Federal Court No. T-418-12

FEDERAL COURT

BETWEEN:

JACQUELINE SCOTT

Applicant

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AND THE MINISTER OF CITIZENSHIP, IMMIGRATION AND MULTICULTURALISM

Respondents

APPLICATION RECORD

SOLICITOR FOR THE APPLICATION

Straith Litigation Chambers
Per: James L. Straith and Joseph Spears
Ocean House (Pacific)
6438 Bay Street
West Vancouver, British Columbia
V7W 2H1
Telephone: 604.921.1122
Fax: 1.888.400.1754

SOLICITOR FOR THE RESPONDENTS

William F. Pentney
Deputy Attorney General of Canada
Per: R. Keith Reimer
Department of Justice Canada
Public Safety, Defence and Immigration
900 - 840 Howe Street
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Federal Court No. T-418-12

FEDERAL COURT

BETWEEN:

JACQUELINE SCOTT

Applicant

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HER MAJESTY THE QUEEN IN RIGHT OF CANADA AND THE MINISTER OF CITIZENSHIP, IMMIGRATION AND MULTICULTURALISM

Respondents

APPLICATION RECORD INDEX

TAB

1

FORM 301- Rule 301

T-418-12

In the Federal Court of Canada

JACQUELINE SCOTT

APPLICANT

AND

HER MAJESTY THE QUEEN IN RIGHT OF CANADA and

THE MINISTER OF CITIZENSHIP, IMMIGRATION and MULTICULTURALISM

RESPONDENTS

NOTICE OF APPLICATION

TO THE RESPONDENTS:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
MINISTER OF CITIZENSHIP AND IMMIGRATION
Department of Justice (Canada)

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Vancouver.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules

and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(Date)

Issued by: 'Sandra McPherson'

(Registry Officer)

Address of local office: Courts Administration Service

Federal Court

PO Box 10065

3rd Floor 701 West Georgia Street

Vancouver, BC

V7Y 1B6

To: HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Department of Justice (Canada)

900- 840 Howe Street

Vancouver, BC, V6Z 2S9

MINISTER OF CITIZENSHIP AND IMMIGRATION

Department of Justice (Canada)

900- 840 Howe Street

Vancouver, BC, V6Z 2S9

APPLICATION

This is an application for judicial review in respect of the decision made by the Minister of Citizenship, Immigration and Multiculturalism concerning the denial of Canadian citizenship to the Applicant Jacqueline Scott who has sought a Certificate of Canadian Citizenship pursuant to section 3(1)(d) or 3(1)(g) and, at the October 2009 request of the Minister, a separate application for grant of citizenship pursuant to section 5(4) of the *Citizenship Act* in January 12, 2010, which request was denied by a decision of the Minister dated January 26, 2012.

The Applicant makes application for, pursuant to s. 18.1 of the *Federal Court Act*, R.S.C. 1985, c. F-7:

1. An Order in the nature of *certiorari* to recognize the Applicant's status as a Canadian citizen by operation of section 3(1)(g) of the *Citizenship Act*.

2. An Order that would provide the Minister with the proper test to apply in this case wherein the Applicant seeks to have her existing Canadian citizenship recognized in both fact and law.

3. A Declaration that:

a) The Applicant is both in fact and law a Canadian citizen.

b) The Applicant's father was a Canadian citizen by fact or operation of law at the time of the Applicant's birth in 1945 and at the coming into force of the *Canadian Citizenship Act* 1946 and/or ;

c) That her status as a citizen is based upon the fact that her father was a Canadian citizen as that term was understood at the relevant time and the effect is to create the status of the Applicant's citizenship under section 3(1)(g);

d) A declaration that the Applicant's citizenship is an existing right based upon her father's status as a Canadian citizen which must not be given a narrow interpretation.

e) In the alternative, that section 3(1)(g) of the *Citizenship Act* R.S.C. 1985, c. C-29 contravenes section 15 of the *Canadian Charter of Rights and Freedoms* by adding date of birth to the discrimination based on the sex and marital status of her Canadian parent maintained by the reference at section 3(1)(d) to the former Act;

4. A writ of *mandamus* directing the Minister to issue a Certificate of Canadian Citizenship to the Applicant as she is both in fact and by operation of law a Canadian citizen and is entitled to all the benefits arising under the *Citizenship Act* by operation of law under section 3(1) (g) of the present *Citizenship Act* and/or any existing legislation that may be applicable.

5. In the alternative, a writ of prohibition that would preclude the Minister from refusing to recognize the Applicant's Canadian citizenship which is a matter of right.

6. Any further order or relief which this Honourable Court may deem just.

The grounds for the application are:

7. The Applicant states and the facts are that by both fact and operation of law she is a Canadian citizen. The Applicant was born in England on June 29, 1945, the natural daughter of James Ellis, born in Canada and serving overseas in the Canadian Army, and Winifred Edith Lucy, born and domiciled in the United Kingdom. Mr. Ellis was subsequently repatriated to Canada and demobilized. Under the terms of Order in Council P.C. 1945-858 (9 February 1945) and section 3 of *An Act to amend the Immigration Act and to repeal the Chinese Immigration Act*, S.C. 1947, c. 19, the Applicant was not permitted to travel to Canada until 1948 because of poor health. Her mother and the Applicant had accrued rights that survived the repeal of P.C. 1945-858 and arrived in Canada on January 24, 1948. The Applicant's parents were married in Toronto on May 21, 1948 and had a long marriage. By her parents' marriage the Applicant was legitimated retroactively from birth under the *Legitimation Act*, R.S.O. 1937, c. 216.

8. The Applicant resided continuously in Canada from her arrival in 1948 to 1972.

9. In 1972, she joined her husband in the United States and left Canada. In 2005, the Applicant became an American citizen by naturalization. She did so reluctantly and only because she needed a passport to travel with her husband.

10. The Applicant had made a previous request for proof of citizenship in 2004. This was denied in 2005, for the reason given, that she was born out of wedlock to a Canadian father and non-Canadian mother.

11. The Office of the Minister had made a request after inquiries to submit an application for citizenship in 2009. Two separate applications were submitted by the Applicant under section 5 (4) Application One) and section 12 of the *Citizenship Act* and section 10 of the *Citizenship Regulations* (Application Two).

12. The Respondent failed in Application Two to take a broad and liberal interpretation of the concept of Canadian citizenship that takes into account the legislative purpose of Bill-C37 that came into force on April 17, 2009 and section 3(1)(g) in particular, whose intent was to remove the unconstitutional effects of discrimination based on sex and marital status in the former Act.

The Respondent failed to recognize that:

13) the Applicant's father was a "citizen" in 1945 under prior legislation in force at the time of her birth;

14) under section 44(f) of the *Interpretation Act* 1985, the *Canadian Citizenship Act* 1946 shall not be held as new law but as a consolidation and declaration of the prior enactment;

15) Canadian citizenship was recognized prior to 1947 and a broad and liberal interpretation must be considered in the present day and modern context, including the *Canadian Charter of Rights and Freedoms*.

16) The Respondents erred in law in finding in the decision on the Application that:

a. Section 3(1)(g) of the *Citizenship Act* does not apply, given the clear intent of Parliament and the purpose of Bill-C37 that came into force on April 17, 2009;

b. The Applicant's citizenship does not derive from her father's status as a citizen at the time of her birth in 1945 based on the claim that the concept "Canadian citizen" did not exist before 1947;

c. Took a restrictive view of the term "Canadian citizen" as defined before 1947, not recognizing that:

i. in addition to its use in the *Immigration Act* for the purpose of border control, the term "citizen" has been used officially to give effect to various Census and Statistics Acts in every decade during the period 1911 to 1941, including instructions to census enumerators and proclamations published in the *Canada Gazette*; and

ii. the term "citizen" as used for the purpose of the census and statistics was to distinguish Canadian citizens from non-citizens for purposes not related to border control.

d. Failed to take into account the wartime Order in Council P.C. 1945-858, which created rights that survived the repeal of prior legislation.

e. Section 3(1)(g) of the *Citizenship Act* did not apply to her father and to her because the section was given a literal interpretation that ignored the purpose of the legislation and the clear intent of Parliament; and

f. Failed to recognize her existing status as a Canadian citizen, notwithstanding the fact that the legislative purpose of section 3(1)(g) is to remedy the unconstitutional effects of discrimination that arises through the reference at section 4(1)(d) to discriminatory provisions of the former Act.

17. Further, and in the alternative, section 3(1)(g) is unconstitutional because it adds discrimination based on a date of birth and marital status of parents, analogous to age to the discriminatory provisions of the former Act referred to by section 3 (1)(d). Applicant states and thus contravenes section 15 of the *Canadian Charter of Rights and Freedoms* in a manner that is not saved by section 1 of the Charter.

18. Such further and other such grounds as counsel may advise and this Honourable Court may permit.

This application will be supported by the following material:

19. The affidavit of Jacqueline Scott to be filed,

20. Other relevant documents with respect to the Applicant's application for citizenship not now in her possession.

The Applicant requests the Minister to send a certified copy of the following materials with respect to the decision made that is not in the possession of the Applicant but is in the possession of the Minister to the Applicant and to the Registry, including the complete

citizenship file and other documentary evidence that is held in the possession of Citizenship and Immigration Canada with respect to the Applicant's Application .

Dated at Vancouver the 23rd day of February 2012.

Counsel for the Applicant
James L. Straith
Straith Litigation Chambers
6438 Bay Street
West Vancouver
V7W 1E1
Telephone (604)921.1122
Email: Jaystraith@gmail.com

TAB

2

Federal Court  Cour fédérale

Date: 20120810

Docket: T-418-12

Vancouver, British Columbia, August 10, 2012

PRESENT: Roger R. Lafrenière, Esquire
Prothonotary

BETWEEN:

JACQUELINE SCOTT

Applicant

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA AND
THE MINISTER OF CITIZENSHIP,
IMMIGRATION AND
MULTICULTURALISM

Respondents

ORDER

UPON MOTION dated July 18, 2012, on behalf of the Applicant for:

(a) an order granting the Applicant an extension of time to file her Affidavit Number 1;

(b) the costs of this motion; and

(c) such further and other relief as this Honourable Court deems just;

AND UPON reading the motion record filed on behalf of the parties;

THIS COURT ORDERS that:

1. The Applicant is granted an extension of time, *nunc pro tunc*, to serve the Applicant's affidavit evidence in support of the application.

2. The Applicant shall file proof of service of the Applicant's affidavit evidence no later than August 20, 2012.

3. The time for service of the Respondents' affidavits and documentary exhibits and to file proof of service is extended to run from August 20, 2012.

4. Subsequent steps shall be taken within the time provided in Part 5 of the *Federal Courts Rules*, unless otherwise extended in accordance with Rule 7.

"Roger R. Lafrenière"
Prothonotary

TAB

3

Federal Court  Cour fédérale

Date: 20130220

Docket: T-418-12

Toronto, Ontario, February 20, 2013

PRESENT: **Roger R. Lafrenière, Esquire**
Prothonotary

BETWEEN:

JACQUELINE SCOTT

Applicant

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA AND
THE MINISTER OF CITIZENSHIP,
IMMIGRATION AND
MULTICULTURALISM

Respondents

ORDER

UPON reading the submissions of counsel for the Applicant in response to the Notice of Status Review dated January 21, 2013;

AND UPON noting the consent of the Respondents, by their solicitors, to the timetable proposed by the Applicant;

AND UPON concluding that the Applicant should not be visited with the consequences of her solicitor's failure to move the proceeding forward in a diligent manner;

AND UPON being satisfied that the application should be allowed to continue in light of the concrete steps proposed by the parties;

THIS COURT ORDERS that:

1. The application shall be allowed to continue as a specially managed proceeding.

2. The parties shall file a Joint Legislative Brief by February 22, 2013.

3. The Applicant shall serve and file the Applicant's Record by March 15, 2013.

4. The Respondents shall serve and file the Respondents' Record by April 15, 2013.

5. The Applicant shall serve and file a Requisition for Hearing no later than April 25, 2013.

"Roger R. Lafrenière"
Prothonotary

Federal Court  Cour fédérale

Facsimile Transmittal Form / Formulaire d'acheminement par télécopieur

TO / DESTINATAIRE(S):

1. Name / Nom : **K. JOSEPH SPEARS and JAMES L. STRAITH (West Vancouver, BC)**

Facsimile / Télécopieur : ~~(604)-921-1867~~ 1 888 400 1754

Telephone / Téléphone :

☐ As requested / tel que demandé

☐ Left voice message / suite au message vocal

2. Name / Nom : **R. KEITH REIMER, Department of Justice (Vancouver, BC)**

Facsimile / Télécopieur : **(604)-666-2639**

Telephone / Téléphone :

☐ As requested / tel que demandé

☐ Left voice message / suite au message vocal

3. Name / Nom :

Facsimile / Télécopieur :

Telephone / Téléphone :

☐ As requested / tel que demandé

☐ Left voice message / suite au message vocal

4. Name / Nom :

Facsimile / Télécopieur :

Telephone / Téléphone :

☐ As requested / tel que demandé

☐ Left voice message / suite au message vocal

FROM / EXPÉDITEUR :

BRYANA BOUCHIR, Registry Officer

Telephone / Téléphone : **(604) 666-3232**

Facsimile / Télécopieur : (604) 666-8181

DATE: Feb 20, 2013

TIME / HEURE : 3PM

Total no. of pages (including this page) / Nombre de pages (incluant cette page) : ____

SUBJECT / OBJET :

Court File No. / N° du dossier de la Cour : **T-418-12 and T-431-12**

Between / entre *Jacqueline Scott v HMTQ*

Enclosed is a true copy of **Order** / Judgment / Reasons of / Vous trouverez ci-joint une copie conform de l'ordonnance / jugement / motifs de :**Roger R. Lafrenière, Esquire**

Prothonotary

dated / date : **February 20, 2013**

COMMENTS / REMARQUES :

Please note that Rule 395 of the *Federal Courts Rules* has changed and the Registry will not be sending certified copies of decisions of the Court, unless a copy is requested by the party. If you do require a copy, please advise the Registry in writing.

Pursuant to section 20 of the Official Languages Act all final decisions, orders and judgments, including any reasons given therefore, issued by the Court are issued in both official languages. In the event that such documents are issued in the first instance in only one of the official languages, a copy of the version in the other official language will be forwarded on request when it is available.

Conformément à l'article 20 de la Loi sur les langues officielles, les décisions, ordonnances et jugements définitifs avec les motifs y afférents, sont émis dans les deux langues officielles. Au cas où ces documents ne seraient émis, en premier lieu, que dans l'une des deux langues officielles, une copie de la version dans l'autre langue officielle sera transmise, sur demande, dès qu'elle sera disponible.

TAB

4

Federal Court  Cour fédérale

Date: 20130322

Docket: T-418-12

Ottawa, Ontario, March 22, 2013

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

JACQUELINE SCOTT

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AND THE MINISTER OF CITIZENSHIP, IMMIGRATION AND MULTICULTURALISM

Respondents

ORDER

UPON THE MOTION in writing under Rule 369(1) of the *Federal Court Rules* by the Respondents;

AND UPON the consent of both parties;

THIS COURT ORDERS that:

1. Citizenship and Immigration Canada may transmit a supplementary certified tribunal record to the Registry and the parties pursuant to Rule 318 of the *Federal Court Rules* on or before March 21, 2013;

2. The time for the Applicant to serve and file the Applicant's Record is extended to Tuesday, March 26, 2013; and

3. The time for the Respondents to serve and file the Respondent's Record is extended to Friday, April 19, 2013.

"Judith A. Snider"
Judge

TAB 5

Court No. T-418-12

In the FEDERAL COURT

Jacqueline Scott

APPLICANT

And:
Her Majesty the Queen in Right of Canada and the Minister of Citizenship, Immigration and Multiculturalism

RESPONDENTS

Affidavit of Jacqueline Scott Number 1

I, **Jacqueline Scott** of 67 175A Street, Surrey, British Columbia make and say as follows:

1. I am the Applicant and have direct knowledge of the matter deposed to herein, except where stated to be on information and belief.

2. I have sought from the Respondents, a certificate of Canadian citizenship pursuant to section 3 (1) (d) and 3(1)(g) of the Citizenship Act

3. Attached hereto as Exhibit "**A**" is a true copy of the letter denying my request for citizenship dated January 26, 2012 and the decision I seek to judicially review.

4. I earlier had made a request for proof of citizenship in 2004. This was denied in 2005 for the reason that I was born out of wedlock to a Canadian father and a British war bride mother.

5. Out of respect for my parents, because of the stigma of being born/having a child out of wedlock, I did not pursue another application until after both my father and mother were deceased.

6. Upon my mother's death, I discovered she had disposed of all documents regarding my citizenship.

7. After discussions with representatives of the Respondents, I was asked in 2008 to make a further submission for citizenship by special grant under section 5(4). This application was denied in 2009 again for the reason that I was born out of wedlock.

8. Two applications were made for citizenship in 2010 at the request of the Minister's Office. One was for special grant of citizenship under section 5(4) and the other for citizenship certificate under section 12 of the Citizenship Act and section 10 of the Citizenship Regulations.

9. I was born on June 29, 1945 in England.

10. My father, James Ellis was born in Canada and was serving overseas in the Canadian Army. My mother Winifred Edith Lucy was born and domiciled in the United Kingdom at the time of my birth.

11. My father was subsequently repatriated to Canada just prior to my birth and demobilized from the Canadian Army.

12. In researching my file I learned and verily believe that under the terms of Order in Council P.C. 1945 – 858 (9 February 1945) and section 3 of an Act to amend the Immigration act and repeal the Chinese Immigration Act, S.C. 1947, c. 19, I was not permitted to travel to Canada until 1948 because of my poor health.

13. In preparation for my case, I obtained, through a search of the National Archives of Canada in Ottawa, Circular #78(B) issued September 3, 1948 to Immigration Officers, Atlantic District, under subject, "Canadian Citizenship Act – Ruling Status of Illegitimate Child Whose Father is Canadian Citizen" which is attached hereto and marked as "Exhibit B" to my Affidavit.

14. I arrived in Canada on January 24, 1948.

15. My parents were married on May 21, 1948.

16. I continuously resided in Canada from my arrival in 1948 to 1972.

17. In 1972, I joined my husband in the United States and left Canada.

18. In 2005 I became an American citizen by naturalization for the sole reason that I needed a passport to travel with my husband. I did so reluctantly.

19. I wish to obtain my Canadian citizenship and have filed this judicial review because I believe I am a Canadian citizen as a matter of fact and have always considered myself Canadian with Canadian parents.

20. I was not asked to make any further submissions concerning factual basis for my application for Canadian citizenship.

SWORN BEFORE ME at the City of)
West Vancouver, in the Province of)
British Columbia,)
This 24th day of May, 2012)

Jacqueline Scott

Jacqueline Scott

Jay Straith
Barrister and Solicitor
Straith Litigation Chambers
Ocean House (Pacific)
6438 Bay Street
West Vancouver, BC V7W 2H1
Tel: 604-921-1272 jaystraith@gmail.com

Citizenship and Immigration Canada
Citoyenneté et Immigration Canada
Case Management Branch
300 Slater St. 9th Floor
Ottawa, Ontario K1A 1L1

January 26, 2012

Proof File: 3745231

This is Exhibit "A" referred to in the affidavit of... Jacqueline Scott
sworn before me at... West Vancouver
this 24TH day of May 20 12
A Commissioner for taking Affidavits for British Columbia

Mrs. Jacqueline Scott
22291 N. 108th Avenue
Sun City, AZ
U.S.A. 85373

Dear Mrs. Scott:

This letter refers to your application, dated January 11, 2010, for a citizenship certificate (proof of citizenship) made under subsection 12(1) of the *Citizenship Act* (current Act) and section 10 of the *Citizenship Regulations*. In addition to filing this application for proof of citizenship, you concurrently filed an application requesting a discretionary grant of citizenship under subsection 5(4) of the current Act. The letter informing you of the decision made in respect of your s. 5(4) application has been sent together with this letter.

According to paragraph 3(1)(d) of the current Act, a person is a citizen if they were a citizen immediately before February 15, 1977. This declaratory provision preserves the status of every person who was, as of February 14, 1977, recognized as a citizen under the *Canadian Citizenship Act* (former Act). However, paragraph 3(1)(d) is not an authority for granting Canadian citizenship to those who did not already have that status when the current Act came into force on February 15, 1977.

You make a number of claims that you are a Canadian citizen, and are therefore entitled to be issued a certificate of citizenship. I will address each of your claims in turn.

The *Canadian Citizenship Act*, which was Canada's first citizenship legislation and has since been repealed, came into force on January 1, 1947. The former Act provided, in subparagraph 4(1)(b)(i), that a person who was born outside of Canada before that date (1947) was a natural-born Canadian citizen if their father, or in the case of a person born out of wedlock, their mother, was born in Canada.

According to your application form and the documents you have provided in connection therewith, you were born on June 29, 1945, in England; your father was born in Canada; and your parents married on May 21, 1948, in Canada. Your mother was born in England and became a naturalized Canadian citizen on April 4, 1955. You did not derive citizenship through your father, as you were born prior to your parent's marriage, and you did not derive citizenship through your mother as she did not become a Canadian citizen until 1955. Since you are not described as a natural-born Canadian citizen under subparagraph 4(1)(b)(i) of the repealed former Act, then you are not described as a citizen under paragraph 3(1)(d) of the current Act.

In your letter dated January 11, 2010, included with this application, you also claim to be described as a citizen under paragraph 9(1)(b) of the former Act. This paragraph states that a person is a Canadian citizen if that person "...immediately before the commencement of this Act was a British subject who had Canadian domicile....". "Canadian domicile" was defined under the former Act and required the person to have maintained a permanent abode in Canada for at least five years. Accordingly, in order to have a claim for citizenship under this provision it would have required you to have lived five years in Canada before the 1st day of January, 1947. In other words, you would have had to be living in Canada between 1942 and 1947 in order to have been recognized as a citizen under paragraph 9(1)(b) of the former Act. As you were born in 1945 in England and only entered Canada for the

first time in1948, you were not domiciled in Canada immediately before January 1, 1947 and were not recognized as a citizen pursuant to paragraph 9(1)(b) of the former Act.

You were admitted to Canada on January 24, 1948, as a landed immigrant. An application for the grant of a citizenship certificate under subsection 10(2) of the former Act was made on your behalf by your father on December 1, 1954. He was advised by letter dated April 4, 1955: "As the birth of your child has been legitimized through your marriage it will be necessary that you file an application for citizenship on her behalf under section 11(2)(b) of the *Canadian Citizenship Act.*" No such application was submitted and your mother later requested the return of fees paid in support of the 10(2) application. Paragraph 11(2)(b) provided for a discretionary grant of a certificate of citizenship to a person who was lawfully admitted to Canada for permanent residence and who, at any time in a province of Canada pursuant to the law of that province then in force had been legitimized, if the person legally recognized as the father of the legitimated person was a Canadian citizen. This section existed until 1977 when the current Act came into force. Had you been granted citizenship pursuant to the authority of the former Act, the authority provided under that Act to permit access to a grant of citizenship for legitimated persons, then you would have been described as a citizen under paragraph 3(1)(d) of the current Act. According to the information on file, your parents did not pursue an application for a grant of citizenship under paragraph 11(2)(b) on your behalf, and also withdrew their request for a grant of citizenship under subsection 10(2) of the Act. As a result, you were not granted citizenship under either of these provisions of the former Act.
I have also considered whether you are recognized as a citizen according to the recent amendments to the *Citizenship Act* (*An Act to amend the Citizenship Act, S.C. 2008, c. 14,* which came into effect on April 17, 2009). Having considered whether you are described as a citizen under any of these paragraphs enumerated under section 3, I find that you are not described as a citizen under any of these provisions. For example, I have considered whether paragraph 3(1)(g), , in theory, could apply to you. This paragraph describes persons who are citizens where "...the person was born outside Canada before February 15, 1977 to a parent who was a citizen at the time of the birth...". This paragraph, however, applies only to persons who had a parent who was a Canadian citizen at the time of their birth. At the time you were born in 1945, neither of your parents was a Canadian citizen. Before 1947, persons born in Canada, such as your father, were considered British subjects, as were you and your mother, since you were both born in England. Canadian citizenship status only gained legal recognition when the former Act came into force on January 1, 1947. Therefore, you are not described as a citizen under paragraph 3(1)(g), or any of the other paragraphs enumerated under section 3 of the current Act as amended.

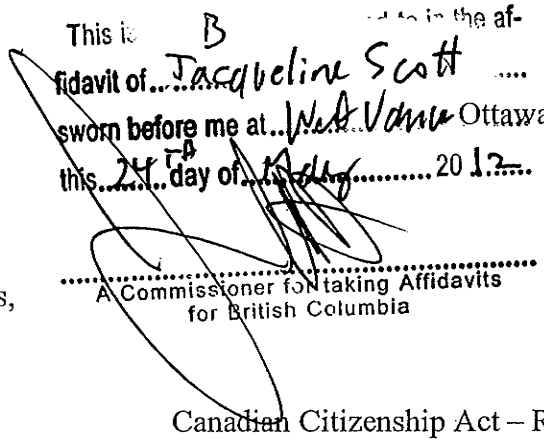
Finally, on the facts of your particular case, you appear to continue to have permanent resident status, and you might therefore consider applying for a grant of citizenship under subsection 5(1) of the current Act. Before deciding to pursue this course of action, I recommend that you consider whether you meet the requirements for such a grant, including the requirement to have accumulated at least three years of residence in Canada prior to the date you apply.
For the reasons outlined above, I am unable to approve this application for a citizenship certificate. I do understand that this decision will be a disappointment to you, and I regret to be the bearer of this news.

Sincerely,

Stella Holliday
Citizenship Analyst

DEPARTMENT OF MINES AND RESOURCES

Immigration Branch



Ottawa, September 3, 1948

Circular #78(B)
To Immigration Officers,
Atlantic District

Subject: Canadian Citizenship Act – Ruling
Status of illegitimate child whose
father is Canadian citizen

A ruling has been received from the Citizenship Branch concerning the status of an illegitimate child whose father is a Canadian citizen. The case upon which the ruling is based is as follows:-

> "A Canadian born citizen was living in the United States out of wedlock with an American born woman. They had an illegitimate child born in the United States. Subsequent to the birth of the child (three weeks thereafter) the parents were married. The father returned to Canada and his wife and child later applied for entry to join him. Our examining officer at the port of entry took the view that the child, having been born out of wedlock, came under Part 1, Section 4, (b) of the Canadian Citizenship Act, deriving citizenship from his mother. Therefore, the child was regarded as an immigrant, of American citizenship, and admitted as such. However, when the facts were submitted to the Citizenship Branch for review the Registrar furnished the following ruling:-
>
> I think it would be right and proper to recognize the child as a Canadian citizen. I note that the Marriage of the parents took place approximately three weeks after the date of birth of the child. We are of the opinion that a marriage under these conditions, wherein the father recognizes, by the fact of marriage, that the child is his own, and

that in all probability the laws of the Community in which the child is born would recognize it as legitimate, we should take the view that the child is the legitimate offspring of the father and in consequence should be recognized as a natural born Canadian".

The above is furnished for your information in the event that you have to deal with a case of this type.

(Signature illegible)
District Superintendent

Source: Libraries and Archives Canada
Canadian Citizenship Act and Regulations 1945-1952 (RG76, Volume 519, File 801544, part 9, 1947-49)
Microfilm reel C-10615
Transcribed 2012-05-02

TAB

6

Court File No: T-418-12

FEDERAL COURT OF CANADA

BETWEEN:

JACQUELINE SCOTT

APPLICANT

AND:

HER MAJESTY THE QUEEN BY RIGHT IN CANADA AND

THE MINISTER OF CITIZENSHIP, IMMIGRATION AND MULTICULTURALISM

RESPONDENT

APPLICANT'S MEMORANDUM OF FACT AND LAW

OVERVIEW

1. This is an application for judicial review of the decision by the Respondent to deny the proof of citizenship to the Applicant Mrs. Scott based upon the marital status of her parents at the time of her birth abroad, because she was born out of wedlock.

2. Mrs. Scott was born abroad before the present Citizenship Act came into force on February 15, 1977 (The Citizenship Act) and before the former and first Citizenship Act came into force on January 1, 1947. She was born abroad on June 29, 1945 out of wedlock to a Canadian father and non-Canadian mother in the United Kingdom.

3. The Applicant requests this Honourable Court to apply the standard of correctness. The Applicant has a right under the Charter of Rights and Freedoms to be recognized as a Canadian citizen by operation of law under either section 3(1)(d) or section 3(1)(g) of the Act. Both sections reference the former Act (the "*1947 Act*", *R.S.C. 1970, c. C-19*).

Citizenship Act, R.S.C., 1985, c. C-29 (in force from February 15, 1977)

***Canadian Citizenship Act*, R.S.C., 1970, c. C-19 (in force from January 1, 1947)**

4. The Federal Court has ruled in numerous cases not distinguishable from her own, that the Charter protects her right to equal treatment under the law.

5. Discrimination based upon the marital status and gender of the Canadian parent is a characteristic arising at birth analogous to the characteristics enumerated in section 15(1) of the Canadian Charter of Rights and Freedoms. Thus the Applicant's claim is not based upon retroactive application of the Charter because the claim is status-related and not event-related.

6. Section 3(1)(d) references the former Act in a manner that continues into the present unequal treatment of the Applicant by comparison to others born abroad both before and after the former Act came into force. The section offends the Charter by demeaning Mrs. Scott's value as a person, specifically because she was born out of wedlock.

7. Section 3(1)(g) came into force on April 17, 2008 together with a substantial number of new or revised provisions aimed to remedy the issue of "Lost Canadians" under review by the House of Commons Standing Committee on Citizenship and Immigration. Bill C-37 provided the benefits of citizenship to many persons who had never been citizens and restored citizenship to others. However, persons born abroad before 1947 who are denied citizenship by virtue of the marital status and gender of their Canadian parent were not included. Under-inclusion of a vulnerable or defined group is unconstitutional, unless justified by section 1 of the Charter.

8. The scheme of discrimination preferred by the Respondent cannot be justified under section 1 of the Charter because it is not rationally connected to any pressing national policy, evidenced by the fact that persons in relevant comparator groups are recognized as citizens. It can be considered a gap or oversight that results in an unjust and unfair result.

9. The Applicant requests this Honourable Court to consider the decision to deny her citizenship in the entire context of the former and current Citizenship Acts and the compliance of the decision with the Charter. The Applicant submits that by operation of the 1947 Act her father was deemed to be a citizen from the date of his birth in 1911 and by operation of section 3(1)(g) she is a citizen.

10. The Applicant requests that the impugned section be given a fair, large and liberal construction and interpretation that will bring the impugned section into compliance with the Charter by preserving the benefits to persons born after January 1, 1947 and extending those benefits to persons born before 1947 as best ensures the purpose of Parliament in enacting Bill C-37 [2008] of which this section is a part. Alternatively, section 3(1)(d) should be read in such a way as to eliminate discrimination carried forward based on marital status and gender of the Canadian parent.

11. The Relief sought is set out in the Notice of Application and below.

THE FACTS

12. The facts situation of the Applicant in this case is not in dispute: the Applicant was born before February 15, 1977 outside of Canada out of wedlock to a Canadian father and a non-Canadian mother. Mrs. Scott's date of birth was June 29, 1945.

13. In the context of this case, the relevant statute is the current Citizenship Act that came into force on February 15, 1977. Mrs. Scott impugns sections of the current Act that reference the former Act, not the former Act directly.

Context of the Applicant's fact situation

14. The context of the Applicant's fact situation was stated under the authority of the Respondent in a letter dated January 6, 2012 as follows:

> According to paragraph 3(1)(d) of the current Act, a person is a citizen if they were a citizen immediately before February 15, 1977. This declaratory provision preserves the status of every person who was, as of February 14, 1977, recognized as a citizen under the *Canadian Citizenship Act* (former Act). However, paragraph 3(1)(d) is not an authority for granting Canadian citizenship to those who did not already have that status when the current Act came into force on February 15, 1977.
>
> You make a number of claims that you are a Canadian citizen, and are therefore entitled to be issued a certificate of citizenship. I will address each of your claims in turn.
>
> The *Canadian Citizenship Act*, which was Canada's first citizenship legislation and has since been repealed, came into force on January 1, 1947. The former Act provided, in subparagraph 4(1)(b)(i), that a person who was born outside of Canada before that date (1947) was a natural-born Canadian citizen if their father, or in the case of a person born out of wedlock, their mother, was born in Canada.
>
> **Applicant's Affidavit, Exhibit "A". Letter from Citizenship and Immigration Canada, dated January 26, 2012, page 5 at para. 2**

15. The Respondent derives authority from sections 3(1)(d) and 3(1)(e) of the current Act to issue proof of citizenship to persons defined as citizens under the former Act. By the count of the 2012 Census, this authority preserves the citizenship status of about 14 million Canadians over the age of 35 who were citizens on February 14, 1977. Section 3(1)(d) preserves the status of persons born before and after January 1, 1947 when the former Act came into force. Section 3(1)(e) refers only to persons born on or after January 1, 1947.

16. By the count of the 2012 Census, the Respondent derives authority from section 3(1)(d) to recognize the citizenship status of about 4 million Canadians over the age of 65 who were citizens on February 14, 1977.

17. Section 3(1)(d) also confers upon the Respondent the authority to deny proof of citizenship to an unknown number of persons in the same fact situation as the Applicant. Section 3(1)(d) achieves this, not by way of grant but by operation of law.

18. The relevance of fact situation is revealed by reading section 3(1)(d) of the current Citizenship Act together with section 4(1)(b)(i) of the former Citizenship Act (the "1947 Act", R.S.C. 1970, c.19).

19. Section 3(1)(d) of the current Act reads as follows:

> **3.** (1) Subject to this Act, a person is a citizen if
> ...
> (*d*) the person was a citizen immediately before February 15, 1977;

20. Section 4(1)(b)(i) of the former Act reads as follows:

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

21. Section 44(h) of the Interpretation Act provides the Respondent with authority to read section 4(1)(b) of the former Act as unrepealed insofar as necessary to give effect to s.3(1)(d) of the current Act. Therefore the Respondent denies citizenship to the Applicant under section 3(1)(d) of the

current Act: the impugned section preserves the status defined by the former Act, whether as citizen or non-citizen.

> ***Canadian Citizenship Act*. R.9., c. 33, R.S.C. 1970, c.19, s. 4(1)(b)(i)**
>
> **Interpretation Act, R.S.C. 1985, c. I-21**

22. The Applicant was born June 29, 1945 in England and on that date

(a) She was not an alien;
(b) because a minor, she was not required to have been lawfully admitted to Canada for permanent residence;
(c) her father James Ellis was born in Canada and was not an alien;
(d) her mother was neither born or naturalized in Canada, nor was she a British subject domiciled in Canada;
(e) her parents were not lawfully married at the time of her birth abroad.

23. The Applicant notes the fact that Canadian military regulations did not permit the parents to marry in England during WWII.

24. The Applicant further notes that Parliament has not defined the term "parent" in the current Act. By common law maxim *expressio unius est exclusio alterius,* the definition of "child" as it appears in the Act still excludes persons born out of wedlock to an unmarried Canadian father:

> "child" includes a child adopted or legitimized in accordance with the laws of the place where the adoption or legitimation took place

25. The authority for issuing certificates of proof of citizenship to illegitimate children born abroad on or after January 1, 1947 is derived not from the Act, but from the *Citizenship Regulations*. The interpretation section of the *Regulations* has apparently changed the common law by declaring that an illegitimate child is no longer *filius nullius*:

> "parent" means the father or mother of a child, whether or not the child was born in wedlock, and includes an adoptive parent.
>
> **Citizenship Regulations, SOR/93-246, current to 2012-12-10 and last amended on 2012-11-01**

24. The Applicant does not intend to cast doubt upon Parliament's intention in 1976 to eliminate discrimination based on marital status of parents. However, Parliament's intention was not adequately conveyed by the wording of the Act itself. A serious gap in the 1976 Act was filled by a definition in the Regulations, not by amending the statute.

25. The Applicant will argue that Parliament's intentions were not adequately conveyed by the wording of Bill C-37 [2008], which also intended to eliminate discrimination based on marital status.

Factual situation of the Applicant in context

26. But for the singular fact that her parents were not married on the date of her birth, Mrs. Scott would be defined as a citizen under section 3(1)(d) of the current Act. As stated in the letter from Citizenship and Immigration Canada,

> Since you are not described as a natural-born Canadian citizen under subparagraph 4(1)(b)(i) of the repealed former Act, then you are not described as a citizen under paragraph 3(1)(d) of the current Act.
>
> **Applicant's Affidavit, Exhibit "A". Letter from Citizenship and Immigration Canada, dated January 26, 2012, page 5 at para. 5**

Relevant facts in context

27. Mrs. Scott was born on June 29, 1945 in England. Her father James Ellis was born in Canada in 1911 and was serving overseas in the Canadian Army. Her mother Winifred Edith Lucy was born and domiciled in England at the time of her birth. Shortly before she was born, her father was repatriated to Canada and demobilized from the Canadian Army.

28. Orders in Council under the Immigration Act provided for mother and child to travel and enter Canada as dependents of a member of the Canadian Forces. Owing to the illness of the child, their departure was delayed by Canadian immigration authorities and Mrs. Scott arrived in Canada with her mother on January 24, 1948. Her parents were married in Toronto on May 21, 1948.

29. Mrs. Scott resided in Canada continuously from her arrival in 1948 to 1972, when she joined her husband in the United States where he had found work. In 2005 she became an American citizen by naturalization for the sole reason that she needed a passport to travel with her husband. She did so reluctantly.

30. Mrs. Scott applied for a certificate of proof of Canadian citizenship under sections 3(1)(d) and 3(1)(g) of the Citizenship Act, and was denied such certificate by authority of the Respondent.

> **Applicant's Affidavit, Exhibit "A". Letter from Citizenship and Immigration Canada, dated January 26, 2012, page 5 at para. 2**

31. In 2004 Mrs. Scott requested proof of citizenship, denied in 2005 because she was born out of wedlock to a Canadian father and non-Canadian mother. Out of respect for her parents she did not pursue another application until after both her father and mother were deceased.

32. After discussions with Respondent's officers, in 2008 she applied for a grant under section 5(4), denied in 2009 by the Governor in Council because she did not satisfy the additional conditions specified by section 5.4. The conditions of section 5.4 are not imposed upon persons in a similar fact situation as the Respondent, those born abroad before 1947 in wedlock to a Canadian father or out of wedlock to a Canadian mother.

33. In 2010 at the request of the Minister's Office, she submitted two applications, one for grant of citizenship under section 5(4), and the other for a certificate of proof of citizenship.

34. In the letter from Citizenship and Immigration Canada cited above her Application for proof of citizenship was denied for the reason that she was born out of wedlock to a father who was born in Canada.

35. Mrs. Scott affirms that the staff of Citizenship and Immigration Canada behaved at all times in a courteous and conscientious manner and, to her knowledge, acted in accordance with rules issued by authority of the Respondent.

PART II – ISSUES

36. The Applicant seeks judicial review of the Respondent's decision that Mrs. Scott is not a Canadian citizen by operation of law, on the following grounds:

i) The Respondent infringes the Applicant's rights under s. 15(1) of the Charter by applying ss. 3(1)(d) and 3(1)(g) of the current Citizenship Act in a manner that ignores the Applicant's right to equal treatment under the law.

ii) The Respondent ignores the legislative purpose of Bill C-37 [2008] of which s. 3(1)(g) was a part.

iii) The Respondent ignores the legislative purpose of the 1947 Citizenship Act. Parliament intended that, on coming into force, the former Act would not diminish rights acquired by her father prior to 1947. Thus, the 1947 Act did not define her father to become a citizen. The Act defined her father to be a citizen. The legislative purpose of the Act was to deem

persons to be citizens from the date of birth in Canada, date of naturalization, or date of acquisition of domicile while a British subject.

The issues to be resolved are:

1. In respect to s. 3(1)(d):

   a) Does section 44(h) of the Interpretation Act 1985 require section 4(1)(b)(i) of the former Act to be read as unrepealed insofar as necessary to maintain or give effect to section 3(1)(d) of the current Act?

   b) Alternatively, does the decision of the Supreme Court of Canada in *Benner v. Canada* [1997] apply to S.C.R. 358, specifically that a claim based on status arising at birth is not held as retroactive application of the Charter?

   c) Does s. 3(1)(d) as read by the Respondent contravene section 15(1) of the Charter?

   d) If answered in the affirmative, is the inequity justified by section 1 of the Charter?

2. **In the alternative:**

   a) When Bill C-37 was enacted, did Parliament intend that s. 3(1)(g) would remedy inequities preserved by s. 3(1)(d), specifically all discrimination based on gender and marital status of the Canadian parent?

   b) In respect to the Applicant: Does s. 3(1)(g) define the Applicant as a citizen by virtue of the former Act, that Act having deemed her father on January 1, 1947 to be a citizen with effect from the date of his birth in Canada in 1911?

   c) If not, does the effect of s. 3(1)(g), when applied to the Applicant, contravene section 15 of the Charter by under-inclusion or otherwise?

   d) If so, is s. 3(1)(g) saved by s.1 of the Charter?

3. **Alternative Charter-compliant readings**

   a) If s. 3(1)(g) is unconstitutional as read by the Respondent, could an alternative reading of section 3(1)(d) or section 3(1)(g) bring the impugned sections into compliance with the Charter?

   b) The Applicant suggests but does not rely on the following plausible alternative reading of the relevant legislation.

In respect to the status of the Applicant's father: On the coming into force of the former Act, Mr. James Ellis did not become a citizen. He was deemed to be a citizen. Parliament's purpose in enacting the former Citizenship Act was to clarify and amend the law in a manner that would preserve status acquired prior to its enactment. Prior rights were not obliterated by repeal of the Naturalization Act and the Canadian Nationals Act.

Mr. Ellis was deemed to be a citizen from the date he acquired the quality of a citizen by birth in Canada. And by a true reading of s. 3(1)(g) by reference to the former Act, Mr. Ellis is deemed to have been a citizen in 1945 on the date of the Applicant's birth.

PART III — SUBMISSIONS

A. INTRODUCTION

37. It is common ground that Canadian citizenship is a creature of statute and has no meaning apart from statute, subject to the Constitution Act of which the Charter of Rights is a part.

38. This judicial review involves a thorny issue which has troubled both parliamentarians and the Federal Court for many years. Although some inequities that originated in the 1947 Citizenship Act have been remedied, the effects of discrimination based on marital status and gender continue into the present.

39. Despite the fact that the Charter right to equal treatment has been repeatedly declared by the Federal Court, the Respondent continues to deny citizenship to children of Canadian parents based on the wedlock status and gender of their Canadian parent. The target of this discrimination is a vulnerable group, those over the age of 65, persons born abroad to a Canadian parent before 1947.

40. The Federal Court has held that date of birth, wedlock status, and gender of the parent are analogous to characteristics enumerated in section 15(1) of the Charter. All persons are protected from infringement of section 15(1) rights, unless either justified under section 1 of the Charter or expressly exempted by the statute itself by reference to section 33 of the Charter.

***Canadian Charter of Rights and Freedoms*, ss. 1, 15(1), 33.**

41. Parliament has not invoked s.33 or the Charter to exempt the sections impugned by the Applicant. This signifies that Parliament intends that provisions of the Citizenship Act that are inconsistent with section 15(1) of the Charter are, to the extent of the inconsistency, of no force or effect.

42. In the case at bar, the onus is on the Respondent to justify infringement of the Applicant's rights by invoking section 1 of the Charter.

43. The Charter received Royal Assent in 1982 with a three-year grace period to allow Parliament to bring legislation into compliance with its provisions. Thirty years have passed and during that time provisions of the current Citizenship Act have been declared to be unconstitutional by the Federal Court. The Respondent continues to discriminate in ways that that the Federal Court has declared unconstitutional.

Sections of the current Citizenship Act 3(1)(d), 3(1)(e) and 3(1)(g)

44. Section 3(1)(d) operates by reference to the former Act to continue into the present discrimination against children born abroad before 1947 to Canadian parents based on marital status and gender. Formerly 3(1)(e) discriminated against persons born after January 1, 1947.

Constitutionality of s.3(1)(e)

45. Section 3(1)(e) formerly discriminated against persons born abroad after January 1, 1947, also based on marital status and gender as for persons such as the Applicant who were born before 1947. Section 5(1)(b) read 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;

46. A partial remedy for discrimination towards persons born abroad after January 1, 1947 was provided by Section 5(2)(b) of the current Act. However, the Federal Court declared sections 3(1)(e) and 5(2)(b) to be unconstitutional because they continued to maintain inequity based on the gender of the Canadian parent.

47. With the enactment of Bill C-37 in 2008, section 5(2)(b) was repealed and a new section 3(1)(g) was enacted to remedy discrimination against children born abroad of Canadian fathers based on the marital status.

48. Section 3(1)(g) is new law that is worded similarly to the repealed section 5(2)(b) grant. The section applies to all persons born before February 15, 1977, but only if the Canadian parent was a citizen at the time of the person's birth.

49. The Respondent claims that section 3(1)(g) cannot apply to the Applicant because she was born in 1945, at a time they claim her father had not yet become a Canadian citizen as defined in the 1947 Act. Therefore, the new section 3(1)(g) as read by the Respondent has the effect of denying citizenship to the Applicant by under-inclusion. Because the effect of the section is to deny a benefit to a vulnerable group, namely persons over the age of 65, such under-inclusion contravenes the Charter.

50. The fact that the former Act defined Mr. Ellis as a Canadian citizen by reason of his birth in Canada in 1911 is not in dispute.

Applicant's claims

51. The Applicant claims that the wording of sections 3(1)(d) and 3(1)(g) is not determinative of contravention of the Charter; the effect of the impugned sections is determinative in contravening the Charter. The effect of the sections is to deprive the Applicant of the benefits of citizenship. These benefits are enjoyed by persons who differ from her solely because of the gender and marital status of their Canadian parent.

52. Section 3(1)(g) has the effect of creating a new statutory basis for discrimination based on age, whether born before or after January 1, 1947.

53. The Respondent has added discrimination date of birth, analogous to age as a basis for denying her right to citizenship. The fact that age discrimination is derived indirectly is not determinative: the effect of the provision is to discriminate on the basis of age. The implication is that persons who are now over the age of 65 who were born out of wedlock are less worthy of Canadian citizenship than those in a similar fact situation under the age of 65. This fine distinction targets a more vulnerable age group than the group that is benefitted by the impugned provision 3(1)(g).

***Canadian Charter of Rights and Freedoms*, s. 15(1)**

B. LANDMARK CASE: *BENNER V. CANADA*

54. The landmark case is that of Mark Benner ("*Benner*"). The Court considered denial of citizenship based on the gender and marital status of his Canadian parent and additional conditions that applied to a person whose mother is the Canadian parent....

> The offending legislation was declared to be of no force or effect.
>
> ***Benner v. Canada* (Secretary of State), [1997] 1 S.C.R. 358, headnote.**

55. Mr. Benner was born abroad in wedlock to a Canadian mother and thus under s. 5(1)(b) of the former Act, Mr. Benner was not defined as a citizen by operation of law because his mother was married to an alien.

> ***Canadian Citizenship Act*, R.S.C. 1970, c. C-19, s. 5(1)(b)**

56. In 1988, he applied for a grant of citizenship under section 5(2)(b) of the current act.

> ***Citizenship Act*, R.S.C., 1985, C-29, s. 5(2)(b), repealed April 17, 2009.**

57. Section 5(2)(b) of the 1977 *Citizenship Act* provided that persons born abroad before February 15, 1977, would be granted citizenship on application if born of a Canadian father but would be required to undergo a security check and to swear an oath if born of a Canadian mother. The sources of the impugned discrimination were sections 3(1)(e) and 5(2)(b) and not the provisions that implemented the security check and oath taking.

58. Mr. Benner had applied for citizenship under section 5(2)(b) of the current Act and was denied citizenship because during the security check when the Registrar of Citizenship discovered that he had been charged with several criminal offences.

59. He applied to the Federal Court for an order in the nature of certiorari quashing the Registrar's decision and for an order in the nature of mandamus requiring the Registrar to grant him citizenship without swearing an oath or being subject to a security check.

60. His application was dismissed by the Federal Court, Trial Division and an appeal from that decision to the Federal Court of Appeal was also dismissed. The appellant was deported.

61. Mr. Benner's appeal raised the constitutionality of provisions of the *Citizenship Act*, S.C. 1974-75-76, c. 108, (R.S.C., 1985, c. C-29 (the "current Act")) that provided for different treatment of persons based on the gender of the Canadian parent.

62. The issues on appeal to the Supreme Court were:

- Whether applying s. 15(1) of the Charter involves illegitimate retroactive or retrospective application;
- If not, whether the treatment accorded to children born abroad to Canadian mothers before February 15, 1977 by the Citizenship Act offends s. 15(1);
- If so, whether the impugned sections are saved by s. 1 of the Charter.

Canadian Charter of Rights and Freedoms, ss. 1, 15(1)

63. The Court allowed Mr. Benner's appeal based on finding that ss. 3(1)(e), 5(2)(b), and 22 of the Citizenship Act, R.S.C., 1985, c. C-29, and s. 20 of the Citizenship Regulations, C.R.C., c. 400, violated, in whole or in part, s. 15(1) of the Canadian Charter of Rights and Freedoms insofar as they imposed more onerous requirements on those claiming Canadian citizenship based on maternal lineage than on those claiming Canadian citizenship based on paternal lineage.

64. The Court found that such contravention of the Appellant's right to equal treatment was not justified by s.1 of the Charter. It is submitted that Brenner applies to the case at bar.

Issue in *Benner* compared to issue at Bar

65. In the case at bar, the Minister's predecessor explained to the House of Commons Standing Committee that Bill C-37 would not address cases such as the Applicant's. Instead, the Minister would evaluate each application on a case by case basis and where appropriate use discretionary powers under s. 5.4 to grants of citizenship.

66. On May 29, 2007, the Honourable Diane Finley, Minister of Citizenship and Immigration, addressed the House of Commons Standing Committee on Citizenship. She considered the effect of what would become section 3(1)(g) and acknowledged that persons born before 1947 would not be included in the proposed remedy and would have to apply for a section 5.4 grant.

Notes for an Address by The Honourable Diane Finley, P.C., M.P., Standing Committee on Citizenship and Immigration "Main Estimates and Loss of Citizenship", Ottawa, Ontario, May 29, 2007. Reiterated in substance in a letter to Chairman Norman Doyle dated April 2, 2008.

67. The section 5.4 grant would impose additional conditions upon persons born abroad before 1947. Conferring a section 5.4 grant relies entirely upon discretion as to what constitutes "special and unusual hardship" or "services of an exceptional value to Canada". These additional conditions do not comply with the decision in *Benner* because they impose a burden and withhold a benefit.

68. Section 1 of the Charter guarantees the right to equal treatment under the law "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

69. To do by Royal Prerogative what should be done by law offends section 1 of the Charter because imposition of such vague and arbitrary grounds for denying citizenship is not justified in a free and democratic society. The law as it stands infringes s. 15(1) of the Charter. A remedy that imposed additional vague and arbitrary conditions is no remedy, but a subtle invention and evasion for continuance of the mischief.

Augier v. Canada

70. In *Augier v. Canada* ("*Augier*") the Trial Judge was guided by the reasoning in *Benner* that discrimination consists in imposing a burden or withholding a benefit.

> *Augier v. Canada* (Minister of Citizenship and Immigration), 2004 FC 613 [2004] 4 FCR 150 at para. 22. Book of Authorities, Tab 4.

71. The scheme proposed as part of Bill C-37 was designed to impose additional requirements of section 5.4 upon Applicants born before 1947 who would otherwise be denied a benefit. Based on the decision in *Benner*, this scheme was unconstitutional, unless justified by section 1 of the Charter. The Supreme Court decision in *Benner* stands for the principle that whether discrimination is by descent through the father or the mother is not determinative. In either case, discrimination is by gender. In *Augier*, the Federal Court reiterated the view that,

> [23] In my opinion, a reasonable person in circumstances similar to the applicant would find that paragraph 5(2)(*b*) of the current Act reflects a demeaning and prejudicial view of the applicant's worth, simply because he was born "out of" wedlock. (*Supra* at paragraph 23.)

C. REASONING IN *BENNER*

72. In *Benner*, at paragraph 55, the Court considered that the decision in *Andrews [1989]* applied to Mr. Benner and supported this approach by reference to Professor Driedger,

> ***Benner v. Canada (Secretary of State),* [1997] 1 S.C.R. 358 at para. 55, 56.**
> ***Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.**

73. Further, the reasoning in *Benner* was that discrimination visited upon the child based on the gender of the Canadian parent was unjust,

> ***Benner v. Canada (Secretary of State),* [1997] 1 S.C.R. 358 at para. 85.**

74. To summarize *Benner*, discrimination that arose from the former Act that continues into the present through the operation of current law may be subject to Charter review. The current Act infringed section 15(1) of the Charter because it denied access to benefits of citizenship on the basis of the gender of the applicant's Canadian parent. The applicant's own gender was not a factor, but the legislature could not circumvent the requirements of section 15 by imposing discrimination against the parent upon the child.

75. The impugned sections were declared to offend s. 15 and were not saved by s.1

D. RELEVANCE OF *BENNER* DECISION

76. In *Benner*, among the sections of the current Act that contravened the Charter were sections ss. 3(1)(e) and 5(2)(b). Both of these sections imposed additional conditions that infringed the Charter: a person's Canadian father had to have been married to the person's mother; a person's Canadian mother could not be married to a natural father who was an alien.

77. The fact is that the Crown did not comply with the decision in *Benner* until after the coming into force of Bill C-37, enacted in 2008. The impugned section 5(2)(b) remained in force until 2009, more than ten years after the decision in *Benner*. Discrimination remains in force for persons in

similar fact situations who were born before 1947. It is submitted that the reasoning in *Benner* applies to the case at bar.

Sections 3(1)(d) and 3(1)(e) compared

78. Section 3(1)(e) is similar to section 3(1)(d) that is impugned in the case at bar. The similarity is revealed by a comparison of the two sections.

***Citizenship Act*, R.S.C., 1985, c. C-29, ss. 3(1)(d) and (e).**

79. Section 3(1)(e) provides for persons born after January 1, 1947 to be entitled to citizenship under terms defined by reference to s.5(1)(b) of the former Act based on the gender and marital status of their Canadian parent. This section was declared in *Benner* to have no force insofar as it imposed a condition based on the gender and marital status of the Canadian parent.

80. Section 3(1)(d) preserves citizenship for persons born before 1947 based on gender and marital status of the Canadian parent as defined in s. 4(1)(b) of the former Act.

81. Comparison of the relevant sections of the former Act shows that ss.4(1)(b) and 5(1)(b) are symmetrical in that both sections discriminate on the basis of gender and marital status of the parents.

***Canadian Citizenship Act*, R.S.C. 1970, C-19, ss. 4(1)(b) and 5(1)(b).**

82. By reference to the former Act, the combined effect of ss. 3(1)(d) and 3(1)(e) is to preserve the citizenship status of approximately 14 million persons over the age of 35, as counted in the 2012 Census, those born before 1977

83. Alone, the reference by section 3(1)(d) preserves the status of about 5 million persons over the age of 65, those born before 1947.

84. An unknown number of persons over 65 have lived in Canada since infancy unaware that Citizenship and Immigration Canada does not consider them to be citizens because of the marital status and gender of the Canadian parent. They will not discover that they are not recognized as citizens until they apply for a passport or other benefits that rely on Canadian citizenship.

85. The Respondent derives power from ss. 3(1)(d) and 3(1)(e) to issue or deny certificates of proof of citizenship to persons born before February 15, 1977. These sections reference sections. 4(1)(b) and 5(1)(b) of the former Act both of which impose conditions based on gender and marital status of the Canadian parent.

86. The Applicant is denied citizenship based on s.3(1)(d) of the current Act by reference to s. 4(1)(b)(i) of the former Act. Based on the Supreme Court decision in *Benner*, she is entitled to be recognized as a Canadian citizen.

E. JURISPRUDENCE AFTER THE BENNER DECISION

87. Following *Benner*, several cases applied the rules for determining when the Charter would be applied retroactively and when not.

- Event-related cases, in particular those related to loss of citizenship by commission or omission of an act, would involve retroactive application of the Charter.
- By contrast, status-related cases arising from characteristics acquired at birth do not involve retroactive application of the Charter.

88. The cases cited below in support of Mrs. Scott's claim to citizenship are all based on marital status and gender of the Canadian parent, except for *Schachter v. Canada* ("*Schachter*").

89. In *Schachter*, the Supreme Court set out the analytical framework regarding remedies available to a Court under s. 52 of the Charter, including the case where a provision denied a constitutionally guaranteed benefit by under-inclusiveness.

***Schachter v. Canada*, [1992] 2 S.C.R. 679 at Part IV. A.**

Decision of Federal Court of Appeal in *McLean v. Canada* [2001]

90. The case of Lloyd McLean is relevant because he was born in wedlock in 1943 to a Canadian mother and alien father. He was denied citizenship under section 3(1)(d) of the current Act based on the gender and marital status of his Canadian parent.

91. The trial judge decided that Mr. McLean did not fall within the ambit of paragraph 5(2)(b) or paragraph 3(1)(d) of the *Citizenship Act* and the *Benner* case did not confer on him an entitlement to Canadian citizenship.

McLean v. Canada **(Minister of Citizenship and Immigration) 1999 CanLII 9040 (F.C.)**

92. Mr. McLean appealed. Counsel for the appellant argued before the Court that the appellant was a Canadian citizen pursuant to paragraph 3(1)(d) of the Act and that his application ought to have been treated accordingly.

93. The Appeal Court held, in a section headed "Decision", that the decision in *Benner* would have applied but for the fact that Mr McLean had confronted the law before the Charter had come into effect.

> ***McLean v. Canada*** **(Minister of Citizenship and Immigration)(C.A.) 2001 FCA 10 at para. 14.**

94. In the case at bar, Mrs. Scott was not confronted by nor did she engage the provisions of the Act until 2004, well after the Charter came into force. Thus, the decision in *McLean* applies in the case at Bar. Mrs. Scott is a citizen under section 3(1)(d) of the current Act.

Decision of Federal Court *Augier v. Canada [2004]*

95. In *Augier v. Canada* ("*Augier*") the Federal Court reviewed a decision by a citizenship officer to deny a section 5(2)(b) grant of citizenship to Mr. Augier because he was born out of wedlock, outside Canada in 1966, to a Canadian father and non-Canadian mother.

96. Mr. Augier had applied for proof of citizenship in 2002 and was refused on the grounds that citizenship for a person born out of wedlock prior to February 15, 1977 could be derived only from a Canadian mother. The Canadian Citizenship Act, 1970, s. 5(1)(b)(i) was not capable of being interpreted to cover children born out of wedlock to Canadian fathers and non-Canadian mothers.

97. The Trial Judge held that the Citizenship Act, 1985, s. 5(2)(b) infringed the applicant's Charter, s. 15 equality rights and that such infringement was not justified under Charter, s. 1.

> ***Augier v.Canada*** **(Minister of Citizenship and Immigration), 2004 FC 613 [2004] 4 FCR150, para. 23.**
>
> Section 5(2)(b) of current Act was declared unconstitutional as read by the Respondent but saved when read with words "or a father". The Application for citizenship was allowed.

98. Notwithstanding the fact that Mrs. Scott was born before the former Act came into force, the decision in *Augier* applies to the case at bar. Discrimination based on the gender and marital status is unconstitutional. Mrs. Scott is a Canadian citizen.

99. Following *Augier*, the window for s. 5.2(b) grant applications was reopened to process applications of those who had suffered discrimination during the previous 19 years since the Charter had come into force. The decision in *Augier* came on May 17, 2004. A revised Operations Bulletin number 10 added the words "or a father" on June 2, 2004. The grant window was reopened until August 14. 2004, less than two months.

100. However, the Citizenship Regulations, 1993, SOR/93-246 that came into force from December 23, 2007 continued to specify birth in wedlock as a condition for citizenship until April 16, 2009 when section 5(2)(b) of the Act was repealed.

Citizenship Regulations, 1993, SOR/93-246, ss.5(1) and 5(2)(b).

Cases distinguished

101. Several cases may be distinguished because they were event-related. By contrast, in the case at bar, the fact situation defines a status-based distinction that does not involve retroactive application of the Charter.

102. In the cases distinguished from the case at bar, the loss provisions of the former Act relied on the commission or omission of an action that was event-based and not protected by the Charter.

103. The most notable case that was distinguished by event-related circumstances was *Taylor v. Canada*. The Minister of Citizenship had appealed the decision of the Trial Court that Mr. Taylor was defined as a Canadian citizen based on the operation of law and in consideration of infringement of his Charter right.

104. The Federal Court of Appeal decided that it was immaterial whether or not Mr. Taylor had ever been a citizen, because he had come under the loss provisions of the former Act. The case was moot.

Taylor v. Canada (Minister of Citizenship and Immigration) (F.C.A.), 2007 FCA 349 at para.105.

105. The Court allowed the minister's Appeal and set aside the decision of the Trial Judge. The extensive discussion by the Appeal Court concerning jurisprudence in relation to citizenship was by way of *obiter dicta* and not part of the *ratio*. Thus the decision in *Taylor v. Canada* is no authority for the case at Bar.

Summary of Federal Court Decisions

106. The Supreme Court in *Benner* made a distinction between characteristics that arise at birth and events that occur during a person's lifetime.

***Benner v. Canada (Secretary of State),* [1997] 1 S.C.R. 358 at para. 85.**

107. Following the unanimous decision of the Supreme Court in *Benner*, minimal change was made to the legislation. Discrimination that was declared unconstitutional by virtue of sections 3(1)(e) and 5(2)(b) continued until 2004, when the Federal Court declared again in *Augier* that section 5(2)(b) was unconstitutional.

108. In *McLean*, the Appellant was born before 1947, yet the Court held that *Benner* applied.

109. The Federal Court of Appeal decided that s. 3(1)(d) was unconstitutional insofar as it referenced the gender and marital status requirements of the former Act.

***McLean v. Canada* (Minister of Citizenship and Immigration)(C.A.) 2001 FCA 10**

110. Nevertheless, Citizenship and Immigration Canada continued to discriminate based on the gender and marital status of the Canadian parent. Then in 2004, the Federal Court declared in *Augier* that s. 5(2)(b) was unconstitutional unless read so that citizenship could be derived from either the Canadian mother or Canadian father, regardless of their marital status at the time of birth.

111. Notwithstanding the decisions in *Benner*, *McLean* and *Augier*, Citizenship and Immigration Canada continues to discriminate against persons born abroad before 1947 based on the gender and marital status of the Canadian parent.

Discrimination against children of Canadian fathers in the 1976 Citizenship Act

112. Discrimination against Canadian fathers was part of government policy in designing the current Citizenship Act.

113. Canada's military law prohibited service personnel from marrying while serving abroad and most persons who served abroad with the Canadian Forces were men. Government policy was designed to limit access to children born out of wedlock to Canadian men while allowing access to children born in wedlock to Canadian mothers.

114. In proposing the second reading of Bill C-20, which was finally enacted as the Citizenship Act, the then Secretary of State the Honourable James Faulkner remarked that the new Act was meant to correct "five very important ways in which the present Citizenship Act discriminates against women".

115. The Royal Commission on the Status of Women (Commons Debates, May 21, 1975 at 5984) had recommended that sections 4 and 5 of the Act be amended "to provide that a child born outside Canada is a natural-born Canadian if either of his parents is a Canadian citizen."

116. After receiving second reading Bill C-20 was referred to the Standing Committee. Discrimination against children of Canadian women was cause for debate and concern. Sections 5(2)(a) and 5(2)(b) proposed grants by way of remedy.

> **Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts, Issue 36, February 27, 1976, 39: 6-7).**

117. Testimony in 1976 by the Director of Legal Services, Department of the Secretary of State, revealed to the Parliamentary Standing Committee the national policy motive for limiting the retroactive application of the current Act. The reason that the children of Canadian men continued to face discrimination was explained in plain words,

> "With the children it was a different situation. ... assuming that some of the members of the forces may have been active, and more active than others and they had children, they would have a right to have them declared Canadians and bring them into the country. That is just one thing. You do not know what you would be sweeping up..." [Emphasis added]
>
> **Testimony in 1976 by the Director of Legal Services, Department of the Secretary of State, House of Commons, Standing Committee on Broadcasting, Films and Assistance to the**

Arts, "Bill C-20, An Act respecting citizenship" in Minutes of Proceedings and Evidence, Issue No. 36 (Friday, February 27 1976] at 6.

118. Canadian attitudes have changed since 1976, when an officer of the Crown could refer in public to Koreans and Cypriots as sweepings who might be inadvertently admitted to Canada along with the valuable persons that the Immigration Department would want to let in.

119. Bill C-37 changed all that. On April 17, 2009, the Koreans and Cypriots mentioned in the Director's speech automatically became citizens under s. 3(1)(g) retroactive to the date of birth and will be provided with citizenship certificates upon substantiating their claims.

120. Not so with the children born out of wedlock to men who served Canada overseas in the Second World War, children born in Britain, Malta, Holland, Belgium and the USA. Children born to Canadian soldiers out of wedlock during World War II are treated differently from those born in Korea and Cyprus after 1947.

121. Different treatment would apply had Mr. Ellis fathered a second child in the UK in 1947. Had the Applicant's father the financial means, he might have returned to England during his daughter's illness. In this scenario, it is possible that a second child might have been born abroad out of wedlock on the first day of January 1947. Under section 3(1)(g), the Applicant's younger sibling would be issued with a certificate of proof of Canadian citizenship because she was born after midnight on December 31 1946. The relevant difference in the characteristics arising at birth and the basis for unequal treatment would be the ages of the children: the younger child would be recognized as a citizen while Mrs. Scott is denied citizenship. Such an outcome would be absurd for reasons similar to the case of case of *Jason Glynos* [1992] that Justice Décary found absurd, in which his brother had been issued with proof of citizenship but he had been denied citizenship, though differing only in age.

***Glynos v. Canada*, [1992] 3 C.F. 691, (F.C.A.)**

122. Canadian society has changed since 1976 in that both parliamentarians and the electorate now expect the Government of Canada to comply with the equality provisions of the Charter unless there are rational and pressing national reasons for limiting such rights.

123. Section 1 of the Charter exists to protect the national interest, but the onus is on the Respondent to justify denying citizenship to persons over the age of 65 merely on the basis of marital status of the Canadian parent.

Part D: BILL C-37 [2008], SECTIONS 5(2)(b) AND 3(1)(g)

124. In 2007 the House of Commons Standing Committee on Citizenship and Immigration considered the problem of the "lost Canadians".

125. In its fourth recommendation, the Committee set out its conclusions, including a recommendation that all children born to a "Canadian mother or a Canadian father" abroad in the first generation be recognized as Canadians.

> **House of Commons, Standing Committee on Citizenship and Immigration, Reclaiming Citizenship for Canadians: A Report on the Loss of Canadian Citizenship, Report 2, 2nd Session, 39th Parliament, December 2007.**

126. The Committee had received testimony following Recommendation 5 that some aged persons who had lived in Canada since infancy might not live long enough to enjoy the benefits of remedial legislation.

127. Bill C-37 brought citizenship benefits to many lost Canadians, but unfortunately, remedial legislation has not benefited those born abroad before 1947, either those who survived or those who have passed away since December 2007.

128. Section 3(1)(d) was not amended and section 3(1)(g) as read by the Respondent does not provide a remedy for persons born abroad before 1947. In effect, they are denied citizenship by under-inclusion in the remedies of Bill C-37.

Decision in *Schachter*: unconstitutionality by underinclusiveness

129. The Supreme Court of Canada considered the constitutional implications of under-inclusion in *Schachter v. Canada, [1992].* In the case of Mr. Schatcher, the Supreme Court considered

the case of a person who had already won his claim of infringement of section 15(1) not justified by section 1 of the Charter.

130. Mr. Schachter had succeeded in his claim that his wife was entitled to a benefit accorded to adoptive parents but denied to natural parents. The legislation impugned was under-inclusive. The only issue at appeal in the Supreme Court was the remedy.

131. The Supreme Court set out a rational analytic framework to guide the Federal Court in determining whether to strike down an unconstitutional provision, to read down the provision restricting its breadth, or to read in words to extend the benefits of a provision. The Supreme Court declared,

> Indeed, if the benefit which is being conferred is itself constitutionally guaranteed (for example, the right to vote), reading in may be mandatory.
> ***Schachter v. Canada*, [1992] 2 S.C.R. 679 at Part IV. A.**

132. The decision in *Schachter* was declaratory of the law in respect to the issues at bar. However, by the time the case reached the Supreme Court, the Government had amended the impugned legislation to bring it into compliance with Charter.

Relevance of *Schachter* to the case at Bar

133. At the heart of this conflict is an issue of constitutionality. Discrimination based on gender and marital status of parents is long-standing. Discrimination against children born out of wedlock to Canadian fathers and non-Canadian mothers or born in wedlock to Canadian mothers and alien fathers derives from naturalization laws in force since long before Confederation.

134. The analysis by the Supreme Court in *Schachter* provides guidance in the case at bar. Either section 3(1)(d) or 3(1)(g) could be read in a manner that would bring the current Act into compliance with Charter section 15.

135. Section 3(1)(d) could be read with the following words added,

> "For the purposes of this section a person born abroad denied citizenship under s. 4(1)(b) of the former Act by virtue of the marital status of the parents shall be deemed never to have been subject to that qualification."

136. Alternatively, section 3(1)(g) of the current Act could be read with the following words added,

> "For the purpose of this section, a person who was defined as a citizen on the coming into force of the former Act shall be deemed to be a citizen from the date of acquisition of the qualifications for citizenship as defined in the former Act."

Plausibility of deemed citizenship on the coming into force of the former Act

137. How plausible is it that Parliament intended to preserve some rights acquired prior to enactment of the 1947 Act? How plausible is it that Parliament intended all persons defined as citizens on the coming into force of the former Act to be deemed citizens from the date of acquisition of the qualifications for citizenship?

138. In several cases the Federal Court has relied on the principle stated by Professor Driedger,

> 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.
>
> **Elmer Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths Ltd., 1983),at p.87.**
>
> ***Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21**

139. The former Act may be read in the manner described by Elmer Driedger as refined by Ruth Sullivan's more specific criteria.

140. Professor Sullivan offers plausibility as the starting point for evaluating an interpretation, followed by "efficacy" and "acceptability".

> **Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths Ltd., 1994), by R. Sullivan, p. 131.**

141. When the 1947 Citizenship Act was enacted Parliament carried forward the ancient traditions concerning the rights of women to pass on their citizenship status and the rights of illegitimate children. These traditions were brought forward into a postwar society that had already changed. For example, under the Ontario Legitimation Act, on the marriage of her parents in 1948, the Applicant was legitimated by retroactive effect to the date of her birth in 1945.

> **Ontario Legitimation Act, 1921 c.53; R.S.O. 1927, c.187,**

142. Despite the fact that members of the Canadian Armed Forces were not permitted to marry and most of the children were illegitimate, the Government of Canada provided passage to Canada for partners and the children under a series of Orders in Council and an amendment of the Immigration Act. The Department of Veterans Affairs recorded the landing in Canada of 70,000 dependants.

> "Between 1942 and 1947, most of the 48,000 young women who had married Canadian servicemen, and their 22,000 children, were brought to Canada."
> ***Veterans Affairs Canada: The Second World War...Canadian War Brides.***

143. The terms of the Orders in Council had not provided for illegitimate children, yet they came in their thousands, their transport provided at government expense. Because the parents had not been permitted to marry, most War Brides were not married to the fathers of the children and most of the children had the common law status of *filius nullius.* They possessed landing cards that purported to make their landing lawful.

144. The 1947 Amendment to the Immigration Act illustrates the gaps between the words of the legislation and the purposes of Parliament. The Amendment defined dependents of members of the Armed Forces to include children born out of wedlock as "step-children" of such "member of the forces" (section 4(b)). However, section 4(c)) defined "member of the forces" as having "married outside of Canada while so serving", something prohibited by military law until the end of the war.

145. By a plain-words interpretation of the Orders in Council and the 1947 Immigration Act, the Government of Canada had acted *ultra vires* in landing most War Brides and most of the illegitimate children. Although few of the 22,000 children who landed in Canada under Government auspices were lawfully landed, after the 1947 Act came into force most of the War Brides and their children were granted Canadian citizenship.

> **An Act to amend the Immigration Act and to repeal the Chinese Immigration Act, 1947, 11 George VI. C. 19, s. 4(b)(ii), 4(c).**

146. The purpose of the Orders in Council was clear. Likewise the purpose of Parliament was clear when it enacted the 1947 Amendment to the Immigration Act. The fault was that the text of the statute and the text of the orders did not reflect the intentions either of Parliament or the Government of Canada.

Legislative purpose of the 1947 Citizenship Act

147. In like manner, gaps and inconsistencies in the text of the 1947 Citizenship Act serve to conceal rather than clarify the intentions of its proposers.

148. On Oct. 22, 1945, Paul Martin as Secretary of State first submitted Bill No. 20, respecting Citizenship, Nationality, Naturalization and Status of Aliens. The Bill expired at the end of the Parliamentary session, reintroduced in the next session and enacted as the 1947 Citizenship Act.

149. After elaborating on the technical anomalies and inconsistencies of the Naturalization Act, the Canadian Nationals Act and the Immigration Act, The Honourable Paul Martin set out the purpose of the government in presenting the Citizenship Act to Parliament:

> By this I mean that the Bill I am introducing is in reality a comprehensive amendment of the Naturalization Act in which, to avoid the old sources of confusion, all definitions, conditions and qualifications are in terms of a general status of 'Canadian citizen'. Further to remove difficulty, the Canadian Nationals Act will be and its whole purpose will be encompassed in this new Bill.
>
> ***House of Commons Debates* (April 2, 1946) at pp. 502ff. [Emphasis added.]**

150. This excerpt of Paul Martin's speech gives us a comprehensive view of the legal situation in 1945 and of the intention of the government: to consolidate and clarify pre-existing legislation. The government assured the public that no one would lose any rights acquired under prior legislation..

151. Section 50(1) of the former Act saved rights acquired prior to 1947, but did not specify what those rights are. Section 50(2) provided that a person who was qualified to be a citizen could become a citizen if not already a natural-born citizen. Only a non-citizen could "become" a citizen.

***Canadian Citizenship Act*. R.9., c. 33, s. 21 [1970].**

152. Section 50(2) stated that a person who had the qualifications for citizenship was defined "to be" a citizen. The determining conditions for citizenship were the same in English and French: "the qualifications for Canadian citizenship as defined in this Act" and "les qualités requises pour la citoyenneté canadienne définie dans cette même loi."

153. The section did not explicitly deem a person to be a citizen from the date of acquisition of the qualifications of a citizen. Parliament did not foresee that this would ever become an issue.

Nevertheless, the purpose of the legislation is obvious: to focus on qualifications and qualities required for citizenship, among which birth in Canada was the paramount quality.

154. When it was proposed that Newfoundland join Canada, terms were designed to reassure Newfoundland voters. In particular, Parliament clarified the issue of prior status by deeming British subjects domiciled in Newfoundland to be Canadian citizens from the date of acquisition of domicile in Newfoundland.

155. Sections 40(1) and 40(4) of the former Act, as consolidated in 1970, read as follows:

> 40. (1) A person who was a British subject on the 1st day of April 1949 and
> ... (c) had Newfoundland domicile on the 1st day of April 1949
> ...is a Canadian citizen.
> ...
> (4) A person who is a Canadian citizen by virtue of paragraph (1)(c), shall be deemed to have become a Canadian citizen on the day he acquired Newfoundland domicile.
>
> *Canadian Citizenship Act, R.S.C., 1970, c.19, s.40*

156. It follows from s. 40(4) of the former Act that in 1949 a British subject who had become domiciled in Newfoundland in 1911 was deemed to have become a Canadian citizen in 1911. A daughter of such a Newfoundlander born abroad in 1945 would be defined as a citizen by s. 3(1)(g) of the current Act.

157. Alternatively, the Federal Court could read down s.40(4) of the former Act to limit the effect of the deeming section to January 1, 1947. However, per *Schachter*, a condition for reading down a provision is that the plain words of such a provision should be explicitly contrary to national policy.

158. Deeming all Canadians to be citizens from the date of acquisition of the qualifications was not and is not explicitly contrary to national policy. On the contrary, it is plausible that Parliament intended the "deeming" of s. 40(4) to clarify the status of all persons who became citizens on the coming into force of the former Act. Further, it is plausible that the 1947 Act would not have been acceptable either to the public or to Parliament unless all persons were deemed to be citizens from the date of acquisition of the qualifications set out in the 1947 Act. Such an interpretation is consistent with the words of Paul Martin when he first introduced the citizenship Bill.

159. Section 22 of the Act (1970) also provides support for this interpretation. Section 22 guaranteed that non-natural-born citizens would have a like status to that of a natural-born Canadian citizen. By inference all citizens were deemed to be citizens from the date of acquisition of the required qualifications.

160. The evidence from sections 9(2), 22, 40(4) and 50 supports the view that Parliament intended persons defined as citizens on the coming into force of the former Act to be deemed citizens from the date of acquisition of the qualifications for citizenship.

Canadian Citizenship Act, R.S. 1952, c.33, s. 9(2)

Canadian Citizenship Act, R.S.C., 1970, c.19, ss. 22, 40(4), 50.

Efficacy and fairness

161. From the foregoing analysis, deeming Mr. Ellis a citizen from the date of his birth would fulfill the second and third steps in Sullivan's refined approach to *Driedger*, the result would promote the legislative purpose of the former Act as referenced by s. 3(1)(d) of the current Act and would be acceptable in that it would not be unjust or unfair.

162. A further consequence of this interpretation merits consideration. About four million Canadian citizens now over the age of 65 who were born in Canada before 1947 would be deemed to have been citizens from the date of their birth in Canada. This would include persons who served in the Canadian forces during World War II, both those who returned and those who lie in Canadian War Cemeteries in France, Belgium and the Netherlands.

PART IV - CONCLUSION AND ORDERS SOUGHT

CONCLUSION

163. The Applicant does not rely on the form of words of the current or former Citizenship Act. The Applicant relies on sections 1, 15(1) and 52(1) of the Charter.

164. Denial of her right to equal treatment under the law infringes s. 15(1) of the Charter and is not saved by s. 1.

165. However, so many others benefit from the impugned sections of the current Act that it would be appropriate to read words into one or other of the impugned provisions to preserve the benefits of others who now enjoy citizenship under the impugned sections and to extend those benefits to persons born abroad before 1947.

ORDER SOUGHT

166. Pursuant to s. 18.1 of the Federal Court Act, R.S.C. 1985, c. F-7, Mrs. Scott applies to the Federal Court for:

1. An Order in the nature of certiorari to recognize the Applicant's status as a Canadian citizen by operation of section 3(1)(g) of the Citizenship Act, R.S.C. 1985, c.C-29.
2. An Order that would provide the Minister with the proper test to apply in this case wherein the Applicant seeks to have her existing Canadian citizenship recognized in both fact and law.
3. A Declaration that:
   a) The Applicant is both in fact and law a Canadian citizen.
   b) The Applicant's father was deemed to be a Canadian citizen by fact or operation of law at the time of the Applicant's birth in 1945 and at the coming into force of the Canadian Citizenship Act 1946 and/or
   c) That her status as a citizen is based upon the fact that her father was deemed to be a Canadian citizen as that term was understood at the relevant time and the effect is to create the status of the Applicant's citizenship under section 3(1)(g);
   d) A declaration that the Applicant's citizenship is an existing right based upon her father's status as a Canadian citizen which must not be given a narrow interpretation.
   e) In the alternative, that section 3(1)(g) of the Citizenship Act R.S.C. 1985, c. C-29 contravenes section 15 of the Canadian Charter of Rights and Freedoms by adding date

of birth to discrimination based on the sex and marital status of her Canadian parent maintained by the reference at section 3(1)(d) to the former Act;

4. A writ of mandamus directing the Minister to issue a Certificate of Canadian Citizenship to the Applicant as she is both in fact and by operation of law a Canadian citizen and is entitled to all the benefits arising under the Citizenship Act by operation of law under section 3(1) (g) of the present Citizenship Act and/or any existing legislation that may be applicable.

5. In the alternative, a writ of prohibition that would preclude the Minister from refusing to recognize the Applicant's Canadian citizenship which is a matter of right.

167. Any further order or relief which this Honourable Court may deem just.

All of which is respectfully submitted this 26TH Day of March, 2013 at Vancouver, British Columbia.

James. L. Straith

K. Joseph Spears

Counsel for the Applicant

Jacqueline Scott

PART V — LIST OF AUTHORITIES

Appendix A — Statutes and Regulations

Canadian Charter of Rights and Freedoms, sections 1, 15, 33, 52.

Canadian Citizenship Act, S.C. 1946, c.15.

An Act to Amend the Citizenship Act, 1949, c.6

An Act to Amend the Citizenship Act, 1950, c.29

Canadian Citizenship Act, R.S. 1952, c.33,

An Act to Amend the Citizenship Act, 1953, c.23

Canadian Citizenship Act, R.S.C., 1970, c.19

Citizenship Act, S.C. 1974-75-76, c. 108.

Citizenship Act, R.S.C., 1985, c. C-29, ss. 3(1), 5(1)(b)

Citizenship Regulations, SOR/93-246, current to 2012-12-10 and last amended on 2012-11-01

Canadian Nationals Act, R.S.C. 1927, c. 2.

Immigration Act, 1910, R.S.C. 1927, c. 93.

1947 Act to Amend the Immigration Act 1946, *11 GEORGE VI. C. 19. (An Act to amend the Immigration Act and to repeal the Chinese Immigration Act, 1947, 11 GEORGE VI. C. 19.)*

Naturalization Act, R.S. 1927, C. 138 (An Act Respecting British Nationality, Naturalization and Status of Aliens, R.S. 1927, C. 138)

Ontario Legitimation Act, 1921 c.53; R.S.O. 1927, c.187

Order in Council P.C. 7318 (September 21, 1944).

Order in Council P.C. 858 (February 9, 1945).

Order in Council P.C. 4216 (October 11, 1946).

Appendix B — Authorities

Augier v. Canada (Minister of Citizenship and Immigration), 2004 FC 613. *Authorson v. Canada (Attorney General),* [2003] 2 S.C.R. 40.

Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358.

Glynos v. Canada, [1992] 3 F.C. 691, (F.C.A.)

McLean v. Canada (Minister of Citizenship and Immigration) **(1999), 177 F.T.R. 219.**

McLean v. Canada (Minister of Citizenship and Immigration), **[2001] 3 F.C. 127 (C.A.).**

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27 at para. 21

Taylor v. Canada (Minister of Citizenship and Immigration) (F.C.A.), 2007 ***FCA*** *349, [2008] 3 F.C.R. 324*

Veterans Affairs Canada: The Second World War...Canadian War Brides. Online: http://www.veterans.gc.ca/eng/history/secondwar/warbrides

Elmer Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths Ltd., 1983), at p. 87.

Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths Ltd., 1994), by R. Sullivan, p. 131

Related Materials

Notes for an Address by The Honourable Diane Finley, P.C., M.P., Standing Committee on Citizenship and Immigration "Main Estimates and Loss of Citizenship", Ottawa, Ontario, May 29, 2007. Online: Web site of Citizenship and Immigration Canada. Date Modified: 2007-02-26. <http://www.cic.gc.ca/English/department/media/speeches/2007/2007-05-29.asp>

The substance of this address was reiterated in a letter from the Honourable Diane Finley to Mr Norman Doyle, M.P., Standing Committee on Citizenship, House of Commons, dated April 2, 2008.

House of Commons Debates - Transcript of comments by the Honourable Paul Martin (Secretary of State) in the House of Commons on April 2, 1946 at pp. 502ff., when Bill No. 20, respecting citizenship, nationality, naturalization and status of aliens was reintroduced.

Testimony of the Director of Legal Services, Department of the Secretary of State. Canada, House of Commons, Standing Committee on Broadcasting, Films and Assistance to the Arts, "Bill C-20, An Act respecting citizenship" in Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts, Issue 36, February 27, 1976, 39: 6-7.

Veterans Affairs Canada: The Second World War...Canadian War Brides

<http://www.veterans.gc.ca/eng/history/secondwar/warbrides>