

COURT OF APPEAL FOR ONTARIO

B E T W E E N

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

Applicants
(Appellants)

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent
(Respondent)

FACTUM OF THE APPELLANTS

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**PETER ROSENTHAL, BARRISTER
C/O PIETERS LAW OFFICE**

181 University Avenue, Suite 2200
Toronto, Ontario M5H 3M7
Telephone: (416) 787-5928 / (416) 978-3093
Fax: (416) 787-6145
E-mail: rosent@math.toronto.edu

Peter Rosenthal (LSUC no. 33044O)
Michael Smith (LSUC no. 14557M)
Selwyn Pieters (LSUC no. 50303Q)
Reni Chang (LSUC no. 59476F)

Solicitors for the Applicants

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PART I: THE APPELLANTS AND THE COURT APPEALED FROM

1. The Appellants request a declaration that requiring applicants for Canadian citizenship to take an oath or affirmation that contains the phrase “...*I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors ...*” violates their rights pursuant to sections 2(a), 2(b) and 15(1) of the *Canadian Charter of Rights and Freedoms* [hereinafter, the “*Charter*”]. Justice Morgan of the Superior Court of Justice dismissed their application, holding that sections 2(a) and 15(1) were not violated and that the violation of section 2(b) was saved by section 1 of the *Charter*. This is an appeal of that dismissal. The Respondent Attorney General has cross-appealed the finding that the requirement violates section 2(b).

PART II: A CONCISE OVERVIEW

2. The Appellants are permanent residents of Canada who wish to become Canadian citizens and to enjoy the privileges and accept the responsibilities of Canadian citizenship. However, the Appellants have religious and/or conscientious beliefs, including a belief in the fundamental equality of human beings, which have caused them to have conscientious objections to taking an oath to a monarch. The requirement to take an Oath to the Queen as a condition of citizenship has effectively barred the Appellants from acquiring citizenship because of their religious and/or conscientious beliefs. It is submitted that this contravenes their rights pursuant to the freedom of conscience and religion guarantee of section 2(a) of the *Charter*.
3. The oath requirement imposes a coercive burden on the Appellants to express meaning and content to which they are fundamentally opposed. Moreover, if the Appellants took the oath, they would feel morally bound not to engage in activities aimed at abolishing

the monarchy. The oath requirement therefore violates the Appellants' freedom of expression under section 2(b) of the *Charter*.

4. The oath requirement discriminates against the Appellants on the basis of religion, national origin and citizenship. People who do not have beliefs that bar them from taking the oath do not suffer a coercive burden to relinquish their beliefs in order to become citizens. People who are born in Canada receive citizenship automatically and do not have to take the oath. They too do not suffer the same coercive burdens as do the Appellants, who were all born outside of Canada, and who must compromise their beliefs and limit their future activities in order to become citizens. The oath requirement violates the Appellants' right to equality under section 15(1) of the *Charter*.

PART III: A CONCISE SUMMARY OF THE FACTS

A) The Canadian Citizenship Oath

5. Applicants for Canadian citizenship must take the citizenship oath in order to become Canadian citizens.¹ The certificate of citizenship does not become effective until the oath is taken.²
6. The complete citizenship oath, with the impugned phrase underlined and italicized [hereinafter, the impugned phrase will be referred to as the "Oath to the Queen"], states:

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

¹ *Citizenship Act*, R.S.C. 1985, c. C-29 (hereinafter, the "*Citizenship Act*"), s. 3(1)(c).

² *Ibid.*, s. 12(3).

³ *Ibid.*, s. 24 and Schedule.

7. Applicants for Canadian citizenship who are in Canada are normally required to take the oath in front of a citizenship judge.⁴
8. Citizenship judges must follow procedures that “emphasize the significance of the ceremony as a milestone in the lives of citizens” and “administer the oath of citizenship with dignity and solemnity, allowing the greatest possible freedom in the religious solemnization or the solemn affirmation thereof”.⁵
9. After taking the oath, citizenship applicants must sign a certificate certifying that they have taken the oath.⁶
10. Any person who “for any purposes of [the Citizenship] Act makes any false misrepresentation, commits fraud or knowingly conceals any material circumstances” is guilty of an offence that is punishable by a fine and/or imprisonment.⁷
11. People born in Canada and people born outside of Canada to a Canadian parent are not required to take the citizenship oath.⁸
12. Exemptions from taking the citizenship oath may be granted to persons who are minors and to persons who cannot understand the significance of the oath for reasons of mental disability. No other exemptions are explicitly provided in the *Citizenship Act*.⁹

⁴ *Citizenship Regulations*, SOR/93-246 (hereinafter, the “*Citizenship Regulations*”), ss. 19(1)-(2) and 20(1).

⁵ *Ibid.*, s. 17(1)(a)-(b).

⁶ *Citizenship Regulations*, s. 21.

⁷ *Citizenship Act*, s. 29(2)

⁸ *Ibid.*, s. 3(1)(a) and (b).

⁹ *Ibid.*, s. 5(3)(b) and (c).

B) The Appellants

13. All of the Appellants are permanent residents of Canada who wish to become Canadian citizens.¹⁰ The Appellants wish to enjoy the privileges of citizenship, including voting in elections and traveling on a Canadian passport.¹¹
14. However, the Appellants have not become citizens because of their religious or conscientious objections to the Oath to the Queen.¹²
15. All of the Appellants would willingly take an oath to observe the laws of Canada and to fulfill their duties as Canadian citizens.¹³
16. The Appellant Michael McAteer is a committed republican and believes in a democratic form of government.¹⁴ He deposes:

8. I take oaths very seriously, and so taking an oath of allegiance to a hereditary monarch who lives abroad would violate my conscience, be a betrayal of my republican heritage and impede my activities in support of ending the monarchy in Canada.

9. The institution of hereditary monarchy, with its hereditary privileges, its perpetuation of a class system, and its insistence that the monarch be a member of the established Church of England is anachronistic and discriminatory and has no place in a democratic, multi-cultural, multi-ethnic, multi-religious country such as Canada. I will not take an Oath to such an institution because it is not in keeping with my beliefs of egalitarianism and democracy.¹⁵

¹⁰ Affidavit of Michael McAteer (hereinafter, "McAteer"), Appeal Book and Compendium of the Appellants, Tab 9, pg. 98, paras. 3 and 5; Affidavit of Simone Topey (hereinafter, "Topey"), Appeal Book and Compendium of the Appellants, Tab 10, pg. 101, paras. 3 and 4; Affidavit of Dror Bar-Natan (hereinafter, "Bar-Natan"), Appeal Book and Compendium of the Appellants, Tab 11, pgs. 104 and 106, paras. 10 and 18.

¹¹ McAteer, Appeal Book and Compendium of the Appellants, Tab 9, pg. 98, para. 5; Topey, Appeal Book and Compendium of the Appellants, Tab 10, pg. 101, para. 5-6; Bar-Natan, Appeal Book and Compendium of the Appellants, Tab 11, pg. 106, para. 18.

¹² McAteer, Appeal Book and Compendium of the Appellants, Tab 9, pgs. 98-99, paras. 6 - 9; Topey, Appeal Book and Compendium of the Appellants, Tab 10, pgs. 101-102, paras. 7 - 8; Bar-Natan, Appeal Book and Compendium of the Appellants, Tab 11, pg. 105, paras. 11 - 14.

¹³ McAteer, Appeal Book and Compendium of the Appellants, Tab 9, pg. 100, para. 11; Topey, Appeal Book and Compendium of the Appellants, Tab 10, pg. 102, para. 9; Bar-Natan, Appeal Book and Compendium of the Appellants, Tab 11, pg. 105, para. 15.

¹⁴ McAteer, Appeal Book and Compendium of the Appellants, Tab 9, pg. 99, para. 8.

¹⁵ *Ibid.*, pg. 42, paras. 8-9.

17. The Appellant Simone Topey is a Rastafarian. To Rastafarians, the Queen is regarded as the head of Babylon. It would deeply violate Ms. Topey's religious beliefs to take any kind of oath to a person who is the head of Babylon.¹⁶

18. The Appellant Dror Bar-Natan states that the Oath to the Queen is “repulsive” to him because:

it states that some people, the royals and their heirs, are born with privilege. It is a historic remnant of a time we all believe has passed, in which the children of peasants could be nothing but peasants, and in which aristocracy existed as a closed club.

... . [It is] a symbol that we aren't all equal and that some of us have to bow to others for reasons of ancestry alone.¹⁷

Affirming allegiance to the Queen would violate Mr. Bar-Natan's conscience.¹⁸

19. Although his wife and son have taken the oath and become citizens, Mr. Bar-Natan has not taken the oath because of his conscientious beliefs.¹⁹

C) Charles Roach and the History of the Proceedings

20. This Application was initiated by Mr. Charles Roach, who passed away in October 2012.²⁰

21. Mr. Roach immigrated to Canada in 1955.²¹ He became a lawyer in Ontario in 1963.²²

He was a republican and believed that state power should reside with the people and

¹⁶ Topey, Appeal Book and Compendium of the Appellants, Tab 10, pgs. 101-102, para. 7.

¹⁷ Bar-Natan, Appeal Book and Compendium of the Appellants, Tab 11, pg. 105, paras. 12-14.

¹⁸ Bar-Natan, Appeal Book and Compendium of the Appellants, Tab 11, para. 14.

¹⁹ *Ibid.*, pg. 48, para. 10

²⁰ Affidavit of Randall White (hereinafter, “White”), Appeal Book and Compendium of the Appellants, Tab 14, pg. 120, para. 13.

²¹ *Roach v. Canada (Attorney General)*, [2009] O.J. No. 737, para. 15; White, Appeal Book and Compendium of the Appellants, Tab 14, pg. 121, para. 15.

²² *Roach v. Canada (Attorney General)*, [2009] O.J. No. 737, para. 16; White, Appeal Book and Compendium of the Appellants, Tab 14, pg. 121, para. 16.

their elected representatives and not with a person who inherited the office.²³ He believed that “it would be hypocritical and contrary to the dictates of his conscience to swear fealty to an hereditary monarch as this would violate his passionate belief in the equality of human beings and his opposition to racial hierarchies.”²⁴

22. In 1988, Mr. Roach, who was a permanent resident, 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.²⁵ Mr. Roach applied for citizenship and was told that he had satisfied all the preconditions for a grant of citizenship.²⁶ All that remained was for him to attend a citizenship ceremony and take the citizenship oath. At the ceremony, Mr. Roach asked if he could take the oath without the Oath to the Queen.²⁷ He was told that he could not.²⁸ Mr. Roach declined to take the oath and his certificate of citizenship was withheld.²⁹
23. However, before the deadline set by the Law Society of Upper Canada had passed, the *Law Society Act* was amended in accordance with the Supreme Court’s decision in *Andrews v. Law Society of British Columbia*³⁰, which held that it is contrary to section 15 of the *Charter* to restrict the practice of law to Canadian citizens. Thus Mr. Roach remained a member of the bar.³¹

²³ *Roach v. Canada (Attorney General)*, [2009] O.J. No. 737, para. 17; White, Appeal Book and Compendium of the Appellants, Tab 14, pg. 122, para. 19.

²⁴ *Roach v. Canada (Attorney General)*, [2009] O.J. No. 737, para. 22

²⁵ *Ibid.*, para. 18.

²⁶ *Roach v. Canada (Attorney General)*, [2009] O.J. No. 737, para. 18.

²⁷ *Ibid.*, para. 19.

²⁸ *Ibid.*, para. 19.

²⁹ *Ibid.*, para. 19.

³⁰ [1989] 1 S.C.R. 143 (hereinafter, “*Andrews*”), para. 18.

³¹ *Roach v. Canada (Attorney General)*, [2009] O.J. No. 737, para. 20.

24. In 1994, Mr. Roach was invited to apply for the position of provincial court judge but he declined because he knew that he would have to take an Oath to the Queen.³²
25. Mr. Roach applied to the Federal Court seeking a declaration that the Oath to the Queen violated sections 2(a) through (d), 12 and 15(1) of the *Charter*.³³ The application was struck on the grounds that it disclosed no reasonable cause of action.³⁴
26. The present application was commenced on December 7, 2005 under the *Class Proceedings Act 1992*, S.O. 1992, c. 6. The Respondent moved to strike or stay the application but the Respondent's motion was dismissed.³⁵ Then the motion for certification was dismissed³⁶ and the proceeding was continued as the present application.
27. Howard Gomberg, a former plaintiff in this proceeding,³⁷ is Jewish. It is against his religious tradition to affirm allegiance to anyone other than God. Mr. Gomberg also believes in equality and that no human being is born better than any other human being. Although he felt that taking the Oath to the Queen was a violation of his religion and conscience, he decided to take it, under duress, because he would have suffered professional difficulties and would have been excluded from fully participating in Canadian life had he not become a Canadian citizen. Since taking the Oath to the Queen,

³² *Roach v. Canada (Attorney General)*, [2009] O.J. No. 737, para. 22; White, Appeal Book and Compendium of the Appellants, Tab 14, pg. 123, para. 23.

³³ *Roach v. Canada (Minister of State for Multiculturalism and Citizenship (C.A.))*, [1994] 2 F.C. 406, para. 34.

³⁴ *Ibid.*, para. 1.

³⁵ *Roach v. Canada (Minister of State, Multiculturalism and Citizenship)*, 86 O.R. (3d) 101.

³⁶ *Roach v. Canada (Attorney General)*, [2009] O.J. No. 737.

³⁷ *Roach v. Ontario (Attorney General)*, [2012] O.J. no. 2842, para. 2.

he deposes that he has “suffered ongoing mental anguish having taken a solemn Oath to be loyal to an institution and political theory that I do not believe in.”³⁸

28. Ashok Charles, another former plaintiff in this proceeding,³⁹ was born in India. He believes in the “fundamental democratic principle of equality and regards the monarchy as an undemocratic institution based on hereditary privilege”. Although he is opposed to all monarchies, the British monarchy, in particular, killed and repressed his ancestors in India. He deposes that swearing allegiance to the British monarchy was “repulsive” and “repugnant”. However, because it was important to him to become a Canadian citizen, he took the Oath to the Queen. Years later, he continued to feel “ideological discomfort and distress”.⁴⁰
29. Finally, twenty-seven years later, Mr. Charles publicly recanted the Oath to the Queen while, at the same time, confirming the remainder of the oath.⁴¹ He asked, in his letter to the Minister of Citizenship and Immigration, whether his citizenship was affected by his recantation.⁴² He was informed that it was not affected.⁴³

D) Origins of the Citizenship Oath

30. The citizenship oath originated in a historical period when people born in Great Britain and other Commonwealth countries, including Canada, were considered British subjects. British subjects immigrating to Canada did not have to be naturalized and thus were not required to take the citizenship oath. The citizenship oath was only required of non-

³⁸ Affidavit of Howard Gomberg (hereinafter, “Gomberg”), Appeal Book and Compendium of the Appellants, Tab 8, pg. 57-59, paras. 5-7 and 9-11.

³⁹ *Roach v. Ontario (Attorney General)*, [2012] O.J. no. 2842, para. 2.

⁴⁰ Affidavit of Ashok Charles (hereinafter, “Charles”), Appeal Book and Compendium of the Appellants, Tab 12, pgs. 107-108, paras. 1, and 5-9.

⁴¹ Charles, Appeal Book and Compendium of the Appellants, Tab 12, pg. 109, paras. 12-13.

⁴² *Ibid.*, pg. 109, para. 14.

⁴³ *Ibid.*, pgs. 109-110, paras. 15-16.

British subjects, who accounted for only a minority of immigrants to Canada since Canadian public policy gave preference to immigrants from Great Britain, the Commonwealth, the United States and Europe.⁴⁴

31. The legal status of a Canadian citizen was not introduced until the Citizenship Act of 1947.⁴⁵ At that time, some British subjects continued to be exempted from taking the citizenship oath.⁴⁶

E) Does the Oath to the Queen have a clear meaning?

32. Although the words in the Oath to the Queen refer specifically to “her Majesty Queen Elizabeth the Second, Queen of Canada, her Heirs and Successors,” there are various interpretations of its meaning.
33. There are no materials prepared by the Canadian government to explain the meaning of the words “Heirs” and “Successors” in the Oath to the Queen.⁴⁷
34. If an applicant for citizenship asked an official presiding at a citizenship ceremony what the words “Heirs” and “Successors” in the Oath to the Queen meant, the official would be advised to seek advice before answering the question.⁴⁸
35. Even the Manager of Citizenship Legislation and Program Policy at the Department of Citizenship and Immigration, Ms. Rell Deshaw, would have to seek legal advice before explaining the meaning of “Heirs” or “Successors”, including whether those two words

⁴⁴ White, Appeal Book and Compendium of the Appellants, Tab 14, pgs. 123-125, paras. 24-27, 30 and 32.

⁴⁵ *Ibid.*, pg. 123, para. 24.

⁴⁶ *Ibid.*, pg. 125, para. 32.

⁴⁷ Transcript of Cross-Examination of Rell DeShaw, Appeal Book and Compendium of the Appellants, Tab 8, pgs. 78 and 80, paras. 80 and 87-88.

⁴⁸ *Ibid.*, pg. 77, para. 76.

have the same or different meaning from each other, and clarifying whether the Oath to the Queen includes a present promise of allegiance to Prince William.⁴⁹

36. Some courts have suggested that the Oath to the Queen has a meaning that differs from a literal interpretation of the words. It has been said 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.”⁵⁰
37. It has also been suggested that the oath represents a “solemn intention to adhere to the symbolic keystone of the Canadian Constitution as it has been and is, thus pledging an acceptance of the whole of our Constitution and national life” and that it is basically a requirement that an applicant “express agreement with the fundamental structure of our country as it is.”⁵¹
38. However, a plain reading of the actual words of the Oath to the Queen expresses allegiance to Queen Elizabeth the Second as an individual, to her heirs whether or not they ever become head of state, and to her successors, regardless of how despotic a successor may be. In any event, the Oath certainly implies allegiance to constitutional monarchy.
39. When Mr. Gomberg made it known to officials that he was taking the citizenship oath under duress and wrote “under duress” above his signature, no concerns were expressed and he was allowed to proceed and become a Canadian citizen.⁵²

⁴⁹ *Ibid.*, pgs. 73-76 and 78-80, paras. 60-73 and 81-86.

⁵⁰ *In re Citizenship Act and in re Werner Willi Peter Heib*, [1980] 1 F.C. 254, para. 8.

⁵¹ *Roach v. Canada (Minister of State for Multiculturalism and Citizenship) (C.A.)*, [1994] 2 F.C. 406, para. 15.

⁵² Gomberg, Appeal Book and Compendium of the Appellants, Tab 13, pgs. 115-116, paras. 7-8 and 12-14.

F) The Present Political and Cultural Context

40. The national and ethnic origin of the Canadian population is much more diverse today than it was in the late 1800s. There has been a significant decline in the proportion of the Canadian population that considers itself to be of British origin. At the same time, the proportion reporting origins other than British, French or Aboriginal increased significantly, from 7.7% in 1871 to 25.2% in 1971.⁵³
41. A survey conducted for Citizenship and Immigration Canada found that 51% of respondents felt that a new citizenship oath should not refer to the monarchy.⁵⁴
42. In fact, surveys conducted by Angus-Reid Strategies in 2007 and 2008 concluded that more than 50% of Canadians supported ending Canada's ties to the British monarchy while only 35% opposed ending such ties. In Quebec, 71% supported ending ties and only 15% opposed ending ties. A further survey conducted by Harris/Decima in 2012 found that 52% of respondents agreed that Canada should retire the British monarchy as the head of Canada's governments while only 43% disagreed. In Quebec, 76% agreed and only 17% disagreed.⁵⁵
43. Moreover, another poll, conducted in 2002, found that only 5% of respondents could identify the Queen as Canada's head of state; 69% of respondents thought that the Prime Minister was the head of state.⁵⁶
44. Since the late part of the last century, there have been various proposals and debates about changing the citizenship oath to omit the Oath to the Queen.⁵⁷ At least several

⁵³ White, Appeal Book and Compendium of the Appellants, Tab 14, pgs. 130-131 and 133, paras. 50, 55, 61 and 62.

⁵⁴ *Ibid.*, pg. 139, para. 80.

⁵⁵ *Ibid.*, pgs. 140-141, paras. 82-85 and 87-88.

⁵⁶ *Ibid.*, pgs. 138-139, paras. 78.

⁵⁷ *Ibid.*, pgs. 127-129, paras. 39-44.

Members of Parliament have proposed and/or advocated a citizenship oath that pledges allegiance only to Canada, and not the Queen.⁵⁸ In 1994, when Citizenship and

Immigration Canada asked a team of writers to draft a new oath, the result was:

I am a citizen of Canada and I make this commitment: to uphold our laws and freedoms, to respect our people in their diversity, to work for our common well-being and to safeguard and honour this ancient Northern land.⁵⁹

45. In Ontario, since 1992, new lawyers can choose whether or not to take an Oath to the Queen.⁶⁰ The same is the case in Manitoba.⁶¹
46. Similarly, police officers in Ontario can choose whether or not to take an Oath to the Queen.⁶²
47. People working in the federal public service take an oath of service that makes no reference to the Queen.⁶³
48. Australia, a Commonwealth country that retains the British monarchy as its head of state, eliminated reference to the British monarchy from its citizenship oath in 1994. Australia's oath requires a pledge of loyalty to Australia and to uphold its laws.⁶⁴

PART IV: ISSUES AND ARGUMENT

A) Does the Oath to the Queen violate freedom of conscience and/or religion pursuant to Section 2(a) of the Charter?

49. Freedom of conscience and religion within the meaning of section 2(a) of the *Charter* protect the freedom to hold both religious and non-religious beliefs.⁶⁵

⁵⁸ *Ibid.*, pgs. 128-129, paras. 41-44.

⁵⁹ *Ibid.*, pg. 127, para. 40.

⁶⁰ *Ibid.*, pg. 149, para. 112.

⁶¹ *Ibid.*, pg. 149, para. 113.

⁶² *Ibid.*, pg. 149, para. 114.

⁶³ *Ibid.*, pgs. 149-150, para. 115.

⁶⁴ *Ibid.*, pgs. 142-143, paras. 91-94.

50. Freedom includes the right to be free from coercion:

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands or act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.⁶⁶

51. Conscientious beliefs that are not based in religion are also protected under section 2(a).

In her concurring opinion in *R. v. Morgentaler*⁶⁷, Justice Wilson found that

“conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience in s. 2(a)”⁶⁸ and that, specifically, a woman’s right to decide whether or not to terminate her pregnancy was protected by section 2(a). She described the protected abortion decision as an “essentially... moral decision, a matter of conscience...[which] must be the conscience of the individual.”⁶⁹ In support of her opinion, Justice Wilson quoted Chief Justice Dickson in *R. v. Big M Drug Mart Ltd.*, as follows:

It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy of “firstness” of the First Amendment. It is this same centrality that in my view underlies their designation in the Canadian Charter of Rights and Freedoms as “fundamental”. They are the sine qua non of the political tradition underlying the Charter.

⁶⁵ *R v. Big M Drug Mart*, [1985] 1 S.C.R. 295, paras. 94-95.

⁶⁶ *Ibid.*, para. 95.

⁶⁷ [1988] 1 S.C.R. 30.

⁶⁸ *R. v. Morgentaler*, [1988] 1 S.C.R. 30, para. 251.

⁶⁹ *Ibid.*, para. 249.

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions or their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the Charter.⁷⁰

52. In *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)(C.A.)*, the earlier case in which Mr. Charles Roach challenged the Oath to the Queen on *Charter* grounds at the Federal Court, Justice Linden, in dissent but not overruled on this point, followed Justice Wilson's opinion. He held that the Oath to the Queen could be challenged on the basis of freedom of conscience under section 2(a) without having to rely on freedom of religion.⁷¹ He found that freedom of conscience "is aimed at protecting views based on strongly held moral ideas of right and wrong, not necessarily founded on any organized religious principles" and, like Justice Wilson, that freedom of conscience and freedom of religion are related in that they "describe the location of profound moral and ethical beliefs, as distinguished from political or other beliefs which are protected by paragraph 2(b)."⁷²
53. Although Linden J. agreed that Mr. Roach's application should be struck out because he thought that Mr. Roach's pleadings, in that case, did not allege a coercive burden that would not be trivial or insubstantial, Linden J. stated that there might have been "a valid

⁷⁰ *Ibid.*, para. 250.

⁷¹ *Roach v. Canada (Minister of State for Multiculturalism ad Citizenship)(C.A.)*, [1994] 2 F.C. 406, para. 45.

⁷² *Ibid.*, para. 45.

argument regarding freedom of conscience had he articulated a conscientious objection to the content of the oath or affirmation.”⁷³

54. It is submitted that such "a conscientious objection to the content of the oath" is clearly articulated in the present application.
55. In *Maurice v. Canada (Attorney General)*⁷⁴, the Federal Court held that the applicant’s freedom of conscience under section 2(b) had been violated when his request for a vegetarian diet was denied after he renounced his Hare Krishna faith and the basis of his request was no longer religious. The Federal Court held that the applicant’s belief system, though not religious, was protected by section 2(b):

Vegetarianism is a dietary choice, which is founded in a belief that consumption of animal products is morally wrong. Motivation for practicing vegetarianism may vary, but, in my opinion, its underlying belief system may fall under an expression of “conscience” Therefore, in my opinion, just as the entitlement for a religious diet may be found in s. 2(a) of the Charter, a similar entitlement for a vegetarian diet exists based on the right to freedom of conscience.⁷⁵

56. In the *Maurice* case, the Federal Court found that the applicant had sufficiently demonstrated his conscientious belief on the basis of his “numerous requests and grievances regarding this issue [of obtaining a vegetarian diet], the extensive time and effort he has expended on this judicial review, as well as his sustained efforts to maintain a vegetarian diet.”⁷⁶
57. In *Alberta v. Hutterian Brethren of Wilson Colony*, the Supreme Court acknowledged that section 2(a) protects both religious beliefs and those of “atheists, agnostics, sceptics

⁷³ *Ibid.*, para. 48.

⁷⁴ [2002] F.C.J. No. 72 (hereinafter, “*Maurice*”).

⁷⁵ *Maurice v. Canada (Attorney General)*, [2002] F.C.J. No. 72, paras. 10 and 12.

⁷⁶ *Ibid.*, para. 15.

and the unconcerned” and that “[i]n judging the seriousness of the limit in a particular case, the perspective of the religious or conscientious claimant is important.”⁷⁷

58. The requirement to take the Oath to the Queen contravenes Ms. Topey’s religious freedom as a Rastafarian because it imposes a coercive burden on her to act against her religious beliefs in order to acquire the privileges of citizenship.
59. The Superior Court dismissed Ms. Topy's claim. The basis for the dismissal appears to be Justice Morgan's assertion that "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."⁷⁸ The judgment does not provide any indication of which "rights of others" would necessarily be "struck down" if Ms. Topey's rights were upheld. It is unlikely that there is any religion that requires that applicants for citizenship take an Oath to the Queen. In any event, if the impugned portion of the oath was made optional, all religious (and conscientious) views of the Oath to the Queen would be accommodated. Justice Morgan also asserts that accommodating Ms. Topey's religious beliefs would amount to a form of accommodation that the Supreme Court has said is impermissible because "state sponsorship of [or support for] one religious tradition amounts to discrimination against others."⁷⁹ Recognizing Ms. Topey's rights does not imply support for her religion. Making the Oath to the Queen optional would not indicate any support for any religion.
60. Mr. McAteer and Mr. Bar-Natan believe that all people are born equal. They oppose the monarchy because it is a system that perpetuates hereditary privilege. They have not

⁷⁷ [2009] 2 S.C.R. 567, para. 90.

⁷⁸ Reasons for Decision of the Superior Court, Appeal Book and Compendium of the Appellants, Tab 4, pg. 27, para. 90.

⁷⁹ *Ibid.*, pg. 28, para. 98

taken the Oath to the Queen because it requires them to affirm their loyalty and true allegiance to the Queen who, as the Monarch, symbolizes inequality to which they are fundamentally opposed.

61. Mr. McAteer and Mr. Bar-Natan's beliefs are protected by freedom of conscience because they are deeply held moral and ethical beliefs that are fundamental to their identities.
62. The requirement to take the Oath to the Queen exerts coercive force on Mr. McAteer and Mr. Bar-Natan as they can only obtain Canadian citizenship if they are willing to violate their moral beliefs.
63. The coercive burden of the oath requirement is very substantial. The Appellants have demonstrated the depth of their beliefs by choosing to give up the privileges of citizenship for many years rather than violate those beliefs.
64. Some people who take the Oath to the Queen despite holding religious or conscientious beliefs that are inconsistent with it feel compromised for years afterwards. Mr. Gomberg deposes that he experiences ongoing "mental anguish".⁸⁰ Mr. Charles deposes that he experienced "ideological discomfort and distress."⁸¹
65. Although the above argument was made both in the factum and in the oral argument before the Superior Court, the judgment below did not refer to the claim that the oath violates the freedom of conscience of the Appellants McAteer and Bar-Natan.
66. It is submitted that the fact that so many Canadians do not support the continuation of the Monarchy leads to the inescapable conclusion that many citizenship Appellants take the Oath to the Queen without any real consideration of its implications. The insistence

⁸⁰ Gomberg, Appeal Book and Compendium of the Appellants, Tab 13, pg. 115, para. 7.

⁸¹ Charles, Appeal Book and Compendium of the Appellants, Tab 12, pg. 108, paras. 8 and 9

on the Oath to the Queen as a requirement of citizenships presents an obstacle only to those who, like the Appellants, do not support the Monarchy and also take oaths very seriously.

B) Does the Oath to the Queen violate freedom of expression pursuant to Section 2(b) of the Charter?

67. Section 2(b) of the *Charter* protects a broad scope of expressive activity that “conveys or attempts to convey meaning, or that has expressive content”.⁸²

i) The requirement to take the Oath to the Queen is forced expression

68. The Oath to the Queen is a statement that conveys a pledge of loyalty and allegiance to the Queen, her heirs and her successors. The Appellants are fundamentally opposed to conveying this meaning because of their religious and/or conscientious beliefs.

69. In addition to protecting the right to express content, freedom of expression also protects the right not to be compelled to say certain things.⁸³

70. The Supreme Court held that a labour adjudicator’s order requiring that an employer include certain uncontested facts in a letter of reference infringed the employer’s freedom of expression under section 2(b). Lamer J., speaking for the majority on this point, stated:

There is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do. The order directing appellant to give respondent a letter containing certain objective facts in my opinion unquestionably limits appellant’s freedom of expression.⁸⁴

⁸² *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927, paras. 41-43.

⁸³ *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038.

⁸⁴ *Ibid.*, para. 92.

71. The requirement of the Oath to the Queen as a condition of Canadian citizenship denies the Appellants the right to refrain from expressing loyalty and allegiance to the Queen and therefore infringes the Appellants' freedom of expression. The fact that the Queen is Canada's head of state is irrelevant, as is any interpretation of the meaning of the oath; the right not to express even objective, uncontested facts is protected under section 2(a).
72. The Appellants' opposition to taking the Oath to the Queen is based on the Appellants' religious and conscientious beliefs. Forcing the Appellants to take the Oath to the Queen contravenes section 2(b) of the *Charter*.

ii) Taking the Oath to the Queen restricts subsequent expression

73. The Appellants clearly take oaths seriously and feel morally bound to honour any oaths that they do take.
74. If the Appellants took the Oath to the Queen, they would feel morally bound to be loyal to the Queen, her heirs and her successors or, at least, to Canada as a monarchy. As a result, they would thereafter be unable feel constrained about expressing their opposition to monarchy.
75. In fact, Ms. Rell DeShaw, Manager of Citizenship Legislation and Program Policy at the Department of Citizenship and Immigration, stated that participation in activities to get rid of the monarch in Canada would be inconsistent with taking the citizenship oath and that, consequently, a person who feels that he/she cannot agree to the contents of the oath could be barred from becoming a Canadian citizen by that requirement.⁸⁵
76. In Mr. Roach's earlier case at the Federal Court, the seriousness nature of oaths was emphasized by Linden J.:

⁸⁵ Transcript of Cross-Examination of Rell DeShaw, Appeal Book and Compendium of the Appellants, Tab 11, paras. 110 and 118-119.

Through an oath or affirmation, a person attests that he or she is bound in conscience to perform an act or to hold to an ideal faithfully and truly. An oath “relies on the individual’s inner sense of personal worth and what is right”.

... .

An oath or affirmation, therefore, is not a matter to be taken lightly; when, for reasons of conscience, a person feels he or she cannot swear a certain oath or make a certain affirmation, one must carefully consider that position, for it shows that that person takes the oath seriously, something we wish to support.⁸⁶

77. Linden J., in dissent, found that Mr. Roach might be able to show that his freedom of expression under section 2(b) is violated by the requirement to take the Oath:

If someone is fundamentally opposed to a significant aspect of that Constitution, and wishes to work toward its abolition, not merely its reform, it is arguable that that person may violate the oath by words and conduct in furtherance of that goal. It may not be unreasonable for the appellant...to feel that, by taking this oath, he is inhibited to some extent in his anti-monarchy activities. In other words, his serious view of the oath might be taken seriously. It may be that, after a trial, it might be concluded that the appellant was being made to choose between his political principles and his enjoyment of Canadian citizenship, something the Charter is supposed to prevent.⁸⁷

78. Moreover, it is an offence under the *Citizenship Act* to make a misrepresentation in the process of obtaining citizenship, and people can lose their citizenship if they obtained it by a misrepresentation.⁸⁸ A person who intends to participate in political movements opposed to the monarchy would be making a misrepresentation if the person took the Oath to the Queen. Whether or not such a person would be prosecuted, a conscientious person who is opposed to monarchy would feel compromised by being put in such a position.
79. Social and political activities directed to supporting the abolition of the monarchy are expressive activities that engage the principles underlying section 2(b).

⁸⁶ *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)(C.A.)*, [1994] 2 F.C. 406, paras. 36 and 42.

⁸⁷ *Ibid.*, para. 57.

⁸⁸ *Citizenship Act*, ss. 10(1) and 29(2).

80. The requirement to take the Oath to the Queen as a condition of obtaining Canadian citizenship forces the Appellants to choose between their freedom to engage in social and political activities with the goal of abolishing the monarchy on the one hand and their enjoyment of the privileges of citizenship on the other.
81. Effects of the requirement to take the Oath to the Queen include promoting the current political structure that has the Queen as head of state and thus discouraging republican thought and action. Conscientious republican immigrants like the Appellants have their political participation severely limited. If they do not take the Oath to the Queen, they are excluded from the political process by being denied the rights to vote and to stand for public office. On the other hand, if they violate their consciences and take the oath, their integrity is compromised and their future republican activities are constrained.
82. It is therefore submitted that the Oath to the Queen contravenes section 2(b) of the *Charter* in two distinct ways: by forcing the Appellants and others to publicly express the oath even if it is repugnant to them and then by limiting the subsequent expression of those who have taken the oath and feel morally bound by it.

C) Does the Oath to the Queen violate the right to equality pursuant to Section 15 of the Charter?

83. Section 15 aims to promote equality by preventing discriminatory distinctions that impact adversely on members of groups identified by enumerated or analogous grounds.

89

84. The two-part test for section 15(1) asks:

(1) Does the law create a distinction based on an enumerated or analogous ground?

⁸⁹ *R. v Kapp*, [2008] 2 S.C.R. 483 (hereinafter, “*Kapp*”), para. 16.

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?⁹⁰

85. National origin and religion are enumerated grounds.⁹¹
86. Citizenship is an analogous ground.⁹²
87. In considering the second part of the *Andrews* test, relevant factors include any pre-existing disadvantage experienced by the claimant group, the degree of correspondence between the differential treatment and the claimant group's reality, and the nature of the interest affected.⁹³

i) Discrimination on the basis of national origin

88. The legislation at issue makes a distinction based on national origin, an enumerated ground. Persons born in Canada are automatically citizens and are never required to take the Oath to the Queen to obtain or retain the privileges of citizenship. Those who are born in a country other than Canada to non-Canadian parents are required to take the Oath to the Queen as a condition of becoming citizens. This distinction places an additional burden on persons born outside of Canada to non-Canadian parents: they must pledge their loyalty and allegiance to the Queen, while the same loyalty and allegiance are not required, or even requested, of persons born in Canada.
89. Depending upon their national origin, people with conscientious republican beliefs that would be compromised by taking the oath are affected very differently by the oath requirement. People originating outside of Canada to non-Canadian parents are forced to choose between violating their beliefs by taking the oath and compromising their future ability to take action in furtherance of their belief, on the one hand, or being

⁹⁰ *Ibid.*, para. 17.

⁹¹ *Charter*, s. 15(1).

⁹² *Andrews*, para. 5.

⁹³ *Kapp*, para. 23.

excluded from the privileges of citizenship, on the other hand. People born in Canada do not have to make this choice: they enjoy the privileges of citizenship and remain free to take actions to further their beliefs.

90. The distinction is not based on any personal characteristics of the people born outside of Canada. The requirement to take the citizenship oath presumes that an applicant for citizenship's loyalty is in question. This implication of disloyalty is based on prejudice.⁹⁴
91. There is no reason to assume that persons born in Canada are more loyal to the Queen than persons born outside of Canada. In fact, as described above, polls have shown that more than half of Canadians do not even recognize the Queen as Canada's head of state; more than half support Canada's independence from the monarchy.
92. The distinction is discriminatory because it targets a group, people whose nationality is other than Canadian, who have historically suffered disadvantage and stereotyping. The disadvantage suffered by this group is comparable to the disadvantage suffered by non-citizens who are permanently resident in Canada. Members of both groups are not automatically citizens and do not automatically have the privileges of citizenship, such as the right to vote. In *Andrews*, Wilson J. stated that:

non-citizens are a group lacking in political power and as such vulnerable to having their interest overlooked and their rights to equal concern and respect violated... Non-citizens, to take only the most obvious example, do not have the right to vote. Their vulnerability to becoming a disadvantaged group in our society is captured by...John Stuart Mill's observation...that "in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked..."⁹⁵

93. The additional burden placed on people born outside of Canada to non-Canadian parents by the oath requirement exacerbates the disadvantage suffered by members of this group

⁹⁴ Edwards, Bryce. "Let Your Yea be Yea: The Citizenship Oath, the Charter, and the Conscientious Objector," *University of Toronto Faculty of Law Review*, Vol. 60, No. 2 (Spring 2002), pg. 75.

⁹⁵ *Andrews*, para. 5.

by binding them to allegiance to the Queen, her heirs and her successors, and restricting them from activities aimed at abolishing the monarchy. Moreover, the burden perpetuates the stereotypical view that persons born outside of Canada are less worthy of trust and more likely to be disloyal.

ii) Discrimination on the basis of religion

94. The requirement to take the Oath to the Queen makes a distinction between people who wish to become Canadian citizens who have religious beliefs that bar them from taking the Oath to the Queen and people who wish to become Canadian citizens who have no such religious objection. People, like the Appellant Ms. Topey, who wish to become Canadian citizens and have religious beliefs that do not allow them to take the Oath to the Queen must choose between maintaining the integrity of their religious beliefs and the privileges of Canadian citizenship. Adherents of other religions, such as Anglicans, would be unlikely to face such a choice.

iii) Discrimination on the basis of citizenship

95. The requirement to take the Oath to the Queen makes a distinction between persons who attain citizenship automatically by birth (citizens) and persons who must apply for citizenship (non-citizens). This distinction is made on the basis of citizenship, an analogous ground under section 15(1).
96. Persons who must apply for citizenship are relatively disadvantaged because citizenship may be withheld from them if they possess religious or other beliefs that cause them to feel that they cannot take the Oath to the Queen. In comparison, citizenship is not withheld from persons who are citizens by birth, regardless of their opposition to monarchy..

97. Moreover, people who must apply for citizenship are disadvantaged if they take the Oath to the Queen because they are burdened (to whatever extent their conscience dictates) by their promise of allegiance to the Queen; people who are citizens by birth are not so burdened.
98. It is therefore submitted that the Oath to the Queen discriminates within the meaning of section 15 of the *Charter* on three different grounds: the enumerated grounds of national origin and religion and the analogous ground of citizenship.
99. The section 15 argument presented in the factum to the Superior Court was almost word-for-word the argument presented above, and this was re-iterated in oral argument. However, most of the argument was not dealt with in the judgment below. In particular, the judgment does not even refer to the claim of discrimination on the basis of national origin.
100. The Superior Court judgment dismisses Ms. Topey's claim of discrimination by holding that "there 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."⁹⁶ Although there is no statistical or demographic evidence, there is the direct and unchallenged evidence of Ms. Topey. There is also the evidence of Howard Gomberg that taking an oath to any human being is contrary to his conception of Judaism. Moreover, the fact that the Queen must be Anglican makes the oath supportive of one religion to the exclusion of others, and the explicit prohibition against Catholic monarchs underlines that.

⁹⁶ Reasons for the Decision of the Superior Court, Appeal Book and Compendium of the Appellants, Tab 4, pg. 28, para. 98

D) Are the violations of Sections 2(a), 2(b) and 15 of the Charter demonstrably justified pursuant to Section 1 of the Charter?

101. The test for justifying a violation of a *Charter* right is clear:

68. Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. ... A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

69. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": ... It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": ... There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. ... In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been.⁹⁷

102. The court below described 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

⁹⁷ *R. v. Oakes*, [1986] 1 SCR 103, paras. 68-70.

reality and constitutional order.⁹⁸

103. The Court below asserted "... the Applicants take no real issue with expressing commitment to the country, or with its characterization as pressing and substantial"⁹⁹ and then moved on to the proportionality test. It is submitted that the Court below erred in not examining whether there was some pressing and substantial objective achieved by the *impugned portion* of the citizenship oath, the Oath to the Queen. There is no evidence or argument to support the contention that it is necessary or even useful to include the Oath to the Queen. Indeed, the Court below stated that it would be rational for Parliament to fashion an oath of citizenship that referenced any of a number of defining elements of Canada.¹⁰⁰ The judgment does not even assert, much less find any evidentiary or logical basis for, the proposition that there is any pressing or substantial objective for the Oath to the Queen, as opposed to the rest of the citizenship oath. In fact, the widespread opposition to the monarchy, in Quebec and elsewhere, suggests that it is irrational to choose the monarchy as the referenced "defining element."
104. The judgment of the Court below concludes that "the oath to the Queen is in fact an oath to a domestic institution that represents egalitarian governance and the rule of law."¹⁰¹ It is submitted that no court and no person can determine what the oath "represents"; it is obvious that the Queen herself and the Oath to the Queen represent different things to different people, depending upon their understanding of the language and their political beliefs.

⁹⁸ Reasons for the Decision of the Superior Court, Appeal Book and Compendium of the Appellants, Tab 4, pg. 18, para. 38

⁹⁹ *Ibid.*, pg. 19, para. 41.

¹⁰⁰ *Ibid.*, pg. 20, para. 48.

¹⁰¹ *Ibid.*, pgs. 22-23, para. 65.

105. A plain reading of the actual words of the Oath to the Queen implies allegiance to Queen Elizabeth the Second as an individual, to her heirs, whether or not they ever become head of state, and to her successors, regardless of how despotic successors may be. In any event, the Oath to the Queen certainly implies allegiance to constitutional monarchy.
106. The judgment below ignores the evidence of the Manager of Citizenship Legislation and Program Policy at the Department of Citizenship and Immigration that suggested that the Oath to the Queen does imply an obligation to the individual monarch and to her individual heirs and successors.¹⁰²
107. In support of his finding that the Appellants misunderstand the meaning of the oath, the Superior Court Justice states "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"¹⁰³ The Superior Court Justice does not quote any Canadian cases in accordance with his assertion that he is describing the "prevalent view". The one case he does cite, from the House of Lords, actually stands for the opposite proposition: that the plain meaning should generally be accepted.¹⁰⁴ There does not appear to be any judge in the world other than Mr. Justice Morgan who has "for the most part seen so-called plain meaning interpretations as misleading."

¹⁰² Transcript of Cross-Examination of Rell DeShaw, Appeal Book and Compendium of the Appellants, Tab 11, paras. 60-73, 81-86

¹⁰³ Reasons for the Decision of the Superior Court, Appeal Book and Compendium of the Appellants, Tab 4, pg. 21, para. 57

¹⁰⁴ *Ibid.*, pg. 21, para. 57; *Chartbrook Ltd. v. Persimmon Homes Ltd.*, [2009] UKHL 38 [2009], 1 A.C. 1101 [2009], paras. 14 and 15.

108. The Oath to the Queen can reasonably be interpreted as at least symbolically expressing allegiance to the named monarch. In any event, it certainly supports the concept of monarchy, and thus is counter to the equalitarian beliefs of the Appellants.
109. The Court below concludes its analysis of "minimal impairment of rights" by asserting "Once the Queen is understood, in context, as an equality-protecting Canadian institution, ... any impairment of the Applicants' freedom of expression is minimal."¹⁰⁵ The decision does not consider minimal impairment in the sense required by the *Oakes'* test: whether the *means* chosen to achieve the objective impair the right "as little as possible". The same objective could be obtained by means not impairing the right at all, such as by making the impugned portion of the oath voluntary or by replacing it by a commitment to "equality."
110. With respect to the proportionality test, the Superior Court Justice states that "the government party must provide evidentiary support for its position about the salutary effects of its actions."¹⁰⁶ However, no such evidentiary support was provided.
111. It is respectfully submitted that the criteria of the *Oakes'* test are not met.

PART V: REQUESTED ORDER

112. The Appellants respectfully seek a declaration that requiring applicants for Canadian citizenship to take the Oath to the Queen violates their rights protected by Sections 2(a), 2(b) and 15(1) of the *Charter* and that the violations are not justified within the meaning of Section 1 of the *Charter*.
113. Should requiring applicants for Canadian citizenship to take the Oath to the Queen be held to be unconstitutional, there are many possible remedies, the simplest of which

¹⁰⁵ Reasons for the Decision of the Superior Court, Appeal Book and Compendium of the Appellants, Tab 4, pg. 23, para. 68.

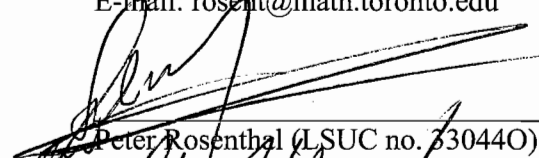
¹⁰⁶ *Ibid.*, pgs. 23-24, para.71.

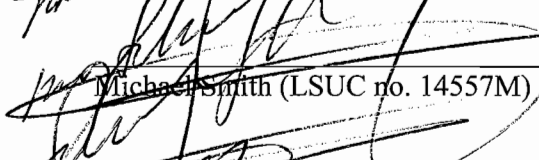
might be to make the impugned portion of the citizenship oath optional. It is respectfully suggested that Parliament should be given one year within which to remedy any constitutional deficiency found by this Honourable Court.

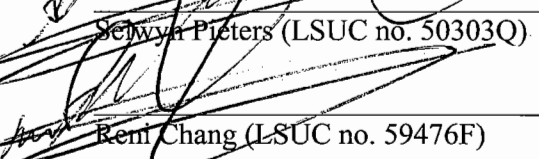
ALL OF WHICH IS RESPECTFULLY SUBMITTED at Toronto this 12th day of November, 2013.

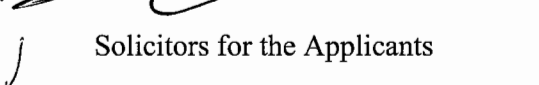
**PETER ROSENTHAL, BARRISTER
C/O PIETERS LAW OFFICE**

181 University Avenue, Suite 2200
Toronto, Ontario M5H 3M7
Telephone: (416) 787-5928 / (416) 978-3093
Fax: (416) 787-6145
E-mail: rosent@math.toronto.edu


Peter Rosenthal (LSUC no. 33044O)


Michael Smith (LSUC no. 14557M)


Selwyn Pieters (LSUC no. 50303Q)


Rem Chang (LSUC no. 59476F)

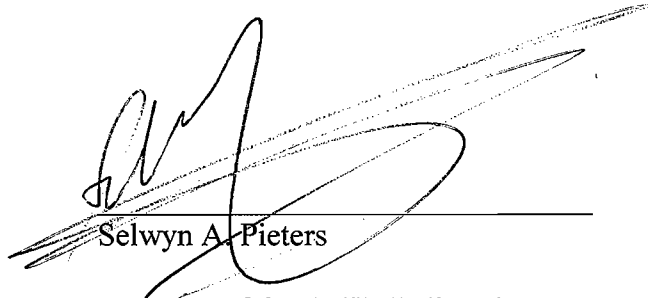
J Solicitors for the Applicants

CERTIFICATE

I, SELWYN PIETERS, lawyer for the Appellants, certify that:

- a) an order under subrule 60.09(2) (original record and exhibits) is not required;
- b) the Appellants estimate that 2.5 hours will be required for oral argument, not including reply.

Date: November 12, 2013



Selwyn A. Pieters

PETER ROSENTHAL, Barrister
C/O PIETERS LAW OFFICE
181 University Avenue, Suite 2200
Toronto, ON M5H 3M7

Telephone: (416) 787-5928
(416) 978-3093

Fax: (416) 787-6145

E-mail: rosent@math.toronto.edu

Peter Rosenthal (LSUC no. 33044O)
Michael Smith (LSUC no. 14557M)
Selwyn Pieters (LSUC no. 50303Q)
Reni Chang (LSUC no. 59476F)

Solicitors for the Applicants

SCHEDULE A – AUTHORITIES

- 1 *Roach v. Canada (Attorney General)*, [2009] O.J. No. 737
- 2 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143
- 3 *Roach v. Canada (Minister of State for Multiculturalism and Citizenship (C.A.))*,
[1994] 2 F.C. 406
- 4 *Roach v. Canada (Minister of State, Multiculturalism and Citizenship)*, 86 O.R.
(3d) 101
- 5 *Roach v. Ontario (Attorney General)*, [2012] O.J. no. 2842
- 6 *In re Citizenship Act and in re Werner Willi Peter Heib*, [1980] 1 F.C. 254
- 7 *R v. Big M Drug Mart*, [1985] 1 S.C.R. 295
- 8 *R. v. Morgentaler*, [1988] 1 S.C.R. 30
- 9 *Maurice v. Canada (Attorney General)*, [2002] F.C.J. No. 72
- 10 *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567
- 11 *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927
- 12 *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038
- 13 *RJR McDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199
- 14 *R. v Kapp*, [2008] 2 S.C.R. 483
- 15 Edwards, Bryce. “Let Your Yea be Yea: The Citizenship Oath, the Charter, and
the Conscientious Objector,” *University of Toronto Faculty of Law Review*, Vol.
60, No. 2 (Spring 2002)
- 16 *R. v. Oakes*, [1986] 1 SCR 103
17. *Chartbrook Ltd. v. Persimmon Homes Ltd*, [2009] UKHL 38 [2009], 1 A.C.
1101 [2009]

SCHEDULE B – STATUTES AND REGULATIONS

Canadian Charter of Rights and Freedoms, Constitution Act, 1982, 1982, c. 11 (U.K.), Schedule B, Part I, Sections 1, 2, 15 and 52.

CONSTITUTION ACT, 1982

1982, c. 11 (U.K.), Schedule B

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

FUNDAMENTAL FREEDOMS

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

EQUALITY RIGHTS

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

GENERAL

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Citizenship Act, R.S.C., 1985, c. C-29, Sections 3(1)(a)-(c), 5(3)(b)-(c), 10(1), 12(3), 24, 29(2) and Schedule.

Citizenship Act

R.S.C., 1985, c. C-29

PART I

THE RIGHT TO CITIZENSHIP

Persons who are citizens

3. (1) Subject to this Act, a person is a citizen if

(a) the person was born in Canada after February 14, 1977;

(b) the person was born outside Canada after February 14, 1977 and at the time of his birth one of his parents, other than a parent who adopted him, was a citizen;

(c) the person has been granted or acquired citizenship pursuant to section 5 or 11 and, in the case of a person who is fourteen years of age or over on the day that he is granted citizenship, he has taken the oath of citizenship;

Waiver by Minister on compassionate grounds

5. (3) The Minister may, in his discretion, waive on compassionate grounds,

...

(b) in the case of a minor, the requirement respecting age set out in paragraph (1)(b), the requirement respecting length of residence in Canada set out in paragraph (1)(c) or the requirement to take the oath of citizenship; and

(c) in the case of any person who is prevented from understanding the significance of taking the oath of citizenship by reason of a mental disability, the requirement to take the oath.

PART II

LOSS OF CITIZENSHIP

Order in cases of fraud

10. (1) Subject to section 18 but notwithstanding any other section of this Act, where the Governor in Council, on a report from the Minister, is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances,

(a) the person ceases to be a citizen, or

(b) the renunciation of citizenship by the person shall be deemed to have had no effect,

as of such date as may be fixed by order of the Governor in Council with respect thereto.

PART IV

CERTIFICATE OF CITIZENSHIP

When effective

12. (3) A certificate issued pursuant to this section does not take effect until the person to whom it is issued has complied with the requirements of this Act and the regulations respecting the oath of citizenship.

PART VI

ADMINISTRATION

Requirement to take oath of citizenship

24. Where a person is required under this Act to take the oath of citizenship, the person shall swear or affirm in the form set out in the schedule and in accordance with the regulations.

PART VII

OFFENCES

Offences and punishment

29. (2) A person who

(a) for any of the purposes of this Act makes any false representation, commits fraud or knowingly conceals any material circumstances,

...

is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding one year or to both.

SCHEDULE

(Section 24)

OATH OR AFFIRMATION OF CITIZENSHIP

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

Citizenship Regulations, SOR/93-246, sections 17(1)(a)-(b), 19(1)-(2), 20(1) and 21.

Citizenship Regulations

SOR/93-246

CITIZENSHIP ACT

CEREMONIAL PROCEDURES OF CITIZENSHIP JUDGES

17. (1) The ceremonial procedures to be followed by citizenship judges shall be appropriate to impress on new citizens the responsibilities and privileges of citizenship and, without limiting the generality of the foregoing, a citizenship judge shall, during a ceremony held for the presentation of certificates of citizenship,

- (a) emphasize the significance of the ceremony as a milestone in the lives of the new citizens;
- (b) subject to subsection 22(1), administer the oath of citizenship with dignity and solemnity, allowing the greatest possible freedom in the religious solemnization or the solemn affirmation thereof;

OATH OF CITIZENSHIP

19. (1) Subject to subsection 5(3) of the Act and section 22 of these Regulations, a person who has been granted citizenship under subsection 5(1) of the Act shall take the oath of citizenship by swearing or solemnly affirming it before a citizenship judge.

(2) Unless the Minister otherwise directs, the oath of citizenship shall be taken at a citizenship ceremony.

20. (1) Subject to subsection 5(3) of the Act and section 22 of these Regulations, a person who is 14 years of age or older on the day on which the person is granted citizenship under subsection 5(2) or (4) or 11(1) of the Act shall take the oath of citizenship by swearing or solemnly affirming it

- (a) before a citizenship judge, if the person is in Canada; or
- (b) before a foreign service officer, if the person is outside Canada.

21. Subject to section 22, a person who takes the oath of citizenship pursuant to subsection 19(1) or 20(1) shall, at the time the person takes it, sign a certificate in prescribed form certifying that the person has taken the oath, and the certificate shall be countersigned by the citizenship officer or foreign service officer who administered the oath and forwarded to the Registrar.

MCATEER, Michael, et al

Applicants/Appellants

-and-

ATTORNEY GENERAL OF CANADA

Respondent/ Respondent

Court File No. 05-CV-301832 CP 00

Court of Appeal File No. **C57775**

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at TORONTO

FACTUM OF THE
APPELLANTS

Peter M. Rosenthal, Barrister
c/o Pieters Law Office
181 University Avenue, Suite 2200
Toronto, ON M5H 3M7

Tel: 416 787-5928 / 416 978-3093
Fax: 416 787-6145

Peter Rosenthal (LSUC No. 33044 O)
Michael F. Smith (LSUC No. 14557 M)
Selwyn Pieters (LSUC No. 50303 Q)
Reni Chang (LSUC No. 59476 F)

Lawyers for the Applicants/ Appellants