T.D. 18/93
Decision rendered on October 8, 1993

CANADIAN HUMAN RIGHTS ACT
R.S.C., 1985, c.H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

SHIRLEY (STARRS) MCKENNA

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

THE DEPARTMENT OF THE SECRETARY OF STATE

Respondent

DECISION

TRIBUNAL: Anne L. Mactavish

APPEARANCES: Prakash Diar and Helen Beck
Counsel for the Canadian Human
Rights Commission

Brian J. Saunders
Counsel for the Respondent

DATES AND PLACE
OF HEARING: June 7, 8 and 9, 1993
Ottawa, Ontario

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I THE COMPLAINT

Shirley (Starrs) McKenna is a Canadian citizen permanently resident in Dublin, Ireland. Mrs. McKenna resides with her husband, who has both Canadian and Irish citizenship. The McKennas have five children. The three McKenna boys are all Mrs. McKenna's biological sons, and are Canadian citizens, having all been born in Canada. The McKennas also have two adopted daughters, Mary Caragh, and Siobhan Maria. Caragh was born in Ireland on May 24, 1974, and was adopted by Dr. and Mrs. McKenna on May 20, 1975. Siobhan was born in Ireland on January 21, 1975, and was adopted on February 19, 1976. Both adoptions occurred in Ireland, in accordance with Irish law.

In 1979, the McKenna family decided to visit Canada. As a result, Mrs. McKenna made application to the Canadian Embassy in Dublin to obtain Canadian passports for her daughters, so as to avoid the visa requirements otherwise necessary for Irish citizens visiting Canada. According to Mrs. McKenna's testimony, she was advised by a

Canadian Embassy official in Dublin that the children were not eligible for Canadian citizenship. Mrs. McKenna was told that citizenship would only pass through the childrens' father, and that as the childrens' mother, she could not pass on her Canadian citizenship to her daughters. In addition, Mrs. McKenna was advised that as the children were adopted in Ireland, they were not eligible for Canadian citizenship as of right. Mrs. McKenna testified that she was not advised of any avenues open to her daughters to obtain Canadian citizenship, although it is apparent from her subsequent correspondence that she was, in fact, advised that in order to be eligible for citizenship the children would first have to be lawfully admitted to Canada as permanent residents.

Mrs. McKenna testified that she asked whether, had her biological children been born in Ireland, they would have been entitled to Canadian citizenship as of right. The Embassy official confirmed that this would be the case.

The McKenna family did visit Canada for three weeks in 1979, with the McKenna daughters presumably having first obtained the requisite visitor's visas. This was the only time that Siobhan and Caragh visited Canada.

Mrs. McKenna testified that she was annoyed by the fact that her adopted children were treated in a different manner than her biological children would have been. She felt this treatment to be very unfair. According to Mrs. McKenna, this was the only context in which her adopted children have been treated differently than her biological children.

In April 1986, Mrs. McKenna wrote to the Ombudsman at the Department of Justice in Ottawa, advising of the information that she had received in 1979, and asking if the policy regarding adopted children was still in effect. Mrs. McKenna's letter was responded to on May 12, 1986 by Catherine Lane, the Registrar of Canadian Citizenship. Ms. Lane's response was as follows:

I have for reply your letter of April 10, 1986 in which you commented concerning the fact that your adopted children are not eligible for citizenship in the same way as are your natural children.

Canada has had its own nationality legislation since May 22, 1868. From that date to the present, derivative nationality has occurred in two basic ways. One is through the principle of jus soli whereby nationality or citizenship is derived from the soil without regard to parentage and the other is through the principle of jus sanguinis whereby nationality or citizenship is derived through the blood of a parent without regard to the place of birth. At no time in Canadian nationality legislation has the law viewed the natural and adopted child in the same way. As an illustration, the provisions of paragraph 3(1)(b) of the current Citizenship Act which relate to the citizenship of children born outside Canada of a Canadian parent read as follows:

"Subject to this Act, a person
is a citizen if he was born
outside Canada after the
coming into force of this Act
and at the time of his birth
one of his parents, other than
a parent who adopted him, was
a citizen."

The Citizenship Act came into force on February 15, 1977. As is evident from the provisions of paragraph 3(1)(b) of that Act, the concept of citizenship or nationality being derived through the blood has been maintained. However, while this is so, the provisions of paragraph 5(2)(a) of the Act provide that the minor child of a citizen may be granted citizenship if he or she has been admitted to Canada for permanent residence. Should either or both your adopted children be under eighteen years of age they will be eligible to be granted citizenship once they have been admitted to Canada for permanent residence. If you decide to pursue this course of action, you may wish to contact the immigration authorities at the Canadian Embassy in Dublin.

In closing, while I realize that the information provided in this letter will not prove satisfactory to you, I am, nonetheless, bound by the requirements of the legislation.

Mrs. McKenna was not satisfied with this response, and accordingly filed a complaint with the Canadian Human Rights Commission (the "Commission"). Mrs. McKenna's complaint, dated March 30, 1987 states:

The Department of the Secretary of State of Canada has discriminated against me because of my family status by refusing to grant my two adopted daughters Canadian citizenship, contrary to section 5 of the Canadian Human Rights Act. My husband and I are Canadian citizens. We have three sons who were born in Canada. They both hold

(sic) Canadian and Irish citizenship. On our return to Ireland my husband and I adopted two daughters. We applied to the Canadian Embassy in Dublin for Canadian citizenship for our adopted daughters and were informed that they are not entitled to automatic Canadian citizenship, because we are not their natural parents. This was confirmed in a letter, dated May 12, 1986, from the Secretary of State of Canada.

Mrs. McKenna made one further attempt to gain citizenship for her daughters. On January 31, 1991 she wrote to the Honourable Gerry Weiner, the Minister of Multiculturalism and Citizenship. In her letter, Mrs. McKenna made application, on behalf of her daughters, for a grant of citizenship under the provisions of subsection 5(4) of the Citizenship Act, 1974-75-76, c.108. This subsection allows the Governor-in-Council, in his discretion, to direct the Minister to grant citizenship in cases of special hardship, or to reward services of an exceptional value to Canada. A response to Mrs. McKenna's application was received by the Commission as part of the conciliation process, and accordingly, was not entered as evidence in these proceedings. We know, however, from Mrs. McKenna's testimony that her daughters still do not have Canadian citizenship.

II THE CITIZENSHIP PROCESS

Citizenship can be acquired in one of three ways:

a) jus soli;
b) jus sanguinis; or
c) by naturalization.

Each of these concepts is embodied in the Citizenship Act. In the case of jus soli, citizenship is acquired by virtue of birth, literally "on the soil" of the country in issue. With jus sanguinis, citizenship is acquired through blood, ie: based upon the citizenship

of the biological parent. Finally, aliens may become citizens through a grant from the state, a process known as naturalization.

In the McKenna case, the McKenna sons were Canadian citizens, as a result of having been born in Canada to Canadians. Had they been born in Ireland, they would still have had Canadian citizenship as of right, through the principle of jus sanguinis. The McKenna daughters, however, not being the biological or "blood" children of the McKennas would not acquire citizenship as of right through jus sanguinis, but rather, could only acquire it through the naturalization process.

Prior to 1977, citizenship by jus sanguinis was primarily passed through the father, except in the case of children born out of wedlock. For children born after February 15, 1977, citizenship by jus sanguinis now passes through either the mother or the father.

Citizenship by naturalization is a right available to anyone who meets the requirements of the Citizenship Act. Section 5 of the Citizenship Act governs the naturalization process. Subsection 5(1) of the Act sets out the requirements for naturalization of adult aliens, which include requirements that the alien be lawfully admitted for permanent residency in Canada, have knowledge of one of the

official languages, have an adequate knowledge of Canada, and various other requirements. For minor aliens seeking naturalization, paragraph 5(2)(a) states:

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

(a) has been lawfully admitted to Canada for permanent residence, has not ceased since that admission to be a permanent resident pursuant to section 24 of the Immigration Act, and is the minor child of a citizen if an application for citizenship is made to the Minister by a person authorized by regulation to make the application on behalf of the minor child;

"Child" is defined as including a child adopted or legitimized in accordance with the laws of the place where the adoption or legitimation took place.

This subsection would have application to either the children of naturalized parents or the adopted children of Canadians.

III PERMANENT RESIDENCY

"Permanent resident" is defined in the Immigration Act, 1976, c.52 as one who has been granted landing but has not become a Canadian citizen.

There are three main classes of immigrants eligible for permanent resident status:

a) independent immigrants;
b) family class immigrants; and
c) humanitarian immigrants.

Independent immigrants are selected for the direct economic contribution they can make to Canada, and include skilled workers and business immigrants. These candidates are assessed on the basis of the contribution they can make, whether by way of specific job skills, business expertise, entrepreneurial abilities or investment potential, as well as on their language abilities, age and education. In addition, these candidates must also meet certain health standards, not have a criminal record and not be a threat to national security.

Family class members are admitted as a result of their relationship with a Canadian citizen, who in turn must be willing to sponsor the applicant. These candidates are not subject to selection criteria in the way that independent applicants are, and are entitled to permanent residency as of right, once all of the requirements of the Immigration Act are met. They must, however, still meet the health, criminality and security requirements of the legislation.

Humanitarian immigrants include convention refugees; that is, individuals who come within the definition of "refugees" as established by the United Nations, as well as other individuals who, although not convention refugees, may nonetheless be eligible for admission as permanent residents on humanitarian grounds.

Minor children may be sponsored as members of the family class category, provided they are under the age of 19 and are

unmarried, or are over the age of 19, and a full-time student, or suffering a health condition such that the individual is substantially financially supported by a parent. Adopted children may also be sponsored for permanent residency, subject to certain additional requirements:

a) the adoption must have taken place in accordance with the laws of the country where the adoption occurred;

b) the adoption must take place prior to the child obtaining the age of 19 (until February, 1993, the adoption was required to have occurred prior to the child attaining the age of 13);

c) the child welfare authority in the province of destination must state, in writing, that it has no objections to the

arrangements for the reception and care of the child (the "letter of no objection"); and

d) since February of 1993, the Immigration Act requires that the adoption not be for the purposes of gaining admission to Canada (the "adoption of convenience").

Neither adopted nor biological children seeking admission as permanent residents are subject to selection criteria and language requirements but both are subject to the health, criminality and security requirements of the Act.

Once the minor child is admitted as a permanent resident, an application may be made for citizenship. There is no specific waiting period required before such an application can be made, and citizenship may be granted very quickly once the application has been submitted. However, a prerequisite to eligibility for citizenship is the grant of permanent residence, which in turn requires the intent to reside permanently in Canada.

IV CITIZENSHIP AS A SERVICE

The Respondent contends that citizenship is a political status and as such is not a "service" within the meaning of s.5 of the CHRA. Section 5, which is the section under which this complaint is brought, states:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination. "Family status" is a prohibited ground of discrimination (s.3, CHRA).

The Tribunal in Le Deuff v. Canada (Employment and Immigration Commission), (1986) 8 CHRR D/3690 held that:
... the Canada Employment and Immigration Commission derives its authority from an act passed by the Parliament of Canada. The scope of this act is general and wherever the Government of Canada applies an act of general scope, it is providing a service to the public. (at p. D/3696)
This conclusion was upheld by a Review Tribunal ((1988) 9 CHRR D/4479 at p.4481).

In Anvari v. Canada (Canada Employment and Immigration Commission), (1988) 10 CHRR D/586 (Rev'd on other grounds, unreported, Federal Court of Appeal, April 16, 1993), it was held that the provision of a Governor-in-Council exemption from certain of the requirements for landed immigrant status under the Immigration Act was a "service" customarily available to the parties.

The Tribunal in Menghani v. Canada Employment and Immigration Commission et al., (1992) 17 CHRR D/236, held that the

denial of an application for landed immigrant status was the denial of a service within the meaning of s.5 of the CHRA.

Like the Immigration Act, the Citizenship Act is general in scope and, in applying the provisions of the Citizenship Act, the government of Canada is providing a service to the public.

In addition, for the purpose of determining its character as a service, there is no distinction, in the Tribunal's view, between

the status of being a landed immigrant, as in Menghani, and the status of being a citizen.

The Tribunal finds, therefore, that the granting of citizenship is a service within the meaning of section 5 of the CHRA.

V WHO IS THE PUBLIC?

It is the position of the Respondent that "the public" as contemplated by s.5 of the CHRA does not include foreign nationals living outside of Canada. The Respondent suggests that the wording of s.40(5) gives some indication as to who is intended to be the public, for the purposes of section 5 of the Act. Section 40(5), which will be dealt with in greater detail in Part X of this decision, delineates what complaints are to be dealt with under the CHRA, and limits the Commission to dealing with complaints arising out of practices occurring in Canada, in a number of defined circumstances. There is, as well, a limited power to deal with complaints relating to acts or omissions occurring outside of Canada, as long as the victim of the practice was a Canadian citizen or permanent resident.

A similar argument was advanced in Naqvi v. Canada Employment and Immigration Commission et al., (Unreported, TD 2/93, January 8, 1993). In Naqvi, the Tribunal concluded that "public", in the context of section 5 of the CHRA, was not limited by section 40 of the Act. In reaching this conclusion, the Tribunal relied on both the objectives of s.3 of the Immigration Act (which dealt with non-discrimination) and the broad interpretation to be given to the remedial provisions of the CHRA. (see Naqvi, p.40)
Since the decision in Naqvi, the Supreme Court of Canada has handed down its decision in Berg v. University of British Columbia et al, (Unreported, May 19, 1993). In Berg, the Supreme Court adopts the relational approach to defining the "public" advocated by Professor Greschner in her article: "Why Chambers is wrong: A Purposive Interpretation of `Offered to the Public'", (1988), 52 Sask. L. Rev. 161. Greschner posits that the proper construction of the term is to:

> ... interpret "public" in relational terms: the public is that group with which the offeror has a public relationship. (at p.182)

Greschner concluded that any service offered by a government would constitute a service customarily available to the public. (A similar conclusion was reached by the Federal Court of Appeal, in A.G. (Canada) v. Rosin, [1991] 1 F.C. 391 at pp.399-400).

In accepting the Greschner analysis, the Chief Justice stated, at p.35 of the Berg decision:

The case of defining a "client group" for a particular service or facility focuses the inquiry on the appropriate

factors of the nature of the accommodation, service or facility and the relationship it establishes between the accommodation, service or facility provider and the accommodation, service or facility user ...

In the context of the provision of citizenship, the "client group" is, by definition, non-citizens. The Tribunal therefore finds that Siobhan and Caragh McKenna are members of the public as contemplated by s.5 of the CHRA.

VI PROOF OF DISCRIMINATION

In complaints under the CHRA, the Complainant bears the initial onus of establishing a prima facie case of discrimination, after which, the burden shifts to the Respondent to establish a bona fide justification, on a balance of probabilities. (Holden v. Canadian National Railway Co., (1990), (Unreported, May 4, 1990), F.C.A.; O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536; and Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202).

A prima facie case has been defined as:

One which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from [the Respondent]. (O'Malley, supra at p.558)

In Andrews v. The Law Society of British Columbia, [1989] 1 S.C.R. 143, the Supreme Court of Canada defined "discrimination" as:

... a distinction, whether intentional or not but based upon grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available

to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group, will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. (at pp.174-5)

The Tribunal concludes that the Commission and the Complainant have satisfied the onus of establishing a prima facie case of discrimination on the basis of family status.

It should be noted that the complaint was framed on the basis of Mrs. McKenna's family status, that is being an adoptive parent. The case was presented and argued, however, on the basis of the status of the children.

The Respondent has not disputed that the status of being an adopted child constitutes "family status" within the meaning of s.3(1) of the CHRA.

It is conceded by the Respondent that biological children of Canadians, which children are born abroad, receive Canadian citizenship as of right, whereas children adopted abroad by Canadians do not. This appears to be a straightforward difference in treatment

arising solely out of the child's status as the biological or adopted child of a Canadian citizen.

The Respondent argues that the Citizenship Act does not discriminate between biological children and adopted children. All children, it is argued, whether subsequently adopted or not, take the citizenship of their biological parents. Thus, if either Caragh or Siobhan's biological mother were Canadian, they too would have Canadian citizenship. The Respondent conceded that, as a practical matter, dependent upon the adoption secrecy laws of the country in issue, the child subsequently adopted may be unable to establish Canadian parentage in such a situation.

The Respondent further argues that all children of non-Canadians, whether adopted or biological, are treated in the same fashion by s.5(2)(a) of the Citizenship Act, and receive preferential citizenship status over other foreign nationals by virtue of their membership in the family unit seeking naturalization.

While each of the Respondent's arguments are valid, insofar as they go, they fail to address the central issue in this case. That is, children adopted abroad by Canadians are required to go through the naturalization process in order to acquire Canadian citizenship, whereas the biological children of Canadians who are born abroad acquire Canadian citizenship as of right. The differential treatment is based solely upon the child's family status as an adopted child.

It is important to recall that, while there is an absolute right to citizenship once all the naturalization requirements have been met, in order to be naturalized, the child must first become a permanent resident of Canada. That is, the child must establish an intent to reside permanently in Canada. There is no comparable requirement on the biological children of Canadians. In addition, in order to obtain permanent residency, the adopted child must satisfy the health, security and criminality requirements of the Immigration Act. It is therefore possible that a seriously disabled adopted child would be unable to receive Canadian citizenship at all, being unable to satisfy the health requirements necessary to first obtain permanent residency in Canada.

VII BONA FIDE JUSTIFICATION

Notwithstanding the Tribunal's finding that the Respondent differentiated adversely against Siobhan and Caragh McKenna on the basis of their family status, it remains open to the Respondent to establish that there was a bona fide justification (BFJ) for this differential treatment.

The operative portion of s.15 of the CHRA states as follows:

15. It is not a discriminatory practice if

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse

differentiation and there is a bona fide justification for that denial or differentiation.

The essence of the Respondent's position is that the differential treatment of adopted children in the Citizenship Act is justified on the basis that, if adopted children were granted Canadian citizenship as of right in the same manner as the biological children of Canadians, the potential would exist for the abuse of the immigration system through the use of the adoption of convenience.

a) Evidence of Mildred Morton

Mildred Morton testified for the Respondent. Ms. Morton is the Acting Director of Immigration Policy with the Canada Employment and Immigration Commission. Ms. Morton described the increasing migration of people to the industrialized countries, and explained that, at present, there are only three immigrant receiving countries in the world - Canada, the United States of America and Australia. An "immigrant receiving country" is one which accepts foreign nationals for permanent residency and citizenship. Canada evidently accepts more immigrants, per capita, than either the United States or Australia. The immigration plan for 1991 to 1995 calls for the admission of 250,000 people each year.

According to Ms. Morton, in the 1970s the Immigration Department became very concerned that Canadian citizens were adopting foreign siblings, in Canada, who were in their late teens, for the purposes of avoiding the selection requirements of the immigration process. In 1974 the Province of Ontario recorded 90 such adoptions. In 1975, 900 such adoptions took place. For the period from May, 1977 to May, 1978 there were over 2,000 such adoptions.

In an effort to address this problem, the immigration legislation was amended in 1978 to require that the adoption create a genuine relationship of parent and child. Ms. Morton testified that, however, as it turned out, this latter requirement could not be used to investigate the bona fides of a particular adoption. According to Ms. Morton, judicial interpretation of the immigration legislation held that once the authorities were satisfied that the adoption itself was legal, it automatically created the necessary legal parental obligations, and the immigration authorities could not look behind the adoption to determine its bona fides. Although I was not provided with any judicial pronouncements to this effect, this testimony was not challenged by either the Commission or the Complainant.

Ms. Morton testified that the 1978 amendments introduced the additional requirement that the adoption take place prior to the child attaining the age of 13. According to Ms. Morton, it was thought that

this requirement would serve as a "blunt instrument", to use her phrase, to prevent most cases of adoptions of convenience.

Until February, 1993, there was no power in the immigration authorities to investigate the bona fides of an adoption. The only attempt to address the issue was that the application of the "blunt instrument" of the age 13 requirement. In February, 1993, the regulations under the Immigration Act were amended to address this

problem. The new regulations define an "adopted child" as excluding one adopted for the purpose of gaining admission to Canada. According to Ms. Morton, visa officers now have the power to determine whether or not an adoption is bona fide.

Ms. Morton acknowledged that, with respect to adoptions occurring outside Canada, there is still no power in the immigration authorities to consider whether the adoption is in the best interests of the child.

One of the requirements for an adopted child to receive permanent resident status is the receipt by the authorities of a "letter of no objection" from the child welfare authorities in the province of destination. Ms. Morton testified that, in practice, a number of provinces take the position that they have no authority to issue such a letter, and will simply issue letters setting out that position. While this is, apparently, sufficient to satisfy the requirements of the immigration authorities, Ms. Morton acknowledged that it did not assist in protecting the interests of the child.

b) Evidence of Joan Atkinson

Joan Atkinson is the Director of Litigation and Legal Issues at the Canada Employment and Immigration Commission. Ms. Atkinson testified that at any given time there are between 2,000 - 2,500 applications for landing in the immigration system, for children adopted abroad. In 1992, 1,043 children adopted abroad were landed in Canada. An additional 206 foreign children were landed in Canada in order to be adopted, in Canada, by the Canadian sponsor.

Historically, between 10 - 15 per cent of the children adopted abroad were denied admission. Ms. Atkinson testified that it is anticipated that this percentage will increase in the light of the February, 1993 amendments.

The greatest number of adopted children seeking landing come from Asia, Central America and the Caribbean, in that order. There are, evidently, serious problems with fraud and corruption in the adoption process in a number of countries. Disturbing evidence was led as to instances of children being removed from their natural parents for adoption purposes by force or subterfuge. Some such cases have been uncovered by visa officers investigating whether adoptions were carried out in accordance with local law.

Ms. Atkinson confirmed that, with the recent amendments, visa officers will now be able to look behind the adoption and determine the motive for the adoption.

c) Applicable Legal Principles

In Rosin, supra, the Federal Court of Appeal concluded, at p.408, that the terms bona fide occupational requirement (BFOR) or bona fide occupational qualification, (BFOQ) as used in s.15 of the CHRA, convey the same meaning as BFJ except that the former relates to employment situations, whereas the latter is used in other contexts. The Supreme Court of Canada has held that even where the BFOR (and by implication the BFJ) defence is applicable, the exception must be interpreted restrictively, so that the larger obligations of

the CHRA are not frustrated. As was stated by the Honourable Mr. Justice Sopinka in Ontario Human Rights Commission v. Zurich Insurance Company, (1992) 16 C.H.R.R. D/255:

One of the reasons such legislation has been so described [as being of a special nature] is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed. (at p.D/263)

As noted, the burden of proof upon the Respondent to establish a BFJ is the ordinary civil standard of a balance of probabilities (Etobicoke, supra, at p.208). The evidence necessary to support a defence of BFJ must be something more than "impressionistic". (Etobicoke, supra, at p.212)

The nature and extent of the BFOR/BFJ defence was recently given careful consideration in the case of Thwaites v. Canadian Armed

Forces, (Unreported, TD 9/93). In a thoughtful analysis of the law, the Tribunal pointed out that to succeed in establishing a BFOR/BFJ defence, a Respondent must satisfy both subjective and objective criteria. The Respondent must establish firstly, that the discriminatory requirement was imposed honestly and in good faith, and that the reasons for the requirement were "in the interests of sound business practice". (Zurich Insurance, supra, at p.D/264) The Respondent must also meet an objective standard by establishing that the rule in issue was reasonably necessary for the operation of the Respondent's enterprise. As the Tribunal in Thwaites said, "It is a criteria of necessity not convenience." (at p.29)

If a Respondent is able to establish that it is justified in treating two classes of people differently, the Respondent does not have unlimited discretion in the rules or practices that it adopts. Where discriminatory distinctions are justified, the application of the distinction must not discriminate more than necessary. To come within the exception created by s.15 of the CHRA, it must be established that there is no reasonable alternative to the impugned practice that would be less discriminatory and still achieve the legitimate operational objective of the Respondent. (Zurich, supra, at p. D/264, see also Brossard (Ville) v. Québec (Comm. des Droits de la Personne, [1988] 25 S.C.R. 279 at pp.311-2)

d) Analysis

The Respondent has led evidence regarding the problems created by the adoption of convenience. Indeed, counsel for the Commission conceded that adoptions of convenience exist, and that there are abuses of the adoption process world wide. The Tribunal is satisfied that to allow adopted children Canadian citizenship as of right would be to create an avenue for the circumvention of the Canadian immigration process. It is, therefore, reasonable and justifiable to require that, as a prerequisite to granting Canadian citizenship, it be established:

(a) that the adoption was carried out in accordance with local law; and

(b) that the adoption created a true parent/child relationship, and was not carried out for the purposes of gaining admission to Canada.

Under s.5(2)(a) of the Citizenship Act, however, in order for an adopted child to receive Canadian citizenship, the child must be granted permanent resident status under the provisions of the Immigration Act. This requires the formulation of an intent to reside permanently in Canada. In addition, a letter of no objection must be obtained from the child welfare authority in the province of destination. The child must have been adopted prior to the age of 19 (previously 13), and the child must meet certain health, criminality and security requirements.

No evidence was led to justify the imposition of the permanent residency requirement on adopted children. It was argued that the permanent residency requirement was an attempt to establish a link between Canada and the person claiming citizenship. However, as the legal child of a Canadian citizen in a bona fide adoption, where a genuine parent/child relationship exists, a comparable link exists with the adopted child as with the biological child born abroad.

With respect to the letter of no objection, the evidence of Ms. Morton made it clear that however well-intended the inclusion of this requirement may have been, in practice, in many cases, it serves no useful purpose whatsoever.

The age requirement (of 13) was described by Ms. Morton as a "blunt instrument" to try and address the problem of the adoption of convenience. An examination of the motivation for the adoption in each individual case will address this concern without the necessity for drawing automatic conclusions from the age at which the adoption took place. Indeed, it is hard to envisage a clearer example of the sort of generalized assumption contemplated in Andrews being drawn about a group, based upon personal characteristics, than that all adoptions of children over the age of 13 (or 19) are suspect.

No evidence was adduced by the Respondent to explain or justify why adopted children should be subjected for screening for citizenship purposes on the basis of health, criminality or security, whereas biological children need not. The Respondent has not, accordingly, discharged the onus on it in this regard.

The Tribunal is not, therefore, satisfied that these additional requirements imposed by the operation of s.5(2)(a) of the Citizenship Act in conjunction with the Immigration Act are reasonably justified within the meaning of s.15(g) of the CHRA.

VIII RETROSPECTIVITY

Counsel for the Respondent argues that, for citizenship purposes, Siobhan and Caragh's status crystallized either at birth or on adoption, both of which events took place prior to the coming into force of the CHRA on March 1, 1978. The argument is advanced that what is being sought is a retrospective application of the CHRA, that

is, to use the subsequent enactment of the CHRA to reverse a status which existed prior to proclamation of the legislation.

In support of this argument, the Respondent relies on the decisions of the Federal Court in Latif v. Canadian Human Rights Commission et al., [1980] 1 F.C. 687 and Benner v. Canada (Secretary of State), (1991) 43 F.T.R. 180, (Aff'd, unreported, Federal Court of Appeal, June 30, 1993).

The Commission states that the act of discrimination occurred at the time citizenship was applied for. No authority was cited to support the Commission's position.

In Latif, the complainant was dismissed from his employment with the Department of National Revenue in 1974. There was an allegation of discriminatory treatment, which was investigated by the Public Service Commission (the "PSC"). The PSC found some merit in Latif's allegations, and recommended, in May of 1978, that Latif be reinstated, and a lesser penalty substituted. The Department refused to act on this recommendation. Latif then filed a complaint with the Canadian Human Rights Commission, alleging that the Department's refusal to accept the recommendations of the PSC was itself discriminatory. The Commission refused to accept the complaint on the basis that the acts complained of took place prior to the coming into force of the CHRA. The Federal Court of Appeal upheld the position of the Commission, holding that the decision of the Department to adhere to its original decision could not be regarded, for the purposes of the CHRA, as a separate and additional discriminatory practice.

Writing for the Court, Le Dain J. concluded that to apply the CHRA to acts occurring before March 1, 1978 would be to give the legislation retrospective effect, which effect was not supported by the wording of the legislation.

In reaching this conclusion, however, the Court was careful to note that the discrimination in issue related to an event occurring prior to the enactment of the legislation, as opposed to a

characteristic or status acquired prior to the effective date of the legislation (see p.701).

Driedger, in The Construction of Statutes (2nd Ed.) summarizes the significance of this distinction as follows:

... the question then arises whether the facts that arose before the enactment bring it into operation, or only these that arose between the time of the enactment and the time of its application.

These past facts may describe a status or characteristic, or they may describe an event. It is submitted that where the fact-situation is a status or characteristic (the being something), the enactment is not given retrospective effect when it is applied to persons or things that acquired that status or characteristic before the enactment, if they have it when the enactment comes into force; but where the fact-situation is an event (the happening of or the becoming something), then the enactment would be given retrospective effect if it is applied so as to attach a new duty, penalty

or disability to an event that took place before the enactment. (see also Côté, The Interpretation of Legislation in Canada, at pp.123-125)

What gives rise to the discrimination in issue in this complaint is not the date of the childrens' birth or the date of their adoption, but the childrens' status as the adopted children of Canadian citizens. That status continued after the proclamation of the CHRA.

The Respondent also cited the decision of the Federal Court, Trial Division in Benner in support of its argument. The Benner case involved a challenge to section 5(2)(b) of the Citizenship Act under the provisions of the Canadian Charter of Rights and Freedoms, 1982. Section 5(2)(b) of the Citizenship Act confers Canadian citizenship, as of right, to children born abroad after February 15, 1977, in wedlock, to Canadian women. Children born in wedlock before that date only received citizenship as of right if their fathers were Canadian.

Benner was born outside Canada to a married woman prior to the operative date. Accordingly, he was subject to, inter alia, the criminality provisions of the legislation. Benner was, in fact, facing a number of serious criminal charges in Canada, as a result of which, his citizenship application was delayed. Benner argued that his section 15 equality rights were being infringed as he was not treated in the same fashion as a similarly situated child born after February 15, 1977.

Jerome J. concluded (at p.191) that the triggering event was Benner's date of birth, which event took place well before the enactment of the Charter. In the Court's view, there was no continuing discrimination as the allegedly discriminatory practice of differentiating between married and unmarried women, was rectified with the legislative amendment in February, 1977. The Court concluded that what was being sought was a retrospective application of the Charter, and dismissed the application.

After the hearing in the present case, and before this decision was rendered, the Federal Court of Appeal affirmed the Trial Division decision in Benner, with the Court handing down three separate sets of reasons. With respect to the reasoning of Jerome J. on the issue of retrospectivity, Marceau J. and Letourneau J. accepted the findings of the Trial Judge. Linden J., however, concluded firstly, that the discrimination against the children of married women caused by the earlier legislation had not been eliminated, as these children were still subject to more onerous requirements in order to obtain citizenship than were the children of married men. He also concluded that the operative date for considering the application of the Charter was the date on which the citizenship application was refused. As this occurred in 1989, there was no need to apply the Charter retrospectively. Linden J. concurred in the result, however, as he found that the discrimination was saved by s.1 of the Charter.

In the Tribunal's view, Benner is distinguishable from the present fact situation. In Benner, the individual's rights under the legislation depended upon his date of birth - that is, a specific fact or event antedating the enactment of the Charter. In the present

case, it is the status of being an adopted child and not the date of the children's birth or the date of adoption that triggers the differential treatment. It is not, therefore, necessary to give the

CHRA retrospective effect to find jurisdiction in this case.

IX SITUS OF DISCRIMINATION

Not everyone is entitled to claim the protection of the CHRA. Section 40(5) of the CHRA provides:

(5) No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice

(a) occurred in Canada and the victim of the practice was at the time of the act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada;

(b) occurred in Canada and was a discriminatory practice within the meaning of section 8, 10, 12, or 13 in respect of which no particular individual is identifiable as the victim; or

(c) occurred outside Canada and the victim of the practice was at the time of the act or omission a Canadian citizen or an individual lawfully admitted to Canada for permanent residence.

As noted by the Tribunal in Menghani, section 40(5) creates a nationality exception to the territorial principle of international law, that is the principle that statutes are presumed not to have extraterritorial application. In other words, the CHRA may have extraterritorial application where Canadian nationals are involved. To determine the applicable provision of s.40(5), it is therefore necessary to determine where the discriminatory practice took place.

With respect to the 1986 and 1991 applications, it appears that an argument could be advanced that the discriminatory acts in issue occurred in Ottawa. If that is the case, the Tribunal would not have jurisdiction, as clearly the facts of the case do not bring it within the provisions of either 40(5)(a) or (b), the two sections governing acts occurring in Canada. However, the original application in 1979 was made by Mrs. McKenna to the Canadian Embassy in Ireland, and that application was refused by Embassy staff. There is no evidence to suggest that the matter was ever referred to Ottawa for a decision.

In any event, counsel for the Respondent conceded in argument that if the service in issue was the granting of citizenship to a foreign national, that service was delivered in Ireland.

X VICTIMS OF DISCRIMINATION

The Respondent has challenged the jurisdiction of the Tribunal on the basis that, if there are victims of discrimination in

this case, those victims are Caragh and Siobhan McKenna, neither of whom meets the citizenship or residency requirements of s.40(5)(c) of the CHRA. The Respondent contends that the denial of citizenship to the McKenna children did not have a sufficiently direct and immediate impact on the Complainant, Mrs. McKenna, so as to constitute her a "victim" within the meaning of the Act.

In determining whether Mrs. McKenna qualifies as a victim, one must consider how the courts have interpreted the CHRA. The proper approach is summarized by the Supreme Court of Canada in Action Travail des Femmes v. C.N.R., [1987] 1 S.C.R. 1114, where Chief Justice Dickson stated:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that the statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. (at p.1134)

(See also O'Malley, supra, at p.546-7 and Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84 at pp.89-91.) In this light, courts and tribunals have recently had

occasion to consider a number of situations where human rights complaints have been filed by individuals not themselves the primary or direct victims of discrimination. In Re Singh, [1989] 1 F.C. 430, the Federal Court of Appeal stated:

The question as to who is the "victim" of an alleged discriminatory practice is almost wholly one of fact. Human rights legislation does not look so much to the intent of discriminatory practices as to their effect. That effect is by no means limited to the alleged "target" of the discrimination and it is entirely conceivable that a discriminatory practice may have consequences that are sufficiently direct and immediate to justify qualifying as a "victim" thereof persons who where never in the contemplation or intent of its author. (at p.442)

The proper construction of the term "victim" was thoroughly canvassed in Menghani. Menghani involved a complaint of discrimination on the basis of national or ethnic origin, filed by a Canadian alleging that he was denied the opportunity of sponsoring his brother for landed immigrant status, as a result of the discriminatory effect of the Respondent's documentary requirements. In concluding that the Complainant was, in fact, properly a "victim" within the meaning of s.40(5)(c) of the CHRA, the Tribunal concluded:

`Victim', therefore, simply means someone who has suffered the consequences of adverse differentiation whether direct or indirect. On this meaning, Jawahar may be the direct victim because of his status under the Immigration Act, or a victim indirectly because he suffered the consequences of an adverse discriminatory practice against his brother. (at p.D/252)

The findings in Re Singh and Menghani are consistent with existing human rights jurisprudence which has concluded that individuals may, indeed, suffer discrimination as a result of actions directed at third party parties, which actions are based upon personal characteristics of the third parties in question. (See for example, New Brunswick School District No. 15 v. New Brunswick (Human Rights Board of Inquiry), (1989) 10 C.H.R.R. D/6426, (N.B.C.A.); Tabar et al v. Scott and West End Construction Ltd., (1985) 6 C.H.R.R. D/2471; and Jahn v. Johnstone, (Unreported, September 16, 1977, Ontario, Eberts). Most recently, in Naqvi, supra, a Human Rights Tribunal

concluded that the Canadian relatives of a foreign national denied a visitor's visa to enter Canada were themselves victims of the discriminatory conduct.

Counsel for the Respondent pointed out that both Menghani and Naqvi were currently under judicial review. He also argued that these decisions had to be considered in the light of the recent decision of the Federal Court of Appeal in A.G. (Canada) v. Anvari, (Unreported, April 6, 1993). In particular, the Respondent relies upon the following statement of Mr. Justice Mahoney in Anvari:

The Immigration Act is replete with provisions which not only permit but require that adverse differentiation be made in relation to individuals on grounds of national origin; its provisions also require adverse differentiation on grounds of age, marital and family status as well as disability. What saves the Commission the necessity of constantly supervising the Act's administration is the limitation of CHRA s.40(5) on its authority to deal with complaints of occurrences outside Canada by persons not entitled to enter Canada. The Act is about little else than discriminatory practices and, accepting that the quasi constitutional CHRA is paramount, in circumstances where the Commission has jurisdiction to investigate, those discriminatory practices have to be justified as provided in paragraph 15(g). (at p.4)

The Tribunal does not see how this assists the Respondent.

While the Court in Anvari specifically addresses the limitation on the jurisdiction of the Canadian Human Rights Commission contained in s.40(5) of the CHRA, it does not consider the type of "derivative" complaint before this Tribunal.

Accepting that one need not be the primary or direct victim of discriminatory conduct in order to claim the protection of the CHRA, it is nonetheless clear that not everyone affected, however incidentally, by a discriminatory practice will be considered a

"victim". The difficulty lies in drawing the line between those who may or may not be considered victims.

As previously noted, in Re Singh, Mr. Justice Hugessen, speaking for the Federal Court of Appeal articulated the test as requiring:

... consequences which are sufficiently direct and immediate to justify qualifying [the complainant] as a victim ...
The limitation on who may be considered a victim was also considered by the Tribunal in Menghani, with the Tribunal attempting to articulate indicia, in the immigration context, to assist in the determination of whether or not there was sufficient proximity between the complainant and the discriminatory practice to constitute the complainant as a victim. The Tribunal stated, at p. D/253:

In the opinion of the Tribunal, the Singh case should not be read to limit potential victims to only those who formally qualify as sponsors within the meaning of the Immigration Act. It would include anyone in Canada who suffers consequences which are sufficiently direct and immediate.

As to whether the consequences are sufficiently direct and immediate, a Tribunal should take into account factors such as:

1. Degree of consanguinity of the Canadian relative to the prospective immigrant;

2. The dependency (financial, emotional) of the Canadian relative on the prospective immigrant;

3. Deprivation of significant commercial or cultural opportunities to the Canadian relative by the absence of the prospective immigrant;

4. The historical closeness of the relationship between the two persons;

5. The degree of involvement of the Canadian relative in supporting the application for immigration under the Immigration Act and Regulations.

As noted by Mr. Justice Hugessen in Re Singh, the question of who will be considered a victim is almost wholly a question of fact. It is clear from a reading of Menghani that the above list is not intended to be exhaustive, and that various factors may be

attributed greater or lesser weight, depending upon the facts of each particular case.

There is a common thread running through the established jurisprudence on this issue. In each of the cases referred to, the complainant has him or herself suffered a direct consequence or disadvantage as a result of the discriminatory conduct: in Menghani, as a family class sponsor, the Canadian brother was himself a party to the immigration application, and as well, lost the opportunity to have

a sibling join in a family business. The complainants in Naqvi were denied the opportunity to have a visitor join them in Canada. In Tabar, the complainants lost various business opportunities by virtue of the discriminatory practices in issue in that case. The complainant in Jahn was restricted in the type of people that she was permitted to bring into her home by the discriminatory rules imposed by her landlord.

The one possible exception to the foregoing proposition appears in the New Brunswick School District case, where a complaint was filed under the provisions of the Human Rights Act of New Brunswick by a Mr. Attis, the Jewish parent of a school aged child. The complaint related to anti-semitic teachings in the child's school.

A preliminary motion was brought challenging Mr. Attis' status as a complainant, which motion was ultimately resolved in the New Brunswick Court of Appeal. The Court concluded that Mr. Attis did have status as a complainant, without identifying what, if any, impact the conduct in issue had upon him. It is apparent that it was not necessary to do so, as the operative portion of the human rights legislation in New Brunswick is significantly different than s.40(5) of the CHRA.

Section 15 of the New Brunswick Act states:

Any person claiming to be aggrieved because of an alleged violation of this Act may make a complaint in writing to the Commission in a form prescribed by the Commission.
This section obviously extends the jurisdiction of the New Brunswick Commission well beyond that contemplated by s.40(5) of the CHRA.

The Tribunal must then consider the impact that the discrimination against Siobhan and Caragh McKenna had on the Complainant.

In Mrs. McKenna's testimony, she indicated that she felt the rejection of her daughters' application for citizenship to be unfair, and that it annoyed her as

... it is the only break in the rule that once you adopt your children are totally equally righted (sic) as your own naturally produced children. (Transcript, p.15)

According to Mrs. McKenna, this was the only occasion on which her adopted children were treated differently from her biological children.

Mrs. McKenna testified that she was very proud of being a Canadian, which was why she wanted her adopted children to have the same rights as her biological children. In her letter to the Honourable Gerry Weiner of January 31, 1991, Mrs. McKenna stated:

As well as providing our children with the tangible comforts of life, we have tried to emphasize the importance of certain intangibles, such as the privilege of Canadian citizenship. My sons have taken advantage of their Canadian citizenship by working in Canada for several summers, while attending University. This has exposed them to the people, geography, culture, and values which so influenced my husband and me until we moved to Ireland in 1968. Should the economic or political stability of Ireland ever take a

downturn, my sons are thus more likely to view our former home, Canada, as their home.

My daughters do not have the same opportunities. While they could reside in Canada for one year before they turn 18 years of age, a one year separation from us during the turbulent teenage years would defeat our aspirations in adopting them - to provide them with a supportive and loving family unit until they attain at least the age of majority.

We want our adopted daughters to have the same rights, privileges and responsibilities as our biological sons.

Indeed, as the children are of different national and ethnic backgrounds, we had hoped that the shared value and privilege of Canadian citizenship might be one of the ties that strengthens the family unit.

With respect to the visit to Canada in 1979, it is clear that the McKenna daughters were treated differently in that Mrs. McKenna had to obtain visitors' visas for her daughters to enter Canada. It appears that the requisite visas were obtained, and the vacation took place as scheduled.

This was the extent of the impact described by Mrs. McKenna in her evidence. In the course of argument, Mrs. McKenna also stated that she has safety concerns for her daughters. In the event that there was political upheaval in Europe, Mrs. McKenna states that her sons could leave on Canadian passports, whereas her daughters could not.

In the Tribunal's view, the consequences of the discriminatory practice were sufficiently direct and immediate to qualify Mrs. McKenna as a "victim" within the meaning of s.40(5)(c) of the CHRA. Looking to the five criteria enunciated in Menghani, the Tribunal finds that as the legal parent of the two girls, Mrs. McKenna had a very close familial relationship with the direct targets of the discriminatory practice, with the attendant financial and emotional ties that this relationship entails. Mrs. McKenna was deprived of the opportunity to pass on her Canadian citizenship, a very important part of her heritage, to her daughters. The McKenna family as a whole has been denied the "shared value and privilege of Canadian citizenship", as Mrs. McKenna described it, and has not had the benefit of common citizenship to strengthen the family unit. Finally, looking to the last of the Menghani criteria, it is apparent that Mrs. McKenna was the only member of the McKenna family involved in the efforts to obtain citizenship for the girls. She appears to have made all of the inquiries on behalf of the family and is the author of all of the relevant correspondence. She is, therefore, one of the victims of the discriminatory practice against her daughters.

XI REMEDY

The Tribunal has concluded that the Citizenship Act discriminates against children adopted by Canadian citizens on the basis of their family status. This discrimination is justified to the

extent that adopted children be required to establish that the adoption was carried out in accordance with local law, that the adoption created a genuine parent/child relationship, and that the adoption was not carried out for the purposes of gaining admission to Canada. The additional requirements imposed on adopted children by virtue of s.5(2)(a) of the Citizenship Act, read in conjunction with the requirements for permanent residency set out in the Immigration Act, and the regulations thereto, have not been shown to be justified, within the meaning of s.15(g) of the CHRA.

Where legislation has been found to be unjustifiably discriminatory in its application, Tribunals have the power to order that the legislation not be further applied. (Canada (AG) v. Druken, [1989] 2 F.C. 24, at p.35). This appears an appropriate case to do so.

The Tribunal therefore orders that the Respondent cease the discriminatory practice of applying the provisions of the Citizenship Act, including s.5(2)(a) thereof, so as to discriminate against children adopted by Canadian citizens beyond the extent which the Tribunal has found to be justified.

The Tribunal further orders that the Respondent consult with the Commission with respect to the measures ordered, pursuant to s.53(2)(a) of the CHRA. Because of the admitted concern for the potential abuse of the immigration process, the order of the Tribunal will be suspended for a period of six months, so as to allow for such consultation.

No award was sought by Mrs. McKenna for compensation, nor did the Complainant seek an order pursuant to s.53(3)(b) of the CHRA. Both the Commission and the Complainant ask, however, that the Tribunal order that Siobhan and Caragh McKenna be granted Canadian citizenship.

Where a complaint has been substantiated, s.53(2)(b) of the CHRA allows a Tribunal to order that a respondent make available such rights, opportunities or privileges as were denied as a result of the discriminatory practice. Citizenship is clearly a privilege.
The Respondent has not contested my ability to make such an order.

The Tribunal is satisfied, and indeed the Respondent has conceded that the adoption of Caragh and Siobhan McKenna was bona fide, and was not carried out for immigration purposes. The Tribunal is also satisfied that the adoptions created a genuine parent/child relationship. The Complainant testified as to the process she went through in the course of adopting the children. The Respondent has not disputed that the adoptions were carried out in accordance with Irish law.

Although Caragh and Siobhan are now over the age of eighteen, and would therefore be subject to different requirements in order to obtain citizenship, at the time the various applications were made, the children satisfied those requirements which have been found to be justified. In the Tribunal's view, it is, therefore, appropriate that the privilege denied as a result of the imposition of requirements which have been found to be unjustified now be made

available to the McKenna daughters. It is therefore ordered that, on the first reasonable occasion, the Respondent take the necessary steps so that Siobhan and Caragh McKenna receive grants of Canadian citizenship.

DATED this 7th day of September, 1993.

Anne L. Mactavish