Date: 20080612

Docket: T-1162-07

Citation: 2008 FC 732

BETWEEN:

LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA

Applicant

and

HER MAJESTY THE QUEEN
THE ATTORNEY GENERAL OF CANADA
WASYL ODYNSKY

Respondents

REASONS FOR ORDER

DAWSON J.

[1] By order dated February 4, 2008, the case management prothonotary struck out this judicial review application. The prothonotary found that it is plain and obvious that the application cannot succeed because the applicant lacks standing. The prothonotary found that the applicant is neither directly affected by the decision at issue, nor does it have public interest standing because it has not raised a serious issue of law.

[2] On this appeal from the prothonotary's order, I exercise my discretion *de novo*. I allow the appeal because I conclude that, in this case, the issue of public interest standing should not be

decided on a preliminary or interlocutory basis. Instead, the issue should be left for the judge who hears the application for judicial review.

Facts

[3] In 1997, the Minister of Citizenship and Immigration (Minister) gave notice to Wasyl Odynsky that she intended to request that the Governor in Council revoke his citizenship. Mr. Odynsky requested that the matter be referred to this Court pursuant to subsection 18(1) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (Act). Previously, the Minister had served a similar notice on Vladimir Katriuk, and he too had requested that the matter be referred to this Court. In accordance with those requests, each matter was referred to this Court for determination as to whether each individual had obtained their citizenship by false representations or fraud, or by knowingly concealing material circumstances.

[4] In reasons reported as *Canada (Minister of Citizenship and Immigration) v. Katriuk*, [1999] F.C.J No. 90 (QL), Justice Nadon found that Mr. Katriuk was admitted to Canada for permanent residence and obtained citizenship by false representation or by knowingly concealing material circumstances. In reasons reported as *Canada (Minister of Citizenship and Immigration) v. Odynsky*, [2001] F.C.J. No. 286 (QL), Justice MacKay reached a similar conclusion in respect of Mr. Odynsky.

[5] Following receipt of the Court's decisions, the Minister prepared reports recommending to the Governor in Council that Mr. Odynsky's and Mr. Katriuk's citizenship be revoked. Counsel for Mr. Odynsky and Mr. Katriuk were each given the opportunity to make written submissions on

whether their client’s citizenship should be revoked. The Minister's reports, together with the submissions and materials provided by Mr. Odynsky and Mr. Katriuk, were then placed before the Governor in Council.

[6] On May 17, 2007, the Governor in Council issued separate orders-in-council not revoking the citizenship of Mr. Odynsky or Mr. Katriuk. That day, separate orders-in-council also issued which revoked the citizenship of Helmut Oberlander and Jacob Fast.

[7] On June 22, 2007, the League for Human Rights of B’Nai Brith Canada (applicant) commenced this application, challenging the decision not to revoke the citizenship of Mr. Odynsky. The applicant alleged that the Governor in Council erred in law and that the decision violated the *Canadian Charter of Rights and Freedoms*. The applicant brought a similar application in respect of the decision concerning Mr. Katriuk, being Court File No. T-1191-07.

[8] After the certified tribunal record had been filed and the applicant had filed its affidavit evidence, Mr. Odynsky moved for an order striking this application on the ground that the applicant lacked standing. This motion was supported by the Attorney General of Canada (Attorney General) and Mr. Katriuk, who each filed written submissions and made oral argument. The parties agreed that the decision on the motion brought by Mr. Odynsky would apply equally to the application concerning Mr. Katriuk. That agreement remains in place and a copy of these reasons will be placed in Court File No. T-1191-07, together with an appropriate order.

The Scope of this Appeal

[9] On this appeal, the applicant argues that the issue of standing should not be decided as a preliminary matter but rather as a component of its application. Mr. Odynsky agrees that, if the Court decides that the prothonotary erred or decides *de novo* that the application should not be struck, the issue of standing should be left to the judge who hears the judicial review application. Accordingly, I do not decide the merits of the applicant's claim to public interest standing.

Standard of Review on Appeals under Rule 51

[10] Justice Hugessen recently explained how discretionary decisions of prothonotaries are reviewed on an appeal brought under Rule 51. In *Jazz Air LP v. Toronto Port Authority*, [2007] F.C.J. No. 841 (QL), aff'd [2007] F.C.J. No. 1240 (C.A.) (QL), he wrote at paragraphs 38 and 39:

> The case law on the standard of review to be applied by a judge of this Court when reviewing a discretionary decision of a prothonotary establishes a clear distinction between decisions which are "discretionary" and those which are not.
>
> A discretionary decision is one respecting a question on which by definition two equally reasonable people may, without error on the part of either one, reach diametrically opposed conclusions. Error, whether of fact or of law will always, of course, open a decision to appellate review. But even where there is no error a discretionary decision may still, in some circumstances invite the reviewing Court to make a fresh and different exercise of its own discretion.

[11] On appeal, the Federal Court of Appeal rejected the argument that Justice Hugessen had erred by interfering with the prothonotary's order in circumstances where he had found no error of law or fact on the part of the prothonotary.

[12] The Federal Court of Appeal also confirmed, at paragraph 11 of its reasons, that judges of this Court remain bound to apply the test as stated by Justice MacGuigan for the majority in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.). Justice Sharlow, writing for the Court of Appeal in *Jazz Air*, cited above, stated at paragraph 13 that:

> The test was recently restated by Justice Décary, on this point writing for the Court in *Merck & Co. v. Apotex Inc.*, [2003] F.C.J. No. 1925, 2003 FCA 488, at paragraph 19. The restated test reads as follows:
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> > Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:
> >
> > a) the questions raised in the motion are vital to the final issue of the case, or
> >
> > b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.
>
> The restatement simply reverses the two branches of the test so that they are considered in a more logical order. Once it is determined that a *de novo* review is required, it is not necessary to attempt to identify any error in the decision under appeal.

[13] In the present case, the applicant and the Attorney General submit that the prothonotary's order dismissing the application on the basis of lack of standing disposes of a question vital to the final issue of the case. Thus, they submit that the appeal of the prothonotary’s order is by way of a hearing *de novo*.

[14] Mr. Odynsky submits, however, that, while the reasoning of the majority in the *Aqua-Gem* decision would support the view that the Court should exercise its discretion *de novo*, the reasoning

of the minority ought to be applied. This is said to be appropriate because the issue of standing is unrelated to any issue of substance raised by the judicial review application. In the alternative, if the issue of standing is to be considered *de novo*, Mr. Odynsky submits that the Court should not disregard the reasoning of the prothonotary.

[15] In my view, the submissions of the applicant and the Attorney General are correct. The issue of standing is one vital to the final issue of the case. It follows that I should exercise my own discretion *de novo*. The answer to Mr. Odynsky's first submission is that the Federal Court of Appeal in *Jazz Air*, cited above, was clear that this Court is bound by the decision of the majority in *Aqua-Gem*. As to the second submission, I agree with Justice Hugessen that a discretionary decision may, in some circumstances, invite the reviewing judge to make a fresh and different exercise of his or her own discretion. This is one such case.

[16] For the reasons that follow, I would not have struck out the application on a preliminary or interlocutory basis.

Principles Applicable to Motions to Strike Applications

[17] Before moving to the issue of standing, it is important to remember that different considerations apply to motions to strike applications than apply to motions to strike actions. The applicable principles were recently summarized by Justice Mactavish in *Amnesty International Canada v. Canada (Canadian Forces)* (2007), 287 D.L.R. (4th) 35 (F.C.). I respectfully adopt her summary, found at paragraphs 22 through 30 and at paragraph 33 of her reasons. There, she wrote:

22. Applications for judicial review are intended to be summary proceedings, and motions to strike Notices of Application add greatly to the cost and time required to deal with such matters.

23. Moreover, as the Federal Court of Appeal observed in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1994] F.C.J. No. 1629, the striking out process is more feasible in actions than in applications for judicial review. This is because there are numerous rules governing actions which require precise pleadings as to the nature of the claim or the defence, and the facts upon which the claim is based. There are no comparable rules governing Notices of Application for Judicial Review.

24. As a consequence, the Federal Court of Appeal has observed that it is far more risky for a court to strike out a Notice of Application for Judicial Review than a conventional pleading. Moreover, different economic considerations come into play in relation to applications for judicial review as opposed to actions. That is, applications for judicial review do not involve examinations for discovery and a trial - matters which can be avoided in actions by a decision to strike: *David Bull*, at para. 10.

25. In contrast, the full hearing of an Application for Judicial Review proceeds in much the same way that a motion to strike the Notice of Application would proceed, namely on the basis of affidavit evidence and argument before a judge of this Court.

26. As a result, the Federal Court of Appeal determined that applications for judicial review should not be struck out prior to a hearing on the merits of the application, unless the application is "so clearly improper as to be bereft of any possibility of success".

27. The Federal Court of Appeal further teaches that "Such cases must be very exceptional and cannot include cases ... where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion": *David Bull*, at para. 15.

28. Unless a moving party can meet this very stringent standard, the "direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself." (*David Bull*, at para. 10. See also *Addison & Leyen Ltd. v. Canada*, [2006] F.C.J. No. 489, 2006 FCA 107, at para. 5, rev'd on other grounds [2007] S.C.J. No. 33, 2007 SCC 33).

> 29. The reason why the test is so strict is that it is ordinarily more efficient for the Court to deal with a preliminary argument at the hearing of the application for judicial review itself, rather than as a preliminary motion: see the comments of the Federal Court of Appeal in *Addison & Leyen*, at para. 5.
>
> 30. By analogy to the process prescribed in the *Federal Courts Rules* with respect to the striking out of statements of claim, as a general rule, no evidence may be led on a motion to strike a Notice of Application. In addition, the facts asserted by the applicant in the Notice of Application must be presumed to be true: *Addison & Leyen Ltd. et al.*, above, at para. 6.
>
> […]
>
> 33. Finally, in deciding whether an Application for Judicial Review should be struck as bereft of any possibility of success, the Notice of Application should be read as generously as possible, in a manner that accommodates any inadequacies in the allegations that are merely the result of deficiencies in the drafting of the document: see *Operation Dismantle*, at para. 14.

[18] Considerations of particular relevance are the following:

- Actions must be pleaded with far more specificity than applications. It is thus more feasible to strike a statement of claim or defence than a notice of application.
- An application will not be struck out unless it is so clearly improper as to be bereft of any possibility of success. This is so because it is generally more efficient for the Court to deal with a preliminary argument at the hearing of the application, rather than on a motion. If a motion to strike is considered and fails, the interlocutory proceedings are a waste of time, money, and court resources.

[19] To this I would add the admonition of Justice Evans, sitting in this Court, in *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211 (T.D.), that only in very clear cases

should a court be prepared to dismiss an application for judicial review on a preliminary motion for lack of standing. At paragraph 25, Justice Evans cautioned that at a preliminary stage the Court may not have the benefit of full legal argument and that, to the extent that the strength of the applicant's case is relevant to the ground of discretionary standing, the Court may not be in a position to make a fully informed decision that would justify a denial of standing. At paragraph 39, he wrote:

> However, when the question of standing is raised in a preliminary motion, such as is the case here, a court should not subject the strength of an applicant's claim to a level of scrutiny that probes more deeply than considering whether, on the materials before the court, the applicant has a fairly arguable case or, putting it the other way, has no reasonable cause of action: Energy Probe v. Canada (Attorney General) (1989), 68 O.R. (2d) 449 (C.A.); Canadian Civil Liberties Assn. v. Canada (Attorney General), supra. The burden will be on the moving party in a preliminary motion to demonstrate that the applicant fails to satisfy even this low threshold test.

The Issue of Standing

[20] The applicant argues that it has a direct interest in this proceeding which distinguishes it from the public at large. The applicant also alleges that it should be afforded public interest standing. Accordingly, I frame the issues to be decided as follows:

(i) Have the respondents demonstrated that the applicant's claim to direct standing is not fairly arguable or is bereft of any possibility of success?

(ii) Have the respondents demonstrated that the applicant's claim to public interest standing is not fairly arguable or is bereft of any possibility of success?

The Claim to Direct Standing

[21] The applicant submits that it has been recognized as having a “direct interest” in related proceedings. Particular reliance is placed on the comments of Justice McLachlin (as she then was) in *R. v. Finta*, [1993] 1 S.C.R. 1138.

[22] The applicant also submits that it has four interests which distinguish it from the public at large. First, it says that, as an organization, it has been directly involved in bringing war criminals to justice. Second, it says that the organization has made a number of representations to the Government of Canada seeking to have Mr. Odynsky’s citizenship revoked. Third, it says that the organization represents the relatives of several persons who died while Mr. Odynsky was stationed at the Poniatowa labour camp in Poland. According to the applicant, these relatives would be willing to be added as parties to this application. Fourth, it says that the organization was denied an opportunity to put its submissions before the Governor in Council. In this regard, the applicant observes that the submissions of another organization were put before the Governor in Council.

[23] Section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, confers jurisdiction upon the Federal Court to hear applications for judicial review. Section 18.1 sets out a number of procedural requirements. Specifically, subsection 18.1(1) provides that the Attorney General or “anyone directly affected by the matter in respect of which relief is sought” may make an application for judicial review.

[24] The jurisprudence establishes that, for a party to be considered to be "directly affected," the decision at issue must be one which directly affects the party’s rights, imposes legal obligations on

it, or prejudicially affects it directly. See: *Rothmans of Pall Mall Canada Ltd. v. Canada (Minister of National Revenue)*, [1976] 2 F.C. 500 (C.A.).

[25] In *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, an appeal from the Federal Court of Appeal, the Supreme Court of Canada quoted with approval at page 623 the following passage from *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.R. 257, when considering the existence of direct standing:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. [emphasis added]

[26] Without doubt, the applicant and the family members it says it represents deeply care, and are genuinely concerned, about Mr. Odynsky's citizenship revocation process and his past service as a perimeter guard of the Seidlung at the Poniatowa labour camp in German-occupied Poland. However, that interest does not mean that the legal rights of the applicant, or those it represents, are legally impacted or prejudiced by the decision not to revoke Mr. Odynsky’s citizenship. Rather, their interest exists in the sense of seeking to right a perceived wrong arising from, or to uphold a principle in respect of, the non-revocation of Mr. Odynsky’s citizenship.

[27] It follows that the respondents have demonstrated that the applicant’s claim to direct standing is not fairly arguable.

[28] In so concluding, I have considered the decision of Justice McLachlin in *Finta*, cited above. However, in that case, Justice McLachlin was considering an application by the applicant to

intervene in a case that raised issues about the interpretation of provisions in the *Criminal Code* dealing with war crimes and crimes against humanity. Rule 18 of the *Rules of the Supreme Court of Canada* required a party seeking intervenor status to establish "an interest." Justice McLachlin granted intervenor status, finding that the applicant had "a direct stake in Canada's fulfilling its international legal obligations under customary and conventional international law."

[29] In my view, the *Finta* decision is distinguishable from the case before me because subsection 18.1(1) of the *Federal Courts Act* was not engaged. What is capable of establishing an "interest" in order to intervene before the Supreme Court of Canada is not necessarily co-extensive with the requirement of being "directly affected" in order to commence an application for judicial review in this Court.

[30] The one interest identified by the applicant that, in my view, deserves specific mention is the fourth one; that is, the claim that the applicant was denied an opportunity to put its submissions before the Governor in Council. On its face, this submission appears to have some merit, especially when, according to the applicant, another organization was provided such an opportunity. However, this submission does not appear to be supported by the evidence. The Governor in Council, when exercising its discretion, owed Mr. Odynsky a duty of fairness. For this reason, Mr. Odynsky was provided an opportunity to make written submissions, which were included in the report of the Minister. According to the Attorney General, this opportunity was only extended to Mr. Odynsky. As part of his written submissions, Mr. Odynsky included information that he had obtained from an organization. Thus, the circumstances surrounding the submissions made to the Governor in

Council do not give rise to any concerns as to fairness. Put simply, another organization was not given a right or privilege that was not extended to the applicant.

[31] I now turn to the issue of public interest standing, noting that subsection 18.1(1) of the *Federal Courts Act* has been held to be broad enough to encompass applicants who are not directly affected when they meet the test for public interest standing. See: *Canada (Royal Canadian Mounted Police Public Complaints Commission) v. Canada (Attorney General)*, [2006] 1 F.C.R. 53 (C.A.), at paragraph 56.

Public Interest Standing

[32] Given my conclusion that this issue should be left for the judge hearing the application, my reasons will be brief and focus solely on whether the respondents have established that the applicant's argument that it has public interest standing is bereft of any possibility of success.

[33] I begin by noting that it is a matter of judicial discretion, to be exercised having regard to the particular circumstances of the case, whether the question of standing should be determined with final effect on a motion to strike. See: *Finlay*, cited above, at pages 616-617.

[34] As to the criteria to be met, the parties agree that an applicant for public interest standing must satisfy a conjunctive, three-part test. The applicant must establish:

1. There is a serious question to be raised.
2. The applicant has a genuine or direct interest in the outcome of the litigation.

3. There is no other reasonable and effective way to bring the issue before the Court.

(a) *A serious question*

[35] One of the issues raised by the applicant is the scope of the discretion possessed by the Governor in Council when deciding whether or not to revoke a person's citizenship. The relevant provision in the Act is section 10, which provides:

10.(1) Subject to section 18 but notwithstanding any other section of this Act, where the Governor in Council, on a report from the Minister, is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances,	10.(1) Sous réserve du seul article 18, le gouverneur en conseil peut, lorsqu'il est convaincu, sur rapport du ministre, que l'acquisition, la conservation ou la répudiation de la citoyenneté, ou la réintégration dans celle-ci, est intervenue sous le régime de la présente loi par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels, prendre un décret aux termes duquel l'intéressé, à compter de la date qui y est fixée :
(a) the person ceases to be a citizen, or	a) soit perd sa citoyenneté;
(b) the renunciation of citizenship by the person shall be deemed to have had no effect, as of such date as may be fixed by order of the Governor in Council with respect thereto.	b) soit est réputé ne pas avoir répudié sa citoyenneté.
(2) A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing	(2) Est réputée avoir acquis la citoyenneté par fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels

material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship.	la personne qui l'a acquise à raison d'une admission légale au Canada à titre de résident permanent obtenue par l'un de ces trois moyens.

[36] The applicant argues that "[t]hough the Governor in Council has treated the revocation of citizenship power as a broad discretionary power allowing for consideration of anything and everything, the law does not allow for the exercise of the revocation power in this manner. The only relevant circumstance for revocation is that the person has obtained citizenship by false representation or fraud or by knowingly concealing material circumstances."

[37] Mr. Odynsky responds that, in *Oberlander v. Canada (Attorney General)*, [2005] 1 F.C.R. 3 (C.A.), the Federal Court of Appeal recognized that the Governor in Council "had a discretion not to revoke citizenship in the case of a person who has been determined to have misrepresented in acquiring citizenship. The [applicant] did not seek to intervene in this case either at first instance or on appeal. It now seeks, as set out in paragraphs 50 to 91 of its submissions, to overturn the Court of Appeal's ruling. It is plain and obvious that the [applicant] cannot succeed in this argument. It has been settled by the Court of Appeal."

[38] The Attorney General also relies on *Oberlander*, at paragraphs 43 and 58, to argue that the law is settled and that this Court is bound by that decision. Further, the Attorney General relies upon

the prior decisions in *Canada (Secretary State) v. Luitjens* (1992), 142 N.R. 173 (F.C.A.), and *Canada (Minister of Citizenship and Immigration) v. Bogutin* (1998), 144 F.T.R. 1 (T.D.). Finally, the Attorney General argues that the applicant's argument is difficult to understand and is circular.

[39] Dealing with each point, I believe that, while some confusion may exist as a result of the applicant's comments about the existence and scope of discretion and about "a form of prosecutorial discretion" which is exercised when a decision is made to pursue revocation proceedings, the applicant has stated its position clearly that "the discretion the Governor in Council now purports to exercise does not exist."

[40] As to whether this argument is bereft of any possibility of success because the law was settled by the Federal Court of Appeal in *Oberlander*, it is without doubt that the Court of Appeal set aside the revocation of Mr. Oberlander's citizenship because "there was no balancing of the personal interests of Mr. Oberlander and of the public interest." See: *Oberlander*, cited above, at paragraph 58. Thus, the decision of the Governor in Council was found to be patently unreasonable.

[41] However, that conclusion must be viewed in the context of paragraph 42 of the Court of Appeal's reasons in *Oberlander*. There, it wrote:

> The Attorney General of Canada acknowledged, in his factum and at the hearing, that "[w]hen considering a report by the Minister to revoke a person's citizenship, the Governor in Council must be satisfied that the statutory criteria for revocation have been met. In addition, the Governor in Council may engage in a delicate balancing of the individual's personal interests, the public interest, as well as a consideration of any relevant program policy objectives" (paragraph 60). I assume, for the purposes of this appeal, that this

> acknowledgment is well-founded. The Minister herself had acknowledged in her report, at page 41, that "[i]n deciding whether to revoke citizenship, the Governor in Council should consider the government's 'no safe haven policy', the findings of the Trial Judge in the reference and any submissions made by Mr. Oberlander." [emphasis added]

[42] I read this to be a clear reservation that the Court of Appeal accepted, for the purpose of the appeal, the Attorney General's acknowledgment of the need to balance interests, but that such acceptance was not intended to foreclose future argument on the issue.

[43] In the circumstance where the Court of Appeal's decision was expressly stated to be based upon the Minister's acknowledgment, I do not find that the applicant's argument is bereft of any possibility of success because of the *Oberlander* decision.

[44] This view is consistent with the observation of Justice Pratte in *Canada (Minister of Employment and Immigration) v. Taggar*, [1989] 3 F.C. 576 (C.A.), at page 582, that the authority of a prior decision "is very limited since, rightly or wrongly, it was partly based on the concession made by counsel for the Minister."

[45] I now consider the prior decisions of *Luitjens* and *Bogutin*, cited above, relied upon by the Attorney General.

[46] At issue in the *Luitjens* case was whether an appeal lay from a finding of this Court made under paragraph 18(1)(*b*) of the Act and, if so, whether subsection 18(3) of the Act violated section

7 of the *Charter*. Any comment made about the scope of the Governor in Council's discretion was, therefore, *obiter*.

[47] In *Bogutin*, this Court found that Mr. Bogutin had obtained Canadian citizenship by false representation or fraud, or by knowingly concealing material circumstances. Justice McKeown discussed subsection 10(1) of the Act in the following terms:

> 117. Subsection 10(1) of the Citizenship Act provides that a person ceases to be a Canadian citizen if the Governor in Council is satisfied that the person has obtained, retained, renounced or resumed citizenship by false representation or fraud or by knowingly concealing material circumstances. In particular, paragraph 10(1)(a) of the Citizenship Act provides for an automatic statutory cessation of citizenship in circumstances where the Governor in Council is satisfied that a person has obtained citizenship by knowingly concealing material circumstances. In the event that statutory cessation of citizenship takes effect under subsection 10(1) of the Citizenship Act, the person would become a permanent resident of Canada, as that term is defined in subsection 2(1) of the Immigration Act, R.S.C. 1985, C1-2, as amended. As a result, the person would be subject to all provisions of the Immigration Act including those pertaining to removal from Canada. [emphasis added]

[48] I do not see how this supports the position of the Attorney General. I note as well that, in the prior case of *Canada (Minister of Citizenship and Immigration) v. Copeland,* [1998] 2 F.C. 493 (T.D.), Justice McGillis also wrote, at paragraph 26, that "paragraph 10(1)(a) of the Citizenship Act provides for an automatic statutory cessation of citizenship in circumstances where the Governor in Council is satisfied that a person has obtained citizenship by knowingly concealing material circumstances."

[49] To the extent the Court commented in *Bogutin*, that evidence as to character and lack of good character could be presented, this related to subsection 10(1) of the legislation in force when Mr. Bogutin applied for citizenship. This is made clear in paragraphs 119 and 120 of the Court's reasons:

> I must then examine the substantive provisions governing the acquisition of citizenship in subsection 10(1) of the Canadian Citizenship Act, R.S.C. 1952, c. 33, as amended, which was in force in 1958-59 when Mr. Bogutin applied for and was granted citizenship. The section reads as follows:
>
> > 10. (1) The Minister may, in his discretion, grant a certificate of citizenship to any person who is not a Canadian citizen and who makes application for that purpose and satisfies the Court that,
> >
> > (a) either he has filed in the office of the Clerk of the Court for the judicial district in which he resides, not less than one nor more than five years prior to the date of his application, a declaration of intention to become a Canadian citizen, the said declaration having been filed by him after he attained the age of eighteen years; or he is the spouse of and resides in Canada with a Canadian citizen; or he is a British subject;
> >
> > (b) he has been lawfully admitted to Canada for permanent residence therein;
> >
> > (c) he has resided continuously in Canada for a period of one year immediately preceding the date of the application and, in addition, except where the applicant has served outside of Canada in the armed forces of Canada during time of war or where the applicant is the wife of and resides in Canada with a Canadian citizen, has also resided in Canada for a further period of not less than four years during the six years immediately preceding the date of the application;

> (d) he is of good character;
>
> (e) he has an adequate knowledge of either the English or the French language, or, if he has not such an adequate knowledge, he has resided continuously in Canada for more than twenty years;
>
> (f) he has an adequate knowledge of the responsibilities and privileges of Canadian citizenship; and
>
> (g) he intends, if his application is granted, either to reside permanently in Canada or to enter or continue in the public service of Canada or of a province thereof.
>
> The relevant paragraphs in this hearing are 10(1)(c) and (d) which deal with the acquisition of Canadian domicile and the applicant being of good character. I agree with Collier, J. in the Luitjens case when he ruled that evidence as to good character and lack of good character could be presented. [emphasis added]

[50] The Court went on to conclude:

> 126. In my view, the foregoing is sufficient to decide the reference. However, for greater certainty, I find that Mr. Bogutin was not lawfully admitted to Canada and therefore did not acquire Canadian domicile and he was not a person of good character, all of which is contrary to the Immigration Act in force in 1951. Mr. Bogutin was ineligible in 1958 to apply for Canadian citizenship and he obtained Canadian citizenship by false representation or fraud or by concealing material circumstances. [emphasis added]

[51] Any comment about good character was not made in the context of the scope of the discretion currently possessed by the Governor in Council under paragraph 10(1)(*a*) of the Act.

[52] To summarize, in *Oberlander*, the Federal Court of Appeal was careful to state that it proceeded on the basis that it accepted, without deciding, that the Governor in Council was entitled to engage in a delicate balancing of the concerned person's interests. The other jurisprudence relied upon by the Attorney General does not make authoritative findings about the scope of the discretion exercised by the Governor in Council when considering citizenship revocation. Both the *Luitjens* and *Bogutin* decisions involved references to the Court under subsection 18(1) of the Act.

[53] While the submissions of the applicant about the scope of the Governor in Council's discretion may not ultimately prevail, I do not find its argument to be so clearly improper as to be bereft of any possibility of success.

[54] It follows that I find a serious question is raised.

[55] Before leaving this point, in oral argument, Mr. Odynsky stressed that no public interest is raised in this case and that the applicant is trying to intervene in what is a purely private matter. However, in *Harris v. Canada* (2000), 256 N.R. 221 (F.C.A.), public interest standing was granted to one taxpayer to seek relief relating to an allegedly improper interpretation of the *Income Tax Act* by the Minister of National Revenue. Notwithstanding that the issue arose in the context of the tax treatment of an unrelated taxpayer, standing was granted so that Mr. Harris could raise a question about the limit of the Minister of National Revenue's statutory authority. The case is therefore an example of public interest standing being recognized to exist in a private matter.

(b) *A genuine or direct interest*

[56] Mr. Odynsky argues that the decision at issue is not rooted in broad public policy considerations and that the applicant has no direct or genuine interest in a decision that impacts upon an individual and his relationship with the state. The Attorney General also argues that public interest standing is granted where there is a connection between the party seeking status and the remedy sought. Reliance is placed upon the decision in *Canadian Bar Assn. v. British Columbia*, [2006] B.C.J. No. 2015 (QL), at paragraph 51. Here, it is said that the applicant will not in any way be affected by an order quashing the decision not to revoke citizenship.

[57] I begin by noting that the reference which the Attorney General relies upon in the *Canadian Bar Assn.* decision was made in the context of the Court's determination of the existence of a serious issue and not its determination of the existence of a genuine interest.

[58] In *Harris*, cited above, the Federal Court of Appeal's analysis of whether Mr. Harris had a genuine issue in the litigation was as follows:

> 62. The third criterion is that the public interest litigant must have a genuine interest in the issue. On appeal, the Attorney General did not seriously contest that Mr. Harris did have a genuine interest in the issues he raises. Mr. Harris is a taxpayer. He is a member of an organization that seeks to ensure the fair administration of the taxation system. Accordingly, I conclude that Mr. Harris has a genuine interest in the issues he raises.

[59] In *Sierra Club*, cited above, Justice Evans considered whether the Sierra Club had "an experience and expertise with respect to the underlying subject-matter of the litigation that will

inform their written and oral submissions made in support of the application for judicial review, and will assist the Court to reach an appropriate result." He also considered whether the Sierra Club had "demonstrated a degree of involvement with the subject-matter of the application for judicial review that is sufficient to make it an appropriate body to institute this proceeding in the public interest."

[60] In the present case, the Attorney General acknowledged the evidence about the applicant's interest in human rights in general and in war crimes.

[61] In my view, it is not plain and obvious that a judge would conclude that the applicant lacks sufficient experience, expertise or involvement with human rights, war crimes, or citizenship revocation so as to have a genuine interest in the proper interpretation of section 10 of the Act.

(c) *Another reasonable and effective way to bring the issue before the Court*

[62] The Attorney General conceded, for the purpose of this motion, that the applicant has satisfied the third element of the test. The prothonotary agreed, and so do I.

[63] Mr. Odynsky, however, disagrees. He submits that it was open to the applicant to intervene in the *Oberlander* case, and that it will be open to the applicant to seek to intervene in future cases where citizenship is revoked and the person concerned challenges that decision.

[64] However, there is jurisprudence to the effect that an intervener takes the pleadings and the record as it finds them, and that an intervener may not litigate new issues. See, for example,

Maurice v. Canada (Minister of Indian Affairs and Northern Development) (2000), 183 F.T.R. 45 (T.D.). In the *Oberlander* case, both the Attorney General and Mr. Oberlander proceeded on the basis that the Governor in Council could engage in a balancing of the individual's personal interests. A similar position has been adopted by the Attorney General in this case.

[65] On the basis of jurisprudence such as *Maurice*, cited above, and the nature of the issue raised in the *Oberlander* decision, I conclude that it is not plain and obvious that a judge would conclude that another reasonable and effective way exists to bring the issue of the scope of the Governor in Council's discretion before the Court.

Conclusion and Costs

[66] For these reasons, the appeal is allowed and the motion to strike is dismissed.

[67] Mr. Odynsky sought costs. The issue of costs is reserved to the judge hearing the application for judicial review.

"Eleanor R. Dawson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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