Revue générale de droit

Mémoire de l'équipe de la Section de droit civil

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Volume 40, numéro 2, 2010

URI : https://id.erudit.org/iderudit/1026963ar
DOI : https://doi.org/10.7202/1026963ar

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Éditeur(s)

Éditions Wilson & Lafleur, inc.

ISSN

0035-3086 (imprimé)
2292-2512 (numérique)

Découvrir la revue

Citer cet article

Lazare, J. & Provencher, C. (2010). Mémoire de l'équipe de la Section de droit civil. *Revue générale de droit*, *40*(2), 620–655. https://doi.org/10.7202/1026963ar

Mémoire de l'équipe de la Section de droit civil

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Canadian Court of Justice
(On appeal from the Federal Court of Appeal)
Cour canadienne de justice
(En appel de la Cour d'appel fédérale)

Between / Entre

Attorney General of Canada / Procureur général du Canada
Appellant / Appelant
and / et
Samundar Rani, Romy Aman and / et Dwayne X
Respondents / Intimés

Respondents' Factum
Mémoire des intimés

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PART I – STATEMENT OF FACTS

Context

1. The respondents contest the constitutional validity of section 24 of the *Citizenship Act* [*Act*]. As committed anti-colonialists, anti-imperialists and republicans, the respondents submit that the requirement of swearing or affirming an oath to Queen Elizabeth the Second in order to become a Canadian citizen is an unjustifiable violation of the constitutional guarantees provided by the *Canadian Charter of Rights and Freedoms* [*Charter*].

2. Samundar Rani, originally from India, has been living in Canada since 2000. After eight years on Canadian soil, Ms. Rani decided that she would like to give back to her new home by joining the Canadian Forces. To this effect, Ms. Rani applied for Canadian citizenship in early 2008. A firm believer in Canadian values, Ms. Rani passed her citizenship test and was invited to attend a citizenship ceremony in June 2008, where she was asked to swear or affirm the oath of citizenship. She refused, as the wording of the oath is contrary to her fundamental beliefs. Coming from a former British colony, Ms. Rani is deeply anti-colonial and nationalistic and pledging allegiance to a colonial power like the Queen is in clear opposition to her principles. Ms. Rani was very willing, however, to swear her allegiance to Canada. As a result of her failure to take the oath, Ms. Rani did not receive her citizenship in June 2008.

3. In March 2009 Ms. Rani obtained her citizenship. In spite of her fundamental anti-colonial values, Ms. Rani took the oath, without which she would not have been able to obtain her desired employment. Despite this, Ms. Rani's beliefs remain unchanged and she continues to maintain that the oath to the Queen violates her freedom of conscience as protected by the *Charter.*

4. Romy Aman, from Algeria, moved with his family to Canada in 2002. As a permanent resident, Mr. Aman has developed an intense pride in his adopted home and thus, wishes to become a Canadian citizen. He looks forward to exercising his democratic rights and voicing his opinion on government by voting in federal and provincial elections. Like Ms. Rani, Mr. Aman applied for citizenship in 2008, passed his citizenship test and was invited to attend his citizenship ceremony in June of the same year. At the ceremony, however, Mr. Aman also refused to swear his allegiance to the Queen, which runs contrary to the dictates of his strongly-held anti-imperialist beliefs and values, stemming from his upbringing in a former French colony. For that reason, Mr. Aman refuses to associate himself with any form of imperialism, including that represented by Queen Elizabeth the Second. Consequently, Mr. Aman is deprived of the right to participate in the political process of the country he now calls home.

5. Dwayne X immigrated to Toronto from Jamaica in 1995. After more than a decade in Canada, he too applied for Canadian citizenship in 2008. Like Mr. Aman, Canadian citizenship is extremely important to Mr. X, who is eager to participate in Canadian democracy by running as a political candidate in future elections. As an adherent of republicanism, however, the tenets of which include anti-monarchism, Mr. X refuses to swear or affirm the oath to the Queen, which constitutes a violation of his constitutional rights to freedom of conscience and expression. Although he attended his citizenship ceremony in June 2008, Mr. X did not obtain citizenship. Consequently, he cannot partake in the shaping of his country's future, as he so desires.

6. The Canadian Anti-Colonial Collective (CAC) is a non-profit volunteer group with an educational and political mandate. Its members, which include the respondents, are Canadian citizens as well as permanent residents, all of whom are committed to the eradication of colonialism, imperialism, neo-colonialism and neo-imperialism. The CAC has branches in Toronto, Montréal, Halifax and Vancouver, and carries on activities across the country, including monthly meetings to discuss issues of national and international importance and peaceful protests against colonialist or imperialist practices by world governments.

7. While many members of the CAC are vocal about abolishing the monarchy in Canada, the respondents are focused primarily on removing the Queen from the oath of citizenship. All three respondents have discussed their emotional distress and frustrations about their difficulties obtaining citizenship at their local meetings, following which, the CAC created a blog posting on its website addressing both the Queen as the figurehead of Canada and the oath to the Crown. The CAC also printed pamphlets, which the respondents distributed to the public outside of provincial legislatures and Citizenship and Immigration offices.

Federal Court

8. At the Federal Court, the Honourable Justice Laliberté dismissed the respondents' application with costs. Applying the test laid out in *Borowski* v. *Canada*, the trial judge found

that the application, with regard to Ms. Rani, was moot, as she had taken the oath and become a Canadian citizen. On the subject of justiciability, Laliberté J. relied on *Reference re Same-Sex Marriage* and *Reference re Canada Assistance Plan (B.C.)* to find that as a purely political question, the matter is one which should be decided by Parliament, through the political process, and not by the courts.

9. With regard to the respondents' *Charter* arguments, Justice Laliberté found that there was no *Charter* violation and that swearing the oath does not prevent the parties from subsequently acting on their beliefs. Applying *R.* v. *Edwards Books and Art* to a freedom of conscience analysis, Laliberté J. did not agree that the respondents' freedom of conscience was actually threatened by the swearing of the oath. Moreover, even if the oath was found to be a form of coercion, Laliberté J. found that the burden of swearing the oath and pronouncing the words is trivial and insubstantial. Thus, the respondents failed to make out a violation of section 2(a) of the *Charter*. Consequently, no section 1 analysis was required.

10. On the question of section 2(b) of the *Charter*, applying *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, Laliberté J. rejected the argument that silence constitutes a form of expression and thus concluded that there was no infringement of freedom of thought, belief, opinion and expression. Again, no section 1 analysis was necessary.

Federal Court of Appeal

11. On the mootness question, the Honourable Justice Loyaliste disagreed with the trial judge. Given the importance of the issue and the fact that a live controversy continued to exist, Ms. Rani's application was not rendered moot. Moreover, Justice Loyaliste found no issue as to judicial economy, as the case was already being heard with respect to Messrs. Aman and X. On the question of justiciability, here too Loyaliste J.A. differed in opinion from the honourable trial judge. Accordingly, the fact that the issues before the Court may be dealt with through the political process does not exclude them from judicial review. It is the role of the courts to ensure the respect of individual rights and freedoms

and to examine issues of public importance. Justices Rebelle and Kohinoor concurred on these questions.

12. Looking at the *Charter* questions, Loyaliste J.A. found that the respondents' rights under section 2(a) were infringed. Applying *R.* v. *Big M Drug Mart*, he agreed with the respondents' submission that being coerced into swearing an oath which they do not believe amounts to a violation of freedom of conscience. Justice Loyaliste also relied on Justice Iacobucci's analysis of religion in *Syndicat Northcrest* v. *Amselem* to maintain that as long as one's conscientious belief is sincere, an infringement of that belief triggers the application of section 2(a) of the *Charter*.

13. Justice Loyaliste also found that the respondents' section 2(b) rights were violated. With respect for Justice Laliberté's contrary opinion, Loyaliste J.A. was of the opinion that silence is a form of expression and that the respondents' decision not to recite the oath falls under the scope of protected activities. Justices Rebelle and Kohinoor concurred with respect to the *Charter* violations.

14. Loyaliste J.A. conducted a section 1 analysis, applying *R.* v. *Oakes* and *Dagenais* v. *Canadian Broadcasting Corp.* He found that the law requiring the oath has a pressing and substantial objective : the demonstration of new citizens' loyalty to Canada. He also found that a rational connection exists between the law's objective and the requirement that new citizens express their commitment to Canada by swearing the oath. However, Justice Loyaliste did not agree that the oath minimally impairs the respondents' rights, but rather, found that the coercive requirement compels the respondents to behave in a way which is contrary to their deeply held beliefs. Thus, the salutary effects of the law do not outweigh the deleterious effects on the respondents' *Charter* rights and the infringement is not justified. Justice Rebelle concurred in this respect.

15. Kohinoor, J.A. disagreed with her colleague's section 1 analysis. Accordingly, the swearing of the oath is a necessary requirement as it ensures that new Canadians will be loyal to the country and its laws. It also minimally impairs the respondents' freedom of conscience, as even after pledging their allegiance to the Queen, the respondents may pursue

their anti-monarchist activities. Thus, any *Charter* violations are justifiable.

16. Justice Loyaliste found the appropriate remedy to be the modification of the current oath as contained in the Schedule of the *Act*. He rejected the respondents' request that the Court strike down section 24 of the *Act* or that they be granted a constitutional exemption, as in most cases, the law would be constitutional. Accordingly, individuals who wish to swear or affirm allegiance to the Queen may continue to do so. Those who object to the presence of the Queen in the oath may swear an alternate oath, wherein the words "Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors" would be replaced with the word "Canada," thus rendering the oath constitutionally valid.

17. Justice Rebelle disagreed with his colleague on the appropriate remedy. Finding that the *Charter* violations were unique to the respondents, Justice Rebelle found the constitutional exemption under section 24(1) of the *Charter* to be the correct remedy.

18. Costs were awarded to the respondents on an indemnity basis.

PART II – POINTS IN ISSUE

To the honourable judges of the Canadian Court of Justice,

The respondents respectfully present their position with regard to the following questions :

1. *Did the Federal Court of Appeal err in finding the respondents' case justiciable?*

The respondents submit that this question must be answered in the negative and that the appeal must be rejected in this respect.

2. *Did the Federal Court of Appeal err in concluding that the application has not become moot with respect to the respondent Samundar Rani?*

The respondents submit that this question must be answered in the negative.

3. *Did the Federal Court of Appeal err in concluding that the oath requirement contained in s. 24 of the* Citizenship Act *infringes on the respondents' rights under the* Canadian Charter of Rights and Freedoms*?*

The respondents submit that the judgment of the Federal Court of Appeal must be upheld with respect to the infringement of the respondents' freedoms of conscience and religion, as well as their freedom of expression under ss. 2(a) and 2(b) of the *Charter*. The appeal must be rejected in this respect.

In addition, the respondents submit that the requirement that permanent residents pledge their allegiance to Queen Elizabeth the Second in order to gain Canadian citizenship infringes upon the right to equality, under s. 15 of the *Charter*.

4. *Did the majority of the Federal Court of Appeal (Loyaliste J.A. and Rebelle J.A.) err in finding that the* Charter *infringements could not be justified in a free and democratic society?*

The respondents submit that this question must be answered in the negative and that the appeal must be rejected in this respect.

5. *Did the majority of the Federal Court of Appeal err in finding the appropriate remedy?*

The respondents submit that this question must be answered in the affirmative. Neither the remedy proposed by Loyaliste J.A. nor that proposed by Rebelle J.A. are appropriate to the respondents' case.

The respondents ask that the honourable Court strike down the requirement that new citizens pledge their allegiance to Queen Elizabeth the Second, as is currently required by s. 24 of the *Citizenship Act*.

PART III – ARGUMENT

1. OVERVIEW

19. The respondents ask that the honourable Canadian Court of Justice uphold the Federal Court of Appeal decision, which finds s. 24 of the *Citizenship Act* unconstitutional. The oath to the Queen unjustifiably infringes the respondents' freedoms of conscience and religion, as well as their freedom

of expression, as protected by the *Canadian Charter of Rights and Freedoms*. Moreover, in creating a distinction between citizens and non-citizens and between permanent residents who hold anti-monarchist beliefs and those who do not, s. 24 of the *Act* unjustifiably discriminates against the respondents. The respondents, therefore, ask this Court to confirm the constitutional invalidity of s. 24 of the *Act*, and to strike down the impugned provision.

- *Citizenship Act*, R.S.C. 1985, c. C-29 [*Act*].
- *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.),* 1982, c. 11 [*Charter*].

2. JUSTICIABILITY

2.1 The question is not political in nature

20. The appellants maintain that the questions before us are political in nature and are therefore not suited to judicial examination. With all due respect for the opposite view, the respondents do not agree with this restrictive view of the role of the courts and ask that this honourable Court uphold the decision of the Federal Court of Appeal.

21. It has been suggested that the courts are not the appropriate place for the respondents to seek redress. This argument involves a mistaken understanding of the constitutional question at bar. While the respondents' belief system promotes the abolition of the monarchy as the Canadian Head of State, the application in question is limited to the constitutionality of the requirement of swearing an oath to the Queen, as prescribed by s. 24 of the *Act*. Unlike the *Charter*, the provisions of which "cannot be easily repealed or amended," the provisions of an ordinary statute are "easily repealed." This is required by s. 52 of the *Constitution Act, 1982*, when laws conflict with its other provisions. Moreover, as permanent residents, the respondents do not enjoy the benefits of citizenship, which empower Canadians to participate in the political process. The argument that the respondents should use the constitutional modification process must, therefore, be rejected.

- *Hunter et al.* v. *Southam Inc.*, [1984] 2 S.C.R. 145, at 155 [*Hunter*].
- *The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.)*, 1982, c. 11, s. 52. See also *Chaoulli* v. *Quebec (Attorney General.)*, [2005] 1 S.C.R. 791, at para. 183 [*Chaoulli*].

22. Questions may have both political and legal aspects and the courts must not shy away from their duty to examine the legal dimensions of questions affecting individual rights. The respondents challenge the legality of s. 24 of the *Act*. Therefore, while it may not be the Court's role to pronounce on the political aspect of the monarchy, there is no doubt as to its capacity to pronounce on the legality of the statutory provision in question. Moreover, where there are *Charter* rights at issue, the courts are obligated to examine the question. As demonstrated below, s. 24 of the *Act* affects the respondents' *Charter* rights. The honourable Court, therefore, has a duty to hear their claims.

- *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 28. See also *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525.
- *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441, at 472. See also *Chaoulli*, *supra*, para. 21, at para. 89.

2.2 The question is not moot

23. The appellants maintain that the application is moot with respect to the respondent Samundar Rani, as she took the oath to the Queen and obtained citizenship following the institution of the current proceedings. Whether an issue before the Court is moot should be determined in light of the parties' interests. Moreover, in applying the Supreme Court's two-step analysis for the application of the mootness doctrine, the Court must first determine whether a live controversy continues to exist. Ms. Rani's interests are without question still affected by the impugned provision and a live controversy exists, as having sworn the oath to the Queen, she was obliged to betray her personal values. Ms. Rani's case, therefore, is not merely academic.

- *Forget* v. *Quebec (Attorney General.)*, [1988] 2 S.C.R. 90.
- *Borowski* v. *Canada (Attorney General.)*, [1989] 1 S.C.R. 342, at 353 [*Borowski*].

24. Should the Court find that a live controversy no longer exists with respect to Ms. Rani, the Court may nevertheless decide whether or not to exercise its discretion to hear her case. If this Court does not hear her case, the controversy between Ms. Rani and the Attorney General will continue to exist, as the only way the former was able to obtain the benefits of citizenship was through the violation of her fundamental rights. Lastly, because the application has not become moot with respect to the respondents Messrs. Aman and X, there is no concern for judicial economy. The respondents therefore submit that given the indisputable existence of a live controversy affecting their rights, the Court must exercise its discretion to hear their claim.

- *Borowski*, *supra*, para. 23, at 353, 358, 360.

3. SECTION 2(A) OF THE *CHARTER*

3.1 Freedom of conscience is protected by the *Charter*

25. The appellants could maintain that freedom of conscience does not exist as a right in itself, apart from the guarantee of freedom of religion in s. 2(a) of the *Charter*. With respect, the respondents cannot agree with such a limited interpretation of the Constitution. This type of restrictive application is contrary to the longstanding constitutional principle of large and liberal interpretation and the "need for a broad perspective in approaching constitutional documents."

- *Hunter*, *supra*, para. 21, at 155. See also *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [*Big M*].

26. The Canadian courts have, on a number of occasions, confirmed that conscience and religion are indeed two independent rights. Writing for the majority in *R.* v. *Edwards Books and Art*, Dickson C.J. (as he then was) states that "[t]he purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's

perception of oneself, humankind, nature, and, *in some cases*, a higher or different order of being." [Emphasis added.] This emphasis on personal beliefs, whether or not they relate to a divinity, indicates that the *Charter* protects the respondents' conscientious beliefs, even though they are not religiously-motivated. Moreover, in her concurring reasons in *R.* v. *Morgentaler*, Wilson J. firmly states that the protection guaranteed by s. 2(a) of the *Charter* extends beyond religiously-motivated beliefs :

> [I]n a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.

- *R.* v. *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at 759 [*Edwards Books*].
- *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, at 179.

27. It may be argued that the majority of the Supreme Court, in *Syndicat Northcrest* v. *Amselem*, rejected the idea that s. 2(a) protects secular beliefs. In our view, however, in *Amselem*, Iacobucci J. undertook only to define religion, which is just one of the rights protected by s. 2(a) of the *Charter*.

- *Syndicat Northcrest* v. *Amselem*, [2004] 2 S.C.R. 551, at para. 39 [*Amselem*].

28. The idea that freedom of conscience exists as an independent right was also confirmed by the Federal Court of Canada in *Maurice* v. *Canada (Attorney General)*. In refusing to provide a vegetarian diet for an inmate whose dietary choices were not based on any recognized religion, despite the regular availability of vegetarian meals to religiously-motivated vegetarians, Correctional Services of Canada was found to be in violation of s. 2(a) of the *Charter*. According to Campbell J. :

> [W]hile the CSC has recognized its legal duty to facilitate the religious freedoms outlined in the Charter, freedom of conscience has effectively been ignored. Section 2(a) of the Charter

> affords the fundamental freedom of both religion and conscience... The CSC cannot incorporate s. 2(a) of the Charter in a piecemeal manner; both freedoms are to be recognized.

- *Maurice* v. *Canada (Attorney General.)*, [2002] F.C.J. No. 72, at para. 9 [*Maurice*].

29. *Maurice* is not alone in this respect. Several jurisprudential and scholarly sources confirm that s. 2(a) protects the individual's conscience as distinct from his or her religious beliefs, demonstrating that the respondents' refusal to pledge their allegiance to the Queen is constitutionally protected.

- *MacKay* v. *Manitoba*, [1985] M.J. No. 164.
- *Prior* v. *Canada*, [1988] F.C.J. No. 107.
- Irwin COTLER, "Freedom of Conscience and Religion (Section 2(a))", in Gérald-A. BEAUDOIN, Ed RATUSHNY, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed., Toronto, Carswell, 1989, 165, at 173.
- Peter W. HOGG, *Constitutional Law of Canada*, 5th ed., Vol. 2, Scarborough, Carswell, 2007, at 42-43.
- Henri BRUN, « Un aspect crucial mais délicat des libertés de conscience et de religion des articles 2 et 3 des Chartes canadienne et québécoise : l'objection de conscience », (1987) 28 *C. de D.* 185-205. See also Henri BRUN, Guy TREMBLAY, Eugénie BROUILLET, *Droit constitutionnel*, 5th ed., Cowansville, Éditions Yvon Blais, 2008, at 143-144.

30. It is commonly accepted that the Canadian courts may look to the country's international obligations when interpreting the *Charter*. Canada is signatory to the *International Covenant on Civil and Political Rights*, which protects "thought, conscience and religion" and prohibits the impairment of the adoption of "a religion or belief" [emphasis added] of one's choice. This has been interpreted as the "far-reaching and profound" protection of both freedom of conscience and freedom of religion equally. Both the *Universal Declaration of Human Rights* and the *European Convention on Human Rights* repeat this guarantee. Further, the European Court of Human Rights has granted claims based on individual ethical convictions with no connection to religion. Thus, in keeping with the practices of the international community, the

freedom guaranteed by s. 2(a) must be interpreted so as to recognize the respondents' right to the independent protection of their personally-held conscientious beliefs.

- *Health Services and Support-Facilities Subsector Bargaining Assn.* v. *British Columbia*, [2007] 2 S.C.R. 391, at para. 69.
- *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, art. 18.
- Melissa CASTAN, Sarah JOSEPH, Jenny SCHULTZ, *The International Covenant on Civil and Political Rights : Cases, Materials, and Commentary*, 2th ed., Oxford, Oxford University Press, 2004, at 502.
- *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, art. 18; *Convention for the protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S., 221, at 223, Eur. T.S. 5, art. 9.
- *Chassagnou and others* v. *France*, No. 25088/94, [1999] 29 E.H.R.R. 615.

3.2 Conscience encompasses more than political beliefs

31. The appellants could maintain that republicanism, anti-colonialism and anti-monarchism are not a manifestation of the respondents' conscience, but rather, that these values systems fall under the protection of political belief, thought and expression guaranteed by s. 2(b) of the *Charter*. While there is indeed a fine line between one's conscience and one's political beliefs, the respondents contend that the two must be distinguished. The *Oxford English Dictionary* defines "conscience" as, "the faculty or principle which pronounces upon the moral quality of one's actions or motives, approving the right and condemning the wrong." Thus, conscience encompasses much more than political allegiances. Like religion, conscience is one's sense of morality, autonomy and the good. The respondents' membership in the Canadian Anti-Colonial Collective (CAC), combined with their group meetings, pamphleteering and blogging activities, demonstrate that their conscientious objection to swearing allegiance to the Queen is not merely a political belief, but rather, guides the manner in which they

live. To subsume the respondents' sincerely-held conscientious beliefs under s. 2(b) would be to undermine their sense of autonomy and personal values. It would also be contrary to the longstanding judicial interpretation of s. 2(b) as protecting freedom of expression, which is distinct from the freedoms protected by s. 2(a). As seen below, the application of the two rights is not interchangeable.

- *The Oxford English Dictionary*, 2th ed., s.v. "conscience" [*OED*].
- See e.g. *Ford* v. *Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [*Irwin Toy*]; *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R.* v. *Sharpe*, [2001] 1 S.C.R. 45 [*Sharpe*].

32. The appellants might maintain that the freedoms protected by s. 2(a) must be subject to certain internal limits and that allowing the respondents' action will lead to a flood of claims under freedom of conscience. The respondents concede that *Charter* rights are not absolute. However, writing for the majority of the Court in *Multani* v. *Commission scolaire Marguerite-Bourgeoys*, Charron J. states that the freedoms guaranteed by s. 2(a) should not be subject to internal limits. Rather, limitations to fundamental freedoms must be balanced at the level of the s. 1 analysis, seen below. In restricting the application of s. 2(a), the appellants would mistakenly apply an unfounded limit to the *Charter* guarantee.

- *Multani* v. *Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, at para. 30.
- See e.g. *R.* v. *Oakes*, [1986] 1 S.C.R. 103; *Sharpe*, *supra*, para. 31.

3.3 Religion is not limited to a belief in the divine

33. Should the Court find that freedom of conscience is not a standalone guarantee, but rather, that it cannot be dissociated from freedom of religion, the respondents submit that religion, as protected by the *Charter*, is not limited to a belief in the divine. Writing for the majority in *Amselem*, Iacobucci J. states that, "[d]efined broadly, religion *typically* involves a particular

and comprehensive system of faith and worship. Religion also *tends to* involve the belief in a divine, superhuman or controlling power." [Emphasis added.] The words "typically" and "tends to" indicate that while in most cases religion includes a belief in the divine, the freedom prescribed by s. 2(a) must not be limited to theistic beliefs. Iacobucci J. goes on to remark that, "religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment... ." This must be understood in light of the definition of "spiritual," which is, "of or pertaining to, affecting or concerning, the spirit or higher moral qualities" and "emanating from the intellect or higher faculties of the mind; intellectual." The respondents' attitude toward the oath is a manifestation of their higher faculties. In refusing to swear their loyalty to the Queen, they are abiding by their respective intellects and morality, which inform their daily lives. Pledging one's allegiance to another person is akin to becoming that person's subject, subordinate or inferior, which contradicts the respondents' moral, spiritual and intellectual belief in human equality. Thus, it is clear that the protection of s. 2(a) extends to the respondents' conscientiously-held intellectual beliefs, despite that they are not based on a belief in the divine.

- *Amselem*, *supra*, para. 27, at para. 39.
- *OED*, *supra*, para. 31, s.v. "spiritual," "allegiance," "subject."

34. Similarly, in his description of a "Religion of Humanity", philosopher John Stuart Mill maintains that the value of religion does not lie in the belief in a supernatural power. Rather, religion may be based on the values of one's conscience and morality:

> The value, therefore, of religion to the individual... as a source of personal satisfaction and of elevated feelings, is not to be disputed. But it has still to be considered, whether in order to obtain this good, it is necessary to travel beyond the boundaries of the world which we inhabit; or whether the idealization of our earthly life... is not capable of supplying... a religion, equally fitted to exalt the feelings, and... still better calculated to ennoble the conduct, than any belief respecting the unseen powers.

- John STUART MILL, *Three Essays on Religion*, New York, Greenwood Press, 1874, at 104.

35. The Supreme Court of the United States relied on the same reasoning in recognizing the right to object to military service based on a conscientiously-held perception of morality not stemming from a belief in a supreme being. The Court found that although the law governing conscientious objection did not allow for objection based on purely political, personal or moral reasons, the parties' belief system, which did not involve a devotion to the divine, could still be qualified as religious in nature, as long as the beliefs in question "occupy in the life of that individual 'a place parallel to that filled by... God' in traditionally religious persons." The Court found that the exclusion of non-religious or spiritual beliefs in the traditional sense was contrary to the Establishment Clause and Free Exercise Clause, which together form the First Amendment guarantee of freedom of religion. In examining the question before us, we urge the Court to draw on the American example, as the Supreme Court has done on several occasions. Thus, the respondents' conscientious repudiation of the oath, which stems from their personal sense of right or wrong, is as deserving of the protection of s. 2(a) of the *Charter* as any belief in a supernatural deity.

- *United States* v. *Seeger*, 380 U.S. 163 (1965); *Welsh* v. *United States*, 398 U.S. 333 (1970). See also *Malnak* v. *Yogi*, 592 F.2d 197 (3d Cir. 1979).
- Michael S. ARIENS, Robert A. DESTRO, *Religious Liberty in a Pluralistic Society*, 2nd ed., Durham, Carolina Academic Press, 2002.
- *Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *Chaoulli*, *supra*, para. 21; *A.C.* v. *Manitoba (Director of Child and Family Services)*, 2009 SCC 30.

3.4 The oath is a significant infringement on the respondents' sincerely-held beliefs

36. The respondents submit that Loyaliste J.A. was correct in applying the test established in *Amselem*. Although the question at bar dealt with freedom of religion, the Court's analysis

in *Amselem* is based on an interpretation of s. 2(a), which, as demonstrated above, should not be limited to a single freedom. The test of a violation of freedom of conscience *or* religion, therefore, requires that the respondents demonstrate that their conscientiously-held beliefs are sincere. The respondents' refusal to take the oath of citizenship is consonant with the established tenets of republicanism and anti-monarchism, which include popular sovereignty, freedom from domination and institutional accountability, thus demonstrating their sincerity. Their membership and activities in the CAC also illustrate their genuine commitment to their beliefs.

- *Amselem*, *supra*, para. 27, at paras 44-56.
- Andrew GEDDIS, "Some Questions for the United Kingdom's Republican Constitution", (2006) 19 *Can. J.L. & Jur.* 177, at 180.

37. Should the appellants maintain that the respondent Samundar Rani is not sincere in her belief, as Ms. Rani swore the oath to the Queen following the institution of the current action, we cannot agree. This argument ignores the Supreme Court's statement that judicial inquiries into an individual's sincerity must be limited. Moreover, the appellants could maintain that in joining the Canadian Forces, which requires the swearing of an oath to the Queen, Ms. Rani renounced her right to challenge the constitutional validity of the oath. This argument, however, is inconsistent with the Federal Court's statement concerning members of the Canadian Forces that "[a]n individual who voluntarily enters into a profession or office does not automatically forfeit his rights under the Charter." Likewise, the Supreme Court has stated that if the renunciation of a fundamental right is even possible, which remains open to debate, it must be "voluntary, freely expressed and with a clear understanding of the true consequences and effects of so doing if it is to be effective." It is clear that the respondents fulfill the s. 2(a) requirement of sincerity of belief and that Ms. Rani did not forfeit her rights. The respondents' claim must, therefore, benefit from *Charter* protection.

- *National Defence Act*, R.S.C. 1985, c. N-5, s. 23(2).
- *Olmstead* v. *Canada*, [1990] 2 F.C. 484, at 497.

- *Amselem*, *supra*, para. 27, at paras 52-53, 96. See also *Godbout* v. *Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 72 [*Godbout*].

38. Lastly, the infringement on the respondents' rights is far from trivial. Writing for the Court in *R.* v. *Khan*, McLachlin J. (as she then was) states that "[t]he object of the law in requiring an oath is to get at the truth relative to the matters in dispute by getting a hold on the conscience of the witness." The Supreme Court, therefore, suggests that the swearing of an oath is a direct manifestation of an individual's conscience. In examining the significance of the oath, Professor Myron Gochnauer affirms that it is the strongest possible undertaking an individual can make : "When nothing less than the strongest commitment will do, the oath is used." This understanding illustrates the relationship between the oath and the moral and conscientious obligations of the person who swears it; the oath has the effect of controlling an individual's behaviour. This is by no means trivial. Swearing the oath to the Queen will have the effect of morally preventing the respondents from continuing with their anti-colonialist and anti-monarchist activities, thus barring the exercise of their conscientiously-held beliefs.

- *Amselem*, *supra*, para. 27, at paras 59-60.
- *R.* v. *Khan*, [1990] 2 S.C.R. 531, at 357 (citing *R.* v. *Bannerman*, (1966), 48 C.R. 110 (Man. C.A.), at 138, aff'd [1966] S.C.R.).
- Myron GOCHNAUER, "Oaths, Witnesses and Modern Law", (1991) 4 *Can. J.L. & Jur.* 67, at 85.

39. Requiring the respondents to take an oath to which they are conscientiously opposed is akin to the direct State coercion which the *Charter* protects against, thus triggering the application of s. 2(a). The appellants maintain that the respondents are not being coerced into taking the oath, as the requirements to obtain citizenship are not being imposed on them; they are actively choosing to become Canadian citizens. This argument, however, is inconsistent with the more flexible notion of coercion, which the Supreme Court has applied in order to ascertain a *Charter* violation. In *Godbout* v. *Longueuil (City)*, for example, the Court rejected the City of

Longueuil's argument that Ms. Godbout, as a city employee, freely chose to obtain employment with the city and was therefore required to sign a contract restricting her *Charter* right to choose her place of residence. The Court found that a person's choice of employment does not justify an unconstitutional requirement on the part of the employer. It can, therefore, be deduced that even though citizenship is voluntary, the condition that one must swear allegiance to the Queen in order to obtain it is an affront to the freedoms protected under s. 2(a).

- *Big M*, *supra*, para. 25, at 336-337. See also *Edwards Books*, *supra*, para. 26, at 757-758.
- *Godbout*, *supra*, para. 37. See also *Amselem*, *supra*, para. 27.

4. SECTION 2(B) OF THE *CHARTER*

4.1 The oath to the Queen violates freedom of expression

40. The appellants maintain that the oath does not infringe the respondents' rights under s. 2(b) of the *Charter*. Respectfully, we must disagree. Writing for the majority of the Supreme Court in *R.* v. *Sharpe*, McLachlin C.J. states that freedom of expression is among the most fundamental rights of Canadians: "It makes possible our liberty, our creativity and our democracy. It does this by protecting not only 'good' and popular expression, but also unpopular or even offensive expression." Thus, while it may or may not be shared by the majority of Canadians, as an expression of their conscientious beliefs, the respondents' refusal to swear the oath to the Queen is their fundamental right. In line with the Court's reasoning in *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, the respondents' repudiation of the oath, which expresses their anti-monarchist beliefs in a non-violent manner, falls under the protection of s. 2(b). Moreover, even if the appellants prove that the intention in enacting s. 24 of the *Act* was not to restrict freedom of expression, the respondents may still demonstrate that the legislation in question infringes their freedom of expression if the message being conveyed relates to the "pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing." Their

message, in refusing to pledge allegiance to the Queen, is the direct expression of their personal truth and individual self-fulfillment.

- *Sharpe*, *supra*, para. 31, at para. 21.
- *Irwin Toy*, *supra*, para. 31, at 968, 979.

41. Like freedom of conscience, freedom of thought, belief, opinion and expression has been interpreted so as to protect individuals from coercion. S. 2(b) guarantees that individuals may not be compelled to make statements contrary to their own beliefs. Furthermore, the respondents ask that this Court uphold the findings of Loyaliste, J.A. that their silence constitutes a protected form of expression. In *Slaight Communications Inc.* v. *Davidson*, Lamer J. (as he then was) maintains that silence is indeed a form of expression and that "freedom of expression necessarily entails the right to say nothing or the right not to say certain things." In light of this, it is undeniable that compelling the respondents to express an allegiance which they do not hold in order to obtain the benefits of citizenship constitutes a *prima facie* violation of s. 2(b) of the *Charter*.

- *National Bank of Canada* v. *Retail Clerks' International Union et al.*, [1984] 1 S.C.R. 269, at 296.
- *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038, at 1080. See also *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199.

4.2 The respondents are not claiming a positive right

42. The appellants could maintain that the respondents are claiming a positive right, which would require action on the part of the government, and which is not usually required under s. 2 of the *Charter*. This argument, however, involves a mistaken understanding of the question at bar. The respondents do not seek positive action on the part of the government; they are not asking the Court to grant their requests for citizenship, nor do they seek express governmental protection. Rather, the respondents are simply claiming freedom from government interference with their expression, which is their right under s. 2 of the *Charter*, as per the test laid out in *Baier* v. *Alberta*.

- *Haig* v. *Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, at 1035; *Dunmore* v. *Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, at para. 19 [*Dunmore*].
- *Baier* v. *Alberta*, [2007] 2 S.C.R. 673, at paras 20, 30 [*Baier*].

43. Should the Court find that the respondents are claiming a positive right, we maintain that the claim constitutes an exception to the general rule that the *Charter* does not require affirmative action by the government. Firstly, the respondents are not asking for access to a particular statutory regime, which would require additional government resources. In accordance with s. 5 of the *Act*, the respondents are already eligible for the right to citizenship because they meet all of the requirements according to which the Minister shall grant citizenship. Rather, the respondents contest the fact that the ultimate condition that they must satisfy in order to benefit from their right to citizenship constitutes a violation of s. 2(b) of the *Charter*. Thus, their "claim is grounded in a fundamental freedom of expression." Second, the exclusion substantially interferes with the respondents' freedom of expression. As seen, the oath requirement, which obliges the respondents to contradict their personal values, has the effect of denying them access to the many benefits of citizenship, which are necessary in order for them to pursue their anti-monarchist activities through their participation in Canadian politics, by far the most practical and effective way of manifesting their freedom of expression. Lastly, the government is clearly responsible for the respondents' inability to exercise their freedom. It is the government's requirement that they take an oath in which they do not believe that infringes the respondents' s. 2(b) rights and prevents them from exercising their fundamental freedom. Therefore, the respondents' claim under s. 2(b) of the *Charter* must succeed.

- *Dunmore*, *supra*, para. 42, at paras 23-26; *Baier*, *supra*, para. 42, para. 30. See also *Greater Vancouver Transportation Authority* v. *Canadian Federation of Students — British Columbia Component*, 2009 SCC 31.
- The *Act*, *supra*, para. 19, s. 5.

5. L'ARTICLE 15 DE LA *CHARTE*

44. Contraindre les résidents permanents à prêter allégeance à la Reine pour obtenir le certificat de citoyenneté enfreint le droit à l'égalité des intimés reconnu à l'article 15 de la *Charte canadienne des droits et libertés*. En effet, la *Loi sur la citoyenneté* crée une différence de traitement discriminatoire fondée sur deux motifs analogues distincts, soit la citoyenneté et les convictions politiques.

- *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle de 1982*, annexe B de la *Loi de 1982 sur le Canada*, 1982, c. 11. (R.-U.) [*Charte*].
- *Loi sur la citoyenneté*, L.R.C. 1985, c. C-29 [*Loi*].

5.1 Il y a distinction fondée sur la citoyenneté

45. Contrairement aux citoyens de naissance, les résidents permanents peuvent bénéficier des droits et avantages que procure la citoyenneté seulement s'ils jurent ou affirment solennellement leur allégeance à la Reine. Il est donc clair que la *Loi* distingue en fonction de la citoyenneté.

- *R.* c. *Kapp*, [2008] 2 R.C.S. 483, au par. 17 [*Kapp*]. Voir aussi *Law* c. *Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, aux par. 23-25, 39, 88 [*Law*].
- *Hodge* c. *Canada (Ministre du Développement des ressources humaines)*, [2004] 3 R.C.S. 357, aux par. 45-49 [*Hodge*].

46. Dans l'arrêt *Lavoie* c. *Canada*, la Cour suprême a jugé que la citoyenneté est un motif de discrimination analogue à ceux énumérés à l'article 15 de la *Charte*, étant donné que les non-citoyens forment une « minorité discrète et isolée ». La citoyenneté doit donc être considérée comme un motif analogue dans le présent litige.

- *Lavoie* c. *Canada*, [2002] 1 R.C.S. 769, aux par. 2, 11, 41 [*Lavoie*]; *Andrews* c. *Law Society of British Columbia*, [1989] 1 R.C.S. 143, aux p. 151-152, 182-183 [*Andrews*].
- *Corbiere* c. *Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203, aux par. 7-10 [*Corbiere*].

- *Halsbury's Laws of Canada*, vol. 17, 1re éd., Markham, LexisNexis, 2008, aux nos HDH-118-HDH-121 [*Halsbury's*].

5.2 Il y a distinction fondée sur les convictions politiques

47. Les résidents permanents antimonarchistes doivent choisir entre leurs convictions politiques et l'obtention de la citoyenneté, ce que n'ont pas à faire les résidents permanents qui ne sont pas antimonarchistes. La *Loi* crée donc une différence de traitement fondée sur les convictions politiques.

- *Kapp*, *supra*, par. 45, au par. 17. Voir aussi *Law*, *supra*, par. 45, aux par. 23-25, 39, 88.
- *Hodge*, *supra*, par. 45, aux par. 45-49.

48. Bien qu'aucune cour d'appel canadienne ne se soit prononcée sur la question jusqu'à maintenant, la Cour suprême de l'Île-du-Prince-Édouard, dans la décision *Condon* v. *Prince Edward Island*, a pour sa part jugé que les convictions politiques sont un motif de discrimination interdit. En se référant au critère établi par l'arrêt *Corbiere* c. *Canada (Ministre des Affaires indiennes et du Nord canadien)*, le juge Jenkins estime que les convictions politiques, sans pouvoir être qualifiées d'« immuables », constituent sans aucun doute une caractéristique qui « est modifiable uniquement à un prix inacceptable du point de vue de l'identité personnelle ». En outre, tout comme la religion ou la citoyenneté, les opinions politiques sont susceptibles d'être à la base de décisions n'étant pas fondées sur le mérite de l'individu. Le juge Jenkins affirme : « Political participation [...] enhances personal growth and self-realization. [...] Political belief is thereby revealed to appear as a fundamental personal characteristic ». Ces propos ont d'ailleurs été récemment confirmés en *obiter* dans un jugement unanime de la Cour d'appel de l'Ontario. En l'espèce, les faits démontrent que les intimés se définissent profondément en fonction de leurs convictions politiques et que celles-ci constituent une caractéristique personnelle fondamentale dictant leurs choix au quotidien.

- *Longley* v. *Canada (Attorney General)*, [2007] O.J. No. 4758, aux par. 89, 102. Voir aussi *Halsbury's*, *supra*, par. 46, au nº HDH-191.
- *Condon* v. *Prince Edward Island*, [2002] P.E.I.J. No. 56, aux par. 66-78 [*Condon*]; *Comité pour la République du Canada* c. *Canada*, [1991] 1 R.C.S. 139, à la p. 173 [*République*].
- *Corbiere*, *supra*, par. 46, au par. 13.

49. L'interdiction de discriminer en fonction des convictions politiques est d'ailleurs très répandue, tant sur le plan national qu'international. Au Canada, neuf des treize provinces et territoires interdisent expressément la discrimination fondée sur ce motif. La *Déclaration universelle des droits de l'homme* et le *Pacte international relatif aux droits civils et politiques* interdisent également ce type de discrimination. De plus, les opinions politiques constituent un motif de persécution énuméré dans la *Convention relative au statut des réfugiés* que le Canada a ratifiée et intégrée à son droit interne. Cela est pertinent, car la Cour suprême a affirmé que « l'énumération des motifs précis sur lesquels la crainte de persécution peut être fondée pour donner lieu à la protection internationale est semblable à la méthode adoptée en droit international relatif à la discrimination ».

- *Condon*, *supra*, par. 48, aux par. 50-82.
- *Human Rights Code*, R.S.B.C. 1996, c. 210, art. 11, 13; *Charte des droits et libertés de la personne*, L.R.Q., c. C-12, art. 10; *Code des droits de la personne*, C.P.L.M., c. H175, art. 9(2)(k); *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, art. 1(1)(d), (m); *Human Rights Code*, R.S.N.L. 1990, c. H-14, art. 6-9, 12, 14; *Loi sur les droits de la personne*, L.R.N.-B. 1973, c. H-11, art. 2, 4-5, 5.3, 6-7; *Human Rights Act*, R.S.N.S. 1989, c. 214, art. 5(1)(u); *Loi sur les droits de la personne*, L.R.Y. 2002, c. 116, art. 7(j); *Human Rights Act*, S.N.W.T. 2002, c. 18, art. 5(1).
- *Déclaration universelle des droits de l'Homme*, Rés. AG 217(III), Doc. off. AG NU, 3e sess., supp. nº 13, Doc. NU A/810 (1948), art. 2; *Pacte international relatif aux droits civils et politiques*, 16 décembre 1966, 999 R.T.N.U. 171, art. 9-14, art. 26.

- *Convention relative au statut des réfugiés*, 22 avril 1954, 189 R.T.N.U. 150, art. 1A.2); *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, c. 27, art. 96.
- *Canada (Procureur général)* c. *Ward*, [1993] 2 R.C.S. 689, aux p. 697-699, 734-735.

50. C'est également pour assurer la cohérence de la *Charte* que les convictions politiques doivent être reconnues comme motif de discrimination interdit. À défaut de ce faire, la *Charte* interdirait les violations de la liberté d'expression tout en permettant les restrictions inégalitaires à cette même liberté, laquelle a été maintes fois reconnue par la Cour suprême comme étant primordiale dans une société libre et démocratique. Cela mènerait à un résultat absurde.

- *Condon*, *supra*, par. 48, aux par. 57-65.
- Voir notamment *Irwin Toy Ltd.* c. *Québec (Procureur général)*, [1989] 1 R.C.S. 927, aux p. 968-969; *R.* c. *Sharpe*, [2001] 1 R.C.S. 45, au par. 21 [*Sharpe*]; *République*, *supra*, par. 48, aux p. 170-171.

5.3 Les distinctions sont discriminatoires

51. Les différences de traitement fondées sur la citoyenneté et sur les convictions politiques sont discriminatoires puisqu'elles contribuent à perpétuer un désavantage à l'égard des résidents permanents en général, ainsi qu'à l'égard des résidents permanents antimonarchistes.

- *Kapp*, *supra*, par. 45, aux par. 18-25; *Andrews*, *supra*, par. 46, à la p. 174.

52. Alors que la jurisprudence reconnaît que les non-citoyens forment un groupe défavorisé, la *Loi* leur impose un fardeau additionnel en les obligeant à prêter allégeance à la Reine. Le processus pour accéder à la citoyenneté est déjà relativement lourd. Habiter au Canada pendant au moins trois ans, passer à travers toutes les procédures administratives requises et réussir un examen vérifiant des connaissances historiques, sociopolitiques et linguistiques (connaissances que ne possèdent probablement pas plusieurs citoyens de naissance) témoignent d'un réel désir de

s'intégrer à la société canadienne. Or, même si les résidents permanents satisfont à toutes les conditions et que le ministre leur attribue la citoyenneté, ils se voient en outre contraints de prononcer le serment ou l'affirmation solennelle. En exigeant qu'ils s'engagent moralement envers la Reine, la *Loi* les oblige alors soit à s'abstenir d'adopter des convictions antimonarchistes, soit à mentir s'ils épousent déjà de telles convictions, ou encore à se priver de la citoyenneté s'ils refusent de limiter ainsi leur liberté de pensée et d'action.

- La *Loi*, *supra*, par. 44, art. 5; *Règlement sur la citoyenneté*, 1993, DORS/93-246, art. 3-4, 11-15, 32.
- *Andrews*, *supra*, par. 46, aux p. 151-152, 155-156.
- Bryce EDWARDS, « Let Your Yea Be Yea : The Citizenship Oath, the Charter, and the Conscientious Objector », (2002) 60 : 2 *U.T. Fac. L. Rev.* 39, au par. 15.
- CITOYENNETÉ ET IMMIGRATION CANADA, « Devenir citoyen canadien », [En ligne]. http ://www.cic.gc.ca/francais/citoyennete/devenir.asp.

53. De plus, ceux qui refusent de prêter serment sont, par le fait même, privés d'une panoplie de droits et avantages tels que le droit de vote et le droit de se présenter à des élections, le droit d'inscrire leurs enfants dans la langue de la minorité, le droit de participer aux élections municipales et scolaires, la protection diplomatique, l'accès à la profession policière, ainsi que l'admission préférentielle dans la fonction publique fédérale.

- *Loi sur les élections et les référendums dans les municipalités*, L.R.Q., c. E-2.2, art. 47, 54 et 61; *Loi sur les élections scolaires*, L.R.Q., c. E-2.3, art. 12 et 20; *Loi sur la police*, L.R.Q., c. P-13.1; *Loi sur l'emploi dans la fonction publique*, L.C. 2003, c. 22, art. 12-13, 39 [*Loi sur l'emploi*]; la *Loi*, *supra*, par. 44, art. 38; *R.* c. *Parisien*, [1988] 1 R.C.S. 950, aux p. 958-959; *Lavoie*, *supra*, par. 46, aux par. 13, 45. Voir aussi Henri BRUN, Guy TREMBLAY, Eugénie BROUILLET, *Droit constitutionnel*, 5e éd., Cowansville, Yvon Blais, 2008, aux p. 159-163 [Brun].

54. Le Canada accorde une grande valeur à la diversité culturelle; ce principe a d'ailleurs été consacré à l'article 27 de

la *Charte*. Or, en forçant de façon discriminatoire certaines personnes à choisir entre leur liberté de pensée et la citoyenneté, la *Loi* mine ce principe si cher aux Canadiens.

6. L'ARTICLE PREMIER DE LA *CHARTE*

55. Les intimés soumettent que les atteintes aux droits et libertés démontrées ci-dessus ne sont pas justifiées en vertu de l'article premier étant donné que l'objectif du serment n'est pas urgent et réel et qu'il ne s'agit pas d'une mesure proportionnée.

- *R.* c. *Oakes*, [1986] 1 R.C.S. 103, aux par. 135-142 [*Oakes*]; *Alberta* c. *Hutterian Brethren of Wilson Colony*, [2009] CSC 37 [*Hutterian*].

6.1 L'objectif recherché n'est pas urgent et réel

56. L'objectif du serment à la Reine va à l'encontre des valeurs protégées par la *Charte* puisqu'il tire son origine de l'époque féodale, souvent qualifiée par les historiens d'oppressive et d'inégalitaire. Le juriste Sir Edward Coke décrivait le lien d'allégeance entre le Roi et ses sujets comme étant « personal and perpetual ». Même si la société a beaucoup évolué depuis, il n'en demeure pas moins que le libellé du serment actuel s'inspire du vocabulaire utilisé au XVI^{e} siècle. Les termes « allégeance » et « fidélité » ne présentent d'ailleurs aucune ambiguïté et sous-entendent à la fois l'obéissance, le dévouement et la loyauté, qualités dont le nouveau citoyen s'engage à faire preuve à l'égard de la Reine lorsqu'il prononce le serment. Le lien personnel ainsi créé est réitéré dans le nouveau guide sur la citoyenneté qui énonce qu'« [a]u Canada, nous jurons notre fidélité à une *personne humaine* qui nous représente tous » [nos italiques]. Le caractère perpétuel du lien subsiste également. Dans l'arrêt *Roach* c. *Canada (Ministre d'État au Multiculturalisme et à la Citoyenneté)*, le juge MacGuigan, écrivant pour la majorité, affirme que le serment a pour effet de lier l'individu à la Reine tant et aussi longtemps qu'elle fera partie de la Constitution. Ainsi, tout comme sous Henri VIII, l'objectif du serment vise à s'assurer que ceux qui le prononcent s'abstiennent indéfiniment de

critiquer le monarque et de participer à son abolition. Un tel objectif ne peut être qualifié d'urgent et réel dans le cadre d'une société libre et démocratique.

- John CANNON (dir.), *A Dictionary of British History*, Oxford University Press, 2009, s.v. « feudalism », [En ligne]. http ://www.oxfordreference.com; EDWARDS, *supra*, par. 52, aux par. 36-38,124; THE MONARCHIST LEAGUE OF CANADA, « Queen or Country? Does it Matter? Understanding a Crucial Issue », [En ligne]. http ://www.monarchist.ca/new/oath.html.
- Alain REY (dir.), *Le nouveau petit Robert*, Paris, Dictionnaires Le Robert, 2006, s.v. « allégeance », « fidélité » [*Le Robert*].
- Robert BOTHWELL, « Something of Value? Subjects and Citizens in Canadian History », dans William KAPLAN (dir.), *Belonging : The Meaning and Future of Canadian Citizenship*, Montréal et Kingston, McGill-Queen's University Press, 1993, aux p. 28-29 [Kaplan, « Belonging »].
- CITOYENNETÉ ET IMMIGRATION CANADA, « Guide d'étude — Découvrir le Canda : Les droits et responsabilités liés à la citoyenneté », [En ligne]. http ://www.cic.gc.ca/francais/ressources/publications/decouvrir/section-01.asp [« Guide d'étude »].
- *Roach* c. *Canada (Ministre d'État au Multiculturalisme et à la Citoyenneté)*, (C.A), [1994] 2 C.F. 406, à la p. 413 [*Roach*].

6.2 La mesure n'est pas proportionnée

57. Si la Cour jugeait que, comme le prétend l'appelant, le serment à la Reine vise un objectif urgent et réel puisqu'il permet de renforcer l'unité nationale en s'assurant que les nouveaux citoyens comprennent les structures de notre régime et qu'ils adhèrent à l'identité canadienne, les intimés soumettent qu'il constitue à tout le moins une mesure disproportionnée.

6.2.1 Il n'y a pas de lien rationnel

58. L'examen de citoyenneté est suffisant pour vérifier les connaissances que possèdent les résidents permanents sur le Canada et, par le fait même, l'intérêt qu'ils témoignent à

l'égard de la société canadienne. De plus, le serment à la Reine ne constitue pas un outil adéquat pour mesurer la sincérité de la personne qui le prononce. En effet, l'appelant allègue que les personnes qui prononcent le serment sont libres de conserver leurs convictions antimonarchistes et de participer à l'établissement d'un régime républicain. Dans leurs motifs, le juge Laliberté et la juge Kohinoor tiennent le même propos. Il en est de même du juge Macguigan dans l'arrêt *Roach*. Avec égards, les intimés sont en désaccord avec une telle affirmation puisqu'ils accordent personnellement une grande importance aux notions de promesse et d'engagement auxquelles réfère le libellé du serment; les mots « jurer », « sincère » et « solennellement » sous-entendent effectivement un haut degré de vérité et d'authenticité. Cependant, si l'État accepte que le serment puisse ne pas être prononcé avec l'intention de le respecter, il n'a aucun lien rationnel avec l'objectif.

- *Roach*, *supra*, par. 56, aux p. 414, 416.
- *Le Robert*, *supra*, par. 56, s.v. « jurer », « sincère », « solennel ».

59. En 2004, M. Ashok Charles, un résident permanent devenu citoyen, a renoncé publiquement à la partie du serment ayant trait à la Reine. Le gouvernement a par la suite confirmé que cela n'affecterait pas sa citoyenneté. En tenant compte de ce fait, les intimés soumettent qu'il est illogique de forcer les résidents permanents à prêter le serment dans ses termes actuels, alors qu'ils peuvent y renoncer sans conséquence après l'avoir prononcé.

- *Roach* v. *Canada (Attorney General)*, [2009] O.J. No. 737, aux par. 23-24.

6.2.2 L'atteinte n'est pas minimale

60. Considérant la quantité et la gravité des violations démontrées ci-haut, le serment à la Reine ne constitue pas une atteinte minimale. En plus de nier substantiellement des droits et libertés fondamentaux des intimés, il force les résidents permanents qui refusent de le prêter à se priver des droits et avantages qui découlent de la citoyenneté. Une mesure aussi attentatoire crée un lourd fardeau de justification pour l'État.

En outre, il n'est pas requis de faire preuve de retenue judiciaire puisque le serment à la Reine ne vise pas à résoudre un problème social grave affectant les finances et la sécurité publiques, comme c'était le cas dans l'arrêt *Alberta* c. *Hutterian Brethren of Wilson Colony*, où la Cour a accordé une plus grande déférence au Parlement, justement pour cette raison.

- *Chaoulli* c. *Québec (Procureur général)*, [2005] 1 R.C.S. 791, au par. 92.
- *Hutterian*, *supra*, par. 55, aux par. 35-37, 53. Voir aussi *Oakes*, *supra*, par. 55, à la p. 139.

61. Le serment à la Reine n'est pas nécessaire. Prêter serment au Canada éviterait de porter atteinte aux droits des résidents permanents tout en remplissant le rôle symbolique de souligner l'engagement de ces derniers envers leur pays d'accueil. Tous les juges ayant rédigé les motifs des instances inférieures précisent d'ailleurs que le serment à la Reine permet de s'assurer de la loyauté des nouveaux citoyens envers le Canada. De plus, des modifications législatives ont été apportées en ce sens, dans d'autres contextes, afin de mieux refléter les valeurs actuelles. En effet, le *Règlement sur les serments et affirmations solennelles* pour entrer dans les services policiers de l'Ontario, ainsi que la *Loi sur l'emploi dans la fonction publique*, notamment, permet maintenant aux personnes de prêter serment au Canada plutôt qu'à la Reine. En outre, l'Australie et l'Inde, deux pays faisant également partie du Commonwealth, exigent dorénavant que leurs nouveaux citoyens prêtent serment au pays ou à la Constitution et non à la Reine.

- *RJR-MacDonald Inc.* c. *Canada (Procureur général)*, [1995] 3 R.C.S. 199, aux par. 160.
- *Loi sur l'emploi*, *supra*, par. 53, art. 12-13, par. 4(8); *Serments et affirmations solennelles*, Règl. de l'Ont. 144/91, art. 1-3.
- *Australian Citizenship Act 2007*, art. 27 et Schedule 1; *The Citizenship Act* [Inde], 1955, *Act* No. 57 of 1955 1, Schedule 2.

62. Certains pourraient prétendre que la Reine est indispensable à la définition de l'identité canadienne. Cependant, le

contraire peut tout aussi bien être soutenu. De nombreux éléments permettent de distinguer le Canada des autres nations, tels que le bilinguisme, les politiques sociales et étrangères, ainsi que la Constitution dont quatre des principes fondateurs reconnus par la Cour suprême sont le fédéralisme, la démocratie, la primauté du droit et la protection des minorités. Bref, un attachement envers le Canada ne va pas nécessairement de pair avec un attachement envers une institution désuète telle que la Reine. Plusieurs auteurs décrivent en fait la monarchie au Canada comme étant un facteur de division plutôt que d'unification de la population.

- Voir, par exemple, *Mahe* c. *Alberta*, [1990] 1 R.C.S. 342, à la p. 350.
- *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, aux par. 46-82.
- CITOYENNETÉ ET IMMIGRATION CANADA, « Citoyenneté canadienne », [En ligne]. http://www.cic.gc.ca/francais/ressources/publications/citoyennete.asp.
- Desmond MORTON, « Divided Loyalties? Divided Country? », Robert FULFORD, « A Post-Modern Dominion : The Changing Nature of Canadian Citizenship », dans Kaplan, « Belonging », *supra*, par. 56, aux p. 3, 56-58, 110-117.

6.2.3 Il y a déséquilibre entre les effets préjudiciables et les bénéfices

63. L'étendue et la gravité des droits touchés surpassent de façon notable les bénéfices que l'État peut retirer de cette mesure. Le serment à la Reine ne permet pas de vérifier l'adhésion des nouveaux citoyens à l'identité canadienne et ne représente pas un avantage par rapport à un serment envers le Canada. La société n'a donc rien à perdre dans le retrait de la Reine du serment, alors que les intimés ont tout à gagner.

- *Hutterian*, *supra*, par. 54, aux par. 73, 78-79; *Oakes*, *supra*, par. 54, aux p. 139-140.

64. Avec respect, l'appelant a tort d'alléguer que la citoyenneté est un privilège et qu'il n'y a donc pas d'effets préjudiciables à l'égard des résidents permanents. À son adoption en 1977, la *Loi* visait justement à faire de la citoyenneté un droit

en établissant des conditions objectives et en diminuant le pouvoir discrétionnaire du juge de citoyenneté et du ministre. En effet, la partie I de la *Loi*, intitulée « Le *droit* à la citoyenneté » [nos italiques], dispose que « le ministre attribue la citoyenneté à toute personne » qui remplit les conditions. Le libellé ne permet donc pas un refus arbitraire de l'octroi de la citoyenneté. Ceci est confirmé dans un document préparé pour le gouvernement dans lequel le professeur Kaplan écrit que : « l'ancienne [*Loi sur la citoyenneté*] se fondait sur le principe de la citoyenneté comme privilège [alors que] la Loi de 1977 faisait de la citoyenneté un droit ». Il n'y a donc aucun doute que, sur le plan juridique, la citoyenneté est un droit et non plus un privilège.

- *Débats de la Chambre des communes*, vol. XI, 21 mai 1975, à la p. 5983; *Débats de la Chambre des communes*, vol. XII, 13 avril 1976, aux p. 12791-12797; CITOYENNETÉ ET IMMIGRATION CANADA, « Les artisans de notre patrimoine : La citoyenneté et l'immigration au Canada de 1900 à 1977 », [En ligne]. http ://www.cic.gc.ca/francais/ressources/publications/patrimoine/chap-6.asp.
- La *Loi*, *supra*, par. 44, art. 3-6.
- *Loi d'interprétation*, L.R.C. 1985, c. I-21, art. 11.
- Ministère du Multiculturalisme et de la Citoyenneté, *Évolution de la législation sur la citoyenneté canadienne,* par William KAPLAN, Ottawa, 1991, à la p. 27.

65. Dans l'arrêt *Syndicat Northcrest* c. *Amselem*, qui portait sur un contrat privé de copropriété empêchant les demandeurs d'ériger des souccahs sur leur balcon et les brimant ainsi dans l'exercice de leur liberté de religion, le juge Iacobucci affirmait que « [c]e serait un geste à la fois indélicat et moralement répugnant que de suggérer que les appelants aillent tout simplement vivre ailleurs s'ils ne sont pas d'accord avec la clause restreignant leur droit à la liberté de religion ». Les intimés estiment qu'il serait tout aussi « indélicat et moralement répugnant » de demander à des individus, qui vivent au Canada depuis plusieurs années et qui ont développé un fort sentiment d'appartenance envers ce pays, de se priver de la citoyenneté canadienne parce qu'une des

conditions pour l'obtenir porte atteinte à des droits et libertés qui font justement la richesse de cette citoyenneté.

- *Syndicat Northcrest* c. *Amselem*, [2004] 2 R.C.S. 551, au par. 98.
- « Guide d'étude », *supra*, par. 56.

7. LES RÉPARATIONS

7.1 La déclaration d'invalidité immédiate constitue le meilleur remède

66. Considérant ce qui précède, les intimés demandent à la Cour de déclarer invalide, en vertu de l'article 52 de la *Loi constitutionnelle de 1982*, la condition prescrite par l'article 24 et l'annexe de la *Loi* de prêter serment ou d'affirmer allégeance à la Reine. En l'espèce, une telle réparation n'aura aucun impact financier pour l'État. De plus, invalider l'« obligation de fond » de prêter serment à la Reine laisserait au Parlement le choix de la mesure qu'il juge appropriée pour remédier à l'inconstitutionnalité du serment.

- *Loi constitutionnelle de 1982* (R.-U.), constituant l'annexe B de la *Loi de 1982 sur le Canada*, 1982, c. 11 (R.-U.).
- *Schachter* c. *Canada*, [1992] 2 R.C.S. 679, aux p. 695-700, 703-704 [*Schachter*]; *R.* c. *Ferguson*, [2008] 1 R.C.S. 96, au par. 35.
- Brun, *supra*, par. 53, aux p. 998, 1004; Peter W. HOGG, *Constitutional Law of Canada*, student ed., Scarborough, Carswell, 2008, à la p. 872 [Hogg].

67. Par ailleurs, les intimés estiment qu'il n'y aurait aucune raison de suspendre la déclaration d'invalidité, puisque l'annulation de l'obligation de prêter serment à la Reine ne risque pas de présenter un danger pour le public. Elle ne porterait pas non plus atteinte à la primauté du droit; au contraire, elle permettrait d'éviter de violer les droits des intimés et d'autres résidents permanents. Finalement, l'invalidité n'aurait pas pour effet de donner à la *Loi* une portée plus limitative que celle que le législateur a voulu lui donner au départ. Elle aurait plutôt pour effet de faciliter l'accès à la

citoyenneté, ce qui constitue un des objectifs de la politique du gouvernement en matière de citoyenneté.

- *Schachter*, *supra*, par. 66, aux p. 715-717. Voir aussi *R* c. *Swain,* [1991] 1 R.C.S. 933, à la p. 1021 et le *Renvoi : Droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, aux p. 747-769.
- *Lavoie*, *supra*, par. 46, au par. 57.

7.2 L'interprétation large constitue un autre remède approprié

68. De façon subsidiaire, les intimés suggèrent à la Cour d'interpréter de façon large le libellé du serment. Ajouter « (*ou* au Canada) » après « à Sa Majesté la Reine Elizabeth Deux, Reine du Canada, à ses héritiers et successeurs » permettrait de corriger l'inconstitutionnalité de la disposition, sans empiéter excessivement sur le pouvoir législatif puisque les termes ajoutés ne modifieraient pas la nature de la *Loi*. De plus, cette solution n'engendrerait aucun coût social et éviterait de violer les droits des résidents permanents se trouvant dans la même situation que les intimés.

- *Schachter*, *supra*, par. 66, aux p. 695-700. Voir aussi *Sharpe*, *supra*, par. 50, aux par. 114-127 et *Vriend* c. *Alberta*, [1998] 1 R.C.S. 493, au par. 179.
- Brun, *supra*, par. 53, à la p. 1007; Hogg, *supra*, par. 66, aux p. 886, 889; Louis TASSÉ, « Application de la *Charte canadienne des droits et libertés* », dans Gérald-A. BEAUDOIN, Errol MENDES (dir.), *The Canadian Charter of Rights and Freedoms*, 4e éd., Markham, LexisNexis, 2005, 70 aux p. 146-151.

PARTIE IV – DÉCISION RECHERCHÉE

POUR TOUS CES MOTIFS, PLAISE À CETTE HONORABLE COUR DE :

REJETER le pourvoi de l'appelant;

CONFIRMER la décision de la majorité de la Cour d'appel fédérale à l'égard de la justiciabilité;

CONFIRMER la décision de la majorité de la Cour d'appel fédérale à l'égard de la violation non justifiée de l'article 2 de la *Charte*;

DÉCLARER que la condition de prêter serment ou d'affirmer allégeance à la Reine viole de façon non justifiée l'article 15 de la *Charte*;

DÉCLARER invalide la condition de prêter serment ou d'affirmer allégeance à la Reine pour l'obtention de la citoyenneté canadienne;

CONDAMNER l'appelant aux dépens tant devant cette Cour que devant les instances inférieures.

LE TOUT RESPECTUEUSEMENT SOUMIS LE 9 FÉVRIER 2010.

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