Senator Hugh Segal on Citizenship, Parliament and the Charter Override Taboo

On August 12, 2009, the Centre for Constitutional Studies interviewed Conservative Senator Hugh Segal. Earlier this year, the senator introduced Bill S-225. This private member's bill would invoke section 33 of the *Canadian Charter of Rights and Freedoms* to protect the citizenship oath's pledge of allegiance to the Queen from challenge under the *Charter*. The Centre was interested in the senator's views on the use of section 33, the controversial "notwithstanding clause".

Senator Segal confirmed that he expects debate on his bill to resume this fall. Though he hopes to call for a vote in the Senate this year, he said the "antiquated procedures" of the Senate may delay the timetable.

Asked if he is deliberately disturbing a taboo against use of the notwithstanding clause, Senator Segal offered his understanding of the genesis of the clause and the way it is viewed now. Referring to his own involvement in the intergovernmental negotiations that produced the *Charter*, he explained that Premiers Peckford of Newfoundland and Blakeney of Saskatchewan proposed the override clause as a way to reconcile a constitutional bill of rights with the British model of parliamentary sovereignty. The notwithstanding clause offered a solution to an impasse. The architects of the *Charter* override saw it as a way to allow Canadian legislatures to "particularize" the targeting of government programs to the needs of specific groups, even if the courts found such programs contrary to their interpretation of the *Charter*.

Returning to Bill S-225, Senator Segal stressed that he did not introduce it to produce debate on the notwithstanding clause. Rather, he said, his view is that something as fundamental as the citizenship oath should not be decided by a court, but should be for Parliament to determine. Segal stresses that Parliament has the right to change the oath. In his view, though, it would be a distortion of the idea of a citizenship oath if people who are not yet citizens could go to court to use the *Charter* to "quash" another part of the constitution: the Queen. He explained that section 33 is part of his proposal because he was advised that it would offer the only way to insulate the oath from the courts.

Discussion turned to the question of the appropriate time for Parliament or a legislature to invoke the notwithstanding clause; that is, whether it should be used proactively to head off a court challenge or only in reaction to a decision from the courts. Senator Segal admitted that some parliamentarians might be more comfortable invoking section 33 after a court decision, but he sees no consensus in the Senate on the appropriate use of the *Charter* override. He said that section 33 has become associated with an "abject taboo feeling" about use of the override, which is "not substantiated by the framers' intent." He

does not yet see parliamentarians distinguishing between pre-emptive and reactive uses of the notwithstanding clause, but he does see potential for a "good debate" on the issue if the bill goes to a Senate committee for study.

Senator Segal said that senators often introduce legislation to force people to engage with an underlying problem, or to bring focus to an underlying principle. In this case, he sees the underlying problem in the Supreme Court of Canada's decision that people who are not yet citizens may use the *Charter* once they are on Canadian soil. He alluded to recent visa restrictions on some countries (Mexico, Czech Republic) as another reflection of this problem. The underlying principle he wants to emphasize is that Parliament may determine the terms of the citizenship oath. Segal pointed out that a government member does not introduce a private member's bill without approval from the relevant minister – in this case, the Minister of Citizenship, Immigration and Multiculturalism.

Asked whether the *defeat* of his bill might help to cement a constitutional convention *against* use of section 33, Segal said he does not see how a defeat in the Senate could have any important bearing on the strength of the notwithstanding clause taboo. He discussed the sources of the bias against using section 33, highlighting Premier Bourassa's use of section 33 to re-enact parts of Bill 101 (Quebec's French language charter), and the immediate hostile reaction when Alberta briefly proposed to use the clause in legislation to compensate victims of forced sterilization. Senator Segal said these precedents are "more salient" than a defeat of Bill S-225 could ever be. He alluded to a "press bias" against the notwithstanding clause, but said most people who know about his bill see it as inconsequential.

Senator Segal said that it is nonetheless important to "liberate" section 33, which was never conceived as a "pernicious way to interfere with people's rights." Referring to his view that the *Charter* override's purpose is to allow legislatures to target programs at classes of beneficiaries, he said it would be a "huge mistake" to leave aside the legislative tool "simply because it offends some people." He foresees that "we will need the instrument of section 33 in years ahead," so he wants to keep the override option available, if seldom used.