CITATION: McAteer et al. v. Attorney General of Canada, 2013 ONSC 5895
COURT FILE NO.: 05-CV-301832-PD3
DATE: 20130920

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Michael McAteer, Simone E.A. Topey, and Dror Bar-Natan Applicants	*Peter Rosenthal, Michael Smith, Selwyn Pieters, and Reni Chang*, for the Applicants
– and –	
The Attorney General of Canada Defendant	*Kristina Dragaitis and Ned Djordjevic*, for the Defendant
	HEARD: July 12, 2013

MORGAN J.

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

[2] The form of oath is authorized and set out in section 24 of the Act and the Schedule thereto, as follows:

> *I swear (*or *affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfill my duties as a Canadian citizen.*

[3] The Applicants submit that the oath to the Queen violates sections 2(b) (freedom of expression), section 2(a) (freedom of religion), and section 15(1) (equality rights) of the *Canadian Charter of Rights and Freedoms*, *Constitution Act, 1982*, Schedule B to the *Canada*

Act, 1982 (UK), 1982, c 11 (the "*Charter*"). They further submit that the oath does not constitute a reasonable limit on those rights under section 1 of the *Charter*. The Respondent takes the position that what the Applicants are seeking is a positive right to citizenship, which is not a right protected by the *Charter*; accordingly, the Respondent submits that the oath to the Queen does not violate any of the constitutional rights of the Applicants.

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

I. The Applicants' claims

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

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

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

[8] The Applicant, Dror Bar-Natan, immigrated to Canada from Israel. He deposes that the oath is "repulsive" to him because "it states that some people, the royals and their heirs, are born with privilege." He further states that "it is a historic remnant of a time we all believe has passed", and that it would violate his belief in equality of all persons to swear allegiance to "a symbol that we aren't all equal and that some of us have to bow to others for reasons of ancestry alone."

[9] The Application was initiated by Charles Roach, a prominent Ontario lawyer who passed away in October 2012. He had immigrated to Canada from Trinidad and Tobago in 1955 and became a lawyer in 1963. Cullity J. set out the salient features of Mr. Roach's case in a reported decision in his judgment denying certification of the present claim as a class action. *Roach v Canada (Attorney General)* (2009), 74 CPC (6th) 22, at paras 18-21; *aff'd* 84 CPC (6th) 276 (Ont Div Ct).

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

[11] As it turned out, before the expiry of the Law Society's deadline the Supreme Court of Canada rendered its decision in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 striking down the requirement of Canadian citizenship for those seeking to be called to the bar. Under amendments to the *Law Society Act* that came into force on February 27, 1989, the criteria for admission to the Ontario bar were amended to bring the law into compliance with the *Andrews* ruling. Mr. Roach was therefore permitted to continue practicing law despite not having sworn the requisite oath to become a citizen of Canada.

[12] It is fair to say that Mr. Roach's stance as an objector to the oath, although not successful in its previous legal iterations, see *Roach v Canada (Minister of State for Multiculturalism & Culture)* (1994), 113 DLR (4th) 67 (Fed CA); *Roach v AG Canada, supra*, brought prominence to the issue at hand. He was very active in the political movement to abolish the monarchy for Canada. In addition, the case of Charles Roach illustrates that there are real costs to a long-time member of Canadian society remaining a permanent resident rather than becoming a citizen. As Cullity J. pointed out, at para 22 of his judgment:

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

II. Legislative history

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

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

[15] The requirement of taking an oath to the Queen as a condition of citizenship was re-enacted and imposed on every applicant for citizenship, whether a British subject or not (except for a limited class of British subjects who had already been resident in Canada for 5 years and were 'grandfathered' as automatic Canadian citizens), when Canadian citizenship was first introduced in the 1947 Act. Thirty years later, the oath was once again reconfirmed in the revisions brought about by the *Citizenship Act*, SC 1974-75-76, c 108. It is this version of the Act that contains the oath of citizenship in its current form.

[16] As for the Queen's stature as head of state, the ancient common law recognized the monarch as the repository of English sovereignty prior to the Norman conquest. The courts elaborated on and confirmed monarchial authority in the late middle ages in response to a series of questions posed to them by Richard II. See Stanley Bertram Chrimes, "Richard II's questions to the judges 1387", 72 Law Q Rev 365–90 (1956). This took into account the limits on royal powers imposed by Magna Carta, 1215, which was itself followed by the gradual emergence of *habeas corpus* and other relevant enactments and common law restraints on royal power. See 9 W. Holdsworth, *A History of English Law* 112 (1926). With all of this, the courts nevertheless confirmed in *Godden v Hales* (1686), 2 Shower 475 (KB) that the Crown sits at the sovereign apex of the legal and political system.

[17] The monarch as head of state was further entrenched by the *Act of Settlement, 1701*, 12 & 13 Will III, c 2, which set out the rules for succession to the Crown of the United Kingdom (Great Britain and Scotland). This conception of sovereignty and executive authority was inherited by Canada in the *Constitution Act, 1867*, 30 & 31 V, c 3, section 9, which provides that, "[t]he Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen". The role of Her Majesty as sovereign has also been reinforced in section 41(a) of the *Constitution Act, 1982*, which requires unanimity of the federal and all provincial legislatures in order to enact any amendment to the constitutional status of "the office of the Queen, the Governor General and the Lieutenant Governor of a province".

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

[19] Actual royal power, certainly, has "gradually relocated from the Monarch in person to the Monarch's advisors or ministers". *Black v Canada (Prime Minister)* (2001), 199 DLR (4th) 228, at para 32 (Ont CA). Nevertheless, the Queen retains authority over "the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers" and other matters commensurate with her stature as national sovereign, *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 AC 374, 418 (HL), even if most of the prerogative

powers are today exercised on advise of the Prime Minister and subject to the *Charter*. *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44, at para 36.

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

III. Freedom of Expression

[21] As the Supreme Court of Canada pointed out in one of its earliest judgments under section 2(b) of the *Charter*, "[t]he content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts." *Irwin Toy Ltd. v Québec (Attorney General)*, [1989] 1 SCR 927, at para 43. Certain behaviours such as a labour strike, *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, acts of criminal violence, *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573, at 588, and the display of commercial wares, *R v Sharma* (1991), 77 DLR (4th) 334, at para 19 (Ont CA), have been specifically excluded from the ambit of the constitutional right; otherwise, "s. 2(*b*) of the *Charter* embraces all content of expression irrespective of the particular meaning or message sought to be conveyed." *R v Keegstra*, [1990] 3 SCR 697.

[22] Accordingly, "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee". *Irwin Toy*, *supra*, at p. 969. Protected speech therefore includes not only the spoken word but the choice of language, *Ford v Québec (Attorney General)*, [1988] 2 SCR 712, and the right to receive or hear expressive content as much as the right to create it. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 SCR 1120. Section 2(b) also guarantees the right to possess expressive material regardless of how repugnant it may be to others or to society at large. *R v Sharpe*, [2001] 1 SCR 45.

[23] Most significantly, "[f]reedom of expression encompasses the right *not* to express views." *Rosen v Ontario (Attorney General)* (1996), 131 DLR (4th) 708, at para 16 (Ont CA) [emphasis added]. As explained by Lamer J. (as he then was) in *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, at para 95, "[t]here is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do." A statutory requirement whose effect is "to put a particular message into the mouth of the plaintiff" would run afoul of section 2(b) of the *Charter*. *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, at 267.

[24] Indeed, the right not to express the government's preferred point of view extends to those who oppose socially positive messages such as health warnings, *RJR McDonald Inc. v Canada*

(Attorney General), [1995] 3 SCR 199, at para 124, and includes even the right to refrain from expressing objective, uncontested facts. *Slaight Communications*, *supra*, at para 95. As Chief Justice Lamer explained in *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, at para 18, individuals are not only protected from having to articulate a message with which they disagree, but are also guaranteed the correlative right not to have to listen to such a message.

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

[26] Despite the Respondent's surprising argument to the contrary in its factum, the inability to become a citizen is not the kind of "state-imposed cost or burden [that is]...not prohibited [because]...the burden is trivial or insubstantial." *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713, at para 97. The fact that the Applicants can remain in the country as permanent residents does not devalue the benefit that they are unable to access without speaking words they do not wish to speak. Iacobucci J. put as high a price as possible on it in *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at para 68: "I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship." The burden on the Applicants' speech – putting citizenship out of their grasp – is real and substantial.

[27] The Respondent contends that the Applicants' *Charter* claim in effect seeks a "positive right" rather than a "negative right", and that section 2(b) guarantees only the latter form of right. Quoting the Supreme Court of Canada in *Baier v Alberta*, [2007] 2 SCR 673, at para 41, the Respondent submits that here "what is sought is 'positive government legislation or action as opposed to freedom from government restrictions on activity in which people could otherwise freely engage...'"

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

[29] L'Heureux-Dubé J. pointed out in *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, at para 79, that "[t]he distinctions between...posit ive and negative entitlements, are not always clearly made, nor are they always helpful." That observation certainly describes the arguments made here.

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

[31] The current challenge is analogous to that in *Libman v Québec (Attorney General)*, [1997] 3 SCR 569, where the challenger sought to fundraise for his cause during the Québec referendum. The governing regulations denied him the benefit of access to any officially sanctioned committee that would permit regulated expenses to be incurred during the referendum period. As with the present Applicants, the challenger sought to express his view (there through funding a political cause, here through non-reference to the Queen in the citizenship oath), independent of any government activity – but was denied a government-created benefit if he did so.

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

[33] It is as much of a *Charter* violation to compel speech by denying a statutory benefit as it is to censor speech by imposing a statutory punishment; the former "positive"-looking right is really just the flip side of the latter "negative"-looking right. A person who cannot access the benefit of citizenship as a consequence of a rights-infringing provision in the Act deserves a constitutional remedy unless the impugned provision is saved by section 1. *Augier v Canada (Minister of Citizenship and Immigration)*, [2004] FC 613, at para 25 (Fed TD).

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

IV. The citizenship oath as a reasonable limit on expression

[35] Since the Applicants have established that the Act's requirement of an oath to the Queen is a *prima facie* breach of section 2(b) of the *Charter*, it is for the Respondent to show that it the oath is, in the words of section 1, demonstrably justifiable in a free and democratic society. Needless to say, the proof at this stage of the analysis need not be definitive; indeed, it probably could not be in the usual courtroom sense of the word "proof". The Supreme Court of Canada

has acknowledged that, ""[d]ecisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society". *McKinney v University of Guelph*, [1990] 3 SCR 229, at 301.

[36] Nevertheless, the court is mandated under section 1 to investigate the justifications for a *Charter* breach. The present case does not, of course, involve criminal justice or entail the potential incarceration of any person, but rather represents a choice made by Parliament in fashioning the process of citizenship acquisition. It therefore need not, and probably could not, be "tuned with great precision in order to withstand judicial scrutiny". *R v Edwards Books & Art Ltd.*, [1986] 2 SCR 713, at 776. The Respondent must, however, provide what McLaghlin CJC has called a "reasoned demonstration" that the breach is a justifiable one. *RJR MacDonald, supra*, at para 129.

[37] In order to establish a section 1 justification, the Respondent must first establish that there is a sufficiently important objective sought to be accomplished by the measure in issue – i.e. the oath. *Reference re sections 193 & 195.1(1)(c) of the Criminal Code (Canada) (Prostitution Reference)*, [1990] 1 SCR 1123, at para 90. It must then demonstrate that this measure is designed to achieve its objective, and is not based on arbitrary, unfair, or irrational considerations. Following that, the Respondent must show that, even if rationally connected to its objective, the oath impairs "as little as possible" the Applicants' right or freedom. *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, at para 139. Finally, the Respondent must then explain to the court's satisfaction the "proportionality between the effects of the [required oath]..., and the objective which has been identified as of 'sufficient importance'". *R v Oakes*, [1961] 1 SCR 103, at para 70.

a. The pressing and substantial objective

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

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

[39] The Applicants respond by submitting polling data suggesting that for contemporary Canadian society the Queen may not serve the symbolic function that the oath seeks to reinforce. In oral argument, counsel for the Applicants supported this approach by asking, rhetorically, why it is pressing and substantial objective to swear allegiance to the Queen as opposed to an oath to Canada or its constitution. Similar sentiments are expressed by the Applicants in their affidavits. Each indicate that they object to the monarch finding her way into the citizenship oath, but that they would have no objection to swearing an oath to Canada or its laws.

[40] With respect, the argument presented by the Applicants does not establish the conclusion that they draw. Nothing in the Applicants' argument takes issue with, or counters, the objective

of ensuring during the citizenship ceremonies "a public, symbolic avowal of commitment" to the country and its established order. Indeed, the Applicants and the Respondents appear to share that objective, but each seeks to achieve it with a different form of words.

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

b. The oath as a rational measure

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

[43] The Applicants' affidavit material addresses this view, describing their perception of the monarchy as essentially undemocratic, inegalitarian, and a figure that runs counter to what they conceive as the essence of Canadian society. They also submit statistical data showing that the percentage of new Canadians of British descent has decreased dramatically since the early decades after Confederation, and they surmise that the personal oath to a monarch of British heritage sends a divisive and elitist rather than a unifying and all-inclusive message.

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

[45] In *Chainnigh v Canada (Attorney General)*, 2008 FC 69, the Federal Court had occasion to consider, and dismiss, similar arguments in the context of a Canadian Forces officer who challenged various expressions of loyalty required during the course of his military service. As Barnes J. put it, at para 49, "the fact remains that our present ties to the British monarchy are constitutionally entrenched and unless and until that is changed there is legitimacy within our institutional structures for demanding, in appropriate circumstances, expressions of respect and loyalty to the Crown."

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

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

[48] The constitution contains universal rights that exist in most liberal societies, such as freedom of expression, as well as "a unique set of constitutional provisions, quite peculiar to Canada", that in many ways define the nation. *Attorney General of Québec v Québec Protestant School Boards*, [1984] 2 SCR 66, at 79. Among the latter are any number of clauses that privilege foundational aspects of Canadian society: French-English bilingualism, common law-civil law bijuridicalism, a parliamentary system, federalism, aboriginal treaty rights, and the status of Her Majesty, to name but a few. It would be entirely rational for Parliament, if it so desired, to fashion an oath of citizenship that referenced any such defining element established by the country's most fundamental law.

c. The minimal impairment of rights

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

[50] To reiterate what was said at the outset of the section 1 discussion, this inquiry is not an exact science. The Supreme Court of Canada has observed that, "[t]he analysis under s. 1 of the *Charter* must be undertaken with a close attention to context." *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877, at para 87. Thus, while the Court has made it clear that "Parliament is not required to choose the absolutely least intrusive alternative", *R v Downey*, [1992] 2 SCR 10, at 37, the question remains whether there is some other method available that would be less intrusive on the Applicants' rights but "which would achieve the objective as effectively". *R v Chaulk*, [1990] 3 SCR 1303, at 1341.

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

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

[53] A similar argument was put forward by an applicant for citizenship in *Re Heib* (1980), 104 DLR (3d) 422 (Fed Ct TD). Like the Applicants here, the appellant in *Re Heib* "interprets the oath as a binding promise by him to bear allegiance to a living person, Queen Elizabeth, and to her successors. He says he cannot bring himself to swear allegiance to any living person." Likewise, Charles Roach in his Federal Court litigation held fast to the view that "a public oath is the most solemn rite and that its terms must be faithfully observed." *Roach v Canada* (FCA), *supra*, at para 21 (per Linden J.A., dissenting).

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

[55] The Federal Court in *Re Heib* viewed that appellant's similar objection to the oath as misguided. Collier J., at para 8, preferred the interpretation that "the oath can be regarded, not as a promise to a particular person, but as a promise to the theoretical political apex of our Canadian parliamentary system of constitutional monarchy." Likewise, the Federal Court of Appeal in *Roach* read the reference to the Queen as a reference not to the person but to the institution of state that she represents. Macguigan JA, for the majority, indicated at para 93 that the oath, properly understood, required a citizenship applicant to simply "express agreement with the fundamental structure of our country as it is."

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

[57] It appears that the Applicants have not embraced the prevalent view that eschews "plain meanings" as an approach to legal texts. Contemporary jurisprudence has for the most part seen so-called plain meaning interpretations as misleading, concluding that, where such plain meanings are invoked, it is as often as not the case that "the context and background [drive] a court to the conclusion that 'something must have gone wrong with the language.'" *Chartbrook Limited v Persimmon Homes Limited*, [2009] UKHL 38, at para 14. In the Applicants' view, however, the meaning of the citizenship oath – in particular the reference to the Queen – is in need of no further interpretation. They simply object to the meaning which they view as plain on the face of the oath.

[58] In fact, as indicated above, the Applicants take the plain words of the oath with much solemnity. They adopt the same posture as the appellant in *Re Heib*, who, at para 7, "said he could have, at the hearing before the Citizenship Judge, taken the designated oath, but...[h]is

conscience...would not allow him to do that." As counsel for the Applicants states in his factum: "[t]he insistence on the Oath to the Queen is an obstacle only to those who, like the Applicants, do not support the Monarchy and also take oaths very seriously."

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

[60] In the first place, Her Majesty the Queen in Right of Canada (or Her Majesty the Queen in Right of Ontario or the other provinces), as a governing institution, has long been distinguished from Elizabeth R. and her predecessors as individual people. Thus, for example, Canada has divided sovereignty, with both the federal and provincial Crowns represented by the Her Majesty. In *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] QB 892, at 916 (CA), Lord Denning explained that "the Crown was no longer single and indivisible", but rather had Canadianized as "was separate and divisible for each self-governing dominion or province or territory."

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

[62] Moreover, at least since the writings of A.V. Dicey and Walter Bagehot in the latter half of the nineteenth century, the Crown as a symbol of the constitutional monarchy is not generally conceived as an arbitrary authority. In fact, "[t]he Queen is only at the head of the dignified [i.e. formal] part of the Constitution. The Prime Minister is at the head of the efficient [i.e. political] part." W. Bagehot, *The English Constitution* (1st edn. 1877) (New York: Cosimo Classics, 2007), at 296. Together, these institutional embodiments of legal sovereignty are more accurately conceived as representing "the rule of law as a fundamental postulate of our constitutional structure." *Roncarelli v Duplessis*, [1959] SCR 121, at 142.

[63] Not only is the Canadian sovereign not foreign, as alleged by the Applicants in identifying the Queen's British origin, but the sovereign has come to represent the antithesis of status privilege. For one thing, the Crown is, *inter alia*, the repository of responsibility toward aboriginal peoples. *Guerin v The Queen*, [1984] 2 SCR 335, at 376.

[64] The Royal Proclamation of 1763, for example, was described by Laskin J. (as he then was) as a form of "Indian Bill of Rights". *Calder v Attorney General of Canada* (1973) 34 DLR (3d) 145, at 203 (SCC). It was therefore the Crown, or the royal sovereign, that first acknowledged aboriginal rights in Canada. In *Ex parte Indian Association of Alberta, supra*, at 916, Lord Denning concluded that "the obligations to which the Crown bound itself in the Royal Proclamation of 1763" continue apace in "the territories to which they related and [are] binding on the Crown...in respect of those territories."

[65] As indicated above, the Applicants depose that they find it "repugnant" to swear an oath to a foreign person that represents hierarchical authority and privileged status. It is more

plausible, however, that the oath to the Queen is in fact an oath to a domestic institution that represents egalitarian governance and the rule of law.

[66] In fact, the Canadianization of the Crown, along with all the other institutions of constitutional government, "was achieved through legal and political evolution with an adherence to the rule of law and stability. The proclamation of the *Constitution Act, 1982* removed the last vestige of British authority over the Canadian Constitution and re-affirmed Canada's commitment to the protection of its minority, aboriginal, equality, legal and language rights, and fundamental freedoms..." *Reference re Secession of Québec*, [1998] 2 SCR 217, at para 46.

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

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

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

[69] As with other cases involving expression in a political context, stacking the citizenship oath up against the rights of those who disagree with it poses a problem that is, once again, "difficult, if not impossible, to measure scientifically". *Harper v Canada (Attorney General)*, [2004] 1 SCR 827, at para 79. The court, however, is entitled not only to consider the evidence in its proper context, but to apply some common sense to the analysis. It is certainly relevant to consider whether, as the Applicants argue, the oath mandated by the Act is "so arbitrary and unreasonable that it *detracts* from the value of Canadian citizenship." *Lavoie v Canada*, [2002] 1 SCR 769, at para 59 [emphasis in original].

[70] The key to the proportionality test under section 1, as with the test for arbitrary deprivations of the section 7 right to life, liberty, and security of the person, is to combine logic with empirically discernible facts – i.e. "to evaluate the issue in the light, not just of common sense or theory, but of the evidence." *Chaoulli v Québec (Attorney General)*, [2001] 1 SCR 791, at para 150. While the legal onus is on the Respondent to establish that the legislation falls within reasonable limits, the risk of empirical uncertainty with respect to the section 1 evidence is, in effect, shared by both parties. See Sujit Choudhry, "So what is the real legacy of Oakes? Two decades of proportionality analysis under the Canadian *Charter*'s section 1" (2006), Sup Ct L Rev 501, at 530.

[71] Accordingly, the government party must provide evidentiary support for its position about the salutary effects of its actions. On the other hand, the challenging party must demonstrate that its position as to the deleterious effects of the state action has a modicum of

credibility, or at least makes logical sense. *Dagenais v Canadian Broadcast Corporation*, [1994] 3 SCR 835, at 884, 888.

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

[73] With all due respect, the notion that the citizenship oath represents a restriction on dissenting expression, including any expression of dissent against the Crown itself, is a misapprehension of Canadian constitutionalism and Canadian history. Differences of opinion freely expressed are the hallmarks of the Canadian political identity, and have been so since the country's origins. As Rand J. put it in *Boucher v. The King*, [1951] SCR 265, at 288: "[f]reedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life."

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

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

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

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

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

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

[79] It is in this light – a heritage of debate and dissent – that one can best understand Canada's tradition of permitting all viewpoints, including advocacy directly contrary to the existing constitutional order. Thus, for example, not only is advocating abolition of the monarchy explicitly permitted, *Committee for the Commonwealth of Canada*, *supra*, but the prospect of separation from the United Kingdom and secession of a province both form the subject of legitimate legal discourse. *Reference re Resolution to Amend the Constitution* ("*Patriation Reference*"), [1981] 1 SCR 753; *Reference re Secession of Québec*, [1998] 2 SCR 217. Moreover, a political party dedicated to constitutional fracture can form Her Majesty's Loyal Opposition in Canada's Parliament. David E. Smith, *Across the Aisle: Opposition in Canadian Politics* (Toronto: University of Toronto Press, 2013), at 85-86.

[80] I accept that the Applicants' beliefs are subjectively sincere, and so the deleterious effect of the oath is not nil. *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, at para 68. Given that these beliefs about the oath to the Queen reflect a fundamental misapprehension, however, it is difficult to attribute them great objective weight. On the other hand, the salutary effect of an expression of fidelity to a head of state symbolizing the rule of law, equality, and freedom to dissent, is substantial.

[81] In requiring a vow of commitment to national values at the moment of citizenship, the Act, as indicated earlier in these reasons, places a limit on free speech; but it does so in a way that is appropriate to the free and democratic society that is Canada. Indeed, the Act, with its mandatory oath, restricts a *Charter* right in a way "that reflects the very purpose for which rights were entrenched", Lorraine E. Weinrib, "The Supreme Court of Canada and Section 1 of the Charter" (1988), 10 Sup Ct L Rev 469, at 494. As a statement that embraces constitutional values, it is a rights-enhancing measure that is justified under section 1 of the *Charter*.

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

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

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

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

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

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

[87] The Supreme Court of Canada addressed this type of claim in *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, where members of a minority religious community claimed that the province of Alberta's requirement of a photo on a drivers' license violated a tenet of their faith. In a description that could be equally apt in the present case, McLaughlin CJC stated, at para 39: "Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs..."

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

[89] The citizenship oath has much in common with the drivers' license photograph in that it is equally a universal requirement of the state applied to applicants without regard or reference to religion. The oath, however, presents an even stronger case for upholding the state action since the challengers' section 2(a) objection – the deleterious effect on a sincerely held religious belief

– runs counter to the very object of holding up constitutional values for new citizens. The freedom of religion challenge here illustrates the observation by Abella J. in *Bruker v Markovitz*, [2007] 3 SCR 607, at para 2, that "[n]ot all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary."

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

[91] The Supreme Court of Canada embraced this notion in addressing the *Charter* arguments in *Reference re Same-Sex Marriage*, [2004] 3 SCR 698. The court stated emphatically, at para 46, that "[t]he promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster." Likewise, an oath of citizenship that references a symbol of national values enriches the society as a whole, and does not undermine the rights and freedoms that the society and its head of state foster and represent.

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

[93] An accommodation of religion such as that sought here – taking account of Ms. Topey's personal religious beliefs in the context of a non-religious citizenship procedure – would be analogous to a public school board accommodating a religious group by de-secularizing its curriculum. In other words, it would amount to a form of accommodation that the Supreme Court has said is impermissible. *S.L. v Commission scolaire des Chênes*, [2012] 1 SCR 235. After all, it stands to reason that, "state sponsorship of [or support for] one religious tradition amounts to discrimination against others." *Ibid.*, at para 17.

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

[95] Turning to the section 15(1) claim raised by the Applicants, two of the three of them (Mr. McAteer and Mr. Bar-Natan) identify the ground of discrimination against them as one of political belief. Mr. McAteer states that he believes in republicanism, while Mr. Bar-Natan

states that he believes in a non-hierarchical society. Ms. Topey, as noted above, claims interference with freedom of religion; and although she bases her argument more on section 2(a) than section 15(1), she raised the issue in a way that is closely related to a claim of discrimination on religious grounds. Further, Cullity J. made it clear in *Roach*, *supra*, at para 17, that an opposition to the entrenchment of "racial hierarchies", and thus to racial discrimination, was a significant part of Charles Roach's original claim in this case.

[96] Race and religion are specifically enumerated grounds of prohibited discrimination under section 15(1) of the *Charter*. Furthermore, the Supreme Court of Canada reasoned in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, at 219, that a ground of discrimination is an analogous *Charter* ground if it is based on characteristics that are immutable, or changeable only at an unacceptably high cost to personal identity. Recent case law has suggested that section 15(1) of the *Charter* can be invoked "to protect against discriminatory treatment of a person on account of having a political belief." *Condon v Prince Edward Island* (2002), 214 Nfld & PEI Rep 244, at para 49 (PEI SC); *aff'd* on other grounds 253 Nfld & PEI Rep 265 (PEI CA).

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

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

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

[100] What the claim of political belief discrimination really reduces to is a claim that the oath discriminates against those who object to the oath. It is self-evident that a claim under section 15(1) cannot be so finely tuned to the very measure being challenged lest every enactment be labeled discriminatory.

[101] That said, the Applicants' argument here is closely allied with their overall claim that they are discriminated against on the grounds of their non-citizenship status. They submit that

since persons who are Canadian citizens by birth do not need to take an oath to the Queen, applicants for citizenship by naturalization are inherently discriminated against by requiring them to take an oath. Those who, like the Applicants, hold political beliefs that oppose the content of the oath, are the ones who feel this discrimination the most.

[102] The Applicants' claim of discrimination on the ground of (non-)citizenship, however, attempts to prove too much. While it is impermissible for government to distinguish between citizens and non-citizens in certain other contexts that are not intrinsically related to citizenship, *Andrews*, *supra*, the very concept of citizenship is premised on there being a legal distinction between citizens and others. "Citizenship", according to Rand J. and just about every other jurist who has written about the issue, "is membership in a state". *Winner v S.M.T.*, [1951] SCR 887, at 918. Needless to say, the very existence of a category of membership also signifies the existence of non-members.

[103] For this reason, the courts in Canada have perceived citizenship to be a status that is "determined by Parliament under subsection 91(25) of the British North America Act, 1867... and is a political prerogative derived from the sovereignty of the nation." *Lavoie* (FCA), *supra*, at para 11. If an immigrant and a citizen were required to be treated equally within the meaning of section 15(1) of the *Charter*, the concept of citizenship would disappear. Accordingly, "one cannot even speak of the possibility of a breach of the equality principle when comparing the privileges of citizenship to those accorded to immigrants." *Ibid.*, at para 9.

[104] Citizenship, as Linden JA indicated in *Lavoie*, at para 125, "is a cherished privilege, not for the pecuniary benefits which accrue to its holders, but for the bonds that it creates." Likewise, when *Lavoie* reached the Supreme Court, the plurality judgment by Bastarache J. emphasized, at para 57, that "citizenship serves important political, emotional and motivational purposes...it fosters a sense of unity and shared civic purpose amongst a diverse population." In much the same way, the oath of citizenship is an articulation of the value-laden glue of which those bonds are composed.

[105] Bonds by definition separate people within from people without. This fact has been the subject of critique by political theorists and legal scholars, who have pointed out that the political and material advantages given to birthright citizens raises for some a "moral disdain against acquisition and transfer rules that systemically exclude prospective members on the basis of ascriptive criteria." Ayelet Shachar and Ran Hirschl, "Citizenship as Inherited Property" (2007), 35 Political Theory 253, at 255. It is this sentiment that is reflected in, for example, Mr. Bar-Natan's testimony that the oath is a form of initiation ritual that is "tantamount to hazing."

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

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

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

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

VI. Disposition

[110] The Application is dismissed.

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

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

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

Morgan J.

Released: September 20, 2013

CITATION: McAteer et al. v. Attorney General of Canada, 2013 ONSC 5895
COURT FILE NO.: 05-CV-301832-PD3
DATE: 20130920

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Michael McAteer, Simone E.A. Topey, and Dror Bar-Natan

Applicants

– and –

The Attorney General of Canada

Defendant

REASONS FOR JUDGMENT

E.M. Morgan J.

Released: September 20, 2013