

**OATHS OF ALLEGIANCE AND  
THE CANADIAN HOUSE OF COMMONS**

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## OATHS OF ALLEGIANCE AND THE CANADIAN HOUSE OF COMMONS

### INTRODUCTION

Questions periodically arise with respect to the oath of allegiance that is required to be taken by Canadian parliamentarians. Two basic issues are involved. First, is it necessary to take the oath, and what are the consequences of a failure or refusal to do so? Second, what are the consequences of an alleged violation or breach of the oath, and how is the validity of such an allegation established? In recent years, there has also been interest among Members of the House of Commons and some Senators in including a specific reference to Canada in the oath of allegiance, either by means of an additional oath of office or by an amendment to the original.

This paper will discuss the main issues surrounding the oath of allegiance. It will review relevant precedents in Canada and other countries and highlight some of the implications of changing, or refusing to take, the oath.

### THE CONSTITUTION

Section 128 of the *Constitution Act, 1867* provides as follows:

Every member of the Senate and the House of Commons of Canada shall before taking his Seat therein take and subscribe before the Governor General or some Person authorized by him, and every Member of a Legislative Council or Legislative Assembly of any Province shall before the Lieutenant Governor of the Province or some Person authorized by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; ...

The oath set out in the Fifth Schedule reads as follows:

I, A.B. do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

Note. The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being is to be substituted from Time to Time, with Proper Terms of Reference thereto.

As can be seen, the oath is one of allegiance to the monarch, not to Canada or the Canadian Constitution.

The Canadian oath of allegiance derives from that used in the British Parliament, where the requirement for such an oath arose from the political and religious conflicts of the 16<sup>th</sup> century. The original purpose of the oath was to assert the primacy of the British sovereign over all matters, both ecclesiastical and temporal; as such, it was primarily directed at preventing Catholics from holding public office. (Other religious denominations were also affected incidentally, until the reforms of the 19<sup>th</sup> century.)

Since 1905, Members of Parliament have been allowed to “solemnly, sincerely and truly affirm” that, though they cannot take the oath, they are still loyal to the Monarch.<sup>(1)</sup>

The wording of the affirmation as it stands today is as follows:

I, ....., do solemnly, sincerely, and truly declare and affirm that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second.<sup>(2)</sup>

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(1) Arthur Beauchesne, *Rules & Forms of the House of Commons of Canada*, Fourth Edition, The Carswell Company Limited, Toronto, 1958, citation 15, p. 13. This was apparently done by Instructions passed under the Royal Sign Manual and Signet of 15 June 1905. The question arises as to how a Royal Instruction can legally amend a constitutional provision; it does not appear that this issue has been addressed. According to later editions of *Beauchesne's* (see, for example, Sixth Edition, 1989, citation 243), the *Oaths of Allegiance Act*, R.S.C. 1985, c. 0-1, permits Members who object to being sworn to make a solemn affirmation, if the taking of an oath is contrary to their religious belief or if they have no religious belief. This, however, does not appear to be correct, as a federal statute cannot override a constitutional provision.

(2) Robert Marleau and Camille Montpetit, eds., *House of Commons Procedure and Practice*, Ottawa, 2000, p. 176.

## OATHS AND THE HOUSE OF COMMONS

Section 128 of the *Constitution Act, 1867* means that only those Members who have taken and subscribed to the oath are allowed to take their seats in the House of Commons. After the Chief Electoral Officer has provided a certificate listing Members returned to serve in Parliament, the Clerk of the House, or any designated Commissioner, administers the oath of allegiance to these Members. According to the Sixth Edition of *Beauchesne's Rules & Forms of the House of Commons of Canada*,

It is not the Oath that makes a person a Member of the House. The person must be a Member before being sworn in. Unless first duly elected under the terms of the *Canada Elections Act*, R.S.C. 1985, c. E-2, one cannot take the Oath. The object of the Oath is to allow the Member to sit in the House. In accordance with this interpretation of the law, Members-elect, as soon as their election is reported to the Clerk by the Chief Electoral Officer, may receive such requisites as are necessary for the performance of their public duties. But if, for some reason or other, a Member were precluded from taking the Oath and sitting in the House, the person would be deprived of any such allowances.<sup>(3)</sup>

This interpretation is consistent with that found in the Twenty-first Edition of Erskine May, which indicates that a Member who has not taken his or her oath may not sit and vote in the House, but is entitled to all the other privileges of a Member, except the salary, “being regarded, both by the House and by the law, as qualified to serve, until some other disqualification has been shown to exist.”<sup>(4)</sup> Indeed, in exceptional circumstances, Members of the British House of Commons who have not taken the oath have been nominated to and have served on committees.

The provisions of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1, also support this position. In Part IV of the Act, which deals with Remuneration of Members of Parliament, section 55(2) provides:

For the purpose of this section, ... a person shall be deemed to have become a member of the House of Commons on the day last fixed for the election of a member of the House of Commons for the electoral district represented by the person.

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- (3) Alistair Fraser, W. F. Dawson, and John A. Holtby, *Beauchesne's Rules & Forms of the House of Commons of Canada*, Sixth Edition, The Carswell Company Limited, Toronto, 1989, citation 242(2), p. 68.
- (4) C. J. Boulton, ed., *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, Twenty-first Edition, Butterworths, London, 1989, p. 231.

## FAILURE OR REFUSAL TO TAKE THE OATH

In 1875, a problem arose when a Member of the Canadian House of Commons failed to take the required oath of allegiance before assuming his seat. The matter was referred to the Select Standing Committee on Privileges and Elections, which tabled its report on 8 March 1875. The Committee noted that the Constitution provided no direct forfeiture or penalty for an omission to take the prescribed oath, and neither did any other statute. The report concluded:

Your Committee are therefore of opinion that the seat of Mr. Orton, the member of Centre Wellington, is not affected by his having sat and voted in Your Honourable House before he took the Oath provided, as aforesaid.

Your Committee is further of opinion that the votes of Mr. Orton, before he took the prescribed Oath, should be struck out of the Division List and Journals of Your Honourable House, as he had no right to sit and vote until he had taken that Oath.<sup>(5)</sup>

Thus, the votes cast by the Member-elect before he took the oath were not recognized, despite his valid election; but he was not disqualified or expelled. It is unclear why Mr. Orton failed to take the oath; it would seem to have been more inadvertent than intentional. Furthermore, it would seem that he rectified the situation by taking the oath as soon as the omission was brought to his attention.

In the 1880s, there was a series of court decisions in Great Britain involving a Mr. Bradlaugh and his reluctance to take an oath of allegiance. Various changes to the British form of the oath had been made during the course of the 19<sup>th</sup> century so as to remove objections to it by various groups, such as the Quakers, who objected on religious grounds to any form of oath. These people were expressly exempted by various statutes and permitted to make an affirmation in terms prescribed. A difficulty remained, however, for persons who had no religious belief, and who, therefore, objected to an oath as having no meaning for them.

On being elected to the British House of Commons in 1880, Mr. Bradlaugh, being an atheist, demanded to be allowed to affirm, as he was allowed to do in judicial proceedings, instead of taking an oath. The House permitted him to do this. Litigation ensued, however, on the basis that Mr. Bradlaugh ought to have been required to take the oath, and his not having

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(5) House of Commons, *Journals*, 1875, p. 176.

done so invalidated his votes. The House of Lords eventually held that he was not entitled to make an affirmation in lieu of an oath.<sup>(6)</sup> Though Mr. Bradlaugh then endeavoured to take the oath, the House resolved that he should not be allowed to do so, presumably because, as an atheist, he would not consider himself bound by it. The courts refused to declare that he was entitled to take the oath.<sup>(7)</sup> Subsequently, the Court of Appeal decided that Mr. Bradlaugh's lack of religious belief made it impossible for him to satisfy the requirements of the Act even if he had taken the oath in due form.

In 1886, however, Mr. Bradlaugh did take the oath, along with other Members elected to the new Parliament. The Speaker refused to intervene, saying that he had no authority to prevent a Member from taking the oath: "The honourable member," he said, "takes the oath under whatever risks may attach to him in a court of law."<sup>(8)</sup> As one commentator wrote:

Mr. Bradlaugh therefore sat and voted subject always to the risk that the law officers of the Crown might proceed against him for penalties incurred and prove to the satisfaction of a jury that having no religious belief he had not taken the oath within the meaning of the *Parliamentary Oaths Act*.<sup>(9)</sup>

Two years later, in 1888, the law was changed so as to enable anyone to make an affirmation in lieu of an oath. The Bradlaugh case, while more directly concerned with affirmations than with oaths, also illustrates the need to make an oath or solemn declaration, as well as the extent and limits of parliamentary and judicial scrutiny or review of oaths.

Similarly, in 1990, a question of privilege was raised in the Canadian House of Commons concerning the meaning of the oath of allegiance and the duties and obligations relating thereto following the first election of a member of the Bloc Québécois. The Speaker held that the chair was "not empowered to make a judgment on the circumstances or the sincerity with which a duly elected member takes the oath of allegiance," and that "only the House can examine the conduct of its members and only the House can take action if it decides action is required."<sup>(10)</sup> No further action was taken.

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(6) *Clark v. Bradlaugh*, (1882–1883), 8 App. Ca. 354 (H.L.), on appeal from (1880–1881), 7 Q.B.D. (C.A.).

(7) *Attorney-General v. Bradlaugh* (1884–1885), 14 Q.B.D. 667.

(8) Quoted in Sir William R. Anson, *The Law and Custom of the Constitution*, Fourth Edition, Reissue Revised, Oxford, 1911, Vol. I, p. 93.

(9) *Ibid.* This text contains a full discussion of the Bradlaugh case, pp. 89–95.

(10) House of Commons, *Debates*, 1 November 1990, p. 14970.



There do not appear to have been any cases of Members of the Canadian House of Commons or the Senate refusing to take the oath of allegiance. It seems clear that a Member who refused to take the oath or make a solemn declaration would not be able to take his or her seat, or draw sessional indemnity. Although various individuals have been elected to the Canadian House of Commons who might have been reluctant to take the oath on various grounds, none of them appears to have neglected to do so or to have refused to swear it or make a solemn declaration.

### **BREACH OF AN OATH OF ALLEGIANCE**

Failure to take the oath of allegiance is one matter. Breaking an oath is another. According to an early edition of Beauchesne:

Should a member violate his oath he would be amenable to the penalty of not being allowed to sit in the House of Commons. He may be suspended from taking part in the sittings while still remaining a member of Parliament, or, in a case of extreme gravity, a Bill might be passed to annul his election. It may happen, when a state of war exists, that a member of Parliament makes, either outside or on the floor of the House, statements detrimental to Canada and favourable to the enemy. This would be in violation of this oath because allegiance to the King means allegiance to the Country, and the offence would be liable to punishment by the house. The power of dealing with treason is inherent in the Parliament of every country.<sup>(11)</sup>

Joseph Howe of Nova Scotia was one of the first opponents of Confederation, and led the anti-confederate forces in that province. He was elected to the first House of Commons in 1867. One historian has written:

Despite Howe's threats in his private letters to England, he assured Major General Hastings Doyle, who was soon to replace Williams as governor, that he would use only constitutional methods to gain repeal. Howe, thus, intended to obey the law of the land, a law which included the act of union. He was not only prepared to take his seat in the Canadian Parliament but he also borrowed \$1,000 from W.J. Stairs to enable him to make the trip to Ottawa.<sup>(12)</sup>

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- (11) Arthur Beauchesne, *Rules & Forms of the House of Commons of Canada*, Fourth Edition, The Carswell Company Limited, Toronto, 1958, citation 16(2), p. 14.
- (12) Kenneth George Pryke, "Nova Scotia and Confederation, 1864–1870," Doctoral Dissertation, Duke University, 1962, p. 147.

The anti-confederate forces in Nova Scotia argued that attendance at the federal Parliament and the acceptance of seats in the House of Commons would constitute acceptance of the union, and acquiescence in Confederation. Nevertheless, Howe was sworn and took his seat in the House of Commons. The federal Members from Nova Scotia attended the first session of the federal Parliament and remained in Ottawa in spite of the growing insistence in Nova Scotia that they leave. In his first speech in the House of Commons, Howe upheld the right of the anti-confederates to agitate against “a mere act of parliament,” but John A. Macdonald noticed that Howe did not pledge himself to agitate. Howe spoke frequently in the House, but, aware of criticism in Nova Scotia, remained apart from both the government and the opposition. He said that he intended to “maintain an independent attitude as an anticonfederate, asking nothing and accepting nothing till [the British] Parliament decides for or against us, and then will be governed by circumstances, after full consultation with our friends.”<sup>(13)</sup> In addition to favouring repeal of the act of union – the *British North America Act* (now the *Constitution Act, 1867*) – Howe also suggested that the tie with Great Britain be reconsidered, a rather revolutionary sentiment at the time.

A few years later, Louis Riel was elected to the House of Commons for the riding of Provencher, first in a by-election in 1873, and then in a general election in 1874. Following his 1874 victory, Riel, who was avoiding arrest, travelled to Hull. On 30 March 1874, he crossed the Ottawa River with another Member-elect, Romuald Fiset, and went to the House of Commons to sign the Members’ register and take the oath of office. Having done so, he immediately fled back to Hull before he could be arrested. It appears that the Clerk of the House, who administered the oath, did not recognize Riel, and did not realize who he was until he had left.<sup>(14)</sup>

Riel was legally elected, sworn and had his name entered on the rolls, but he did not attempt to exercise any of his privileges as a Member.<sup>(15)</sup> The House of Commons ordered him to appear in the House, which he could not do for fear of arrest; so, after a heated debate, he was expelled for failure to comply with the order. In any event, there appears to have been no question of his refusing to take the oath, nor were there allegations that he had breached it.

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(13) Ibid., pp. 152–153. See also J. Murray Beck, *Joseph Howe*, Vol. II, McGill-Queen’s University Press, Montréal, 1983, p. 223.

(14) Thomas Flanagan, *Louis “David” Riel: “Prophet of the New World,”* University of Toronto Press, Toronto, 1979, p. 42; William McCartney Davidson, *Louis Riel, 1844–1885*, The Albertan Publishing Company Ltd., Calgary, 1955, p. 110; Hartwell Bowsfield, *Louis Riel: The Rebel and the Hero*, Oxford University Press, Toronto, 1971, p. 70; G. F. G. Stanley, *Louis Riel: Patriot or Rebel?* The Canadian Historical Association, Booklet No. 2, Ottawa, 1979, p. 14.

(15) Ibid.; and see also Norman Ward, *The Canadian House of Commons: Representation*, University of Toronto Press, Toronto, 1950, p. 70.

In 1942, during World War II, the Bloc populaire was formed in response to the introduction of conscription; by 1944 it had four Members. In the 1945 general election, only two members of the Bloc populaire were elected. There is no indication that the oath of allegiance was or became an issue in relation to them.

It was also in the 1940s that Fred Rose was elected to the House of Commons. One writer has noted that “as Mr. Rose was subsequently convicted in the spy trials of 1946, it would be difficult to say whether his acceptance of the oath of allegiance established a precedent of any significance.”<sup>(16)</sup> Rose was expelled by the House after his conviction, although this was not done on the basis that he had breached his oath of allegiance.

Were a Member to be found to have breached his or her oath of allegiance, the House of Commons could impose punishment. The Canadian House of Commons has from the beginning reserved the right to refuse to let a Member take his or her seat, and to discipline or expel any of its Members. Properly speaking, this right involves the privileges of the House and its Members, and the House’s inherent ability to manage its own affairs, rather than qualifications for membership. There is ample precedent for this practice in Canada, and in other parliamentary systems. Before Confederation, expulsions were effected in Canada in 1800, 1829, 1831, and 1858. Members have frequently challenged the right of other Members to sit and vote. In addition to the expulsion of Louis Riel, there have been a number of serious investigations with respect to the propriety of allowing certain Members to remain in office. Most of these cases involved allegations of criminal activity, although one writer has noted “the readiness of the House to disqualify or expel, even though no statute may have been violated – and provided, perhaps, that party lines could stand the strain.”<sup>(17)</sup>

Although actual rejection of an elected Member by the House is rare, the House of Commons expelled Louis Riel twice in 1874–1875, Thomas McGreevy in 1891, and Fred Rose in 1947. In two of these cases, the House did not pass a formal motion of expulsion. In Riel’s second expulsion, the House merely observed that he appeared to have “been adjudged an outlaw for felony,” and was, therefore, disqualified; Rose was found to be “incapable of sitting or voting in this House” when he was sent to jail.<sup>(18)</sup> In none of these cases – even that of Rose, who was convicted of treason – did the issue arise of whether the individual concerned had breached his oath of allegiance.

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(16) Ibid., p. 79.

(17) Ibid., p. 72.

(18) Norman Ward, *Dawson’s The Government of Canada*, Sixth Edition, University of Toronto Press, Toronto, 1987, p. 105. In 1996, the Supreme Court of Canada upheld the right of provincial legislative assemblies to expel and prevent one of their members from running again, as part of their parliamentary privileges and stated that the *Canadian Charter of Rights and Freedoms* did not apply to the exercise of such privileges: *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876.

## CASES INVOLVING OTHER LEGISLATURES

Members of provincial legislative assemblies are required by section 128 of the *Constitution Act, 1867* to take the same oath as federal Members of Parliament. Provincial legislation for some of the provinces replicates that obligation, and permits members to solemnly affirm their allegiance rather than swear.<sup>(19)</sup>

Individuals advocating various forms of separation have been elected to provincial legislatures in Canada. For example, in the wake of Confederation, anti-confederates gained control of the provincial legislature in Nova Scotia, and eventually formed the government. There is no evidence that any problem or issue arose over their taking the oath of allegiance.

The most recent and dramatic case involves the 1976 election of the Parti Québécois in Quebec. According to one press report, members of the Parti Québécois, faced with the necessity of taking the oath, resolved it by “crossing their fingers” while doing so.<sup>(20)</sup> Another explanation is that the oath was seen as an oath to the Queen in right of the province, since the Crown in Canada is divisible. As such, the Queen represents the state (or the province), and is a symbol rather than an identifiable individual.

Since 1982, members of Quebec’s National Assembly have been required to take a second oath. Section 15 of the *National Assembly Act*, R.S.Q., A-23.1, provides: “No member may sit in the Assembly before making the oath provided in Schedule I.” Schedule I sets out the following oath or affirmation:

I, (name of the Member), declare under oath that I will be loyal to the people of Québec and that I will perform the duties of Member honestly and justly in conformity with the constitution of Québec.

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(19) British Columbia *Constitution Act*, R.S.B.C. 1996, c. 66, s. 24; Alberta *Legislative Assembly Act*, R.S.A. 2000, c. L-9, s. 23; Saskatchewan *Legislative Assembly and Executive Council Act*, 2007, S.S. 2007, c. L-11.3, s. 13; Manitoba *Legislative Assembly Act*, C.C.S.M., c. L110, s. 10.

(20) Charles Lynch, “Bloc Québécois: Members make oaths of office seem ridiculous,” *Ottawa Citizen*, 29 July 1990.

According to the 1986 Members' Manual of the National Assembly:

Writers on parliamentary law (Beauchesne, 4<sup>th</sup> ed.) state that the oath of allegiance to the Queen required by section 128 of the *British North America Act* refers to allegiance to the country, while the oath required by section 15 of the *National Assembly Act* is an oath of allegiance to the people and Constitution of Quebec.<sup>(21)</sup> [translation]

This distinction between the two oaths, and description of the constitutionally required oath, presumably enables Members to take the oaths who might otherwise object to doing so.

The obligation under section 128 of the *Constitution Act, 1867* to subscribe an oath of allegiance to Her Majesty the Queen applies only to members of the Senate, House of Commons, and provincial legislative assemblies, and therefore does not encompass members of the territorial legislative assemblies. The duty to subscribe an oath for the members of these assemblies may rather be found in the creating statutes of the territories.

Members of the Northwest Territories Legislative Assembly must, pursuant to the *Northwest Territories Act*, take the required oaths of office and allegiance before assuming any duties of office.<sup>(22)</sup> Such oaths of office and allegiance to the Queen are prescribed by the Order in Council entitled *Oaths of Allegiance and Office and Seat of Government Order (N.W.T.)*<sup>(23)</sup> and are replicated by the *Legislative Assembly and Executive Council Act*.<sup>(24)</sup>

Members of the Legislative Assembly of Yukon must, in accordance with the *Yukon Act*, subscribe to the oath of office as prescribed by the Legislature of Yukon and the oath of allegiance that is provided for by the Fifth Schedule of the *Constitution Act, 1867*.<sup>(25)</sup>

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(21) Quebec, National Assembly, *Manuel des membres de l'Assemblée nationale*, c. 2.1, 1986, p. 2.

(22) *Northwest Territories Act*, R.S.C., 1985, c. N-27, s. 10.

(23) *Oaths of Allegiance and Office and Seat of Government Order (N.W.T.)*, C.R.C., c. 1239.

(24) *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22, s. 9, see Schedule B, Forms 1 and 2. The oath of allegiance is as provided by the *Oaths of Allegiance Act*.

(25) *Yukon Act*, S.C. 2002, c. 7, s. 12. It appears that the Legislature of Yukon has yet to enact an oath of office for members of its legislative assembly, but that the members are subscribing an oath of office as prescribed by an Order in Council taken pursuant to the previous version of the *Yukon Act*. Moreover, the *Legislative Assembly Act*, R.S.Y. 2002, c. 136, s. 16, refers only to the oath of allegiance to the Queen while being silent in respect of the oath of office.

The *Nunavut Act* provides that all members of the Nunavut Legislative Assembly must subscribe an oath, as prescribed by the Governor in Council, before assuming their duties.<sup>(26)</sup> The *Nunavut Legislative Assembly and Executive Council Act* replicates that obligation.<sup>(27)</sup>

## CASES IN OTHER COUNTRIES

There have been cases where “separatist” parties and individuals have been elected to legislatures in other countries. Again, few specific examples have been found of the failure or refusal to take an oath of allegiance or of allegations that a Member violated or breached such an oath.

In Great Britain, members of Welsh and Scottish nationalist parties have been elected to the British House of Commons. Such individuals have often advocated devolution, and other forms of political restructuring. As they would not necessarily have opposed the continuation of the monarchy, however, they would probably have had no great difficulties in swearing an oath of allegiance to the Crown.

More problematic is the case of Irish Catholic members of the British Parliament who advocate unification of Northern Ireland with the Republic of Ireland. Gerry Adams and Martin McGuinness were elected to the United Kingdom House of Commons on 1 May 1997 as members of Sinn Féin, the political arm of the Irish Republican Army. Both had stated, in line with Sinn Féin policy, that they would refuse to take the oath of allegiance to the British monarchy. They nonetheless wished to take up their seats in the House of Commons and to avail themselves of the facilities provided to all members of the House, including office accommodations, staff allowances, research facilities, travel allowances and other benefits. The Speaker, however, ruled that in accordance with the *Parliamentary Oaths Act 1866*, successful electoral candidates who refused to swear or affirm the oath of allegiance would not be permitted to take up their seats in the House, nor would parliamentary facilities be provided to

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(26) *Nunavut Act*, S.C. 1993, c. 28, s. 16. See the Order in Council P.C. 1998-2183 of 10 December 1998.

(27) *Legislative Assembly and Executive Council Act*, S.Nu. 2002, c. 5, s. 12; see Schedule D, Form 1 “Oath of Allegiance” and Form 2 “Oath of Office.”

them. Both Members sought leave to apply for judicial review to the Northern Ireland High Court of Justice. Their applications were refused, largely on the basis that the subject matter of the application was not amenable to judicial review. The Court ruled that the Speaker's decision was purely a matter internal to the House of Commons, falling within Parliament's exclusive jurisdiction, and leaving no room for court intervention.

Mr. McGuinness brought an application before the European Court of Human Rights, alleging that the requirement to take the oath of allegiance was an unjustified interference with his right to freedom of expression guaranteed under Article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.<sup>(28)</sup> He also alleged breaches of Article 9 (freedom of religion, since he is a Roman Catholic, and is required to swear allegiance to a monarch who by law cannot be Roman Catholic or marry a Roman Catholic), Article 13 (lack of effective remedy for breach of Article 9), Article 3, Protocol 1 (denying his constituents free expression by infringing his right to represent their views in Parliament) and Article 14 (discrimination on the basis that the Speaker imposed the exclusionary measure in the knowledge that Mr. McGuinness did not intend to take the oath). The application was dismissed as inadmissible largely on the basis that the oath is a "reasonable condition attaching to elected office having regard to the constitutional system of the respondent State." The Court further held that the requirement of an oath of allegiance to a reigning monarch is "reasonably viewed as an affirmation of loyalty to the constitutional principles which support ... the workings of representative democracy in the respondent State."<sup>(29)</sup>

Even before the establishment of the Republic of Ireland, there were problems when Members of the British Parliament representing constituencies in what was known as the Irish Free State (1921–1937) and Eire (1937–1949) were constitutionally required to take an oath of allegiance to the British Crown.<sup>(30)</sup>

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(28) *McGuinness v. United Kingdom*, (1999) ECHR No. 39511/98.

(29) *Ibid.*, p. 7. The idea that a monarch "personalizes" a constitutional provision has been echoed in Canada in the context of citizenship oaths. This was expressed by McGuigan JA in *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406 (CA), in upholding a lower court decision that the requirement did not violate sections 2(b), 2(d) and 15 of the Charter.

(30) See Donal O'Sullivan, *The Irish Free State and its Senate*, Faber and Faber Limited, London, 1940; J. L. McCracken, *Representative Government in Ireland*, Oxford University Press, London, 1958; and Timothy Patrick Coogan, *Ireland Since the Rising*, Pall Mall Press, London, 1966.

Similarly, as various former colonies in the British Empire gained their independence, no doubt legislators were elected who advocated independence, separation, a break from Britain, and other policies that were not necessarily consistent with the oath of allegiance. Even so, the issue does not appear to have arisen in any significant way.

In 1920, the Australian House of Representatives expelled one of its Members, Hugh Mahon, for:

Having, by serious and disloyal utterances at a public meeting ... been guilty of conduct unfitting him to remain a Member of this House and inconsistent with the oath of allegiance which he has taken as a Member of this House ... .<sup>(31)</sup>

This is virtually the only case found where a legislator lost his or her seat for violating an oath of allegiance. Even this case seems to have been based on political and personal grounds as much as anything else.

In New Zealand, a government bill, introduced 10 May 2005, is currently before the House of Representatives. The *Oaths Modernisation Bill 2005* would amend the oath of allegiance sworn by parliamentarians, the Judicial Oath, and the Executive Councillor's Oath, all of which are currently set out in the *Oaths and Declarations Act 1957*. The bill would also amend other official oaths currently set out in a number of statutes. The oath of allegiance would be only slightly revised to add a reference to the Queen or King as the "Queen (or King) of New Zealand." Otherwise, no meaningful changes to that oath are proposed. The bill also provides for Maori translations of all the oaths proposed to be revised.

## **WHAT CONSTITUTES A VIOLATION OR BREACH OF THE OATH?**

There do not appear to be any cases to illustrate what would constitute a violation or breach of the oath of allegiance. The taking of an oath, or indeed an affirmation, is essentially a question of morality. It is generally believed that people do not take the oath or affirmation lightly, and will consider themselves bound by it. If the person taking the oath lies, on one level that is a matter between that person and his or her conscience or God. At the same time, just as

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(31) Australia, House of Representatives, *Votes and Proceedings* (1920–1921), p. 431. See also *Parliamentary Debates*, 1920–1921, Vol. SCIV, pp. 6283–6284, 6327–6328, 6382–6475.



some witnesses lie in court, despite having been sworn to tell the truth, some people do on occasion break their oaths. Moreover, in the present, less religious era, it is likely that many people are not as intimidated by oaths as was previously the case.

When an oath is broken, penalties are usually imposed. For example, witnesses who lie in court can be charged with perjury or held in contempt of court. In the case of legislators, it is up to the legislature to punish such contraventions. Punishment can consist of a motion of censure, or, in the most severe cases, expulsion of the individual.

There may be significant difficulties in establishing whether politicians have broken an oath. Perhaps this would be easy to do in a clear case of treason; but in most other cases it would depend, in part, on how one saw or interpreted the oath, and one's definition of allegiance or loyalty.

Some see the oath not as one of allegiance to the Queen as an individual so much as one of allegiance to the Crown as a symbol. The Queen can be seen as a representative or symbol of the state, either nationally or provincially, or as the embodiment of a democratic and constitutional form of government.

It is extremely difficult to define what activities would be considered to be a breach of the oath of allegiance. Would the test be objective or subjective? While an individual might feel honestly and sincerely that his or her actions did not breach the oath, others might disagree. Moreover, if the oath is considered to be to the Queen as representative or symbolic of a parliamentary and democratic system, one is arguably remaining faithful to it so long as one does not advocate a violent overthrow of the government.

In a courtroom setting, it may be a relatively simple matter to determine whether someone has told the truth in sworn testimony. In considering concepts such as "allegiance," though, determination of a breach is much more difficult. What one person considers to be in the best interests of the country may not seem to be so to other people. An individual may honestly believe that a communist form of government would be good for the people: would this belief be contrary to his or her oath of allegiance? Does how the person goes about achieving the goal make a difference? One person's idea of loyalty to Canada may not be someone else's; but so long as the objective is pursued by legal, democratic and parliamentary means, it might be argued that the person has not violated the oath of allegiance.

A distinction could also be drawn between those who seek a new constitutional arrangement and those who seek the break-up of the country. Again, by representing certain views of their constituents, Members could be perceived as being themselves at variance with the "national interest." Similarly, even the break-up of the country may not in itself constitute a

violation of the oath: the oath is to the Queen, and the Queen could remain the head of any new state that resulted (this would seem to be the policy of the Scottish Nationalist Party in Great Britain).

There have been repeated attempts over the past 15 years by Members of House of Commons to introduce private Members' bills proposing various changes to the oath of allegiance. Because of the difficulty of achieving a constitutional amendment, most bills have sought to amend the *Parliament of Canada Act*. Various formulations of the revised or additional oath have been proposed. Bill C-408, sponsored by Eugène Bellemare, MP, received second reading in May 2003 and was referred to the Standing Committee on Procedure and House Affairs. The bill had not been reported back to the House when the second session was prorogued, and later when the 37<sup>th</sup> Parliament was dissolved. An identical proposal, Bill C-335, sponsored by Member of Parliament Joe Preston, was introduced in the 38<sup>th</sup> Parliament, but did not go beyond first reading.

Some members of the House of Commons have taken it upon themselves to make such a pledge, within their own ridings, and in the company of their constituents. Others have chosen simply to add a second pledge after the required constitutional pledge, without it being required by law.<sup>(32)</sup>

In the Senate, Senator Raymond Lavigne added the words “and to my country, Canada” when taking the constitutionally prescribed oath. This led to questions in the Chamber, and the Senator was obliged to take the oath a second time without altering the text as it read in the Constitution.<sup>(33)</sup> Senator Lavigne subsequently moved to amend the *Rules of the Senate* by adding after Rule 135 the following:

135.1 Every Senator shall, after taking his or her Seat, take and subscribe an oath of allegiance to Canada in the following form, before the Speaker or a person authorized to take the oath:

I, (*full name of the Senator*), do swear (*or solemnly affirm*) that  
I will be faithful and bear true allegiance to Canada.

On 9 June 2005, this motion was referred to the Standing Senate Committee on Rules, Procedures and the Rights of Parliament. The Committee did not report to the Senate before the end of the 38<sup>th</sup> Parliament.

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(32) House of Commons, *Debates*, 14 March 1994, at 1140 (Ted White, MP); House of Commons, *Debates*, 5 May 2003, at 1730 (Eugène Bellemare, MP).

(33) Senate, *Debates*, 16 April 2002, No. 104, at 1520 (Question Period).

## CONCLUSION

It is important to understand the purpose of oaths of allegiance. Persons who are elected or appointed to public office are expected to be loyal and faithful. They are assuming positions of public trust, and the oath of allegiance is a pledge that they will conduct themselves “patriotically,” and in the best interests of the country. The oath also serves to remind the individual taking it of the serious obligations and responsibilities that he or she is assuming. There is no magic about oaths, but they do serve an important symbolic function.

Various forms of oaths are possible. An oath of allegiance to the head of state is the one adopted in Canada and most Commonwealth countries. Oaths of allegiance to the country, to the people, or to the country’s constitution are also used in various countries. The Dutch have added a requirement that the individual take an oath or affirmation that he or she is not under any obligation to any other person. Variations of these oaths are possible, for example, an oath in favour of democratic traditions. To some extent, the choice of subject matter for oaths depends on the values of the society, and the things seen as the cornerstones of the country’s political system.

The Crown was important in terms of the historical development of the United Kingdom. In the context of the religious battles between Catholics and Protestants, and the debate over religious leadership, the requirement for an oath of allegiance to the monarch is understandable. When the Canadian Constitution was being drafted, the British tradition was imported. As Canada gradually acquired full independence, culminating in the patriation of the Constitution in 1982, the nature of the oath required of legislators in Canada could have been reviewed. Since the Queen is still the head of state of Canada, an oath of allegiance to her is still relevant. The monarchy, however, is not as central to the Canadian political system as it once was; indeed, many Canadians question the concept of a monarch, particularly one who, living in another country, is perceived as “foreign.” Others see the Crown as a vestige of the colonial or imperial past. At the same time, however, the oath does not involve the Queen in her personal capacity, but rather the Queen as the symbol or personification of the country, its constitution and traditions, including concepts such as democracy.

Failure to take the oath of allegiance constitutes an absolute bar to sitting or voting in Parliament or the provincial legislatures of Canada. The only way to change this would be to amend the Canadian Constitution. It is not entirely clear whether this could be done under the general amending formula (through resolutions of Parliament and of the legislatures of at

least two-thirds of the provinces having at least 50% of the population) or whether it would require unanimity. (One could argue that a single legislature could by itself amend the oath required of its own Members, but any action based on such a premise would probably be challenged.)

There is, however, no penalty for a Member's failure to take an oath, other than his or her inability to sit or vote or to draw a salary. Presumably, the House of Commons could expel anyone who consistently refused to take the oath, or even declare the seat vacant.

Once a Member has taken the oath of allegiance, thus becoming entitled to take a seat and vote in the House, the only subsequent related issue that could arise would be whether the Member violated or breached the oath. The House of Commons has the power to expel or otherwise discipline Members who contravene the oath. There do not appear to be any precedents for use of this power, however; and, given the general vagueness of the concept, considerable difficulties would seem to lie in the way of establishing the validity of allegations of contravention. Ultimately, the matter would probably have to be resolved politically, although the *Canadian Charter of Rights and Freedoms* might be relevant in appropriate circumstances.