

①

is full view of a
face important to
truthfinding?

re-trial/prelim.
Ordered to remove
post SCC test

N.S. Niqab Case 2012

still express via eyes, body language & gestures

no effect on clarity, tone, inflection of voice, cadence of speech,
or substance of answers

N.S. v. R. (SCC) Judgement December 20 2012

N.S. v. R. involves a sexual assault complainant who wears a niqab – a veil that covers the face, with the exception of the eyes. The question before the SCC was whether N.S. can access the Canadian justice system wearing her niqab.

→ Women's Legal Education and Action Fund

LEAF intervened before the Ontario Court of Appeal and the Supreme Court of Canada.

N.S., who is now in her 30s, alleges that she was repeatedly sexually abused as a child from the ages of 6 – 12 by her uncle and cousin (the accused). N.S. reported the alleged abuse to a teacher when she was a child, but her father convinced the police not to lay charges. As a result, charges were not laid until 2007.

On the first day of the preliminary inquiry, the accused objected to N.S. wearing her niqab while ~~giving~~ testifying, asserting a right to "demeanour evidence", including N.S.'s full facial expressions.

✓ The preliminary inquiry judge ordered the complainant to remove her niqab. The Ontario Superior Court of Justice and the Ontario Court of Appeal quashed that order. The lower courts, however, did not hold that N.S. has a right to wear the niqab. Instead both courts directed that the accused's objection be re-considered by the preliminary inquiry judge. N.S. is appealing to the SCC for an order that she is entitled to wear the niqab at the preliminary inquiry and trial.

LEAF argued that N.S. is entitled to wear her niqab at the preliminary inquiry and trial, and that an Order requiring N.S. to remove her niqab as a precondition to testifying would violate her rights under ss.7 and 15 of the Charter.

LEAF argued that the accused's objection to the complainant testifying in her niqab must be situated in the context of the historical and ongoing legal and procedural norms that re-victimize sexual assault complainants and reinforce their inequality.

In particular, LEAF argued that the objection must be seen in the context of defence tactics to "whack the complainant." In other words, the removal of the niqab in this context is best understood as an attempt to humiliate, degrade and intimidate the complainant. Such intimidation can force a complainant to withdraw from participating at trial, likely putting an end to the prosecution.

LEAF's submission was that whatever one's personal views are on the niqab, effectively disenfranchising sexual assault complainants who wear the niqab from the criminal justice system is inconsistent with promoting their substantive equality and respecting and protecting their s.7 Charter rights to life, liberty and security of the person.

s.15

an investigation into the purpose and impact of the law, as well as a consideration of the impact of historical disadvantage – acknowledges circumstances in which treating competing

In a split decision, the SCC imposed a test aimed at balancing the complainant's rights against those of the accused.

<http://www.leaf.ca/r-v-n-s-scc/>

* gendered analysis

CLT

- account for disproportionate impact sexual assault trials have had on female victims throughout history
- no simply about religious freedom, about women's access to justice when she has faced violence, & how a male dominated court system can block that access
- SCC test further isolates women who have faced violence
- too much emphasis on demeanour (appearance & behaviour)
- court assumes facial expressions necessary to tell truth
- reinforces common myth that there are specific mannerisms a sexual assault victim must show to be believed (i.e., behave like a 'real' victim)
- removal = re-traumatize victim by creating a space of extreme discomfort
- critical level of underreporting is further heightened

realist

everyone
equally is
not the same
as treating
everyone the
same

owj.n.org
(Ont. Women's
Justice Network)

misinterp. as
untruthful

Courts against our system of open, independent courts & blocks communication / values of openness & religious neutrality



OWJN Article "Competing Rights: R. v. N.S. 2012"

Natural Law Conflict

- ① rights to religious freedom (how genuine is her religious belief? test)
- ② rights to trial fairness (full answer & defence)
- ③ rights of women survivors of sexual violence to every opportunity to defend oneself esp. at access justice trial...

DOES covering one's face (witness) interfere with trial rights of accused (particularly for religious reasons)

SCC ruling - decide on case-by-case basis and no one solution can apply to every case **REALIST**

Presumption of: cross-examination & testing credibility

depends on the kind of evidence witness is providing

R. v. N. S.

December 20, 2012

In R. v. N.S., the Supreme Court of Canada ruled on whether a witness in a preliminary inquiry in a criminal case should be allowed to wear a niqab for religious reasons while testifying.

N.S., who at the time of the inquiry was an adult woman, alleged that she had been repeatedly sexually abused as a child by her uncle and cousin (the accused). On the first day of the preliminary inquiry, the accused objected to N.S. wearing her niqab while testifying, asserting a right to "demeanour evidence", including N.S.'s full facial expressions. The issue proceeded to the Supreme Court, which ruled that the right of a witness to wear a niqab while testifying must be decided on a case-by-case basis, having regard to a four-part test:

(1) Would ordering the witness to remove the niqab while testifying interfere with her religious freedom? **s. 2(a)**

(2) Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness for the accused? **s. 11(d)**

(3) Is there a way to accommodate both rights and avoid the conflict between them?

(4) If no accommodation is possible, do the positive effects of requiring the witness to remove the niqab outweigh the negative effects of doing so? **SUBJECTIVE**

(e.g., societal norms such as discouraging reporting by women, discouraging participation in justice system)

The Court sought to balance the witness' right to religious freedom under s. 2(a) of the *Canadian Charter of Rights and Freedoms* with the accused's right to a fair trial under sections 7 and 11(d) of the *Charter*. It held that a judge must assess whether there is a way to accommodate both sets of rights and to avoid the conflict between them—including by utilizing reasonably available alternative measures that would allow the witness to follow her religious convictions while still preventing a serious risk to trial fairness. Ultimately, however, the Court held that, even where a witness has a sincere religious belief, she will be required to remove her niqab if it poses a significant risk to the right of the accused to a fair trial. Factors affecting trial fairness will include whether the witness' proposed evidence is central to the trial, and whether the evidence is contested.

<http://goldblattpartners.com/experience/notable-cases/post/r-v-n-s/>

No reasonable alternatives that will prevent a risk

in what sexual assault case is the victim's testimony NOT this? NONE this niqab will always be a risk

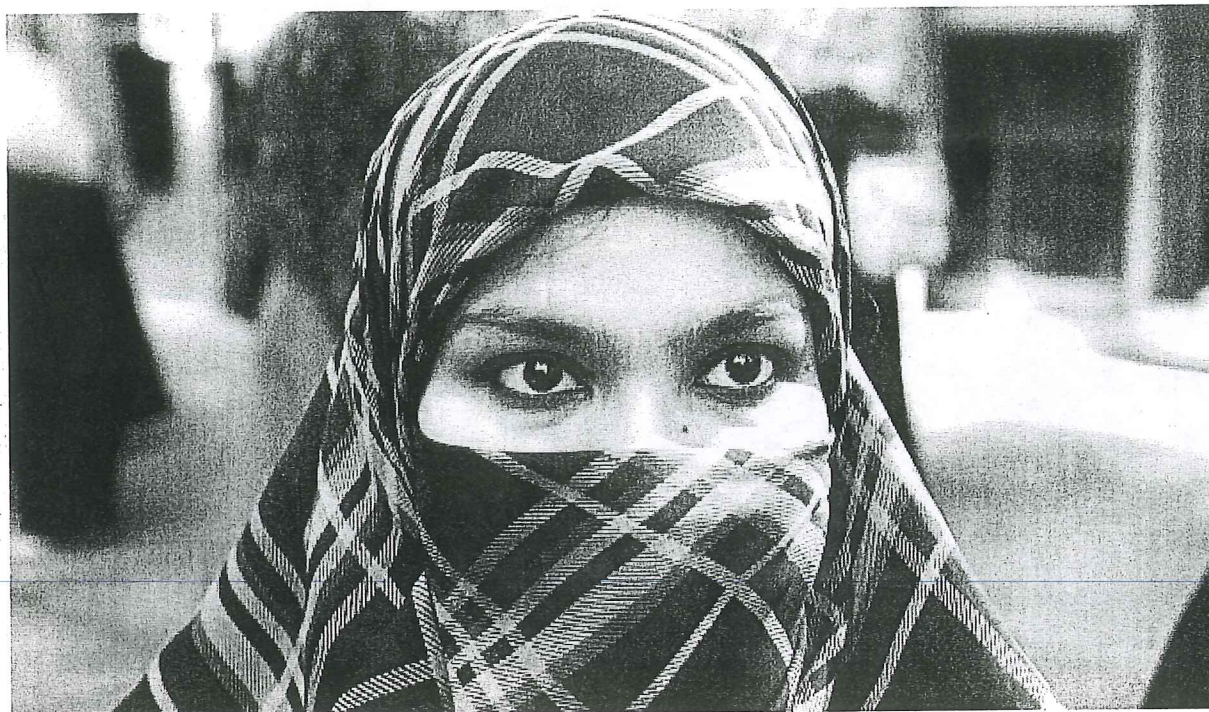
- ① evidence NOT contested
- ②

Justice Abella (dissent) only judge to provide a gendered analysis (**CLT**) that was sensitive to the realities of sexual assault complainants [inability to charge/testify/participate more severe than inability to see her face] appearance of witness not absolutely critical to testing truth/credibility (i.e., necessary to see full face) e.g., where appearance/behaviour obscured — illness (e.g., stroke), use of language interpreters

②

Zunera Ishaq Niqab Citizenship Oath Case

Canada (Citizenship and Immigration) v. Ishaq FCC (2015)



ANALYSIS

Charter of Rights and the niqab collide in views on 'Canadian values'

It seems Canadians love the charter and dislike the niqab -- which makes acting on those feelings problematic

By James Fitz-Morris, CBC News Posted: Oct 04, 2015

More fuel for those who stereotype Canadians as a dry, boring people.

Statistics Canada said last week that more than 90 per cent of us, when asked, identified the Charter of Rights and Freedoms as an "important symbol of Canadian identity."

Hockey is down in fifth place on Statistics Canada's list of national symbols — although still chosen by 77 per cent of respondents.

The high value Canadians continue to place on the charter is interesting, especially when you consider how charter rights have become a surprising, and apparently game-changing, issue in this election campaign.

According to the government's own polling, 83 per cent of Canadians support forcing a Muslim woman to remove her niqab to take part in the oath of citizenship.

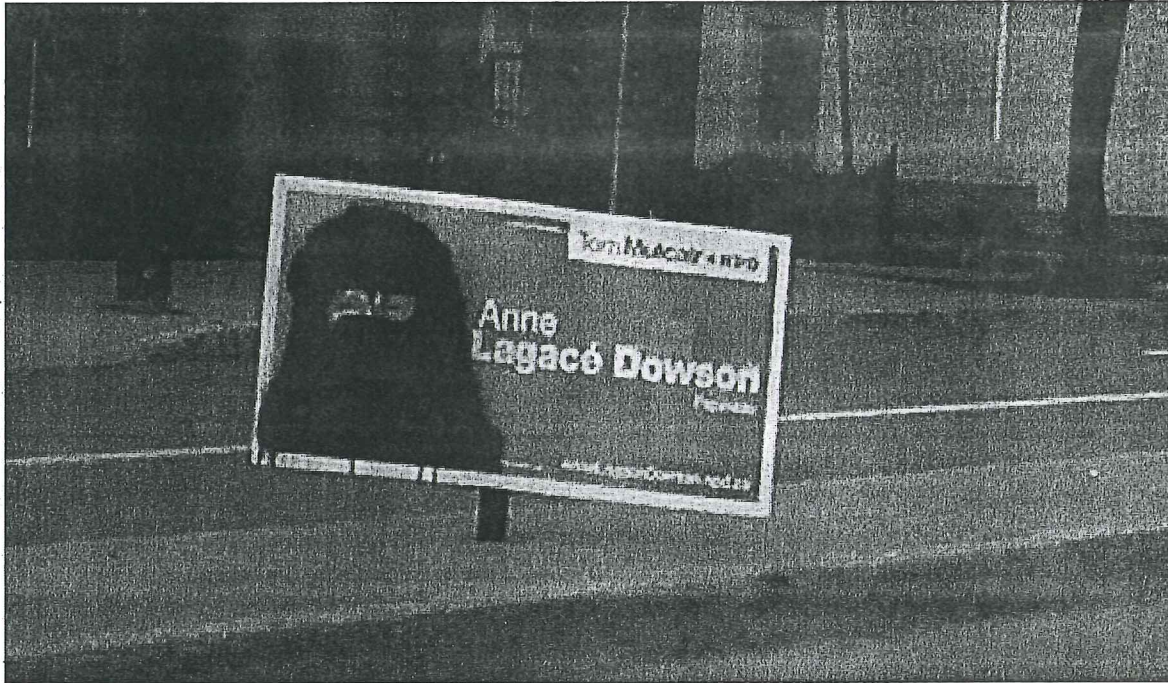
People are, of course, entitled to hold opinions and to express them. *S.2(b) → violence, hate, not protected forms of expression*

Section 2 of the charter makes sure of that.

The protections of the charter don't extend to petty acts of vandalism, nor to the promotion of hate against groups of people based on their racial or religious background.

Nor does it cover attacking a pregnant woman on the street for, apparently, wearing a hijab.

Far from being an isolated incident, Statistics Canada reported earlier this year that "Muslim populations had the highest percentage of hate crime victims who were female (47 per cent)."



The Conservative government announced the niqab ban in 2011 and brought in a regulation to enforce it.

Twice now, the courts have pointed out the regulation doesn't conform with the existing law and struck it down.

It's a point the Conservatives seem to have already conceded as they introduced new legislation on the very last day of the House of Commons to fill the hole.

Nonetheless, they are pursuing their challenge to the Supreme Court.

No court has yet ruled, or even heard, arguments on the constitutionality of the ban.

What the charter says

There is good reason to believe it infringes on a number of aspects of Section 2 of the charter — including the right to religion, expression and association — as well as Section 15, which guarantees no one is to be singled out based on religion or gender.

Both of those sections, by the way, guarantee fundamental rights to "everyone," meaning all people residing in Canada whether or not you have become a full citizen yet.

Section 1, of course, allows for "reasonable limits" that can be "demonstrably justified."

If the government's new legislation is passed, there can be little doubt it will be challenged.

Courts will be asked if it is "reasonable" to deny a woman citizenship because — after having removed her veil to prove her identity — she would like to replace it for a public ceremony

different then

benefits of
protecting
the rights
to claimant

why is it so important in a ceremony

to remove it?

social benefit
of denying the
claimholders'
right

Citizenship and Immigration Canada acknowledges that, in the nearly four years the ban has been in place, two women have chosen not to go through with the ceremony and receive citizenship as a result.

So, to show the ban is "demonstrably justified," the courts will likely have to look at the consequences of decades of letting about one veiled woman take the citizenship oath every other year.

On Thursday, Conservative candidate Pierre Poilievre was the latest from his party in this election campaign to add his voice to support the niqab ban.

"We are not going to succumb to political correctness in order to accommodate a practice that is not in line with Canadian values," he told reporters.

↳ such as...?

It seems like an odd way of looking at "political correctness" though.

The minuscule number of women affected by this are asking to do what they do in their daily lives and, until four years ago, were allowed to do at citizenship ceremonies.

So, is it those who would defend their right to do so at a citizenship ceremony who are suffering from political correctness, or those whose sense of Canadian values are offended by what's happening at a ceremony the vast majority of Canadians have never attended?

↳ cut against the Charter values

That may ultimately be up to the Supreme Court to decide.

<http://www.cbc.ca/news/politics/canada-election-2015-charter-and-niqab-analysis-1.3254167>

3

Exclusive: Tories move from Canadian-born terrorist

Case of Saad Gaya, convicted bomb plotter, a major test for controversial new law

Michael Friscolanti

September 30, 2015



The Harper government is attempting to revoke the citizenship of a convicted terrorist who was born and raised in Canada, *Maclean's* has learned—a first under a controversial new law that has triggered intense debate during the election campaign.

Saad Gaya, 27, is believed to be the only Canadian-born citizen (terrorist or not) to ever face the prospect of being stripped of his citizenship. Until now, there was no legal mechanism to undo what has long been considered an irreversible birthright. — link to charter right? equal before & under the law? s.15(1)

A member of the so-called "Toronto 18," Gaya pleaded guilty to his role in an al-Qaeda-inspired bomb plot and was sentenced to 18 years in prison. Although he was born in Montreal and grew up in Oakville, Ont., the Tories say recently enacted legislation provides the power to rescind Gaya's citizenship because they believe he is a dual national of Pakistan—by virtue of the fact his parents, who immigrated to Ontario more than three decades ago, were born there.

Gaya, who has never lived in Pakistan, has launched a Charter challenge in Federal Court, arguing that the government's revocation system amounts to "cruel and unusual punishment" and could have "a sufficiently severe psychological and social impact." s.7 security of the person s.12

"For many individuals captured by the new revocation provisions and who would now face deportation, including the Applicant, their other nationality derives from a country with which they have no meaningful connection, have little or no familiarity with the language or culture, and have no family or other support network," reads Gaya's court filing, submitted Sept. 18. "The Applicant was born and grew up in Canada. His family is in Canada and has been since before he was born."

That Saad Gaya was a terrorist is not in dispute. A former honours student at Hamilton's McMaster University, he confessed to participating in a 2006 conspiracy to detonate bombs in southern Ontario in retaliation for Canada's military mission in Afghanistan. Although a judge concluded he was not the plot's driving force, he was a loyal, willing underling who followed every order; the day he was arrested (June 2, 2006), police videotaped him at a north Toronto warehouse unloading what he believed to be a truckload of explosive fertilizer.

Gaya himself described his criminal behaviour as "shameful," "politically naïve," and "irrational."

Yet despite his undeniable guilt, the Tories' push to revoke Gaya's citizenship presents an uncomfortable (and potentially unconstitutional) possibility: that a person born in Canada could lose his Canadian status and be

deported to a country he's never known—all because his parents were born there and, by extension, passed their dual nationality onto him.

personal characteristic \leq distinction made discriminatory treatment s.15(1) analysis

"Exiling someone who was born in Canada, and who has never been to the country they're going to be deported to, is a horrible punishment," Lorne Waldman, Gaya's lawyer, tells *Maclean's*. (Again, immigration experts say no one born in Canada has ever had his citizenship revoked. Before the new law came into force, only a naturalized Canadian who acquired citizenship through fraud or misrepresentation could be stripped of that status.)

gov't action

In effect since May 29, the Strengthening Canadian Citizenship Act was portrayed by the Conservatives as another critical tool to combat the "ever-evolving threat of jihadi terrorism." The law allows the government to revoke the citizenship of anyone convicted of serious crimes against Canada's security, including treason, espionage and terrorism—providing that person is a dual national who holds citizenship in a second country. International treaties do not allow Ottawa to leave a person stateless, which means terrorists who hold only Canadian citizenship can't be stripped of their status. Differential treatment?

Critics say the law, introduced as Bill C-24, creates "two-tiered" citizenship because the harsh new rules apply only to dual nationals, not to the vast majority of Canadians. They also argue that revocation essentially amounts to banishment for those who fit the criteria—and that the Charter of Rights and Freedoms protects even an admitted, convicted terrorist from being punished twice for the same crime. s.11(h)

"The concern is the law creates two classes of citizens," says Peter Edelmann, a Vancouver immigration lawyer. "Two people who commit the exact same offence are subject to different consequences: you have banishment as a punishment for certain people, and not for others. For me, it's not a question of assessing: 'How do you punish terrorists?' It's a question of: 'Are dual nationals less Canadian?' If the answer is yes, I think that has some very profound implications."

Those potential implications were thrust into the centre of the federal election campaign last week when the *National Post* reported that Zakaria Amara—the confessed ringleader of the "Toronto 18" bomb plot, now serving a life sentence—became the first candidate to have his citizenship revoked under the new law.

Born in Jordan, Amara immigrated to Canada as a young boy before growing up to become a prime target of the country's spy agency, the Canadian Security Intelligence Service (CSIS). A gas-station attendant in Mississauga, Ont., Amara was so obsessed with Internet jihad videos and avenging the "slaughter" of Muslims that he hatched what a judge later described as a "spine-chilling" plan: a trio of truck bombs aimed at the Toronto Stock Exchange, the downtown offices of CSIS, and an unnamed military base. It's "gonna be kicking ass like never before," he told an accomplice, unaware of the police wiretap recording their words.

With the help of an undercover informant, the RCMP arranged a sting operation, delivering what Amara thought was three tonnes of ammonium nitrate to complement the remote-controlled detonators he had already built. Saad Gaya was among those who met the truck at the warehouse. "It is difficult to put into words Zakaria Amara's degree of responsibility," Justice Bruce Durno said during his 2010 sentencing hearing. "He was the leader and directing mind of a plot that would have resulted in the most horrific crime Canada has ever seen."

Liberal Leader Justin Trudeau and NDP Leader Tom Mulcair have both vowed to scrap the revocation law if their respective parties prevail on Oct. 19. "A Canadian is a Canadian is a Canadian," Trudeau told Prime Minister Stephen Harper during the Munk Debate on foreign affairs on Sept. 28. "You devalue the citizenship of every Canadian in this place and in this country when you break down and make it conditional for anyone."

"A few blocks from here, he would have detonated bombs that would have been on a scale of 9/11," Harper replied, referring to Amara, but not naming him. "This country has every right to revoke the citizenship of an individual like that."

The government has alerted a handful of others that their citizenship could be in jeopardy, including Asad Ansari, a fellow "Toronto 18" convict who is now free; Hiva Alizadeh, an Iranian-Canadian serving a 24-year sentence for plotting al-Qaeda bombings; and Misbahuddin Ahmed, Alizadeh's co-conspirator, who was sentenced to 12 years in prison. Like Gaya, Ansari and Ahmed have launched their own constitutional challenges in Federal Court, fighting to have the law struck down before Ottawa has a chance to apply it in their cases.

But Gaya's predicament is especially unique. As the only Canadian-born convict targeted for revocation so far, his case raises potentially troubling questions about just how wide the net should be cast—if at all. Voters who may agree that a foreign-born terrorist should be stripped of Canadian citizenship may not be as comfortable with the law being applied to a born-and-raised Canadian. As Toronto lawyer Rocco Galati argued while Bill C-24 was being debated: "Anyone who is born on Canadian soil is a Canadian citizen. You can't take that away."

The specifics of the government's case against Gaya may prove equally unsavoury to some Canadians.

In early August, a senior immigration official mailed a Notice of Intent to Revoke Citizenship to Gaya's current home at Warkworth Institution, a medium-security facility near Brighton, Ont. The letter acknowledges that Gaya was born in Canada, but claims he is a citizen of Pakistan by descent because his father, who moved to Canada in 1977, and his mother, who immigrated here in 1981, were both Pakistani-born.

But the paper trail gets somewhat confusing. The notice goes on to acknowledge that Pakistan did not recognize dual citizenship when Gaya's parents swore their oaths as Canadian citizens in the 1980s, so they were technically no longer Pakistanis when their son, Saad, was born in Montreal on Nov. 17, 1987. However, the Harper government now says the parents' dual citizenship was retroactively reinstated when Pakistan passed an updated citizenship law in May 2004.

Which also means, according to Ottawa, that Gaya suddenly became a Pakistani citizen, too—making him a dual national now eligible for revocation under the new Act, despite the fact he was born here.

Gaya disputes that conclusion. "The Applicant has never applied for Pakistani citizenship and denies that he has Pakistani citizenship," his court filing reads.

The government has yet to respond to Gaya's court action, and a hearing date has not been set.

Gaya pleaded guilty in 2009 to participating in a terrorist group that intended to cause an explosion likely to cause serious property damage, bodily harm or death. He then proceeded to read a lengthy statement to the court, accepting full responsibility for his "shameful" actions but insisting that "right from the outset of my involvement in all of this, I was given assurances that no one would get hurt and that this was not going to be like the London bombings of 2005."

"I am not someone who has grown up in a hate-soaked environment, brainwashed to believe that I am part of some eternal war against the Western civilization," he continued. "That is not who I am and these are not the values that are instilled in me ... I did not take part in this crime out of hatred against this society or its people. I really believed at the time, albeit incorrectly, that by participating in this scheme I would only be assisting the Afghan population in determining their own future without any outside interference. I was young and politically naïve. Today, however, I recognize how irrational and unreasonable this line of thought was. My views have matured and I know with certainty that I will never commit such a mistake again."

Gaya, who turns 28 in November, is eligible to apply for parole next year. What happens when he's eventually released—and which country he'll live in—is suddenly much less clear.

<http://www.macleans.ca/news/canada/exclusive-tories-move-to-strip-citizenship-from-canadian-born-terrorist/>

④ ?

Citizenship law Bill C-24 challenged as unconstitutional by civil rights groups

MICHELLE MCQUIGGE

TORONTO — The Canadian Press

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Last updated Thursday, Sep. 24, 2015 12:49PM EDT

A new law that gives the federal government the power to revoke Canadian citizenship for certain dual nationals undermines the country's identity and violates its Constitution, a coalition of civil rights groups said Thursday.

The British Columbia Civil Liberties Association and the Canadian Association of Refugee Lawyers (CARL) said the rules that went into effect when Bill C-24 became law in May create a two-tiered system in which naturalized Canadians are treated as second-class.

The two organizations are launching a formal constitutional challenge of the law on the grounds that it violates the Charter of Rights and Freedoms.

The organizations take exception to the government's much-publicized position that the bill is necessary to protect Canada from terrorism, but have focused the charter challenge on many of the law's lesser-known clauses.

Vague stipulations about a new Canadian's intention to live here, plus changes to the procedure by which people can contest challenges to their citizenship, mean the bill could have an impact on millions more than Ottawa's intended target, they said.

"All Canadian citizens used to have the same citizenship rights no matter what their origin," B.C. Civil Liberties Association Executive Director Josh Paterson said at a news conference.

"We were all equal under the law. Now this new law has divided us into classes of citizens: those with more rights and those — overwhelmingly immigrants to Canada and their children and grandchildren — who have fewer rights."

In rolling out the contentious bill, the federal government spoke openly about some of the new powers it would provide.

The new law allows Ottawa to revoke citizenship for anyone convicted of terrorism, treason or espionage offences inside or outside of Canada. The rules also apply to dual citizens who take up arms against Canada by fighting in a foreign army or joining an international terrorist organization.

Immigration Minister Chris Alexander has previously stated that the regulations are necessary to combat "the ever-evolving threat of Jihadi terrorism."

But the civil rights groups said other provisions, such as the "intent to reside clause," present more insidious threats.

CARL member Lorne Waldman said the ambiguously worded clause forces naturalized citizens to declare their intention to make Canada their permanent home, but leaves the door open to accuse them of misrepresenting their claims if they're out of the country for an extended period of time.

"This means that if after they obtain citizenship they wish to travel abroad for an extended period, perhaps if they got accepted into a university or because there's a family member who's ill, they face the prospect of having their citizenship revoked because they misrepresented their intention," he said.

Waldman also expressed concern over the revamped revocation process.

He said people on the verge of losing citizenship previously had the right to a hearing in front of a judge, who would then decide their fate.

Now, Waldman said, people are given 60 days to fight the revocation through a written submission, and the final decisions are made by government employees.

He also criticized Ottawa's stated purpose for Bill C-24, saying many terrorism convictions handed down outside of Canada are reached through dubious processes.

Waldman cited the example of Mohamed Fahmy, the Canadian-born journalist convicted of terrorist offences in Egypt during a trial that was internationally condemned as politically motivated and unjust.


Fahmy's case was so infamous that the official opposition New Democrats extracted a promise from the government that the new rules would not be used to target him when the law was first announced.

The Ministry of Citizenship and Immigration did not immediately respond to a request for comment on the constitutional challenge.

This is not the first time Bill C-24 has been taken before the courts.

Last October, Toronto-based lawyers Paul Slansky and Rocco Galati launched a constitutional court challenge against the new law. Federal Court Judge Donald Rennie dismissed the case earlier this year.

Paterson said this latest effort differs from the previous suit by tackling the law based on the charter rather than more technical constitutional grounds.


<http://www.theglobeandmail.com/news/national/citizenship-law-bill-c-24-challenged-as-unconstitutional-by-civil-rights-groups/article26032727/>

Court challenge slams new Citizenship Act as 'anti-Canadian'

Legal advocacy groups launch constitutional challenge Thursday, arguing Bill C-24 creates discriminatory 'two-tier citizenship regime.'

By: Debra Black Immigration Reporter, Published on Thu Aug 20 2015

Two legal advocacy groups are launching a constitutional challenge to the Conservative government's new Citizenship Act in federal court, calling it "anti-immigrant, anti-Canadian, anti-democratic, and unconstitutional." Both the B.C. Civil Liberties Association and the Canadian Association of Refugee Lawyers are filing a judicial review application and a statement of claim Thursday arguing that Bill C-24, the Strengthening Canadian Citizenship Act, creates a "two-tier citizenship regime" that discriminates between dual nationals — born here or abroad — and naturalized citizens.

The legal challenge focuses on some key provisions in the act which add an intent to reside in Canada provision before being granted Canadian citizenship, expand the grounds upon which a person can have his or her citizenship revoked and amend the procedures that lead to that revocation.

"This citizenship-stripping law is unjust, legally unsound and violates the core values of equality enshrined in the Charter of Rights and Freedoms," says Toronto lawyer Lorne Waldman, one of the litigators handling the case and a member of the executive of the Canadian Association of Refugee Lawyers.

"With this law the federal government shows a flagrant disregard for these values, and for the basic rights of all Canadians. We are asking the court to strike the law down."

The Minister of Immigration Chris Alexander vigorously defended Bill C-24 both when it was first introduced and as it was debated in Parliament.

The act also introduced a series of sweeping changes, including altering residency requirements for permanent residents to four out of six years before being eligible for citizenship; increasing the fees for applications for citizenship to \$300 a person; expanding the age range for those required to demonstrate language proficiency and a knowledge test to 14-years-old to 64-years-old and streamlining the application process.

At the time of its introduction in February 2014 and beyond there was widespread and vociferous criticism of the bill. And one legal challenge — by Toronto lawyer Rocco Galati and the Constitutional Rights Centre — filed last year has already been dismissed although that decision is being appealed.

"The value of citizenship has never been more widely recognized as it is today, but it only has value because there are rules governing it," Alexander told the Star last year, rejecting the growing criticism and opposition to the act.

"Citizenship of course involves rights and enormous privileges in Canada, but it also, for those of us born here and for naturalized Canadians, involves responsibilities.

"This act reminds us where we come from and why citizenship has value. When we take on the obligations of citizens we're following in the footsteps of millions of people who came here and made outstanding contributions over centuries. And we're celebrating that diversity, solidifying the order and rule of law we have here."

But according to Waldman, the law doesn't do that at all, but rather creates two classes of citizens, a profoundly unfair process and exposes many Canadians to not only losing their citizenship without due process but also their rights to move and travel out of the country.

5.7/5.11

Under Bill C-24, which came into effect in June, Canadians could see their citizenship revoked if convicted of certain serious crimes in Canada or abroad — even in countries that do not have due process, according to the statement of claim.

What's more, there is no right to an oral hearing if citizenship is revoked and the decision to revoke citizenship is to be made by government bureaucrats and not a court of law. ^{s.7}
s.11

The claim also argues that new Canadians — who have become citizens under Bill C-24 — could lose their citizenship if they move abroad for work or school or family because they must sign an intent to reside in Canada when they receive their new citizenship. That requirement was not in effect for new citizens prior to the passing of Bill C-24.

"All Canadian citizens used to have the same citizenship rights, no matter what their origins," says Josh Paterson, executive director of the BCCLA. "Now this new law has divided us into classes of citizens — those who can lose their citizenship and those who can't. Bill C-24 is anti-immigrant, anti-Canadian, and anti-democratic. It undermines — quite literally — what it means to be Canadian."

This is fundamentally an issue of equality, Paterson says in an interview with the Star.

According to the statement of claim, two key sections of the act — the revocation provisions as well as the intent to reside provision — violate fundamental sections of the Canadian Charter of Rights and Freedoms.

The legal arguments of the case focus on the fact the new bill violates the equality rights, mobility rights, the rights to freedom and security of person, ^{s.7} due process rights, ^{s.15(1)} the right to freedom from cruel and unusual punishment — all freedoms guaranteed to Canadians under the charter, says Paterson. ^{s.6}
^{s.7/s.11} ^{s.12}

"It is a constitutional mess," says Paterson. "But for us the bigger point is this creation of second-class citizenship where some Canadians have a less strong citizenship than others and that weakens citizenship for everyone. This for us is a fundamental attack to what it means to be Canadian."

"All Canadians are equal," he adds. "It doesn't matter where we're born. Once you're Canadian you should always be a Canadian. Period. Everybody's citizenship is weakened when we design a system that makes some of us less worthy Canadians than others."

Key Arguments

1. The suit claims the law violates Section 15 of the Charter, which guarantees equality rights, by discriminating against some Canadians and giving them limited rights because they, their parents or their ancestors were born elsewhere. ^{personal characteristic / distinction results in differential treatment}
2. The suit claims the law violates due process rights, ^{liberty & security of person} guaranteed under Section 7 of the Charter, because the act leaves citizenship revocation decisions in the hands of Ottawa officials rather than a court of law.
3. The suit alleges that Sections 6 of the Charter is also violated leaving citizens without the right to enter and leave Canada freely because of the intent to reside clause; Section 11 is also breached because under the act citizens can be punished twice for a crime; and Section 12 is violated because the bill subjects people to cruel and unusual punishment.

<http://www.thestar.com/news/immigration/2015/08/20/court-challenge-slams-new-citizenship-act-as-anti-canadian.html>

5

Pot Cookies Case

The Supreme Court of Canada lifts ban on cannabis derivatives (R. v. Smith SCC 2015)

June 2015

By David K. Law

Alternative forms of medical marijuana were legalized by the Supreme Court of Canada on June 11, 2015. The implications are significant for patients, drug producers and workplaces across the country.

Under the *Controlled Drugs and Substances Act* (CDSA), possession of marijuana is a criminal offence. The Medical Marijuana Purposes Regulations (MMPRs) create an exemption to the CDSA's prohibition for possession of marijuana.

Expert evidence demonstrates that different methods of administering marijuana offer different medical benefits. For example, oral ingestion of active marijuana compounds may aid gastro-intestinal conditions and may be more appropriate for chronic conditions. Furthermore, inhaling presents health risks and is less effective for some conditions than administration of cannabis.

Despite that evidence, Parliament had limited the legal use of cannabis to dried marijuana products. That was challenged in the case of *R. v. Smith* and on June 11, 2015 the Supreme Court of Canada (SCC) found those limitations contrary to the *Charter of Rights and Freedoms* (the Charter). In a concise judgment, the SCC found that confining medical access to dried marijuana violates section 7 of the Charter. The restriction was deemed arbitrary, the Court said, because it

↳ s.7 test - life, liberty, security of person
"does nothing to enhance the state's interest in preventing diversion of illegal drugs or in controlling false and misleading claims of medical benefit"¹.

Furthermore, the Court ruled that the prohibition foreclose those who have already established a legitimate need for marijuana from reasonable medical choices through the threat of criminal prosecution.

How will *R. v. Smith* affect the workplace?

Because medical marijuana is used to treat a variety of illnesses that may meet the definition of a "disability" under human rights legislation, the use of medical marijuana in the workplace engages the issue of accommodation. Similarly, employers have a duty to inquire into the relationship between the disability, and the performance of the employee before making an adverse decision based on performance. Employers may be found in violation of human rights legislation if the employee's mental or physical disability is deemed to have been a factor in the decision to terminate his or her employment². s.15(1)

For a start, employers who are aware or reasonably ought to be aware that an employee is a prescribed user of medical marijuana have a duty to accommodate the employee to the point of undue hardship. However, employers need only make accommodation for needs that are known, therefore an employee must bring evidence to substantiate a claim for accommodation of a disability. For example, Tribunals may require evidence from a medically qualified practitioner attesting to the fact that the employee has been prescribed medical marijuana.³

Human rights legislation sets out three factors to be considered in determining whether the threshold of undue hardship has been met: cost, health and safety requirements and outside sources of funding. Given the SCC's decision, the threshold to claim an undue hardship defence is high. Individuals who have been prescribed medical marijuana will now have access not only to dried marijuana for smoking, but edible and topical cannabis products, such as cookies, gel capsules, rubbing oil, topical patches, butters and lip balms. thus discriminatory / differential treatment

In the past, some employers have relied on the case of *Ivancicevic v. Ontario (AGCO)*, in which the Ontario Human Rights Tribunal dismissed a complaint involving a claimant's right to smoke medical marijuana in an open-patio tobacco smoking area. The Tribunal outlined several health hazards associated with passive marijuana inhalation in dismissing the complaint. Employers may have relied on this decision to insist that medical marijuana be consumed privately, away from anyone who could inhale it passively. This could mean that smoking in a workplace or building's designated tobacco smoking areas might be validly prohibited as well. Prescribed medical marijuana users will now have access to cannabis derivatives as an alternative to smoking dried marijuana in light of the *R v. Smith* ruling. Therefore, health and safety concerns regarding passive inhalation of medical marijuana may not be a relevant factor in the evaluation of undue hardship.

Private vs. gov't = Charter vs. HR legislation...

In conclusion, employers will have to be sensitive when providing on-the-job accommodations to employees with a prescription for medical marijuana. It is well established that employees must be treated with dignity and respect, regardless of whether they have a disability. What is now clear, following the *R v. Smith* ruling, is that employers will now have to accommodate a broader scope of medical marijuana consumption.

s.15
essential
human
dignity

¹ *R. v. Smith*, 2015 SCC 34 at para 8.

² See *Hamilton Street Railway v. A.T.U. Local 127*, in which the Board decided to reinstate a Grievor who had been terminated following an off-duty consumption of marijuana without conditions and with full back pay. The Board found no evidence linking the off-duty consumption of marijuana with poor job performance.

³ See: *Johnson Controls, L.P. and CAW-Canada, Local 222*, where the Board did not consider the written statement of the addictions counsellor that the Grievor had a "substantial issue" with cannabis to be sufficiently probative to establish that the Grievor was addicted to marijuana, at any material time. The Board also found that the surrounding circumstances were not sufficiently probative to establish that the Grievor was addicted to marijuana, as opposed to being a recreational user.

<https://www.gowlings.com/KnowledgeCentre/article.asp?pubID=4049>

Medical pot cookie prohibition ruled unconstitutional

Court challenge stems from B.C. case of Owen Smith, who was charged with trafficking for baking pot cookies

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It's unconstitutional to forbid licensed medical marijuana users from possessing pot-laced products, such as cookies or body creams, a B.C. Court of Appeal judge has ruled.

Parliament has been given one year to recraft regulations to allow medicinal marijuana users to use products made from cannabis extract. They can include creams, salves, oils, brownies, cakes, cookies and chocolate bars.

Health Canada currently allows people suffering from debilitating illnesses access to medicinal marijuana, but only in the form of dried marijuana.

In her written reasons, Justice Risa Levine said this specification "is arbitrary and cannot be justified in a free and democratic society." *s.7 & s. 1 balancing*

Levine went on to state that when patients choose to use edible forms of marijuana, it "was a matter of necessity, or put another way, the restriction to dried marijuana interfered with their physical or psychological integrity." *i.e. security of the person*

Case of the pot cookie baker

The court challenge stems from the case of Owen Smith, who was charged with trafficking for baking pot cookies and producing topical cannabis creams for a medical marijuana club in Victoria in 2009.

Smith was caught baking more than 200 pot cookies for the Victoria Cannabis Buyers Club, and had a supply of cannabis-infused cooking oils and some dried dope in his apartment when he was arrested.



Owen Smith was caught baking more than 200 pot cookies for the Victoria Cannabis Buyers Club in 2009. (CHEK)

He was acquitted in April 2012 after the B.C. Supreme Court ruled the medical marijuana regulations were unconstitutional, because patients were denied access to edible pot products and derivatives.

Justice Robert Johnston concluded that permitting dried cannabis alone was arbitrary and did little to further a legitimate state interest. s.7

Thursday's ruling means Smith acquittal stands and he will not be retried.

Health Minister Rona Ambrose's office said in a statement released Thursday that it is "reviewing the decision in detail and considering our options."

Marijuana laws under the microscope

Canada currently prohibits the possession and trafficking of all marijuana products under subsection 4(1) and Schedule II of the Controlled Drugs and Substances Act. However, subsection 55(1) of this act allows for exemptions to be made.

As such, an annex to that act, the Marihuana for Medical Purposes Regulations, allow people with medical need and authorization access to medicinal marijuana.

Under these regulations, many people suffering from debilitating illnesses get marijuana through Health Canada approved companies or get permission to grow it themselves.

However, the MMPR and its predecessor, the MMAR program, limit this access to dried marijuana and do not make any other exceptions to the list of banned substances detailed in Schedule II of the Controlled Drugs and Substances Act.

These banned substances, aside from the exempted dried marijuana, include cannabis resin and various extracts and derivatives of the cannabis plant.

Ottawa had hoped the B.C. Court of Appeal would strike down the B.C. Supreme Court decision.

But under Thursday's ruling, government has been asked to review these rules, which could mean medical marijuana users would be supplied with resin or extract or be permitted to make themselves products such as pot cookies using marijuana extracts.

<http://www.cbc.ca/news/canada/british-columbia/medical-pot-cookie-prohibition-ruled-unconstitutional-1.2736526>

Gay Ont. man loses blood donation negligence suit

By CBC News
CBC News



A gay Toronto man who concealed his sexual history on a blood donor form and was sued for negligence by Canadian Blood Services has lost in Ontario Superior Court.

A gay Toronto man who concealed his sexual history on a blood donor questionnaire and was sued for negligence by Canadian Blood Services has lost in Ontario Superior Court.

In a decision released Thursday, the court sided with CBS in its suit against Kyle Freeman for "negligent misrepresentation."

The court said Freeman did not have a Charter of Rights and Freedoms defence against the claim of negligence.

The decision essentially upholds the current CBS practice of prohibiting men who have had sex with other men anytime since 1977 from donating blood. **MSM**

Freeman donated blood several times between 1990 and 2002. Each time, he falsely denied that he had had sex with another man since 1977.

Ban not discriminatory, judge

In June 2002, Freeman donated blood that subsequently tested positive for syphilis. He was permanently ruled out as a donor. Freeman did not know at the time he had syphilis, and did not know how he had contracted it, the judge wrote.

CBS took steps to get any blood traceable to Freeman out of its system, at a cost of about \$10,000. It later filed suit against him.

In her decision, Justice Catherine Aitken ruled that the CBS ban on donation was not discriminatory based on sexual orientation. **s.15(1)**

"It is based on health and safety considerations; namely, the prevalence of HIV/AIDS and other blood-borne, sexually transmitted pathogens in the [men who have sex with men] populations, and the corresponding risk this creates for the safety of the blood supply system," the judge ruled.

CBS chief executive officer Dr. Graham Sher applauded the decision.

"It is important to understand, and as the judge affirmed, our donor selection policies have always been about protecting the safety of blood recipients, and the [men who have sex with men] policy is no exception."

Freeman was held liable to the blood bank for \$10,000 in damages.

A counterclaim by Freeman against CBS was also dismissed. The court ruled that CBS is not a government entity, and therefore, not covered by the Charter.

Ruling disappoints groups

"We're very disappointed with this decision," Monique Doolittle-Romas, the executive director of the Canadian AIDS Society, said in a statement.

"Although the judge agreed with us that there is no evidence to justify the current deferral period being used, which applies to any man who had sex with another man even once since 1977, the court refused to order a change," she said.

Helen Kennedy of Egale Canada said that because the court found the blood bank's policy was based on safety concerns, the questionnaire did not discriminate against gay and bisexual men. **personal characteristic**

"The negative consequences this ruling has on Charter rights are enormous," Kennedy said. **- such as ? ...**

Thursday's ruling reverberated even in British Columbia, where the executive director of a Vancouver HIV/AIDS advocacy group called it "misguided."

"In an era when gay men are discriminated against in many ways, I think this is one area where it need not be," said Maxine Davis, of the Dr. Peter AIDS Foundation. **historical discrimination/disadvantage**

"It does perpetuate a perception that somehow gay men are more promiscuous."

