, that "the fact remains that our present ties to the British monarchy are constitutionally entrenched and unless and until that is changed there is legitimacy within our institutional structures for demanding, in appropriate circumstances, expressions of respect and loyalty to the Crown."

basis that they view Canada's constitutional order as repugnant and undemocratic.

Proportionality

58. The proportionality stage of the s. 1 analysis requires that the alleged limit on the Charter right be rationally connected its objective, that it minimally impair the right, and that the salutary benefits of the limit outweigh its deleterious effects on the right. The proportionality analysis in *Hutterian Brethren*[66] 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]

59. Requiring a permanent resident who, by definition, is a national of another country and therefore may have an pre-existing allegiance elsewhere, to take a public oath of allegiance to Canada's head of state is rationally connected to the objective of ensuring that new citizens recognize and express commitment to

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66 Hutterian Brethren, supra, at para. 69.

Canada's constitutional order. It is furthermore rational to expect a permanent resident to swear or affirm an oath of allegiance involving Canada's constitutional institutions, if they are seeking the full panoply of political rights within Canada.

60. The requirement is minimally impairing in that there are no less harmful means of achieving the "limit" without significantly compromising the stated objective.[67]

61. In fact, permitting a "side" procedure or piecemeal 'opting out' of fundamental constitutional principles that a claimant has difficulty accepting on conscientious or other grounds would compromise the purpose of the oath and the integrity of the important Canadian institution of citizenship, that is intended to create "an underlying community of status" that binds Canadians together. The oath would then admit of a cafeteria-type approach to constitutional principles in which citizenship candidates would be permitted to raise objections to any of the fundamental principles of Canada's constitution that might be reflected in the oath for any reason of conscience, and thereby "opt out" of the constitutional principles. Yet at the same time these individuals would become citizens of Canada.

62. In *Edwards Books*,[68] the Supreme Court specifically weighed in against such a process being part of a minimal impairment analysis. It expressed its concern with the '*undesirability of state-sponsored inquiries into religious beliefs*"

67 Hutterian Brethren, supra, paras. 53, 60.
68 Edwards Books, supra, paras. 133, 137.

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.

63. The salutary effects of the oath outweigh any deleterious effects on the applicants' rights. The applicants have provided scant evidence as to their reasons for wanting citizenship and in what way their lives are currently impeded by being permanent residents. Moreover, they have provided no evidence of how taking the oath would interfere with their ability to hold or express their own religious or conscientiously-held beliefs in the future.[69] As commented on by the Supreme Court,[70] 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. The legislated limit may impose costs on the practitioner in terms of money, tradition or inconvenience. The state is not required to indemnify against those costs, and society reasonably expects adherents to bear those costs without their being any infringement, as long as there is still a choice as to religious practice or conscientious belief. The cost alone does not adversely impact on other *Charter* values. The inability to enjoy the benefits of citizenship – to hold a Canadian passport and to vote – are

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69 See Chainnigh, supra, at para. 39.
70 Hutterian Brethren, supra, para. 95.

amongst the costs reasonably borne by individuals whose personal beliefs run contrary to Canada's foundational constitutional structure.

ORDER SOUGHT

64. The respondent requests that the application be dismissed, but if granted, requests a suspension of 30 days to permit a Notice of Appeal to be filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto Tuesday, 25th day of June 25, 2013.

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

05-CV-301832-PD3

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

Applicants

AND

THE ATTORNEY GENERAL OF CANADA

Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

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