Date: 20060901

Docket: T-1024-05

Citation: 2006 FC 1053

BETWEEN:

JOSEPH TAYLOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

MARTINEAU J.

REASONS FOR ORDER

[1] On April 5, 2005, M.A. Hefferon, Citizenship Officer, dismissed the application for proof of citizenship made by the Applicant in November 2003, thus giving rise to the present judicial application.

[2] The Applicant is the natural son of a Canadian soldier who served overseas during World War II. He was born in England in 1944. His parents married in 1945. He landed in Canada with his mother in 1946. The Applicant's parents' marriage broke up after a few months. The Applicant returned with his mother to England six weeks before the *Canadian Citizenship Act*, S.C. 1946, c. 15 (the 1947 Citizenship Act) came into force.

[3] Both natural parents of the Applicant undoubtedly became Canadian citizens on January 1, 1947: (1) the Applicant's father because he was born in Canada and had not become an alien; (2) the Applicant's mother because she was a British subject who had married abroad a Canadian national, and who had been lawfully admitted to Canada for permanent residence before the coming into force of the 1947 Citizenship Act.

[4] But the Applicant, according to the Respondent, has no automatic right to citizenship because his parents were not married at the time of his birth. To paraphrase the Respondent's position with respect to dependents of Canadian soldiers who were repatriated from Europe after 1945, although these brides and children may have been welcomed and even financially assisted by the Canadian authorities to come in Canada, with the special status of "Canadian citizens" under the *Immigration Act, 1910*, S.C. 1910, c. 27, as revised R.S.C. 1927, c. 93 (the 1910 Immigration Act), this did not automatically made them "Canadian citizens" upon the coming into force of the 1947 Citizenship Act.

[5] Under the 1910 Immigration Act, a member of a "prohibited class" could not enter or remain in Canada (see Note 1). Despite the fact that the Applicant and his mother were "British

subjects", such status did not, by itself, constitute a licence to enter, land or remain in Canada (see Note 2). Only "Canadian citizens" and persons who had "Canadian domicile" within the meaning of the 1910 Immigration Act were allowed to enter and remain in Canada. The Applicant relies on *Order in Council re entry into Canada of dependents of members of the Canadian Armed Forces*, P.C. 1945-858 (9 February 1945), which was passed in 1945 and remained in force until May 15, 1947. Under that Order in Council, where a former member of the Canadian Armed Forces who served during World War II was a "Canadian citizen" or had "Canadian domicile" within the meaning of the 1910 Immigration Act, his dependents were automatically granted the same status upon landing in Canada.

[6] In the present case, the Respondent submits that Canadian citizenship can only be acquired by the Applicant if he complies with all the requirements of section 5 of the *Citizenship Act*, R.S.C. 1985, c. C-29, as modified (the current Citizenship Act), which provides that an application for grant of citizenship be made to the Minister.

[7] By analogy, the Respondent's counsel referred this Court to a 1964 Canadian Citizenship Branch publication titled "British Subjects and Canadian Citizens", where one can read the following observation:

> The position of the British subject in Canada who is not a citizen, can be compared to that of an honoured guest in someone else's house. Although he may share many or all of the privileges enjoyed by members of the family, he is nonetheless only a guest.

[8] For the reasons mentioned below, I have come to the conclusion that the Applicant is a Canadian citizen, that the impugned decision rendered by the Citizenship Officer should be set aside, and that the Minister be directed to issue a certificate of citizenship to the Applicant.

[9] In so doing, I also dismiss the alternative argument made by the Respondent to the effect that the Applicant has lost his Canadian citizenship in the meantime. To the extent that:

(a) the Respondent invokes or is authorized under subsection 3(1), paragraphs 3(1)(*d*) or (*e*), or section 7 of the current Citizenship Act to rely on the loss of citizenship provisions found in former citizenship legislation, including section 13 of *An Act to Amend the Canadian Citizenship Act*, S.C. 1952-53, c. 23 (the 1953 Citizenship Amendment Act) and subsection 4(2) of *An Act respecting citizenship, nationality naturalization and status of aliens*, R.S.C. 1970, c. C-19 (the 1970 Citizenship Act); or

(b) the Applicant is denied the right to make an application for resumption of citizenship as a result of the repeal of the 1970 Citizenship Act by section 36 of *An Act respecting citizenship*, S.C. 1974-75-76, c. 108 (the 1977 Citizenship Act) and the application of subsection 3(1) and sections 7 and 11 of the current Citizenship Act,

the Court declares that the impugned legislative provisions are contrary to due process and infringe paragraphs 1(*a*) and 1(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III (the Bill of Rights) and the right of an individual not to be deprived to life, liberty or security of the person except in accordance with the principles of fundamental justice guaranteed by section 7 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being

Schedule B to *Canada Act, 1982* (UK), 1982, c. 11 (the Charter). These infringements are not justified under section 1 of the Charter and as a result, the above provisions are inoperative.

[10] Furthermore, to the extent that subsection 3(1), paragraphs 3(1)(*b*), (*d*) and (*e*), and section 8 of the current Citizenship Act, when read together, authorize the dismissal of the Applicant's application for proof of citizenship on the ground that:

(a) the citizenship of a child born out of wedlock before February 15, 1977, outside Canada, can only be derived from the child's mother, or

(b) there is an automatic loss of citizenship if an application for retention of citizenship has not been made by the child born out of wedlock, before February 15, 1977, outside Canada, between the age of 21 and 24 years,

the Court finds that these provisions contravene subsection 15(1) of the Charter and the contraventions are not justified under section 1 of the Charter.

[11] The background is very important in the case at bar and the parties' numerous arguments tended to revolve around the construction and effects of different statutes and Orders in Council on war brides and their children (including the Applicant), as well as the issue of the extent to which the past or present application of the impugned legislative provisions is contrary to the Applicant's right to due process of law and equality rights. Accordingly, for a better understanding of the answers given to the complex legal questions which were raised in the present case, these reasons will follow the following general plan:

I. Factual Background

II. Decision under review

I. Factual Background

[12] Between 1939 and 1945, nearly half a million Canadian soldiers poured into England: "… Naturally, the Canadians met British women, and whenever that happened there was romance and its inevitable results." An estimated 30,000 Canadian war children were born in Britain and Europe during World War II – some 22,000 in England alone, another six to seven thousand in Holland after the country was liberated: see Melynda Jarratt, "The Canadians in Britain, 1939-1946" in Olga Rains, Lloyd Rains & Melynda Jarratt, *Voices of the Left Behind* (Toronto: The

Dundurn Group, 2006) 15 at 16; see also Melynda Jarratt, “By Virtue of his Service” in *Voices of the Left Behind, supra* at 200. The Applicant is one of those war children.

[13] The Applicant’s father, Joe Taylor Sr., was born in Canada and was 18 years old when he arrived in England in 1942. He was a member of the Canadian Armed Forces. Sometime between late 1943 and early 1944, he began a relationship with the Applicant’s mother, Jenny Rose Harvey. She was born on the Isle of Wight (England) and was two years older than the Applicant’s father. The couple had decided to marry in the spring of 1944. However, Joe Taylor Sr. needed permission from his Commanding Officer before they could marry. Due to the war, various restrictions and limitations were placed on the status of Canadian Armed Forces personnel. Preparations for the D-Day invasion were well underway in the spring of 1944. On D-Day, June 6, 1944, Joe Taylor Sr. was deployed to France before the couple was given permission to marry. When Joe Taylor Sr. left England, Jenny Rose Harvey was pregnant. The Applicant was born in Britain on December 8, 1944, while his father was still stationed in France.

[14] Joe Taylor Sr. was not permitted to return to England until February of 1945 when he was granted permission by his Commanding Officer to marry the Applicant’s mother. They were married on May 5, 1945. Joe Taylor Sr. remained in England until February of 1946 when he was discharged from the Canadian Armed Forces. He was then repatriated to Canada and returned to Cumberland, British Columbia where he prepared for the arrival of his wife and child.

[15] Not all Canadian servicemen married the women they met in Europe. That being said, between 1942 and 1948, 43,454 war brides – about 94% British – and their 20,997 children landed

in Canada. Their transportation was sponsored by the Canadian government through an organization called the Canadian Wives Bureau, an adjunct of the Department of National Defence. It was formed in 1944 in response to the realization that the war was soon going to be over and that nearly 70,000 dependents of members of the Canadian Armed Forces would be landing in Canada.

[16] The Applicant and his mother obtained passage on the *Queen Mary* which, on this voyage, was used solely for the repatriation of Canadian soldiers and their families. They landed in Canada on July 4, 1946 at Halifax, Nova Scotia. There is no question that they were legally admitted in Canada. The repatriation of war brides and their children was a happy event. Indeed, when the Applicant and his mother arrived in Vancouver, the Comox Newspaper, the local journal of the largest town nearest to Cumberland, signaled their arrival. Unfortunately, once reunited with Joe Taylor Sr., the Applicant's mother's life was far from idyllic. It would appear that after having experienced the severe horrors of war, the Applicant's father was not the same man. His personality had changed. After a few months, the marriage broke up, apparently due to the violence of the Applicant's father against his mother.

[17] Since the Applicant's mother had no immediate family and nowhere else to go in Canada, she was left with little choice but to return to England with her young child (see Note 3). The parents of the Applicant's mother sold their furniture in order to pay for their return to England.

[18] The Applicant was not yet two years old when he left Canada under his mother's care. They first reached New York City in the United States of America. Both traveled from New York to the

United Kingdom with the Canadian passport issued to the Applicant's mother in New York on October 11, 1946.

[19] While he was growing up in England, the Applicant was informed by his mother and believed himself to be "half-Canadian" and "half-British". Both he and his mother thought they were citizens of both Canada and the United Kingdom. When he was about 7 or 8 years old, the Applicant started to ask questions about his father in Canada. His mother still had the Applicant's father's address in British Columbia. The Applicant corresponded on a fairly regular basis with his father for a couple of years, until the correspondence with his father became less frequent and, eventually, ceased.

[20] On December 8, 1965, the Applicant turned 21. Under applicable Canadian citizenship legislation he was no longer a minor.

[21] At the age of 24, already married with two children of his own, the Applicant approached Canada House in London, England, about the possibility of establishing himself in Canada. He explained that he was the son of a repatriated Canadian veteran who had lived in Canada in his early childhood. He was apparently given standard application forms for immigration which required a "sponsor" in Canada. He completed the forms and sent them to his father at his last known address.

[22] The Applicant waited many months for a response from his father, but none was forthcoming. Since he received no replies to his correspondence and had no other address for his

father, he continued with his life in England and concentrated on building his accounting practice and raising his family.

[23] For the next 30 years, the Applicant did not make any attempt to come to Canada (or assert a claim to Canadian citizenship). In 1999, the Applicant made a trip to British Columbia and visited Nanaimo where his father was born. Upon his return to England, the Applicant went to Canada House in London to enquire into the possibility of moving to Canada. He was told that he had lost his Canadian citizenship on his 24th birthday.

[24] In November 2000, the Applicant discovered that his father had died in 1996 and that he had seven half-brothers and half-sisters, all of whom lived on Vancouver Island. In the meantime, the Applicant had purchased a residence in Victoria, British Columbia and during the years 2000 to 2004, he spent respectively 8, 11, 14, 18 and 20 weeks in Canada (at the time the Applicant filed his application in this Court in June 2005, he was planning to spend 22 weeks in Canada).

[25] In February 2003, the Applicant made an application to obtain a certificate of Canadian citizenship (based on the fact that he was the child of a Canadian Armed Forces member permanently stationed in England who was repatriated and later lived in Canada), but was told that his application would not be forwarded for further processing because he had lost citizenship the day he turned 24.

[26] In November 2003, the Applicant presented a new application for proof of citizenship and this time, it was accepted for further processing by the Respondent. However, some 18 months later,

the Applicant was informed by letter dated April 5, 2005, from M. A. Hefferon, Citizenship Officer, that his application was dismissed on the ground that he had never acquired citizenship status. It is that latter decision which the Applicant now seeks to have reviewed and set aside by the Court.

[27] Since 2003, the Applicant has addressed numerous letters to immigration officials and politicians including the Right Hon. Paul Martin and the Hon. Joe Volpe in their former capacities of Prime Minister and Minister of Citizenship and Immigration, seeking assistance with his situation, but with no avail. An application for reconsideration of the impugned decision was made to the Citizenship Officer in 2005, but it has apparently been left unanswered.

[28] At the hearing of this judicial proceeding in Vancouver, on May 30, 2006, Respondent's counsel asserted that there is no legal way whatsoever that the Applicant can be recognized today as a Canadian citizen, unless he is naturalized and makes a formal application for a grant of citizenship under section 5 of the current Citizenship Act. Respondent's counsel also informed the Court that he had no instructions whatsoever to settle the case or to agree to any consent order (as was done in *Augier v. Canada (Minister of Citizenship and Immigration)*, [2004] 4 F.C.R. 150 (F.C.), a case which presents similar, albeit not identical, features as the case at bar).

[29] After the hearing, the parties were given the opportunity to complete their record, to make additional submissions with respect to cases and other materials judicially noted by the Court, and to clarify their position with respect to the constitutional issues which were raised, including submissions with respect to constitutional declarations and remedies.

II. Decision under review

[30] The Citizenship Officer based her decision on the 1947 Citizenship Act which came into force on January 1, 1947.

[31] Because the Applicant was “born out of wedlock” (a condition the Applicant is unable to change), the Citizenship Officer determined that the Applicant cannot derive Canadian citizenship through his Canadian born father. The Citizenship Officer determined that in the case of an “illegitimate child” born before January 1, 1947, Canadian citizenship can only be derived from his mother.

[32] Since the Applicant’s mother was born in England and, at the time of the Applicant’s birth, did not reside in Canada, the Citizenship Officer dismissed the application for proof of citizenship made by the Applicant.

III. Standard of review

[33] In the case at bar, the parties submit that the impugned decision should be examined on a correctness standard. Having considered all relevant factors (*Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226), I come to the same conclusion.

[34] Pursuant to subsection 12(2) of the current Citizenship Act, certificates of citizenship are issued to naturalized citizens after completion of the process but natural-born citizens must make an

application for proof of citizenship before any certificate is issued by the Minister. This asks for a correct interpretation and application of any applicable legislation, regulation or order in council by the Citizenship Officer. The requirements for citizenship are enumerated at section 3 of the current Citizenship Act which came into force on February 15, 1977. With respect to a person born before that date, "[s]ubject to [the current Citizenship Act], [this person] is a citizen if … the person was a citizen immediately before February 15, 1977, or … was entitled, immediately before February 15, 1977, to become a citizen under paragraph 5(1)(*b*) of the former Act" (see paragraphs 3(1)(*d*) and (*e*) of the current Citizenship Act). Moreover, section 7 of the current Citizenship Act provides that a person who is a citizen shall not cease to be a citizen except in accordance with Part II of the current Citizenship Act.

[35] The decision rendered by the Citizenship Officer must not be contrary to law: see paragraphs 18.1(4)(*b*) and (*f*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended. This goes well beyond this Court assuring itself that the interpretation chosen by the Citizenship Officer accords with any applicable citizenship legislation (or regulation or Order in Council) : see paragraph 18.1(4)(*b*) of the *Federal Courts Act*. In this regard, the Constitution of Canada is the supreme law of Canada, and any law, regulation, administrative decision or order authorized by statute that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect (subsection 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11) unless, in cases where a right guaranteed by the Charter is infringed or denied, such an infringement or denial can be justified under section 1 of the Charter: see *Slaigth Communication Inc. v. Davidson*, [1989] 1 S.C.R. 1038. The Bill of Rights is a quasi-constitutional statute: unless the conflicting legislation expressly declares that it operates

notwithstanding the Bill (as required by section 2) where federal legislation conflicts with its protections, the latter applies and the legislation (or part thereof) is inoperative: see *R. v. Drybones*, [1970] S.C.R. 282; *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at para. 28; *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40 at para. 32.

[36] I note that the Citizenship Officer has no particular expertise with regards to the questions of legal applicability raised in this instance, which include determining when and how citizenship status was acquired under the law, and whether by operation of the law it was lost in the meantime. In this regard, the Court must be satisfied that any requirement prescribed by law or currently imposed by the Citizenship Officer with respect to the acquisition or extinguishment of citizenship status by operation of the law, does not infringe or deny any of the rights and freedoms constitutionally guaranteed by the Charter or declared to exist in Canada by the Bill of Rights. There is no room for deference in these matters: see *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256. Accordingly, the impugned decision must be reviewed on a correctness standard and in light of the constitutional validity of any applicable provision of the current Citizenship Act.

IV. Issues raised and submissions made by the parties

[37] In a nutshell, this case raises issues of (1) statutory interpretation (2) due process, and (3) equality rights. The submissions made by the parties with respect to these issues can be summarized as follows.

1. The statutory interpretation issue

[38] The Applicant submits that the Citizenship Officer erred in law in determining that the Applicant is not a Canadian citizen based on her examination of prior citizenship legislation. In particular, the Applicant submits that the Citizenship Officer failed to consider the applicability and effects of Order in Council, P.C. 858. Since the Applicant's father was at all relevant times a "Canadian citizen" (before or after 1947), the Applicant and his mother automatically became "Canadian citizens".

[39] Essentially, the Respondent submits that Order in Council, P.C. 858 did not confer "citizenship status"; rather, it merely facilitated the entry and landing in Canada of the Applicant and his mother for the purpose of Canadian immigration legislation.

2. The due process issue

[40] The Respondent submits, in the alternative, that if the Citizenship Officer erred in law in determining that the Applicant did not acquire citizenship on January 1, 1947, he otherwise lost it in the meantime by operation of the law. First, any "Canadian domicile" (within the meaning of the applicable immigration legislation) acquired or deemed to have been acquired by the Applicant and his mother upon their landing in Canada on July 4, 1946, was definitively lost following their voluntary departure from Canada (sometime after October 11, 1946) and residence in England for more than one year. Second, the Applicant lost his citizenship when he reached the age of 24: this is so because prior applicable citizenship legislation provided that a citizen born outside Canada prior

to February 15, 1977, had to make an application for retention of citizenship between his 21st and 24th birthdays, which the Applicant failed to do in this case. While such requirements were not known by the applicant or divulged to him before he reached the age of 24 years, ignorance of the law is no excuse.

[41] Essentially, the Applicant submits that when he left Canada in October 1946 under the care of his mother, there were no such statutory requirements. If the statutory requirements adopted in 1953 can apply here (another question in these proceedings), the Applicant is of the view that the Respondent cannot impose or invoke them: see paragraph 3(1)(*d*) of the current Citizenship Act. First, because these requirements were never considered by the Citizenship Officer. Second, because they do not respect the due process of law, including any of the rights declared to exist under paragraphs 1(*a*) and 2(e) of the Bill of Rights (which was applicable at the time the alleged loss of citizenship occurred), or otherwise guaranteed by section 7 of the Charter.

3. The equality rights issue

[42] The Applicant further submits that both the prior and current legislative citizenship schemes are “discriminatory”. Children born outside Canada, in wedlock or out of wedlock, prior to and after February 15, 1977, are treated differently with respect to the acquisition and the extinguishment of citizenship status. The differential treatment is currently based on one’s date of birth (an analogous ground to age) and, in effect, perpetuates former differential treatment based on the marital status and sex of one’s parents, which are the key factors to determine whether citizenship is derived from one’s father or mother. The Applicant submits that such differential treatment reflects a demeaning

and prejudicial view of “illegitimate children” which is discriminatory and infringes the rights to equality guaranteed by subsection 15(1) of the Charter.

[43] Essentially, the Respondent submits that the impugned statutory provisions do not distinguish between claimants based on any enumerated or analogous ground of discrimination. Moreover, the Respondent submits that the Charter cannot be given a “retrospective” or “retroactive” application, so as to confer citizenship status on the Applicant.

V. Evolution of immigration, nationality and citizenship law

1. Citizens and non-citizens today

[44] Simply stated, citizenship is the status of being a citizen. Today, we can generally say that Canadian citizenship represents a sharing of sovereignty and a social contract between individuals and our society as a whole. Citizenship is no longer viewed as a “privilege”. Practical benefits flow from this status, such as the right to vote, the right to enter or remain in Canada, and the right to travel abroad with a Canadian passport. Canadian citizens also enjoy privileged access to the Federal Public Service: see *Lavoie v. Canada*, [2002] 1 S.C.R. 769.

[45] The distinction between “citizens” and “non-citizens” is recognized in the Charter where citizenship is a required qualification for voting rights (s. 3), mobility rights (s. 6) and minority language educational rights (s. 23). However, it may at the same time constitute an “analogous ground of discrimination” under section 15 of the Charter in other instances of legislative preference

(see *Andrews v. Law Society of British Columbia*,, [1989] 1 S.C.R. 143), and any such "discrimination" must be justified under section 1 of the Charter (*R. v. Oakes*, [1986] 1 S.C.R. 103).

[46] Current Canadian citizenship legislation contemplates that citizenship is either acquired automatically by operation of the law, or by a grant of citizenship by the Minister (naturalization). By operation of the law, citizenship can be acquired by birth in Canada (*jus soli* principle) or by descent where the birth occurs outside Canada if one of the natural parents of the child is a citizen (*jus sanguinis* principle).

[47] There is no definition of who is a "citizen" in the Charter and any statutory definition, such as the one in the current Citizenship Act, must comply with the Charter: see *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358. The modern approach is to scrutinize differential treatment according to entrenched rights and freedoms and, in the s. 15(1) context, the concept of essential human dignity and freedom: see *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Lavoie*, *supra*.

[48] This brings me to examine certain assumptions made by the parties in this case.

2. Assumptions made by the parties

[49] It is submitted by the Respondent that "citizenship" is a creature of statute and that it has no legal meaning apart from statute: see *Solis v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 407 (F.C.A.) (QL). The Respondent concedes that the Applicant was a "British

subject" and also a "Canadian national" within the meaning of the *Canadian Nationals Act*, S.C. 1921, c. 4, as revised in R.S.C. 1927, c. 21 (the Canadian Nationals Act) at the time of his birth.

[50] That being said, the Respondent submits that prior to the coming into force of the 1947 Citizenship Act, there was no such thing as a "Canadian citizen". The Respondent submits that if there were any "Canadian citizens" in this country before 1947, then they were citizens only in the "Roman sense" and for the limited purpose of implementing Canadian immigration policy.

[51] The Applicant is not ready to accept the propositions put forward by the Respondent and submits that the legal concept of "Canadian citizen" was referred to and used in at least two statutes enacted by Parliament prior to 1947: the 1910 Immigration Act and the Canadian Nationals Act.

[52] This is the first time that a court examines in a thorough manner the evolution of Canadian immigration, nationality and citizenship law prior to and after the adoption of the 1947 Citizenship Act.

[53] It is recognized that legislative history material is admissible in both constitutional and non-constitutional cases to assist in the interpretation of legislation, provided it meets a threshold test of relevance and reliability. In interpretation cases the courts consult a wide variety of academic and professional publications including textbooks, monographs, studies, reports and scholarly articles. Such material may be used as evidence of an external context or as direct evidence of legislative purpose. The weight to be given to the material is established on a case by case basis: see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.:

Butterworths, 2002) at 471-502; *Lavoie*, *supra* at paras. 40, 57; *Reference re Firearms Act*, [2000] 1 S.C.R. 783 at para. 17; *Law*, *supra* at para. 77; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paras. 21, 35; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at paras. 48-50).

[54] In this regard, the Respondent submits that there are two consistent features in the historical documents, cases and commentary:

(a) A general avoidance of the use of the word "citizenship" when discussing nationality prior to 1947. The words "subject", "national", "naturalization" and their derivatives are instead used synonymously for the term "citizen" as we know it today.

(b) When the term "citizen" is used prior to 1947, it generally refers to the term as defined in the 1910 Immigration Act, and notes that the term has been defined for the specific purposes of that Act.

[55] Let us explore, for a moment, the propositions made by the Respondent and consider what "British subject", "Canadian national" and "Canadian citizen" meant prior to 1947, and what it has come to mean today.

3. Original concept of Citizenship

[56] In its original sense, the term "citizen" referred to a member of a "free or jural society" (*civitas*), who possessed all the rights and privileges that could be enjoyed by any person under its constitution and government. While many societies had a concept of citizenship, it was in the Greek city-states that the status was first defined and it was further refined in Rome: see William Kaplan,

"Who Belongs? Changing Concepts of Citizenship and Nationality" in William Kaplan, ed., *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal and Kingston: McGill-Queen's University Press, 1993) 246 at 247.

[57] The original concept of citizenship is best described by professor Kaplan, who wrote at 247:

> Athens was the best known of the Greek city-states, and it was a democracy in the sense that all citizens participated in government, as electors and as officials. However, not all persons could become citizens. Women, slaves, foreigners, and resident aliens were denied this status and enjoyed only limited membership in the community.
>
> The status of citizenship was further refined in Rome. Citizenship was more widely granted than had been the case in the Greek city-states but was still quite restrictive. The Roman Republic distinguished between civil rights, meaning equality before the law without participation in government, and political rights, or membership in the sovereign body with full political participation. Only persons who had both civil and political rights had citizenship rights, also referred to as "freedom of the city." As the boundaries or Rome, and then the Roman Empire, expanded and grew, citizenship was extended to the conquered peoples: "It is interesting to note that initially it was citizenship as the right of membership within the City of Rome, and only subsequently did it become citizenship in the wider sense of being a member of the Empire.
>
> (emphasis added)

[58] The concept of "citizenship" was revised during the later Middle Ages and the Renaissance to include membership in a free town or city. However, the basic distinctions between citizens and others remained. Only "citizens" could participate fully in all aspects of community life.

[59] The term "citizen" ("citoyen") came into wide use during the French Revolution as "the leaders and supporters of the Revolutionary forces felt that this term, and its connotation in the sense of free and equal participation in the government, seemed best suited to describe how the people felt

about their new situation" (see Derek Heater, *Citizenship: the Civic Ideal in World History, Politics and Education* (London: Longman, 1990) at 2, cited in Kaplan, *supra* at 248).

[60] At the same time, and for quite similar reasons, the term was adopted in the newly formed United States. The American constitution speaks of "citizens" rather than "subjects" and of "citizenship" rather than "nationality".

[61] While "citizenship" describes a status that can be conferred, "nationality" means membership in a "nation". The concepts of "citizenship" and "nationality" tend to be somewhat synonymous or interchangeable today, and I note that in Canada, since 1947, they have been merged into the single status of "Canadian citizen". However, this was not always the case (see Note 4).

4. British subject status or nationality

[62] In republics, the state has come to be identified with the nation itself and the individuals belonging to the nation owe allegiance to the state. From an historical perspective, this is not true for individuals born in a country where a monarchy exists. They owe allegiance to the sovereign. This is the case in the United Kingdom (see Note 5).

[63] In common law countries, nationality has tended to precede the concept of citizenship. This is especially true in England and Canada since the English "conquest". One can say that the exercise

of any right associated with citizenship was contingent upon the acquisition of some form of "national" status.

[64] Under English common law a person became a "British subject", as a general rule, upon birth in England (*jus soli*). This extended to persons born in all parts of His Majesty's "dominions and allegiance". In the late nineteenth century the "dominions" of the Crown included both the colonies and self-governing Dominions (Australia, New Zealand, South Africa, Canada and Newfoundland). "Citizenship by birth", if I can used this expression for lack of a better phrase to describe the relationship between the individual and the "state", was perpetual and could not be revoked regardless of residency. By the same reasoning, "aliens", were unable to revoke their relationship with their place of birth. Therefore, at English common law foreign-born individuals could not become British "citizens" or "nationals" through any procedure or ceremony.

[65] That being said, two procedures existed by which an "alien" could become a British subject with some of the rights of citizenship. First, "naturalization" granted all the legal rights of citizenship except political rights (e.g. holding office). Naturalization required that an act of Parliament be passed. Second, "denization", like naturalization, allowed a person to gain the rights of citizenship other than political rights. However, denization was granted by Letters Patent, bestowed by the King as an exercise of royal prerogative. Denization was therefore an exercise of executive power, whereas naturalization was an exercise of legislative power.

[66] Later, with the expansion of the Empire, the Imperial Parliament permitted the Colonies and self-governing Dominions to enact “local” legislation dealing with the naturalization of aliens (see 6. Naturalization legislation prior to 1947, *infra* at para. 70).

5. Powers of Canadian Parliament

[67] As part of the British Empire and later the Commonwealth, Canada has been a part of the “British citizenry” for most of its existence (see Note 6).

[68] With Confederation, the legislative power with regard to “naturalization” passed to the Parliament of Canada, which shared its legislative power with the provinces with respect to “immigration” (s. 91(25) and s. 95 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (the 1867 Constitution Act)). Moreover, section 91(24), purported to assign jurisdiction over “Indians, and Lands reserved for the Indians” to the Parliament of Canada (see Note 7).

[69] That being said, in 1867, the federating provinces were still “British colonies” despite having achieved responsible government and a large measure of self-government in local affairs. The new federation also became a British “colony”, subordinate to the United Kingdom in international affairs, and subject to important imperial limitations in local affairs (see Note 8).

6. Naturalization legislation prior to 1947

[70] Prior to 1867, there were various local legislative enactments with respect to naturalization of aliens which are not necessary to relate here: see Clive Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* (London: Stevens & Sons, 1957) vol. 1 at 431-45.

[71] In 1868, the Parliament of Canada began adopting laws dealing with naturalization that established the conditions under which an alien could be naturalized as a "British subject" (see *An Act respecting Aliens and Naturalization*, S.C. 1868, c. 66 (the 1868 Naturalization Act); *An Act respecting Naturalization and Aliens*, S.C. 1881, c. 13 **(**the 1881 Naturalization Act)). Such statutes were at first referred to as "local Acts" until 1914 when the Imperial Parliament removed the local restriction applicable to certificates of naturalization granted beyond the United Kingdom.

[72] In 1914, an attempt was made to develop a cooperative scheme of naturalization throughout the British Empire. Naturalization laws were more or less "imperialized" by the enactment of the *British Nationality and Status of Aliens Act, 1914* (U.K.), 4 & 5 Geo. V, c. 17 (the 1914 British Nationality and Status of Aliens Act), which allowed for "imperial" rather than merely "local" naturalization, with the proviso that it had effect in other Dominions only if they too had adopted a parallel measure. The Canadian Parliament acquiesced to this common plan by re-enacting the 1914 British Nationality and Status of Aliens Act including those parts which related to broader issues of national status rather than "naturalization", narrowly construed: see *Naturalization Act, S.C. 1914*, c. 44 (the 1914 Naturalization Act) (see Note 9).

[73] The naturalization legislation broadly defined the “national status” of all individuals. Any person born within His Majesty’s Dominions before 1947, including Canada, automatically acquired British subject status at birth by operation of the law alone regardless of the status of the person’s parents: see paragraph (1)(*a*) of the 1914 British Nationality and Status of Aliens Act, and paragraph 3(*a*) of the 1914 Naturalization Act.

[74] Moreover, any person born outside of His Majesty’s Dominions, before 1947, including Canada, whose father was (1) a British subject at the time of that person’s birth; and (2) either was born within His Majesty’s allegiance or was a person to whom a certificate of naturalization had been granted, automatically obtained British subject status at birth: see paragraph 1(*b*) of the British Nationality and Status of Aliens Act and para. 3(*b*) of the 1914 Naturalization Act.

[75] There is an old French adage that says “qui prend mari prend pays”. She who takes a husband assumes his nationality and becomes a citizen of his country. In Roman law the bride said: “And your people shall become my people and your gods my gods”. This was particularly true for the women who, at that time, married British subjects. Under diverse naturalization legislation, they automatically became British subjects if their husband was himself a British subject at the time of their marriage. Similarly, a woman became an alien upon marriage to an alien on the date her husband ceased to be a British subject (see Note 10).

[76] Under the common law, the general principle was that a child would follow the nationality of its lawful parent (see Note 11). An illegitimate child born outside of His Majesty’s Dominions

could not derive British nationality through his British father. As a general rule, British nationality could only be passed on through the father, and parents were required to be married. The natural-born child or "bastard" as expressed in the Common law, being *filius nullius,* could not comply with this requirement: " … you must shew that his father was a natural-born subject. And if he have no father, then of course he is not entitled to the benefit of the statute": see *Abraham v. Attorney General*, [1934] P. 17 at 21, 27; *Shedden v. Patrick* (1854), 1 Macq. 535 at 640 (H.L.)).

[77] Where a person was deemed a "bastard" at birth, there was formerly no way in which he could be made "legitimate", except by an Act of Parliament. Indeed, until the passing of the *Legitimacy Act, 1926* (U.K.), 16 & 17 Geo. V, c. 60 (the 1926 Legitimacy Act), the law of England had always refused to accept the doctrine that a child "born out of wedlock" might be legitimated by the subsequent marriage of his parents (*Halsbury's Laws of England,* 3rd ed. (London: Butterworths, 1953) vol. 3 at paras. 146-47).

[78] In Canada, a child of naturalized parents was included in the certificate of his father. It appears that despite its liberal wording, naturalization legislation was applied in a manner to limit the *jus sanguinis* principle to children born "in wedlock". I note that in *Abraham, supra,* an English case, it was held that *legitimatio per subsequens matrimonium* under the 1926 Legitimacy Act did not confer, upon the legitimated child, any entitlement to a declaration that he was a natural-born subject of the Crown (see Note 12).

[79] That being said, prior to 1947, the Secretary of State was allowed to use his discretionary power to grant a certificate of naturalization to any minor, even if he or she failed to satisfy all the

statutory requirements: see subsection 5(2) of the 1914 British Nationality and Status of Aliens Act and subsection 7(2) of the 1914 Naturalization Act. This discretionary executive power was maintained by the 1947 Citizenship Act and attributed to the Minister: see paragraph 11(*b*) of the 1947 Citizenship Act

[80] A great number of children of Canadian soldiers born during the war in England and Holland were born out of wedlock: see Melynda Jarrat, *supra*. In 1946, the fact that the Applicant was born out of wedlock would not have posed a problem in terms of his British nationality or citizenship. He was undoubtedly a British subject by reason of his birth in England (*jus soli* principle). However, the war children born outside England, such as the 6000 children born in Holland, were not in the same position as the Applicant in terms of British nationality or citizenship. The *jus soli* principle did not apply to them because their birth was outside His Majesty's allegiance. Unless they were born in wedlock, the children born in Holland would need to be "naturalized" in order to become British subjects (like any other children born outside His Majesty's allegiance).

[81] That being said, the status of "British subject" has also evolved over time. Following Canada's decision to enact its own citizenship law in 1946, the Commonwealth Heads of Government decided in 1948 to embark on a major change in nationality laws throughout the Commonwealth.

[82] I pause to mention here that the effect of "legitimation" on the citizenship or nationality of a British subject or citizen was no longer an issue in 1949 under English law. Indeed, a person legitimated by the subsequent marriage of his parents is treated by statute, as from the date of the

marriage or 1st January 1949, whichever is later, as if he had been born legitimate, in all questions relating to the determination of whether the legitimate person is a citizen of the United Kingdom and Colonies, or was a British subject immediately before 1st January 1949: see *British Nationality Act, 1948* (U.K.), 11 & 12 Geo. VI, c. 56, ss. 23(1), 34(2). This overrules the previous law as laid down in *Shedden, supra,* and *Abraham, supra,* (see *Halsbury's Laws of England, supra,* at para. 151).

[83] Since 1948, the label "British subject" has generally referred to a person who is a "Commonwealth citizen". Therefore, the national and the citizenship status of such a person (who is not actually a British citizen or national) will generally be defined by legislation duly adopted within each country of the Commonwealth (see Note 13).

[84] That being said, Canadian citizens continue to owe allegiance to the Queen of Canada (and not of England), Her Majesty Elizabeth the Second, Her Heirs and Successors. Indeed, naturalized Canadian citizens must swear allegiance to the Queen (see the current Citizenship Act, ss. 12(3), 24, Sch.).

7. Definition of " Canadian citizen" in the 1910 Immigration Act

[85] With respect to the institution of a "Canadian citizenship", Justice Rand wrote in *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887 at 918-19:

> … The first and fundamental accomplishment of the constitutional Act [of 1867] was the creation of a single political organization of subjects of His Majesty within the geographical area of the Dominion, the basic postulate of which was the institution of a

> Canadian citizenship. Citizenship is membership in a state; and in the citizen inhere those rights and duties, the correlatives of allegiance and protection, which are basic to that status.
>
> The Act makes no express allocation of citizenship as the subject-matter of legislation to either the Dominion or the provinces; but as it lies at he foundation of the political organization, as its character is national, and by the implication of head 25, section 91, "Naturalization and Aliens", it is to be found within the residual powers of the Dominion: Canada Temperance case [[1946] A.C. 193 at 205], at p. 205. Whatever else might have been said prior to 1931, the Statute of Westminster, coupled with the declarations of constitutional relations of 1926 out of which it issued, creating, in substance, a sovereignty, concludes the question.
>
> (emphasis added)

[86] Prior to 1947, the Canadian Parliament had made no effort to exhaustively define in one statute the status of Canadian citizenship, although it had made various *ad hoc* forays into the field as I will now explain.

[87] Since Parliament has the authority to adopt an immigration policy, it follows that it can enact legislation prescribing the conditions under which “non-citizens” or “aliens” will be permitted to enter and remain in Canada: see *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711. It did so, as early as 1869 (see Ninette Kelley and Michael Trebilcock, *The Making of the Mosaic, An History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998) c. 3).

[88] That being said, the 1910 Immigration Act was the first Canadian legal instrument to introduce the particular status of “Canadian citizenship” into the law. Section 2 of the 1910 Immigration Act defined “citizen” as:

(1) a person born in Canada who has not become an alien,

(2) a British subject domiciled in Canada, or

(3) a person naturalized in Canada not having lost domicile or become an alien.

[89] "Canadian citizens" and persons having "Canadian domicile" under the statute were allowed to enter and remain in Canada. This is tantamount to the mobility rights and the right to enter and remain in Canada given today to citizens and permanent residents. On the other hand, immigrants, passengers or other persons who fell within one of the "prohibited classes" were not permitted to either enter, land or remain in Canada. Being a "Canadian citizen" (or having a "Canadian domicile") meant that such a person had a legal right to establish himself or herself everywhere in Canada. Moreover, a "Canadian citizen" could not be deported (see 1910 Immigration Act, ss. 23, 40).

[90] I also note that the status of British subject did not, by itself, constitute a licence to enter, work, live or remain in Canada (see Notes 1 and 2). In this respect, in an annotation to the *Thirty-Nine Hindus* case (1913), 15 D.L.R. 189 (B.C.S.C.), A. H. F. Lefroy, K.C., provides the following comments and explanations, which bring into light Parliament's objectives in developing, as early as 1910, a concept of "Canadian citizenship":

> But what is of more importance in connection with this subject is that the Imperial Government has officially conceded the right of this Dominion, and the other self-governing Dominions to legislate for the exclusion of immigrants, though British subjects. Lord Crewe, Secretary of State for India, speaking at the last Imperial conference, said:
>
> I fully recognize, as His Majesty's Government fully recognize, that as the Empire is constituted, the idea that it is possible to have an absolutely free interchange between all individuals who are subjects

> of the Crown, that is to say, that every subject of the King, whoever he may be, or wherever he may live, has a natural right to travel or still more to settle in any part of the Empire, is a view which we fully admit, and I fully admit as representing the India Office, to be one which cannot be maintained. As the Empire is constituted it is still impossible that we can have a free coming and going of all the subjects of the King throughout all parts of the Empire. Or to put the thing in another way, nobody can attempt to dispute the right of the self- governing Dominions to decide for themselves whom, in each case, they will admit as citizens of their respective Dominions.
>
> (emphasis added)

[91] Lefroy went on to cite the propositions made at the time by Sir Samuel Griffith, Chief Justice of Australia , and a member of the Judicial Committee of the Privy Council, and which were summarized in the following manner in his annotation:

1. British nationality confers upon the holders of the status of British nationals the right to claim the protection of the British Sovereign as against foreign powers;

2. It does not, of itself, entitle the holder to any political rights or privileges within any part of the Empire, but it may be a condition of the enjoyment of such rights and privileges;

3. In the absence of any positive law to the contrary, a British national is probably entitled to claim the right of entry into any part of the British Empire;

4. A competent legislative authority of any part of the Empire may, by positive law, restrict or deny that right of entry.

[92] Lefroy finally concluded:

> … [T]he exclusion of British subjects, whatever their colour, from any part of British soil, will at best be regarded as a lamentable necessity by those who have the interests of the Empire at heart. It will call for the exercise of the highest statesmanship, and much mutual forbearance, to adjust these matters without disturbing the pax Britannica.

[93] I note that under the 1910 Immigration Act, every person entering Canada was deemed to be an "immigrant" unless belonging to one of the "non-immigrant classes" which included, *inter alia*, "Canadian citizens" and persons who had "Canadian domicile". Section 2 of the 1910 Immigration Act defined "alien" as a person who was not a British subject, while "Canadian domicile" could only be acquired by a person having his domicile for at least five years in Canada after having been landed therein within the meaning of the 1910 Immigration Act. The 1910 Immigration Act also provided that "Canadian domicile was lost, by a person voluntarily residing out of Canada not for a mere special or temporary purpose but with the present intention of making his permanent home out of Canada, or by any person belonging to the prohibited or undesirable classes". This is akin to today's loss of Canadian permanent resident status.

[94] As noted by Donald Galloway in his article titled "The Dilemmas of Canadian Citizenship Law" (1999) 13 Geo. Immig. L.J. 201, the statutory structure of the 1910 Immigration Act is somewhat peculiar because the definition of "citizen" appears to overlap to a significant degree with the category of persons with a Canadian domicile. The immigration purposes of the statute could

have been achieved simply by establishing two categories – persons born in Canada and persons not born in Canada who were domiciled in Canada. If there was no need to define British subjects and domiciled naturalized persons as citizens, why was it done? In this regard, Parry justifiably commented, *supra* at 451, that one sees in the statute a parliamentary intent to assert its authority to identify individuals as "citizens", but to do so "in a way that did not threaten confrontation with colonial superiors".

[95] Therefore, in my opinion, it is an understatement to attempt to trivialize today, as suggested by the Respondent, the status of being a "Canadian citizen" prior to 1947. Moreover, it appears that the "citizenship status" of an individual for the purpose of Canadian immigration law was also inextricably connected with the Canadian Nationals Act, a statute broadly defining Canadian nationality and "Canadian national" status, as we will now see.

8. Canadian Nationals Act

[96] Parliament did not immediately opt for a consolidated definition of "nationality" and "citizenship" in a single statute. Prior to 1947, and in parallel with the passing of legislation with respect to the naturalization of "aliens" as "British subjects", Parliament decided in 1921 that it was time to adopt a statute of its own pertaining to the "national status" of those persons who were already "Canadian citizens" within the meaning of the 1910 Immigration Act, including their brides and children. This was done by the enactment of the Canadian Nationals Act.

[97] Section 2 of the Act provided that the following persons were "Canadian nationals":

> (a) Any British subject who is a Canadian citizen within the meaning of the 1910 Immigration Act;
>
> (b) The wife of any such citizen;
>
> (c) Any person born out of Canada, whose father was a Canadian national at the time of that person's birth, or with regard to persons born before the third day of May, one thousand nine hundred and twenty-one, any person whose father at the time of such birth, possessed all the qualifications of a Canadian national.

[98] At the time of its adoption, the Act served the immediate purpose of securing Canadian participation in the permanent Court of international justice (see Note 14). But clearly Parliament was also pursuing concurrent and broader long-term objectives. The Act conferred the status of a "Canadian national" to persons outside Canada who may not have been "Canadian citizens" within the meaning of the 1910 Immigration Act, such as the wife of a Canadian citizen who may not have landed in Canada (see Note 15). Moreover, by the principle of *jus sanguinis*, any person born out of Canada, whose father was a Canadian national at the time of that person's birth, was also a Canadian national (see Note 16). This is akin to citizenship by descent as we know it today in citizenship legislation.

[99] While being cautious not to enlarge the meaning of the word "citizen" used in the 1910 Immigration Act, the fundamental purpose of the Canadian Nationals Act has been described in the following way by the Hon. Charles Joseph Doherty, Minister of Justice in 1921:

> … The Bill does not contemplate to in any way affect the status or position of any Canadian as a British subject. Notwithstanding its

> enactment we shall all remain, of course, British subjects; and under the definition as proposed nobody will be a Canadian national who is not a British subject. But the purpose of the Bill is to define a particular class of British subjects who, in addition to having all the rights and all the obligations of British subjects, have particular rights because of the fact that they are Canadians.
>
> …
>
> … The Immigration Act stands absolutely untouched, and as regards immigration will continue absolutely to govern. Our reference to it is only for the purpose of bringing in as Canadian nationals everybody who is a Canadian citizen under the Immigration Act. It does not make anybody a Canadian citizen who under the Immigration Act is not a Canadian citizen. It does not remove any disability, as, for instance, in the case of the wife, the disability resulting from the fact that she has not been landed in Canada. The Immigration Act stands as the law, absolutely untouched. All that this Act is doing is defining what is a Canadian national.
>
> …
>
> … Our Canadian national will be that kind of British subject who is in a special manner subject to and owes obedience to Canadian laws as administered through Parliament and the Government and ultimately His Majesty, he being King of these Dominions just as he is King of Great Britain and the entire Empire.
>
> …
>
> … We are defining our own Canadian national. Some other of the self-governing Dominions may deem it wise to define their nationals – Australia, for instance – but Australia will do exactly what she likes about it. I do not think the Canadian Parliament would feel that we had to go and ask anybody else's leave to define who we are. It is for us to recognize who is a Canadian and who is not.
>
> (emphasis added)

(see *House of Commons Debates* (8 March 1921) at 645, 772, 776, 785)

[100] As can be seen from the comments above, the purpose of the Canadian Nationals Act was "to define a particular class of British subjects who, in addition to having all the rights and all the

obligations of British subjects, have particular rights because of the fact that they are Canadians". This definition is much akin to the present concept of "citizenship", which does not automatically confer the status of Canadian citizen to a citizen of the Commonwealth.

[101] While imperfect in its form, I note that the Canadian Nationals Act nevertheless confers a distinct and special status to persons who are Canadian nationals. Parliament's intention that this status be virtually immutable and remain attached to that person is evidenced by the fact that a person born in Canada (*jus soli*) or out of Canada (*jus sanguinis*) can only cease to be a Canadian national by making a formal declaration of renunciation (s. 3 of the Canadian Nationals Act); a procedure akin to the declaration of renunciation of citizenship found in current Canadian citizenship legislation.

[102] From 1921 to 1947 Canada did not adopt any other law affecting nationality. That being said, the concept of "Canadian national" did not prove to be purely "symbolic". For instance, in 1937, it was specifically used to prevent Canadian nationals from enrolling in the Spanish civil war (see *House of Commons Debates* (5 April 1946) at 603). Indeed, the *Foreign Enlistment Act,* S.C. 1937, c. 32, makes it an offence for a "Canadian national" to enlist with a foreign state at war with a friendly state, and to engage in any of the acts prohibited by statute. In so doing, Parliament repealed, insofar as it was a part of the law of Canada, a previous Imperial Act dealing with the foreign enrolment of British subjects, that is *The Foreign Enlistment Act 1870* (U.K.), 33 & 34 Vict., c. 90.

9. Passport issued in Canada prior to 1947

[103] All states owe protection to their nationals or citizens. The issuance of a passport is closely connected to the concept of State protection and has significant legal consequences, including the security and liberty of movement of the individual. Today's Canadian passports are still issued in the name of Her Majesty the Queen and constitute the single most important domestic and international identity document a Canadian citizen or national can carry when he travels inside or outside Canada.

[104] The story of the Canadian passport is entwined with Canada's history, both as a colony of Great Britain and as a neighbour of the United States. The following draws on documentation of a general nature judicially noted by the Court and brought to the attention of counsel: see particularly Passport Canada, "History of passports," online: Passport Canada website <http://www.ppt.gc.ca/about/history.aspx?lang=e)>.

[105] Before 1862, Canadians (as British subjects) could travel freely to and from the United States without passports. To travel to Europe, however, a Canadian had to obtain a British passport from the Foreign Office in London. Those who were not British subjects by birth could still go to the United States with a certificate of naturalization, which was issued by local Canadian mayors mainly for the purpose of voting in municipal elections.

[106] During the American Civil War, however, authorities in the United States wanted more reliable certification from people living in Canada. In 1862, the Governor General, Viscount

Monck, introduced a centralized system for issuing passports. For the next 50 years, a Canadian passport was really a "letter of request" signed by the Governor General.

[107] A series of international passport conferences (1920, 1926 and 1947) resulted in a number of changes to the Canadian passport. The 1920 conference recommended that all countries adopt a booklet-type passport, which Canada began issuing in 1921. Another recommendation of 1920, that all passports were to be written in at least two languages, one of which was to be French, led to the first bilingual Canadian passport in 1926. The 1920 conference also recommended that passports should be valid for at least two years and preferably for five. It is interesting to note that, since 1919, Canadian peacetime passports were already valid for five years, with the possibility of a five-year extension.

[108] The year 1930 saw more changes in Canadian passport regulations, reflecting Canada's growth and international status. Canadian travellers needing passport services abroad were now directed to the nearest Canadian legation rather than to a British consular office.

[109] When war broke out in 1939, the United States government announced that Canadians would need passports and visas to cross the border. At that time, about half a million Canadians travelled to the States each year without any documentation. Tensions rose at border crossings when American officials began searching Canadian travellers culminating in a riot when a hearse was detained at the border. This led to the issuance of special wartime passports for Canadians travelling to the United States.

[110] Until 1947, two kinds of passports, each differentiated by colour, were issued in Canada, one for British-born citizens and one for naturalized citizens (see note 17). The familiar blue passport booklet with pale pink pages similar to the booklets with blue pages issue to British subjects appeared sometime after the adoption of the 1947 Citizenship Act. That being said, as of July 1948, passports were issued by the Canadian government only to Canadian citizens.

[111] I note that the document on which the Applicant and his mother travelled in October 1946 was a blue coloured passport for natural-born British subjects. Inside the front cover is a letter emanating from the Secretary of State for External Affairs for Canada requesting, in the name of His Majesty the King, safe passage abroad and affording to the bearer (here the Applicant's mother and accompanying son) every assistance and protection he or she may stand in need. On its face, it appears that the passport was issued in New York by the Canadian Consulate and remained valid at least until October 11, 1948.

[112] Apparently, there was no request made by the Applicant's mother to renew her Canadian passport or obtain a new one after its expiry on October 11, 1948.

[113] Based on the evidence on record, I find that at least until October 11, 1948, Canadian authorities granted the Applicant and his mother all the rights and privileges normally afforded to Canadian citizens while travelling abroad. Moreover, as we will now see under Canadian immigration legislation both of them were deemed to be "Canadian citizens" since their landing in Canada. As such, they were allowed to return, establish themselves or remain in Canada as any other Canadian citizens.

VI. Orders in Council, P.C. 7318 and P.C. 858

[114] Based on the evidence on record, I find that notwithstanding the various legal impediments found in the 1910 Immigration Act, special treatment was afforded to the dependents of the members of the Canadian Armed Forces who served during World War II, including the Applicant and his mother. Indeed, apart from the requirement of a medical examination, other conditions for entry and landing in Canada of war brides and their children were generally waived by the Canadian government. Moreover, where the members of the Canadian Armed Forces were "Canadian citizens" or had "Canadian domicile", their dependents were granted the same status. Reference is made in this regard to two Orders in Council taken under the authority of the *War Measures Act*, R.S.C. 1927, c. 206 (the War Measures Act) (see section 3 of Order in Council, P.C. 858, *supra*; compare to section 2 of Order in Council, P.C. 1944-7318 (21 September 1944), which was revoked by Order in Council, P.C. 858).

[115] In this regard, Order in Council, P.C. 858, which applies to the case at bar, provided that before proceeding to Canada, the dependent had to undergo a medical examination. If a dependent were suffering from an infectious or contagious disease, his or her admission to Canada could be deferred until the production of a medical certificate establishing that the conditions was not infectious or contagious anymore. Save these cases of medical inadmissibility, every such dependent "shall be permitted to enter Canada and upon such admission shall be deemed to have landed within the meaning of Canadian immigration law … [and] for the purpose of Canadian immigration law be deemed to be a Canadian citizen if the member of the forces upon whom he is

dependent is a Canadian citizen and shall be deemed to have Canadian domicile if the said member has Canadian domicile".

[116] As can be seen, Order in Council, P.C. 858 was not merely directed at overcoming immigration issues of entry. It was designed, as the plain meaning of the Order in Council describes, to give a special status to individuals who were children or dependents of armed forces personnel serving abroad. The intention of Parliament is made clear by the wording of the Order in Council, P.C. 858 in the recital and in its specific order.

[117] Orders in Council, P.C. 7318 and P.C. 858, contain legislation that could have been adopted by Parliament itself. Under the War Measures Act, the Governor in Council was empowered to adopt any legislation that Parliament could have adopted, provided the requirements mentioned in that Act were satisfied. Indeed, the authority conferred on the Governor-General in Council "is a plenary legislative power, both to adopt the orders and to continue them in force" as was decided in 1946 by the Supreme Court of Canada in *Reference Re: Deportation of Japanese*, [1946] S.C.R. 248, 3 D.L.R. 321 at 338-39 (S.C.C.), Rinfret J., aff'd [1947] 1 D.L.R. 577 (P.C.).

[118] Under the *National Emergency Transitional Powers Act, 1945*, S.C. 1945, c. 25, as amended (the NETPA), the Governor in Council had the power to order that the regulations and orders that were lawfully made under the War Measures Act and which were in force immediately before January 1, 1946, would continue to have full force and effect while the NEPTA remained in force. Indeed, pursuant to the authority of the NEPTA, the Order in Council, P.C. 858, dated February 9, 1945, along with all the other orders and regulations made under the War Measures Act,

were prolonged after the coming into force of the 1947 Citizenship Act, that is until May 15, 1947 (see Order in Council, P.C. 1945-7414 (28 December 1945) and Order in Council, P.C. 1947-1112 (25 March 1947).

[119] On May 14, 1947, the *Act to Amend the Immigration Act and to Repeal the Chinese Immigration Act*, S.C. 1947, c. 19 (the 1947 Immigration Amendment Act), was assented to. The applicable immigration legislation had been amended in order to permit the landing in Canada of the war brides and the war children who were still in Europe. In the 1952 Revised Statutes of Canada, the aforementioned provision became s. 83 of the *Immigration Act*, R.S.C. 1952, c. 145. It appears to have remained part of the Act until 1970 when the *Immigration Act* was again revised and the section removed (see *Immigration Act*, R.S.C. 1970, c. I-2).

[120] Accordingly, whatever status the Applicant and his mother may have had under the 1947 Citizenship Act, I find that under Order in Council P.C. 858, the 1910 Immigration Act and the 1947 Immigration Amendment Act, they both had the legal right to enter, land, establish a domicile, remain, leave or return to Canada. (At the hearing, the Respondent's counsel conceded that such right existed until the enactment of the 1970 Citizenship Act.).

VII. The 1947 Citizenship Act

[121] The 1947 Citizenship Act was given Third Reading on May 16, 1946, and came into force on January 1, 1947. It repealed the 1914 Naturalization Act and the Canadian Nationals Act (see subsection 45(1) of the 1947 Citizenship Act). By way of consequential amendments introduced by

a separate Act, the definition of “Canadian citizen” found in the 1910 Immigration Act was repealed and substituted by a new text which provided that “Canadian citizen” meant a person who was a Canadian citizen under the 1947 Citizenship Act (see *An Act to amend the Immigration Act*, S.C. 1946, c. 54).

[122] As noted by Justice Bastarache in *Lavoie*, *supra* at paragraph 57, the 1947 Citizenship Act sought to clarify confusion over the use of the terms “citizen” and “national” in federal legislation and create a unifying symbol for Canadians (see *House of Commons Debates* (22 October 1945) at 1335ff (the Hon. Paul Martin Sr.)). Indeed, the 1947 Citizenship Act merges the concepts of “nationality” and “citizenship” into a single status, that of “Canadian citizen”, while incorporating and adapting naturalization procedures earlier developed in Canada (see Parry, *supra* at 467-522).

[123] Subsection 45(2) of the 1947 Citizenship Act provided that:

> 45. (1) …
>
> (2) Where, in any Act of the Parliament of Canada or any order or regulation made thereunder, any provision is made applicable in respect of
>
> (a) a “natural-born British subject” it shall apply in respect of a “natural-born Canadian citizen”; or
>
> (b) a “naturalized British subject” it shall apply in respect of a “Canadian citizen other than a natural-born Canadian citizen”; or
>
> (c) a “Canadian national” it shall apply in respect of a “Canadian citizen”
>
> under this Act, and where in any Act, order or regulation aforesaid any provision is made in respect of the status of any such person as a Canadian national or British subject it shall apply in respect of his status as a Canadian citizen or British subject under this Act.

[124] The 1947 Citizenship Act divided Canadian citizens into two classes: (1) “natural-born” and (2) “other than natural-born” (see Part I and II of the 1947 Citizenship Act). These classes are reminiscent of the former classes of natural-born and naturalized British subjects.

[125] Sections 4, 5 and 9 of the 1947 Citizenship Act read as follows:

> 4. A person, born before the commencement of this Act, is a natural-born Canadian citizen: –
>
> (a) if he was born in Canada or on a Canadian ship and has not become an alien at the commencement of this Act; or
>
> (b) if he was born outside of Canada elsewhere than on a Canadian ship and his father, or in the case of a person born out of wedlock, his mother
>
> (i) was born in Canada or on a Canadian ship and has not become an alien at the time of that person’s birth, or
>
> (ii) was, at the time of that person’s birth, a British subject who had Canadian domicile,
>
> if, at the commencement of this Act, that person has not become an alien, and has either been lawfully admitted to Canada for permanent residence as a minor.
>
> 5. A person, born after the commencement of this Act, is a natural-born Canadian citizen:
>
> (a) if he was born in Canada or on a Canadian ship; or
>
> (b) if he is born outside of Canada elsewhere than on a Canadian ship, and
>
> (i) his father, or in the case of a child born out of wedlock, his mother, at the time of that person’s birth, is a Canadian citizen by reason of having been born in Canada or on a Canadian ship, or having been granted a

certificate of citizenship of having been a Canadian citizen at the commencement of this Act, and

(ii) the fact of his birth is registered at a consulate or with the Minister, within two years after its occurrence or within such extended period as may be authorized in special cases by the Minister, in accordance with the regulations.

(…)

9 (1) A person other than a natural-born Canadian citizen, is a Canadian citizen, if he

(a) was granted, or his name was included in a certificate of naturalization and he has not become an alien at the commencement of this Act; or

(b) immediately before the commencement of this Act was a British subject who had Canadian domicile; or in the case of a woman,

(c) if she

(i) before the commencement of this Act, was married to a man who, if this Act had come into force immediately before the marriage, would have been a natural-born Canadian citizen as provided in section four of this Act or a Canadian citizen as provided in paragraphs *(a)* and *(b)* of this subsection, and

(ii) at the commencement of this Act, is a British subject and has been lawfully admitted to Canada for permanent residence.

(2) A person who is a Canadian citizen under subsection one of this section shall be deemed, for the purpose of Part III of this Act, to have become a Canadian citizen: –

(a) where he was granted, or his name was included in, a certificate of naturalization, on the date of this certificate;

(b) where he is a Canadian citizen by reason of being a British subject who had Canadian domicile, on the date he acquired Canadian domicile; and

> (c) in the case of a woman to whom paragraph *(c)* of subsection one of this section applies, on the date of the marriage or on which she became a British subject or on which she was lawfully admitted to Canada for permanent residence, whichever is the latest date.

[126] In substance, the following persons are "natural-born Canadian citizens": (1) persons born in Canada; (2) persons born on a Canadian ship; (3) persons not in either of the former categories, but whose father, or in the case of a person "born out of wedlock", whose mother falls within either category or is a British subject with Canadian domicile and who fulfills a number of conditions which vary according to whether a person is born before or after January 1, 1947 (see sections 4 and 5 of the 1947 Citizenship Act). On the other hand, the following persons, who though they may not be "natural-born Canadian citizens", are nevertheless "Canadian citizens": (1) British subjects who have Canadian domicile immediately before January 1, 1947; (2) British subjects who have been naturalized under any act of the Parliament of Canada and have not become aliens on January 1, 1947; (3) British subject women lawfully admitted to Canada for permanent residence who are married to men who, if the 1947 Citizenship Act had come into force immediately before the marriage, would have been "Canadian citizens" (see section 9 of the 1947 Citizenship Act).

[127] That being said, the Minister may, in his discretion, issue or grant a certificate of citizenship to "a person with respect of whose status as a Canadian citizen a doubt exists", and also to "a minor in any special case whether or not the conditions required by this Act have been complied with" (paragraphs 11(*a*) and (*b*) of the 1947 Citizenship Act, as amended by section 6 of *an Act to Amend the Canadian Citizenship Act*, S.C. 1950, c. 29 (the 1950 Citizenship Amendment Act) and by section 7 of the 1953 Citizenship Amendment Act). Moreover, the 1947 Citizenship Act provides that the question as to whether any person had "Canadian domicile" immediately prior to the Act's

coming into force, “shall be determined by the same authority and in a like manner as if it arose under the Immigration Act” (see section 43 of the 1947 Citizenship Act). By way of consequential amendments to the 1910 Immigration Act, the definitions of “domicile”, “Canadian domicile” and “Canadian citizen” were amended and clarified (see *An Act to amend the Immigration Act*, S.C. 1946, c. 54).

[128] Therefore, all persons who were not “Canadian citizens” on January 1, 1947 and who were not “natural-born Canadian citizens” must be “naturalized” before becoming “Canadian citizens” (section 10 of the 1947 Citizenship Act). This clearly applies to “British subjects” as well as to “aliens” and to wives of “Canadian citizens” who do not come within the ambit of the transitory provision (see section 9 of the 1947 Citizenship Act) (see Note 18).

[129] The provisions defining citizenship in the 1947 Citizenship Act remained practically the same for more than 30 years. It is noted that a provision was specifically added in 1950 to empower the Minister to grant a certificate of citizenship in case of legal adoption or legitimation if the male adopter or father was a Canadian citizen (see section 6 of the 1950 Citizenship Amendment Act). The Minister also kept, until the coming into force of the current Citizenship Act, his discretionary power to grant a certificate of citizenship to a minor in any special case whether or not the conditions required by the 1947 Citizenship Act had been complied with.

[130] At this point, I note that the 1947 Citizenship Act did not contemplate the possibility that a natural-born Canadian citizen or Canadian citizen lose his Canadian citizenship except in the cases and in the manner provided in Part III (see sections 16 to 25 of the 1947 Citizenship Act). That

being said, section 6 of the 1947 Citizenship Act expressly dealt with conditions for retention of Canadian citizenship by persons born outside of Canada.

[131] Section 6 of the 1947 Citizenship Act reads as follows:

> 6. Notwithstanding anything contained in section four or section five of this Act, a person who is, at the commencement of the Act, a minor born outside of Canada elsewhere than on a Canadian ship and who has not been lawfully admitted to Canada for permanent residence, or who is born after the commencement of this Act and outside of Canada elsewhere than on a Canadian ship, shall cease to be a Canadian citizen upon the expiration of one year after he attains the age of twenty-one years unless after attaining that age and before the expiration of the said year
>
> (a) he asserts his Canadian citizenship by a declaration of retention thereof, registered in accordance with the regulations; and
> (b) if he is a national or citizen of a country other than Canada under the law of which he can, at the time of asserting his Canadian citizenship, divest himself of the nationality or citizenship of that country by making a declaration of alienage or otherwise, he divests himself of such nationality or citizenship:
>
> Provided that in any special case the Minister may extend the time during which any such person may assert his Canadian citizenship and divest himself of the other nationality or citizenship, in which case upon so doing within the said time he shall thereupon again become a Canadian citizen.
>
> (emphasis added)

[132] It is clear that the purpose of section 6 of the 1947 Citizenship Act is to regulate the situation of minors born outside Canada who were never lawfully admitted to Canada prior to 1947. Therefore, section 6 of the 1947 Citizenship Act does not apply to the case at bar (see Note 19). Moreover, under the 1910 Immigration Act, when the Applicant and his mother left Canada in

October 1946, they did not lose the status of “Canadian citizens” that they were deemed to have upon their landing under Order in Council, P.C. 858.

VIII. The 1952 Citizenship Act and the 1953 Amendment Citizenship Act

[133] The 1947 Citizenship Act was consolidated in 1952: see *An Act respecting Citizenship, Nationality, Naturalization and Status of Aliens*, R.S.C. 1952, c. 33, as amended, sections 4, 5 and 9 (the 1952 Citizenship Act).

[134] Parliament enacted the *Act to Amend the Canadian Citizenship Act*, S.C. 1953, c. 23 (the 1953 Citizenship Amendment Act) on May 14, 1953. As far as this case concerns the interpretation and application of section 4 of the 1947 Citizenship Act, one must consider the effect of the 1953 Citizenship Amendment Act because it was made retroactive to January 1, 1947 (see Note 20).

[135] Under subsection 2(1) of the 1953 Citizenship Amendment Act, section 4 of the 1947 Citizenship Act was repealed and the following substituted thereof:

> 4(1) A person born before the first day of January, 1947, is a natural-born Canadian citizen, if
>
> (a) he was born in Canada or on a Canadian ship and was not an alien on the first day of January, 1947;
>
> or
>
> (b) he was born outside of Canada elsewhere than on a Canadian ship and was not, on the first day of January 1947, an alien and either was a minor on that date or had, before that date, been lawfully admitted to Canada for permanent residence and his father, or in the case of a person born out of wedlock, his mother

> (i) was born in Canada or on a Canadian ship and was not an alien at the time of that person's birth,
> (ii) was, at the time of that person's birth, a British subject who had Canadian domicile,
> (iii) was, at the time of that person's birth, a person who had been granted, or whose name was included in, a certificate of naturalization, or
> (iv) was a British subject who had his place of domicile in Canada for at least twenty years immediately before the first day of January, 1947, and was not, on that date, under order o deportation.
>
> (2) A person who is a Canadian citizen under paragraph (*b*) of subsection one and was a minor on the first day of January, 1947, ceases to be a Canadian citizen upon the date of the expiration of three years after the day on which he attains the age of twenty-one years or on the first day of January, 1954, whichever is the later date, unless he
>
> (a) has his place of domicile in Canada at such date; or
> (b) has, before such date and after attaining the age of twenty-one years, filed, in accordance with the regulations a declaration of retention of Canadian citizenship.

[136] A corollary repeal and identical amendment to section 4 of the 1952 Citizenship Act is provided by section 13 of the 1953 Citizenship Amendment Act.

IX. The 1970 Citizenship Act

[137] In 1970, there was a further consolidation of the 1952 Citizenship Act, as amended: see the *Canadian Citizenship Act*, R.S.C. 1970, c. 19.

[138] Sections 4 and 5 of the 1970 Citizenship Act define who is a natural-born Canadian citizen. These provisions distinguish between persons born before and those born after January 1, 1947.

[139] A person born in Canada (or on a Canadian ship) before January 1, 1947 is a natural-born citizen provided that on January 1, 1947, he was not an “alien”. “Alien” means a person who is not a Canadian citizen, a Commonwealth citizen, a British subject or a citizen of the Republic of Ireland (section 2 and paragraph 4(1)(*a*) of the 1970 Citizenship Act). That being said, any person born in Canada (or on a Canadian ship) after January 1, 1947, is a natural-born citizen (see paragraph 5(1)(*a*) of the 1970 Citizenship Act). The Respondent concedes that the Applicant’s father was a “Canadian natural-born citizen” until he died in 1996.

[140] A person born outside of Canada (elsewhere than on a Canadian ship) before January 1, 1947, is a natural-born citizen, provided that on January 1, 1947, he was not an alien, and either was a minor or had, before that date, been lawfully admitted to Canada for permanent residence. Moreover, his father or in the case of a person born out of wedlock, his mother (*i*) was born in Canada (or on a Canadian ship) and was not an alien at the time of that person’s birth, (*ii*) was, at the time of that person’s birth, a British subject who had Canadian domicile (as defined in the laws respecting immigration that where in force at the time), (*iii*) was, at the time that person’s birth, a person who had been granted, or whose name was included in, a certificate of naturalization, or (*iv*) was a British subject who had his place of domicile in Canada for at least 20 years before January 1, 1947 (see paragraph 4(1)(*b*) of the 1970 Citizenship Act).

[141] A person born outside of Canada (elsewhere than on a Canadian ship) after January 1, 1947, is a natural-born citizen, provided (*i*) his father, or in the case of a child born out of wedlock, his mother, at the time of that person's birth, is a Canadian citizen, and (*ii*) the fact of his birth is registered within two years after its occurrence (or within such extended period as the Minister may authorize in special cases) (see subsection 5(1) of the 1970 Citizenship Act).

[142] However, a natural-born Canadian citizen born outside of Canada automatically ceases to be a citizen at 24 years (or on the first day of January 1954, whichever is the later date) unless he has his place of domicile in Canada at such date or has between 21 and 24 years, filed a declaration of retention of Canadian citizenship (paragraphs 4(2) and 5(2) of the 1970 Citizenship Act). That being said, such a person may file a petition for resumption of citizenship to the Minister (see section 6 of the 1970 Citizenship Act).

[143] Part II of the 1970 Citizenship Act deals with Canadian citizens other than natural-born. For the present proceeding, it is not necessary to review it, except insofar as to mention again that the Applicant's mother was a "Canadian citizen" being a British subject who had "Canadian domicile" and being married to a man who would have been a natural-born Canadian citizen, if this Act had come into force immediately before the marriage (see paragraph 9(1)(*d*) of the 1970 Citizenship Act).

[144] The 1970 Citizenship Act was repealed and replaced in 1977 by *An Act Respecting Citizenship*, S.C. 1974-75-76, c. 108, as amended (the 1977 Citizenship Act).

X. The 1977 Citizenship Act and the current Citizenship Act

[145] The 1977 Citizenship Act came into force on February 15, 1977 and was amended from time to time (see *Immigration Act*, S.C. 1976-77, c. 52, s. 128 (Sch., item 5); *Employment and Immigration Reorganization Act*, S.C. 1976-77, c. 54, s. 74(2) (Sch., item 2); *Miscellaneous Statute Law Amendment Act, 1978*, S.C. 1977-78, c. 22, s. 8; Canadian *Security Intelligence Service Act*, S.C. 1984, c. 21, s. 75; and *Investment Canada Act*, S.C. 1985, c. 20, s. 50**)**. Its provisions were consolidated in 1985 and amended from time to time: see *An Act respecting citizenship*, R.S.C. 1985, c. C-29, as amended (the current Citizenship Act).

[146] Section 3 of the current Citizenship Act defines citizenship status in almost identical language as the text found in the 1977 Citizenship Act (The 1977 Citizenship Act and the current Citizenship Act are really the same Act but for purpose of convenience I will refer to them separately).

[147] Subsection 3(1) of the current Citizenship Act provides:

> 3. (1) Subject to this Act, a person is a citizen if
>
> (a) the person was born in Canada after February 14, 1977;
>
> (b) the person was born outside Canada after February 14, 1977 and at the time of his birth one of his parents, other than a parent who adopted him, was a citizen;
>
> (c) the person has been granted or acquired citizenship pursuant to section 5 or 11 and, in the case of a person who is fourteen years of age or over on the day that he is granted citizenship, he has taken the oath of citizenship;

> (d) the person was a citizen immediately before February 15, 1977; or
>
> (e) the person was entitled, immediately before February 15, 1977, to become a citizen under paragraph 5(1)(b) of the former Act.

[148] Paragraph 3(1)(*e*) of the current Citizenship Act must be read in correlation with paragraph 5(2)(*b*) of the current Citizenship Act which provides as follows:

> (2) The Minister shall grant citizenship to any person who
>
> …
>
> (b) was born outside Canada, before February 15, 1977, of a mother who was a citizen at the time of his birth, and was not entitled, immediately before February 15, 1977, to become a citizen under subparagraph 5(1)(*b*)(*i*) of the former Act, if, before February 15, 1979, or within such extended period as the Minister may authorize, an application for citizenship is made to the Minister by a person authorized by regulation to make the application.

[149] For purpose of convenience, the text of paragraph 5(1)(*b*) of the 1970 Citizenship Act is reproduced below:

> 5(1) A person born after the 31st day of December 1946 is a natural-born Canadian citizen,
>
> …
>
> (b) if he is born outside of Canada elsewhere than on a Canadian ship, and
>
> (i) his father, or in the case of a child born out of wedlock, his mother, at time of that person's birth, is a Canadian citizen, and
>
> (ii) the fact of his birth is registered, in accordance with the regulations, within two years after its occurrence

> or within such extended period as the Minister may authorize in special cases.
>
> (emphasis added)

[150] The purpose and object of section 5(2)(*b*) of the 1977 Citizenship Act was examined at length in 1992 by the Federal Court of Appeal in *Glynos v. Canada*, [1992] 3 F.C. 691 (F.C.A.). The relevant facts of that case are set out below.

[151] Jason Glynos was born to Canadian parents, Anita Glynos and Michael Glynos, in the United States in 1967. His father being a Canadian citizen, he himself became a Canadian citizen upon his birth pursuant to subparagraph 5(1)(*b*)(*i*) of the 1970 Citizenship Act. In 1985, Jason's mother, Anita Glynos, was informed by the Vancouver Citizenship Office that her sons Jason and Byron were no longer Canadian citizens. She made an application for Canadian citizenship on behalf of her minor son Byron, pursuant to paragraph 5(2)(*a*) of the 1977 Citizenship Act (which is the same as the text found in the current Citizenship Act). The Minister granted such citizenship to Byron Glynos effective January 5, 1987. The Court was informed at the hearing that no such application could have been made by Anita Glynos with respect to her son Jason because at that time Jason Glynos had attained the age of eighteen years and was no longer a “minor” child for the purposes of the Act (subsection 2(1) of the 1977 Citizenship Act).

[152] Anita Glynos was nevertheless convinced that she had the right under the 1977 Citizenship Act to pass on her Canadian citizenship to her son Jason and she commenced corresponding with the Secretary of State. She eventually submitted an application for citizenship on behalf of her son Jason on August 6, 1987. On December 1, 1987, the Secretary of State refused to grant the application on the basis, essentially, that paragraph 5(2)(*b*) of the 1977 Citizenship Act was in his

view applicable only to persons who had never been Canadian citizens. On September 12, 1989, Anita Glynos and Jason Glynos commenced an action before the Trial Division of the Federal Court of Canada and sought a declaration that, on the true construction of paragraph 5(2)(*b*), Jason Glynos was eligible for a grant of Canadian citizenship. They also asked the Court to issue a writ of mandamus to compel the Secretary of State to grant Canadian citizenship to Jason Glynos. While the relief sought is couched in terms that relate to the Charter, the Trial Judge and counsel for all parties addressed the question as being one of statutory interpretation in addition to being one of application of the Charter (see *Glynos v. Canada* (1991), 13 Imm. L.R. (2d) 83 (F.C.T.D.).

[153] At the hearing before the Federal Court of Appeal, counsel for the appellants did not insist on the Charter argument. That being said, Justice Décary who delivered the judgment of the Federal Court of Appeal nevertheless notes in his reasons that, with paragraph 5(2)(*b*) of the 1977 Citizenship Act "… Parliament has provided persons who are entitled to citizenship by birth with a procedural avenue of instant citizenship which has been described by the Associate Chief Justice as a "preferential treatment" (see *Benner v. Canada (Secretary of State) (T.D.)*, [1992]1 F.C. 771 at 788 (F.C.T.D.), and has been seen by this court as "speedy and economical resolution" of the problem Jason Glynos wishes the court to deal with (see *Benner v. Canada (Minister of Employment and Immigration)* (1988), 93 N.R. 250 at 251 (F.C.A.), Mahoney J.A.).

[154] Then, after disposing of the preliminary issue of mootness which had been raised by the Respondent, Justice Décary examined the legislative history of and the parliamentary debates relating to paragraph 5(2)(*b*) of the 1977 Citizenship Act and made the following observations at paragraphs 19-22, 28, 30:

Paragraph 5(2)(b) was specifically introduced into the Citizenship Act of 1976 to eliminate the discriminatory policy against women that flowed from the former Act, under which the child of a married Canadian woman born outside Canada could not acquire citizenship through her. In proposing the second reading of Bill C-20 which was finally enacted as the Citizenship Act, the then Secretary of State, the Honourable James Faulkner, remarked that the new Bill was meant to correct "five very important ways in which the present Citizenship Act discriminates against women". These ways had been pointed out in the Report of the Royal Commission on the Status of Women in Canada [at page 364] (House of Commons Debates, May 21, 1975, at page 5984) which had, in particular, recommended that sections 4 and 5 of the Act be amended "to provide that a child born outside Canada is a natural-born Canadian if either of his parents is a Canadian citizen".

After receiving second reading Bill C-20 was referred to the Standing Committee on Broadcasting, Films and Assistance to the Arts for consideration. In the course of that Committee's deliberations, the fact that Bill C-20 made no provision allowing children born outside of Canada to Canadian women before February 15, 1977 to acquire citizenship was the subject of much debate and concern. The addition of paragraphs 5(2)(a) and (b) was therefore proposed for the purpose of treating in the same way "those who happen to be born after the Act comes into place" and "those who are alive now and who have been affected adversely by the previous legislation" (Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts, Issue 36, February 27, 1976, 39:6-7).

Bill C-20, with the amendments recommended by the Standing Committee, including that to subsection 5(2), received third reading in the House of Commons on April 13, 1976. Bill C-20 then came into force as of February 15, 1977 as the Citizenship Act, S.C. 1974-75-76, c. 108.

The foregoing demonstrates that the legislator intended that anyone born to a Canadian mother at any time prior to the enactment of the Act and who had been adversely affected by the former Act's discriminatory provisions was to be entitled to receive citizenship under subsection 5(2). Whether that intent was carried into the wording used by Parliament is what remains to be seen.

…

> Paragraph 3(1)(*c*), which appears in Part I, confers the right to citizenship on a person who "has been granted or acquired citizenship pursuant to section 5 or 11." As section 11 is found in Part III, one can hardly suggest that Part I is exclusive of Part III. Further, Jason's brother, Byron, who had ceased to be a citizen before February 15, 1977 for the same reason as Jason, was nevertheless granted citizenship by the Minister under paragraph 5(2)(*a*). The Minister can simply not now argue that Part I, where paragraph 5(2)(*a*) appears, only applies to persons who have never been citizens. It would be absurd, absent a formal text to the contrary, to suggest that two brothers born out of the country prior to the coming into force of the Act and having the same status under the former Act are subject to a different treatment under the new Act. It would also be absurd to suggest that the paragraph 5(2)(*b*) application process is accorded to a person born outside Canada whose mother was Canadian and whose father was not Canadian at the time of the birth (see Benner v. Canada (Secretary of State), supra), but is denied to a person born outside Canada whose mother was Canadian and whose father was also Canadian at the time of birth.
>
> …
>
> When read altogether, these provisions lead to the inescapable conclusion that all children born outside Canada to a Canadian father or to a Canadian mother prior to the coming into force of the 1976 Act have the right to citizenship under Part I of that Act.
>
> (emphasis added)

[155] Accordingly, the Federal Court of Appeal allowed the appeal and declared that Jason Glynos was, on the true construction of paragraph 5(2)(*b*) of the 1977 Citizenship Act, eligible for a grant of citizenship.

[156] In the case at bar, I note that the Applicant was born in England on December 8, 1944. This is before February 15, 1977. Paragraphs 3(1)(*d*) and 3(1)(*e*) of the current Citizenship Act govern such cases. There has been no suggestion that the Applicant was entitled, immediately before February 15, 1977, to become a citizen under paragraph 5(1)(*b*) of the 1970 Citizenship Act which

deals with persons born outside Canada after December 31, 1946 (paragraph 3(1)(*e*) of the current Citizenship Act). The particular situation of persons born outside Canada prior to 1947 is regulated by paragraph 4(1)(*b*) of the 1970 Citizenship Act. Therefore, the Citizenship Officer had to determine whether or not the Applicant was a citizen immediately before February 15, 1977 (paragraph 3(1)(*d*) of the current Citizenship Act).

[157] However, as we will see later on in these reasons, even if the interpretation chosen by the Citizenship Officer is correct in law, the Applicant submits, in the alternative, that subsection 3(1), along with related provisions in the current Citizenship Act, establishes a discriminatory scheme based on the age of the person born outside of Canada before 1947, which has the effect of perpetuating discrimination based on the marital status and sex of his or her parents.

XI. Conduct of the parties

[158] The Applicant spent all his life believing that he was “half Canadian” and “half British”. That description was based on having had a declaration of Canadian citizenship, a passport, and a father who was a naturally born Canadian. The present recourse is based on the assumption that Canadian law does not prohibit dual nationality or citizenship (an assumption that the Respondent has not challenged here).

[159] I find that contemporary declarations made by the Minister of Citizenship and Immigration, and his Assistant Deputy Minister who are responsible for the application and implementation of Canadian citizenship legislation and policy, favour the legal position taken by the Applicant that

war brides and their children were not obliged under the 1947 Citizenship Act to apply for a grant of citizenship to the Minister (see letter dated September 21, 2005 from the Hon. Joe Volpe, Minister of Citizenship and Immigration; see also Canada, Parliament, Standing Committee on Citizenship and Immigration (10 May 2005), testimony of Mr. Daniel Jean, Assistant Deputy Minister, Policy and Program Development, Department of Citizenship and Immigration).

[160] Indeed, the overwhelming documentary evidence produced by the parties, or judicially noticed by the Court, supports the general belief that dependents of natural-born (or naturalized) Canadian Armed Forces soldiers, who legally landed in Canada prior to January 1, 1947, automatically became "Canadian citizens" when the 1947 Citizenship Act came into force. This belief is based on the legal assumption that these soldiers were themselves natural-born or naturalized Canadian citizens on January 1, 1947. Therefore, their wives (whether they were British subjects or not) and their children (whether they were born in wedlock or out of wedlock) were not required to apply for naturalization.

[161] Apart from the statutory interpretation issue raised in this proceeding, it can be said that the conduct and inaction of the Respondent and past officials certainly raised a legitimate expectation that war brides and their children would be treated as "Canadian citizens" once they were legally admitted in Canada. In this regard, there is no indication in the record that the wives and children of members of the Canadian Armed Forces who did not qualify as "Canadian citizens", were ever informed by Canadian authorities that they needed to apply for naturalization. There was no contemporary public announcement submitted as evidence in this proceeding to the effect that the "illegitimate children" born outside Canada of members of the Canadian Armed Forces (who had

legally landed in Canada with their mothers prior to January 1, 1947), had to apply for Canadian citizenship.

[162] Be that as it may, Respondent's counsel asserts that past conduct of Canadian officials and contemporary declarations made by the Minister or the Assistant Deputy Minister are not legally binding. They merely propose an interpretation of the law. They do not create rights that are inexistent in law. It is submitted that the public statements in question "did not fully account for the subtleties of the relevant citizenship law and how it applies to the facts of a specific individual". The Respondent asserts today that Parliament determined in 1946 that "illegitimate children" born outside Canada to Canadian fathers did not have a valid claim for citizenship unless their mothers were also Canadian citizen at the time of birth.

[163] In 2006, some sixty years after the end of the Second World War, probably half of the war brides and a large number of their children are still alive and living in Canada. Like the Applicant their claim to Canadian citizenship may be based upon their landing in Canada pursuant to Order in Council, P.C. 858. If the interpretation of the Respondent is correct and the Court is wrong, it follows that the majority of these war children (many who were "born out of wedlock") are not "natural-born Canadian citizens" (despite the fact that they may have lived all their life in Canada). This means that like any other permanent resident in Canada they would all need to apply for a grant of citizenship by the Minister. (For instance, the children born out of wedlock in Holland were "aliens" in 1947 and could not derive Canadian citizenship under the *jus soli* or *jus sanguinis* principles.)

[164] It is hard to believe today that citizenship rights would be denied to sons and daughters of Second World War veterans who offered their lives for Canada simply because their parents were not married at time of birth. If this is the case, procedural fairness may demand that the war children in a similar situation be given a chance to appear and make representations to the Respondent as to their right to Canadian citizenship (see *Veleta v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 138, at paras. 15, 22-23). That being said, for the reasons exposed in the next section, I have decided that the Applicant is a Canadian citizen.

XII. The statutory interpretation issue

[165] The statutory interpretation issue raised in this proceeding relates to the purported intention of Parliament or its legal substitute in times of war, the Governor in Council. The 1947 Citizenship Act is a law of general application dealing with citizenship. On the other hand, the Order in Council, P.C. 858 is a particular piece of legislation which specifically intended to grant Canadian citizenship status, for the purpose of Immigration legislation, upon landing, to the dependents of the Canadian Armed Forces members who were born in Canada or who were Canadian citizens.

[166] As mentioned by Professor Ruth Sullivan in the introduction of *Sullivan and Driedger on the Construction of Statutes*, *supra* at 1, more than 25 years ago, Elmer Driedger described an approach to the interpretation of statutes which he called the “modern principle”:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[167] The modern principle has been cited and relied on in innumerable decisions of Canadian courts, and in *Rizzo & Rizzo Shoes Ltd. (Re)*, *supra*, it was declared to be the preferred approach of the Supreme Court of Canada (see also *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26). In this regard, an interpretation that defeats the spirit of legislation, while complying with the literal meaning of the words employed, should be avoided if the words reasonably bear a more plausible meaning. Moreover, courts have jurisdiction to correct drafting errors, redress inappropriate avoidance measures and fill gaps in legislative schemes (see *Sullivan and Driedger on the Construction of Statutes*, *supra*, c. 6).

[168] The decision under review refers to the 1947 Citizenship Act. Since the Applicant was born outside Canada before January 1, 1947, the Citizenship Officer based her decision on the purported effects of paragraph 4(*b*) of the 1947 Citizenship Act (see Note 21). The Applicant does not contest that a literal interpretation of section 4 of the 1947 Citizenship Act supports the conclusion reached by the Citizenship Officer. However, the Applicant submits that this provision should not be read in isolation. It must be construed in a manner consistent with the purpose, object and effects of Order in Council, P.C. 858, which specifically provides that dependents of members of the Canadian Armed Forces who are “Canadian citizens” or have “Canadian domicile” acquire, upon landing in Canada, the same status as the members. Since the Applicant’s father was a natural-born Canadian citizen, the Applicant submits that he must also have the same status of a natural-born Canadian citizen.

[169] The relevant portions of Order in Council, P.C. 858 read as follows:

> Whereas the Minister of Mines and Resources, with the concurrence of the Secretary of State for External Affairs, and with the approval

> of the Cabinet War Committee, reports that it is desirable to facilitate entry into Canada of dependents of members of Canadian Armed Forces and, where the said members are Canadian citizens or have Canadian domicile, to provide such dependents with the same status; and …
>
> 1. In this Order, unless the context otherwise required:
>
> (a) "dependent" means the wife, the widow or child under eighteen years of age of a member or former member of the Canadian Armed Forces who is serving or who has served outside Canada in the present war;
>
> …
>
> 2. Every dependent applying for admission to Canada shall be permitted to enter Canada and upon such admission shall be deemed to have landed within the meaning of Canadian immigration law.
>
> 3. Every dependent who is permitted to enter Canada pursuant to section two of this Order shall for the purpose of Canadian immigration law be deemed to be a Canadian citizen if the member of the forces upon whom he is dependent is a Canadian citizen and shall be deemed to have Canadian domicile if the said member has Canadian domicile.
>
> …
>
> 7. Order in Council P.C. 7318 of the twenty-first day of September, 1944, is here revoked.
>
> (emphasis added)

[170] The Respondent acknowledges that the Citizenship Officer did not consider the effects of Order in Council, P.C. 858. The Order had not been repealed by Parliament and had full force and effect on January 1, 1947 and remained in force until May 15, 1947. However, the Respondent submits that the Citizenship Officer correctly applied section 4 of the 1947 Citizenship Act and relies, in this respect, on *Bell v. Canada (Minister of Employment and Immigration)* (1996), 136

D.L.R. (4th) 286 (F.C.A.) and *Kelly v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1880 (F.C.T.D.) (see Note 22). Moreover, the Respondent submits that Order in Council, P.C. 858 is limited to the application of Canadian immigration law and asserts it does not confer Canadian citizenship status to the war brides and their children.

[171] I note that the Orders in Council, P.C. 7318 and P.C. 858, refer to the legislative concepts of "Canadian citizen" and "Canadian domicile" which the 1947 Citizenship Act purports to import or modify. The expressions "Canadian citizen" and "Canadian national" are not gratuitous concepts. Apart from their vernacular use, such expressions have been used and defined in Acts of Parliament adopted prior to 1947. They grant special privileges and rights to persons who have the status of "Canadian citizens" or "Canadian nationals". It is the duty of the Court to interpret and harmonize these expressions with the true intent of Parliament.

[172] As noted earlier, the only law in Canada prior to 1947 which referred to the words "Canadian citizen" was immigration law. Therefore, the reference in paragraph 3 of Order in Council, P.C. 858 "for the purposes of Canadian immigration law to be a Canadian citizen" is not determinative. When Order in Council, P.C. 858 was passed, the independence of citizenship law did not exist. That being said, the definition of "Canadian citizen" found in the 1910 Immigration Act was modified upon the coming into force of the 1947 Citizenship Act on January 1, 1947 so as to mean, from that point forward, any person who was a "Canadian citizen" within the meaning of the 1947 Citizenship Act. Since then, the interplay between "citizenship law" and "immigration law" has been continuous. But there is a further and even more important point to make here. By necessary implication, the dependents of members of the Canadian Armed Forces who became

Canadian citizens on January 1, 1947, were from then on deemed to be "Canadian citizens" within the meaning of both the 1947 Citizenship Act and the 1910 Immigration Act. This tantamount to a statutory grant of citizenship (*Reference Re Deportation of Japanese, supra*).

[173] Indeed, the Respondent recognizes that "[f]or those arriving after January 1, 1947 and prior to May 15, 1947, P.C. 858 could have led to an automatic grant of Canadian citizenship if their supporting member of the Armed Forces had also become a citizen or they were a British subject". Respondent further notes that:

> While P.C. 858 itself limited its reach "for the purpose of Canadian immigration law", the amendments to the *Immigration Act*, also coming into force on January 1, 1947 changed the definition of citizen to incorporate the definition found in the new Canadian Citizenship Act. Additionally, the combination of being granted domicile and being a British subject would have themselves met the requirements of the 1947 Canadian Citizenship Act" (Respondent's written submissions (1 August 2006) at para. 15).
>
> (emphasis added)

[174] That being said, if Order in Council, P.C. 858, could have led to an automatic grant of Canadian citizenship for the dependents arriving after January 1, 1947 and prior to May 15, 1947, as admitted by the Respondent, it must also have granted such rights at the coming into force of the 1947 Citizenship Act to dependents who also had "citizen status" at that date. I fail to see why dependents who had legally landed in Canada prior to January 1, 1947, should be treated differently upon the coming into force of the 1947 Citizenship Act and the amendment to the definition of "Canadian citizen" found in the 1910 Immigration Act.

[175] There is no distinction in Order in Council, P.C. 858 between the dependents who have landed before and those who landed after January 1, 1947. The legal distinction introduced by the Respondent has the effect of placing the dependents who landed between January 1, 1947 and May 15, 1947 in a better position than dependents who landed prior to January 1, 1947. This was certainly not the intention of the drafters of Order in Council, P.C. 858 or of the Governor in Council in promulgating the same. Therefore, I cannot accept the restrictive interpretation proposed by the Respondent (by analogy see *Schavernoch v. Canada (Foreign Claims Commission*, [1982] 1 S.C.R. 1092).

[176] While the Applicant and his mother could not have been "Canadian citizens" for the purpose of citizenship legislation that did not yet exist, it appears that in 1946, they nevertheless enjoyed, under the 1910 Immigration Act, the rights and privileges that only "Canadian citizens" enjoyed (see A.H.F. Lefroy, "Annotation – Deportation from Canada of British subjects of Oriental origin" in Re Thirty-Nine Hindus, *supra*). In insisting today on a strict interpretation and application of section 4 of the 1947 Citizenship Act, the Respondent does not take into account the particular circumstances of this case and of the war brides and their children. It is apparent that war brides and their children were all treated the same by the Canadian government under Order in Council, P.C. 858. Whether they were British subjects or not (it must be remembered that some 6,000 war children were born in Holland), whether they were born in wedlock or out of wedlock (it is reasonable to assume that a vast majority of these children were born out of wedlock), it remains that upon their landing in Canada they all acquired the status of their Canadian husbands or fathers. It is, practically speaking, a legal recognition of the effects of the lawful marriage of their parents on the nationality of the children born out of wedlock.

[177] I conclude that Order in Council, P.C. 858, whose effect was prolonged to May 15, 1947, is tantamount to a statutory grant of Canadian citizenship to the war brides and their children who landed in Canada prior to May 15, 1947, where their husband and their father were born in Canada and became a Canadian citizen on January 1, 1947 upon the coming into force of the 1947 Citizenship Act. Had these Orders in Council been taken after the coming into force of the 1947 Citizenship Act, I have no doubt that the words used would have reflected the intention of the Governor in Council of conferring to these war brides and children "citizenship status" for all purposes. I therefore conclude that on January 1, 1947, the Applicant's mother and the Applicant himself were Canadian citizens for all purposes.

XIII. Retroactive or retrospective application of the Charter

[178] I will now address the issue of the presumption against the retroactive or retrospective application of legislation, which is incidentally raised by the Respondent as a bar to the Court examining the Charter and Bill of Rights arguments made by the Applicant in this proceeding.

[179] It has been decided in numerous instances that the Charter applies neither retroactively nor retrospectively: see *R. v. Stevens*, [1988] 1 S.C.R. 1153 at 1157; *R. v. Stewart*, [1991] 3 S.C.R. 324 at 325; *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335; *R. v. Dubois*, [1985] 2 S.C.R. 350. That being said, a statute or regulation which was enacted before April 17, 1982 (or before April 17, 1985), and which is inconsistent with a provision of the Charter, will be

rendered “of no force or effect” by paragraph 52(1) of the *Constitution Act, 1982*. However, this applies only from April 17, 1982, or April 17, 1985, as the case may be (*Stevens*, *supra*).

[180] In the case at bar, some of the confusion with respect to the question of determining whether the denial of issuing a certificate of citizenship is opened to Charter scrutiny, results from the ambivalent position taken by the parties. The Respondent, for one, has invited the Court to consider, in the alternative, grounds which have not been invoked by the Citizenship Officer in the impugned decision to dismiss the application for proof of citizenship made by the Applicant.

[181] In this regard, the Respondent submits that “the determination of an otherwise reviewable error does not always result in a matter being set aside and returned for re-determination”. Indeed, where the result is inevitable, a reviewing court may decide not to grant the remedy sought: see *Abasalizadeh v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1407 at para. 24. In this instance, the Respondent invites the Court to determine that the Applicant either lost his citizenship status because he and his mother returned to the United Kingdom in 1947 and remained thereafter in that country for more than a year, or because he failed to declare that he wished to retain his Canadian citizenship before reaching his 24th birthday. It is the Respondent’s submission that this Court ought to dismiss the present judicial review application despite any error made by the Citizenship Officer.

[182] Key to the claimed right of the Applicant to obtain a certificate of citizenship under section 12 of the current Citizenship Act is paragraph 3(1)(*d*) of the current Citizenship Act which provides that “[s]ubject to this Act, a person is a citizen if … the person was a citizen immediately

before February 15, 1977". It is also noted that paragraph 3(1)(*e*) of the current Citizenship Act states that a person is a citizen if the person was entitled, immediately before February 15, 1977, to become a citizen under paragraph 5(1)(*b*) of the 1970 Citizenship Act.

[183] The Applicant submits in this regard that paragraphs 3(1)(*b*), 3(1)(*d*), 3(1)(*e*) and section 8 of the current Citizenship Act perpetuate the pre-existing differential treatment of persons that existed in the 1947 Citizenship Act, the 1952 Citizenship Act, the 1970 Citizenship Act, and in the 1977 Citizenship Act up to this day, which is contrary to section 15(1) of the Charter (the equality rights issue). It is also submitted that by necessary implication, the current Citizenship Act applies the extinguishment provisions of subsections 4(2) and 5(2) of the 1952 Citizenship Act up to and including the date of February 14, 1977, which is contrary to paragraphs 1(*a*) and 1(*e*) of the Bill of Rights and to section 7 of the Charter (the due process issue).

[184] More particularly, the Applicant notes that paragraph 4(1)(*b*) of the 1970 Citizenship Act is not referred to in the current Citizenship Act, thereby distinguishing the group of people who were born before January 1, 1947 from the group of people who were born after January 1, 1947. The combined effect of paragraphs 3(1)(*d*) and (*e*) of the current Citizenship Act is to prohibit a person from making an application for resumption of citizenship based on the fact that they had lost their citizenship prior to February 15, 1977 if they were born before January 1, 1947 but <u>not</u> if they were born after January 1, 1947. It is further submitted that the pre-existing differential treatment based on whether the claimant was born within or out of wedlock was perpetuated by requiring that the status had to have been already "acquired" for citizenship in order to be conferred on the claimant.

[185] The Respondent notes that paragraph 3(1)(*d*) of the current Citizenship Act simply states that if one was a citizen immediately before February 15, 1977, then one remained a citizen on the coming into force of the current Citizenship Act on February 15, 1977. The Respondent then concludes that this provision, "enacted pre-Charter, crystallized the status quo for the purposes of assessing a continuous (or continuing) status – it froze the past as the past" (written representations of the Respondent, 31 July 2006, at para. 28).

[186] With respect to the application of the Charter protections in this case, notably the rights guaranteed in sections 7 and 15(1), the Respondent submits that these provisions cannot be invoked by the Applicant to correct any wrong or discrimination that occurred prior to the coming into force of the Charter or its equality provision (April 17, 1982 and April 17, 1985 respectively), either under the former citizenship legislation or the current Citizenship Act. The Respondent submits that the Applicant, who was born before February 15, 1977, is in the same position as the applicants in *Dubey v. Canada (Minister of Citizenship and Immigration)* (2002), 222 F.T.R. 1, 2002 FCT 582; and *Wilson v. Canada (Minister of Citizenship and Immigration)* (2003), 244 F.T.R. 148, 2003 FC 1475, in which two judges of this Court confirmed the legality of decisions rendered by Citizenship Officers which denied their applications for proof of citizenship (see Note 23).

[187] The Respondent further submits that being a quasi-constitutional document of "lesser status" than the Charter, the Bill of Rights cannot be used to correct past instances of discrimination and further submits that the loss of citizenship provisions found in the 1970 Citizenship Act and the current Citizenship Act do not infringe the due process protections of the Bill of Rights.

[188] I cannot accept the arguments made by the Respondent for the following reasons.

[189] First, I fail to see any problem with respect to ascertaining the legality of the alleged loss of citizenship status in light of the due process protections of the Bill of Rights, whether from a procedural or substantive rights perspective (*Authorson*, *supra* at para. 50). At the time that the Applicant reached the age of 24 years, on December 8, 1968, the Bill of Rights was applicable. That being said, I doubt that the Bill of Rights can be characterized as a quasi-constitutional document of "lesser status", as suggested by the Respondent. In his reasons for judgment in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, Justice Beetz rehabilitated the Bill of Rights by putting to rest the concept that "it was merely an instrument of construction or interpretation" (see *MacBain v. Lederman*, [1985] 1 F.C. 856 at 875-79 (F.C.A.)). As noted by Justice Beetz in *Singh* at paragraph 85: "[b]ecause [the Bill of Rights is] drafted differently [from the Charter], [it is] susceptible of producing cumulative effect for the better protection of rights and freedoms. But this beneficial result will be lost if [the Bill of Rights] fall into neglect. It is particularly so where [it] contain[s] provisions not to be found in the [Charter] …".

[190] Second, the Supreme Court of Canada examined the constitutionality of certain provisions of the current Citizenship Act with respect to the application of equality rights provision in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, where the impediment to the retrospective or retroactive applicability of Charter was also raised by the Respondent. Applying the approach developed by the Supreme Court of Canada in *Benner*, the issue that confronts this Court is whether the current Citizenship Act continues to perpetuate past discrimination. Despite its repeal, amendment or replacement, the 1947 Citizenship Act continues to be invoked today as a bar to a

citizenship claim made under the current Citizenship Act. I therefore conclude that this case is simply one of assessing the contemporary application and legality of laws which continue to produce legal effects today.

[191] The statutory provisions under challenge in *Benner*, *supra*, were paragraphs 3(1)(*e*), 5(2)(*b*) and 22 of the 1977 Citizenship Act. The Supreme Court of Canada found them to impose more onerous requirements on those claiming Canadian citizenship based on maternal lineage than on those claiming citizenship based on paternal lineage. For children born before February 15, 1977, the 1977 Citizenship Act distinguished between those born of a Canadian father, who were automatically entitled to register as citizens, and those born of a Canadian mother, who had to apply for citizenship, which involved passing a security check.

[192] Mr. Benner was born in 1962 to a Canadian mother and an American father. In 1987, when he applied for Canadian citizenship, the required security check revealed that he had been charged with a murder (he subsequently pleaded guilty to manslaughter), and he was refused citizenship. Had his father (instead of his mother) been the Canadian citizen, he would have had an automatic right to register as a citizen regardless of his criminal record. He brought proceedings to quash the refusal of citizenship on the ground that it was a breach of his equality rights to treat the children of Canadian mothers differently than the children of Canadian fathers.

[193] Associate Chief Justice Jerome held that the Charter could not be applied to the appellant's case since he was seeking a retrospective application of the Charter (see *Benner v. Canada (Secretary of State) (T.D)*, [1992] 1 F.C. 771 (F.C.T.D.)). The Federal Court of Appeal unanimously

dismissed the appellant's appeal (see *Benner v. Canada (Secretary of State) (C.A.)*, [1994] 1 F.C. 250 (F.C.A.)). Justices Marceau and Létourneau held that the Charter did not apply, because his complaint related to the circumstances of his birth, which had occurred 20 years before the Charter came into force in 1982. Justice Linden concluded that subsection 15(1) of the Charter applied to the appellant's case, and that the legislation was discriminatory, but that it was saved under section 1 of the Charter.

[194] Justice Marceau stated, at 259-60, that "[i]t is not the moment when a claimant has been actually affected by the provisions of an Act … that is relevant to determine whether he or she seeks a retroactive application of the Charter; it is whether the contended discrimination would flow from the provisions themselves or rather from the previously acquired legal situation that those provisions acted upon."

[195] Justice Létourneau pointed out that the real source of the appellant's complaint was the 1947 Citizenship Act, which assigned Canadian citizenship only to children born abroad in wedlock who had Canadian fathers. The 1977 Citizenship Act sought to correct this by bestowing citizenship upon children born abroad after February 14, 1977, from either a Canadian mother or father. The appellant's complaint, according to Justice Létourneau, was that by not addressing persons born before February 14, 1977, the new Act did not go far enough in correcting the injustices of the 1947 Citizenship Act, and just as subsection 15(1) of the Charter could not be applied retroactively to bring the 1947 Citizenship Act in line with the Charter, neither could it be applied to the 1977 Citizenship Act. According to Justice Létourneau, any discrimination against the appellant "crystallized" on the date of his birth in a foreign country when the 1947 Citizenship Act refused

him citizenship because his father was not Canadian. It was at the point of his birth –August 29, 1962 –that legal consequences were attached to his situation. (Justice Létourneau also determined, should the Charter apply, that there was no discrimination on the basis of sex since under the 1977 Citizenship Act children born outside of Canada after February 14, 1977 derived citizenship from either a Canadian father or mother.)

[196] Justice Linden, however, disagreed. In his opinion, the Charter applied to the appellant's case. He noted that the appellant was not seeking to have his citizenship changed retroactively to the point of his birth; rather, he was simply seeking to become a Canadian citizen on the date of his application – October 27, 1988. The law in force in Canada at that time was the 1977 Citizenship Act and that law was subject to Charter scrutiny. Whether he was a Canadian citizen prior to his application was not directly relevant, since the real question was the constitutional legitimacy of the access to citizenship provided for in the 1977 Citizenship Act at the time of his application. No retroactive or retrospective application of the Charter was therefore required. The relevant date was that of the rejection of the appellant's application for citizenship, not his date of birth (however, although he found there was legislative discrimination, he determined that it was nevertheless justified under section 1 of the Charter, largely for the reasons articulated by Justice Létourneau)

[197] The Supreme Court of Canada allowed Benner's appeal. Justice Iacobucci, writing for a unanimous Court, held that the better way to characterize his complaint was in terms of a status or condition that imposed a disadvantage on him that persisted after the coming into force of the equality provision of the Charter. The discrimination occurred when the applicant was refused citizenship on the basis of that status, and the refusal took place in 1987. Therefore, the applicant

was entitled to challenge the refusal of citizenship under the Charter (the Court went on to hold that there was a breach of Benner's equality rights, and he was successful in challenging the decision and the statutory provision underlying it.).

[198] At paragraph 45 of *Benner*, Justice Iacobucci indicated:

> The question, then, is one of characterization: is the situation really one of going back to redress an old event which took place before the *Charter* created the right sought to be vindicated, or is it simply one of assessing the contemporary application of a law which happened to be passed before the *Charter* came into effect?

[199] I pause here to mention that the facts in *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.), leave to appeal to the Supreme Court of Canada dismissed [2002] S.C.C.A. No. 476, offer an interesting illustration of an attempt to redress events which took place before the Charter. At issue were the federal Chinese Immigration Acts in force from 1885 to 1923; these immigration laws imposed a "head tax" on persons of Chinese origin upon entering Canada, thus making it very difficult to immigrate to Canada from China. The claimants included both people who had paid the head tax and descendants of persons who had either paid the head tax or suffered in other ways from the application of these laws. They sought the return (with interest) of the head taxes paid and damages. The Ontario Court of Appeal, affirming the trial judge, acknowledged that the laws discriminated on the ground of race, and would today offend the Charter. However, the laws were repealed in 1923, and since the laws were not in force at the commencement of the Charter, those whose rights were denied by the laws had no remedy under the Charter.

[200] Coming back to the rationale for allowing a Charter challenge in *Benner*, *supra*, Justice Iacobucci examined the Respondent's argument to the effect that the rights granted under citizenship legislation "crystallized" at birth. He writes at paragraph 50:

> The respondent urged us to find that the key point in the chronology of events was the appellant's birth in 1962. The respondent argued that the focus placed on birth by the impugned citizenship legislation suggests that the rights granted under that legislation "crystallize" at birth: see *Crease v. Canada*, [1994] 3 F.C. 480 (T.D.). Whatever discrimination took place in the appellant's case, therefore, took place when he was born, since that is when his rights were determined under the impugned legislation. To revisit these rights in light of s. 15, according to the respondent, is therefore inescapably to go back and alter a distribution of rights which took place years before the creation of the Charter.
>
> (emphasis added)

[201] I note that in *Crease v. Canada*, [1994] 3 F.C. 480 (F.C.T.D.), which is referred in the above passage of the Supreme Court's decision in *Benner*, Justice Wetston relied extensively on the opinion of Justice Létourneau in the Federal Court of Appeal decision earlier rendered in *Benner (C.A.)*, and determined that the Charter did not apply and that the plaintiff's rights under section 15(1) of the Charter had not been infringed in any event (see *Crease*, *supra* at paras. 41-42, 46, 66-67) (see Note 24).

[202] That being said, with respect to the courts' power to examine allegations of discrimination in the context of citizenship status, Justice Iacobucci stated in *Benner* at paragraphs 51-52, that:

> I am uncomfortable with the idea of rights or entitlements crystallizing at birth, particularly in the context of s. 15. This suggests that whenever a person born before April 17, 1985, suffers the discriminatory effects of a piece of legislation, these effects may be immunized from Charter review. Our skin colour is determined at

> birth – – rights or entitlements assigned on the basis of skin colour by a particular law would, by this logic, "crystallize" then. Under the approach proposed by the respondent, individuals born before s. 15 came into effect would therefore be unable to invoke the Charter to challenge even a recent application of such a law. In fact, Parliament or a legislature could insulate discriminatory laws from review by providing that they applied only to persons born before 1985.
>
> The preferable way, in my opinion, to characterize the appellant's position is in terms of status or on-going condition. From the time of his birth, he has been a child, born outside Canada prior to February 15, 1977 of a Canadian mother and a non-Canadian father. This is no less a "status" than being of a particular skin colour or ethnic or religious background: it is an ongoing state of affairs. People in the appellant's condition continue to this day to be denied the automatic right to citizenship granted to children of Canadian fathers.
>
> (emphasis added)

[203] At paragraph 59, Justice Iacobucci concluded:

> Simply put, I believe the discrimination, if it was discrimination, did not take place until the state actually denied the appellant's application for citizenship on the basis of criteria which he alleges violate s. 15 of the *Charter*. Until he tried to obtain citizenship and was refused, the appellant could not really claim to have been discriminated against… The denial of his application took place on October 17, 1989, long after s. 15 came into effect. This denial is therefore open to *Charter* scrutiny.

[204] Accordingly, in view of the comprehensive and authorative character of the Supreme Court decision in *Benner*, I am reluctant to rely on the prior *dicta* in *Benner* and *Crease* of the Federal Court of Appeal and of this Court with respect to retroactivity and discrimination. The decisions of this Court in *Dubey* and *Wilson*, *supra*, are attempts to distinguish the Supreme Court decision in *Benner* (see Notes 23, 24 and 25). In my opinion, these precedents are not determinative, and I note that a contrary result was achieved in *Augier v. Canada (Minister of Citizenship and Immigration)*, [2004] 4 F.C.R. 150 (F.C.), a more recent decision of this Court.

[205] In *Augier*, *supra*, the Citizenship Officer had determined that since the applicant was born out wedlock, outside of Canada, on May 9, 1966, pursuant to the legislation then in force, Canadian citizenship could only be derived from his mother. If the applicant's parents had been married at the time of his birth, then he could have derived Canadian citizenship from his father. However, since his natural parents were not married and the applicant's mother was not a Canadian citizen at time of the applicant's birth, the Citizenship Officer refused his application for proof of citizenship.

[206] In *Augier*, *supra*, this Court decided to set aside the Citizenship Officer's decision and held that paragraph 5(2)(*b*) of the current Citizenship Act (incidentally at issue in the present case) infringed subsection 15(1) of the Charter and was not justified by section 1. In this regard, Justice Mosley noted that Parliament failed, when it adopted the current Citizenship Act in 1977, to address the issue of children born out of wedlock to Canadian fathers and non-Canadian mothers. Paragraph 5(2)(*b*) of the current Act was found to address the injustice of a child not having the option of claiming citizenship from his Canadian mother when she was married to a non-Canadian father. Paragraph 3(1)(*b*) of the current Citizenship Act also removes the stipulation of being born in wedlock for children born abroad after February 14, 1977; however, it did not provide redress for persons in the applicant's situation born abroad, out of wedlock to Canadian fathers and non-Canadian mothers before February 15, 1977.

[207] In *Augier*, *supra*, Justice Mosley followed the Supreme Court decision in *Benner*. At paragraphs 16-18, he wrote:

> The *Benner* decision establishes that the alleged Charter violation in the present case is not barred due to retroactivity or lack of standing.

> On both of these issues, the situation before me is akin to that of *Benner*. In *Benner*, *supra*, the Supreme Court noted that the 1977 amendments to the citizenship legislation allowed children to claim citizenship from either or both parents, regardless of the parents' marital status. Such change in the law, however, applies only to children born after February 14, 1977.
>
> Previously, children born of Canadian mothers in wedlock could not derive citizenship from their mother, unless she was unwed at the time of the child's birth. Therefore, paragraph 5(2)(*b*) was added in 1977, and remains in the current Act. This permitted children born of married Canadian mothers, who previously were denied through subparagraph 5(1)(*b*)(i) of the 1970 Act, to apply for citizenship that would be granted upon the person swearing an oath of allegiance and passing a criminal and security clearance. However, children born in wedlock of Canadian fathers did not have to swear such an oath or undergo background checks, and were recognized as citizens upon registration of their birth. The Supreme Court of Canada found that this distinction violated section 15 of the Charter and was not saved by section 1.
>
> The applicant's situation, however, is not directly analogous to the one faced by the Court in *Benner*, *supra*, as here, the alleged discrimination rises from a possible stereotypical application or view of children born out of wedlock and that as a result of such status, individuals born to unwed, non-citizen mothers are prohibited by the legislation from claiming Canadian citizenship through their Canadian fathers. If the Canadian father and non-Canadian mother were married at the time of the individual's birth, prior to February 15, 1977, then such an individual could have claimed citizenship through his father. Marital status of the individual's parents is therefore a key, differential factor in this case, rather than merely the gender of the Canadian parent.

[208] I do not see any reason to depart from the approach taken by Justice Mosley in *Augier*, *supra*. In my opinion, the *Benner* decision is not limited to the constitutionality of paragraph 5(2)(*b*) of the current Citizenship Act but stands for the broader proposition that it is discriminatory to treat children born abroad as having different rights based on the gender of the parents on whom they base their claim to citizenship. The fact that *Augier* dealt with an individual born out of wedlock after 1947 in circumstances not exactly similar to that of *Benner*, was found by the Court not to be

material. I am also comforted by the fact that the Federal Court of Appeal decided in 2001 that the reasoning in *Benner* applies equally to a person born in wedlock outside Canada to Canadian-born mothers prior to January 1, 1947 (see *McLean v. Canada (Minister of Citizenship and Immigration) (C.A.)*, [2001] 3 F.C. 127 (F.C.A.) at paras. 9-18).

[209] I have also considered the decision rendered by this Court in *Veleta v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 801 which is also cited by the parties. The decision under review denied the Applicants' application for proof of citizenship under paragraph 3(1)(*b*) of the current Citizenship Act because they were born outside Canada after February 14, 1977, and neither of their parents were citizens. They were denied citizenship because their grandfather was born out of wedlock. Accordingly, their father could not have been a Canadian citizen as well. In that context, the Court determined that the applicants sought to right a historical wrong that occurred long before section 15 came into effect (see Note 26). That being said, I note that on April 19, 2006, about a month and a half before the present proceeding was heard (which perhaps explains why counsel failed to mention the Federal Court of Appeal judgment), the decision of this Court in *Veleta* was set aside. The Federal Court of Appeal found that procedural fairness demanded that the grandfather be given a chance to appear and make representations as to his right to Canadian citizenship: see *Veleta v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 138. The judgment of the Federal Court of Appeal is discussed in the next section (see XIV. The due process issue).

[210] While section 15 of the Charter cannot be used to attack a discrete act which took place before the Charter came into effect, not every situation involving events which took place before the

Charter came into force will necessarily involve a retrospective application of the Charter. Where the effect of a law is simply to impose an on-going discriminatory status or disability on an individual, it will not be insulated from the Charter review simply because it happened to be passed before April 1985. If it continues to impose its effects on new applicants today, then it is susceptible to Charter scrutiny: see *Andrews*, *supra*.

[211] For instance, prior to the Civil War, many American nationals, slaves in particular, were not citizens. Slavery has been abolished in America and it would be inconceivable today to deny citizenship status to Afro-Americans on the ground that their ancestors in the nineteen century were not citizens themselves. Let's nevertheless imagine the following fictitious scenario:

(a) An old citizenship statute provides that all "free men" born in this country are citizens of this state. Therefore, slaves and women are not citizens. The statute is discriminatory both on the grounds of gender and civil status of the person at the time of birth. Moreover, it excludes all black slaves based on their race.

(b) Thirty years later, the statute is amended to provide that all "free men and <u>women</u>" born in this country are citizens. In passing I note that the amending statute now gives a different legal qualification under the law to a continuing condition (being a woman) and an isolated event (being born free) which taken together did not previously confer citizenship status in the past. It can also be argued the presumption against retroactivity would prevent the "free women" born in this country before the coming into force of the amending statute from claiming that they were "citizens"

since the date of their birth, and accordingly, that they were entitled prior to the coming into force of the amending statute to benefit from all the privileges and advantages of citizenship.

(c) Another 30 years later, the same statute is repealed and replaced by another statute which now provides that all persons born in this country after the coming into force of the new statute are citizens of this country. The new statute also contains a further provision to the effect that persons who were citizens immediately before its coming into force are citizens of this country. It might be argued that "age" is not an analogous ground of discrimination because the transitory provision in the new statute applies irrespective of the age a person has at the time of the coming into force of the new statute. The requirement imposed by the new statute for persons who were born before the coming into force of the new statute, is simply that they have to be citizens at that date. However, after 60 years, there may still be a group of black men and women living in this country who were not born as "free men and women". This group did not have any citizenship rights under the old statute. Therefore, they continue to be denied citizenship status and are not natural-born citizens of this country. Accordingly, under the new statute, they would have no right to obtain a certificate of citizenship.

[212] I will now provide a second example under the current Citizenship Act. John and Mary are not married. They nevertheless decide to have children. John is Canadian and Mary is British. They live together in England. On February 14, 1977, Mary is admitted to a London hospital. At

11:58 p.m., she gives birth to Albert. A few minutes afterwards, Mary gives birth to a second child, Robert. The latter is born on February 15, 1977, at precisely 12:02 a.m. Both births are registered the same day. Albert, the older twin, is not a natural-born Canadian citizen (since he was born out of wedlock prior to February 15, 1977 and his mother is British) while Robert is a natural-born Canadian citizen (since he was born after February 14, 1977 and his father is a Canadian).

[213] After the coming into force of the Charter, certificates of citizenship are requested by the parents. They learn at this point that only Robert is a Canadian citizen. A variation of the same example involves Albert. He is now 25 years old and he wants to get a Canadian passport. His passport is refused because he is not Canadian. Despite the fact that Albert is the same age as his brother (after all, only four minutes separate the two brothers), he learns that he is not a Canadian citizen. Besides, he is also told that had he had the ability to claim citizenship, he lost it at the age of 24 when he failed to apply for retention of his citizenship. Again, I fail to see how a proceeding instituted by Albert or his parents to have the impugned legislative provision declared inoperative under the Charter and the Bill of Rights can be dismissed on the basis that the Charter or the Bill of Rights cannot apply retrospectively, unless restoring the "crystallization of rights" theory that has been rejected by the Supreme Court in *Benner*.

[214] In *Benner*, *supra*, the Supreme Court held that a critical component of the analysis was determining when an individual was first confronted with a law that took the claimed ground of discrimination into account. In this regard, the Respondent submits that the first time that the Applicant's lack of citizenship was held against him was not on April 5, 2005. Rather, it was in

1968 when he went to Canada House in London, England, sought to come to Canada, and was given the standard application forms for immigration which required sponsorship.

[215] The Applicant made an application for proof of citizenship which was rejected on April 5, 2005. I agree with the Applicant that the "discrimination" complained of in this case coincides with the Citizenship Officer's decision to apply the requirement that his mother be Canadian since he was born out of wedlock. According to the un-contradicted evidence submitted by the Applicant, it is the first and only occasion where he was confronted with "discrimination" based on the lineage and sex of his natural parents who were not married at the time of his birth. For this reason, the facts in the present case are quite different from the factual situation considered by the Federal Court of Appeal in *McLean, supra*.

[216] With respect to the argument made by the Respondent that citizenship was lost some time in 1968 when the Applicant turned 24 years old, the evidence on this issue is not conclusive. I cannot say that "the result is inevitable" and that the Applicant indeed lost his citizenship status. With respect to the question of determining at what time the Applicant's rights were engaged, there is no indication in the evidence that the people working at the Canada House in London, England, in 1968, ever told the Applicant about the loss of citizenship provisions of the 1947 Citizenship Act or the 1952 Citizenship Act. It appears from the evidence that the Applicant simply made an inquiry and was given standard immigration forms. These forms could have been given to the Applicant by any clerk at the desk. Their remittance to the Applicant does not permit this Court to infer that there was any examination of the law or legal determination made by a responsible Citizenship Officer as to the citizenship status and rights of the Applicant.

[217] Therefore, in light of the evidence on record, I conclude that the Applicant was "confronted" (within the meaning of *Benner, supra* or at para. 55) with the loss of citizenship provisions only when (1) he was informed in 1999 that he had "lost" his Canadian citizenship on his 24th birthday, and (2) in February 2003 when he was told that his first application to obtain a certificate of Canadian citizenship would not be forwarded for further processing because he had "lost" citizenship the day he turned 24. These two events occurred well after the coming into force of the Charter and they involve the interpretation and the application of the current Citizenship Act.

[218] In conclusion on this point, this case involves a contemporary refusal (in 2005) to issue a certificate of citizenship to the Applicant based on the requirement found in paragraph 3(1)(*d*) of the current Citizenship Act that he be a "citizen" immediately before February 15, 1977. The legality of his exclusion can be examined today under the Charter and the Bill of Rights (despite the fact the 1947 Citizenship Act, the 1952 Citizenship Act and the 1970 Citizenship Act have been repealed and do not exist anymore).

XIV. The due process issue

[219] The Citizenship Officer's failure to consider and apply Order in Council, P.C. 858 is determinative in this case. This error of law vitiates the whole decision and is sufficient in itself to order that the impugned decision be set aside. This is not a case in which the Court should exercise its discretion to refuse to set aside an administrative decision on the basis that it can otherwise be upheld on grounds not considered by the Citizenship Officer. The evidentiary record with respect to

the Applicant's loss of citizenship is incomplete and does not permit the Court to make any conclusive findings in this regard. In any case, I have further grounds for dismissing the Respondent's arguments and subsidiarily making a declaration of unconstitutionality.

[220] The Respondent assumes that since the Applicant left Canada prior to 1947, he was not a British subject with Canadian domicile when the 1947 Citizenship Act took effect. This is incorrect. It is clear that the Applicant was a natural-born British subject. By virtue of Order in Council, P.C. 858, he was deemed to be a Canadian citizen and did not need to maintain Canadian domicile since his father was born in Canada. I also note that upon the coming into force of the 1947 Citizenship Act, the Applicant had only been out of Canada for six weeks.

[221] I am unable to accept the Respondent's argument to the effect that the Applicant and his mother automatically lost their citizenship one year after they had returned to England. This is an argument presented for the first time in 2005 in the Respondent's memorandum of fact and law. I am unable to accept this new argument in view of the absence of proper evidentiary record, combined with the fact that the Applicant's mother has never been made a party to this proceeding. Procedural fairness demands that the Applicant's mother be given the right to make representations as to the alleged loss of her Canadian citizenship (see the discussion *infra* with respect to the Federal Court of Appeal in *Veleta*).

[222] While there is no evidence of the Applicant's mother's intent on January 1, 1947, I do not need to dismiss the Respondent's argument on this basis. None of those computations of time should affect a minor child who was considered a "disabled person" under statute. This is clearly

against due process. As a minor child, the Applicant did not voluntarily make any choices. This brings me to address the Respondent's argument that the Applicant automatically lost his citizenship status when he turned 24 because he failed to make an application for retention of citizenship in accordance with paragraph 4(2)(*b*) of the 1953 Amendment Citizenship Act or the 1970 Citizenship Act (that is, between the age of 21 and 24).

[223] The main difficulty with this proposition raised by the Respondent is that the Applicant's citizenship status is not derived from the application of paragraph 4(1)(*b*) of the 1947, 1952 or the 1970 Citizenship Acts. As I have already decided, Order in Council, P.C. 858 is tantamount to the issuance or granting of a certificate of citizenship by the Minister or Parliament. I fail to see how a loss of citizenship after January 1, 1954 under the operation of subsection 4(2) of the 1952 Citizenship Act (as amended by section 13 of the 1953 Citizenship Amendment Act) or the 1970 Citizenship Act could have occurred in this case. Indeed, paragraph 4(1)(*b*) of the 1947, 1952 or 1970 Citizenship Acts deny citizenship status to children born out of wedlock of non-Canadian mothers, a point that I will address later on in these reasons when disposing of the equality rights issue.

[224] That being said, if I nevertheless assume that the impugned legislative provisions cited above are applicable, when construed with the current legislative scheme, I conclude that they are contrary to due process and procedural fairness.

[225] This is the first time that this Court has had occasion to examine the legality of legislative provisions providing automatic loss of citizenship in the context of the procedural and substantive rights of an individual not be deprived of his life, liberty or security of the person except by due

process of law. That being said, in *Veleta, supra*, the Federal Court of Appeal questioned the legality of the Respondent's standard practice, in which the Respondent did not formally notify persons of the loss of their citizenship until such persons either requested a certificate of citizenship or the issuance of a passport.

[226] In *Veleta*, the Federal Court of Appeal disposed of an appeal from a judicial review of a citizenship officer's denial of an application for proof of Canadian citizenship. The applicants' grandfather was born out of wedlock in Mexico in 1933; his parents had gone through a religious but not a civil ceremony at the time of his birth. The grandfather and his son (the father of the applicants) both obtained certificates of Canadian citizenship. The officer concluded that because the grandfather was born out of wedlock that he did not acquire Canadian citizenship under the laws in effect at the time and as a result was unable to pass on that citizenship to his son and grandchildren. The father commenced an application for judicial review of the finding that he was not a Canadian citizen, which was adjourned pending disposition of the appeal.

[227] The Federal Court of Appeal determined that the procedural fairness demanded that the grandfather be given a chance to appear and make representations as to his right to Canadian citizenship. In consideration of the two sets of proceedings, inconsistent verdicts could arise if the appeal was dismissed and the father's judicial review was allowed. On that basis, the appeal was allowed and the matter was remitted to redetermination.

[228] The reasons for judgment were given by Justice Sexton who wrote at paragraphs 15, 21-25:

> It is surprising, at the very least, that Jacob (the father) was given no formal notice that he was no longer considered a Canadian citizen.

> Counsel for the respondent indicated to the court that it was standard practice for the respondent not to formally notify persons of the loss of their citizenship, but rather to wait until such persons either requested a certificate of citizenship or the issuance of a passport before informing them.
>
> …
>
> Both Jacob (David's son) and the appellants (David's grandchildren) relied on David's status as a Canadian citizen for their claim to citizenship. Thus, it is necessary in both of those proceedings to establish whether David was a Canadian citizen at the relevant time. Indeed, in the case before this court, the applications judge determined that David was never entitled to become a Canadian citizen.
>
> Thus, David (the grandfather) is in the position of having the courts deliberate upon and decide whether he ever became a Canadian citizen, in spite of his having been issued a certificate of Canadian citizenship approximately 40 years ago and in spite of his never having been notified by the respondent that he is no longer considered a citizen.
>
> I find this an intolerable situation. Procedural fairness demands that David (the grandfather) be given a chance to appear and make representations as to his right to Canadian citizenship.
>
> I also have considered that the present state of the two sets of proceedings would permit this court to dismiss the present appeal on the basis that Jacob (the father) was no longer a citizen and therefore the appellants could not become citizens. At some later time, the Federal Court, on the evidence before it, could conceivably conclude that Jacob (the father) had not lost his Canadian citizenship, thus producing inconsistent verdicts. This is a most unsatisfactory state.
>
> Consequently, the appeal should be allowed, the decision of the applications judge set aside and the matter remitted to the Federal Court for redetermination.

[229] Well beyond any precise legal definitions, it remains that the archetypical character and symbolic value of “citizenship” has always been closely attached to freedom and liberty from ancient times to the present day. Indeed, citizenship status has been used by the courts to enhance

fundamental rights and to prevent chauvinism and arbitrary conduct when the Canadian Constitution did not explicitly guarantee political rights and freedoms (see Note 27). Moreover, the concept of “citizenship” permits the identification of the individual with his mother country or country of adoption. It has come to be identified with one’s origin or acquired nationality.

[230] For most people citizenship is an heritage that comes from the simple fact of birth (*jus soli* or *jus sanguinis*). For others, it is a choice which may have great consequences. Indeed, as stated by Justice La Forest in *Andrews*, *supra* at paragraph 70: “… citizenship is a very special status that not only incorporates rights and duties but serves as a badge identifying people as members of the Canadian polity”.

[231] In *Lavoie*, *supra* at paragraph 57, Justice Bastarache noted:

> … In any liberal democracy, the concept of citizenship serves important political, emotional and motivational purposes; if nothing else, it fosters a sense of unity and shared civic purpose among a diverse population: see W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995), at pp. 173-76. This was recognized by this Court in *Winner*, *supra*, in which Rand J. defined citizenship, at p. 918, simply as "membership in a state". Rand J. went on to affirm the very basis of Canada's citizenship policy: "in the citizen", he held, "inhere those rights and duties, the correlatives of allegiance and protection, which are basic to that status"…

[232] A person’s right to security (such as obtaining state protection) and liberty of movement is inextricably linked with his national, or as the case may be, his citizenship status. Nationality and citizenship are so intimately attached to an individual that I am ready to accept that any deprivation or loss of nationality or citizenship by an act of the state – whether or not it renders someone

"stateless" – engages an individual's rights to "liberty" and "security of the person" (*Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307).

[233] Accordingly, any legislative attempt to deny, abolish or somewhat curtail an individual's nationality or citizenship must respect due process, including any right declared to exist in Canada by paragraphs 1(*a*) and 2(*e*) of the Bill of Rights, or otherwise constitutionally guaranteed by section 7 of the Charter, as these rights have been defined by the jurisprudence (see *Singh*, *supra*; *Reference Re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486).

[234] It is well established that the requirements of procedural fairness (and more broadly of due process) are not static and that their content is to be decided in the specific context of each case (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817). One must consider what the status of citizenship entails in practice and how it is closely connected to the life, liberty or security of an individual, including his liberty of movement and his right to State protection, as the case may be.

[235] Loss of citizenship for a person who is currently residing in Canada has great consequences. The content of the procedural guarantees must be directly proportionate to the importance and impact an automatic loss of citizenship can have on the life of the person who is affected. If the person was not a permanent resident in Canada before having obtained citizenship, he or she may be in Canada without any status and subject to removal proceedings under current immigration proceedings. For the person who is residing outside Canada, he or she may be denied entry into

Canada (unless he or she comes as a visitor). Such a person will naturally have to obtain a permanent resident visa before being able to establish himself or herself in Canada.

[236] While “citizenship” describes a status that can be conferred by the state to an individual, “nationality” means membership in a “nation”. Indeed, citizens are referred to as “nationals” when they travel abroad. The Applicant was a Canadian national by descent (*jus sanguinis*) because he was the son of a Canadian citizen. The Applicant’s father was born in Canada and was a Canadian citizen under the 1910 Immigration Act. The Applicant remained a Canadian national until the *Canadian Nationals Act* was repealed and I have determined that he became a Canadian citizen on January 1, 1947. He cannot be deprived of his status of Canadian national or citizen without due process.

[237] Before the Bill of Rights came into force in 1960, due process already required that no one be arbitrarily deprived of his nationality or citizenship.

[238] Article 15 of the *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, recognizes that everyone has the right to nationality and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. In this regard, I note that subsection 46(1) of the 1947 Canadian Citizenship Act prescribed that:

> 46(1) Notwithstanding the repeal of the *Naturalization Act* and the *Canadian Nationals Act*, this Act is not to be construed or interpreted as depriving any person who is a Canadian National, a British subject or an alien as defined in the said Acts or in any other law in force in Canada of the national

> status he possesses at the time of the coming into force of this Act.

(emphasis added)

[239] While there were many ways in which Canadian nationals could lose their citizenship status before 1977 (and 1960), in most instances (except the impugned provisions invoked by the Respondent) it appears that the requirements for due process were satisfied.

[240] The most common instances in which a person could lose his or her citizenship involved the voluntary and formal decision taken by an individual, who was not a “lunatic” or an “idiot”, after attaining the full age of 21 years, to acquire the nationality or citizenship of a country other than Canada or to file a declaration of a renunciation of his Canadian citizenship in case of dual nationality (see sections 15 and 16 of the 1970 Citizenship Act). For instance, the issue of renunciation may have arisen in situations where naturalized citizens were unable to draw attention from, or wished to perform official services for the government for their country of birth, and were unable to do so unless they resumed or retained their foreign citizenship exclusively. Renunciation of citizenship is still possible today (see section 9 of the current Citizenship Act). These cases pose no problem in terms of due process because the law requires that the individual not be a minor at the time of making the application for renunciation (or if there is a mental disability, that he understands the significance of renouncing citizenship).

[241] The second category of cases involved the voluntary decision taken by the Governor in Council to revoke the citizenship of an individual who had obtained Canadian citizenship by false representations, fraud, or by concealment of material circumstances. In such instances, an order

could only be made following a report of the Minister. The 1970 Citizenship Act sets out the procedure the Minister must follow, beginning with notice to the individual. The person could request that the Minister refer the case for inquiry by a commission constituted for that purpose by the Governor in Council. The procedure followed by the commission was of a judicial nature and the individual in question would have the possibility to present evidence and make arguments. A somewhat similar procedure exists today except the inquiry is devoted to a judge of this Court (see sections 10 and 18 of the current Citizenship Act). Accordingly, these cases pose no problem at least in terms of procedural rights attached to the concept of due process.

[242] The third category of cases involving the loss of citizenship occurred where the individual served in the armed forces of a country which was at war with Canada. While the loss of citizenship was "automatic", the law required that the individual be a national or citizen of such country and provided that loss did not occur where the latter, under the law of this other country, became a national or citizen of such country when it was at war with Canada (see section 17 of the 1970 Citizenship Act). I see no problem with due process.

[243] The fourth category of cases is problematic. Natural-born Canadian citizens by descent (*jus sanguinis*) of the first generation born outside Canada prior and after 1947 would automatically lose their citizenship (and nationality) unless they had a place of domicile in Canada or had submitted an application for retention of their Canadian citizenship between their 21st and 24th birthdays (see subsections 4(2) and 5(2) of the 1970 Citizenship Act). Furthermore, there was a registration requirement with respect to the children born after 1947. This also mean that citizenship may be denied to Canadian military's dependents born abroad, in wedlock, between 1947 and 1977 in the

case their parents were unaware of the fact that the birth had to be registered at a consulate or with the Minister within two years after its occurrence or within such extended period as the Minister may authorize in special cases (paragraph 5(1)(*b*)(*ii*) of the 1970 Citizenship Act).

[244] The Respondent concedes that individuals affected in these circumstances may never have been aware of such requirements and may have lost citizenship status as a result of their ignorance of the law.

[245] The problem was resolved in part in 1977. First generation citizens by descent born after February 14, 1977, were no longer required to submit an application for retention of citizenship or to have a domicile in Canada. Under the current Citizenship Act, only second generation citizens who hold citizenship on the basis of their birth abroad to Canadian citizens themselves born outside of Canada are required to apply for retention of their citizenship before reaching the age of 28. They must have registered as citizens, and have either (1) lived in Canada for at least one year prior to the application or (2) established that they have a substantial connection to Canada (see section 8 of the current Citizenship Act).

[246] In the case at bar, I conclude that the automatic application of the loss of citizenship provisions is depriving the Applicant of the Canadian nationality previously granted to him under the Canadian Nationals Act, and of his citizenship status as well, which is contrary to due process.

[247] In the present case, the applicability of the impugned legislative provisions is further questioned by the Applicant who asserts that from 1947 to 1953, no requirement to submit an

application for retention of citizenship or to have a domicile in Canada was imposed upon a Canadian citizen by descent, who had come in Canada come to Canada as a minor and been lawfully accepted prior to 1947.

[248] I am uncomfortable with the Respondent's answer that ignorance of the law is not an excuse. There are a number of countries in the world where birth within their territory (*jus soli*) does not automatically confer citizenship. Certain foreign countries may require that at least one of the parents of that child be a citizen of this country. This means in practice that persons born outside Canada prior February 15, 1977, whose two parents were Canadian citizens or nationals at the time of birth, ran the risk of losing their Canadian citizenship, which is the only national status they would have possessed at the time of their 24th birthday.

[249] The simple fact that the automatic loss of citizenship was "prescribed by law" does not make it more compliant with due process if it has the potential to deprive one's life, liberty or security (see *Reference re Motor Vehicle Act (British Columbia) S 94(2), supra*). There should be some form of proper notice given to the individual, provided for in the statute or regulations. However, it is not the role of this Court to remedy past and current legislative or regulatory deficiencies. It is sufficient to declare that the claimed automatic loss of citizenship was and is unenforceable against the Applicant because it was and is contrary to due process and infringes the rights guaranteed by paragraphs 1(*a*) and 2(*e*) of the Bill of Rights, and section 7 of the Charter.

[250] The fact that an individual who has lost his citizenship can submit an application for resumption of citizenship to the Minister may provide some form of acceptable alternative remedy,

especially if any certificate of citizenship accordingly issued has a retroactive effect, as was the case under prior citizenship legislation (see section 6 of the 1970 Citizenship Act). But, the Respondent submits in this regard that December 31, 1970, is the latest date on which a person born outside Canada, before 1947, could have retained Canadian citizenship by virtue of having filed a declaration of retention of citizenship, or by having established a permanent abode in Canada. Consequently, on January 1, 1971, entitlement to Canadian citizenship by virtue of birth outside Canada before 1947, to a parent born in Canada, was extinguished. No possibility for citizenship status, other than through naturalization, remained for such persons, regardless of the status of their parents at the time of their birth or thereafter.

[251] In view of the rigid position taken by the Respondent that the Applicant is not a citizen, the Applicant is or has been effectively barred from making an application for resumption of citizenship to the Minister. Moreover, in any case, it is not clear today whether such an application could be granted by the Minister under section 11 of the current Citizenship Act, since the 1970 Citizenship Act was repealed in 1977, and the Applicant's particular case does not come within the ambit of the exceptions mentioned in subsections 11(1.1) and 11(2) of the current Citizenship Act.

[252] To the extent that

(a) the Respondent invokes or is authorized under section 3(1), paragraphs 3(1)(*d*) or (*e*), or section 7 of the current Citizenship Act to rely on the loss of citizenship provisions found in former citizenship legislation, including section 13 of the 1953 Citizenship Amendment Act and subsection 4(2) of the 1970 Citizenship Act; or

(b) the Applicant is denied the right to make an application for resumption of citizenship as a result of the repeal of the 1970 Citizenship Act by section 36 of the 1977 Citizenship Act and the application of subsection 3(1) and sections 7 and 11 of the current Citizenship Act,

I also find that the impugned legislative provisions are contrary to due process and infringe paragraphs 1(*a*) and 1(*e*) of the Bill of Rights and the right of an individual not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice guaranteed by section 7 of the Charter. Furthermore, they are not justified under section 1 of the Charter, and as a result are inoperative.

XV. The equality rights issue

[253] I have already found that Order in Council, P.C. 858 is tantamount to a statutory grant of citizenship. My conclusion is that dependents of members of Canadian Armed Forces constituted a special group of persons. Children born out of wedlock or in wedlock derived their Canadian citizenship through their natural or lawful father. This result was achieved notwithstanding the fact that paragraph 4(1)(*b*) of the 1947 Citizenship Act provided that in case of a child born out of wedlock outside Canada prior to January 1, 1947, citizenship could only be derived from the natural mother.

[254] If Order in Council, P.C. 858 does not have the purported effects mentioned earlier, it becomes necessary to address the constitutionality of the impugned legislative provisions in light of the equality provision found in subsection 15(1) of the Charter. (It is not necessary to make a separate finding with respect to the compliance of the impugned legislative provision with the right of the individual to equality before the law and the protection of the law mentioned at paragraph 1(*b*) of the Bill of Right).

[255] The equality provision reads as follows:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[256] As can be seen, under subsection 15(1) of the Charter, equality is expressed in four different ways: equality before the law, equality under the law, equal protection of the law and equal benefit of the law. The section also guarantees against "discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". These are the named or listed grounds of discrimination. The section makes it clear, by the phrase "in particular", that the named grounds are not exhaustive.

[257] The Applicant submits, in the alternative, that both the prior and current legislative citizenship schemes are "discriminatory". Children born outside Canada, in wedlock or out of wedlock, prior and after February 15, 1977, are treated differently with respect to both the acquisition and the extinguishment of citizenship status. The differential treatment is currently based on one's date of birth (an analogous ground to age) and, in effect, perpetuates former differential

treatment based on the marital status and sex of one's parents, which are the key factors to determine whether citizenship is derived from one's father or mother. The Applicant submits that such differential treatment reflects a demeaning and prejudicial view of "illegitimate children" which is discriminatory and infringes the rights to equality guaranteed by subsection 15(1) of the Charter.

[258] The Respondent's answer to the Applicant's claim is that there is no differential treatment based on an analogous ground of discrimination. Moreover, if there is any "discrimination", it occurred under the former 1947 Citizenship Act which is no longer in force in Canada since its repeal. Indeed, the current Citizenship Act adopted in 1977 preceded the coming into force of section 15 of the Charter. However, I have already disposed of this latter argument in a preceding section (see XIII. Retroactive or retrospective application of the Charter).

[259] In the case at bar, we are confronted with the application of the current Citizenship Act in a way that operates to deny Canadian citizenship to children born out of wedlock outside of Canada prior to February 15, 1977, and where it appears that at the time of the child's birth, the mother was neither born in Canada, nor possessed a Canadian domicile (prior to 1947), nor was a Canadian citizen (after 1947). It is clear that the 1977 amendments which resulted in the enactment of the current Citizenship Act were designed to overcome the apparent inequalities that existed under previous citizenship legislation.

[260] With respect to a child born outside Canada after February 14, 1977, the current Citizenship Act now purports to remove any previous legal impediment related to the marital status of parents at

the time of the child's birth. It no longer matters that a child is born in or out of wedlock. As long as one of the parents is a citizen, that natural-born child automatically becomes a citizen. That being said, the new provision restricts citizenship status to the natural-born child of a Canadian parent. As I understand this exclusion, an adopted child will inherit Canadian citizenship only if at time of his birth one of his biological parents is a citizen (see paragraph 3(1)(*b*) of the current Citizenship Act).

[261] The equality rights entrenched in subsection 15(1) of the Charter raise the question of whether it is constitutionally permissible today to continue to exclude classes of individuals from the status of citizenship on the basis, as invoked here, of their age and lineage, depending whether or not, in case of a child born out of wedlock, the mother had Canadian citizenship.

[262] The Supreme Court of Canada in *Law*, *supra*, set out the prevailing approach in analyzing whether a legislative provision violates subsection 15(1) of the Charter. In this regard, in order to analyse a claim under subsection 15(1), the Court should make three broad inquiries:

1. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

2. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

3. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

[263] As stated in *Law* at paragraph 51, the purpose of subsection 15(1) of the Charter "is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration". Citizenship is not only a legal definition; it is a testimony to how one is treated in a given society. Therefore, the highest status that a state can bestow on its inhabitants is that of citizenship.

[264] That being said, to the extent non-citizens are differently situated than citizens it is only because legislature has accorded them a unique legal status. In this regard, as noted in by Justice Bastarache in *Lavoie, supra*: "[i]n all relevant respects – sociological, economic, moral, intellectual – non-citizens are equally vital members of Canadian society and deserve tantamount concern and respect. The only recognized exception to this rule is where the Constitution itself

withholds a benefit from non-citizens, as was the case in *Chiarelli, supra*." (*Lavoie, supra* at para. 44).

[265] Citizenship legislation is the mechanism whereby a society achieves regeneration, retaining its identity while its constituent members are born and die, arrive and depart. In order to determine whether the legislative distinction resulting from the exclusion of a category of individuals from the status of citizenship is discriminatory, a purposive and contextual approach is required. In this regard, the contextual factors which determine whether the impugned legislation has the effect of demeaning a claimant's dignity must be construed and examined from the perspective of the claimant. The focus of the inquiry is both subjective and objective.

[266] I have no difficulty in concluding that the current legislative scheme draws a formal distinction between the claimant and others on the basis of one or more personal characteristics which results in a substantively differential treatment between the Applicant and others.

[267] While *Benner* was rendered before *Law*, it is still useful in the present context (see Note 28). Justice Iacobucci stated in *Benner*, at paragraphs 70, 72:

> The impugned provisions of the 1977 Citizenship Act expressly distinguish between children born abroad before 1977 to Canadian mothers and children born abroad before 1977 to Canadian fathers.
>
> (…)
>
> This appears clearly to demonstrate a lack of equal benefit of the law.

[268] Under the current Citizenship Act, any person <u>born in Canada after February 14, 1977,</u> is a citizen, with limited exceptions (see paragraph 3(1)(*a*) and subsection 3(2) of the current Citizenship

Act). Therefore, a child born in Canada after February 14, 1977 to a parent with no legal status in Canada at all is nevertheless a citizen (*jus soli*). Note that the natural-born Canadian citizens may leave Canada at any time and do not need to maintain any connection with Canada. A prolonged absence from Canada will not result in a loss of Canadian citizenship unless, at the age of majority, that person renounces his Canadian citizenship in favour of the citizenship of another country (section 9 of the current Citizenship Act).

[269] With respect to a child born outside Canada after February 14, 1977, the current Citizenship Act provides that the latter is a citizen, provided that at the time of birth one of his parents, other than a parent who adopted him –, was a citizen. It does not matter that at the time of the child's birth, his parents were married or not. As long as one of the natural parents is a citizen, that child automatically becomes a citizen (see ss. 3(1)(*b*) of the current Citizenship Act). The children born outside Canada of a Canadian citizen who has himself being born outside Canada upon birth is also a Canadian citizen (*jus sanguinis*). That being said, there is no requirement under the current Citizenship Act that a child of the first generation makes an application for retention of citizenship resides or establishes connection with Canada. However, a second generation child ceases to be a citizen on attaining the age of 28, unless he makes an application to retain his citizenship and, registers as a citizen and either resides in Canada for a period at least one year immediately preceding the date of his application or establishes a substantial connection with Canada (see section 8 of the current Citizenship Act).

[270] I also find that the second branch of the *Law* test, whether the Applicant is subject to differential treatment based on one or more enumerated and analogous grounds, is met in this case.

[271] Again, it is useful to refer to Justice Iacobucci's reasoning in *Benner*, at paragraphs 78 and 82, where he wrote:

> … That is, they do not determine the rights of the appellant's mother to citizenship, only those of the appellant himself. His mother is implicated only because the extent of his rights is made dependent on the gender of his Canadian parent.
>
> … The link between child and parent is of a particularly unique and intimate nature. A child has no choice who his or her parents are. Their nationality, skin colour, or race is as personal and immutable to a child as his or her own.

[272] I also conclude that the third element of the *Law* test is met in the case of children born out of wedlock who cannot derive Canadian citizenship because their mother was not Canadian. The differential treatment discriminates by withholding a benefit from the Applicant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.

[273] A reasonable person would find that the current Citizenship Act reflects a demeaning and prejudicial view of the Applicant's worth, simply because he was born "out of wedlock" (see *Augier*, *supra* at para. 23). It must be recalled that under the common law, "[t]he child of an unmarried woman is always born a "bastard" (see *Halsbury's Laws of England*, *supra* at paras. 137-38). The current Citizenship Act continues to uphold the view that "bastards", even after legitimation, are not worthy to derive the citizenship of their natural father.

[274] While the facts in *Benner* are not exactly the same as these here, the discrimination at issue was perhaps even less evident than the one involved in this case. At paragraphs 90-91, Justice Iacobucci came to the following conclusion:

> … This legislation continues to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen…
>
> For these reasons, I conclude the impugned provisions of the *Citizenship Act* are indeed discriminatory and violate s. 15 of the *Charter*.

[275] I am also comforted by the fact that in *Augier*, *supra*, this Court declared in 2004 that paragraph 5(2)(*b*) of the current Citizenship Act is unconstitutional as it currently reads, unless it is read to include the word "father" which was omitted when the 1977 Citizenship Act was enacted.

[276] I discussed *Augier*, *supra*, with respect to retroactivity, but for convenience it may be helpful to review the facts of this case once more. The applicant had been born out of wedlock, in St. Lucia, on May 9, 1966, of a father who was a Canadian citizen and a mother who was a permanent resident. In September 2002, the Applicant applied for proof of Canadian citizenship, claiming to have derived Canadian citizenship from his natural father. The Citizenship Officer determined that since the applicant was born out of wedlock outside of Canada, and that pursuant to the legislation then in force, Canadian citizenship could only be derived from the applicant's mother. The Immigration Officer stated that because the applicant's mother was not a Canadian at the time of the applicant's birth, the application for citizenship was refused.

[277] The Court considered subparagraph 5(1)(*b*)(*i*) of the 1970 Citizenship Act. Justice Mosley concluded at paragraphs 21, 23-24:

> In my opinion, the provision at issue in this case clearly draws a formal distinction between Mr. Augier and others on the basis of two personal characteristics, namely, the relationship status of his parents at the time of his birth and the gender of his Canadian parent at birth. Marital status has been interpreted as an analogous ground of discrimination.
>
> (…)
>
> In my opinion, a reasonable person in circumstances similar to the applicant would find that paragraph 5(2)(*b*) of the current Act reflects a demeaning and prejudicial view of the applicant's worth, simply because he was born "out of" wedlock. He is denied the benefit of applying for Canadian citizenship through his claimed Canadian father, a benefit which similarly situated individuals born outside of Canada prior to February 15, 1977 whose parents were married, receive and enjoy. Furthermore, this benefit is denied on the basis of the gender of his parent, as unwed Canadian fathers cannot pass their citizenship to their children, whereas unwed Canadian mothers can do so.
>
> Paragraph 5(2)(*b*) of the current Act is implicated in this proceeding. As that section currently reads, children of Canadian mothers who would not have been entitled to claim citizenship by virtue of subparagraph 5(1)(*b*)(*i*) of the 1970 Act are given the benefit of claiming citizenship, however, children of Canadian fathers similarly precluded by virtue of subparagraph 5(1)(*b*)(*i*) of the 1970 Act are denied this benefit. Therefore, paragraph 5(2)(*b*) of the current Act, as it now reads, infringes the applicant's right to equal treatment under the law pursuant to section 15 of the Charter.

[278] I find no reason to distinguish *Augier* from the present instance. The same principles and considerations apply here.

[279] The general principles governing a section 1 Charter analysis have been set out many times since the leading case of *Oakes*, *supra*. In *Benner*, *supra*, Justice Iacobucci referred to these principles as they were re-stated in *Egan v. Canada*, [1995] 2 S.C.R. 513 at 605:

> … A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be

> pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the Charter guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

[280] In *Benner*, the Supreme Court concluded that the legislation in question failed on the first branch of the second requirement – rational connection – and therefore was not justified under section 1 of the Charter. More particularly, the Supreme Court declared that paragraph 3(1)(*e*), paragraph 5(2)(*b*), and section 22 of the current *Citizenship Act*, R.S.C., c. C-29, as well as section 20 of the *Citizenship Regulations*, C.R.C., c. 400, did not constitute a reasonable limit prescribed by law pursuant to section 1 of the Charter.

[281] In the case at bar, there was no attempt made by the Respondent to justify under section 1 of the Charter the differential treatment flowing from the application of paragraphs 3(1)(*b*), (*d*) and (*e*), and section 8 of the current Citizenship Act.

[282] I fail to see any sufficiently pressing and substantial objective in continuing to deny citizenship status to persons born out of wedlock outside Canada prior to February 15, 1977. It has not been explained to the Court why only certain provisions of the current Citizenship Act have a retrospective character. If Parliament was ready in 1977 to correct retrospectively discrimination directed against women resulting from past discriminatory treatment based on sex, I fail to see why there would not be compelling reasons to correct the injustice caused to all “illegitimate children”

born abroad prior to and after 1947 who could not by descent derive Canadian citizenship from their natural father. Apart from the fact that it coincides with the coming into force of the current Citizenship Act, the date of February 15, 1977 appears purely arbitrary.

[283] To the extent that subsection 3(1), paragraphs 3(1)(*b*), (*d*) and (*e*), and section 8 of the current Citizenship Act, when read together, authorize the dismissal of the Applicant's application for proof of citizenship on the ground that:

> (a) the citizenship of a child born out of wedlock before February 15, 1977, outside Canada, can only be derived from the child's mother, or
>
> (b) there is an automatic loss of citizenship if an application for retention of citizenship has not been made by the child born out of wedlock, before February 15, 1977, outside Canada, between the age of 21 and 24 years,

I find that these provisions contravene subsection 15(1) of the Charter and are not justified under section 1 of the Charter.

XVI. Conclusion

[284] For the reasons above, I have decided to allow the present judicial application. The impugned decision rendered by the Citizenship Officer is set aside. The Court declares that the Applicant is a Canadian citizen. The Minister is directed to issue a certificate of Canadian citizenship to the Applicant. Subsidiarily, the impugned legislative provisions are also declared to be inoperative to the extent already indicated in these reasons. Costs against the Respondent are awarded to the Applicant. An Order is issued accordingly.

"Luc Martineau"
Judge

Ottawa, Ontario
September 1, 2006

NOTES

Note 1

The list of undesirable immigrants found in the 1910 Immigration Act was a long one. It echoed a number of stereotypes. Persons portrayed as possessing undesirable traits were not welcomed to Canada, even on a temporary basis and they could always be reported for detention or deportation. Particular vulnerable groups of persons, such as "[i]diots, imbeciles, feeble-minded persons, epileptics, insane persons…", "[i]mmigrants who are dumb, blind, or otherwise physically defective", or "[p]ersons of constitutional psychopathic inferiority" were excluded. Moral values also resulted in the exclusion of "[p]ersons with chronic alcoholism", of "[p]rostitutes and women and girls coming to Canada for any immoral purpose…", or of "[p]rofessional beggars or vagrants", to cite just a few examples.

A large number of exclusions found in the applicable immigration legislation in force when the 1947 Citizenship Act was enacted would not stand up to Charter scrutiny under a subsection 15(1) analysis. Many were based on personal and immutable characteristics. They reflect a demeaning and prejudicial view of these individuals in a way that infringes human dignity (see *Law, supra)*.

It must be remembered that Canadian immigration policy in the first decades of the Twentieth Century, in addition to barring the immigration of persons who fell into one of the prohibited classes, prevented by regulation the landing of certain classes of immigrants by reason of

their “nationality or race”. These discriminatory exclusions were still enforced when World War II was over and continued throughout the 1950s. (see Ninette Kelley and Michael Trebilcock, *supra*).

Note 2

For instance, “Orientals of a certain class” were systematically refused entry to Canada by the immigration authorities despite the fact that they might have been “British subjects”. Indeed, the category of regulatory exclusions was enlarged in the 1950s to authorize the making of regulations respecting the prohibition or limiting of persons by reason of “nationality, citizenship, ethnic group, occupation, class or geographical area of origin”.

In *Samejima v. The King*, [1932] S.C.R. 640 at 342, Justice Duff suggested *in obiter* that section 23 of the 1910 Immigration Act, which prohibited courts from reviewing a deportation order unless the applicant is a Canadian citizen or has Canadian domicile, should be construed in a manner which did not deprive British subjects, who were not Canadian citizens of all redress, in respect of arbitrary and unauthorized acts committed under the pretence of exercising the powers of the 1910 Immigration Act. At page 342, Justice Duff wrote :

> I gravely fear that too often the fact that these enactments are, in practice, most frequently brought to bear upon Orientals of a certain class, has led to the generation of an atmosphere which has obscured their true effect. They are, it is needless to say, equally applicable to Scotsmen. I admit I am horrified at the thought that the personal liberty of a British subject should be exposed to the hugger-nugger which, under the name of legal proceedings, is exemplified by some of the records that have incidentally been brought to our attention.

As can be seen, while the courts may have been allowed to examine the legality of deportation orders issued against British subjects, this by no means authorized the courts to set aside a deportation order on the basis that it was discriminatory. As long as the discriminatory exclusion of an immigrant (whether he was a British subject or not) was authorized by statute or by regulation, courts were obliged to confirm the legality of the deportation order. For instance, the legality of a deportation order issued in 1953 by a special Inquiry Officer appointed under *The Immigration Act*, R.S.C. 1952, c. 325, against two British subjects born in Trinidad (their parents and grandparents had also been born in Trinidad) was later judicially confirmed by the Supreme Court of Canada on the ground that the appellants came within the ambit of *The Immigration Regulations*, [1953] S.O.R. 536, which prohibited the landing in Canada of "any Asian" because of their "ethnicity", here "East Indian" (*Narine-Singh v. Canada (Attorney General)*, [1954] O.R. 784 (C.A.), aff'd [1955] S.C.R. 395).

There is no doubt that the adoption by Parliament of the Bill of Rights in 1960 accelerated and forced the revision of these discriminatory laws and regulations.

Note 3

The Applicant's situation is not unique or exceptional. In her contribution to *Voices of Left Behind*, *supra* at 113-115, Melynda Jarrat wrote:

> In March 1947, the Directorate of Repatriation for the Canadian Department of National Defence optimistically reported that by the time all of the 48,000 war brides and their children were brought to Canada, the total number of servicemen's dependents could very well exceed 70,000.

> What those figures don't tell us, however, is that not all of the 48,000 marriages between Canadian servicemen and their war brides ended up in idyllic circumstances back in Canada. By February 1947, the official war bride transportation scheme was coming to a close and nearly 10 percent, or 4,500 war brides, had decided not to come to Canada despite offers of free passage by the Canadian Wives Bureau in London and the Continent.
>
> (…)
>
> Other wives and children actually did immigrate to Canada on the war bride ships, but their marriages did not survive real life in Canada. They cut their losses and, with no thanks to the Canadian government, they made their way back home with the children as soon as possible. They form part of a group for whom incompatibility, poverty and alcoholism were the common experience, and one might say these women did the right thing for their children because their lives were infinitely better back home.
>
> We'll never know how many women went back home to Britain and Europe after coming to Canada as was brides. Once the war emergency was over, Immigration no longer counted these women as a distinct group, so they blended in statistics for outward migration. We can only imagine how many war brides who found themselves in dire circumstances in Canada would have liked to go back, but who received no help from the Canadian government and did not have the financial resources to do so on their own.

Note 4

Again, I refer to Professor Kaplan's article, *supra* at 248-49:

> While "citizenship" describes a status that can be conferred, "nationality" means membership in a "nation." The latter has come to be defined not just as a political entity but also as a ethnological and sociological one. Prior to the French and American revolutions, the relationship between the individual and the state was generally signified by a personal bond of allegiance between the sovereign and the subject. The French and American revolutions fashioned republican forms of government which were ultimately derived from Lockean notions of allegiance. Locke's theories emphasized that the relationship between the people and their government was consensual and contractual.

> In the same way that the French and American revolutions revived the concept of citizenship, they also introduced the idea that persons having a common language and culture formed a nation. It followed that such a nation ought to be recognized as entitled to self-government and independence. The state came to be identified with the nation, and individuals belonging to the nation owed allegiance to the state: "Thus, with the rise of the nation state and the emergence of the idea that those who lived within its boundaries were members of an 'imagined community' with collective interests grounded in a common heritage, the possession of common characteristics and the universalization of political rights, there developed a dichotomy between *national* and *alien* (or *foreigner*). The former, as citizens, were considered to have the right of residence and political participation within the nation state while the latter could enter only with the permission of the state which assumed sovereignty over the nation.
>
> Nationality, therefore, both as a legal and as a political ideal, is of modern origin, as is the intermingling and synonymous use of the terms "citizenship" and "nationality." Indeed, citizens are referred to as "nationals" when they travel abroad. While "citizenship" and "nationality" are used interchangeably, they may mean different things and can describe a very different status. In the United States, for instance, all citizens are American nationals, but some American nationals, such as people born in American Samoa, are not citizens. Prior to the Civil War, many American nationals, slaves in particular, were not citizens. The examples in other national contexts are virtually endless.
>
> (emphasis added)

Note 5

British nationality and citizenship law as its origins in medieval times. In English law, there has always been a distinction between the "subjects" and "non subjects" of the King or Queen. All non subjects are considered "aliens". Moreover, in a feudal system, individuals are not born "free". Their relationship to the sovereign is a personal one. It can be said that in this regard that all subjects owe to their monarch "a debt of gratitude" for protecting them through infancy.

Note 6

Following English “conquest”, the first significant event in the law of nationality as applied to this country was the making of a provision in the Treaty of Utrecht, 1713, that upon the restoration or cession of Nova Scotia and the cession of Newfoundland by France, French subjects should be free to withdraw themselves and their movable property within one year. Those of who remain in the territories affected should be free to exercise the Roman Catholic religion insofar as the law of Great Britain might allow. When the King of England became the King of Canada, the Natives of Canada became his subjects. The Treaty of Paris, 1763, provided for the cession of Canada to Great Britain and of all rights over the inhabitants thereof, and for the liberty of the inhabitants to withdraw within 18 months. Thereafter, the law of England (and not the law of France) determined questions of nationality.

Note 7

In 1763, the victorious British were quick to honour their obligations to their First Nations allies. Each First Nation had its own territory and system of government. The people had their own allegiances rights, and responsibilities. The Royal Proclamation of 1763 established a formal policy for the surrender of lands. It forbade colonists from purchasing or settling aboriginal lands to the West without “special leave and license” of the Crown. It has been suggested that implicit in this document is the concept that, while the First Nations were under the protection of the British Crown, their “citizens” were not among the monarch’s subjects (see Darlene Johnston, “First

Nations and Canadian Citizenship" in William Kaplan, ed. *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal and Kingston: McGill-Queen's University Press, 1993) 349 at 352.

In Canada, members of the First Nations are in a unique situation flowing from concurrent constitutional and statutory enactments, and accordingly, have been treated differently. I note in this regard that "Indians" and "Eskimos" were not "citizens" until an amendment to the 1947 Citizenship Act was passed in 1956 to include them in the class of "Canadian citizens other than natural-born", provided that they had a place of domicile in Canada on the 1st day of January, 1947, and on the 1st day of January, 1956, they had resided in Canada for more than ten years (see *An Act to amend the Canadian Citizenship Act*, S.C. 1956, c. 6).

Note 8

At the time, there was a distinction between (1) "received" statutes (and common law), which applied in a colony by virtue of settlement, conquest or adoption, and (2) imperial statutes, which applied in a colony by virtue of their own force (see Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) c. 2). Section 129 of the *Constitution Act, 1867*, continued pre-confederation laws that were in force in the uniting provinces, and it gave to the federal Parliament or provincial Legislatures (depending upon which was competent) the power to repeal, abolish or alter such pre-confederation laws.

These colonial limitations have now disappeared, by convention if not by law, as the British Empire has evolved into the Commonwealth, and the colonies have evolved into independent states

within the Commonwealth. Indeed, Canada's sovereignty was acquired in the period between its separate signature of the Treaty of Versailles in 1919 and the Statute of Westminster in 1931 (see *Reference Re: Ownership of Off Shore Mineral Rights (British Columbia)*, [1967] S.C.R. 792 at 816). In this interim period, Canada obtained separate membership within the League of Nations (1919) and recognition of equal status in the Balfour Declaration (1926) (see Peter W. Hogg, *supra* at c. 3).

Note 9

Professor Galloway argues that this suggests that from the Canadian point of view, it was important to at least appear to have authority over all matters relating to nationality and citizenship. The most plausible explanation for promoting this image is that the Canadian government considered it an effective measure to create momentum in its attempts to gain independence from the United Kingdom (see Galloway, *supra* at 213).

Note 10

The 1881 Naturalization Act provided that a married woman and a child under twenty-one years of age could not personally apply for naturalization as they were in a state of disability under the provisions of the Act. It provided that the wife of a British subject was a British subject and the wife of an alien was an alien. Therefore, a wife automatically became a British subject immediately upon the acquisition of British subject status by her husband. Similarly a woman became an alien on marriage to an alien or on the date her husband ceased to be a British subject.

The 1914 Naturalization Act provided a means for the naturalization of a person after three years residence in Canada from the date of entry as a landed immigrant if not under a disability. This three-year period was increased to five years effective June 6, 1919. A married woman or a child under 21 was considered in a state of disability. The 1914 Naturalization Act provided that the name of the wife would be entered on the reverse side of the husband's naturalization certificate. However, even if the wife's name did not appear, she acquired British status provided the certificate was granted before January 15, 1932.

Effective January 15, 1932, the 1914 Naturalization Act was amended with respect to a wife. She no longer automatically had her husband's status, either British or alien. From January 15, 1932 onwards, if the husband became naturalized, it was necessary for the wife to file a declaration expressing her desire to become a British subject. She acquired British status on taking the Oath of Allegiance. A wife remained an alien if she failed to comply with this requirement.

To sum up, an alien woman who became a British subject under any of the various naturalization Acts in effect in Canada before January 1, 1947, automatically became a British subject if her husband was British at the time of the marriage. A British woman who married an alien prior to January 15, 1932, automatically became an alien on marriage. A British woman who married an alien on or after January 15, 1932, only became an alien if, on marriage, she automatically acquired the alien nationality of her husband.

Note 11

A child was automatically deemed to be included in his father's local naturalization if the child had entered Canada before January 1, 1915, had taken up residence with his father and was under twenty-one years of age the time of the naturalization.

After 1914, the name of a minor child residing with his father when the father applied for naturalization was entered on the reverse side of the certificate. The father was required to apply to have the name of the child added to his certificate if the child had been omitted because he came to Canada after the date of the father's application for naturalization.

Note 12

The question whether the 1926 Legitimacy Act ever applied in Canada has become academic. I note that the restriction with respect to imperial statutes defined by the *Colonial Laws Validity Act, 1865* (U.K.), 28 & 29 Vict., c. 63, continued to applied to the dominions until the passing of the *Statute of Westminster, 1931* (U.K.), 22 Geo V, c. 4 (the Statute of Westminster). Indeed, in 1926, the Privy Council struck down a federal statute of 1888 (the statute purported to abolish appeals to the Privy Council in criminal cases), on the ground that the statute exceeded Canadian legislative power by its extra-territorial effect and its inconsistency with two Imperial statutes (*R. v. Nadan*, [1926] 2 D.L.R. 177 (P.C.).

Note 13

As noted by Parry, *supra* at 466-67:

> The Bill inevitably affected, too, the rest of the Commonwealth. It might declare that a Canadian citizen was British subject. But it could not provide that such a citizen was a British subject under the former common law of the Commonwealth, and thus under the law of any other part of the Commonwealth in particular, save by negative stipulation. It remained the case, immediately after the Bill became law, that a person born in Canada was a British subject in, for instance, the United Kingdom. This followed, however, not from the Canadian provision that he was a Canadian citizen and therefore a British subject, but from the circumstance that Canada was and remained within the allegiance of the Crown, so that birth there involved the acquisition of the status of a subject in terms of the law of the United Kingdom. And, as for the provision for the grant to an alien of a certificate of citizenship after five years' residence and upon the satisfaction of certain other conditions, this in fact involved no substantial departure from the terms of the scheme of common Imperial naturalisation, but it could have no force elsewhere than in Canada, just because if did not constitute Imperial naturalisation.

Note 14

Following the 1919 Peace Conference in Paris, the participating countries, including Canada, had accepted to create a Court of international justice after the setting up of the "League or Nations". But the League never managed to exercise any dynamic role and was unable to prevent the outbreak of the Second World War in 1939. The League was officially pronounced dead in 1946 (see Margaret Macmillan, *Paris 1919: Six Months that Changed the World* (Random House: 2003) at 83-97).

That being said, under the statute of that court, each member of the League of Nations was entitled to nominate two of its "nationals" as candidates for the court, and not more than one member of a particular "nationality" could be elected. If there was an immediate reason in the Canadian Nationals Act for using the word "national" rather than the word "citizen", it is to be found in the fact that the statute in question the word "national" was used as designating a person, whether subject or citizen, who formed part of the people of a particular member of the League (see *House of Commons Debates* (8 March 1921) at 645 (Hon. Charles Joseph Doherty)).

Note 15

It must be remembered that prior to 1932 the nationality of the married women followed that of her husband, whether the latter was at time of marriage a British subject or an alien (see Note 10, *supra*). It is not surprising therefore that paragraph 2(*b*) of the Canadian Nationals Act provides that the wife of such a Canadian citizen is also a Canadian national.

Note 16

The beginning of paragraph 2(*c*) of the Canadian Nationals Act ("any person born out of Canada …") suggests that the provision applies not only in Commonwealth countries or British colonies but everywhere else in the world. Moreover, there is no distinction in the wording used by Parliament between a child born in "wedlock" and "out of wedlock".

Note 17

In his written submissions, the Applicant suggests that the red passport was for "domiciled Canadians" and the blue one for "natural-born Canadians". I make no finding on this point, but it appears more probable that the blue passport was for all "British-born citizens" (whether born or domiciled in Canada or not) and the red one for the naturalized British subjects or citizens (see Passport Canada website, *supra*).

Note 18

In requiring a British subject born outside Canada to reside in Canada for a five-year period as a prerequisite to "citizenship" (in the new sense), the 1947 Citizenship Act simply perpetuated the requirements found in the 1910 Immigration Act which required a person to reside in Canada for at least five years after having landed before he or she could acquire "Canadian domicile"

That being said, a significant change was nevertheless introduced by the 1947 Citizenship Act. As noted by Parry, *supra* at 466:

> … [U]nder the earlier law, once he had lawfully landed, such a British subject had merely to let time go by and refrain from any activity which would render him deportable and in five years he automatically acquired the right to return to the country should be once leave it. But under the new Bill, though he could in the same period acquire citizenship, and thus the same right, he could do so only at discretion: he was placed on a par with the alien and thus in the position of having to apply for what in effect was naturalisation. Furthermore, even assuming the exercise of the executive discretion in his favour and the grant of citizenship to him, he was left liable to the revocation of the grant for, *inter alia*, the same sort of offence as

> would earlier merely have prevented his acquisition of Canadian domicile.
>
> (…)
>
> (emphasis added)

Note 19

I will assume for the moment that the Applicant would be a natural-born Canadian citizen under paragraph 4(*b*) of the 1947 Citizenship Act. (It must be remembered that this provision denies Canadian citizenship to a child born outside Canada prior to 1947, out of wedlock, of a mother who was not born in Canada (or on a Canadian ship) or who was not a British subject having Canadian domicile at the time of that person's birth). For one thing, it is clear that under section 6 of the 1947 Citizenship Act, the Applicant would not be obliged to assert his Canadian citizenship by a declaration of retention. First, when the Applicant arrived in Canada in July 1946, he was not yet two years old and was still a minor. Second, at the commencement of the 1947 Citizenship Act, the Applicant had been lawfully admitted with his mother in Canada under the authority of Order in Council, P.C. 858, which treated both of them as "Canadian citizens" for the purpose of Canadian immigration law.

Note 20

See subsection 2(2) of the 1953 Citizenship Amendment Act. However, while retroactive to January 1, 1947, this provision provides that any declaration of retention of Canadian citizenship that has been filed pursuant to section 6 of the 1947 Citizenship Act by a person who was a

Canadian citizens under paragraph 4(*b*) of the 1947 Citizenship Act shall have the same effect as if it had been filed under section 2 of the 1953 Citizenship Amendment Act.

Note 21

The Citizenship Officer wrote in her decision:

> (…)
>
> The information and documentation you have submitted has been carefully reviewed and I very much regret to inform you that we have been unable to establish your claim to Canadian Citizenship.
>
> I should explain that one's Canadian citizenship status must be established based on Citizenship legislation and, as such, is not a discretionary matter.
>
> Canada's first Citizenship Act of 1947 provided that a person born outside Canada before that date had a claim to Canadian Citizenship if certain conditions were met. If born in wedlock, a child could derive citizenship through a Canadian-born father; if born out of wedlock, citizenship could only be derived through the mother.
>
> After reviewing your parents' marriage certificate, dated May 5, 1945, it has become clear that any claim to Citizenship would have to be based on your mother's citizenship status at the time of your birth on December 8, 1944. Unfortunately, as your mother was not born in Canada and there is no indication that she had been resident in Canada prior to your birth, I regret that your claim to citizenship cannot be supported.
>
> (…)

Note 22

I note that both *Bell* and *Kelly* deal with the validity of a removal order issued against an individual (whose Citizenship status could only have derived from the mother because the individual was born "out of wedlock" before February 15, 1977). The statutory issue raised in the present proceeding was not before the Federal Court of Appeal or the Federal Court in those respective cases. In *Bell*, the Federal Court of Appeal determined that the requirements under paragraph 3(1)(*e*) of the current Citizenship Act were not met because the respondent did not fall within the plain language of paragraph 5(1)(*b*) of the 1970 Citizenship Act. While *Kelly* dealt with a "war child" born in 1941 in England, it appears that Justice Dubé was not asked to consider the applicability and effects of Order in Council, P.C. 858. Therefore, I find that none of these decisions are binding.

Note 23

In *Dubey*, *supra*, decided in 2002, Justice Nadon recognized that paragraph 3(1)(*d*) of the current Citizenship Act does not allow persons born abroad of a Canadian mother before 1947 to acquire citizenship (*Dubey*, *supra* at paras. 20, 27). However, any such injustice or discriminatory treatment was created in the first place by the 1947 Citizenship Act. Since the current Citizenship Act adopted in 1977 did not correct the "injustice" resulting from the 1947 Citizenship Act, in his view, it was the latter Act which prevented the plaintiffs in this case from obtaining Canadian citizenship.

In *Wilson, supra,* decided in 2003, Justice Harrington concluded that there was "discrimination" in this case: "It is obvious that entitlement to citizenship through one's father and not one's mother, unless born out of wedlock, as provided in the 1914 Act, and 1947 Act and the 1970 Act violates section 15 of the Charter." (*Wilson, supra* at para. 19). However, Justice Harrington noted that "all these statutes were repealed long before section 15 came into force" (*Ibid*). In Justice Harrington's view, the current Citizenship Act adopted in 1977 "snapped the chain of causality, so that Mr. Wilson is really asking us to redress an old event" (*Wilson, supra* at para. 25). In this regard, Justice Harrington adopted the opinion of Justice Nadon in *Dubey* and concluded that: "[s]ince the 1977 does not deal with people such as Mr. Wilson who were born in 1946, the 1977 Act did not carry forward legislative discrimination which would have to be assessed against the Charter" (see *Wilson, supra* at para. 26).

Note 24

In *Crease*, the plaintiff, Mr. Robert Crease, was born in Venezuela in 1943. His mother was born in Toronto in 1904 but had left Canada in 1932, when she met and married the plaintiff's father, a British subject, and moved with him to Venezuela. In 1979, the plaintiff applied to the Minister for a grant of Canadian citizenship pursuant to paragraph 5(2)(*b*) of the 1977 Citizenship Act. Following the Minister's refusal, he brought an action seeking a declaration that he was eligible for a grant of Canadian citizenship pursuant to paragraph 5(2)(*b*) of the 1977 Citizenship Act. His application was denied on the ground that "there was no such term as "Canadian citizen" [at the time of his birth in 1943]". In Mr. Crease's situation, his mother was a British subject and not "a Canadian citizen". In the case cat bar, the Respondent submits the same proposition. However,

contrary to *Crease* and *Benner*, the evidentiary record in the present case actually permits this Court to assess in a proper factual and legal context the Respondent's proposition in light of the definitions of "Canadian citizen" and "Canadian national" respectively found in the 1910 Immigration Act and the Canadian Nationals Act.

That being said, in *Crease*, *supra* at paragraph 48, Justice Wetston accepted the Defendants' argument that the alleged discrimination in that case "crystallized" on the date of Mr. Crease's birth:

> … The Court is of the opinion that what is of primary importance in the application of paragraph 5(2)(*b*) is whether Mr. Crease's mother was a citizen at time of his birth. Since citizenship did not exist prior to 1947 in Canada, paragraph 5(2)(*b*) is event driven, and, therefore, the application of subsection 15(1) to the facts before the Court would be retrospective.

In my opinion, the authority of the decision rendered by Justice Wetston in *Crease* is doubtful today both on the issue of the retrospective character of the Charter and the infringement of section 15 of the Charter. On the former issue, Justice Wetston noted, at paragraph 66, that

> There was virtually no evidence before the Court with respect to the policy underlying the passage of the Act in 1947. Therefore, the Court is unable to determine the purpose, intent or underlying objectives of Parliament in 1947 in treating differently those born to Canadian mothers abroad before this time; a policy decision which is still reflected in paragraph 5(2)(*b*) of the Act".

Moreover, as presented earlier, the Supreme Court of Canada decided in *Benner* that the impugned provision infringed the equality provision.

Note 25

I note that in *Dubey, supra,* Justice Nadon relied on Justice Létourneau's observations in *Benner (C.A.), supra* at paras. 52-55. Justice Nadon was of the view that some of Justice Létourneau's comments remained valid despite the fact that the Supreme Court of Canada ultimately quashed the Court of Appeal judgment. I prefer to rely on the analysis made by Justice Iacobucci in *Benner*.

Note 26

In *Veleta, supra*, Justice Mactavish noted in this regard at paragraphs 68-74:

> In this case, the applicants were denied Canadian citizenship under paragraph 3(1)(b) of the current Citizenship Act.
>
> Unlike the legislative provisions in issue in Benner and Augier, paragraph 3(1)(b) does not draw any distinction based upon the marital status of an applicant's parents. In this case, the applicants were denied citizenship certificates, not because their grandfather was born out of wedlock, but because the children were born outside of Canada, and neither of their parents were Canadian citizens.
>
> While I am in no way seeking to minimize the discrimination that people born out of wedlock faced in the first half of the last century, the fact is that what the applicants are seeking here is to right a historical wrong, one that occurred long before section 15 of the Charter came into effect.
>
> Indeed, the real source of the discrimination in issue here are the provisions of the 1914 Naturalization Act, which prevented David Giesbrecht from becoming a British subject. This resulted in him being an alien when the 1947 Citizenship Act came into force, and thus not entitled to Canadian citizenship.
>
> In this case, the applicants are seeking to give the Charter not just retrospective effect, but retroactive effect. That is, they are seeking to change the historical consequences of repealed legislation, so as to confer ex post facto Canadian citizenship upon David Giesbrecht.

> The Charter does not operate retroactively: see Benner, at para. 40, and Mack.
>
> As the Ontario Court of Appeal noted in Mack, the negative effects of discrimination can be felt for generations. That does not mean, however, that the descendants of past victims of discrimination are entitled to relief under section 15, when such relief depends on a retroactive application of the Charter.
>
> As a consequence, I find that section 15 of the Charter does not assist the applicants.

Note 27

For instance, Justice Rand of the Supreme Court of Canada asserted that being a "citizen" meant being able to exercise basic human rights and freedoms in all parts of the country (see Ronald R. Price, "Mr. Justice Rand and the Privileges and Immunities of Canadian Citizens" (1958) 16 U. T. Fac. L. Rev. 16). He had already identified the right to free speech and the right of mobility as constituting elements of the status of "citizen". Consequently, any attempt to curtail these would be an attack on the status of citizenship itself and would therefore be beyond the powers of the provinces (see Galloway, *supra* at 221).

Note 28

In *Benner*, Justice Iacobucci adopted the methodology exposed by Justice McLachlin in *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 485. In this regard, Justice Iacobucci wrote at paragraph 60:

> The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show

that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed ground or personal characteristics.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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