Federal Court of Appeal | Cour d'appel fédérale

Date: 20140514

Docket: A-35-13

Citation: 2014 FCA 126

CORAM: **DAWSON J.A.**
TRUDEL J.A.
NEAR J.A.

BETWEEN:

HELEN JEAN KINSEL and
BARBARA ELIZABETH KINSEL

Appellants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Vancouver, British Columbia, on December 10, 2013.

Judgment delivered at Ottawa, Ontario, on May 14, 2014.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: TRUDEL J.A.
NEAR J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20140514

Docket: A-35-13

Citation: 2014 FCA 126

CORAM: **DAWSON J.A.**
TRUDEL J.A.
NEAR J.A.

BETWEEN:

HELEN JEAN KINSEL and
BARBARA ELIZABETH KINSEL

Appellants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

DAWSON J.A.

I. Introduction

[1] In 2009, the *Citizenship Act*, R.S.C. 1985, c. C-29 (Act) was amended to extend citizenship to individuals who had lost or were denied their citizenship for a variety of reasons. At issue in this appeal is the scope of the amendment.

[2] This is an appeal from an order of the Federal Court dismissing the appellants' application for judicial review of a decision by a delegate of the Minister of Citizenship and Immigration. The delegate refused to issue citizenship certificates to the appellants because they did not meet the statutory requirements for citizenship set out in the Act.

[3] In the Federal Court, the appellants argued that the delegate had erroneously interpreted the Act. In the alternative, they argued that, if correct, the delegate's interpretation of the Act violated section 15 of the *Canadian 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 (Charter).

[4] For reasons reported as 2012 FC 1515, 423 F.T.R. 299, the Federal Court dismissed the application for judicial review. For the reasons that follow, I would dismiss the appeal. The appellants have not established that the delegate erred in her interpretation of the Act and the appellants have failed to establish any violation of section 15 of the Charter.

II. The Facts

[5] The facts are carefully set out in the decision of the Federal Court and are not in dispute. Simply put, the appellants' paternal grandmother was a Canadian citizen who (under the then applicable citizenship legislation) ceased to be a Canadian when she became a naturalized citizen of the United States of America. The appellants' father was born in the United States and at the time of his birth, neither of his parents held Canadian citizenship. The appellants were also born in the United States. At the time of their births, neither of their parents held Canadian citizenship.

[6] On April 17, 2009, Bill C-37 came into force. Its effect was to amend the Act and restore citizenship to so-called "lost Canadians". Under paragraphs 3(1)(*f*) and 3(7)(*d*) of the Act, Bill C-37 retroactively restored Canadian citizenship to persons, like the appellants' paternal grandmother, who ceased to be a Canadian citizen as a result of acquiring another nationality. Under Bill C-37, such persons were deemed to be citizens of Canada from the time they lost their citizenship.

[7] Additionally, under paragraphs 3(1)(*g*) and 3(7)(*e*) of the Act, citizenship was granted retroactively to persons born abroad to a Canadian. Thus, the appellants' father was deemed to be a Canadian citizen from the time he was born.

[8] The issue before this Court is whether Bill C-37 introduced a limit on derivative citizenship (that is citizenship derived from being born to a Canadian parent). It is the position of the Minister that, pursuant to paragraph 3(3)(*a*) of the Act, Canadian citizenship by descent extends only to the first generation of progeny born abroad. The appellants assert that there is no such limitation affecting their claims. They argue they are entitled to citizenship pursuant to paragraph 3(1)(*b*) of the Act which extends citizenship to persons born outside of Canada to a Canadian citizen.

[9] In the alternative, the appellants argue that if the delegate properly interpreted the Act (as amended by Bill C-37), the legislation is unconstitutional on the ground that it violates section 15 of the Charter.

III. Applicable Legislation

A. *Citizenship Act*

[10] The relevant portion of the definition of "citizenship" under the Act is:

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;
[…]	[…]
(*f*) before the coming into force of this paragraph, the person ceased to be a citizen for any reason other than the following reasons and did not subsequently become a citizen:	*f*) qui, avant l'entrée en vigueur du présent alinéa, a cessé d'être citoyen pour un motif autre que les motifs ci-après et n'est pas subséquemment devenu citoyen :
(i) the person renounced his or her citizenship under any of the following provisions: […]	(i) elle a renoncé à sa citoyenneté au titre de l'une des dispositions suivantes : […]
(ii) the person's citizenship was revoked for false representation, fraud or concealment of material circumstances under any of the following provisions: […]	(ii) sa citoyenneté a été révoquée pour cause de fausse déclaration, fraude ou dissimulation de faits importants ou essentiels au titre de l'une des dispositions suivantes : […]
(iii) the person failed to make an application to retain his or her citizenship under section 8 as it read before the coming into force of this paragraph or did make such an application that subsequently was not approved;	(iii) elle n'a pas présenté la demande visée à l'article 8, dans ses versions antérieures à l'entrée en vigueur du présent alinéa, pour conserver sa citoyenneté ou, si elle l'a fait, la demande a été rejetée;
(*g*) the person was born outside	*g*) qui, née à l'étranger avant le

Canada before February 15, 1977 to a parent who was a citizen at the time of the birth and the person did not, before the coming into force of this paragraph, become a citizen;	15 février 1977 d'un père ou d'une mère ayant qualité de citoyen au moment de la naissance, n'est pas devenue citoyen avant l'entrée en vigueur du présent alinéa;

[11] What the Minister characterizes to be the limit on derivative citizenship introduced by Bill C-37 is found in subsection 3(3). Only paragraph 3(3)(*a*) is relevant to this appeal:

3. (3) Subsection (1) does not apply to a person born outside Canada	3. (3) Le paragraphe (1) ne s'applique pas à la personne née à l'étranger dont, selon le cas :
(*a*) if, at the time of his or her birth or adoption, only one of the person's parents is a citizen and that parent is a citizen under paragraph (1)(*b*), (*c.1*), (*e*), (*g*) or (*h*), or both of the person's parents are citizens under any of those paragraphs; or	*a*) au moment de la naissance ou de l'adoption, seul le père ou la mère a qualité de citoyen, et ce, au titre de l'un des alinéas (1)*b*), *c.1*), *e*), *g*) et *h*), ou les deux parents ont cette qualité au titre de l'un de ces alinéas;

[12] Subsection 3(4) is characterized by its heading to be a transitional provision which provides an exception to subsection 3(3):

3. (4) Subsection (3) does not apply to a person who, on the coming into force of that subsection, is a citizen.	3. (4) Le paragraphe (3) ne s'applique pas à la personne qui, à la date d'entrée en vigueur de ce paragraphe, a qualité de citoyen.

[13] It is paragraphs 3(7)(*d*) and (*e*) respectively that operated to confer citizenship on the appellants' paternal grandmother retroactive to the time she lost her Canadian citizenship and on Mr. Kinsel, retroactive to the date of his birth:

3. (7) Despite any provision of this Act or any Act respecting naturalization or citizenship that was in force in Canada at any time before the day on which this subsection comes into force	3. (7) Malgré les autres dispositions de la présente loi et l'ensemble des lois concernant la naturalisation ou la citoyenneté en vigueur au Canada avant l'entrée en vigueur du présent paragraphe :

[…]	[…]
(*d*) a person referred to in paragraph (1)(*f*) — other than a person described in paragraph (*c*) — is deemed to be a citizen under paragraph (1)(*f*) from the time the person ceased to be a citizen;	*d*) la personne visée à l'alinéa (1)*f*) autre que celle visée à l'alinéa *c*) est réputée être citoyen au titre de l'alinéa (1)*f*) à partir du moment où elle a cessé d'être citoyen;
(*e*) a person referred to in paragraph (1)(*g*) or (*h)* is deemed to be a citizen from the time that he or she was born;	*e*) la personne visée aux alinéas (1)*g*) ou *h*) est réputée être citoyen à partir du moment de sa naissance;

B. *Canadian Charter of Rights and Freedoms*

[14] As stated above, if this Court finds paragraph 3(3)(*a*) precludes the appellants from claiming citizenship under paragraph 3(1)(*b*), they argue in the alternative that this preclusion violates their equality rights under section 15 in a manner not saved by section 1 of the Charter:

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.

IV. The Delegate's Decision

[15] The delegate refused the appellants' applications for citizenship on the ground they did not meet the statutory requirements for citizenship under paragraph 3(1)(*b*) of the Act. In particular, the delegate found subsection 3(3) limits citizenship by descent to the first generation of progeny born abroad to Canadian citizens. Since the appellants were the second generation of Canadian-descendents born abroad, subsection 3(3) precluded them from claiming citizenship by descent.

V. The Federal Court's Decision

[16] After setting out the relevant facts, the Judge found the delegate's decision should be reviewed on a reasonableness standard. In coming to this conclusion, the Judge relied on Federal Court decisions *Rabin v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1094, [2010] F.C.J. No. 1366 at paragraphs 16 and 17 and *Jabour v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 98, [2013] 3 F.C.R. 640 at paragraphs 21 to 29 where reasonableness review was applied to a delegate's determination on the same issue. The Judge also relied on the fact that determining who is a citizen falls directly within a delegate's expertise and that, although important to Canadians, citizenship is not of central importance to the legal system as a whole.

[17] The appellants argued that because their father was granted citizenship retroactive to the date of his birth, history was "rewritten" such that the appellants were born to a Canadian citizen and, therefore, met the requirements of paragraph 3(1)(*b*) of the Act. In turn, this meant, the

appellants were already citizens when subsection 3(4) came into force and, as such, were insulated from the first generation cut-off.

[18] The Judge analyzed the relevant provisions of the Act and found that, notwithstanding the appellants' submissions, subsection 3(4) did not only apply to people born after April 17, 2009 when Bill C-37 came into force. There were two reasons for this conclusion. First, as set out in numerous legislative reports, the purpose of Bill C-37 was to preclude citizenship by descent after the first generation born abroad; the appellants' interpretation would frustrate this purpose. Second, the appellants' interpretation erroneously suggested their father's retroactive citizenship under paragraph 3(7)(*e*) was conferred earlier than their loss of eligibility under paragraph 3(3)(*a*). In the Judge's view, the following events all occurred simultaneously when Bill C-37 came into force:

- Mr. Kinsel became a citizen from the date of his birth;
- The appellants became entitled to citizenship; and
- The appellants' entitlement to citizenship was foreclosed by paragraph 3(3)(*a*).

[19] The Judge then referred to various Parliamentary reports and Citizenship and Immigration documents to conclude that paragraph 3(3)(*a*) was intended to cut-off citizenship by descent after the first generation born abroad, regardless of whether or not an applicant was born before 2009. Further, because the appellants did not argue before the delegate that paragraph 3(3)(*a*) was inconsistent with the United Nations' *Convention on the Reduction of Statelessness*30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, the Judge ruled she

would not consider it on judicial review. Given that the argument was not before her, in the Judge's view it was reasonable for the delegate not to consider it.

[20] Finally, the Judge found the appellants did not have standing under the Charter to challenge the alleged unconstitutionality of paragraph 3(3)(*a*) of the Act. The Judge reasoned that the appellants were relying on the alleged denial of their father's right to pass his citizenship on by descent. Since their father was not a party to this application, the appellants did not have standing to rely on the alleged violations of his rights. Moreover, since the appellants were not physically present in Canada, as non-citizens they could not avail themselves of the Charter.

[21] For these reasons, the Judge found the delegate's decision was reasonable and the Charter challenge was not well-founded. Accordingly, the Judge dismissed the application for judicial review.

VI. The Issues

[22] In my view, the issues to be determined on this appeal are:

1. What are the applicable standards of review?
2. Does paragraph 3(3)(*a*) of the Act, as amended by Bill C-37, preclude the appellants from receiving citizenship by descent?
3. If so, do subsections 3(3) and 3(4) of the Act infringe section 15 of the Charter?
4. If subsections 3(3) and 3(4) infringe section 15 of the Charter, is such infringement justified under section 1 of the Charter?

VII. What are the applicable standards of review?

[23] On an appeal from an application for judicial review in the Federal Court, this Court's role is to identify whether the Judge selected the correct standard of review and applied it correctly. In practice, this requires the reviewing court to step into the shoes of the lower court; the focus of this Court is, in effect, on the administrative decision (*Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 at paragraph 247; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45 and 46.

[24] As set out above, the Judge found that the delegate's interpretation of section 3 of the Act should be reviewed on the standard of reasonableness. In reaching this conclusion, the Judge did not have the benefit of the decisions of the Supreme Court in *Agraira* and *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895. Nor did she have the benefit of this Court's decision in *Kandola v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 85, [2014] F.C.J. No. 322. Indeed, *Kandola* was released after the hearing of this appeal. As a result, the parties were afforded the opportunity to make written submissions on the applicability of *Kandola* to this appeal. Those submissions have been received and considered.

[25] As in this appeal, *Kandola* concerned an appeal from the Federal Court on an application for judicial review of a decision. The decision under review was the decision of a delegate of the Minister of Citizenship and Immigration not to issue a citizenship certificate.

[26] In *Kandola*, this Court carefully considered the effect of *Agraira* upon prior jurisprudence. The Court concluded that as a result of *Agraira*, the determination of the applicable standard of review must begin from the premise that the reasonableness standard applies to the review of a citizenship officer's interpretation of paragraph 3(1)(*b*) of the Act. I agree, for the reasons given by the Court in *Kandola* at paragraphs 30 to 42. For the same reasons, I conclude that the presumption of reasonableness review applies to the delegate's interpretation of subsection 3(3) of the Act as well.

[27] However, the analysis does not end there as it is necessary to consider whether the presumption of reasonableness review is rebutted.

[28] In *Kandola*, the Court found this presumption could be quickly rebutted for a number of reasons, including the following:

- The absence of a privative clause.
- The nature of the question; namely, a pure question of statutory interpretation.
- The absence of any discretionary element in the decision.
- The absence of anything in the structure or scheme of the Act suggestive of the notion that deference should be accorded to the delegate on the question he or she had to decide.

[29] These factors are also present in this case.

[30] On the basis of *Kandola*, I am satisfied the presumption of reasonableness has been rebutted. The delegate's interpretation of the Act should be reviewed on the standard of correctness.

[31] In the event I am wrong in this conclusion and, as the Attorney General submits, *Kandola* should be distinguished, I rely upon the decision of the Supreme Court in *McLean*.

[32] In *McLean*, the Supreme Court considered the standard of review to be applied to a securities commission's interpretation of a limitation period contained in its home statute. Justice Moldaver (writing for the majority) observed that where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision-maker adopts a different interpretation, that interpretation will of necessity be unreasonable (*McLean*, paragraph 38).

[33] For reasons developed below, I have conducted the required textual, contextual and purposive analysis of the relevant legislation. I am satisfied that there is only one reasonable interpretation of the legislation.

[34] It follows that whether as a result of the rebuttal of the presumption of reasonableness, or as a result of the fact that there is only a single reasonable interpretation, this Court must interpret the relevant legislation and verify that the delegate's interpretation is consistent with that interpretation.

VIII. Does paragraph 3(3)(*a*) of the Act, as amended by Bill C-37, preclude the appellants from receiving citizenship by descent?

A. Applicable principles of statutory interpretation

[35] Whether the delegate's decision was correct depends on the interpretation of paragraph 3(3)(*a*) and subsection 3(4) of the Act.

[36] The parties do not take issue with the applicable principles of statutory interpretation.

[37] The Supreme Court has expressed the preferred approach to statutory interpretation in the following terms:

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

See: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at paragraph 29.

[38] The Supreme Court restated this principle in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 adding at paragraph 10:

> […] The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[39] Inherent in the preferred approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision at issue "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context the interpreting court aims to ascertain legislative intent, "[t]he most significant element of this analysis" (*R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 26).

B. Application of the principles of statutory interpretation

[40] I next turn to consider the required textual, contextual and purposive analysis needed to determine whether the delegate's interpretation of the Act was correct.

(i) Textual analysis

[41] Upon the coming into force of Bill C-37, Canadian citizenship was restored to the appellants' paternal grandmother (pursuant to paragraph 3(1)(*f*) of the Act). The restoration was retroactive to the date she lost her citizenship (paragraph 3(7)(*d*)). The effect of this was to deem Mr. Kinsel's mother to be a Canadian citizen at the time of his birth.

[42] As a result, upon the coming into force of Bill C-37, Canadian citizenship was also granted to Mr. Kinsel (paragraph 3(1)(*g*)). This grant was retroactive from the time Mr. Kinsel was born (paragraph 3(7)(*e*)).

[43] Paragraph 3(1)(*b*) of the Act is a long-standing provision which confers citizenship by descent. A person is a citizen of Canada if that person was born outside of Canada after February 14, 1977, and at the time of his birth one of his parents was a Canadian citizen. The appellants rely upon this provision to argue that because their father is now deemed to be a Canadian citizen from the time of his birth, they are Canadian citizens.

[44] In my respectful view, this ignores the effect of paragraph 3(3)(*a*) of the Act which came into force with the passing of Bill C-37. I repeat paragraph 3(3)(*a*) for ease of reference:

3. (3) Subsection (1) does not apply to a person born outside Canada	3. (3) Le paragraphe (1) ne s'applique pas à la personne née à l'étranger dont, selon le cas :
(*a*) if, at the time of his or her birth or adoption, only one of the person's parents is a citizen and that parent is a citizen under paragraph (1)(*b*), (*c.1*), (*e*), (*g*) or (*h*), or both of the person's parents are citizens under any of those paragraphs; or	*a*) au moment de la naissance ou de l'adoption, seul le père ou la mère a qualité de citoyen, et ce, au titre de l'un des alinéas (1)*b*), *c.1*), *e*), *g*) et *h*), ou les deux parents ont cette qualité au titre de l'un de ces alinéas;

[45] In my view, the text of paragraph 3(3)(*a*) is unambiguous. Mr. Kinsel became a Canadian citizen by operation of paragraph 3(1)(*g*). At the time of their births, the appellants' mother was not a Canadian citizen. Paragraph 3(3)(*a*) of the Act operates to limit the grant of citizenship by descent to the first generation born outside of Canada to a Canadian parent. This limitation applies to the appellants.

[46] The appellants argue that subsection 3(4) of the Act removes them from the application of paragraph 3(3)(*a*). Again, for ease of reference, subsection 3(4) provides:

3. (4) Subsection (3) does not apply to a person who, on the coming into	3. (4) Le paragraphe (3) ne s'applique pas à la personne qui, à la date

force of that subsection, is a citizen.	d'entrée en vigueur de ce paragraphe, a qualité de citoyen.

[47] I reject the appellants' argument. In my view, for the reasons that follow, subsection 3(4) does not apply to the appellants.

[48] I begin from the premise that prior to the coming into force of Bill C-37 the appellants were not Canadian citizens. For that reason, subsection 3(4) does not apply to them.

[49] It is significant that paragraph 3(3)(*a*) of the Act includes both paragraphs 3(1)(*b*) and 3(1)(*g*) as categories of parentage that are only able to bestow Canadian citizenship on the first generation of progeny born outside of Canada.

[50] Unlike paragraph 3(1)(*g*), paragraph 3(1)(*b*) has been in effect for many years. Paragraph 3(1)(*g*), and subsections 3(4) and 3(7) came into effect as part of Bill C-37. The result of this legislative scheme is that a child could not obtain Canadian citizenship by descent from a parent whose citizenship depended upon paragraph 3(1)(*g*) until after Canadian citizenship was granted to that parent. It follows that such a child's claim to citizenship under paragraph 3(1)(*b*) could only arise after the coming into force of Bill C-37. Put another way, notwithstanding the retroactive grant of citizenship to their father, the appellants could not have been citizens before Bill C-37 came into effect. They, therefore, fall within paragraph 3(3)(*a*) of the Act.

[51] Contrary to the appellants' submissions, by enacting subsection 3(4) Parliament intended to protect the vested rights of individuals who were already citizens when Bill C-37 came into force.

[52] It follows that I agree with the Judge's interpretation of the temporal effect of Bill C-37, as described at paragraph 18 above.

[53] In my view, the text of the relevant portions of section 3 considered above are precise and free of ambiguity. Therefore, their ordinary meaning should play a dominant role in the interpretive process. They support the delegate's conclusion that subsection 3(3) of the Act, as amended by Bill C-37, limits citizenship by descent to the first generation of progeny born outside of Canada.

[54] I next consider the relevant contextual factors.

(ii) Contextual analysis

[55] The appellants rely upon two other provisions of the Act as providing relevant context for the proper interpretation of paragraph 3(3)(*a*) and subsection 3(4) of the Act: subsection 5(5) and section 6.

[56] Subsection 5(5) states:

(5) The Minister shall, on application, grant citizenship to a person who	(5) Le ministre attribue, sur demande, la citoyenneté à quiconque remplit les conditions suivantes :

(*a*) is born outside Canada after the coming into force of this subsection;	*a*) il est né à l'étranger après l'entrée en vigueur du présent paragraphe;
(*b*) has a birth parent who was a citizen at the time of the birth;	*b*) l'un de ses parents naturels avait qualité de citoyen au moment de sa naissance;
(*c*) is less than 23 years of age;	*c*) il est âgé de moins de vingt-trois ans;
(*d*) has resided in Canada for at least three years during the four years immediately before the date of his or her application;	*d*) il a résidé au Canada pendant au moins trois ans au cours des quatre ans précédant la date de sa demande;
(*e*) has always been stateless; and	*e*) il a toujours été apatride;
(*f*) has not been convicted of any of the following offences: […]	*f*) il n'a jamais été déclaré coupable de l'une des infractions suivantes : […]
[Emphasis added.]	[Le souligné est de moi.]

[57] The appellants argue that subsection 5(5) provides for the protection of stateless persons only if they are born after Bill C-37 came into effect on April 17, 2009. They assert that, properly interpreted, Bill C-37 did not require protection for stateless persons born on or before the coming into force of the Bill because the Bill granted citizenship to second generation Canadians born abroad. Thus, the delegate's alleged misinterpretation of the Act is said to re-create the risk of statelessness because second-generation Canadians born abroad are denied citizenship.

[58] This argument must fail. The appellants have not shown that subsection 5(5) fails to satisfy Canada's obligations as a signatory to the *Convention on the Reduction of Statelessness* if

it only applies to those children born after April 17, 2009. In particular, they have not shown why Canada was obliged as a signatory to provide such protection with retroactive effect.

[59] The second provision relied upon by the appellants is section 6 of the Act:

6. A citizen, whether or not born in Canada, is entitled to all rights, powers and privileges and is subject to all obligations, duties and liabilities to which a person who is a citizen under paragraph 3(1)(*a*) is entitled or subject and has a like status to that of such person. [Emphasis added.]	6. Tout citoyen, qu'il soit né ou non au Canada, jouit des droits, pouvoirs et avantages conférés aux citoyens qui ont cette qualité aux termes de l'alinéa 3(1)*a*); il est assujetti aux mêmes devoirs, obligations et responsabilités, et son statut est le même. [Le souligné est de moi.]

[60] The appellants say that the delegate's interpretation violates this provision of the Act by denying their father the right, by virtue of his status as a Canadian citizen, to confer citizenship on the appellants. I agree this is a valid contextual factor to be weighed against the text and purpose of the legislation.

[61] There is also a third relevant contextual factor: the clause-by-clause analysis which accompanied Bill C-37 (Appeal Book, Volume 2 at page 243). In respect of paragraph 3(3)(*a*) of the Bill, the clause-by-clause analysis explained that subsection 3(3) limits citizenship to the first generation born to a Canadian parent abroad. Persons born outside Canada do not acquire citizenship by descent if their parent was also born abroad.

[62] In respect of subsection 3(4) of the Bill, the clause-by-clause analysis advised that the subsection clarified that, notwithstanding subsection 3(3), no one would lose their Canadian citizenship on the coming into force of the Bill, even if they were the second or subsequent

generation born abroad. This applies to protect second or subsequent generations of Canadians who held Canadian citizenship prior to the coming into force of Bill C-37.

[63] The clause-by-clause analysis is a relevant contextual factor that supports the interpretation reached under the textual analysis.

[64] Further, prior to the enactment of Bill C-37, a child born outside of Canada to a Canadian citizen after February 14, 1977 was entitled to citizenship. However, such a child lost their citizenship on attaining the age of 28 unless the child:

a. applied to retain his citizenship; and

b. registered as a citizen and either resided in Canada for at least one year immediately preceding the date of his application, or established a substantial connection with Canada

[65] Subsection 3(4) was intended to protect such second or subsequent generation Canadians born abroad who already had Canadian citizenship from losing it on the coming into force of Bill C-37.

[66] In my view, interpreting paragraph 3(3)(*a*) of the Act to limit citizenship by descent to the first generation of progeny born abroad when a parent holds citizenship under paragraph 3(1)(*g*) is consistent with the preponderance of the contextual factors.

[67] I next turn to the purposive analysis.

(iii) Purposive analysis

[68] The genesis of Bill C-37 was a report prepared by the House of Commons Standing Committee on Citizenship and Immigration entitled "Reclaiming Citizenship for Canadians: A Report on the Loss of Canadian Citizenship".

[69] The report contained a number of recommendations. Recommendation 4 urged that the Act be amended to provide that the following three classes of persons are Canadian citizens:

- Anyone who was born in Canada at any time, retroactive to the date of their birth. The only exceptions contemplated were for those persons born in Canada to an accredited foreign diplomat, and those persons who later renounced their citizenship as an adult.
- Anyone who was born abroad at any time to a Canadian mother or father, retroactive to the date of their birth, if they are the first generation born abroad. The only exception contemplated was for those persons who later renounced their citizenship as an adult.
- Anyone who became a naturalized Canadian citizen at any time. The only exceptions contemplated were for those who renounced their citizenship as an adult, and those who obtained their citizenship by false representation, fraud, or knowingly concealing material circumstances.

[70] To the extent Bill C-37 flowed from the Report of the Standing Committee, this recommendation reflects that one purpose of Bill C-37 was to grant Canadian citizenship to those born in Canada who lost their citizenship (other than by renunciation) and to allow those

formerly lost Canadian citizens to confer Canadian citizenship on their foreign born progeny, if the progeny was the first generation born abroad. The first generation born abroad were not to be able to bestow Canadian citizenship on their foreign born children.

[71] A second, more relevant statement of legislative purpose is found in the Legislative Summary prepared by the Library of Parliament, Parliamentary Information and Research Service in respect of Bill C-37 (Appeal Book, Volume 1 at page 197). Under the heading "Description and Analysis", the Summary noted:

> Bill C-37 amends the *Citizenship Act* in four main ways. It adds five new situations to the list defining who is a citizen. It provides for retroactive application of these new citizenship provisions. It precludes Canadians from passing down Canadian citizenship to their offspring born abroad after one generation. And it provides some relief for the stateless offspring of Canadians. Other provisions of Bill C-37 address various technical or housekeeping matters, including coordinating the coming into force of Bill C-37 with an Act adopted in June 2007 amending the *Citizenship Act* in relation to foreign adoptions.

[72] Under the heading "Citizenship by Descent Limited to First Generation", the Summary stated that "Bill C-37 precludes citizens from passing citizenship down to their children born abroad after one generation."

[73] The delegate's interpretation of the effect of Bill C-37 is consistent with these statements of purpose.

[74] At the very least, there is nothing in the purpose to suggest Parliament intended to exempt second generation descendants like the appellants from the one generation rule when they only received Canadian citizenship on the coming into force of Bill C-37.

[75] The appellants argue that the objects of Bill C-37 included the desire to solve the "lost Canadian" problem by restoring citizenship retroactively and to satisfy Canada's international obligations as a signatory to the *Convention on the Reduction of Statelessness*. They argue their interpretation is consistent with these objects.

[76] In support of the first object and the appellants' argument that they are entitled to citizenship because subsequent to the time of their births, their father was granted Canadian citizenship retroactive to the time of his birth, they rely upon a passage of the Summary found in Appeal Book, Volume 1 at page 198 under the heading "Retroactive Application of Citizenship Provisions".

[77] In my view, the appellants take the passage out of context. It contains a general statement as to why lost citizens required retroactive grants of citizenship. The Summary later clarified in significant detail that there was a one generation limit to grants of citizenship by descent to children born abroad.

[78] I have already dealt with the appellants' argument based upon the *Convention on the Reduction of Statelessness*.

[79] The appellants also point to documents generated by Citizenship and Immigration Canada, such as Operational Bulletin 102, that are said to contain passages which support their interpretation of the legislation. They submit that these passages should be taken as binding admissions against interest made by the Minister.

[80] I reject this submission for the following reason. Assuming, without deciding, that there are passages in Citizenship and Immigration Canada documents that support the appellants' position, it is well-established in the jurisprudence that such documents do not bind a court.

[81] For these reasons, interpreting paragraph 3(3)(*a*) of the Act to limit citizenship by descent to the first generation born abroad to Canadian citizens is consistent with the purpose of the legislation.

(iv) Conclusion of statutory interpretation analysis

[82] Having conducted the required textual, contextual and purposive analysis I am satisfied the delegate's interpretation of the legislation was either correct or, alternatively, the only reasonable interpretation. In any event, because the delegate's decision meets the higher standard of correctness, the standard of review applied does not affect the outcome of the appeal.

[83] It is, therefore, necessary to consider the arguments advanced by the appellants pursuant to section 15 of the Charter.

IX. Do subsections 3(3) and 3(4) of the Act infringe section 15 of the Charter?

[84] As described above, the Judge dismissed the Charter arguments on the basis that the appellants lacked standing to challenge the alleged unconstitutionality of the legislation.

[85] Both in their written and oral submissions, the appellants and the respondent advanced arguments on the issues of standing, as well as the application of sections 15 and 1 of the

Charter. For the following reasons, I prefer to deal with the merits of the appellants' contention that the subsections 3(3) and 3(4) infringe section 15 of the Charter.

[86] First, in my respectful view, the appellants' argument concerning the territorial application of the Charter was not well developed. This is an important issue that required fuller submissions, tied to all of the relevant jurisprudence.

[87] Second, it is a serious matter to invoke the Charter to challenge the validity of legislation enacted by Parliament. The important Canadian rights and freedoms enshrined in the Charter should not be devalued by ill-considered challenges devoid of a proper evidentiary foundation. For the two reasons that follow, I conclude that this is such a challenge.

[88] First, the appellants' Charter argument is not clearly articulated. The submissions may be described as sketchy, contained in six paragraphs of a 91 paragraph memorandum of fact and law.

[89] The analogous ground proffered by the appellants is dual citizenship. They argue that individual Canadians, such as their grandmother and father, historically found themselves discriminated against as being somehow suspect, less worthy members of society because they wanted or needed to be citizens of more than one country.

[90] However, in *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, 239 N.R.1, the Supreme Court discussed the criteria by which a ground of a

distinction is identified as being analogous to an enumerated ground. In the Court's view, section 15 of the Charter "targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion". "Constructively immutable" grounds are grounds that are "changeable only at unacceptable cost to personal identity" (paragraph 13).

[91] The Supreme Court has consistently described analogous grounds in such fashion. See, for example, *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61 at paragraph 335.

[92] As the appellants' representative conceded in oral argument, in the circumstances before the Court, dual citizenship is neither an immutable nor constructively immutable characteristic. The appellants are citizens of the United States who are fully able to apply for permanent resident status in Canada. Such status can lead to the grant of Canadian citizenship.

[93] Of equal importance is my second concern. To date, the most authoritative pronouncement as to what violates section 15 of the Charter is contained in *Quebec (Attorney General) v. A*. At paragraph 332 Justice Abella, writing for the majority on this point, observed that at the root of section 15 is awareness that certain groups have been historically discriminated against, and that perpetuation of this discrimination should be curtailed. State conduct that widens, not narrows, the gap between the historically disadvantaged and the rest of society based on an enumerated or analogous ground is discriminatory.

[94] A flexible and contextual inquiry is needed to determine if a distinction has the effect of perpetrating arbitrary disadvantage because of membership in an enumerated or analogous group. Evidence is required to establish elements such as historic discrimination or disadvantage, and that the impugned legislation perpetuates such discrimination or disadvantage.

[95] The appellants adduced no evidence to support the alleged violation of their equality rights. While each appellant and their father filed affidavits in support of the appellants' application, the affidavits are wholly bereft of evidence relevant to section 15.

[96] The appellants' affidavits are each half a page long and consist of four paragraphs which are confined to biographical information. The father's affidavit is 12 paragraphs long, contains biographical information, information with respect to the procedural background of this case and attaches as an exhibit his legal opinion, as an American attorney, as to why the delegate's decision is wrong in law.

[97] No other evidence was filed on the appellants' behalf.

[98] In sum, there is no evidence before this Court to establish the elements of a section 15 claim.

[99] For these reasons, I would dismiss the appellants' challenge under section 15 of the Charter. As I have found no violation of the Charter, it is not necessary to consider section 1.

[100] Before leaving this issue, I observe for completeness that because I chose not to deal with the issue of the appellants' standing to bring a challenge under the Charter, these reasons should not be seen to confirm or reject the Judge's analysis on the issue of standing.

X. Conclusion

[101] For these reasons, I would dismiss the appeal.

[102] I see no reason to depart from the principle that costs follow the event. Therefore, I would award the costs of the appeal to the respondent.

"Eleanor R. Dawson"
J.A.

"I agree.
Johanne Trudel J.A."

"I agree.
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-35-13
STYLE OF CAUSE:	HELEN JEAN KINSEL and BARBARA ELIZABETH KINSEL v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	DECEMBER 10, 2013
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	TRUDEL J.A. NEAR J.A.
DATED:	MAY 14, 2014

APPEARANCES:

William A. Kinsel	FOR THE APPELLANTS
Banafsheh Sokhansanj Phillipe Alma	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William A. Kinsel, Esq. North Vancouver, British Columbia	FOR THE APPELLANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT