Senate Bill Would Preserve Citizenship Oath to the Monarchy, "Notwithstanding" Charter Challenges

New citizens of Canada are required to swear an oath that includes the promise to "be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors."[1] Most citizens are born in Canada, so they never have occasion to reflect on the meaning on these words. And the vast majority of new citizens, whatever the words of the oath might mean to them, make no objection to this ceremonial step to naturalization. Still, there are some who have strong beliefs and convictions on the meaning of the oath, and feel that having this wording foisted upon them infringes their *Charter* rights. The issue has been before the courts, but has yet to be definitively settled.

Senator Hugh Segal seems to worry that the citizenship oath is vulnerable to ongoing litigation. On February 10, 2009, he introduced Bill S-225, *An Act to Amend the Citizenship Act*.[2] His private member's bill would insert a provision to retain the citizenship oath notwithstanding sections 2 and 15 of the *Charter*. If it passes into law, it would mark the first time the Parliament of Canada has employed the section 33 *Charter* override clause, the "notwithstanding clause." With this change to the law, the oath would be required despite any court decision that might find it contrary to the specified *Charter* rights. This constitutional override would expire after five years, in accordance with section 33(3); to keep it would require a new vote of Parliament.

The Citizenship Oath in Jeopardy?

Toronto lawyer Charles Roach, who immigrated to Canada in 1955, has been leading the charge against the citizenship oath. He contends that the oath violates all of his fundamental freedoms (as set out in section 2) and his equality rights guaranteed by section 15 of the *Charter*.

Roach lost his first court challenge 15 years ago,[3] but decided to re-open the matter in 2005 as a class action suit involving several others who are philosophically, politically or religiously opposed to pledging allegiance to Queen Elizabeth or the monarchy in general.

In 2007, Judge Belobaba of the Ontario Superior Court of Justice heard a motion

from the government to strike out Roach's application for a class proceeding. Judge Belobaba held that recommencing litigation is "neither frivolous nor vexatious," considering the passage of time, the newly developed arguments and the new group of litigants.[4] He also referred to dissenting judicial opinion and academic literature that lent merit to the arguments against imposing the oath on all new citizens.[5]

Judge Belobaba pointed out that "there is nothing in the Constitution Act that requires a Canadian oath of citizenship or that a new citizen must swear allegiance to the Queen."[6] He went on to refer to the example of Australia (another Commonwealth nation) that requires new citizens to make only a "pledge of commitment" to "Australia and its people … and laws."[7]

On January 23, 2009, the Ontario Superior Court dismissed Roach's application for class action certification. Nonetheless, Judge Cullity made it clear that the door to individual proceedings has not been closed.[8] The court made no ruling on the merits of the *Charter* arguments.

Notwithstanding Clause to the Rescue?

During debate on April 10, 2008, Senator Segal said that he would make no comment on the validity of the court cases seeking to strike down the citizenship oath.[9] Yet he maintained that "the core symbols of our citizenship, the core institutions of our society and the values they reflect and defend are not just another list of negotiable preferences to be chopped up in court challenges."[10]

It seems unlikely that Parliament will pass Bill S-225 and thus invoke section 33 of the *Charter*. Aside from the Quebec National Assembly, which protested the *Charter* in the years after it first came into effect by routinely employing the "notwithstanding clause", the clause has been used just three times. Parliament has never used the clause.[11]

Senator Segal addressed the reluctance of Parliament to employ section 33:

> *The phobia around the use of the 'notwithstanding' clause is narrow-minded and, in my humble view, anti-democratic. The phobia has the effect of gutting the careful balance negotiated in 1982 between courts and elected parliaments, assemblies and legislatures of Canada. That balance was endorsed by this chamber, the other place and nine legislatures, assemblies or provincial parliaments at the time. Honourable senators, I do not suffer from that phobia.[12]*

On May 28, 2009, Senator Fred Dickson reported to the Senate that he had been in discussions with Senator Segal and that debate on second reading was

expected to resume the next week.[13]

Further Reading

Notwithstanding Clause, *Centre for Constitutional Studies.*
Peter Lougheed, Why a Notwithstanding Clause?, *Centre for Constitutional Studies.*

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[1] Citizenship Act, RSC 1985 c C-29, s 24.
[2] 2nd Sess, 40th Parl, 57-58 Elizabeth II, 2009.
[3] *Roach v Canada [1994] 2 FC 406.*
[4] *Roach v Canada* (2007), 86 OR (3d) 101 at paras 24, 25, 34.
[5] *Ibid.* at paras 15-20.
[6] *Ibid*. at para 8.
[7] *Ibid*.
[8] *Roach v. Canada (2009)* CanLII 7178 at para 83.
[9] Senate of Canada, *Hansard* (10 April 2008) at 1510.
[10] *Ibid*.
[11] Hogg, Peter W, *Constitutional Law of Canada*, 4th ed, (Toronto: Thomson Carswell) at chapter 36.2.
[12] *Supra*, note 9.
[13] Senate of Canada, *Hansard* (28 May 2009) at 1550.