Date: 20080423

Docket: T-67-06

Citation: 2008 FC 409

BETWEEN:

DUANE EDWARD WORTHINGTON and HELEN CHARLOTTE WORTHINGTON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of a decision dated October 24, 2005 by a case analyst refusing Duane Edward Worthington's application for Canadian citizenship under section 3 of the *Citizenship Act*, R.S.C. 1985, c. C-29, (*Citizenship Act* or the Act). While both Duane Edward Worthington and his adoptive mother, Helen Charlotte Worthington are listed as applicants on the record, for reasons of simplicity I will refer only to Duane Edward Worthington as "the applicant".

[2] The applicant requests:

(a) the decision of the case analyst dated October 24, 2005 be quashed and set aside;

(b) an order in the nature of *mandamus* requiring the Minister of Citizenship and Immigration to recognize and grant Canadian citizenship to the applicant;

(c) a declaration that paragraph 3(1)(e) of the Act is unconstitutional by reason of its inconsistency with section 15 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Charter*);

(d) in the alternative, that this Court read in the words "or adopted" immediately after the word "born" in paragraph 5(1)(b) of the 1947 *Canadian Citizenship Act (repealed)* (the Former Act) and immediately before the word "outside", and direct that the rest of the section be read *mutatis mutandi*; and

(e) costs on a solicitor-client basis.

Background

[3] The applicant, Duane Edward Worthington, is an American citizen, born in the U.S.A. on March 9, 1961. The applicant was adopted by Frank Edward Worthington (Bud Worthington) and Helen Charlotte Worthington on March 20, 1962. The applicant's adoptive parents are residents of the U.S.A., but were both born in British Columbia. The applicant is currently serving a 425 month sentence in a medium security federal penitentiary in the U.S.A. for drug and weapons related offences committed in the U.S.A.

[4] In 2002, the applicant inquired with Citizenship and Immigration Canada (CIC or the Department) as to the possibility of claiming Canadian citizenship on the basis of his adoption by Canadian parents. In response to his inquiry, the applicant was given an application form for a Certificate of Citizenship from outside of Canada under section 3 of the Act and an application form for a grant of citizenship under section 5 of the Act.

[5] On July 4, 2002, the applicant submitted an application for a Certificate of Citizenship from outside Canada under section 3 of the Act (the first application). He claimed citizenship on the basis that he was born outside of Canada between January 1, 1947 and February 14, 1977 in wedlock to a Canadian father. On August 30, 2002, the applicant received a letter from the Senior Consular Program Officer (the program officer) informing him that his application under section 3 of the Act was not valid as he was the adoptive child of Canadian parents (section 3 is limited to naturally born children). The applicant was informed that the appropriate application for adoptive children was an Application for Canadian Citizenship under subsection 5(1) of the Act.

[6] On September 11, 2002, the applicant submitted an application under subsection 5(1) of the Act. In a letter dated December 30, 2002 from the Department, the applicant was informed that the Department was unable to proceed with his application. Grants of citizenship under subsection 5(1) of the Act are limited to persons who have permanent residence status in Canada. The letter further requested that the applicant sign and date the enclosed ‘Request for Withdrawal’ form with regards to his subsection 5(1) application. The applicant refused to withdraw his application and subsequently, the Department converted his subsection 5(1) application into a subsection 5(4)

application. Subsection 5(4) applications are special grants of citizenship under the discretionary power of the Minister of Citizenship and Immigration.

[7] On July 3, 2003, the then Minister of Citizenship and Immigration, Denis Coderre, informed the applicant that his subsection 5(4) application had been refused. This decision was judicially reviewed by Madame Justice Layden-Stevenson of this Court in November 2004 (see *Worthington* v. *Canada (Minister of Citizenship and Immigration*), 2004 FC 1546). In that decision, the matter was referred back for re-determination, with terms.

[8] The matter was reconsidered and in a letter dated November 25, 2005, the applicant was informed by the then Minister of Citizenship and Immigration, Joe Volpe, that his application had been refused. On December 28, 2005, the applicant filed an application with this Court to have the Minister's decision judicially reviewed. This application is under the file number T-2295-05.

[9] Meanwhile, the applicant submitted another application for a Certificate of Citizenship from outside Canada under section 3 of the Act dated June 17, 2004 (the second application). The applicant's application for citizenship flowed from the citizenship of his adoptive father, Bud Worthington, since his parents were married at the time of Mr. Worthington's adoption. The applicant included in the application copies of both his adoptive parents' birth certificates, documents relating to the adoption, a marriage certificate of his adoptive parents and a U.S. Alien Card for his adoptive mother. By letter dated August 21, 2004, the applicant received notice that his

application had been received. This letter included the phrase: “The application and documents will now be reviewed and we will contact you if additional information is required.”

[10] In a letter dated October 24, 2005, Ms. Campbell, a case analyst with CIC (the case analyst) informed the applicant that his application had been rejected. This is the judicial review of the decision.

Board’s Reasons for Decision

[11] In the decision dated October 24, 2005, the case analyst refused the applicant’s application for a Citizenship Certificate from Outside Canada under section 3 of the Act. As the decision was very brief, I have reproduced it below:

> Mr. Worthington,
>
> This refers to your “Application for a Citizenship Certificate from Outside Canada (Proof of Citizenship) Under Section 3”, filed on June 17, 2004.
>
> Children born outside Canada and adopted by a Canadian citizen are not eligible for citizenship under paragraph 3(1)(e) and subsection 4(3) of the *Citizenship Act*. Paragraph 3(1)(e) of the *Citizenship Act* requires that the person must have been entitled, immediately before February 15, 1977, to become a citizen under paragraph 5(1)(b) of the former *Act*. You have not provided evidence to demonstrate that you satisfy the conditions of this paragraph.
>
> Furthermore, I would also like to point out that the documentation you submitted in support of your application was insufficient to demonstrate that your parents were Canadian citizens at the time of your adoption.

> In light of the above noted factors, you do not qualify for a delayed registration under subsection 4(3) for the purposes of paragraph 3(1)(e) of the *Citizenship Act*.
>
> Sincerely,
>
> Nicole Campbell
> A/Analyst
> Citizenship Case Review

Issues

[12] The applicant submitted the following issues for consideration:

1. What is the applicable standard of review?

2. Did the applicants have a legitimate expectation that they would be contacted for additional information as they were promised?

3. If yes, would it make any sense to send the matter back for reconsideration given the respondent's consistently held position that adopted children do not have a derivative claim to citizenship under paragraph 3(1)(e) as well as the respondent's refusals on many different occasions?

4. Is it legally right to say that the concept of "Canadian citizenship" did not exist before 1947?

5. Was the adoptive father a Canadian citizen? Should the respondent be estopped from challenging the adoptive father's Canadian citizenship? Has the matter become *res judicata*?

6. Even if the Court is not satisfied about the adoptive father's Canadian citizenship, does Mr. Worthington have a derivative claim through his mother?

7. Does paragraph 3(1)(e) violate, in whole or in part, section 15(1) of the *Charter*, insofar as it creates a distinction which has the effect of not only withholding a benefit but also imposing a more onerous obligations on those claiming Canadian citizenship based on their adoption to their Canadian parents than on those claiming Canadian citizenship based on their natural birth to their Canadian parents? If so, is it saved by section 1 of the *Charter*?

[13] The respondent submitted the following preliminary issue for consideration:

1. Is the applicant's affidavit of Sonia Kociper in violation of Rule 81 of the *Federal Courts Rules*, S.O.R. 98-106, and therefore should be assessed with caution and accorded minimal weight?

[14] I would rephrase the issues as follows:

I. Preliminary Issues

a) Does the applicant's affidavit of Sonia Kociper violate Rule 81 of the *Federal Courts Rules*?

II. Judicial Review Issues

a) What is the appropriate standard of review?

b) Did the applicant have a legitimate expectation that he would be contacted by the case analyst if more information was needed? Was this legitimate expectation violated?

c) Did the applicant have a legitimate expectation that by submitting a copy of his adoptive father's Canadian provincial birth certificate, the requirement to prove his adoptive father's citizenship had been met? Was this legitimate expectation violated?

d) Did the case analyst err in finding that there was insufficient evidence to prove the applicant's parents' citizenship?

III. Procedural Issues

a) Is the question of the applicant's parents' citizenship *res judicata?*

b) Is the respondent estopped from challenging the parents' citizenship?

c) Would sending the matter back for re-determination serve any purpose?

IV. Constitutional Issues

a) Does paragraph 3(1)(e) violate section 15 of the *Charter*?

b) Can it be saved under section 1 of the *Charter?*

c) What is the appropriate remedy?

V. Costs

a) Should the applicant be awarded costs on a solicitor-client basis?

[15] I will be summarizing the parties' submissions under the following headings:

I. Preliminary Issues

(a) Affidavit of Sonia Kociper

II. Judicial Review Issues

(a) Standard of Review

(b) Legitimate Expectation #1

(c) Legitimate Expectation #2

(d) Error in Finding Insufficient Evidence

III. Procedural Issues

(a) Res Judicata

(b) Estoppel

(c) Sending the Matter Back for Re-Determination

IV. Constitutional Issues

(a) Section 15

(b) Section 1

(c) Remedies

V. Costs

(a) Solicitor-Client Costs

Applicant's Submissions

[16] **I. Preliminary Issues**

(a) Affidavit of Sonia Kociper

The applicant submitted that the respondent takes issue with the applicant's underlying affidavit of Sonia Kociper as being hearsay. The applicant submitted that all statements contained in the affidavit are based on personal knowledge arrived at by reviewing documentary exhibits and backed by supporting documentation attached to the affidavit as exhibits. The applicant submitted that there is no violation of Rule 81 of the *Federal Court Rules*.

[17] **II. Judicial Review Issues**

(a) Standard of Review

The applicant submitted that the appropriate standard of review is correctness as the Court is being asked to determine whether the case analyst's decision conforms to the applicable legislation and the *Charter* (*Taylor* v. *Canada*, [2006] F.C.J. No. 1328 at paragraphs 35 and 36).

[18] *(b) Legitimate Expectation #1*

The applicant submitted that the doctrine of legitimate expectation arises where a decision-maker in its reasons reproaches the applicant for failing to provide evidence without putting the applicant on notice that they are at risk on that issue (*Veres* v. *Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 124). The applicant submitted that two separate legitimate expectations arose in the present case.

[19] Firstly, the applicant submitted that there existed a legitimate expectation that the case analyst would contact the applicant if additional information was required. In making this submission, the applicant relied on the following documents:

(1) The letter acknowledging receipt of his application dated August 21, 2004 included the phrases "we will contact you if additional information is required" and "you should receive your new citizenship certificate within 2 or 3 months if no further information is required";

(2) The CIC's Operational Manuals, specifically the Guide Book that accompanies section 3 states: "additional documents may be required during processing your application" and "in these cases you will be contacted for more information or asked to supply additional documents"; and

(3) CP 10 (titled “Proof of Citizenship” under section 11.5) deals with delayed registrations of birth and states: “CPC Sydney will contact the client if additional documents are required.”

[20] The applicant submitted that he was never contacted to provide additional information and as such, he was led to believe that he had provided sufficient documentation. Thus, his legitimate expectation was breached when the case analyst refused his application on the basis of a lack of evidence.

[21] *(c) Legitimate Expectation #2*

The second legitimate expectation was on the basis that a number of CIC documents provided that a copy of the adoptive father’s Canadian provincial birth certificate was sufficient to prove his adoptive father’s citizenship. The applicant noted the following documents in support of this submission:

(1) CP 12 (titled “Documents” under section 1.3) deals with documents used to establish citizenship and acceptable documents and states: “Documents used to establish citizenship are: […], Canadian provincial birth certificate”;

(2) CP 4 (titled “Grants” under section 5) deals with the documents used to show a parent’s citizenship and states: “Acceptable documents to establish a parent’s citizenship are: […], a parent’s birth certificate confirming the parent’s birth in Canada”; and

(3) CIC Guidebook for section 3 applications, under the section ‘Documents you must send with your form’ states: “If you were born outside Canada to a Canadian parent before February 15, 1977, you must send: […], proof that your natural father was a Canadian

> citizen when you were born, i.e., your parents' Canadian birth certificate or Canadian citizenship certificate."

[22] The applicant submitted that he provided his adoptive father's Canadian provincial birth certificate as proof of his adoptive father's citizenship. Thus, the case analyst's refusal on the basis of a lack of evidence proving his father's citizenship was a breach of the applicant's legitimate expectation.

[23] *(d) Error in Finding Insufficient Evidence*

The applicant submitted that paragraph 3(1)(e) of the Act states that a person born outside Canada before February 15, 1977 is a Canadian citizen if, under paragraph 5(1)(b) of the Former Act, his father was a citizen at the time of the child's birth and if the birth was registered within two years of its occurrence or within such extended time as the Minister permits. The applicant noted that the definition of a natural born citizen under paragraph 4(1)(a) the former Act, was "A person born before the 1st day of January 1947, is a natural born Canadian citizen if he was born in Canada or on a Canadian ship and had not become an alien before the 1st day of January, 1947". Furthermore, the definition of alien under section 2 of *An Act respecting Citizenship, Nationality, Naturalization and Status of Aliens*, R.S.C. 1952, c. 33 was "a person who is not a Canadian citizen, Commonwealth citizen, British subject or citizen of the Republic of Ireland." The applicant submitted that according to these definitions, his father was indeed a natural born Canadian citizen at the time of the applicant's birth. Thus, the case analyst erred in making the determination that there was insufficient evidence to prove the father's Canadian citizenship.

III. Procedural Issues

[24] *(a) Res Judicata*

The applicant submitted that the question of his parents' citizenship is *res judicata* as it was conceded by the case analyst in the following submissions:

(1) Memorandum to the Minister dated June 12, 2003 wherein it was written "[Mr. Worthington] was adopted at birth by parents who were natural born Canadian citizens. Although both parents resided in the United States for some time, neither parent ever acquired U.S. citizenship.";

(2) Memorandum to the Minister dated May 30, 2005 wherein it was written "He [Mr. Worthington] was adopted at birth by parents who were natural born Canadian citizens. They remained permanent residents of the United States and did not become U.S. citizens."; and

(3) Case analyst's affidavit dated March 31, 2004 wherein it was stated "The applicant was not a permanent resident and had never lived in Canada. As such, he was not eligible for a grant of citizenship under section 5(1). However, given his status as an adopted child of Canadian citizens, […]."

[25] Furthermore, his parents' citizenship was also previously determined by Madam Justice Layden-Stevenson of this Court in *Worthington* above, at paragraph 1:

> [. . .] Duane's birth certificate lists Mr. and Mrs. Worthington as his parents. Frank Worthington, now deceased, was a Canadian citizen, having been born in Grand Fork, British Columbia. Mrs. Worthington is also a Canadian citizen, having been born in Sandon,

> British Columbia. Both Mr. and Mrs. Worthington resided in the United States but neither of them ever acquired American citizenship.

[26] The applicant submitted that given that his parents' citizenship has already been determined to be Canadian, this issue has become *res judicata*.

[27] *(b) Estoppel*

The applicant submitted that the respondent is estopped from alleging that his parents' citizenship is otherwise than it has been decided (*Canada (Minister of Employment and Immigration)* v. *Lidder*, [1992] F.C.J. No. 212 (F.C.A.)). The applicant submitted that the requirements of estoppel as per *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)*, 2001 FCA 67, are met in this case: the parents' citizenship was decided in a final judgment, the parties are the same, and the determination was fundamental to the judgment rendered.

[28] *(c) Sending the Matter Back for Re-Determination*

The applicant submitted that sending this case back for reconsideration will not serve any purpose because the respondent has consistently taken the position that children adopted by Canadian parents have no derivative right to Canadian citizenship under paragraph 3(1)(e) of the Act. The applicant also submitted that the Minister has had five different opportunities to resolve this matter, but has refused to do so. In *Popov* v. *Canada (Minister of Employment and Immigration)* (1994), 75 F.T.R. 90 at 93, this Court held that the Court need not send the matter

back for re-determination where convinced that no real purpose would be served by doing so. Thus, the applicant submitted that the appropriate action is for this Court to make an order in the nature of *mandamus*.

IV. Constitutional Issues

[29] In the alternative, the applicant argued that he has a derivative claim to Canadian citizenship through his mother. The applicant submitted that while under paragraph 3(1)(e), claims to citizenship through maternal lineage is only applicable to children born out of wedlock, this section violates the *Charter*. The applicant noted that the Federal Court of Appeal in *McKenna* v. *Canada (Attorney General)*, [1999] 1 F.C. 401 (C.A.), held that paragraph 3(1)(e) of the current Act is *prima facie* discriminatory and that the only issue which remains unaddressed is justification under section 1 of the *Charter*.

[30] *(a) Section 15*

The applicant then proceeded to assess the constitutionality of paragraph 3(1)(e). As to the first requirement of differential treatment, the applicant submitted that natural children born abroad to Canadian parents have access to automatic citizenship while the adopted children born abroad to Canadian parents are subject to a discretionary grant of citizenship. With regards to the analogous ground on which the discrimination is based, the applicant noted that the Courts have already determined that adoption is analogous to an enumerated ground. The applicant then went on to address whether the law in question has a purpose or effect that is discriminatory within the

meaning of the equality guarantee. The applicant relied on *McKenna*, above to state that while equality between natural and adoptive children has gained a substantial amount of momentum, there remains a certain degree of social stigma and the Canadian treatment of adopted children in the context of citizenship is one of these carryovers.

[31] *(b) Section 1*

The applicant conceded that the objectives of the impugned provision - to provide access to citizenship while establishing and safeguarding the security of Canadian citizens and nation-building – are sufficiently pressing and substantial to warrant limiting a *Charter* right. However, the applicant submitted that the legislation fails the rational connection requirement. The applicant clarified that the relevant question is not whether requiring an oath and a security check are rational ways of ensuring the above cited objectives, but yet whether demanding these requirements of only adopted children are. The applicant argued that there simply is no rational connection. The applicant also submitted that paragraph 3(1)(e) completely impairs his protected right to equality. The applicant then submitted that requirements such as requiring the person to be over 18 years of age at the time of the adoption or requiring the adoption to be in the best interest of the child would be a more appropriately justifiable impairment of the applicant's right. The applicant submitted that these requirements could also prevent so-called "adoptions of convenience" and accommodate adopted children who are in the applicant's position.

[32] *(c) Remedies*

The applicant submitted that on the facts of this case, all the prerequisites for a grant of *mandamus* are met (*Apotex Inc.* v. *Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.)):

(1) The applicant complied with all the regulatory requirements in applying under section 3 of the Act, and this created a "public legal duty" for the Minister to process the application without discriminating against the applicant;

(2) the duty was owed to the applicant;

(3) in light of the applicant's constitutional arguments, the applicant has a right to citizenship;

(4) the only other remedy is to send the matter back for re-determination and this will not serve any purpose;

(5) the order sought will be of some practical value or effect as it recognizes a constitutionally guaranteed right;

(6) there are no equitable bars to recognizing a constitutionally guaranteed right;

(7) the balance of convenience favours recognizing and remedying the historically disadvantaged position of adopted children; and

(8) the Minister has no discretion in this matter.

V. Costs

[33] *(a) Solicitor-Client Costs*

The applicant seeks an award of costs on a solicitor-client basis. The Federal Court in *Koehler* v. *Warkworth Institution* (1991), 45 F.T.R. 87 (T.D.), made an award of costs on a

solicitor-client basis, payable forthwith, where the tribunal had denied the applicant natural justice despite having been instructed on the law in that area by the Court three months earlier. The applicant relied on the fact that the respondent has brought motion after motion for various extensions of time, failed to properly disclose all materials, and brought unnecessary motions.

Respondent's Submissions

I. Preliminary Issues

[34] *(a) Affidavit of Sonia Kociper*

The respondent submitted that it is plain and obvious that the affidavit of Sonia Kociper, an associate lawyer at the firm retained by the applicant, is not confined to the associate's personal knowledge as required by Rule 81 of the *Federal Court Rules*. The information in the affidavit is fundamentally hearsay in nature, and as such should be assessed with caution and overall accorded minimal weight.

II. Judicial Review Issues

[35] *(a) Standard of Review*

The respondent submitted that the appropriate standard of review for questions of statutory interpretation and the *Charter* is correctness (*Dr. Q.* v. *College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at 41). The appropriate standard of review for a finding of

fact is patently unreasonable (*Keeprite Workers' Independent Union* v. *Keeprite Productions Ltd.* (1980), 29 O.R. (2d) 513 (C.A.)).

[36] *(b) Legitimate Expectation #1*

With regards to the applicants' submission that he had a legitimate expectation that the case analyst would contact him if further information was required, the respondent submitted that this argument must fail. The respondent noted that policy manuals clearly indicate that the burden of proof is on an applicant to prove that they are entitled to recognition as a Canadian citizen. There is nothing in the manuals that may be construed to shift the onus onto citizenship officials to seek out information necessary to support an applicant's application (*Ayyalasomayajula* v. *Canada (Minister of Citizenship and Immigration)*, 2007 FC 248; *Danyluk* v. *Ainsworth Technologies Inc.*, 2001 SCC 44). The respondent noted Chapter CP-10, which states that "the onus is on the applicant to obtain the necessary information from the authorities of the country concerned."

[37] *(c) Legitimate Expectation #2*

With regards to the applicant's submission that he had a legitimate expectation that his adoptive parents' birth certificates were sufficient evidence to prove Canada citizenship, the respondent submitted this argument must also fail. The respondent submitted that the applicant has not shown that he could have any expectation that he would not have to prove the necessary elements of his case. The respondent argued that no Canadian government official made any representation to the applicant that by submitting birth certificates, his parents' citizenship would be established. Once again, the respondent noted that policy manuals are only a guide on the

"minimum" documentation required to establish Canadian citizenship. In no way do these policy manuals give rise to legitimate expectations.

[38] *(d) Error in Finding Insufficient Evidence*

The respondent submitted that the case analyst's decision that there was insufficient evidence to demonstrate that the applicant's parents were citizens at the time the applicant's adoption is in no way patently unreasonable given:

- The adoptive parents might have been American citizens at birth derivatively through their American parents;
- The adoptive father represented himself to be an American citizen to the public at large; and
- No evidence was produced for the adoptive father, as was for the adoptive mother, other than a Canadian provincial birth certificate.

[39] Furthermore, the respondent submitted that paragraph 4(1)(a) of the Former Act provided that a person born before January 1, 1947 was a natural born Canada citizen "if" they were born in Canada or on a Canadian ship and "if" they were not an "alien" on January 1, 1947. As there were facts before the case analyst suggesting that the applicant's adoptive father could have been an "alien", her decision was not patently unreasonable.

III. Procedural Issues

[40] *(a) Res Judicata*

The respondent submitted that the issue of the applicant's parents' Canadian citizenship is not *res judicata.* Firstly, the respondent submitted that there is no evidence that any Canadian government official made any representation to the applicant in the context of processing his application that his adoptive parents were Canadian citizens. Secondly, the respondent submitted that this Court has never made any determinations on the citizenship status of the applicant's adoptive parents. And lastly, the respondent submitted that any erroneous statements made by a government official in the context of the first judicial review were innocent and collateral to the issues before the Court.

[41] *(b) Estoppel*

The respondent submitted that the doctrine of estoppel does not apply as it cannot interfere with the proper administration of law.

[42] *(c) Sending the Matter Back for Re-Determination*

The respondent submitted that should the Court determine that a legitimate expectation existed, the appropriate course of action would be to allow the judicial review on this ground and refer the matter back for re-determination on this issue, and not to address the constitutional issue.

IV. Constitutional Issues

[43] *(a) Section 15*

The respondent submitted that the applicant lacks the necessary standing to bring a *Charter* challenge as he has not proven that his adoptive father was a Canadian citizen at the time of the applicant's birth or adoption. Thus, he would not have a right to citizenship under section 3 even if it were found to be unconstitutional. The respondent also submitted that the applicant's submission that he has a derivative claim to citizenship based on his mother's citizenship is unfounded as her citizenship has also not been determined. The respondent also noted the Supreme Court's holding that section 15 *Charter* rights are personal in nature (*R v. Swain*, [1991] 1 S.C.R. 933). The respondent submitted that the applicant has as of yet not demonstrated that he has any personal connection to any claim of citizenship under paragraph 3(1)(e) of the Act because such a claim requires the finding that his father or mother was indeed a Canadian citizen at the time of his birth or adoption.

[44] The respondent also submitted that the applicant is asking the Court to apply the *Charter* retroactively. A concept the Supreme Court of Canada has held cannot be done (*Benner* v. *Canada (Secretary of State)*, [1997] 1 S.C.R. 358). The respondent argued that the applicant's complaint is against the effects that flowed from the Former Act, not the current *Citizenship Act*. The respondent distinguished this case from that of *Benner*, above on the basis that that case dealt with a constitutional challenge to the 1977 *Citizenship Act*, not the 1947 *Citizenship Act.*

[45] The respondent claimed that the applicant rested his case almost exclusively on legal submissions from the Supreme Court's decision in *Benner* above, and the Court of Appeal in *McKenna*, above. The respondent submitted that this *Charter* challenge should not be entertained as it is made in a factual and legal vacuum, and this could have the effect of trivializing the *Charter*.

[46] The respondent then addressed whether a violation of section 15 of the *Charter* had occurred. The respondent submitted that although paragraph 3(1)(e) does not treat all persons identically, it does not give rise to differential treatment based on personal characteristics. The respondent noted that the group of persons not captured under paragraph 3(1)(e) is very broad and disperse. Furthermore, the respondent submitted that the comparator group proposed by the applicant simply cannot hold. The respondent argued that comparing 'foreign children who are adopted in foreign countries by Canadians residing abroad' to 'foreign children born to Canadians residing abroad is wrong as these groups are not in the same situation by virtue of the fact that adoption is a legal process. Foreign children are by and large citizens of their country of birth, subject to that country's laws, including adoption laws. Moreover, granting automatic citizenship could potentially remove the foreign-born adopted child's existing citizenship since dual citizenship is still not currently recognized by all countries. Furthermore, the respondent submitted that it cannot be assumed that all adoption processes are uniform, or that Canada recognizes all foreign adoptions. Canada has a legitimate interest in protecting the best interest of the child and in preventing "adoptions of convenience". The respondent submitted that foreign children adopted outside of Canada by Canadians have special needs that Parliament has sought to address through the provisions of the *Citizenship Act*.

[47] *(b) Section 1*

The respondent submitted that the *Citizenship Act* is Parliament's mechanism for ensuring some form of connection between Canada and its citizens. Furthermore, the legislation clearly contemplates that foreign-born children adopted by Canadian citizens will be given citizenship through the "granting" mechanism under section 5 of the Act. The respondent noted a number of pressing and substantial concerns including insuring the best interest of the child, preventing "adoptions of convenience", and fulfilling international obligations such as under the *Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*.

[48] The respondent submitted that the legislative means are rationally connected to the objective; they ensure that the best interest of the adopted child are considered and prevent the abuse of intercountry adoptions for immigration purposes. Furthermore, the respondent submitted that the current scheme reflects a practical reality: while the provinces are responsible for adoption, the federal government is in the best position to investigate whether an adoption is *bona fide*.

[49] The respondent also submitted that the applicant's contention that paragraph 3(1)(e) results in a "complete impairment" of his rights, completely disregards the "granting" provision under section 5 of the Act. Courts should not find provisions overbroad solely because an alternative which might be less intrusive can be conceived of (*RJR MacDonald Inc.* v. *Canada (A.G.)*, [1995] 3 S.C.R. 199). The respondent then noted that when compared to other jurisdictions, Canada's scheme is described as an "as-of-right-model", and not a "discretionary" model which exists in countries such as Britain, France, and Germany. Furthermore, the United States has a similar

scheme to that of Canada in that foreign adopted children must still go through United States Citizenship and Immigration Service processing.

[50] Finally, the respondent submitted that any deleterious effects caused by the requirement that these children apply for citizenship through the "granting" provision in section 5 is small in comparison to the important objectives that the current scheme fulfills. The respondent submitted that this is especially true given that in the area of 90% of visas for children born abroad and adopted by or to be adopted by Canadians are usually approved. Furthermore, these children upon arrival to Canada are eligible for a grant of citizenship under section 5 of the Act.

[51] *(c) Remedies*

The respondent submitted that the applicant failed to identify a solution that would remedy the situation. The respondent also submitted that the applicant is not entitled to *mandamus* as the respondent acted in accordance with the law in refusing the application. Moreover, the respondent noted that the declaration sought would be the equivalent of asking that paragraph 3(1)(e) be struck without identifying a section that would give the applicant access to citizenship on the grounds he seeks. Reading into paragraph 5(1)(b) of the former 1947 *Citizenship Act* constitutes an impermissible retroactive application of the *Charter* and simply cannot be done.

V. Costs

[52] *(a) Solicitor-Client Costs*

The respondent submitted that the applicant has failed to demonstrate that entitlement to any costs or that solicitor-client costs should be awarded.

Analysis and Decision

I. Preliminary Issues

[53] a) Does the applicant's affidavit of Sonia Kociper violate Rule 81 of the *Federal Courts Rules*?

The respondent submitted that the applicant's supporting affidavit of Sonia Kociper, an associate at the law firm representing the applicant, violates Rule 81 of the *Federal Courts Rules*. I should mention that the determination of this issue is not detrimental to this application for judicial review as the majority of the information provided in Sonia Kociper's affidavit is also found in the affidavit of Duane Edward Worthington and the certified tribunal record. Nonetheless, I feel the need to address the argument raised by the respondent.

[54] The general requirement of Rule 81 is that affidavits be confined to the personal knowledge of the deponent. In *Moldeveanu* v. *Canada (Minister of Citizenship and Immigration)* (1999), 1 Imm. L.R. (3d) 105, the Federal Court of Appeal held that facts which do not appear on the record

and which are within the knowledge of the applicant cannot be put in evidence by the affidavit of a third person who has no personal knowledge of those facts. This would simply violate the requirement of personal knowledge.

[55] The applicant is well aware of this requirement. In fact, in *Worthington* above, Madame Justice Layden-Stevenson of this Court held at paragraph 26:

> The supporting affidavit is that of a solicitor from the law firm representing the applicants. While that is not necessarily fatal to an application for judicial review, in this instance it results in a clear violation of Rule 8 [*sic*] of the *Federal Court Rules, 1998*, SOR/98-106, as am.(the Rules). The deponent does not have personal knowledge of much of the information that he has sworn to in the affidavit.

[56] Having reviewed the affidavit of Sonia Kociper, I am of the opinion that the situation before this Court is the same as above.

[57] Consequently, I agree with the respondent that the affidavit shall be assessed with caution and overall accorded minimal weight.

II. Judicial Review Issues

[58] a) <u>What is the appropriate standard of review?</u>

Issues of procedural fairness are reviewable on the standard of correctness. Issues involving the *Charter* are also reviewable on a standard of correctness. Regarding the question of whether the

case analyst erred in finding that there was insufficient evidence to make a determination on the applicant's adoptive parents' citizenship, we must apply the standard of review analysis to determine the appropriate standard of review.

[59] There is no privative clause in the *Citizenship Act.* This is a neutral factor.

[60] As to the nature of the question, the question at issue is whether or not the case analyst erred in finding that there was insufficient evidence to make a determination on the applicant's adoptive father's citizenship. I am of the opinion that the question of whether or not sufficient evidence exists to make a determination is one of mixed fact and law. A mid-level of deference is warranted.

[61] The expertise of a case analyst is to analyze the evidence before them in relation to citizenship applications and to make determinations as required under the Act. The sufficiency of evidence in order to make a determination is directly within the expertise of citizenship case analysts. This factor warrants more deference.

[62] As to the purpose of the Act and section, in *Lam* v. *Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 410 at paragraph 20, the Court held that the Act in question deals with "the requirements and application procedures for citizenship, the loss and resumption of citizenship and measure applicable where national security considerations are in issue." The purpose of section 3 of the Act is to provide automatic citizenship to those who meet the legal requirements of the section.

[63] I am of the view that the appropriate standard of review for the question of sufficiency of evidence to make a determination is reasonableness.

[64] b) Did the applicant have a legitimate expectation that he would be contacted by the case analyst if more information was needed? Was this legitimate expectation violated?

The applicant submitted that he had a legitimate expectation that the case analyst would contact him if further information was required to fulfill the requirements of his application. The Supreme Court of Canada in *Canadian Union of Public Employees* v. *Ontario (Minister of Labour)*, [2003] S.C.J. No. 28 at paragraph 131 provided the following articulation of the doctrine of legitimate expectation:

> The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness": *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty. See: *Old St. Boniface Residents Assn. Inc.* v. *Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker*, *supra*; *Mount Sinai*, *supra*, at para. 29; *Brown and Evans*, *supra*, at para. 7:2431. Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate" expectation.

In a letter dated August 21, 2004 confirming receipt of the applicant's application, the Case Processing Centre in Sydney included the following phrase:

> […] we will contact you if additional information is required.

[65] In my opinion this was a clear, unambiguous and unqualified promise that a certain action would be taken by the responsible government official, if further information was required. The promise made was procedural in nature, not substantive. Furthermore, there appears to be proof that the applicant relied on this promise to his detriment.

[66] The respondent submitted that the alleged promise cannot be accepted as the citizenship policy manuals clearly indicate that the burden of proof is on the applicant to prove that they are entitled to recognition as a Canadian citizen. Furthermore, the respondent submitted that there is no duty on an officer to inform a claimant regarding the strength or their application. In making these submissions, the respondent relied on *Ayyalasomayajula*, above and *Danyluk*, above. In my opinion, these cases are not comparable as neither of them dealt with the doctrine of legitimate expectation.

[67] While I agree that the onus is on the applicant to provide sufficient documentation, I believe that the above promise is not necessarily contrary to this onus. The applicant bears the onus of providing sufficient documentation, but if the case analyst requires more information to render a decision, they have a responsibility based on the above articulated representation to contact the applicant. Consequently, I am of the opinion that the applicant did have a legitimate expectation that he would be contacted if further information was required. This legitimate expectation was subsequently breached by the case analyst when she rendered her decision refusing to grant citizenship on the basis of insufficient information. The application for judicial review would succeed on this ground.

[68] c) Did the applicant have a legitimate expectation that by submitting a copy of his adoptive father's Canadian provincial birth certificate, the requirement to prove his adoptive father's citizenship had been met? Was this legitimate expectation violated?

Having provided the legal requirements of the doctrine of legitimate expectation above, I will now proceed to evaluate the applicant's second claim of legitimate expectation. The applicant claims that the citizenship policy manuals and Guidebooks provided to him gave him reason to believe that by providing solely his father's Canadian provincial birth certificate, the requirement to prove his father's citizenship was automatically satisfied. The specific representations that the applicant relies on are as follows:

(1) CP 12 (titled "Documents" under section 1.3) deals with documents used to establish citizenship and acceptable documents and states: "Documents used to establish citizenship are: […], Canadian provincial birth certificate";

(2) CP 4 (titled "Grants" under section 5) deals with the documents used to show parent's citizenship and states: "Acceptable documents to establish a parent's citizenship are: […], a parent's birth certificate confirming the parent's birth in Canada"; and

(3) CIC Guidebook for section 3 applications, under the section "Documents you must send with your form" states: "If you were born outside Canada to a Canadian parent before February 15, 1977, you must send: […], proof that your natural father was a Canadian citizen when you were born, i.e., your parents' Canadian birth certificate or Canadian citizenship certificate."

[69] In my opinion, these excerpts provide citizenship applicants with strong suggestions as to which documents are considered acceptable by CIC. However, I would not go so far as to say that these suggestions amount to a legitimate expectation that in submitting one of the enumerated documents, proof of citizenship is automatically satisfied. If this were so, there would be no need for case analysts to render discretionary decisions once the documents were submitted. Furthermore, I think that the alleged promise in this instance would give rise to a substantive right and not a procedural right. As such, I find no legitimate expectation on this basis.

[70] d) Did the case analyst err in finding that there was insufficient evidence to prove the applicant's parents' citizenship?

The applicant concedes that the only piece of documentation that he submitted in proof of his adoptive father's Canadian citizenship was a Canadian provincial birth certificate. The information before the case analyst included the several indications that the applicant's adoptive father may not have been a Canadian citizen under the definition of the Former Act as required under paragraph 3(1)(e). Specifically, I note that unlike for the applicant's adoptive mother, the applicant had not submitted his father's U.S. Alien Card. Furthermore, the application indicated that the applicant's adoptive father resided in the U.S.. In light of the evidence before the case analyst, I think it was reasonable for the case analyst to conclude that insufficient evidence was provided to make a determination.

III. Procedural Issues

[71] a) Is the question of the applicant's parents' citizenship *res judicata?*

The applicant submitted that his parents' citizenship is *res judicata*. The respondent dismissed this claim stating that the Court in *Worthington*, above may have made innocent statements on the parents' citizenship, but in no way decided the issue. While the Court in that decision did in explaining the facts say that the applicant's parents were Canadian citizens, this was not the judicial question at issue in the case and as such, *res judicata* does not apply.

[72] b) Is the respondent estopped from challenging the adoptive father's citizenship?

The applicant claims that the respondent is estopped from challenging his parents' citizenship. The first requirement for estoppel is that the issue has already been decided in a final judgment (*Blueberry River Indian Band*, above). Having found above that the issue of the parents' citizenship is not *res judicata*, I must also reject this argument. The requirements for estoppel have not been met.

[73] c) Would sending the matter back for re-determination serve any purpose?

The applicant submitted that sending the case back for reconsideration will not serve any purpose because the respondent has continually taken the position that the applicant, as a foreign born adoptive child of Canadian parents, is not eligible to apply for citizenship under section 3 of the *Citizenship Act*. The respondent disagreed with this position stating that if a reviewable error was committed, the appropriate remedy is to refer the matter back for re-determination.

[74] While the normal procedure upon a finding a reviewable error on judicial review is to send the matter back for re-determination, in certain circumstances this Court has deviated. In *Popov*, above this Court held that it need not send the matter back for re-determination where convinced that no real purpose would be served by doing so. In *Abasalizadeh* v. *Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1714 at paragraph 24, this Court noted "the authorities indicate that where natural justice or procedural fairness has been denied, a remedy may be withheld where the decision maker would have been bound in law to reject the application on the evidence before [them]."

[75] Although I have found that a reviewable error was committed (in that the applicant's first claim of legitimate expectation was breached), I do not see the purpose of sending the matter back for re-determination without determining the constitutional challenge to the legislation. While the citizenship of the applicant's parents has yet to be determined, the fact remains that the Department has taken the position that the applicant is ineligible for citizenship under section 3 of the Act on the basis of him being an adopted child. Thus, even if the father is found to be a Canadian citizen upon re-determination, his application will nonetheless be rejected. As such, I will proceed with evaluation of the constitutional challenge.

IV. Constitutional Issues

[76] Before assessing whether or not paragraph 3(1)(e) of the Act violates section 15 of the *Charter*, I will first address the issues of standing and retroactivity raised by the respondent.

Standing

[77] The respondent submitted that the applicant lacks the necessary standing to bring a constitutional challenge of paragraph 3(1)(e) of the Act. Specifically, the respondent claimed that the applicant has not yet satisfied the case analyst that his parents were Canadian citizens as required under paragraph 3(1)(e) of the Act. While I agree with the respondent's statement that the applicant has not met the requirements of paragraph 3(1)(e) of the Act, I nonetheless believe that he has standing to bring the constitutional challenge.

[78] The applicant's application under section 3 was rejected by the case analyst on the basis that the applicant was an adoptive child of Canadian parents and as such, was not eligible for citizenship under section 3 of the Act. Thus, in my opinion, the applicant has already faced hardship under the section as his application for citizenship has been dismissed on the basis of his status as a foreign born adoptive child of Canadian parents.

Retroactivity of the Charter

[79] The respondent also submitted that the applicant's *Charter* challenge requires this Court to apply the *Charter* retroactively. The issue of applying the *Charter* retroactively was explained by the Supreme Court of Canada in *Benner* above at paragraph 45:

> 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?

[80] The paragraph at issue in this case is paragraph 3(1)(e), but it incorporates by reference paragraph 5(1)(b) of the Former Act. Paragraph 3(1)(e) reads as follows:

> 3. (1) Subject to this Act, a person is a citizen if
>
> . . .
>
> (e) the person was entitled, immediately before February 15, 1977, to become a citizen under paragraph 5(1)(b) of the former Act.

[81] Subparagraph 5(1)(b)(i) of the former Act provides:

> 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 the time of that person's birth, is a Canadian born citizen, and . . .

[82] In my opinion, paragraph 3(1)(e) (and by reference subparagraph 5(1)(b)(i) of the Former Act) continue to impose on-going discrimination against adopted children of Canadian parents. While subparagraph 5(1)(b)(i) was enacted prior to the *Charter*, it is its current continuing application that the applicant takes issue with. I do not believe that the applicant is requesting that

this Court retroactively apply the *Charter* and as such, I will proceed with the constitutional challenge.

[83] a) Does paragraph 3(1)(e) violate section 15 of the *Charter*?

Before engaging in a section 15 analysis, I think it necessary to make a few comments concerning the decision in *McKenna,* above. That case involved a Canadian applicant with two foreign born adoptive daughters who were denied citizenship on the basis that they were not permanent residents as required for a citizenship application under paragraph 5(2)(a). The applicant argued that sections 3 and 5 of the *Citizenship Act* discriminated against her adoptive children for the purposes of the *Canadian Human Rights Act*. The root of the issue was that because automatic citizenship grants under section 3 did not apply to adoptive children, adoptive children were forced to apply under section 5, which required permanent residence status. The Federal Court of Appeal held that these provisions were discriminatory pursuant to the *Canadian Human Rights Act*. The applicant submitted that *McKenna,* above held that section 3 of the Act is *prima facie* discriminatory. While I agree that section 3 was found to be discriminatory, I note that *McKenna,* above did not involve the application of the *Charter*. As such, I find it necessary to engage in a full section 15 analysis.

[84] In *Law* v. *Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497, the Supreme Court of Canada set out the following three-step test for determining whether a legislative provision violates section 15 of the *Charter*:

> 1. whether a law imposes differential treatment between the claimant and others, in purpose or effect

> OR
>
> whether the law fails to take into consideration the claimant's already disadvantaged position within Canadian society;
>
> 2. whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
>
> 3. whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

Comparator Groups

[85] The applicant submitted that the appropriate comparator groups are foreign born natural children of Canadian citizens and foreign born adopted children of Canadian citizens. The respondent rejected the proposed comparator groups on the basis that these groups are not in the same situation by virtue of the fact that adoption is a legal process. That is that adoptive children are subject to the laws of the countries in which they are born, including citizenship and adoption laws. Notwithstanding these submissions, I accept the applicant's comparator groups.

Differential Treatment

[86] Under the Act, natural born children are eligible to apply for citizenship under section 3, whereas adoptive children are ineligible under this section and as such, must apply for citizenship under section 5. Whereas section 3 of the Act "deems" citizenship on an applicant, section 5 "grants" citizenship to an applicant. These separate application processes clearly draw a formal distinction on the basis of the personal characteristic of being a natural or adoptive child. On the

face of the legislation, there exists differential treatment and as such, there is no need to consider the effects of the legislation. As I have found that a differential treatment on the basis of a personal characteristic exists, there is no need to explore whether the law fails to take into consideration the already disadvantaged position of the claimant in Canadian society (*Law*, above).

Enumerated or Analogous Ground

[87] In *Grismer* v. *Squamish First Nation*, 2006 FC 1088, this Court considered the requirements of an analogous ground articulated in *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, and held that the status of being adopted was an analogous ground. In rendering its decision, the Court in *Grismer*, above articulated at paragraph 46:

> An infant cannot change his status as an adopted child. This is an immutable characteristic. In the case of children who have been adopted as adults, their status is constructively immutable. The status of the applicants as adopted children qualifies as an analogous ground.

I believe that the same rationale applies to the circumstances of this case. The requirement of an analogous ground is satisfied.

Discriminatory Purpose or Effect

[88] Not all differential treatment amounts to discrimination under section 15 of the *Charter*. The test is whether a reasonable person, having similar circumstances as the applicant and taking into account the relevant contextual factors, would feel that the differential treatment of the legislation

has the effect of demeaning the applicant's dignity (*Grismer*, above at paragraph 48). The following contextual factors may be considered in evaluating whether a law infringes section 15 of the *Charter* (*Law*, above at paragraph 88):

> 1. any pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue;
>
> 2. the correspondence, or lack thereof, between the ground on which the claim is based and the actual need, capacity, or circumstances of the claimant or others;
>
> 3. the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and
>
> 4. the nature and scope of the interest affected by the impugned law.

[89] The disadvantaged position of adoptive children was explored in depth by the Federal Court of Appeal in *McKenna*, above. In that case, Justice Linden at paragraphs 26 to 27, made the following comments that I feel are particularly relevant in the case at hand:

> The general tenor of this history is that in the past adopted children have been regarded as "second best", and adoptive parents have not been seen as "real" parents. But in recent years there has been a great deal of momentum toward a more sensitive and humane attitude. In many areas, the law has begun to treat adoptive parents and children with much the same respect accorded to their non-adoptive peers. In the area of labour law, many of the benefits that were once available only to birth parents are now given to adoptive parents as well. We now treat adopted children, it will be seen, in much the same way as birth children. Any social stigma that still exists is a carryover from older days and older attitudes.
>
> The Canadian treatment of adopted children in the context of citizenship is one of these carryovers. It is interesting to note that in other jurisdictions, the rights of adopted children have taken a similar step forward. American and British law both provide citizen parents residing abroad with an expedited way to seek citizenship for their foreign-born adopted children. None of these regimes requires the

> adopted child to be established as a qualified immigrant and go through the full process of naturalization. British law permits citizen parents to register their foreign-born minor adopted children as citizens without a medical or residency requirement. Where the British provisions are discretionary, in the United States citizenship must be granted to the adopted child where the parent or grandparent meet the residency requirement. Each country has its limitations, but each is less strict than Canadian law. Canada insists that a child adopted by a citizen abroad submit to the same stringent requirements as other foreign nationals.

In the above mentioned case, Justice Linden's was the dissenting judgment; however, at paragraph 77, Justice Robertson writing for the majority, agreed with Justice Linden's findings on the adoption issue.

[90] I believe that the above articulated circumstances hold true in the case at hand. Although progress has been made, this Court cannot ignore the persistent disadvantaged position of adoptive children in Canadian society.

[91] Regarding the presence of a correspondence between the analogous ground and the circumstances or needs of the group, I believe that such a connection exists. Foreign born adoptive children have a special need to have comparable citizenship to that of their Canadian parents.

[92] With respect to the third contextual factor listed in *Law*, above there is no ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society.

[93] In considering the nature and scope of the interest affected by the impugned legislation, I find the Supreme Court's comments in *M* v. *H.*, [2004] S.C.J. No. 23 at paragraph 72, helpful:

> Drawing upon the reasons of L'Heureux-Dube J. in *Egan*, Iacobucci stated that the discrimination caliber of differential treatment cannot be fully appreciated without considering whether the distinction in question restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society, or constitutes a complete non-recognition of a particular group.

[94] In my view, citizenship constitutes both a fundamental social institution and a basic aspect of full membership in Canadian society. The interest at stake for the applicant, and other foreign born adoptive children of a Canadian parent is critical to their full inclusion into Canadian society. As stated in *Taylor*, above at paragraph 263:

> 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.

[95] Having considered all the relevant contextual factors as provided in *Law* above, I find that the third requirement of the *Law* test is satisfied. The impugned law is discriminatory within the meaning of the equality guarantees under the *Charter*. In my view, paragraph 3(1)(e) of the *Citizenship Act*, discriminates against foreign born adoptive children of Canadian citizens by denying them the opportunity to obtain "deemed" citizenship under section 3 of the Act on the basis of their status as adopted children.

[96] a) Can it be saved under section 1 of the *Charter*?

In order for a *Charter* violation to be justified in a free and democratic society under section 1, it must satisfy the following test (see *Egan* v. *Canada*, [1995] 2 S.C.R. 513):

> 1. Is the legislative goal pressing and substantial?
>
> 2. Are the means chosen to attain this legislative end reasonable and demonstrably justified in a free and democratic society?
>
> a) the rights violation must be rationally connected to the aim of the legislation;
>
> b) the impugned provision must minimally impair the *Charter* guarantee; and
>
> c) 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.

Pressing and Substantial Legislative Goal

[97] The applicant conceded that the impugned legislation has a pressing and substantial goal. The applicant identified the objectives of the impugned provision as providing access to citizenship while establishing and safeguarding the security of Canadian citizens and nation-building. The respondent submitted that the overall purpose of the *Citizenship Act* is that it serves as Parliament's mechanism for ensuring some form of connection between Canada and its citizens. The respondent also noted a number of other pressing and substantial goals served by the Act such as ensuring the best interests of adoptive children, preventing "adoptions of convenience", and fulfilling international obligations. In my view, these goals easily fulfill the low threshold under the first step of the test, and may legitimately be characterized as pressing and substantial.

Rational Connection

[98] The applicant submitted that there is no rational connection between the goal of providing access to citizenship while safeguarding the security of Canadian citizens and nation-building, and requiring only adoptive children, not biological children, to seek citizenship through the discretionary power provided in section 5. The respondent submitted that requiring adoptive children of Canadians born abroad to apply for citizenship under section 5 is rationally connected to the legislative goals of ensuring the best interest of the child, preventing "adoptions of convenience", and fulfilling international obligations.

[99] Having carefully considered the arguments of both parties, I am of the opinion that a rational connection exists. By "granting" foreign-born children adopted abroad by Canadian citizens under section 5 of the Act, the Canadian government has the opportunity to ensure the adoption is *bona fide* and in the best interest of the child before citizenship is granted. As noted by the respondent, in some circumstances the effect of an automatic grant of Canadian citizenship on a foreign born child could remove that child's citizenship from its birth country. Moreover, the discretionary nature of section 5 helps the Canadian Government to fulfill its international requirements. Specifically, the *Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, which requires that signatory states ensure the best interest of the child, prevent abuses of intercountry adoptions, and confirm that consents to the adoption are valid. And finally, requiring persons in the situation of the applicant to apply for Canadian citizenship under section 5 is also rationally connected to Canada's interest in preventing "adoptions of convenience".

Minimal Impairment

[100] The applicant submitted that in denying him the opportunity to apply for "deemed" citizenship under section 3, Parliament has completely impaired his protected right to equality. The respondent submitted that the applicant's submission that section 3 results in a complete impairment ignores the applicant's eligibility for "granted" citizenship under section 5 of the Act. Furthermore, the respondent drew the Court's attention to other jurisdictions. The respondent claimed that Canada's "naturalization" route of obtaining citizenship is, comparatively, more aptly described as an "as-of-rights-model" instead of the more "discretionary" model of countries such as Britain, France and Germany.

[101] I note that it is not necessary that Parliament adopt the least intrusive means of reaching its legislative goal. The Supreme Court of Canada in *Libman* v. *Quebec (Attorney General)*, [1997] 3 S.C.R. 569 at paragraph 59, recognized that a certain degree of deference is owed to the legislature:

> This Court has already pointed out on a number of occasions that the social, economic and political spheres, where the legislature must reconcile competing interests in choosing one policy among several that might be acceptable, the courts must accord great deference to the legislature's choice because it is in the best position to make such a choice.

[102] However, I am of the view that the current scheme does not minimally impair the rights of foreign born adoptive children of Canadian parents.

[103] By denying automatic citizenship under section 3, the claimant group is forced to apply for citizenship under section 5. While prior to the Federal Court's decision in *McKenna* above, this generally meant applying for citizenship under subsection 5(1), the Department has since adopted an interim measure concerning persons adopted by a Canadian citizen outside of Canada (CP 01-05). The interim measure is administrative policy meant to facilitate grants of citizenship under subsection 5(4) to persons adopted outside of Canada by Canadians residing abroad. Essentially, to avoid the permanent residence requirement under subsection 5(1), foreign born adoptive children of Canadian citizens could apply under subsection 5(4). However, unlike subsection 5(1), subsection 5(4) is a discretionary section, that is the granting of citizenship under this section is entirely up to the Minister. Thus, the hardship caused by section 3 is that applications for citizenship by foreign born adoptive children of Canadian citizens who are not permanent residents of Canada are subject to the Minister's discretion under subsection 5(4). In my opinion, this is not a minimal impairment as it leaves these individuals completely at the mercy of the Minister.

[104] I agree with the applicant that a less impairing and therefore more appropriate legislative scheme would be one that conferred on the Minister the mandatory power to grant citizenship once certain requirements were met. For instance, a provision that provides that the Minister "shall grant citizenship" to a minor child adopted by a Canadian provided it is proven that the adoption is in the best interest of the child, is a legally valid adoption, and is not an adoption of convenience. Such a provision would meet the pressing and substantial goals of the legislation without imposing the hardship of uncertainty imposed by the purely discretionary nature of subsection 5(4). As such, I

find that the current scheme does not minimally impair the rights of the claimant group and therefore fails the *Oakes* test.

[105] The appropriate remedy is outlined in the judgment I have issued in this matter.

V. Costs

[106] a) Should the applicant be awarded costs on a solicitor-client basis?

The applicant seeks an award of costs on a solicitor-client basis. He relies on *Koehler*, above whereby the Court awarded costs on a solicitor-client basis, payable forthwith, because the tribunal had denied the applicant natural justice despite having been instructed on the law in that area by the court three months earlier. In my view, the facts of the case before the Court are not comparable. The case of *McKenna*, above did not determine the issue in this case as it was a challenge to the Act as per the *Canadian Human Rights Act*, and not the *Charter*.

[107] Under Rule 400 of the *Federal Court Rules*, this Court has full discretionary powers to award costs. Rule 400(3) provides factors that the Court may consider in making its award. These factors include:

(1) Any conduct that tended to shorten or unnecessarily lengthen the duration of the proceeding;

(2) The failure by a party to admit anything that should have been admitted or to serve a request to admit; and

(3) Whether any step in the proceedings was improper, vexatious or unnecessary or taken through negligence, mistake, or excessive claim.

[108] The applicant noted that the respondent has brought motion after motion for various extensions of time, failed to properly disclose all materials, and brought unnecessary motions. Having reviewed the parties' submissions, I am of the opinion that solicitor-client costs should not be awarded.

[109] The applicant shall have his costs of this application.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Citizenship Act*, R.S.C. 1985, c. C-29:

3.(1) Subject to this Act, a person is a citizen if	3.(1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne:
(a) the person was born in Canada after February 14, 1977;	a) née au Canada après le 14 février 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;	b) née à l'étranger après le 14 février 1977 d'un père ou d'une mère ayant qualité de citoyen au moment de la naissance;
(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;	c) ayant obtenu la citoyenneté — par attribution ou acquisition — sous le régime des articles 5 ou 11 et ayant, si elle était âgée d'au moins quatorze ans, prêté le serment de citoyenneté;
(d) the person was a citizen immediately before February 15, 1977; or	d) ayant cette qualité au 14 février 1977;
(e) the person was entitled, immediately before February 15, 1977, to become a citizen under paragraph 5(1)(b) of the former Act.	e) habile, au 14 février 1977, à devenir citoyen aux termes de l'alinéa 5(1)b) de l'ancienne loi.
. . .	. . .

5.(1) The Minister shall grant citizenship to any person who	5.(1) Le ministre attribue la citoyenneté à toute personne qui, à la fois:
(a) makes application for citizenship;	a) en fait la demande;
(b) is eighteen years of age or over;	b) est âgée d'au moins dix-huit ans;
(c) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada calculated in the following manner:	c) est un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés et a, dans les quatre ans qui ont précédé la date de sa demande, résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante:
(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;
(d) has an adequate knowledge of one of the official languages of Canada;	d) a une connaissance suffisante de l'une des langues officielles du Canada;

(e) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and

e) a une connaissance suffisante du Canada et des responsabilités et avantages conférés par la citoyenneté;

(f) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.

f) n'est pas sous le coup d'une mesure de renvoi et n'est pas visée par une déclaration du gouverneur en conseil faite en application de l'article 20.

(1.1) Any day during which an applicant for citizenship resided with the applicant's spouse who at the time was a Canadian citizen and was employed outside of Canada in or with the Canadian armed forces or the federal public administration or the public service of a province, otherwise than as a locally engaged person, shall be treated as equivalent to one day of residence in Canada for the purposes of paragraph (1)(c) and subsection 11(1).

(1.1) Est assimilé à un jour de résidence au Canada pour l'application de l'alinéa (1) c) et du paragraphe 11(1) tout jour pendant lequel l'auteur d'une demande de citoyenneté a résidé avec son époux ou conjoint de fait alors que celui-ci était citoyen et était, sans avoir été engagé sur place, au service, à l'étranger, des forces armées canadiennes ou de l'administration publique fédérale ou de celle d'une province.

(2) The Minister shall grant citizenship to any person who

(2) Le ministre attribue en outre la citoyenneté:

(a) is a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and is the minor child of a citizen if an application for citizenship is made to the Minister by a person authorized by regulation to make the application on behalf of the minor child; or

a) sur demande qui lui est présentée par la personne autorisée par règlement à représenter celui-ci, à l'enfant mineur d'un citoyen qui est résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés;

(b) was born outside Canada, before February 15, 1977, of a

b) sur demande qui lui est présentée par la personne qui y

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.

est autorisée par règlement et avant le 15 février 1979 ou dans le délai ultérieur qu'il autorise, à la personne qui, née à l'étranger avant le 15 février 1977 d'une mère ayant à ce moment-là qualité de citoyen, n'était pas admissible à la citoyenneté aux termes du sous-alinéa 5(1)b)(i) de l'ancienne loi.

(3) The Minister may, in his discretion, waive on compassionate grounds,

(3) Pour des raisons d'ordre humanitaire, le ministre a le pouvoir discrétionnaire d'exempter:

(a) in the case of any person, the requirements of paragraph (1)(d) or (e);

a) dans tous les cas, des conditions prévues aux alinéas (1)d) ou e);

(b) in the case of a minor, the requirement respecting age set out in paragraph (1)(b), the requirement respecting length of residence in Canada set out in paragraph (1)(c) or the requirement to take the oath of citizenship; and

b) dans le cas d'un mineur, des conditions relatives soit à l'âge ou à la durée de résidence au Canada respectivement énoncées aux alinéas (1)b) et c), soit à la prestation du serment de citoyenneté;

(c) in the case of any person who is prevented from understanding the significance of taking the oath of citizenship by reason of a mental disability, the requirement to take the oath.

c) dans le cas d'une personne incapable de saisir la portée du serment de citoyenneté en raison d'une déficience mentale, de l'exigence de prêter ce serment.

(4) In order to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada, and notwithstanding any other

(4) Afin de remédier à une situation particulière et inhabituelle de détresse ou de récompenser des services exceptionnels rendus au

provision of this Act, the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant citizenship to the person named in the direction.	Canada, le gouverneur en conseil a le pouvoir discrétionnaire, malgré les autres dispositions de la présente loi, d'ordonner au ministre d'attribuer la citoyenneté à toute personne qu'il désigne; le ministre procède alors sans délai à l'attribution.

The *Canadian Citizenship Act* S.C. 1946, C. 15 (repealed):

5. A person, born after the commencement of this Act, is a natural-born Canadian citizen:-	5. Une personne, née après l'entrée en vigueur de la présente loi, est citoyen canadien de naissance
(a) if he is born in Canada or on a Canadian ship; or	a) Si elle naît au Canada ou sur un navire canadien; ou
(b) if he is born outside of Canada elsewhere than on a Canadian ship, and	b) Si elle naît hors du Canada ailleurs que sur un navire canadien, et si
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 or having been a Canadian citizen at the commencement of this Act, and	(i) son père ou, dans le cas d'un enfant né hors du mariage, sa mère, à la naissance de ladite personne, est citoyen canadien en raison de sa naissance au Canada ou sur un navire canadien, ou parce qu'il lui a été accordé un certificat de citoyen-neté ou du fait d'avoir été citoyen canadien lors de la mise en vigueur de la présente loi, et si
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	(ii) le fait de sa naissance est inscrit à un consulat ou au bureau du Ministre, dans les deux années qui suivent cet événement ou au cours de la

authorized in special cases by the Minister, in accordance with the regulations.	prorogration que le Ministre peut autoriser, dans des cas spéciaux, en conformité des règlements.

The *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
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.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

FEDERAL COURT

SOLICITORS OF RECORD

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