SOME CITIZENS ARE MORE EQUAL THAN OTHERS

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Abstract

Canada has stood out for its formal constitutional commitments to equal and expansive citizenship protections (Winter 2013, 100). Canada grants citizenship expansively to most persons born subject to its territorial jurisdiction. Canada's Charter of Rights and Freedoms also treats naturalized and native-born citizens as equals with the same democratic and mobility rights. But new distinctions are emerging that are threatening the equal status and rights of Canadian citizens, regardless of where they live and how they acquired their citizenship. Here, I argue that the reemergence of the dormant norm of citizenship as allegiance has become the primary mechanism for eroding equal citizenship status in Canada. This raises the specter of casting citizens deemed disloyal out from Canada's protection and supervision. I document the erosion of equal citizenship status and rights in Canada under the guise of protecting native-born mono-citizens from security threats. Dual nationals convicted under treason or terrorism charges by foreign governments for anti-regime activities in that country can be subject to expedited citizenship revocation in Canada. These measures raise the danger of denaturalizing native-born citizens without due process. They also run the risk of exporting Canadian citizens charged with war crimes or terrorism-related offenses to countries that lack the capacity or will to prevent them from reoffending. In the interest of justice, national and international security, Canada has a responsibility not to denaturalize war criminals and terrorists, but rather to ensure they are tried in Canadian courts and detained, if convicted, in Canadian prisons.

Introduction

The simplicity of citizenship status as an exclusive right that draws clear boundaries between insiders and outsiders in terms of access to rights has always been elusive (Turner 2016, 681). Many countries differentiate between their citizens based on how they acquired their status, where they live, and what other citizenships they possess. Like the United States, Canada grants citizenship expansively to most persons born subject to the territorial jurisdiction at birth with little regard to their parent's citizenship or immigration status. In both nations, the norm of equal citizenship emerged out of a hard-fought battle against differentiating between citizens based on their race, national origin, gender, or other ascriptive characteristics. Canada's Charter of Rights and Freedoms also treats naturalized and native-born citizens as equals with the same democratic and mobility rights. But the Charter falls short of granting a specific constitutional right to citizenship at birth like Section 1 of the 14th Amendment to the U.S. Constitution, leaving Canadian immigration scholars like Catherine Dauvergne to argue that "constitutionalized birthright citizenship is uniquely American" (Dauvergne 2016, 21). In Canada, members of

Parliament can reconsider laws regarding the attribution and retention of citizenship, with consequences for native-born Canadians claims to citizenship.

In the wake of the "war on terrorism," new distinctions are emerging threatening the equal status and rights of Canadian citizens, regardless of where they live, how they acquired their citizenship, and what other citizenships they possess. Here, I document the erosion of equal citizenship status and rights in Canada under the guise of "strengthening citizenship" and protecting native-born citizens from terrorism and other security threats. Since 2014, dual nationals suspected of treason, terrorism, and foreign military service have become subject to expedited citizenship revocation, while naturalized citizens can have their citizenship revoked if it was later discovered that they did not intend to reside in Canada at the time of their naturalization (Strengthening Canadian Citizenship Act, 2014). Though the denaturalization provisions of the "Strengthening Canadian Citizenship Act" were devised by Stephen Harper's Conservative government, they have been used more aggressively under Trudeau's Liberal government in 2016 and 2017 (Dyer 2016). These measures aim at "strengthening" the Canadian citizenship of native-born residents at the expense of dual citizens, naturalized citizens, and non-resident citizens (Strengthening Canadian Citizenship Act 2014). They raise the danger of leaving naturalized Canadians stateless and denaturalizing native-born citizens without due process.

Equal Citizenship in Theory and Past Practice

As a confederation of settler societies colonized, conquered, and governed by the U.K, Canada shares with both the former British dominions and the incompletely republican United States in the legal heritage of *jus soli* citizenship that predated the American Revolution and the founding of the first colonies in North America (Galloway 1999, 203). The antecedent to the legal principle that a person born on Canadian soil is a citizen by birth, except if she is deemed subject to the jurisdiction of foreign power, can be traced back to *Calvin's Case,* a 1608 decision about whether a child born in Scotland was subject to the allegiance and jurisdiction of James I, king of England and Scotland (Bothwell 1993, 28-33). Canada's first Citizenship Act enacted in 1946 codified the principle of *jus soli* citizenship alongside with allegiance to the sovereign from birth (Buhler 2002). Coke's 1608 decision to elevate the rule of *jus soli* birthright citizenship above "judicial and municipal laws" ensured the universality and permanence of the rights conferred by this standard for the benefit of those born under the jurisdiction of the realm (Price 1997, 88). According to Coke, ". . . the obedience and ligeance of the subject to his sovereign be due by the law of nature [as] parcel of the laws, as well of England, as of all other nations, [is] immutable" (*Calvin v. Smith* 1608). This meant that an unpopular or powerless minority group – in this case King James VI's subjects in Scotland, but later extending to ethnic and racial minorities in the colonies – was not to be disenfranchised through a popular action of the privileges inhering from allegiance to the sovereign (Price 1997, 97-98). Before Canada acquired its own form of citizenship, the U.K. Naturalization Act of 1870, which applied to Canadians as British subjects, divested the *jus soli* of the illiberal implications of lingering early modern views about perpetual allegiance in response to U.S. complaints (Cockburn 1869, 38-41, 70-137; Fransman 1998, 166-167). This left a native-born British subject free to expatriate himself when naturalizing elsewhere (Salmond 1902, 57). Early in its history, the Canadian government did not

always respect this principle in practice, as when Crown prosecutors in 1885 sentenced Louis Riel, a naturalized U.S. citizen born in Canada, to death for treason for violating "the natural allegiance he owed as a native-born British subject" (Mumford 2007, 242-243).

Though "feudal" in provenance, the rule of birthright citizenship provides a powerful legal tool for counteracting attempts to apply another ancient Anglo-Saxon "corruption of blood principle" in later English and American law (Stier 1992). In its modern form, *jus soli* refers primarily to the political relationship between governments and citizens, preventing the hereditary transmission of statelessness or immigration status-based legal disabilities from one generation to the next (Shachar 2009, 115). By eliminating *jus soli* birthright citizenship, which guarantees the protection of the sovereign from birth to infants born subject to the allegiance and jurisdiction of the state, countries in the British common law heritage like the United Kingdom (1981), Australia (1986), Ireland (2004) and New Zealand (2006) have exposed the children of undocumented immigrants born there to statelessness (Dauvergne 2016, 20-21). They may also face insecure status in the country where they were born and raised because of their parents' immigration status and behavior up to the time of their birth (Carens 2013, 35-37). While common law countries like the U.K. and Australia now deny native-born children the positive automatic right of protection at birth as citizens if their parents are not legal permanent residents, they are reviving what was once the negative correlative duty of allegiance by activating dormant grounds for revocation for terrorism and treason charges as part of their citizenship laws (Pillai and Williams 2017, 19-20). Hence, despite its archaic provenance, the rule of birthright citizenship as articulated in *Calvin's Case* contains tools that are normatively defensible in light of Canada's constitutional commitments to values of inclusion and equal protection – insofar as it is not coupled with the original prospect that a breach of allegiance can result in the revocation of citizenship.

The Intent of the First Canadian Citizenship Act

The project of redefining His Majesty's British subjects residing in Canada as Canadian citizens was inexorably shaped by the experiences of defence workers and armed forces personnel federally mobilized to participate in total warfare – on the homefront and in combat overseas – as a nation-building project (Brodie 2002, 47-50). Thirty years before the first Canadian Citizenship Act, Canadian service in the First World War led Canada's British imperial representative to recognize a distinct duty-based Canadian political identity. In his 1919 Speech from the Throne, the Governor General noted that "from the terrible struggle in which our country has borne so notable a part, Canada emerges with the proud consciousness that in fulfilling her duty to civilization and humanity she has taken a high place among the world's nations" (Cavendish 1919, 414). In April 2017, one hundred years after the pivotal battle of Vimy Ridge, Justin Trudeau similarly interpreted the battle and Canada's involvement in World War I as a nation-building project whereby . . .

> . . . immigrants to this country . . . people of many languages and backgrounds, representing every region in Canada, fought for the values we hold so dear: freedom, democracy, and peace. In the words of one veteran: 'We went up Vimy

Ridge as Albertans and Nova Scotians. We came down as Canadians.' (Trudeau 2017).

Inclusion in Canada's wartime and post-war national identity was premised on a record of loyalty evidenced by shared sacrifice. Even so, mere ancestry in a nation at war with Canada was invoked during the First and Second World Wars as a sign of possible disloyalty and grounds for denaturalization (Cowen 2008, 61; Anderson 2008, 85). In the First World War, immigrants to Canada from the Austro-Hungarian Empire who came from what is now the western Ukraine were sent to internment camps irrespective of their individual loyalties. During the Second World War, both native-born and immigrant Canadians of Japanese origin suffered the same fate (Martin, Couperus, and Waltier 2016).

As Deborah Cowen argues in *Military Workfare* (2008), while "Canada is not typically understood as a military nation," mobilization for World War II "helped to transform a collection of peoples into a nationalized people" (Cowen 2008, 61). Their work and welfare were coordinated by the central government independent of its British and U.S. allies (Cowen 2008, 61; Byers 2016, 114-116). After the war, Secretary of State Paul Martin Sr., an MP representing Windsor, Ontario of French-Canadian descent, described his motivation for a Canadian Citizenship Act (1946) as emanating from a tour of the military cemetery at Dieppe as he contemplated the sacrifices of hundreds of thousands of Canadians "of diverse national origins . . . serving their country" at home and abroad. There, he claimed to have decided that "it was essential to incorporate into law a definition of what constituted a Canadian" (Martin 1993, 67).

The version of Canadian citizenship that came into being after the Second World War was a more multicultural nation-building project than its post-World War I predecessor. This time, Martin proposed a dispensation to substitute long residence for knowledge of English and French aimed at recognizing the contributions of Eastern Europeans who toiled to settle the Prairies, as well as their more recent "notable service to Canada" on our farms and in our factories," a notable turn of sentiment from the time when some Ukrainian settlers were held as suspected "enemy aliens" in World War I internment camps (Martin 1946, 505; Triadafilopoulos 2012, 59). But for Martin, the more important justification for independent Canadian citizenship was recognition that Canada had already proven itself to be a nation through the sacrifices of its citizens in two world wars where "we had borne our full and serious responsibility" (Martin 1993, 71). Despite resistance to conscription among his fellow French Canadians with an older, distinct ethnic understanding of identity to their homeland (Byers 2016, 233), Martin based his view of Canadian citizenship on a very traditional view that the rights of citizenship are most readily correlated to obligations of national defence (Martin 1993, 76-77). Accordingly, Paul Martin Sr. proposed that under the new Canadian Citizenship Act, naturalization should be preferentially extended to non-citizens who served overseas without prior Canadian residence "on the theory that if a man is prepared to fight for this country there should be no hesitation in granting him what we can grant by calling him a citizen of this country" (Martin 1946, 506).

John Diefenbaker, the Progressive Conservative MP from Lake Centre, Saskatchewan who would later go on to become Canada's 13th Prime Minister, wanted to go further than Martin by proposing the adoption of a Bill of Rights as part of the Canadian Citizenship Act

(Diefenbaker 1946b, 513). Diefenbaker's aspiration was meant in part to overcome racial prejudice, by "building for that unity which, beginning with the dreams of the fathers of Confederation, was cemented by a common sacrifice in two wars" making "service" the basis of a common Canadian citizenship (Diefenbaker 1946b, 511). The immediate occasion for Diefenbaker's concern to attach a Bill of Rights to the Canadian Citizenship Act was to protect native-born Canadians from being deported – notably – those of Japanese ancestry - without due process unless they committed treason (Diefenbaker 1946c, 1176-1177). This was a matter which Angus MacInnis (C.C.F. MP for Vancouver East) defended with greater urgency to protect Canadian citizens of Japanese ancestry from other British Columbia MP's representing citizens who continued to question their allegiance and loyalty after the war and demanded their deportation (MacInnis 1946, 1499-1502).

For MacInnis and Diefenbaker, the fact that Japanese-Canadians had fought on the side of the allies in both the First and Second World War was enough to establish that "these British subjects have vindicated the fundamental essentials of citizenship" and ought to be protected as such (Diefenbaker 1946b, 513-514; MacInnis 1946, 1501). MacInnis, Diefenbaker, and all those who supported combining a bill of rights with the Canadian Citizenship Act regarded citizenship status as nothing less than a fundamental right that ought to be protected without reference to race, creed and color (Diefenbaker 1946c, 1499; MacInnis 1946, 1500). Diefenbaker was emphatic in his defence of a rights-based Canadian citizenship. He insisted that a bill of rights be included as part of the Citizenship Act to "protect individuals in this country against acts of the Crown," namely, emergency power acts used against the Japanese during the war and suspected spies and communists by 1946 (Diefenbaker 1946, 138-140; Roy 2007, 208-209).[1] Martin resisted Diefenbaker's suggestion as unduly American, not in keeping with tradition, and infringing on provincial jurisdiction (Martin 1946b, 1310-1314). Diefenbaker's proposal was not included in the Canadian Citizenship Act, one in which Martin insisted that Canadian citizenship be defined not just in terms of rights, but rather in a feeling of belonging and a "partnership in the fortunes and in the future of the nation" (Martin 1946, 509). Presumably, those who naturalized elsewhere were deemed to have lost this "partnership" with Canada, as the Citizenship Act provided new provisions for denationalizing dual nationals including native-born Canadian citizens and their immediate family members who acquired another nationality, or served in another nation's military, even that of an ally like the United States, Britain or France (Canadian Citizenship Act 1946, §16-25). In the process, a generation of "lost Canadians" was created, children of Canadian-born citizens with no claim to Canadian citizenship until this provision of the law was invalidated on 17 April 2009 (Harder 2010, 208-211).

Allegiance and Protection: The Obligations and Rights of Citizenship

The common law understanding of birthright allegiance is a concept of political membership that comes with both rights and obligations. Where it is still operative, as is the case

[1]See also: Alastair Stewart (Winnipeg North, CCF), "Canadian Citizenship." *Dominion of Canada: Official Report – Debates House of Commons*, 20th Parliament, 2nd Session, Vol. 1. (21 March 1946), p. 701: "Then we had the Prime Minister of Canada (Mr. Mackenzie King) in the dying hours of the last session coming here and tabling three orders in council which had as their intent the deportation of Canadians of Japanese descent. I have nothing but contempt for any party which calls itself a Liberal party which can do a thing like that."

in Canada, it technically grants the newborn child of undocumented immigrants protection from deportation, but holds him liable to charges of betrayal if he later aids or fights for an enemy of the state. In the Anglo-American legal tradition writ large, allegiance to the state by birth or naturalization is an essential part of the crime of treason, for which past protection in exchange for loyalty is a necessary element (Kim 2000, 192; Lyon 2002, 41-42; Vasanthakumar 2014, 203). In Canada, citizenship is still defined in terms of allegiance to the Queen, observation of the laws of Canada and fulfillment of duties as a Canadian citizen (Citizenship Act, R.S.C. 1985, c. C-29, 2017). The permanent allegiance of the native-born citizen, as well as the naturalized citizen confers advantages like immunity from deportation and diplomatic protection abroad. But as of 2014, Canadian citizenship can once again be revoked by a government official (the Minister of Public Safety and Emergency Preparedness) for treason, which among other acts constitutes a breach of allegiance, and native-born citizens are not immune if they have a claim to nationality elsewhere (Ibid).

The first *Canadian Citizenship Act* (1946) made natural-born Canadian citizenship relatively easy to lose by a "voluntary and formal act," but with some notable exceptions that undermine recent comparisons by defenders of the citizenship-stripping provisions of recent changes to the citizenship act (Tamaki 1947, 78-79). Sections 16 and 17 provide that dual nationality acquired at birth, before the age of 21, or through marriage did not automatically result in the loss of Canadian citizenship (Canadian Citizenship Act, S.C. 1946, §16-17). These dual native-born citizens could only involuntarily lose their Canadian citizenship for "serving in the armed forces of any country when it is at war with Canada" (Ibid, §17(2)). In parliamentary debates on this provision, it was clear that Martin wanted to avoid denaturalizing dual nationals who served in the armed forces of a country or group not explicitly at war with Canada, including the United States and even armed factions like the 1930s Spanish Republican army (Martin 1946b, 1152, 1156). This is not the same as more recent 2014 changes to the citizenship act that allow the Minister of Immigration, Refugees and Citizenship to strip citizenship of persons who were sentenced to an "equivalent foreign terrorist conviction" in another country (Strengthening Canadian Citizenship Act 2014, §10(1)(b)).

Finally, Section 21 of the 1946 Act only allowed the Minister responsible for Citizenship and Immigration to "order a person other than a natural-born Canadian citizen to cease to be a Canadian citizen" for an act of treason, disloyalty, or fraud. Natural-born citizens, including Canadian-born dual citizens who did not lose their citizenship under Section 16 of the 1946 Act, were exempt from this citizenship-stripping provision (Canadian Citizenship Act 1946, §16). For natural-born persons who aided or fought for the enemy, Martin's preference, speaking for the Liberal minority government in power at the time, was to prosecute natural-born Canadian citizens in the courts rather than strip them of their citizenship (Martin 1946b, 1150). CCF Members of Parliament echoed Martin's view, with Robert Roy Knight (Saskatoon) arguing that Canadian-born citizens who fought for Japan should "be punished as Canadians. Let them be put in gaol as Canadians. If necessary let us shoot them as Canadians, but let us deal with them as Canadians. Let us accept responsibility for their upbringing and their environment" (Knight 1946, 1001). In short, while the 1946 Citizenship Act did contain citizenship-stripping provisions, they should not be seen today as a Canadian precedent for banishing native-born Canadians suspected of terrorism, when the government's preference at the time was to hold

them to justice in Canadian courts. Denaturalizing and deporting traitors and war criminals does not necessarily serve the cause of justice, when instead of being held accountable in Canada in full recognition of the heinousness of their crimes, they may be sent to countries where they may be welcomed home as heroes, or allowed to regroup and fight once again.

War Crimes: A Problem to Be Dealt With in Canada, With Expatriation as a Last Resort.

The Citizenship Act 1974-75-76 (c. 108) removed the provisions in the 1946 Citizenship Act for revoking citizenship for a breach of allegiance and punishing treasonous acts committed by former citizens, while permitting dual nationality by allowing Canadians who naturalized elsewhere to maintain their citizenship status (Forcese 2014, 559). As Trudeau's Secretary of State James Hugh Faulkner described the government's intent in 1975 and 1976, the changes to the Citizenship Act that went into effect in 1977 made the "grant, retention, resumption and renunciation of citizenship" a matter of right far less subject to the discretion of the Minister of Manpower and Immigration (Faulkner 1975, 5983, 5986). When Bob Kaplan (Liberal – York Centre, ON) proposed changes to the Citizenship Act to revoke the Canadian citizenship of convicted Nazi war criminals in October, 1978, members of his own party cited Faulkner's idea of citizenship as a right and international protections against statelessness to successfully challenge and table his proposal (Kaplan 1979, 3873-3874). David Collenette (Liberal – York East, ON) and Claude André-Lachance (Liberal – Rosemont, QC) argued that the 1976 Citizenship Act was intended to prevent banishment as a form of "cruel and unusual punishment" that also violated the Bill of Rights. They were in favor of holding naturalized Canadians to account for their crimes in Canadian courts instead (Collenette 1979, 3875-3876; LaChance 1979, 3877-3878).[2] Kaplan's bill was withdrawn for lack of support from his own party, and he was informed by the Justice Department in 1980 that no action against war criminals was possible under the 1976 Citizenship Act, an unintended consequence of the move from a duty and allegiance-based citizenship to a rights-based conception of Canadian citizenship (Troper and Weinfield 1988, 121).

Following a series of revelations in the 1980s that high profile Nazi war criminals were able to gain entrance to Canada and naturalize under false pretences after the Second World War, Brian Mulroney's conservative government established a Commission of Inquiry on War Crimes under the direction of Jules Deschênes of the Quebec Court of Appeal. The Deschênes Commission's 1986 report recommended amendments to the 1976 Citizenship Act, c. 108 that would "ease the revocation of citizenship of war criminals" (Deschênes 1986, 7, 9). The Commission's judgment was narrowly tailored to naturalization applicants deemed to have the mere "privilege" of citizenship, explicitly exempting Canadian-born citizens who held their citizenship as a matter of right and were protected from denaturalization under the 1946 and 1976 Citizenship Acts (Deschênes 1986, 108, 169). Furthermore, the Commission distanced itself from more expansive U.S. revocation and deportation practices, arguing that revocation did not serve the interest of justice, as "revoking citizenship merely "transfers the suspect to another

[2] "The deprivation of citizenship because of conviction for a criminal offence is inconsistent with the spirit of the [Citizenship] act [of 1976] which reduced the number of reasons justifying deprivation of citizenship. Such deprivation can be an extreme punishment by making the person concerned stateless . . . a direct breach by Canada of its international commitments pursuant to the Convention on the Reduction of Statelessness" (LaChance 1979, 3877-3878).

country," absolving Canada of the duty to ensure that suspects are tried for their crimes – in domestic courts if need be – with Canada serving as a "surrogate prosecutor" (Deschênes 1986, 86).

In subsequent debate in Parliament in 1987 on a bill based on the Deschênes Commission report, Attorney General Ray Hnatyshyn expressed a commitment not to change the Citizenship Act retroactively, but to pursue denaturalization cases based on fraud, which the Commission argued would be difficult to prove since immigration officials rarely asked applicants about their wartime activities (Deschênes 1986, 199; Hnatyshyn 1987a, 4079). Even amidst the gravity of this duty-based challenge to rights-based citizenship, Hnatyshyn argued that all Canadian citizens – even suspected war criminals – should benefit from the protections of the Charter of Rights and Freedoms and due process within Canada (Hnatyshyn 1987a, 4078). Robert Kaplan – who first proposed a citizenship revocation bill in 1978 - concurred with Deschênes that neither denaturalization nor expatriation serves the interests of justice, since "extradition puts the individuals in the hands of another country, however much we might respect that particular country" (Kaplan 1987, 4081). Instead of emphasizing citizenship revocation for war criminals like the United States, Canada's approach emphasized the exercise of universal jurisdiction over war crimes committed by its nationals and residents (Lafontaine 2011, 41-43, 337; Weil 2013, 178-179). With these provisions in place, Bill C-71 was adopted by Parliament and received Royal Assent on 16 September 1987 (Purves 1998, 17). The guiding principle in the 1987 debate about prosecuting, expatriating, and denaturalizing war criminals as a last resort is one that is worth revisiting as Canada and other Western governments seek to absolve themselves of their duty to protect and prosecute citizens suspected of terrorist or other criminal activities by allowing them to be removed them to another country. Canada has a duty to protect its territorially present citizens' rights to due process and to prosecute citizens for their crimes in Canadian courts rather than deporting them.

Between 1987 and 2007, only seven citizens were denaturalized as a result of Second World War related activities, by which time Canada's Program on Crimes Against Humanity and War Crimes announced that "criminal prosecution [in Canada] is no longer a viable remedy for Second World War cases due to the passage of time and death of most witnesses (Government of Canada 2007; Government of Canada 2008). In the meantime, the events of September 11 reignited the debate regarding whether citizenship should be seen as a right, used to protect Canadian citizens wrongfully accused of terrorist involvement, or a revocable privilege, used by the government as a security measure to scrutinize the allegiance of its citizens and deny its protection to both terrorism and war crimes suspects (Anderson 2008, 94). In November 2001, Andrew Telegdi (Liberal – Kitchener/Waterloo) condemned post-9/11 anti-terrorism measures as an extension of "star chamber" citizenship revocation procedures for war criminals outside the realm of the ordinary judicial process in contravention of Section 7 of the Charter of Rights and Freedoms (Telegdi 2001). In 2005, Telegdi led the multi-party House of Commons Standing Committee on Citizenship and Immigration which rejected revoking citizenship for treason or terrorism charges. As in the debate regarding war crimes prosecutions in 1987, the majority of the committee recommended that "once 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'" (Telegdi 2005, 3).

In modern war crimes and suspected terrorist cases, which constitute the focus of denaturalization proceedings today, denaturalizing and deporting a Canadian citizen does not serve the cause of justice or the prevention of future criminality. Rather, Canada has unjustly attempted to offload its responsibilities to countries with varying degrees of adherence to standards of due process observed in Canadian courts, with uneven capacities to monitor convicted offenders (Winter 2016). Once Canadian authorities have investigated and approved an immigrant's naturalization application, the government has a responsibility to hold its naturalized citizens accountable to its criminal laws, holding them in Canadian prisons if they are judged guilty as a means of ensuring the safety and security of its people.

Stripping Citizenship under the Guise of "Honouring the Canadian Armed Forces"

The citizenship-stripping provisions of the "Strengthening Canadian Citizenship Act" of 2014 were the culmination of a broader agenda aimed at redefining Canadian citizenship as a privilege rather than a right for naturalized and native-born dual citizens, making their claims to Canada's protection contingent on subjective and non-reviewable assessments of their allegiance and ties to Canada by Cabinet officials. While serving with a minority government, Stephen Harper's conservatives introduced changes to the Citizenship Act in 2007 that went into effect in April 2009 (Bill C-37), limiting Canadian citizenship by descent to the first generation of children born abroad (Becklumb 2008, 13-14). The Minister of Citizenship, Immigration and Multiculturalism, Jason Kenney (CPC – Calgary Southeast) justified the changes as a way to "ensure the value of Canadian citizenship so that permanent residents with little or no connection to Canada will not be able to pass on Canadian citizenship *ad infinitum* (Kenney 2009, 678). Opponents of the bill like NDP immigration critic Olivia Chow (NDP – Trinity-Spadina) argued that "the minister was creating a second-class of citizens" that further "penalized Canadians that work overseas" (Chow 2009, 678).

Kenney's crusade towards "ensuring the value of Canadian citizenship" by denying it to persons with less physical connection – and by extension, for Kenney, limited loyalty – to Canada expanded when his party won a majority government in May, 2011. Shortly after the Conservatives' re-election, in July 2011, Kenney announced that his department would revoke the citizenship of 1,800 naturalized citizens for suspected fraud, whereas only 70 naturalized citizens had their citizenship revoked between 1947 and 2011 according to data obtained by the CBC in 2012 (Payton 2012). On 30 May 2012, Devinder Shory (CPC – Calgary Northeast) introduced a private members' bill (C-425, An Act to Amend the Citizenship Act) intended to "honour the armed forces" by returning to earlier notions of duty-based citizenship. On the one hand, the measure would positively recognize the historic connection between military service and citizenship by making citizens eligible for expedited naturalization (Shory 2012, p. 8572). As was the case when the Citizenship Act of 1946 was debated in the shadow of the Second World War, with Paul Martin Sr. connecting military service to an entitlement to citizenship, Shory and his Conservative colleagues argued that in the midst of Canada's involvement in the conflict in Afghanistan, "to serve Canada in our military is a patriotic act of service worthy of

reward" through expedited naturalization (Martin 1946, 506; Shory 2012b, James 2013, 13428). Conservative, NDP and Liberal members of Parliament all expressed support for this positive, citizenship-as-participation aspect of Shory's bill to honour the sacrifices of soldiers and veterans, "encourage the armed forces to incorporate more landed immigrants" and facilitate immigration participation in national institutions more generally (Lamoureux 2013, 13425; Sims 2013, 13424; Groguhé, 14221).[3]

On the other hand, Shory's bill would "provide that individuals are deemed to have made applications for renunciation of their Canadian citizenship . . . if they engage in an act of war against the Canadian armed forces," making citizenship once again contingent upon continued allegiance (Shory 2012, 8572). This aspect of the bill concerned Liberal and NDP MP's as early as the first reading, with the citizenship stripping procedure singled out by Jinny Jogindera Sims (NDP - Newton—North Delta) and Sadia Groguhé (NDP – Saint Lambert) as a possible threat to the due process rights of Canadians that may render dual nationals and naturalized Canadians stateless, for a crime not explicitly defined in Canadian law (Sims 2013, 13424). Sims and Groughé's concerns about this aspect of the bill were prescient. As debate on C-425 moved forward, it became clear that Shory's bill had Conservative support – on the backbench and in Cabinet – more for the citizenship-stripping aspect of the legislation than rewarding the sacrifices of immigrant soldiers. First, Rick Dykstra (CPC- St. Catharines) justified the citizenship-stripping provisions of C-425 as an extension of ancient penalties for treason as a breach of allegiance against the sovereign. He connected the proposal to his government's broader expansion of citizenship-stripping measures for fraud, commenting favorably on the revival of citizenship-stripping and banishment procedures in Australia and the U.K. "if it is in the public interest," which he acknowledged was "a much lower and more vague standard than the sponsor of this bill or the minister have suggested" (Dykstra 2013, 14220). Outside the House of Commons on 6 February 2013, Immigration Minister Jason Kenney suggested "we should consider working with Shory to broaden the scope of his bill to include not just acts of war against Canada by Canadian citizens, but perhaps we should also consider acts of terrorism" (*CBC News* 2013). Kenney's justification for shifting Shory's bill from honouring exemplary citizens with expedited naturalization to stripping citizenship from suspected terrorists was partly punitive, and partly in keeping with his objective to reorient Canadian citizenship from an inalienable right towards its ancient predecessor, a revocable privilege with protection contingent on continued allegiance. Going beyond all antecedents in Canadian citizenship law, Kenney urged that this power be applied to dual nationals, even those born in Canada who did not take an oath of allegiance to become a citizen by consent (*Ibid*). By contrast, the Canadian Citizenship Act of 1946 did not automatically strip dual citizens who acquired their other nationality as a minor, or by marriage, of citizenship (Sections 16 and 17). Penalties for disloyalty and treason were reserved for naturalized citizens (Sections 17 and 21).

In spite of Kenney and Dykstra's broader ambitions for the bill, NDP and Liberal MP's voted unanimously with their Conservative colleagues to allow the bill to proceed to a Second Reading after a 275 to 3 vote – with NDP and Liberal support premised on the provision for

[3] "Our military make sacrifices. Sometimes, they even make the ultimate sacrifice. As parliamentarians, it is our duty to give them all the recognition they deserve. Therefore, acknowledging this exceptional contribution by speeding up citizenship approval would be welcome" (Groughé 2013, 14221).

expedited citizenship for armed forces personnel and the need for further debate on the citizenship-stripping provisions, which they opposed (Vote No. 620 2013; Colter 2013, 14218; Davies 2013, 14222). After C-425 was referred to the Standing Committee on Citizenship and Immigration – with Conservative support for the citizenship stripping clauses and NDP and Liberal support only for expediting citizenship for immigrants in the military, Conservative members of the committee concluded by recommending "that it be granted the power . . . to expand the scope of the Bill such that the provisions of the bill be not limited to the Canadian Armed Forces" (Tilson 2013). In committee meetings, Kenney passed quickly over the stated purpose of the bill, to expedite naturalization for immigrant armed forces personnel." Instead, he argued for a revised version of the bill that would "enhance our ability to take [citizenship] away from those who undermine our national security" covering "anyone who serves as a member of an organized armed group in armed conflict with Canada" (Kenney 2013b). The premise for Kenney's support for citizenship-stripping was that:

> The oath of citizenship and indeed this legislation reflect the idea that citizenship is founded upon the premise of reciprocal loyalty. If one violently renounces that reciprocal loyalty, we should consider that a renunciation of their citizenship. 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 (*Ibid*).

The revised bill focused not on positively rewarding immigrant soldiers with expedited naturalization, but on negatively retracting citizenship status and rights from dual citizens, including Canadian-born citizens *suspected* of membership in a group deemed to have terrorist affiliations. Such affiliations could be understood very broadly, within the discretion of the Minister of Immigration and Citzenship, or even a foreign government whose conviction of a Canadian on a terrorist charge could be taken into consideration in a denaturalization proceeding. The bill was consistent with Kenney's broader objective to redefine and separate Canadian citizenship into two tracks. Citizenship would continue to be a right for native-born Canadians with no other nationality as a concession to Canada's treaty obligations under the 1961 Convention on the Reduction of Statelessness (*Ibid.*). For naturalized and native-born Canadians who acquired another nationality at birth, marriage, or naturalization abroad, the protection of citizenship status would again become a privilege contingent on subjective assessments of a citizen's allegiance.

Following the revision of Devinder Shory's original private members' bill, NDP and Liberal members of Parliament withdrew their support for the measure, casting the expedited naturalization provision of the original "Honouring the Canadian Armed Forces" private members' bill as a Trojan horse for the Conservative government's citizenship-stripping agenda (Rae 2013, 15922; Cohen 2013). Notwithstanding this opposition, both the citizenship-stripping and expedited military naturalization elements of C-425 were incorporated into a broader Conservative bill, C-24, sponsored by the Minister of Citizenship and Immigration, Chris Alexander in 2014 (Shory 2014, 3611). C-24 provided the Minister of Citizenship and Immigration with the discretion, absent further judicial review, to revoke the citizenship of any naturalized or dual citizen "convicted of 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" (Strengthening Canadian Citizenship Act 2014, §10.(1)(2)(b)). Minister Alexander's vision regarding what "does our citizenship look like in the 21st century" involves:

> . . . less fraud and more penalties . . . constitut[ing] a very profound deterrent, not just to younger generations, but to all Canadians, and a reminder that allegiance and loyalty to this country require that these grave crimes be avoided at all costs. When they are committed, they will be punished" (Alexander 2014).

Alexander wanted to emphasize that his government was committed to redefining the meaning of Canadian citizenship away from a rights-based vision which he deemed to have "neglect[ed] issues of loyalty and allegiance" (Alexander 2014). No one would have a secure right to citizenship. Instead, like Kenney, Alexander wanted Canadian citizenship to be a forfeitable privilege, bound to continued good behavior and allegiance to its government's laws.

C-24 passed on a straight party-line vote with 137 Conservatives voting in favour, and every Liberal, NDP, and Green party member present voting against the measure, and it became law on 19 June 2014 (Vote No. 210, 2014). Conservative MP and Parliamentary Secretary to the Minister of Foreign Affairs and for International Human Rights, Deepak Obhrai abstained and refused to vote for the measure. He protested that "when a Canadian citizen's citizenship is revoked . . . we are treating one Canadian differently from another Canadian, and in my opinion that is against a fundamental human rights provision . . . a Canadian is a Canadian is a Canadian. We do not talk about dual nationality" (Obhrai 2014, 5786). Obhrai's insistence on equal citizenship rights became a rallying cry during the 2015 election when very similar language was taken up by the Liberal and NDP leaders.

Just before C-24 became law, opposition MP's raised the specter that a dual Canadian-Egyptian citizen, Mohamed Fahmy, who was convicted of terrorism in Egypt for his activities as a journalist could be stripped of his Canadian citizenship (Mathyssen 2014). Fahmy's effective rights and protections as a citizen were subsequently limited when he was denied a Canadian passport in February 2015 by Citizenship and Immigration Canada based on the Egyptian charges against him (Ward 2015; Fahmy 2016, 332).[4] The Fahmy case only added to concerns raised by Amnesty International and other human rights groups that changes to the citizenship act would provide a pretext for foreign governments to prosecute dual Canadian citizens with impunity. Regime opponents and human rights activists could be convicted of trumped-up terrorism charges that would trigger a denaturalization proceeding in Canada, denying them protections as Canadian citizens (Amnesty International 2014).

Conservative Party changes to citizenship, immigration, and multicultural policies were hot button issues that helped to decide the outcome of the 2015 Canadian election as the asylum

[4] Fahmy was eventually granted a replacement passport by the Canadian Ambassador to Egypt on 22 April 2015, which he attributes to intense political pressure exerted by NDP and Liberal MPs who raised the issue of ineffective consular services and government advocacy on his behalf during debate in the House of Commons (Fahmy 2016, 339-340; Trudeau 2015, Mulclair 2015; Dewar 2015).

crisis in Europe hit home with the drowning death of a Syrian toddler, Alan Kurdi, whose family was forced to flee by sea after they were rejected for refugee status in Canada (Dornan 2016, 17-21). Beyond merely defending his government's citizenship-stripping and immigration policies, Harper argued in a 17 September 2015 debate that "not providing health care to 'bogus refugees and immigrants'" was something that "new and existing old stock Canadians agree with," in a comment reminiscent of Jacques Parizeau's condemnation of "*l'argent et les votes ethniques*" after his loss in the 1995 referendum (Macleans 2015). The NDP leader, Tom Mulclair seized upon this ethnically charged comment and Harper's defence of his government's citizenship-stripping provisions to argue that the Conservatives were "dividing Canadians one against the other, creating two different categories of citizenship" (Peritz 2015).

After the election, then-Immigration, Refugees, and Citizenship Minister John McCallum (Liberal – Markham-Thornhill, ON) introduced changes to the Citizenship Act designed, in part, to repeal the "ground for citizenship revocation that allowed citizenship to be taken away from dual citizens for certain acts against the national interest of Canada" (McCallum 2016). The underlying normative reasoning behind this measure was consistent with the principle advanced by John Diefenbaker, along with many CCF members of Parliament during the first Canadian Citizenship Act debate in 1946, and both Liberal and Conservative MP's arguments during the debate on war crimes in 1987. No one should escape justice for their crimes, in Canada, or abroad. Canada's justice system provides lengthy prison terms for those convicted of war crimes and terrorist offenses. Denaturalization and deportation merely shifts the burden of justice to another country with less oversight, where they may avoid prosecution altogether. In the interests of justice for individuals and national security, all Canadians should be accorded the same legal protections and held to the same legal responsibilities, regardless of their place of birth or other nationality.

Conclusion: The Continued Fragility of Rights-Based Citizenship in Canada

On 17 June 2016, the House of Commons passed the third reading of Bill C-6, "An Act to Amend the Citizenship Act," containing provisions which nullified the intent to reside in Canada provision of the Citizenship Act, and restoring the revoked citizenship of dual and naturalized citizens who were denaturalized under the *Strengthening Canadian Citizenship Act* of 2014 (Bill C-6, 2016). The measure is not yet law. Meanwhile, the number of revocations of Canadian citizenship per month is continuing to increase since the 2015 election that brought the Liberal government to power in part on a promise to repeal citizenship revocations for Canadian-born dual citizens (Dyer 2016).[5]

Aside from the issues raised by recent citizenship revocation measures for terrorism charges, Canadian-born individuals with a possible claim to dual citizenship remain prone to involuntary denaturalization, or a denial by Immigration, Refugees and Citizenship Canada that they were ever a citizen in the first place. By contrast, in the U.S., where the older common law

[5] On 10 May 2017, Justice Jocelyne Gagné ruled that the citizenship revocation process in place now violates Section 2(e) of the Canadian Bill of Rights, which says no law should deprive someone of the right to a fair hearing. The government has 30 days to appeal the decision (*Hassouna v. Minister of Citizenship and Immigration*, 2017).

jus soli citizenship rule is entrenched in Section 1 of the Fourteenth Amendment to the United States Constitution, birthright citizenship is protected a matter of constitutional right, in spite of later controversy surrounding this issue (*Wong Kim Ark v. United States* 1898, 658-667, 694; Schuck and Smith 1985). For instance, the U.S.-born children of undocumented immigrants are deemed U.S. citizens at birth by the U.S. State Department, even if they were born in an immigration detention facility physically located in the U.S. (U.S. State Department 2014). Both Canada and the U.S. exclude the children of foreign diplomats from acquiring citizenship at birth on their territory as persons "not subject to the jurisdiction" of the country (Citizenship Act, R.S.C. 1985, c. C-29, 2017, §3(2); U.S. Department of Homeland Security 2016). The list of exempted personnel is more extensive in Canada, extending beyond diplomatic and consular officials (the U.S. State Department exemption) to include "an employee in the service of a person" listed above.[6]

The latter section is at issue right now in the case of Deepan Budlakoti, a stateless Ottawa, Ontario-born child of former "domestic helpers to the Indian High Commission to Canada," whose claim to Canadian citizenship at birth was denied in Federal Court in 2014, followed by a dismissal of his appeal to the Canadian Supreme Court in January 2016 (*Budlakoti v. Canada* 2014, §17-19; CBC News 2016).[7] Budlakoti has an Ontario birth certificate and he had successfully obtained a Canadian passport in the past. His citizenship status was called into question after he was convicted of narcotic trafficking and sentenced to three years in jail (Stasiulis 2017, 12). During his sentence, prison officials initiated contact with Citizenship and Immigration Canada, which determined that Budlakoti was never a Canadian citizen despite his Ontario birth to parents who were ordinary immigrants at the time of Budlakoti's birth (Stasiulus 2017, 17). Budlakoti remains in Canada, but only because the government of India, his parents' country of origin, refuses to acknowledge him as their citizen. As a result, he is effectively stateless, with limited legal protections and no social or political rights in Canada (LoFaro 2017). Budlakoti's case demonstrates that the protections that traditionally accompany *jus soli* birthright citizenship in Canada are not inviolable for those who commit criminal offenses that fall far short of the breaches of allegiance that were deemed grounds for denaturalization in terrorism and treason cases in the past. The further problem at stake here, and in other citizenship-denial and revocation cases, is that Canadian citizenship is not explicitly protected as a matter of constitutional right against involuntary revocation.

As a suggestion for further research following up on matters within the scope of this paper, I suggest that a strong normative case can and should be made for explicitly protecting Canadian citizenship as a Charter right, as American citizenship is under multiple interpretations of Section 1 of the Fourteenth Amendment to the U.S. Constitution (Weil 2013, 173-175; Lenard

[6] Citizenship Act, R.S.C., 1985, c. C-29, current to December 31st, 2016 (Section 24, Oath or Affirmation of Citizenship).

[7] By contrast, in the United States, these exemptions only apply to diplomats listed in the State Department Diplomatic List with full privileges and immunities, and would not apply to service staff, whose children would be entitled to U.S. citizenship at birth. Even the children of diplomats on the blue list can receive legal permanent resident status at birth in the United States (U.S. Department of Homeland Security 2016).

2016, 77).[8] This point was underlined by U.S. Supreme Court Justice Hugo Black's opinion in *Afroyim v. Rusk* (1967) that:

> . . . in our country, the people are sovereign, and the government cannot sever its relationship to its people by taking away their citizenship . . . 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. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship . . . (*Afroyim v. Rusk* 1967, 257, 268).

Only when the Canadian Charter of Rights and Freedoms similarly offers explicit protection for a Canadian citizens' right to citizenship, regardless of how they obtained it, can all Canadians hope to be protected in the security of their legal citizenship status against the vagaries of political assessments of their character, allegiance or connections to their country.

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[8] Naturalized U.S. citizens can lose their American citizenship if they committed war crimes, or committed fraud during the naturalization process (Weil 2013, 178-180). Immigrants to the U.S. who receive expedited naturalization based on their U.S. military service during a war can also be denaturalized if they are dishonorably discharged less than 5 years after their enlistment (Stock 2012, 87).

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