

BRIEF OF THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS

**Bill C-24, An Act to amend the Citizenship Act and to make consequential
amendments to other Acts**

Presented to the Citizenship and Immigration Committee of the House of Commons

May 5, 2014

Introduction:

The Canadian Association of Refugee Lawyers (CARL) is a national organization of lawyers, academics, law students and other professionals who work with refugees. CARL advocates on behalf of refugees and engages in litigation on issues related to the protection of refugees. CARL is a national organization with over 300 members. We have intervened before the Supreme Court of Canada in cases involving refugee issues and have initiated litigation to challenge the cuts to refugee health care. We have prepared this brief to express our concerns about how the proposed changes to the Citizenship Act will have a serious and negative impact on refugees.

Immigration Minister Chris Alexander's reforms to the citizenship legislation represent a serious threat to the rights of all Canadians. The "Strengthening Canadian Citizenship Act" does exactly the opposite of what the title proclaims. Instead of a permanent and secure status that belongs to the citizen, Canadian citizenship will be reduced to another form of permanent resident status which is conditional on the Minister's discretionary judgment about who deserves to get it and who deserves to keep it. It broadly expands the requirements for citizenship in ways that will make it inaccessible to many while dramatically reducing due process rights when the government seeks to take citizenship away.

Under the proposed changes a person will only be eligible for citizenship if they satisfy the Minister that they intend to reside in Canada after they obtain citizenship. This only applies to naturalized citizens. The government does not presume to dictate to Canadians by birth whether and for how long they may reside elsewhere. Of course, the government may legitimately encourage present and future Canadians to reside in Canada. But that's not what this provision does. Rather, it empowers a government official to speculate on a citizenship applicant's future intentions, and then potentially deny citizenship on the basis of that conjecture.

Worse still, it also holds out the implicit threat that if a naturalized Canadian citizen takes up a job somewhere else, forms a relationship with someone abroad, or even accompanies a Canadian-born spouse who takes a job elsewhere, the government may move to strip the person of citizenship for misrepresenting their intention to reside in Canada when they were granted citizenship. Whether the government acts on the threat is not the issue; it is enough that people will be made insecure and apprehensive by the possibility that a government official may arbitrarily decide to launch revocation proceedings against them if they leave Canada too soon, or remain away too long. That's not a way to foster a citizenship of commitment. That's a way to foster a citizenship of fear.

The proposed law also greatly reduces the due process rights when the Minister seeks to revoke citizenship. Under the current law citizenship can only be removed after a hearing before a Judge. Under the new proposals, the Minister will, in most cases, make the decision without a hearing. Today's judicial proceeding will be replaced by an informal administrative process. An official will send a letter stating that the Minister believes that the person misrepresented when they obtained citizenship. Any response must be made in writing. There is no automatic right to a hearing although the legislation

does say that there might be one in some unspecified circumstances. After receiving submissions the Minister can order that the citizenship be revoked. That's the extent of due process.

And if that is not enough, the proposal reduces the right of citizens to appeal to the courts. Gone is the appeal as of right. Instead a person whose citizenship is revoked will have to apply to the Federal Court for permission to start an appeal. And of course, under basic legal principles the Federal Court will be required to defer to the views of the Minister and will be reluctant to disagree with the Minister's assessment of the evidence, so the scope of any review by the Courts will be very limited indeed. Fair judicial process for revocation has been replaced by Ministerial discretion. This process mimics the present process for permanent residents who wish to access judicial review, and demonstrates again the way in which citizenship has been downgraded to a form of permanent resident status.

What follows is an initial analysis of some of the changes, followed by a brief assessment of the bill's constitutionality. We note that there are some aspects of the legislation that are positive. These include the efforts to resolve the situation of "lost Canadians". Other measures like the changes that will make citizenship more accessible to persons who have served in the armed forces are not problematic although it is doubtful they will affect many persons.

Changes to requirements and eligibility for citizenship

Residence

Current Law: Requires residence for three out of four years (1,095 days).

New Law: Requires physical presence for four years (1,460 days) out of the six years.

Comment: This increases the waiting time to obtain citizenship. CARL believes that citizenship should be accessible to encourage integration. Especially in the case of refugees, delays in obtaining citizenship can impose severe hardship because refugees are denied the protection of their country and need the protection of Canadian citizenship. CARL believes that three years of physical presence in Canada is sufficient time for a person to develop close ties to Canada that would warrant granting citizenship.

CARL notes that in the past 18 months, the new bureaucratic measures implemented by the present government have added two to three years to the delay in the processing of citizenship applications. This is not the result of law, but due to changes in the processing of applications and the government's own allocation of resources. Therefore, this backlog will not be affected by the proposed change to the bill that the government claims will speed up the process. The current situation is that the de facto residency period is already 5-6 years (3 years residence + 2-3 years government imposed delay in processing). Before the government considers extending the legal requirement for residence, it should demonstrate that it has resolved its self-inflicted backlog, rather than resort to self-serving predictions of future efficiency.

The Act adds other requirements. One must be in Canada at least 183 days in each calendar year for four out of six years. This makes applying for citizenship much more complex and will require scrutiny by calendar years as well as overall scrutiny of the number of days absent. Given the current procedures for determining residency and the amount of time it is taking to get an application processed, the addition of this requirement will make the application process more complex and time consuming.

Physical Presence

Current Law: No clear requirement that a resident be physically present; the exact nature of this requirement has been the subject of considerable debate in the jurisprudence.

New Law: Requires physical presence. This change is made to clarify the requirements for citizenship because there has been confusion as a result of the conflicting jurisprudence on this point. CARL believes that citizenship should be accessible to encourage integration. We do not oppose this change, as it will clarify the rules as they apply to citizenship applications.

Time as a non-permanent resident (non-PR)

Current law: Two years of time spent as a non-permanent resident may be counted as one year toward residence for citizenship.

New Law: Eliminates this right.

Comment: There is no reason why time spent legally in Canada as a non-permanent resident should not count towards citizenship. This measure will especially impact those who spend many years obtaining their permanent resident status while in Canada legally, such as refugees and persons who have come to Canada on the Live-in Caregiver Program (LCP). As Canada moves away from admitting economic immigrants permanently and opts for two-step migration programs, it is only sensible and fair to credit those immigrants with time spent as temporary foreign workers or participants in the LCP. If the idea behind the wait times for citizenship is to ensure that people have lived in Canada, it is reasonable to allow some portion of the several years that the person was in Canada with some form of status other than PR status partially count towards obtaining citizenship.

Intent to reside provision

Current Law: There is no intent to reside provision.

New Law: Introduces as a requirement that the person applying for citizenship have an intent to reside in Canada after they obtain citizenship.

Comment: The government is free to encourage naturalized as well as birthright citizens to reside in Canada. The provision goes further, however, by making an intention to reside a condition of naturalization. This creates two problems. First, it grants broad

discretion to a citizenship officer to speculate on the future intentions of a citizenship applicant and deny citizenship based on an alleged lack of intention to reside in Canada. Some have argued that this is a hypothetical concern and not one that will arise in practice. However, intention is already an issue in immigration applications. Applications are often refused because an officer concludes that the person does not have the intention to reside in Canada after he or she becomes a permanent resident. Applications are refused because an officer concludes that a person who has applied as a Skilled Worker under the Federal Program intends to reside in Quebec. By introducing the question of intention into the requirements for citizenship, the government will give officers a broad discretion to refuse citizenship based on their understanding of the person's intent.

Secondly, since misrepresentation or fraud in relation to any condition of citizenship is a ground for revocation, a naturalized citizen is vulnerable to revocation of citizenship if she leaves Canada and allegedly takes up residence elsewhere. This is not a risk faced by citizens who obtain citizenship by birth. Even if this power is exercised infrequently, its existence creates uncertainty and insecurity in citizens. They will live with the fear that leaving Canada might expose them to the accusation of fraud on the grounds that they did not intend to reside permanently. The possibility of judicial review offers little protection against the arbitrary exercise of this vague and broad discretion because of the deference that courts show to the exercise of discretion by administrative decisions.

Changes to knowledge and language requirements

Current Law: The requirement for a written language test has already been introduced. This measure has already had a significant impact on the ability of some permanent residents to acquire citizenship and disproportionately impacts refugees who came to Canada to flee persecution and who did not have to pass language exams in order to qualify for permanent residence. Under the current law persons only have to pass language and knowledge test to the age of 54.

New Law: Under new law the requirement is extended to the age of 64.

Comment: While CARL agrees that some knowledge of one of Canada's official languages should continue to be a requirement of citizenship, CARL opposes the requirement that applicants take a written test in order to establish their proficiency. First, requiring a written test significantly increases the cost of applying for citizenship and will make it inaccessible to low-income individuals. The average cost of an approved language test is \$200.00. This would be in addition to the costs of the application for citizenship which will now cost \$200.00 making the total cost of an application at least \$400.00.

In addition, while some knowledge of an official language is required so as to ensure that an individual has sufficient language skills to be able to participate in the democratic process, requiring that an individual pass a written test will make citizenship inaccessible to refugees and sponsored family members who could and should be accommodated in the manner of evaluation. CARL opposes the requirement that applicants for citizenship

be required to take a written language test.

Changes to Bar for Criminal Convictions

Current Law: Three-year bar for convictions in Canada.

New Law: Four-year bar for convictions in or outside of Canada.

Comment: This provision increases the bar by one year. In addition, it adds foreign convictions as a ground for being denied citizenship. It makes no distinction between a conviction that takes place within the context of a democratic regime and one that occurs in a non-democratic regime where there is no due process. Thus a person who has been found to be a refugee based on a false prosecution in an undemocratic country could be denied citizenship based on that conviction.

CARL opposes the increasing of the bar to citizenship by one year. There is no reason why the bar should be increased. Moreover, the addition of a bar to citizenship based on convictions outside of Canada is not necessary or justified.

Adds Requirements to File Tax Returns

Current Law: No formal requirement to file tax returns although these were routinely requested as part of residency test.

New Law: Will require income tax returns for four of last six years.

Comment: As these are now often required this is not a significant change.

Changes to Revocation Procedures

Current Law: In order to revoke citizenship on grounds of fraud or misrepresentation, the Minister must notify the person of his intent to revoke. The person has a right to seek a hearing in the Federal Court. If the person seeks a hearing, there is a proceeding in the Federal Court and if the Court decides that the person misrepresented a material fact it makes a finding. The matter is then referred to the Governor in Council that makes the final determination on revocation.

New Law: Under the new law, a new revocation regime is established, which is to include new grounds for revocation, new procedures for revocation and new consequences of revocation. Most revocation proceedings will not be the subject to a judicial or quasi-judicial process but rather will be a discretionary decision made by the Minister or a Minister's Delegate.

Revocation in cases involving fraud will be subject to new procedures, which no longer require the Governor in Council to be involved. If the Minister is satisfied of fraud, on a balance of probabilities, the Minister may revoke citizenship. However, it is unclear if, as under previous law, the person will become a permanent resident as a result of revocation (presuming permanent residence was not obtained by fraud). If the Minister believes that a person has misrepresented on his or her citizenship application in relation

to anything other than a matter that involves membership in a terrorist group, involvement in war crimes, crimes against humanity or organized crime, the new procedure will allow the Minister to revoke citizenship without a hearing. The Minister will send notice to the person. Once notice is received the person will be permitted to make written submissions. There will be no requirement for an oral hearing, although it may occur in some unspecified situations. Once the Minister reviews the submissions he will have the power to revoke citizenship. The decision will be subject to judicial review but will be subject to a requirement that leave be obtained first. Moreover, on judicial review, the Court will only intervene if the decision is outside the realm of possible decisions meaning that the scope of review will be very limited.

Revocation in cases involving allegations that a person withheld his or her membership in a terrorist group, withheld the fact that he or she committed war crimes or crimes against humanity or withheld his or her membership in organized crime will be referred to the Federal Court.

The requirement that revocation be approved by Governor in Council will be eliminated.

Comment: Bill C-24 eliminates any type of hearing in most revocation cases, and replaces it with an administrative procedure that gives citizens in revocation proceedings less protection than permanent residents who are found inadmissible on grounds of misrepresentation. It demeans the meaning of citizenship and poses a grave threat to all citizens in Canada. When one considers this provision in combination with some of the other changes including the requirement that a person possess the intent to remain in Canada after he or she receives citizenship, then the risk of introducing this type of procedure becomes apparent.

Consider this: A person applies for citizenship and obtains it. Six months later he decides to study in Europe. He goes to Europe and registers as a Canadian studying abroad. The officer notifies citizenship officials that he left Canada six months after he got citizenship. The officer concludes that he misled officials when he swore he would live in Canada after he got citizenship. They commence revocation proceedings by sending a letter advising of their intention to revoke. The only due process is a right to respond in writing. After the officials receive the response they decide he did not have the intention and the citizenship is revoked. The only recourse is to apply for leave to commence an application for judicial review. In assessing the case, the Court will apply the concept of deference and will only intervene if it concludes that the decision of the officer was outside the realm of possible decisions.

This provision undermines the right of citizens to due process and must be vigorously opposed.

Revocation for Convictions

Current law: This provision does not exist in the current law.

New Law: The new law will allow for revocation of citizenship based on convictions inside and outside of Canada for treason, spying or terrorism offences. It will apply to all Canadians regardless of how they obtained their citizenship. Citizenship revocation for

fraud, misrepresentation or concealment target conduct that occurs prior to obtaining citizenship, and is justified on the basis that it corrects an erroneous grant of citizenship. The rationale for citizenship revocation for criminal offences is qualitatively different. It revokes citizenship as punishment for misconduct as and while a citizen.

New grounds for revocation include convictions that occurred before or after¹ the new law comes into force for matters relating to security and serving as a member of an armed force in a conflict against Canada. If a person is convicted of any of the listed offences (including inter alia treason, terrorism, aiding the enemy, espionage, or communicating), the Minister may revoke citizenship. However, where the revocation involves allegations of service in an armed force in a conflict against Canada the Minister must obtain a declaration from the Federal Court that the person so served. The process leading to a declaration appears to fall well short of an actual trial, and has the effect of immediate revocation. The result of revocation in these instances is to render the person a foreign national, not a permanent resident of Canada.

Comment: CARL opposes this provision. In terms of convictions in Canada, persons are subject to due process in Canada and are given the punishment proscribed by law. There is no reason to add to this the additional punishment of banishment. The result of this law is to remove citizenship and render the person a foreign national, rather than a Canadian permanent resident. This provision is applicable only to those who possess dual nationality, effectively making dual citizens second-class citizens by making their citizenship more tenuous.

The law restricts its application to cases where the person has another nationality and it also imposes the burden of proof on the individual to show he or she does not have another nationality. This reversal of the onus of proof results in requiring an individual to prove a negative in order to avoid potential statelessness. If the Minister has reasonable grounds to believe that the person has another nationality, it is up to the individual to prove that he/she is not a citizen of that country. It is obvious that the Canadian government is better situated in terms of diplomatic resources to make the necessary inquiries to ascertain nationality. Yet, it appears that the Minister is prepared to insist that someone is a citizen of another state even where the other state denies it and to revoke Canadian citizenship on that basis. This may well result in actions that are contrary to international conventions with regard to statelessness, despite assurances to the contrary, particularly where an individual is not well positioned to prove their lack of status elsewhere.

This provision also allows for revocation of citizenship if the person is convicted of terrorism outside of Canada. In addition to the concerns raised above, this provision should be removed because it allows for revocation regardless of whether or not due process was respected in obtaining the conviction. Canadian courts have recognized that revocation triggers s.7 of the *Charter*, denying liberty and security of the person. Therefore revocation can only occur in accordance with the principles of fundamental justice, which is difficult to ascertain for convictions outside of Canada, particularly

¹ The introduction of a provision that is retroactive raises other issues including possible Charter concerns.

where a conviction takes place within the context of a non-democratic regime where there is no due process.

There is another absurdity lurking in the availability of Canadian citizenship revocation for conviction of a terrorism offence in a foreign country. The rationale for this must be that an enemy of one state is an enemy of all. But whatever terrorist conduct makes him unworthy of Canadian citizenship would presumably make him equally unworthy of citizenship anywhere else. Consider the ludicrous result if all states adopted a law like Bill C-24 (or the current UK law): A dual Canadian-UK citizen is convicted of a terrorism offence in the UK. Both states prohibit the creation of statelessness. So, now it becomes a race to see which country can strip citizenship first. To the loser goes the citizen.

The Canadian Charter of Rights and Freedoms

CARL submits that Bill C-24, as presently drafted, does not comply with ss. 7, 11, 12, and 15 of the *Charter*. Our submissions are more fully developed in a separate brief.

1. **Revocation for Misrepresentation of ‘Intent to Reside’**

Section 6 of the *Charter* guarantees to all citizens the right to leave, enter and remain in Canada. Section 15 of the *Charter* guarantees equality before and under the law, and equal benefit of the law. Naturalized citizens of Canada face a risk of citizenship revocation for leaving Canada, if the Minister forms the opinion that the departure proves that the individual, when applying for citizenship, misrepresented his or her intent to reside in Canada post-citizenship. The chilling effect this will exert on the citizen’s mobility violates s. 6 of the *Charter*. Because it applies only to naturalized citizens whose country of origin is not Canada, and does not to birthright citizens, it also discriminates on the basis of national origin, contrary to s. 15 of the *Charter*.

2. **Revocation for Conviction for Stipulated Offences or Engaging in Armed Conflict Against Canada**

Deprivation of citizenship breaches security of the person under s. 7; citizenship, lawfully obtained, ceases to be a secure status and becomes contingent and insecure. Non-citizens do not have an unqualified right to enter and remain in Canada. Once denationalized, the newly produced non-citizen becomes vulnerable to deportation. The government has made it clear that it intends to use citizenship revocation as the first step toward expulsion from Canada. Expulsion of citizens for wrongdoing is variously known as exile or banishment. Therefore issue is whether banishment accords with principles of fundamental justice.

In *Sauvé v. Canada (Chief Electoral Officer)*, the Supreme Court of Canada ruled that withholding the franchise from prison inmates serving more than two year sentences violated their *Charter* s. 3 rights and could not be justified under s. 1. As the Court stated:

The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen’s

continued membership in the self-governing polity. **Indeed, the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order.** Certain rights are justifiably limited for penal reasons, including aspects of the rights to liberty, security of the person, mobility, and security against search and seizure. But whether a right is justifiably limited cannot be determined by observing that an offender has, by his or her actions, withdrawn from the social compact.²

Disenfranchisement deprives convicted persons of a specific constitutional right. A non-citizen outside Canada is not protected by the *Charter*, and so banishment effectively deprives them of all rights. If it is unconstitutional to deprive inmates of the right to vote as additional punishment, then it follows that stripping them of all *Charter* rights – which is the effect of banishment – would also be unconstitutional.

The same conclusion is reached by evaluating revocation for citizen misconduct under s. 12 of the *Charter*, which prohibits cruel or inhuman treatment or punishment. In the 1958 case of *Trop v. Dulles*, a majority of the US Supreme Court found expatriation for desertion to constitute cruel and unusual punishment under the Eighth Amendment of the US Constitution:

Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship [...] But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure.³

Where the state subjects an individual to proceedings that may lead to 'a true penal consequence', the Supreme Court of Canada has held that s. 11 of the *Charter* mandates certain procedural consequences. Banishment meted out as additional punishment for the offences listed in Bill C-24 would likely constitute 'a true penal consequence'. The procedural requirements of s. 11 are systematically breached by Bill C-24:

Section 11 Guarantees Breached under Bill C-24

Because revocation is now being used as an additional punishment in addition to criminal prosecution the protections of s. 11 will come into play. Several of these are breached by Bill C-24:

² *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68, para. 47.

³ *Trop v. Dulles* (1958) 356 U.S. 86

- presumption of innocence → reverse onus for statelessness
- proof beyond a reasonable doubt → balance of probabilities or less
- open and fair trial before an independent and impartial tribunal → Ministerial decision, written submissions
- prohibition on retroactive laws → retrospective for criminal convictions, engaging in armed conflict against Canada
- right not be punished twice for the same offence → imprisonment plus banishment

Section 7 of the *Charter*

Even if banishment is not regarded as a ‘true penal consequence’ for purposes of triggering s. 11 rights, the same result would obtain under *Charter* s. 7, insofar as the principles of fundamental justice include the basic entitlement to procedural fairness. Only independent judges, after conducting fair and open trials that protect the rights of the accused, possess the authority to make findings of guilt and impose criminal punishment. Government Ministers do not have authority to act as prosecutor, judge and executioner. This usurpation of judicial authority is even more flagrant in the case of revocation for engaging in armed conflict against Canada, since the Minister inflicts punishment in the absence of a criminal conviction.

Section 15 of the *Charter*

Citizenship revocation for criminality or engaging in armed conflict against Canada only applies to dual citizens or, more accurately, to citizens whom the Minister reasonably believes are dual citizens. This means that only those whom the Minister believes are dual citizens are at risk of citizenship revocation on these grounds, whereas mono-citizens of Canada are not at risk. The notion that stripping someone of Canadian citizenship is acceptable if they possess citizenship elsewhere presumes that citizenship is fungible – one citizenship is the same as any another. CARL submits that this assumption is wrong. Stripping someone of Canadian citizenship inflicts incalculable harm that is not erased by the existence of another citizenship, even if the specific harm of statelessness is avoided. A commitment to the principle of equal citizenship – expressed in our abhorrence of second-class citizenship – means that discriminating between citizens clearly violates s. 15. Further, because an extremely high percentage of dual nationals are immigrants this provision draws a distinction on the basis of the enumerated ground of “national origin” under s. 15 of the *Charter*. Exposing dual citizens to banishment – a punishment not inflicted on mono-citizens – makes dual citizens unequal before the law.