

A Tale of Two Citizenships: Citizenship Revocation for “Traitors and Terrorists”

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Amending Canada’s citizenship laws to provide for denaturalization of “traitors and terrorists”, as proposed by the current federal government, is an idea consumed with legal flaws. To comply with international law on the prohibition of citizenship deprivation that would result in statelessness, any such amendments would have to apply only to individuals with dual citizenship. However, targeting those individuals would be very hard to defend against equality-based challenges under the Canadian Charter of Rights and Freedoms. In addition, denaturalization of “traitors and terrorists” might well be perceived as a punitive measure, whose impact and stigma would call for constitutional procedural protections far stronger than those set out in the current Citizenship Act and the proposed revisions to it. Such denaturalization also seems unlikely to advance any clear Canadian national security interest, and would accomplish less than can be done through other laws, including the Criminal Code.

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Introduction

I. Citizenship and Its Revocation

- A. *The Concept of Citizenship*
- B. *A Brief History of Denaturalization*

II. Comparative Citizenship Revocation Practices

- A. *International Law Context*
- B. *Comparative Law*
- C. *Select Court Practice*

III. Revising Canada's Revocation Rules

- A. *Current Denaturalization Process*
- B. *Bill C-24's Rethinking of Denaturalization*
- C. *The Legality of the Proposed Denaturalization Standards*
 - (i) Procedural Rights and Sections 7 and 11 of the *Charter*
 - a. Application
 - b. Due Process
 - (ii) Equality Rights Under Section 15 of the *Charter*
 - a. Citizenship Revocation and Equal Protection of the Law
 - b. Revocation and Discrimination
 - (iii) Could the Citizenship Revocation Provisions of Bill C-24 Be Saved Under Section 1 of the *Charter*?

Conclusion

Introduction

“Canadian citizenship is predicated on loyalty to this country”, former Citizenship and Immigration Minister Jason Kenney urged in February 2013.¹ In his view, loyalty is renounced by committing an act of terror or treachery:

[C]itizenship is founded upon the premise of reciprocal loyalty. . . . If citizens are convicted of serious terrorist offences, if they take up arms against Canada, or if they are convicted of high treason, those individuals have severed the bonds of loyalty that are the basis of their citizenship.²

1. Stewart Bell, “Jason Kenney suggests new legislation needed to strip citizenship of dual nationals involved in terrorism”, *National Post* (6 February 2013) online: National Post <<http://www.nationalpost.com>>.

2. House of Commons, Standing Committee on Citizenship and Immigration, *Expanding the Scope of Bill C-425, An Act to Amend the Citizenship Act (Honouring the Canadian Armed Forces)*, 1st Sess, 41st Parl, (21 March 2013) at 0850 (Chair: David Tilson) *Evidence* [HC 21 March 2013] (the bill in question at that meeting was Bill C-425, 2012 [Bill C-425]).

These views appear to animate the government's new citizenship bill, Bill C-24.³ Key parts of this bill will revoke Canadian citizenship for dual-nationals who commit terrorism, treason or spying, or who engage in armed conflict against Canada—a class of people Minister Kenney labeled as “traitors and terrorists”.⁴

Citizenship revocation is, however, fraught with legal issues. Revocation under the present *Citizenship Act*⁵ was called into question throughout the 1990s, as the government sought to withdraw Canadian citizenship from accused Nazi collaborators.⁶ Those proceedings were mired in court battles, not least because the grounds for revocation were limited to fraud—or more precisely, to obtaining citizenship by “false representation or fraud or by knowingly concealing material circumstances”.⁷ Proving fraud was a thorny undertaking where records on immediate post-World War II citizenship applications had since evaporated.

Revocation for terrorism or treacherous activity presents different but equally complex issues. For one thing, the new revocation provisions will distinguish between types of citizens, applying to dual-nationals but not to Canadians with single citizenship. To revoke the citizenship of someone who is Canadian-only would render that person stateless. Because stateless people are anathema in modern international relations, this would run counter Canada's treaty obligations. Yet opening the door to revocation for dual-nationals raises problems of its own. It would create two classes of citizenship: those who have only one nationality and cannot be stripped of it, and the others (of whom there are hundreds of thousands in Canada). This apparent double standard raises important constitutional issues, especially under section 15 of the *Canadian Charter of Rights and Freedoms*.⁸

3. Bill C-24, *An Act to amend the Citizenship Act and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2014 (first reading 6 February 2014) [Bill C-24].

4. *Ibid.*

5. RSC 1985, c C-29 [*Citizenship Act* 1985].

6. See e.g. Claire I Farid, “A Primer on Citizenship Revocation for WWII Collaboration: The 1998–1999 Federal Court Term” (2000) 38:2 *Alta L Rev* 415.

7. *Citizenship Act* 1985, *supra* note 5, s 10.

8. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

A second problem flows from Canada's experience with immigration security certificates.⁹ Some of the proposed new grounds for citizenship revocation will almost certainly resemble immigration removal on terrorism grounds: cases will be hard fought and dependent on intelligence, secret sources and information from foreign governments. Whenever an instance of revocation is challenged in the courts, existing constitutional principles and regular common law rules of procedural fairness would take all of that information out of the confines of government and deposit it in the public domain.

Alternatively, the government could protect that intelligence under the *Canada Evidence Act*,¹⁰ but would then never be able to use it, creating a considerable risk of losing such challenges. If the government did wish to use such material, it would have to build a security certificate edifice of closed courts and *in camera* proceedings. If it did that, it would likely also have to accept security certificate-style special advocates. The resulting unwieldy apparatus might ultimately produce citizenship revocation processes that dwarf even the cumbersome proceedings of the 1990s in length, complexity and cost.

This article takes up these issues and examines the merits, demerits and legal pitfalls of the proposed citizenship revocation process. Part I examines the concept of citizenship and traces past practice with respect to denaturalization. Part II focuses on the (limited) international legal rules that apply to revocation and examines comparative experience with citizenship revocation, especially on grounds related to national security. Part III describes the proposed amendments to the denaturalization parts of the *Citizenship Act* and considers the constitutional implications of these changes. On the basis of the analysis in this article, I conclude that citizenship revocation of the sort proposed in Bill C-24 would be amenable to successful legal challenge.

9. See *Immigration and Refugee Protection Act*, RSC 2001, c 27, s 76 [IRPA].

10. RSC 1985, c C-5.

I. Citizenship and Its Revocation

A. *The Concept of Citizenship*

Citizenship—or to use the international legal parlance, nationality—is the formal link between a state and the class of individuals most closely identified with that state—a link that amounts to “a bundle of privileges, powers, and immunities”.¹¹ Modern sociologists describe citizenship as “a status of equality between members of a political community”.¹² In democracies, this equality includes both a capacity to participate in political activity and a capacity to enter and exit the state of citizenship.¹³ It may, however, also ground more fundamental interests.

Indeed, nationality has historically clothed individuals with most of the legal rights they have enjoyed. As Edmund Burke admonished in his critique of the French Revolution, it was better to rely on the “rights of Englishmen” than to depend on inalienable but abstract human rights.¹⁴ Until comparatively recently, the latter have had little positive recognition in law. The treatment of individuals has been the close monopoly of

11. Shai Lavi, “Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach” (2011) 61:4 UTLJ 783 at 790.

12. Simon McMahon, “Introduction: Developments in the Theory and Practice of Citizenship” in Simon McMahon, ed, *Developments in the Theory and Practice of Citizenship* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2012) at 1. The concept of equality of citizenship is recognized in section 6 of the *Citizenship Act* 1985. “A citizen, whether or not born in Canada, is entitled to all rights, powers and privileges and is subject to all obligations, duties and liabilities to which a person who is a citizen under paragraph 3(1) (a) [that is, a person born in Canada after 1977] is entitled or subject and has a like status to that of such person”. *Supra* note 5, s 6. The antecedents of this language date to at least the 1868 *Naturalization Act*. SC 1868, c 66 [*Naturalization Act* 1868]. See Christopher G Anderson, “A Long-Standing Canadian Tradition: Citizenship Revocation and Second-Class Citizenship Under the Liberals, 1993–2006” (2008) 42:3 *Journal of Canadian Studies* 80 at 84.

13. See Lavi, *supra* note 11 at 790. In the Canadian context, only Canadian citizens have the right to vote and the right to leave and enter Canada. See *Charter*, *supra* note 8, ss 3, 6.

14. Edmund Burke, *Reflections on the Revolution in France* (London: Pall-Mall, 1790) at 46.

states, which have often discriminated between citizens and non-citizens in the recognition of rights and liberties.¹⁵

Against that backdrop, citizenship amounts to a “right to have rights”—a phrase deployed by Hannah Arendt in discussing the consequences of denaturalization in early twentieth century Europe.¹⁶ Paul Martin Sr., as a Member of Parliament, echoed that view in the legislative debates leading to the enactment of the original *Canadian Citizenship Act*¹⁷ in 1947: “Under this bill, we are seeking to establish clearly a basic and definite Canadian citizenship which will be the fundamental status upon which the rights and privileges of Canadians will depend.”¹⁸

But as Will Kymlicka has said, citizenship is more than a mere “legal status, defined by a set of rights and responsibilities”; it is also “an identity, an expression of one’s membership in a political community”.¹⁹ In traditional liberal democratic theory, the political community envisages “the nation as ‘the bearer of sovereignty, the central object of loyalty, and the basis of collective solidarity’”.²⁰ In the words of a 1913

15. Discrimination between citizens and non-citizens has been countered in public international law with concepts of “minimum treatment of aliens”, intended to avoid (among other things) denials of justice directed at foreigners. In its design, however, this concept too was tied to nationality. The maltreatment of an alien that went without remedy was not so much a breach of an obligation to the individual as “a wrong against the alien’s State of nationality”. Richard B Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester: Manchester University Press, 1984) at 1. The state was empowered to exercise “diplomatic protection” on behalf of its wronged national (*ibid* at 3). Absent this link of nationality, no such right exists, and the individual is bereft of the protection of any state. For more on the importance of that link to diplomatic protection, see *Nottebohm Case (Liechtenstein v Guatemala)*, 1955 ICJ Rep 4 [*Nottebohm*]; see also *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, 1970 ICJ Rep 3.

16. Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace & Company, 1951) at 294.

17. RSC 1946, c 15.

18. Canada, *House of Commons Debates*, 20th Parl, 2nd Sess, No 1 (2 April 1946) at 503 (Paul Martin), cited in Donald Galloway, “The Dilemmas of Canadian Citizenship Law” in Douglas B Klusmeyer & Thomas Alexander Aleinikoff, eds, *From Migrants to Citizens: Membership in a Changing World* (Washington, DC: Brookings Institution Press, 2000) 82 at 98.

19. Will Kymlicka, “New Forms of Citizenship” in Thomas J Courchene & Donald J Savoie, eds, *The Art of the State: Governance in a World Without Frontiers* (Montreal: Institute for Research in Public Policy, 2003) 265 at 268.

20. *Ibid* at 274.

United States Supreme Court decision on denaturalization: “Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society”.²¹ The International Court of Justice described nationality as “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”.²² This idea of reciprocal rights and duties is perhaps becoming antiquated as relatively homogeneous nation states give way to religiously, linguistically, ethnically and culturally pluralistic societies. Nevertheless, states themselves and many of those who live in them (in Canada, as elsewhere) persist in seeing the bestowal of citizenship as demanding a fidelity or loyalty to the state on the part of the citizen.²³

In this respect, Donald Galloway has argued that two distinct philosophies animate Canada’s history of citizenship. One is a “nationalistic or collectivist vision” that sees citizenship law “as a device to promote and stabilize social cohesion”. The other is a “more individualistic approach that emphasizes the need to respect individuals as equals”.²⁴ Writing in 2000, Galloway concluded that the former vision was prevalent—that “social cohesion and assimilation are currently preferred concerns”,²⁵ and that “[t]his focus has contributed to the undervaluation of the interests of noncitizens, and also of some individual citizens.”²⁶

The security preoccupations of the post-September 11 era seem to have augmented that tendency. Those preoccupations have prompted what Audrey Macklin and Yasmeen Abu-Laban have respectively described

21. *Luria v United States*, 231 US 9 (SC 1913) at 22 [*Luria*].

22. *Nottebohm*, *supra* note 15 at 23.

23. See e.g. Micheline Labelle & Daniel Salée, “Immigrant and Minority Representations of Citizenship in Quebec” in T Alexander Aleinikoff & Douglas Klusmeyer, eds, *Citizenship Today: Global Perspectives and Practices* (Washington, DC: Brookings Institution Press, 2001) 278 at 284 (discussing contemporary Canadian discourse on citizenship); Lloyd L Wong, “Home away from Home? Transnationalism and the Canadian Citizenship Regime” in Paul T Kennedy & Victor Roudometof, eds, *Communities Across Borders: New Immigrants and Transnational Cultures* (London, UK: Routledge, 2002) 169 (asserting that “[t]he citizenship regime in Canada is shifting to an exclusive one focusing on the soil, allegiance and loyalty” at 181).

24. Galloway, *supra* note 18 at 115.

25. *Ibid.*

26. *Ibid* at 93.

as the “securitization”²⁷ and “segmentation”²⁸ of citizenship—that is, the ratcheting up of the thresholds for citizenship. As Christopher Anderson notes, “proposed alterations to Canadian citizenship law became an important part of the government’s post-September 11th national security strategy, one of the results of which was to generate a much more sharply defined debate over the meaning of being Canadian”.²⁹

B. A Brief History of Denaturalization

Denaturalization (or citizenship revocation) often reflects the emphasis on loyalty outlined above, and has historically been part of security-oriented reconceptualizations of citizenship. Fraud in the obtaining of a nationality has historically been grounds for denaturalization.³⁰ Before World War I, other justifications for denaturalization were generally limited to clear violations of the expectation of loyalty. For instance, citizenship could be revoked for accepting foreign titles or decorations, or entering into foreign governmental or military service (sometimes with the added requirement of a refusal to withdraw from such service upon demand of the denaturalizing state).³¹

During World War I, a number of states denaturalized those guilty of “anti-national conduct or attachment to the enemy”.³² Several British Commonwealth and continental European jurisdictions enacted denaturalization laws allowing revocation on broad, ill-defined grounds of public policy or unworthiness to retain citizenship.³³ Canadian legislation, for instance, permitted revocation where a citizen had traded or communicated with the enemy or was a citizen of a state at war with

27. Audrey Macklin, “The Securitisation of Dual Citizenship” in Thomas Faist & Peter Kivisto, eds, *Dual Citizenship in Global Perspective: From Unitary to Multiple Citizenship* (New York: Palgrave Macmillan, 2007) 42.

28. Yasmeen Abu-Laban, “The New North America and the Segmentation of Canadian Citizenship” (2004) 29:1 *International Journal of Canadian Studies* 17.

29. Anderson, *supra* note 12.

30. *Ibid* at 85. In Canada, revocation for fraud dates back to the *Naturalization Act* 1868. *Supra* note 12.

31. See Lawrence Preuss, “International Law and Deprivation of Nationality” (1934–35) 23 *Geo LJ* 250 at 255–56.

32. *Ibid* at 259.

33. *Ibid* at 260.

Britain.³⁴ Revocation on these sorts of grounds constitutes what Shai Lavi has called “political punishment” for “political crimes”.³⁵

By the 1920s, other grounds for revocation in Canada included a lack of good character at the time citizenship was granted, and a record of crimes of sufficient severity after naturalization.³⁶ After World War II, the *Canadian Citizenship Act* introduced a power of revocation for, among other things, actions abroad that showed a non-natural born citizen “by act or speech to be disaffected or disloyal to Her Majesty”, or for the conviction of a non-natural born citizen for “any offence involving disaffection or disloyalty to Her Majesty”.³⁷

As of 1977, however, Canada reverted to fraud as the sole basis for revocation. At that time, Secretary of State James Faulkner rejected denaturalization for treason: “We have methods of punishing all acts including the act of treason. . . . To deprive a person of citizenship over and above that would simply add to the penalty”, as well as creating statelessness.³⁸ As recently as 2005, the House of Commons Standing Committee on Citizenship and Immigration rejected the idea of amending the law to permit revocation for treason and terrorism.³⁹

Other states have taken a different course. As discussed in the next section, expanded grounds for denaturalization persist to the present day in a number of countries, tempered in some cases by concerns about compliance with international law and its rules on statelessness.

II. Comparative Citizenship Revocation Practices

A. International Law Context

As the discussion above suggests, international law says remarkably little about nationality, and leaves states with substantial discretion to

34. See *Naturalization Act*, RSC 1927, c 138, s 9 [*Naturalization Act* 1927].

35. *Supra* note 11 at 798.

36. See *Naturalization Act* 1927, *supra* note 34.

37. RSC 1952, c 33, s 19.

38. Parliament of Canada, Standing Committee on Broadcasting, Films, and Assistance to the Arts (26 February 1976) at 30, *Evidence*.

39. House of Commons, Standing Committee on Citizenship and Immigration, *Citizenship Revocation: A Question of Due Process and Respecting Charter Rights* (June 2005) (Chair: Andrew Telegdi) [HC 2005].

craft nationality laws. As one international tribunal asserted in 1923, “[I]n the present state of international law, questions of nationality are . . . in principle within the reserved domain”.⁴⁰ Article 1 of the 1930 Hague *Convention on Certain Questions Relating to the Conflict of Nationality Law* affirms that “[i]t is for each State to determine under its own law who are its nationals.”⁴¹ That position was also taken in one of the first cases heard by the International Court of Justice, which concluded that nationality was a question for each sovereign state to settle under its own law and was therefore generally a matter of domestic jurisdiction.⁴²

Modern international human rights law has added little more to the position of international law on nationality. The *Universal Declaration of Human Rights* guarantees a right to nationality, but also specifies that a nationality may be revoked, as long as the revocation is not “arbitrary”.⁴³ The subsequent *International Covenant on Civil and Political Rights* is even more anemic on the right to nationality, simply saying that “[e]very child has the right to acquire a nationality”.⁴⁴

More critically for this article, the *International Convention on the Elimination of All Forms of Racial Discrimination* guarantees everyone’s right “without distinction as to race, colour, or national or ethnic origin,” to “equality before the law” in the enjoyment of a right to nationality.⁴⁵ Equality rights and citizenship are matters discussed at length below, with reference to the *Charter*.

Furthermore, international law is clearly uncomfortable with state action that would render an individual stateless—that is, with no nationality at all. As its name suggests, the United Nations *Convention on the Reduction of Statelessness* does not absolutely prohibit measures resulting in statelessness, but it carefully limits denaturalization producing

40. *Collection of Advisory Opinions* (1923), PCIJ Reports (Series B), No 4 at 24, online: Publications of the Permanent Court of International Justice <<http://www.icj-cij.org>>.

41. *Convention on Certain Questions Relating to the Conflict of Nationality Law*, Australia, 13 April 1930, 179 LNTS 89 art 1 (available on AustLII).

42. See *Nottebohm*, *supra* note 15 (the Court did note that international law would inquire whether a naturalization was properly bestowed so that a state could then exercise diplomatic protection in relation to that naturalized citizen).

43. GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) art 15.

44. 19 December 1966, 999 UNTS 171, art 24, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976).

45. GA Res 2106 (XX), UNGAOR, 20th Sess, Supp No 14, UN Doc A/6014, (1965) 47 at 48–49.

statelessness to a handful of circumstances.⁴⁶ Acquisition of citizenship by fraud is one of these. Another is a violation of the duty of loyalty to the state of nationality through conduct that is “seriously prejudicial to the vital interests of the State”.⁴⁷ Notably, however, the latter basis of revocation is available only if the state guards this ground in its national law at the time it becomes party to the treaty (and expressly preserves it at that time). Canada became a party to that convention in 1978 without preserving any revocation rights in its instrument of accession.⁴⁸ Therefore, Canada has not maintained the right to impose statelessness for conduct that is prejudicial to its interests. The Representative of the United Nations High Commissioner for Refugees made that exact point during parliamentary committee deliberations on Bill C-425, a private member’s bill which preceded Bill C-24.⁴⁹

B. Comparative Law

Given this largely permissive international legal environment, it is not surprising that the rules of different states on the revocation of citizenship vary considerably. Many states permit denaturalization on a host of different grounds. Within Europe alone, twenty-two states permit denaturalization for behaviour believed to be prejudicial to the state (or for a variant on that concept, such as unauthorized service in a foreign military).⁵⁰ A number of these laws have broadly textured and vague

46. 989 UNTS 175.

47. *Ibid*, art 8.

48. *Ibid* at ch V(4).

49. Canada, House of Commons, Standing Committee on Citizenship and Immigration (26 March 2013) at 1005, *Evidence*.

50. See Gerard-René de Groot & Maarten P Vink, *EUDO Citizenship Observatory: Loss of Citizenship—Trends and Regulations in Europe* (Florence: European University Institute, 2010) at 22. The states with revocation laws tied to activities prejudicial to states interests include: Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Moldova, Netherlands, Romania, Slovakia, Spain, Switzerland, Turkey and the United Kingdom. Of these states, two expressly invoke terrorism as a ground for revocation (France and Romania). Several states confine the reach of their revocation law to dual-nationals (or those who acquired nationality through naturalization) or expressly limit revocation where statelessness would result. These include: Belgium, Bulgaria, Cyprus, Denmark, Estonia, France, Germany, Ireland, Lithuania, Malta, Netherlands, Romania, Slovakia, Spain and the United Kingdom. *Ibid*.

language, referring to such matters as severe damage to national interests and reputation. Other countries mix general language of that sort with more specific grounds. The French Civil Code, for example, specifies that unless statelessness would result, a citizen can be denaturalized for acts detrimental to the interests of France and for the benefit of a foreign state—but also, among other things, for a major offence that constitutes an act of terrorism.⁵¹ These rules apply to acts committed before the acquisition of citizenship or within ten years afterwards (fifteen years for terrorist crimes).

For its part, UK law has evolved considerably in recent years, broadening the government’s discretion to denaturalize UK citizens. The *British Nationality Act* of 1981 now simply states that “[t]he Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.”⁵² An added proviso specifies that no such order is to be made if it would render the person stateless.

Broad executive discretion is also found in democracies outside Europe. In New Zealand, for example, the government may denaturalize a citizen who “voluntarily exercised any of the privileges or performed any of the duties of another nationality or citizenship possessed by him in a manner that is contrary to the interests of New Zealand”.⁵³ The Australian law includes both enumerated grounds for revocation and a more general discretion. Thus, the Australian government may denaturalize a person who has been, among other things, convicted of a serious offence or where the Minister believes “it would be contrary to the public interest for the person to remain an Australian citizen”.⁵⁴ At least for some classes

A number of these states are parties to the UN *Convention on the Reduction of Statelessness* and several appear not to have entered the reservation required to preserve their revocation laws on this ground when they became parties. A number, however, did, including: Austria, France, Ireland and the United Kingdom. For details on the revocation laws of these states, see *Convention on the Reduction of Statelessness*, *supra* note 46 at ch V(4).

51. *Code civil* (1815–) art 25 C civ.

52. *British Nationality Act 1981* (UK), 1981, c 61, s 40(2). For a discussion of how versions of this law prior to 2006 were more limiting on the government’s discretion to denaturalize, see Groot & Vink, *supra* note 50 at 26.

53. *Citizenship Act 1977* (NZ), 1977, 61 RS, s 16. New Zealand issued a reservation preserving this provision when it became party to the UN *Convention on the Reduction of Statelessness*. *Supra* note 46 at ch V(4).

54. *Australian Citizenship Act 2007* (Cth), s 34.

of citizen, the Minister may not denaturalize where it would result in statelessness.⁵⁵

American law is considerably more restrained in allowing denaturalization, reflecting US Supreme Court jurisprudence discussed further below. For both naturalized Americans and those who obtain US citizenship by birth, the act triggering denaturalization must be done “with the intention of relinquishing United States nationality”.⁵⁶ Such acts include serving in the armed forces of a foreign state as an officer, serving in foreign armies that are engaged in hostilities against the US, “committing any act of treason” and generally making war against or attempting to overthrow the US government.⁵⁷

In sum, states generally guard broad discretion to strip nationality from individuals deemed undeserving of citizenship status. Some, including France, the UK and Australia, bar revocation where denaturalization would produce statelessness. Others, such as Belgium⁵⁸ and Ireland⁵⁹, confine citizenship revocation to naturalized citizens, presumably on the assumption (probably not always true) that those people have an original citizenship to which they would revert upon denaturalization.⁶⁰ These limitations are obvious efforts to comply with the spirit (and perhaps the letter) of the UN *Convention on the Reduction of Statelessness* or with the requirements of European regional analogues to that convention.⁶¹

Other states are less attentive to the issue of statelessness, including those that expressly entered provisos preserving their existing laws

55. Thus, Australian law imposes a statelessness requirement on those who were naturalized upon application by “conferral”, but apparently not to foreign-born persons who obtain citizenship by descent from an Australian citizen or inter-country adoption.

56. *Aliens and Nationality Act*, 8 USC §1481 (1952).

57. *Ibid.*

58. See *Code de la nationalité belge*, (1984), art 23.

59. See *Irish Nationality and Citizenship Act 1956*, s 19.

60. A common ground for citizenship revocation is acquiring the nationality of another state. It may well be, therefore, that the state of original nationality has revoked the citizenship of emigrants who naturalize in another state.

61. The *European Convention on Nationality* permits denaturalization for, among other things, “conduct seriously prejudicial to the vital interests of the State Party”. Council of Europe, CA, Strasbourg, 6 November 1997, *European Convention on Nationality*, ETS 166, art 7. However, this ground for revocation is not available if the person concerned would be rendered stateless. The limitations on rendering a person stateless are more robust in European law than in the UN treaty. *Ibid.*

when they became state parties to the statelessness treaty. Whether they would in fact apply their laws to produce statelessness is another issue. Denaturalization may deny a person citizenship rights in the denaturalizing state, but it does not ensure deportation where no other state is willing to acknowledge a link of nationality and receive that person. In such a case, therefore, denaturalization may not be an effective way for a state to rid itself of undesirables. Moreover, as the discussion below suggests, denaturalization may lead to protracted judicial scrutiny.

C. *Select Court Practice*

Journalistic reports have identified at least twenty-one cases of denaturalization in the UK since 2002, all but one apparently tied to anti-terrorism or national security justifications.⁶² These cases have led to occasional legal complexities, especially where recent court and tribunal decisions have embroiled decision makers in a difficult foreign law analysis of whether the individual whose British nationality had been revoked actually retained a prior citizenship.⁶³ No case seems, however, to have hinged on differential treatment of naturalized versus natural-born UK citizens, or on the rights implications of denaturalization.

The situation in the US is quite different. For a considerable time, the US Supreme Court has been preoccupied with constitutional limitations on revocations. In one of its first decisions, the Court said that a naturalized citizen

becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.⁶⁴

62. See Chris Woods & Alice Ross, “‘Medieval Exile’: The 42 Britons Stripped of Their Citizenship” *The Bureau of Investigative Journalism* (26 February 2013), online: The Bureau of Investigative Journalism <<http://www.thebureauinvestigates.com>>.

63. See *Al Jedda v Secretary of State*, [2012] EWCA Civ 358, aff’d [2013] UKSC 62. See also *Y1 v Secretary of State*, [2012] UKSIAC 112/2011 (18 May 2012).

64. *Osborn v Bank of the United States*, 22 US (9 Wheat) 738 (SC 1824). See also *Luria*, *supra* note 21.

In keeping with this view, the US Supreme Court has cast doubt on laws that impose a differential denaturalization burden on naturalized as opposed to native-born US citizens. Thus, in *Schneider v Rusk, Secretary of State*, a law that stripped nationality from a naturalized American who had lived abroad for more than a specified time was held to violate the Fifth Amendment to the US Constitution by imposing discriminatory treatment which was “so unjustifiable as to be violative of due process”.⁶⁵

More generally, the US Supreme Court’s jurisprudence has regularly emphasized the significance of the citizenship entitlement, deprivation of which is “[i]n its consequences . . . more serious than a taking of one’s property, or the imposition of a fine or other penalty.”⁶⁶ Revoking citizenship deprives a person “of a right no less precious than life or liberty”.⁶⁷ As the Court observed, “[d]enaturalization consequences may be more grave than consequences that flow from conviction for crimes. . . . This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty.”⁶⁸ Indeed, the use of denaturalization as punishment is seen as cruel and unusual punishment barred by the Eighth Amendment:

It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.⁶⁹

65. 377 US 163 at 168 (1964).

66. *Schneiderman v United States*, 320 US 118 at 122 (1943) [*Schneiderman*]. See also *Afroyim v Rusk, Secretary of State*, 387 US 253 (1967) (“[c]itizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. . . . The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship” at 267–68). See also JM Spectar, “To Ban or Not to Ban an American Taliban? Revocation of Citizenship & Statelessness in a Statecentric System” (2002–03) 39:2 Cal WL Rev 263.

67. *Klapprott v United States*, 335 US 601 at 616, (1949) (Rutledge J, concurring) [*Klapprott*].

68. *Ibid* at 611–12.

69. *Trop v Dulles*, 356 US 86 at 101–02 (1958) (Warren Cj).

Where denaturalization is permissible for reasons other than punishment, the US Supreme Court requires the government to show the “clearest sort of justification and proof”, “with evidence of a clear and convincing character”.⁷⁰ Indeed, “[t]his burden is substantially identical with that required in criminal cases—proof beyond a reasonable doubt.”⁷¹ In fact,

the factors that support the imposition of so heavy a burden are largely the same in both contexts—particularly critical are the immense importance of the interests at stake, . . . the possibility of loss of liberty, . . . the resultant stigmatization, . . . and the societal interest in the reliability of the outcome.⁷²

The sorts of considerations that have animated US judicial holdings may also become pertinent in Canada if the grounds for revocation of citizenship are expanded.

III. Revising Canada’s Revocation Rules

A. Current Denaturalization Process

The *Citizenship Act* regulates Canadian citizenship and sets out the sole basis for revoking it.⁷³ In the form in which Canadian citizenship existed at the time of this writing, it can only be lost through voluntary renunciation⁷⁴ or through revocation where it (or permanent residence) was obtained through “false representation or fraud or by knowingly concealing material circumstances”.⁷⁵

The current process for revoking Canadian nationality varies depending on why it is taken away. In the case of voluntary renunciation, the clear presumption is that the person concerned wishes to pursue denaturalization. To summarize the process succinctly, the applicant must file for renunciation with accompanying documents,⁷⁶ at which point the

70. *Schneiderman*, *supra* note 66 at 122–23.

71. *Klapprott*, *supra* note 67 at 612.

72. *Kungys v United States*, 485 US 759 at 795 (1988) (Stevens J, concurring).

73. *Citizenship Act*, 1985, *supra* note 5, s 7.

74. *Ibid*, s 9.

75. *Ibid*, s 10.

76. See *Citizenship Regulations*, SOR/93-246, s 7.

application is reviewed by a citizenship officer and then by a citizenship judge.⁷⁷ The latter then approves or does not approve the application, subject to appeal to the Federal Court.⁷⁸

Revocation proceedings alleging fraud are more adversarial and involve fact-finding by the Federal Court. If the Minister pursues revocation, notice is given to the citizen, who may then require that the matter be referred to the Federal Court. That Court then considers whether the person has “obtained, retained, renounced or resumed citizenship by false representation or fraud or by knowingly concealing material circumstances”.⁷⁹ The Court’s finding is final, and determines whether the Minister may report the matter to the Governor-in-Council so that the latter may decide whether to carry out the denaturalization.⁸⁰

B. Bill C-24’s Rethinking of Denaturalization

Parliament will significantly supplement this narrow, fraud-predicated basis of involuntary revocation if it enacts Bill C-24, the *Strengthening Canadian Citizenship Act*. A private member’s bill sponsored by Conservative MP Devinder Shory in the last session of Parliament serves as the clear inspiration for Bill C-24. The Shory bill, C-425, proposed that “[a] Canadian citizen who is also a citizen or a legal resident of a country other than Canada is deemed to have made an application for renunciation of their Canadian citizenship if they engage in an act of war against the Canadian Armed Forces.”⁸¹

After Mr. Shory tabled his bill, Jason Kenney, Minister of Citizenship and Immigration at the time, expressed support for it and raised the prospect of amending it to include more grounds for revocation. This development followed terrorist incidents in Africa in which Canadian citizens were implicated.⁸² In testimony before the committee studying Bill C-425, Minister Kenney proposed that “individuals who are convicted of a terrorist crime in Canada or abroad should be deemed . . . through their own choices and actions . . . to have renounced their Canadian

77. See *Ibid*, s 11.

78. See *Citizenship Act* 1985, *supra* note 5, s 14.

79. *Ibid*, s 18.

80. *Ibid*, s 10.

81. *Supra* note 2 at cl 2.

82. Bell, *supra* note 1.

citizenship”.⁸³ He also urged that the bill be amended to apply to “dual citizens who are convicted of high treason” and of serving “as a member of an organized armed group in armed conflict with Canada”.⁸⁴

Minister Kenney’s position is now embodied in Bill C-24. Under this law project, the revocation provisions in the current law would be repealed and replaced with entirely new substantive grounds for revocation, as well as new revocation procedures. Revocation would continue to be available for fraud, the definition of which would be considerably broadened.⁸⁵ Revocation would also be available on these new grounds:

- *Armed Conflict*: Having served “as a member of an armed force of a country or as a member of an organized armed group and that country or group was engaged in an armed conflict with Canada”;⁸⁶
- *Treason*: Having been “convicted under section 47 of the *Criminal Code* of treason and sentenced to imprisonment for life or . . . convicted of high treason under that section”;⁸⁷
- *Terrorism*: Having been “convicted of a terrorism offence as defined in section 2 of the *Criminal Code*—or an offence outside Canada that, if committed in Canada, would constitute a terrorism offence as defined in that section—and sentenced to at least five years of imprisonment”;⁸⁸
- *Spying*: Having been “convicted of an offence described in section 16 or 17 of the *Security of Information Act* [communicating certain information to a foreign entity or terrorist group] and sentenced to imprisonment for life”;⁸⁹
- *Analogous Offences under the National Defence Act*.⁹⁰

It is worthy of note that Bill C-24 does not “authorize any decision, action or declaration that conflicts with any international human rights

83. See HC 21 March 2013, *supra* note 2 at 0850.

84. *Ibid.*

85. Bill C-24, *supra* note 3 at cl 8, s 10.1(1). Fraud now expressly includes concealing material circumstances regarding immigration admissibility under the immigration law.

86. *Ibid.*, s 10.1(2).

87. *Ibid.*, s 10(2)(a).

88. *Ibid.*, s 10(2)(b).

89. *Ibid.*, s 10(2)(g).

90. *Ibid.*, s 10(2).

instrument regarding statelessness to which Canada is signatory”.⁹¹ This language deals (indirectly) with the concern about statelessness discussed earlier in this article. As noted above, when Canada became a party to the statelessness treaty, it did not preserve the right to impose statelessness for conduct that is “seriously prejudicial to the vital interests of the State”, so that prospect is now barred to it as a matter of international law.⁹²

In an apparent nod to the difficult experience in the UK, the onus of proof that revocation would render a person stateless is on the person who makes that claim. The net result of these changes is to confine the reach of the revocation provisions to those who have a dual nationality, or who are unable to prove that they have only Canadian nationality.

Somewhat incongruously, Bill C-24 does not appear to amend section 6 of the *Citizenship Act*, which reads as follows:

A citizen, whether or not born in Canada, is entitled to all rights, powers and privileges and is subject to all obligations, duties and liabilities to which a person who is a citizen under paragraph 3(1)(a) [born in Canada after 1977] is entitled or subject and has a like status to that of such person.⁹³

If Bill C-24 were enacted, section 6 of the *Citizenship Act* would assert a patent falsehood, since the special class of dual-nationals would have a different and lesser set of citizenship rights. As discussed below, the vast majority of those persons were born outside of Canada, creating de facto tiering of citizenship as between naturalized and native-born Canadians.

Procedurally, Bill C-24 establishes two different revocation systems. For grounds other than participating in armed conflict against Canada, the Minister has the simple discretion to revoke, subject to the prerequisite to give notice and to hear written (and possibly oral) representations.⁹⁴ Revocation on the armed conflict ground requires a proceeding before the Federal Court in which the Minister seeks a declaration that the person did serve in the proscribed manner. Any court declaration to that effect then constitutes revocation.⁹⁵

91. *Ibid*, s 10.4(1).

92 *Convention on the Reduction of Statelessness*, *supra* note 46, art 8.

93. *Citizenship Act*, 1985, *supra* note 5, s 6.

94. Bill C-24, *supra* note 3 at cl 8, s 10(3).

95. *Ibid*, s 10.1(2).

C. *The Legality of the Proposed Denaturalization Standards*

At the time of this writing, Bill C-24 is at first reading in Parliament and it may well be amended during the legislative process. It is, however, very important to reflect on the constitutional issues that will inevitably arise if the revocation provisions summarized above, or provisions similar to them, are in fact enacted. The application of any such provisions will no doubt prompt difficult procedural questions, mostly under the *Charter*. Equality rights issues will also inevitably arise.

(i) Procedural Rights and Sections 7 and 11 of the *Charter*

a. Application

In contrast to the American jurisprudence, Canadian case law is sparse on the right to citizenship and on constitutional limitations on its revocation. The *Charter* includes no express guarantee of citizenship. However, in 1997, Iacobucci J, speaking for the entire Supreme Court of Canada, said that he could not “imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship”.⁹⁶ The Federal Court has taken up that theme,⁹⁷ and has described citizenship revocation as “not an ordinary civil or administrative proceeding”.⁹⁸

Not every citizenship revocation will have serious repercussions. A dual-national may, for instance, have Canadian citizenship by birth but in all other respects have closer ties to a foreign state and be indifferent to the loss of the Canadian nationality.⁹⁹ But for those who reside in Canada on the strength of their Canadian nationality, citizenship is of fundamental importance. Not least, after one loses citizenship, the

96. *Benner v Canada*, [1997] 1 SCR 358 at para 68, 143 DLR (4th) 577 [*Benner*].

97. See *Worthington v Canada*, 2008 FC 409 at para 94, 72 Imm LR (3d) 81 (TD) (“citizenship constitutes both a fundamental social institution and a basic aspect of full membership in Canadian society”).

98. *Canada v Parekh*, 2010 FC 692 at para 52, [2012] 1 FCR 169.

99. Even those with attenuated citizenship ties to Canada may occasionally see value in the link. See, for instance, the debate on dual citizens that arose in the wake of the 2006 Lebanese conflict, in which Canadians with very incidental ties to Canada sought Canadian protection. “Dual citizenship faces review”, *National Post* (21 September 2006) online: National Post <<http://www.nationalpost.com>>.

entitlement to remain in, leave and return to Canada promised by section 6 of the *Charter* disappears.¹⁰⁰

For exactly these kinds of reasons, at least one court has held that the revocation of citizenship denies liberty and security of the person, and thus triggers the application of section 7 of the *Charter*¹⁰¹—that is, that no deprivation can be done without fundamental justice.¹⁰² In a case on revocation for fraud in the procuring of citizenship, Reilly J of the Ontario Superior Court of Justice said that he could “think of no consequence, apart from a sentence of several years’ imprisonment in a penitentiary, which would be more significant to a responsible citizen than the loss of that citizenship”.¹⁰³

A challenge to Bill C-24 may prompt even stronger views on application of the *Charter*’s procedural guarantees. Protecting against fraud in the acquisition of nationality may reasonably be characterized as closely linked to the integrity of both the process and substance of citizenship. In comparison, the proposed revocation measures in Bill C-24 have little to do with the reasons underlying citizenship per se. Instead, they strip nationality as a further expression of abhorrence of behaviour that is incompatible with Canadian values but is exogenous to the actual bestowal of citizenship. The government affirms this view in its background document supporting the bill. It describes the new revocation measures as “an effort to reinforce the value of Canadian citizenship”, under the heading of “Protecting and Promoting Canada’s Interests and Values”.¹⁰⁴

Indeed, revocation on these sorts of grounds is plausibly described as punitive. In defending the use of revocation as punishment for political-style crimes, one scholar has argued as follows: “The citizen who has breached the constitutional bond has violently attempted to undermine

100. *Supra* note 8, s 6.

101. *Ibid*, s 7.

102. *Oberlander v Canada (Attorney General)* (2004), 69 OR (3d) 187 at para 45, 114 CRR (2d) 345 (Ont Sup Ct J) [*Oberlander*].

103. *Ibid*. But see *Canada v Luitjens* (1992), 142 NR 173, 9 CRR (2d) 149 (FCA). See also *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui* 2007].

104. “Citizenship and Immigration Canada, *Strengthening Canadian Citizenship Act: Protecting and Promoting Canada’s Interests and Values* (February 2014) online: Government of Canada <<http://www.cic.gc.ca>> .

the power of the community to self-govern. The proper punishment for such an act would be to deny her the right of membership in the political community.”¹⁰⁵

This punitive perspective was echoed in the following statement made before the Standing Committee on Citizenship and Immigration by Mr. Shory, the sponsor of Bill C-425 (the earlier private member’s bill warmly received by Minister Kenney):

Until 1977 the people who committed acts of treason would be punished by the removal of their Canadian citizenship. Canadians want to see this returned to law. My bill would expand existing laws to see that those who commit acts of treason meet proper justice, with all due oversight and rights to appeal outlined in the [*Criminal Code*] and the [*Citizenship Act*]. Canadians simply want to see these measures brought back into law.¹⁰⁶

It remains to be seen how parliamentarians will characterize the government’s current Bill C-24. However, a quasi-criminal objective of the sort expressed by Mr. Shory, when coupled with the effect of revocation, would not ease the government’s defence of a section 7 challenge to the revocation procedure. Indeed, other *Charter* rights may be engaged by the preoccupation with punishment. It is true that the Federal Court has declined to apply the *Charter*’s section 11 guarantee of a fair trial in criminal proceedings to citizenship revocation proceedings for fraud, on the basis that they are not criminal or quasi-criminal and involve no penal consequence. In the Court’s words, “[T]he forfeiture of the fruits of fraud is not punishment per se”.¹⁰⁷

It is conceivable, however, that the courts would take a different position on the reach of section 11 where (as with Bill C-24) the legislative measure in question is not geared to forfeiture for fraud but seeks much more clearly to impose *ex post facto* punishment and condemnation. The Supreme Court’s two-pronged test for the application of section 11 considers both the nature of the proceeding and whether it has penal consequences.¹⁰⁸ The “nature” test would appear to be irrelevant to the revocation process discussed in this article. It focuses on whether the

105. Lavi, *supra* note 11 at 805.

106. Canada, House of Commons, Standing Committee on Citizenship and Immigration, 41st Parl, 1st Sess, No 072 (13 March 2013) at 850 (Devinder Shory) *Evidence*.

107. *Canada (Minister of Citizenship and Immigration) v Ducek*, [1998] 2 FC 614 at para 39, 41 Imm LR (2d) 259 (TD).

108. See *R v Rodgers*, 2006 SCC 15 at para 60, [2006] 1 SCR 554 [*Rodgers*].

proceedings are “of a public nature, intended to promote public order and welfare within a public sphere of activity”,¹⁰⁹ and its preoccupation is with the presence of criminal law-like procedural trappings. In contrast, the requirements of the “penal consequences” test are met by what the Supreme Court has described as “imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity”.¹¹⁰ In the event of a conflict between the penal consequences test and the “nature” test, the Supreme Court has said that the penal consequences test prevails.¹¹¹

While revocation of citizenship amounts neither to a fine nor to a direct form of imprisonment, it may nonetheless be considered a form of penal consequence.¹¹² A court need not reach far to conclude that denaturalization for terrorists and traitors—especially when tied to the existence of actual convictions for criminal acts—is a supplementary type of punishment that looks to redressing “the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity”.¹¹³ Accordingly, it would not be surprising if the protections in section 11—including the presumption of innocence and the right to a fair and public trial before an independent tribunal—were held to be triggered by these sorts of revocations of citizenship.¹¹⁴ If so, the provisions of Bill C-24 placing the onus of demonstrating statelessness on the person making that claim (most likely, the person subject to the revocation proceeding) would attract constitutional scrutiny.

109. *R v Wigglesworth*, [1987] 2 SCR 541 at 560, 45 DLR (4th) 235.

110. *Ibid* at 561.

111. *Martineau v Canada*, 2004 SCC 81 at para 57, [2004] 3 SCR 737.

112. See *Rodgers*, *supra* note 108 at para 61 (it should be noted that detention could result under the immigration law where a person’s nationality is revoked and they become a foreign national).

113. *Wigglesworth*, *supra* note 109 at 561.

114. It is also conceivable that the revocation would raise *Charter* section 12 cruel and unusual treatment issues. See *Charter*, *supra* note 8, s 12. However, in a case concerning citizenship revocation because of fraud, the Federal Court held that “[i]n law there is nothing intrinsically ‘cruel and unusual’ about the revocation of citizenship. . . . [I]f deportation is generally not cruel and unusual treatment, it follows that revocation of citizenship that could lead to deportation is also not cruel and unusual treatment.” *Canada v Sadiq* [1991] 1 FC 757 at 768, 39 FTR 200 (TD). See also *Oberlander*, *supra* note 102 at para 35.

b. Due Process

Even if revocation triggered only section 7 (and not section 11) rights, the concept of “fundamental justice” set out in section 7 explicitly requires due process of law. In any event, apart from the provisions of the *Charter*, the government would have to provide due process standards as a matter of simple common law procedural fairness. Moreover, citizenship revocation is almost certainly an interest to which the procedural guarantees in the *Canadian Bill of Rights* would apply.¹¹⁵ Exactly what sort of due process is required might, however, be a matter of dispute.

In the past, the role of due process in citizenship revocations has attracted substantial attention. For instance, a 2005 House of Commons report recommended that the revocation process should be entirely judicial, with discretion to revoke preceded by a court trial, and that the grounds of revocation should have to be proven beyond a reasonable doubt, and through the application of normal criminal rules of evidence.¹¹⁶ In so recommending, the report distanced itself from a bill introduced by the Liberal government in 2002 that would have replaced the 1977 *Citizenship Act*. The 2002 bill’s provisions on revocation did not include the grounds set out in Bill C-24, but looked only to fraud-related considerations. However, it too would have addressed at least some due process issues: the government would have been able to certify an individual as a security risk in a process clearly modeled on the immigration security certificate process, with its strict limitations on disclosure.¹¹⁷ These issues of standard of proof and disclosure raised a decade ago will inevitably also arise in relation to Bill C-24 and its use.

115. RSC 1960, c 44, s 1(a) (which guarantees “due process of law” where the right to “life, liberty, security of the person and enjoyment of property” is at issue); s 2(e) (which bars the deprivation of a person’s “right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations”). The Supreme Court concluded that the *Bill of Rights* applied to the adjudication of refugee status. *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177, 17 DLR (4th) 422. It follows that it must also apply to the revocation of a person’s fundamental interest in citizenship.

116. HC 2005, *supra* note 39.

117. Bill C-18, *An Act respecting Canadian citizenship*, 2nd Sess, 37th Parl, 2002, cl 16 (second reading and referral to committee 8 November 2002).

1. Standard of Proof

As outlined above, revocation of citizenship in the US requires the “clearest sort of justification and proof”, and the government bears the burden of providing “evidence of a clear and convincing character”.¹¹⁸ In Canada, there is authority that section 7’s promise of fundamental justice includes expectations about burdens of proof. In *Jaballah (Re)*, the Federal Court concluded as follows:

[I]t would not be possible to specify one standard of proof as a principle of fundamental justice. In every case the inquiry must take into account the context, including the nature of the proceeding and the interests at stake. The issue is whether the process, including the application of a specified test or threshold, is fundamentally unfair to the affected person.¹¹⁹

The *Jaballah* case involved an immigration security certificate, and the Court ultimately declined to augment a statutorily prescribed and quite minimal governmental burden of proof.¹²⁰ In reaching that conclusion, it followed a Federal Court of Appeal decision refusing to hold that the statutory standard of proof “adopted for preventive intervention to protect national security is unreasonable or in breach of the principles of fundamental justice”.¹²¹

This is, however, very slender precedent. “Preventive intervention” involves an exigent situation of imminent (or at least prospective) peril to national security. Citizenship revocation does not. Much like the ordinary criminal law, citizenship revocation serves to signal social stigma. It moves the denaturalized citizen abruptly into a class of persons with more attenuated rights (not least, an attenuated right to remain in Canada). In that light, citizenship revocation might reasonably be held to attract the same standard of proof as criminal offences. This concern seems most acute when revocation is grounded in a claim of participation in an armed conflict—a basis for revocation that raises more difficult

118. See *Schneiderman*, *supra* note 66 at 122–23.

119. 2010 FC 79 at para 53, [2011] 2 FCR 145.

120. *Ibid.*

121. *Charkaoui (Re)*, 2004 FCA 421 at para 107, [2005] 2 FCR 299, rev’d on other grounds in *Charkaoui 2007*, *supra* note 103.

evidentiary issues than are raised where an individual has been convicted for crimes such as terrorism or treason.¹²²

2. Disclosure

Disclosure may be another area of difficulty in armed conflict cases. It has been a particularly controversial issue in administrative proceedings related to national security, especially proceedings involving immigration security certificates. In those matters, the government often relies on covert sources or on information provided in confidence from foreign governments. As a consequence, it attempts to limit disclosure of these materials to the affected individual. In the security certificate context, the Supreme Court has concluded that although the right to disclosure is not absolute, it does require that the affected party know the case to be met, and may require the appointment of a security-cleared special advocate who is allowed to see all of the relevant information in the government's possession and who is charged with advancing that party's case.¹²³ This mechanism for handling security certificate cases has been developed legislatively,¹²⁴ in the wake of Supreme Court deliberations on the procedural guarantees needed in those cases. The Federal Court has also used special-advocate-like systems on a more ad hoc basis in certain *Canada Evidence Act* cases in which the government is contesting disclosure on national security grounds.¹²⁵

Similar arrangements would likely be called for in citizenship revocations, to the extent that the case for revocation is based on sensitive information. Unless the citizen was outright captured on the battlefield, overtly bearing arms, it seems likely that sensitive information would be needed to demonstrate that she was serving as "a member of an armed force of a country or as a member of an organized armed group and that country or group was engaged in an armed conflict with Canada".¹²⁶ Even

122. Even where revocation is based on past convictions, however, difficult evidentiary and procedural fairness issues may arise if questions are posed about the legitimacy of that conviction. For instance, a foreign regime may tar a dissident with a trumped up conviction.

123. See *Charkaoui* 2007, *supra* note 103.

124. See *IRPA*, *supra* note 9, s 85.

125. See e.g. *Canada (Attorney General) v Almalki*, 2011 FCA 199, 333 DLR (4th) 506.

126. Bill C-24, *supra* note 3, s 10.1(2).

if the individual was caught flagrantly engaged in combat, the Omar Khadr case strongly suggests that the government would seek to protect information from disclosure.¹²⁷

In the result, citizenship revocation proceedings under Bill C-24 might turn out to be as procedurally complex as those associated with immigration security certificates. Because Bill C-24 in its present form does not anticipate that eventuality, it may lead to a protracted cycle of constitutional challenge and statutory amendment.

(ii) Equality Rights Under Section 15 of the *Charter*

a. Citizenship Revocation and Equal Protection of the Law

Section 15 of the *Charter* specifies that

[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹²⁸

Three Supreme Court decisions on alleged differential treatment as between citizens and non-citizens—*Andrews*¹²⁹, *Chiarelli*¹³⁰ and *Lavoie*¹³¹—have established some of the foundational rules for the application of section 15 in this area, and have named citizenship as an analogous ground of discrimination under section 15. A fourth decision—*Benner*—held that the now-repealed imposition of stricter conditions on the granting of citizenship to children who had Canadian-born mothers rather than Canadian-born fathers produced a “lack of equal benefit of the law”.¹³² Similar objections would likely be mounted to a revocation provision that distinguished between dual-national and single-national Canadians.

127. *Canada (Justice) v Khadr*, 2008 SCC 29, [2008] 2 SCR 143.

128. *Charter*, *supra* note 8, s 15(1). The *Canadian Bill of Rights* may also be relevant, as it recognizes the right (without discrimination by reason of, for instance, national origin) “to equality before the law and the protection of the law”. *Bill of Rights*, *supra* note 115, s 1(b).

129. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews*].

130. *Chiarelli v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 711, 90 DLR (4th) 289.

131. *Lavoie v Canada*, 2002 SCC 23, [2002] 1 SCR 769.

132. *Benner*, *supra* note 96 at para 72.

A related subtext is that dual-national Canadians are more likely to be immigrants, as discussed below.

It is true that section 15 has had little impact on Canadian immigration law. This is not surprising, as an Ontario trial court has recently observed, “the very concept of citizenship is premised on there being a legal distinction between citizens and others”.¹³³ The Federal Court has put it in these terms:

[O]ne cannot even speak of the possibility of a breach of the equality principle when comparing the privileges of citizenship to those accorded to immigrants. . . . To try to apply equality rights between citizens and non-citizens with respect. . . not to their common condition as human beings but to their relative status on Canadian soil appears to me to negate or abolish the concept of citizenship altogether.¹³⁴

Section 15 says very little therefore about the practices the government may follow to determine citizenship in the first place, including a requirement that immigrants swear an oath to become a citizen.¹³⁵ The outcome of the analysis should however be very different where what is at issue is not the difference between citizens and non-citizens, but the different treatment for classes of persons who are all, indisputably, citizens. Once immigrants cross the boundary between permanent resident and citizen, any distinctions that continue to be made on the basis of their past status as a non-citizen creates a typology of different sorts of citizens. A discriminatory typology or gradation of citizens is squarely the sort of thing section 15 should guard against. Here, there is a lack of equal benefit of the law.

This issue arose in relation to Bill C-425—the private member’s bill that attracted government support in the preceding session of Parliament. Defenders of Bill C-425 disputed the notion that it would produce tiers of Canadian citizenship by discriminating against naturalized Canadians. Rather, as Minister Kenney put it in his parliamentary testimony, the bill would enable the revocation of citizenship for any Canadian with dual citizenship, whether born in Canada or abroad:

133. *McAteer v Canada (Attorney General)*, 2013 ONSC 5895 at para 102, 20 Imm LR (4th) 121 [*McAteer*].

134. *Lavoie v Canada*, [2000] 1 FC 3, at paras 9, 11, 163 FTR 251 (CA), aff’d 2002 SCC 23, [2002] 1 SCR 769.

135. See *McAteer*, *supra* note 133.

The bill . . . would apply equally without respect to whether people are born in Canada or were naturalized as Canadians by immigrating here. . . . [Y]ou could be born in Canada and inherit citizenship from your parents, or you could go out and become naturalized in a second, third, or fourth country, or multiple countries, or you could immigrate to Canada, having retained the citizenship of your country of origin, or you could immigrate to Canada and renounce that original citizenship and go out and seek citizenship in a third country. So the notion that this is discriminatory vis-à-vis naturalized Canadians is completely inaccurate.¹³⁶

The Minister's position seems to be that because not all dual citizens are naturalized rather than native-born Canadians, Bill C-425 does not discriminate against naturalized Canadians. However, the fact remains that the overwhelming majority of those with dual nationality are naturalized. In 2011, 2.9% of the total population had dual nationality, and 79.5% of that group were immigrants. Fully 14.3% of all naturalized Canadians were dual-nationals, but only 0.7% of Canadian-born citizens had other citizenships.¹³⁷ Put another way, subjecting everyone with dual nationality to the possibility of revocation of citizenship would single out 2.9% of the population for a special peril, and more than three quarters of those people are new Canadians.

b. Revocation and Discrimination

In light of the above discussion, the citizenship revocation measure proposed in Bill C-24 imposes differential treatment. Moreover, this differential treatment can be readily equated with discrimination. As the Supreme Court of Canada noted in *Andrews*,

[D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not

136. HC 21 March 2013, *supra* note 2 at 0920.

137. Statistics Canada, *Obtaining Canadian Citizenship* (2011) online: Statistics Canada <<http://www.statcan.gc.ca>>. In absolute numbers, there were 760,285 dual-national Canadians who were born outside Canada and 172,385 dual-national Canadians born in Canada in 2011. See Statistics Canada, *Data Table, cat 99-010-X2011026* (2011) online: Statistics Canada <<http://www.statcan.gc.ca>>.

imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.¹³⁸

The Supreme Court's contemporary approach to section 15 claims consists of a two-part test, both parts of which must be satisfied to establish a breach of that section: "(1) does the law create a distinction that is based on an enumerated or analogous ground? and (2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"¹³⁹ As noted above, citizenship has been held to be an analogous ground of discrimination, and because they apply only to individuals who hold dual citizenship, the citizenship revocation provisions of Bill C-24 clearly draw a distinction on that ground.¹⁴⁰ Furthermore, because dual nationality is highly coincident with naturalization, Bill C-24 probably also draws a distinction on the basis of section 15's explicitly enumerated ground of "national origin".¹⁴¹ Therefore, it is very likely that differential treatment based on dual citizenship status would be held to breach the first part of the section 15 test.

As for the second part of the test, the Supreme Court held in *Withler* that it will be breached if it is shown "that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1)".¹⁴² Alternatively, the Court said in the same case, a breach could be established "by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group".¹⁴³ This is not to say, as the Court noted in the more recent case of *Quebec (Attorney General) v A*, that claimants

138. *Supra* note 129 at 174–75, aff'd *Withler v Canada*, 2011 SCC 12 at para 29, [2011] 1 SCR 396 [*Withler*].

139. *Ibid* at para 30.

140. *Ibid* at para 33.

141. Some Canadian domestic human rights bodies have concluded that differential standards applied to dual- as opposed to single-nationality Canadians amount to impermissible discrimination on the basis of national origin. See e.g. Commission des droits de la personne et des droits de la jeunesse, Press Release: "A Settlement is Reached with Bell Helicopter Following a Complaint to the Commission des Droits de la Personne et des Droits de la Jeunesse" (17 January 2008) online: Commission des droits de la personne et des droits de la jeunesse <<http://www.cdpedj.qc.ca>>.

142. *Withler*, *supra* note 138 at para 35.

143. *Ibid* at para 36.

must “prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them”.¹⁴⁴ The focus is not on attitude or motive, but instead on discriminatory conduct:¹⁴⁵ “If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.”¹⁴⁶

In this light, unfavourable distinctions based on dual nationality, immigrant status and national origin would seem to be discriminatory. Since the vast majority of dual-nationals are immigrants, a measure singling out dual-nationals necessarily visits injury on a class of individuals who have historically suffered prejudice or disadvantage.¹⁴⁷ Even if this were not the case, a measure singling out dual-nationals for the peril of citizenship revocation on the basis that they are “traitors or terrorists” would seem likely to create a prejudicial impact—it risks fuelling the perception that they are inherently more prone to such behaviour than are other citizens.

(iii) Could the Citizenship Revocation Provisions of Bill C-24 Be Saved Under Section 1 of the *Charter*?

It is well understood that under the *Oakes* test, section 1 may save a rights-impairing measure where the government proves that the measure has an important objective, that there is a rational connection between the objective and the means, that there is a minimal impairment of the

144. 2013 SCC 5 at para 327, [2013] 1 SCR 61, Abella J, dissenting (Abella J dissented in the result, but the majority concurred with her opinion on section 15).

145. *Ibid* at para 328.

146. *Ibid* at para 332.

147. It goes beyond the scope of this article to trace the full extent to which first generation Canadians are a class of individuals who have suffered prejudice and disadvantage relative to native-born Canadians. However, to cite one scholar, “Recent immigrants have lower earnings than Canadian-born workers of the same sex and level of education.” Alan Simmons, *Immigration and Canada: Global and Transnational Perspectives* (Toronto: Canadian Scholars’ Press, 2010) at 142. This gap appears to have widened since 1980, and while it attenuates with the time a newcomer spends in Canada, it still exists for persons who have been in Canada for decades. *Ibid* at 144. As of 2012, immigrant household income was twenty-one percent lower than that for native-born Canadians. Organization for Economic Co-operation and Development, *Indicators of Integration of Immigrants and their Children: Key Information by Country: Canada* (2012) online: Organization for Economic Co-operation and Development <<http://www.oecd.org>> .

right in question and that there is proportionality between the impact on the right and the benefits of the measure in question.¹⁴⁸

It is not clear exactly what objective the citizenship-revocation provisions in Bill C-24 would serve. I shall assume, however, that the objective is to denounce disloyalty and protect national security. It is not obvious that a rational connection can be drawn between discriminatory citizenship revocation provisions and the objectives of protecting national security and denouncing disloyalty. A measure that singled out naturalized Canadians—or even the broader class of dual-nationals—would not be rationally connected to those objectives. To show such a connection, it would have to be proven that dual-national Canadians in fact present an inherently greater threat to national security or are more prone to disloyalty. The challenge of providing such proof would be an insurmountable one for the government. More generally, the link between revocation and national security would be merely haphazard. As Catherine Dauvergne urged, exposing dual citizens to the possibility of denaturalization is arbitrary:

[F]irst of all, many individuals do not make an informed or independent choice about whether to become dual nationals. These choices are determined by their parents, by their states of nationality, by accidents of their birth, or by all three of these factors acting in concert . . . [W]hether an individual will or will not be a dual citizen will principally be determined by the laws of another state.¹⁴⁹

In this way, the revocation tool would only be available through a chain of mere coincidence. Incidental availability of this tool makes it hard to envisage revocation as truly rationally connected to the national security objective.

Nor is there a clear claim that the revocation provisions are minimally impairing of rights. If the government's objective is to punish or denounce disloyalty, there are obvious alternative measures that do that without violating section 15. The *Criminal Code* provisions on treason and terrorism are important examples. If the government's objective is to protect national security, it again has a range of measures available to it,

148. *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

149. House of Commons, Standing Committee on Citizenship and Immigration (16 April 2013) (Witness: Catherine Dauvergne) at 0845, *Evidence*.

from passport revocation to criminal prosecution. These are all effective tools that comply with the *Charter*.

In fact, some of these existing measures are undermined when the link of nationality is dissolved. Dauvergne made this clear in her parliamentary opposition to Bill C-425:

Maintaining the bond of citizenship helps Canada maintain its legal jurisdiction over all individuals. . . . Banishing those we suspect of terrorism does not make us safer. It merely removes them from our surveillance, from our monitoring, and from our control. It will not, alas, ensure that we are safe from them. Indeed, it may make us less safe if they are sent away to quiet, dark corners of the world where it is easier to plot against us unnoticed.¹⁵⁰

Finally, the detrimental impact on the rights of dual-nationals seems disproportionate to the limited contribution it would likely make to protecting national security and punishing disloyalty. The impact of such revocation on the individual might well be severe, as the US jurisprudence abundantly recognizes. In Shai Lavi's words: "[T]he revocation of citizenship is a denial of concrete rights, including the active right of political participation and the passive right of residency, as well as a denial of membership in the community and, with it, the more fundamental right to have rights vis-à-vis the state".¹⁵¹ In contrast, citizenship revocation would have at best an ambivalent effect in furthering Canadian national security or inducing loyalty to the country.

A dual citizen who lost Canadian citizenship would revert to foreign national status and be subject to immigration removal procedures. As Dauvergne suggests above, removal of that person simply displaces risk: the person is sent abroad, potentially beyond the reach of measures (such as criminal incarceration) that might be more effective in limiting whatever danger he presents.

It is even less clear that any positive effects of removal would be proportionate to the objective of enhancing loyalty. Indeed, there may be no positive effects on loyalty. Selective denaturalization that would, in most cases, target naturalized Canadians might be expected to have the opposite effect—that is, to fuel a sense of second-class citizenship among the affected communities and erode their feelings of social solidarity with Canada and its government. All told, the government may find it very

150. *Ibid.*

151. *Supra* note 11 at 805.

difficult to meet the burden of justifying the revocation of citizenship provisions of Bill C-24 under section 1 of the *Charter*.

Conclusion

Denaturalization is an idea consumed with legal flaws. The government must be wary of drawing too much inspiration from the practices of other states, from restrictive provisions in earlier versions of Canadian citizenship legislation, or from the relatively permissive attitude of the international community to questions of nationality.

International law does impose precise limits on who can lose citizenship under denaturalization provisions targeting “traitors and terrorists”, by providing that Canada may not render anyone stateless through those provisions. This has forced the federal government to make Bill C-24 applicable to citizens with dual nationality, whether they are naturalized or Canadian-born. However, because the great majority of dual citizens are naturalized Canadians, the bill in fact draws a distinction between native-born and naturalized Canadians—a distinction that will be very hard, if not impossible, to defend against equality rights challenges. In addition, denaturalization of “traitors and terrorists” would likely be construed as a punitive measure with an impact and stigma demanding procedural protections that far exceed those now set out in the *Citizenship Act* and the amendments proposed to it by Bill C-24.

At the stage of justification under section 1 of the *Charter*, the citizenship revocation provisions of Bill C-24 would likely meet few if any of the requirements of the *Oakes* test. Among other things, those provisions would not appear to advance any clear national security interest, and they would probably do little in terms of punishment and deterrence in light of the alternatives already open to the government through the *Criminal Code* and measures such as passport revocation.

In sum, denaturalization as proposed in Bill C-24 has little to recommend it and much to condemn. Final words on its merits might usefully be left to the 2005 Standing Committee on Citizenship and Immigration: “[O]nce citizenship is properly granted, any future conduct should be addressed through Canada’s criminal justice system. If citizenship is legitimately

awarded and there is no question as to fraud in the application process, a person who later commits a crime is ‘our criminal’”.¹⁵²

152. HC 2005, *supra* note 39.

