SUBMISSION TO THE SENATE STANDING COMMITTEE ON SOCIAL AFFAIRS, SCIENCE AND TECHNOLOGY

Bill C-6: *An Act to Amend the Citizenship Act and to make consequential amendments to another Act*

March 2017

The BC Civil Liberties Association and the Canadian Association of Refugee Lawyers (CARL) are pleased to take this opportunity to make written submissions to the Committee on Bill C-6: *An Act to Amend the Citizenship Act and to make consequential amendments to another Act*.

We are largely supportive of the proposed legislation, which repeals significant portions of the *Citizenship Act*, as amended by Bill C-24, that we believe are unconstitutional. However, there is an important issue that Bill C-6 does not address that we wish to bring to your attention. In this submission, we provide an overview of the portions of Bill C-6 that we support, then move to a discussion of its shortcomings and our recommendation for amendment.

Introduction

The BCCLA and CARL opposed the reforms to the *Citizenship Act* made by Bill C-24 from the moment they were first tabled in 2014. It was and remains our position that the revocation and "intent to reside" provisions of the *Act*, introduced in Bill C-24, are unconstitutional and created two tiers of Canadian citizens, giving fewer rights to some Canadians based merely on where they were born. This, we say, is second class citizenship, and has no place in a constitutional democracy like Canada.

When Bill C-24 was proposed our organizations immediately began a public education campaign to alert people in Canada of its unconstitutional nature and the impact it would have on dual and prospective citizens. A petition we launched against the law generated some 60,000 signatures before the bill was passed; by the time it came into force in 2015, that petition had been signed by over 110,000 people. Clearly, this is a critically important issue to many Canadians.

Weeks after the law came into effect in 2015, the BCCLA and CARL launched a lawsuit challenging the constitutionality of several of its provisions on the basis that they violate rights protected by the *Canadian Charter of Rights and Freedoms*.

We are pleased to note that Bill C-6 addresses many of what we see as Bill C-24's key constitutional deficiencies, including those that created that created *second class citizens*: the power to revoke citizenship on the basis of a conviction for certain serious offences, and the "intent to reside" provisions of the former law. If Bill C-6 receives Royal Assent, we expect to be in a position to discontinue our lawsuit.

Bill C-6 Addresses Key Constitutional Defects in the *Citizenship Act* as amended by Bill C-24

Revocation

Prior to Bill C-24, section 10 of the *Citizenship Act* provided for revocation of a person's citizenship if it was established that their citizenship was obtained "by false representation or fraud or by knowingly concealing material circumstances". Bill C-24 expanded the grounds upon which citizenship can be revoked (in s. 10(2)) and provided for revocation of citizenship after that citizenship has been lawfully granted.

In our submission, it is unconstitutional to strip citizenship from a Canadian for offences committed after the grant of citizenship. The provisions violate the following *Charter of Rights and Freedoms* provisions:

- They constitute **cruel and unusual treatment or punishment** contrary to section 12;
- They **violate the right to equality** under section 15;
- They **violate the rights to liberty and security of the person** under section 7;
- They violate the protections for accused persons guaranteed by sections 11(h) and (i).

The criminal justice system is the appropriate tool for responding to criminal offences, not the medieval practice of banishment.

Intent to Reside

Since the coming into force of Bill C-24, individuals applying for citizenship must now establish an intention "to continue to reside in Canada" unless they fall into a narrow category of persons connected to the public service or the Canadian Forces working abroad (paragraph 5(1)(c.1)).

This treats different kinds of Canadians unequally: Canadians by birth can live abroad indefinitely without consequence, while naturalized Canadians face the risk that moving

away from Canada for work, family or other personal reasons could be construed as evidence of past misrepresentation of their intent to reside here. In our submission, this is a violation of the mobility and equality rights protected by the *Canadian Charter of Rights and Freedoms*.

Other problematic elements of Bill C-24 – length of residency and language testing cut-off ages

In addition to making Canadian citizenship easier to lose, Bill C-24 also makes citizenship more difficult to get by imposing additional language and residency requirements, as well as higher costs. While these provisions were not the subject of our constitutional challenge, we support the amendments made by Bill C-6 regarding the length of residency required to obtain citizenship and the ages for which language testing is required.

Responding to a core argument against Bill C-6: Citizenship revocation does not make Canada safer

There are a number of flawed national security arguments being advanced against Bill C-6. Bill C-24 did not make Canada safer. Instead, it subjected Canadians to unequal treatment before the law, with no sound national security justification.

Flawed argument: We take citizenship away from war criminals? Why not terrorists?

Bill C-6 continues to allow Canada to revoke citizenship for fraud and misrepresentation by war criminals, terrorists, and other criminals when those individuals concealed their crimes committed before they became citizens or permanent residents. Their citizenship is annulled, as their misrepresentation is what permitted them to obtain it in the first place.

However, crimes committed by Canadians after they become citizens have always been dealt with under the Canadian criminal justice system, and Bill C-6 restores this fundamental principle.

Bill C-24 created an unconstitutional situation in which some people can be singled out for extra punishment based on their national origin – dual citizens or individuals who may have access to nationality in another country, who can be stripped of their citizenship in addition to their sentences and time served in prison, whether or not they were born in Canada.

Flawed argument: Stripping citizenship from individuals convicted of terrorist offences makes Canada safer.

Contrary to the arguments made by the government when Bill C-24 was passed, there is no evidence that revoking citizenship from those convicted of serious crimes such as terrorism offences will make Canadians safer.

Former CSIS director-general of counterterrorism Ray Boisvert stated: "In terms of being counterproductive and a detriment to enhancing our overall security, individuals pushed out become very likely deep threats at some point down the road. There is a better than average chance that the individual will turn against Canada, Canadians in the region, and our global interest. Talk about fertile recruiting for terrorist organizations or nation states with interests that are inimical to our own."[1]

National security and constitutional legal experts Craig Forcese and Kent Roach have written that the law results in the displacement, not the elimination, of risk. In addition, because citizenship stripping is a selective process targeting only certain Canadians based on their national origin, the Professors write that it can help "fuel a sense of second-class citizenship among the affected communities and erode their feelings of social solidarity with Canada and its government."[2]

Parliament gave the Minister of Public Safety the authority to stop Canadians travelling abroad when by revoking a passport when there are reasonable grounds to suspect it will prevent the commission of a terrorism offence, or for national security purposes under the *Prevention of Terrorist Travel Act*.

Stripping citizenship from individuals and deporting them, if they pose a continued national security risk, will place them beyond the jurisdiction of Canadian law enforcement, and the ability of Canadian security services to effectively monitor them. Deporting such individuals abandons the effort to promote rehabilitation and terrorist disengagement and de-radicalization, and potentially poses risks to other states as well as continued risk to Canada.

[1] Quoted in Michael Friscolanti, "Why banishing homegrown terrorists will backfire", Maclean's, October 9 2015.
[2] Craig Forcese and Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism*. Toronto: Irwin Law, 2015 at p. 199.

Required improvement to Bill C-6 to make it constitutionally compliant: re-establishing due process for revocations on account of alleged misrepresentation

The BCCLA-CARL lawsuit challenging the constitutionality of Bill C-24 challenged an additional element of the law that has not been addressed by Bill C-6: the lack of basic procedural protections for persons at risk of revocation. Under the current law, a Canadian citizen can have his or her citizenship revoked by an official without a hearing and without any right to have full disclosure of the case against him or her. Worse still, if the allegation of misrepresentation relates to the person's original application for permanent residence, the person will lose not only his citizenship but also his permanent residence as well.

In our view, the removal of due process by Bill C-24 rendered the revocation scheme for misrepresentation constitutionally problematic and susceptible to being struck down under section 7 of the Charter. We urge the Senate to amend Bill C-6 to address this deficiency, described in more detail below.

The Canadian government has always had the ability revoke someone's citizenship on the basis of fraud or misrepresentation. Essentially, this is akin to correcting a mistake, as the grant of citizenship should never have been made in the first place and is void *ab initio*.

Prior to Bill C-24, revocation was considered a measure that would only be used in the most serious cases. Every person had the right to an oral hearing before a Federal Court Judge prior to losing his or her citizenship. A finding of fraud in obtaining citizenship could only be made by the Governor in Council based on a report prepared by the Minister. Prior to issuing a report, the Minister was required to notify the affected citizen, who had a right to a Federal Court hearing. If the person chose to have a Federal Court hearing, and the judge found that the person misrepresented him/herself on either his application for citizenship or his application for permanent residence, the Judge would issue a declaration to that effect. The matter was then referred to the Governor in Council which would make the final decision.

Since the passage of C-24, the decision to revoke is taken by the Minister directly, and the subject has no right to an oral hearing, no right to have the matter referred to Federal Court, and no right to disclosure of relevant materials in the possession of the Minister.

The current system works as follows. If a case management officer at IRCC believes that a misrepresentation may been made:

a. A letter to the person in which an officer sets out the basis for the allegation that the person misrepresented on his or her citizenship;

b. A response in writing within 60 days where the person can respond to the allegations. The person does not have a right to an oral hearing or a right to full disclosure and does not provide for a determination before an independent decision maker.

c. The same officer determines whether an oral hearing is required and if one is required will conduct one. A person does not have an oral hearing as of right but it is in the sole discretion of the officer to grant one. Most decisions are made without an oral hearing.

d. The same officer renders a decision. If the officer concludes that the person misrepresented then the person's citizenship is revoked and he is required to surrender his passport.

e. There is no appeal only the possibility of seeking leave to commence an application for judicial review. Thus the person does not have a right to a hearing before the Federal Court. Moreover the Federal court cannot receive new evidence, and is limited to determining whether or not the decision was reasonable and has no power to exercise equitable discretion.

In our submission, the discretionary regime established by Bill C-24 lacks basic procedural protections for persons at risk of revocation, contrary to principles of fundamental justice and in violation of section 7 of the *Charter*, and the fair process guarantee in s. 2(e) of the *Bill of Rights*.[3]

Bill C-6 fails to fix this problem.

Bill C-6 leaves in place an unfair process that gives greater protection to permanent residents than to citizens – Both citizens and permanent residents deserve due process for revocations

Bill C-6 continues to allow a Canadian citizen to have their citizenship taken away by an official without any hearing or right to full disclosure of the case against them. A permanent resident subject to deportation for misrepresentation has a right to a hearing and then an appeal at the Immigration Appeal Division – a citizen whose citizenship is being revoked has fewer rights than a permanent resident being stripped of their status.

By way of comparison:

[3] This regime does not apply to revocations on the basis of fraud or misrepresentation where the misrepresentation relates to certain serious offences set out in ss. 34, 35 and 37 of the *Immigration and Refugee Protection Act*. See s. 10.1(1) of the *Citizenship Act*.

When government applies to revoke permanent residency for misrepresentation, a permanent resident has:

- The right to a full oral hearing of the evidence and a chance to defend themselves at the Immigration Division of the IRB, and
- The right to an equitable appeal of a decision to revoke at the Immigration Appeal Division

When government moves to revokes citizenship for misrepresentation, the citizen has:

- **No right to a hearing** at an independent tribunal or court
- **No right to complete disclosure** of the evidence against them or relevant materials in the Minister's possession
- **No opportunity to have humanitarian or compassionate reasons considered**
- **No right to an appeal**
- **No right to counsel**

Instead, the Minister or his official makes the decision. The Canadian only has the right to send a letter to defend themselves, based on an incomplete understanding of the evidence and allegations. A single official initiates the revocation procedure, and makes the decision.

If the Minister decides to revoke, the former citizen – if they obtain leave from the Federal Court, may seek a limited judicial review of that decision, but has no right to an appeal.

Canadians are entitled to a hearing if they get a parking ticket – they must have the right to a hearing when their citizenship is being taken away.

Necessary features of fair process amendment for citizenship revocation:

- OPTION: Decision may either (a) be made by Minister with right of appeal to Federal Court, OR (b) by Federal Court on referral by the Minister.
- Citizenship revocation cannot take effect until appeals are exhausted.
- Citizen must have a right to disclosure of all relevant materials in the Minister's possession.
- Process must allow consideration of best interests of child and humanitarian & compassionate grounds (such as long connection to Canada, family reasons) that could justify rejecting the revocation application.
- Citizen must have a right to counsel.
- Citizen reverts to permanent resident status if they have their citizenship stripped. If they misrepresented in their permanent residence application, the

> Minister may proceed under *IRPA* to revoke that status, independently of the citizenship revocation process.

In a 2016 decision of the Federal Court in *Monla v. Minister of Citizenship and Immigration Canada*,[4] a number of individuals who had received revocation notices on the basis of misrepresentation under these new procedures won an injunction staying the Minister from taking any further steps to revoke their citizenship until the constitutionality of the revocation process can be determined.[5]

Their underlying application seeks a declaration that the procedural provisions described above offend s. 7 of the *Charter* and the right to a fair hearing protected by s. 2(e) of the *Bill of Rights*.

The Minister sought to strike the applications. Justice Zinn granted the applicants' stay motion and refused the Minister's application to strike.

In his reasons for judgment, Justice Zinn noted the serious consequences for individuals of a decision to revoke their citizenship:

> The more serious the consequences to an individual, the greater the need for procedural fairness and natural justice. Revocation of citizenship for misrepresentation and fraud is a very serious matter and the allegations made by these applicants, although they may ultimately not succeed, raise a case demanding a response from the Minister. (at para 80)

Bill C-6 fails to respond to this issue, and we believe this oversight must be corrected before the bill is passed into law.

We note that members of the current government, including the previous Immigration Minister, Hon. John McCallum, have agreed publicly with the proposition that citizens are entitled to an independent hearing if they are at risk of losing their citizenship. On June 9, 2014, during debates on Bill C-24, Mr. McCallum said:

> We object in principle to the arbitrary removal of citizenship from individuals for reasons that are highly questionable and to the very limited opportunity for the individual to appeal to the courts against that removal of citizenship.

Similarly, on June 2, 2014 he said:

> When you give the minister dictatorial powers to remove a Canadian citizenship, you rather devalue the citizenship. You reduce the value of the citizenship

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[4] 2016 FC 44.

[5] The Federal Court heard the merits of the case in November 2016, and has reserved its decision.

> because it can be so arbitrarily taken away. You reduce its value rather than increase its value as a consequence of this bill.

Further, on June 3, 2014, Geoff Regan, MP, (as he then was) proposed an amendment to Bill C-24 that would provide that a Canadian will have a full appeal to the Federal Court in the case of citizenship revocation proceedings. He said in support of this motion:

> Canadian citizenship is, of course, our most fundamental right. The government shouldn't have the power to remove it without a full and complete right of appeal to the courts. It's absolutely mindboggling, in fact, that the government would not support such an amendment. To not support such an appeal would fly in the face of our Charter and in the face of the rules of natural justice.
> ...
> Mr. Chairman, in my view, Canadians deserve the full right of appeal with regard to citizenship.

While we don't suggest that Speaker Regan expresses a position on this question in his current capacity, we very much agree with the sentiment he expressed as a representative of his party while in opposition.

In our submission, the government should repeal the procedural changes made to the *Citizenship Act* by Bill C-24 and restore individuals' right to a fair hearing before an independent judicial decision-maker who can take humanitarian and compassionate considerations into account in making their decision.