BCCLA B.C. Civil Liberties Association

550 – 1188 W Georgia St. Vancouver, B.C. V6E 4A2 (604) 687-2919

Study on Loss of Canadian Citizenship for the years 1947, 1977 and 2007
Standing Committee on Citizenship and Immigration (CIMM)

Submitted by Jason Gratl, President and Christina Godlewska, Articled Student
Appearing as Witnesses: March 26, 2007

Introduction

Citizenship is the badge of membership in a political democracy. It forms the foundation of political community, of political rights, and of identity. Not only does citizenship entail special legal rights through our laws and the *Canadian Charter of Rights and Freedoms*, but it also has strong implications for feelings of identity and membership that make up the character of a nation. It forms the basis for the relationship between members of a polity and their state, as well as members of a polity and each other.

The B.C. Civil Liberties Association has prepared these submissions in defense of citizenship as a fundamental right, which can only be revoked or restricted by a free and democratic society in accordance with the principles of fundamental justice. These submissions are organized into three sections. In the first section, we will outline the civil liberties issues engaged by the problems currently at issue before the Committee. The second section looks at the present state of affairs and analyzes the challenges which need to be overcome. The final section summarizes our recommendations.

I. Issues

The concept that citizens constitute the state provides the foundation for the rights of citizens to vote, to have access to government records and to express themselves freely. In this way, citizenship is perhaps the single most fundamental political right, forming the basis for all others.

The evidence already received by this Committee has done much to reveal the cultural, emotional and practical significance of citizenship status. In relating their citizenship difficulties, many witnesses spoke of profound insult and crisis of identity.[i] This serves to demonstrate that, although at times they may seem idealistic and abstract, concepts like 'fundamental rights,' 'political community' and 'dignity' have profound psychological and practical importance.

Citizenship status is also accorded a unique significance in Canadian law. In the words of the Supreme Court of Canada, "citizenship is a very special status that not only

incorporates rights and duties but serves as a badge identifying people as members of the Canadian polity."[ii] The rights to vote and run for elected office are directly tied to citizenship status.[iii] Citizenship judges, upon swearing in new citizens, are required by regulation to "emphasize the significance of the ceremony as a milestone in the lives of the new citizens" and to "promote good citizenship, including respect for the law, the exercise of the right to vote, participation in community affairs and intergroup understanding."[iv] Finally, the *Charter* grants to citizens alone special rights of mobility that allow them to travel abroad and return at will.[v]

Taken together, this cluster of citizenship-related rights, ties and obligations amount to a legal and political status which has serious enough implications to engage section 7 of the *Charter*. As explained by Justice Martineau in his recent judgment in the *Taylor* case, "A person's right to security (such as obtaining state protection) and liberty of movement is inextricably linked with his national, or as the case may be, his citizenship status. Nationality and citizenship are so intimately attached to an individual that I am ready to accept that any deprivation or loss of nationality or citizenship by an act of the state – whether or not it renders someone 'stateless' – engages an individual's rights to 'liberty' and 'security of the person."[vi]

Loss or denial of citizenship status, where it unfairly makes a person stateless, is moreover a breach of international human rights law. The plight of the Jewish people in Nazi Germany made it clear to the world that *state*lessness effectively leads to *right*lessness, by leaving people in a legal no-man's land. This should not happen at the hands of a free and democratic society which prides itself on human rights, and it most certainly should not happen as a result of the continued operation of provisions that do not meet basic requirements of equality and due process.

One might be tempted to respond that it is an anachronism to apply contemporary concepts of equality and due process to the provisions of the earlier citizenship acts and events, such as the expiration of citizenship, which seem to have occurred a very long time ago. However, several cases,[vii] including a unanimous decision by the Supreme Court of Canada in 1997,[viii] have held that because these old laws have been incorporated into the current *Citizenship Act* and continue to be applied by government representatives today as a bar to citizenship claims, the legality of these laws can be challenged under the *Canadian Charter of Rights and Freedoms*.

If this seems like a legal nicety or slight of hand, consider the following analogy.[ix] Imagine that up to sixty years ago, there was black slavery in Canada, and there was a law that 'only those born free' could be citizens. Then, sixty years ago (in this scenario), slavery was abolished and former slaves were issued citizenship cards which they had every reason to believe granted them Canadian citizenship status for life. Finally, thirty years ago, the Citizenship Act was amended to rectify the fact that the children of slaves had continued to be denied citizenship after emancipation. Unfortunately, due to a legislative oversight underwritten by lingering prejudice, those who were born before emancipation technically remained excluded from citizenship. Eight years later, a 'Charter of Rights' came into force, prohibiting discrimination.

Would we want to say to the 65 year old black pensioner: 'although we now believe that racial discrimination and slavery are offensive and injurious, since the laws which disqualified you from citizenship on the basis of racial discrimination predate our Charter of Rights, we will nonetheless, today, still deny you citizenship because you once were a slave?' Would this decision not be a contemporary act of discrimination? How could anyone fail to see this as a perpetuation of the kind of injustice which we, as a nation of Canadian citizens, claim to have forsworn?

In the same way, individuals today are being told that their status as the child or grandchild of a person born 'out of wedlock' is the reason for being refused citizenship, despite the fact that, like race, 'legitimacy' is a state-of-being determined at birth and over which the individual in question has no control.[x] These laws, when their contemporary application is subjected to *Charter* scrutiny, have been found to be discriminatory and unjust.[xi]

The same analysis applies to our contention that contemporary considerations of due process must apply to contemporary government actions and decisions having such a profound impact on people's fundamental rights and legal status. On one level, it may seem counterintuitive to apply due process requirements in a way which seems to impose expectations on the governments of the previous century. However, we nevertheless have the opportunity today to act in accordance with what we now know the principles of fundamental justice require, both by affording proper procedural rights to contemporary decision-making processes, and by refusing to perpetuate the effects of unjust laws which did not afford procedural fairness to the individuals affected by their operation.

Recognition of the injustices perpetuated by the operation of past citizenship acts has not been limited to the courts. On several occasions, legislators have identified and attempted to counteract these outdated laws with retroactive or retrospective new laws. For example, sections 5(2) and 11(1.1) of the current *Citizenship Act* were clearly enacted in this spirit,[xii] and more recently Bills C-14 and S-2 demonstrate a commitment to using remedial measures in an effort to avoid contemporary injustices.

Unfortunately, as you have heard from many previous witnesses, problems persist. The next section seeks to analyze current challenges in light of the civil liberties issues identified.

II. Challenges

The witnesses who have appeared before this Committee have served to demonstrate two key points with respect to the present situation. The first, already mentioned above, is that there is much at stake for individuals who run into problems with their citizenship. The second is that the circumstances that may lead to an unjust loss or denial of citizenship status are as myriad, diverse and complicated as life itself. You have heard stories involving religious marriages, Mexican laws, kidnappings and document forgery. This kaleidoscope of factual scenarios then interacts with the tangled morass of Canadian

citizenship laws, which themselves reflect the development of our national identity within a complex social and historical context.

In her evidence, the Minister states she has created a task force within her call center in order to deal with individual situations on a case-by-case basis. We support this step as an apparent recognition of the breadth, complexity and importance of making proper determinations with respect to citizenship status. We also support the Minister's decision to use the discretion allowed to her under the Act, especially section 5(4), in order to grant citizenship to people experiencing the kinds of difficulties some witnesses have related.

However, the Minister also admits that only thirty-three people so far have benefited from the process of having their case considered under the current regime. Furthermore, the government is appealing the ruling in *Taylor* which is the latest case seeking to rectify the injustices being inflicted on one of the largest groups of 'Lost Canadians'. Mr. Taylor is being bankrupted, Ms. Marion Vermeesh (who appeared before you on March 19th) is told she has been voting illegally for decades, and Mr. Romeo Dallaire is inspired to use the term 'bureaucratic terrorism.' Why?

Although some of the blame must continue to fall on the laws themselves, we must also confront the way these laws are being interpreted and applied. One example is the recent policy of not accepting birth certificates issued by the Department of National Defence (as relayed by Mr. Kitsch last week). The Minister gave evidence that around twenty or so such cases are before her and that they are being 'worked through.' One is forced to wonders why these individuals are being put through such a lengthy process of scrutiny over such a trifle. These and other stories you have heard suggest that the Ministry is taking a guilty-until-proven-innocent approach which we submit is simply not called for in this context. In the next section, we will explore the approach we feel is more appropriate to the circumstances.

III. Recommendations

1. General Approach: Respecting the Right to Citizenship

First and foremost, **we must keep firmly in mind that citizenship is a right, not a special dispensation**. In her evidence, the Minister cited a need to stem the tide of people willing to lie, cheat and steal their way into our country. We are sure that this floodgates argument is not unfamiliar to members of this Committee in the context of immigration matters. We also realize, as one member pointed out during last question period, that when one thinks of this country's need for immigrants, it is hard not to wonder why people like Ms. Sheila Walsh, a registered nurse with strong attachments and family in Canada, are being turned away.

However, **we urge that immigration issues be kept separate** as they engage related but ultimately very different concepts and concerns. For example, although it is arguably legitimate for Canada to use its discretion to refuse applications on the basis of economic

considerations in the context of immigration, it is no more acceptable to refuse citizenship to indigent Canadians than it is to deport people for being poor.

It defies common sense that the children of World War II veterans and life-long electoral officers should be subjected to years of administrative wrangling because of their birthdate, their so-called 'legitimacy,' or the gender of their Canadian parent. **The basic presumption should be that people, irrespective of how they have conducted their lives, should be able to receive timely recognition of their Canadian citizenship if: 1) they were ever a Canadian citizen and have not renounced it, or 2) blatantly discriminatory laws prevented them from acquiring citizenship from their parents.**

Jus solis and *jus sanguinis*: right of birth and right of blood. That should be the starting point for anyone with a prima facie case to Canadian citizenship. If the Ministry argues an alleged fraud or operation of *Charter*-compliant law which rebuts this presumption, it should bear the cost and onus to investigate and inquire into the matter in accordance with the principles of fundamental justice (explored further below). It can then use the provisions already in force relating to acquisition of citizenship by fraud if a material defect is found. But the presumption in favour of protecting Canadian citizens from unfair loss or denial of their birthright must be clear.

2. Application of the *Charter*

This Committee and the Ministry should accept and incorporate the basic legal principle that **all laws and administrative decisions with respect to citizenship status must be made in accordance with the principles of equality and due process, whether or not a part of the legal framework being applied predates the *Charter* in its origins**.

3. Non-Discrimination

In accordance with the principles of the fundamental right of citizenship and the application of the *Charter* to present-day determinations of citizenship, **no person should be denied or stripped of their citizenship solely because of the gender of their Canadian parent or the so-called 'legitimacy' of the person applying for citizenship** (or that of any member of their family).

4. Due Process of Law

In her submissions, one of the reasons the Minister advanced for appealing the *Taylor* case is that the judge took the government to task for past actions that were 'clearly against due process,' such as stripping a minor child of their citizenship for choices he did not make voluntarily.[xiii] Furthermore, the judgment suggests that procedural fairness may require that someone who is being denied citizenship on the basis that they failed to take action to retain it must be allowed to make representations and be heard.[xiv] To meet this requirement, notice would obviously have to be afforded to individuals affected by laws such as those which required action to be taken to retain citizenship.

The Minister claims that this ruling must not be allowed to stand lest the government find itself having to give notice to every person affected by laws it wishes to enforce. In support, she gave the example of amendments to the *Income Tax Act*. But this is a false analogy, because what is at stake here is not the equivalent of a businessperson's ability to rework her capital outlay and offshore bank accounts. The fear that the courts would enforce the right to notification as a principle of fundamental justice in the context of tax law is frankly ill-founded. Section 7 of the *Charter* and the principles of fundamental justice are only engaged when fundamental rights are at stake. A better legal analogy would be situations in which people are having their liberty restricted by way of restraining order, having their drivers license revoked or are being evicted. In all of these situations, notice is required before the laws can be applied, in recognition of the fundamental nature of the rights at stake. Given some of the stories this Committee has heard, such as that of Mr. Teichroeb, perhaps a better analogy still would be the due process rights afforded to those charged with an offence or threatened with deportation. Those situations require not only notice, but the right to be heard, to have access to the system and to have one's claims dealt with in a timely fashion.

In a free and democratic society, the more important the right, the more safeguards are put in place to protect that right from arbitrary abridgement. **It is inconsistent with the importance of Canadian citizenship status for it to be stripped or denied except in accordance with the principles of fundamental justice**. Although the requirements of procedural fairness are always dependent on the factual context, **we submit that in most circumstances the minimum that would be required is notice and the right to an accessible process which includes a chance to be heard. Moreover, it is imperative that these situations are dealt with in a timely fashion, especially where the individual's livelihood is at stake.**

5. Short-term Measures: Simplified Decision-Making and Policy Guidelines

We ultimately agree with the witnesses and members who have suggested that only legal reform can appropriately and authoritatively deal with the issues this study has uncovered. However, given the rotation of Ministers through this portfolio, the cancellation of funding for a new Citizenship Act and the possibility of an imminent election, **we submit that the best course of action in the meantime is for this Committee to direct the Minister to issue a set of policy guidelines that will fundamentally alter the approach the government is taking towards these issues**. Agreeing on these guidelines will give the Committee the opportunity to come up with a non-partisan stance on the general approach which may later serve to provide guidance in future situations, or in the generation of new regulations or amendments to the Act itself.

Unfortunately, the Minister only has certain amount of discretion under the current Act. For example, the notion of a 'substantial connection to Canada' is already restrictively defined in the regulations.[xv] However, the regulations also have some leeway with respect to what might count as 'evidence which establishes' certain facts.[xvi] And perhaps most importantly, section 5(4) gives the Minister discretion to grant citizenship "in order to alleviate cases of special and unusual hardship."

It is our submission that hardship can be presumed in the case of people who have had one of their most fundamental rights rescinded or denied on the basis of blatantly discriminatory criteria and/or without due process of law. If made clear to Ministry staff, this simple presumption could provide the basis for the Minister's task force to deal with obvious cases in a timely fashion. For example, cases that turn solely on the issue of 'wedlock' would be greatly expedited, as there would no longer be a reason to spend valuable time wrangling marriage records from Mexican authorities or performing background checks on the marital status of World War II veterans in the name of national security

At every level, the guidelines designed to guide this discretion should reflect the elementary nature of the right to citizenship and the basic need to avoid outcomes that arbitrarily render people stateless. Moreover, they should be coupled with procedural mechanisms that provide **timely access to fair proceedings**. Finally, acts of discretion in citizenship-related areas such as voters lists, pension benefits and the issuing of passports should reflect a **presumption of entitlement to the benefits of citizenship upon establishing a prima facie case**. If, in some rare cases, benefits must be cancelled or revoked because material fraud is established, this is vastly preferable to a reprise of the parade of tragedies that have come before this Committee.

Once these policies are in place, Ministry-wide **staff training** regarding the Minister's 'task force' must take place in order to ensure that each new case is handled with expediency and expertise. Provisions should also be in place to provide **interim relief** for those who will suffer irrevocable harm from delay while their application is processed. Canadian citizens who are victims of government misrepresentation and discriminatory laws should not be further victimized by a sluggish and recalcitrant Ministry.

Finally, **the Minister should direct that the case against Mr. Taylor be dropped**. That case provides the legal basis on which the Ministry can immediately treat as unconstitutional any citizenship law that does not meet the requirements of equality and due process as laid out in these submissions. The Minister's assertions that a trial-level federal court judgment sets dangerous precedents in unrelated areas of law are not only suspect, but are simply not a good enough reason to add insult to the multitudinous injuries already suffered by the children of Canada's 'war brides'. We are concerned that the real motivation behind the desire to appeal the *Taylor* case might be an extension of the government's apparent desire to keep the door firmly shut on those who were the victims of obscure and discriminatory laws, for fear of what might come through if Canada were to adopt a more reasonable approach. **We submit that these kinds of speculative concerns are inappropriate and need to be counteracted in the Ministry wherever they are found, before any further damage is done to the value of Canadian citizenship.**

6. Long-term Solution: Law Reform

As recognized above, we appreciate the level of complexity of the current law in this area. We therefore think it best to refrain from making specific legal recommendations and will instead defer to the team of legal experts which should be engaged in any future law reform effort.

That said, we do support along general lines those amendments and provisions suggested by Mr. Chapman. Our submissions also accord with those of the representative from Mosaic who recommended that new or amended citizenship legislation should contain a presumption of permanence and irrevocability of citizenship, except by renunciation and substantial fraud.

We also have two general recommendations. First, the civil libertarian principles of equality and due process urged throughout this paper should guide the law reform process and find central expression in any new laws. Second, given the high stakes for everyone involved, and the extreme factual complexity to which these rules are meant to apply, **the legislative and regulatory reform process must be sure to involve an appropriate level of dedicated time, care and attention**. We look forward to the opportunity to make further submissions when the Committee is once again granted the funding and commitment it needs to fix these problems in a broader and more permanent fashion.

---

[i] And it is unlikely that the group who appeared before you are unusual in this regard. In fact, the Supreme Court of Canada recognized in *Lavoie* that the concept of citizenship serves not only important political purposes, but "emotional and motivational purposes" as well: *Lavoie v Canada*, 2002 SCC 23 at para 57 (per Bastarache J).

[ii] *Andrews v. Law Society (British Columbia)*, [1989] 2 W.W.R. 289, 56 D.L.R. (4th) 1 at para 70 (per LaForest J).

[iii] *Canada Elections Act*, S.C. 2000, c. 9, ss 3 & 65(a).

[iv] *Citizenship Regulations, 1993*, SOR/93-246, s.17(1)(a) & (d).

[v] *Canadian Charter of Rights and Freedoms*, s.6(1).

[vi] *Taylor v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1053 at para 232.

[vii] *Taylor*, *supra* note vi; *Benner v Canada (Secretary of State)*, [1997] 1 S.C.R. 358, *Augier v Canada (Minister of Citizenship and Immigration)* 2004 FC 613.

[viii] *Benner*, *supra* note vii.

[ix] Simplified from analogy provided in *Taylor, supra* note vi at paras 211 ff.

[x] Marital status has been interpreted as an analogous ground of discrimination: see *Miron v. Trudel* , [1995] 2 S.C.R. 418 (S.C.C.) and *Walsh v. Bona*, [2002] 4 S.C.R. 325 (S.C.C.).

[xi] *Taylor, supra* note vi; *Benner, supra* note vii*; Augier, supra* note vii.

[xii] See ex. *Glynos v Canada*, [1992] 3 F.C. 691 (F.C.A.) at para 22 where evidence of the legislative intent behind s.5(2) is analyzed.

[xiii] *Taylor* at 222.

[xiv] *Taylor* at 164.

[xv] *Citizenship Regulations, 1993*, SOR/93-246, s.16.

[xvi] See ex. *Citizenship Act*, R.S.C. 1985, c. C-29, s.9(4).