SCC File Number: 36120

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

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

APPLICANTS
(Appellants)

and

THE ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

REPLY OF THE APPLICANTS

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REPLY OF THE APPLICANTS, MICHAEL McATEER, SIMONE E.A. TOPEY, AND DROR BAR-NATAN

A. Test case on the widespread pledge of allegiance to Queen Elizabeth the Second

1. At paragraph 11 of its factum, the Respondent argues that, by framing this case as a "test case", the Applicants are engaging in a "bare attempt to expand the issues in this case to those that were not before the Courts below, i.e., oaths in general".

2. While it is true that the issues before the courts below concerned only the constitutional validity of the specific pledge of allegiance to Queen Elizabeth the Second contained within the Canadian citizenship oath, this pledge of allegiance appears virtually word for word in several other oaths and pieces of Canadian legislation.[1] The *Public Service of Ontario Act*, for example, requires Ontario's civil servants to "be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors according to law." Employees of the Manitoba civil service, police officers in British Columbia, Nova Scotia, Saskatchewan, New Brunswick, and Alberta and lawyers in Alberta, Newfoundland & Labrador, and Prince Edward Island must likewise pledge allegiance to the Queen in similar terms. A Supreme Court of Canada decision on the constitutionality of the citizenship oath in the present case will necessarily have precedential value for the interpretation of all these other pieces of legislation.

3. As a result, the decision of this Court will likely impact not only the hundreds of thousands of annual citizenship applicants, but also the tens or hundreds of thousands of other individuals who are compelled by legislation to pledge allegiance to the Queen. The affidavit of Christa Big Canoe confirms that requirements to make oaths to the Queen affect the employment experiences and opportunities of a number of these other Canadians, particularly First Nations people.

4. More generally, beyond the specific pledge of allegiance to Queen Elizabeth the Second, this case would also be this Court's first opportunity to assess how constitutional principles apply to oaths of conscience. This Court has protected persons from compelled speech in the contexts of commercial advertising, the writing of objectively true reference letters, and socially positive health warnings on cigarette packages, unless these violations can be justified pursuant to s. 1 of

[1] See Factum of the Applicants to the Supreme Court of Canada at paras 15-18.

the *Charter*.[2] It now has its first opportunity to apply its principles in the context of a compelled oath of conscience.

B. Issue of national importance: compelling the Applicants to swear the oath of citizenship puts a message in their mouths and breaches their freedom of expression

5. As noted by the Respondent at paragraph 19 of its factum, the Court of Appeal for Ontario's decision that compelling the oath does not breach s. 2(b) of the *Charter* is based on its holding that "an incorrect understanding of a provision cannot ground a finding of unconstitutionality."

6. It is important that this Court correct the misunderstanding of the court below. The *Charter* protects individuals from any compelled speech that aims to control their expression, whatever their understanding of that speech. As this Court explained in *Slaight Communications Inc. v Davidson*, s. 2(b) even allows individuals to refrain from expressing objectively true facts.[3] Here, the Respondent clearly intends to put a message in the mouths of the Applicants. (Contrary to the belief of the Respondent at paragraph 22 of its factum, the fact that the oath is ceremonial is relevant because it confirms that one purpose of the oath is to put words in the mouths of the Applicants.) Whatever the content of the message, the fact that the Applicants are compelled to speak it breaches their freedom of expression.[4]

7. Yet the Court of Appeal for Ontario's decision in this case has changed the law to provide that, at least in Ontario, the government can now compel individuals to speak specific words whenever its official purpose differs from the individuals' understanding of these words. This drastically restricts freedom of expression in Ontario. If this Court does not hear the appeal, this new restriction will bind courts in Ontario, while influencing other courts throughout the country.

8. The issue of statutory interpretation is a red herring. The Applicants do not either deny or affirm the Court of Appeal's interpretation of the "true meaning" of the oath. They simply object to being forced to speak the words of the oath, because of the meaning that they and many others

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[2] See Factum of the Applicants to the Supreme Court of Canada at para 42.
[3] *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, para. 1080 [**Applicants' book of authorities ("ABA"), Tab 6q**].
[4] The present case differs from *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211 [**ABA, Tab 6f**], where the purpose was not to compel the articulation of a commitment but rather was to organize finances. In the present case, the purpose is to generate the articulation of a commitment.

ascribe to these words and symbols.

9. Finally, the Respondent notes at paragraph 15 of its factum that the court below held that "neither the substance of the oath nor its history support the proposition that it has a purpose that violates the *Charter*." This finding blurs the lines between ss. 1 and 2(b) of the *Charter* and acts as a novel consideration in the s. 2(b) analysis: a worthy purpose of legislation can now shield legislation from a breach of s. 2(b). This interpretation is wrong. It is important for this Court to restore the boundaries between the ss. 1 and 2(b) analysis.

C. Issue of national importance: how does the *Amselem* test apply in the present case?

10. At paragraph 25 of its factum, the Respondent states that the *Syndicat Northcrest v Amselem* decision[5] is "irrelevant to the determination of the [Applicants'] claims". Its position is based on the decisions of the courts below, which did not apply the *Amselem* test. In fact, neither of the courts below applied any principled test to determination of the s. 2(a) claim.

11. This is wrong. The *Amselem* test is the Supreme Court of Canada's test to determine whether a provision infringes a person's freedom of religion under s. 2(a) of the *Charter*. The present case offers this Court its first chance to apply it in the context of a freedom of conscience claim and in the context of an oath of conscience. This is an issue of national importance.

12. Specifically, this Court must decide whether the requirement to take the pledge objectively infringes the Applicants' sincere conscientious beliefs. In the context of an oath of conscience, the Court should use the Applicants' reasonable understanding of the oath, since oaths are largely symbolic in meaning, and the effect of this symbolism depends on the individual's beliefs. Understanding an oath and determining one's duty arising out of taking it are matters of conscience. Since the Applicants reasonably perceive the citizenship oath as contradicting their consciences and, if taken, binding their consciences, this Court should accept that it objectively does so.

D. Conclusion

13. This case concerns the power of words and symbols. Many individuals have no problem speaking the words "I affirm that I will be faithful and bear true allegiance to Her Majesty Queen

[5] *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551 [**ABA, Tab 6r**].

Elizabeth the Second, Queen of Canada, Her Heirs and Successors." Many individuals have no problem swearing an oath on the New Testament. Many individuals have no problem pledging allegiance to a flag and to country. For some, however, such words and acts are repugnant.

14. As the law in Ontario currently stands, governments can compel the articulation of commitments, promises, or affirmations using whatever words or symbols they choose without the need for s. 1 justification. The Court of Appeal for Ontario has ruled that, in compelling these articulations from individuals, the government is not actually putting words in the mouths of the individuals or compelling the conveyance of particular meanings. This severe limit on freedom of expression should not stand. Yet it will, unless this Court agrees to hear this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED AT TORONTO this 13th day of November 2014.

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