Date: 20071102

Docket: A-417-06

Citation: 2007 FCA 349

CORAM: **DESJARDINS J.A.**
DÉCARY J.A.
RYER J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

JOSEPH TAYLOR

Respondent

Heard at Vancouver, British Columbia, on September 18, 2007.

Judgment delivered at Ottawa, Ontario, on November 2, 2007.

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: DESJARDINS J.A.
RYER J.A.

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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] It is common ground that under paragraph 4(*b*) of the *Canadian Citizenship Act* of 1947 (S.C. 1946, c. 15, (the 1947 *Canadian Citizenship Act* or the 1947 Act)), a person born outside Canada before the date of January 1, 1947, had a claim to Canadian citizenship if born in wedlock to a Canadian-born father and, if out of wedlock, only through the mother, provided that the latter was born in Canada or, was at the time of the birth, a British subject who had Canadian domicile.

[2] Mr. Joseph Taylor (or the respondent) was born in England in 1944 out of wedlock. His mother was born in England and did not have, at the time of the birth, Canadian domicile. When Mr. Taylor applied, in 2003, for a Canadian citizenship certificate, he was informed that he did not qualify. Hence the proceedings at issue in this appeal.

[3] In a remarkably documented set of reasons, Martineau J., a judge of the Federal Court, came to the conclusion that the respondent is a Canadian citizen. He directed the Minister of Citizenship and Immigration (the Minister) to issue a certificate of citizenship to the respondent. The reasons of the Judge were given September 1, 2006 (2006 FC 1053). They extend over 284 paragraphs and include in addition 28 notes published in an appendix.

[4] The issues dealt with in this appeal are all questions of law that attract the application by this Court of the standard of correctness.

The Facts

[5] A short summary of the facts is warranted at the outset. They are taken directly from the findings of the Judge and the affidavit of Mr. Taylor.

[6] Mr. Taylor, who is presently a citizen of the United Kingdom, was born in England on December 8, 1944. His mother, Jenny Rose Harvey, was born in England. His father, Joseph Taylor Sr., was born in Canada. Joseph Taylor Sr. joined the Canadian Armed Forces and he arrived in England in 1942, at the age of 18. He began a relationship with the respondent's mother sometime

between 1943 and early 1944. The couple had decided to marry in the spring of 1944, but due to the requirements of the war and to various restrictions placed on the status of Canadian Armed Forces personnel, the couple was not given permission to marry at that time. Joseph Taylor Sr. was deployed to France on D-Day, June 6, 1944. The respondent's mother was then pregnant. The respondent was born on December 8, 1944 while his father was still stationed in France. Joseph Taylor Sr. was not permitted to return to England until February of 1945. He was then granted permission to marry the respondent's mother.

[7] They were married on May 5, 1945 and remained in England. In February of 1946, the respondent's father was discharged from the Canadian Armed Forces and repatriated to Canada. He returned to Cumberland, British Columbia, where he prepared for the arrival of his wife and child who eventually landed at Halifax, Nova Scotia on July 4, 1946. After a few months, the marriage broke up. Since the respondent's mother had no immediate family and nowhere else to go in Canada, she was left with little choice but to return to England with her young child, which she did in the fall of 1946. She travelled via New York, where on October 11, 1946, she was issued a Canadian passport.

[8] When he "was 26 years old" (A.B. vol. 2, p. 178), already married with two children of his own, Mr. Taylor approached Canada House in London, England, about the possibility of establishing himself in Canada. He explained that he was the son of a repatriated Canadian Armed Forces soldier from World War II and had lived in Canada. He states in his affidavit that the people he talked to at Canada House did not then inform him that he had to make an application to retain

his citizenship before his 24th birthday. He was sent standard application forms for immigration which required a "sponsor" in Canada. He completed the forms and sent them to his father at his last known address. He never got any response and continued with his life in England without pursuing the matter further. (A.B. vol. 2, p. 176).

[9] For the next 30 years, Mr. Taylor did not make any attempt to come to Canada or assert a claim to Canadian citizenship. In 1999, he made a trip to British Columbia. Upon his return to England, he went to Canada House in London to enquire into the possibility of moving to Canada. He was told that he had lost his Canadian citizenship on his 24th birthday, *i.e.* on December 8, 1968.

[10] He purchased a house in Victoria, British Columbia, in 2000 and during the years 2000 to 2004, he spent respectively 8, 11, 14, 18 and 20 weeks in Canada. In November 2000, he had discovered that his father had died in 1996 and that he had seven half-brothers and half-sisters, all of whom lived on Vancouver Island.

[11] In February 2003, he made an application in London to obtain a certificate of citizenship, but was told that his application would not be forwarded for further processing because he had lost his citizenship the day he turned 24.

[12] In November 2003, he presented a new application for a citizenship certificate from outside Canada (also called "Application for Proof of Citizenship"). By letter dated April 5, 2005 from Citizenship Officer Hefferon, he was informed that his application was dismissed on the ground that

having been born out of wedlock he had never acquired citizenship status. The suggestion was made to him that he "may wish to consider taking up permanent residence in Canada and formalizing [his] strong family connection with Canada by means of the Naturalization process" (A.B. vol. 2, p. 279).

[13] On June 10, 2005, Mr. Taylor filed a Notice of Application for judicial review of the April 5, 2005 decision, arguing essentially that an Order in Council dated February 9, 1945 (P.C. 858) gave him the status of a "Canadian citizen", that the loss provisions in the 1947 *Canadian Citizenship Act* violated his right to due process under the *Bill of Rights* and the *Canadian Charter of Rights and Freedoms* (the *Charter*) because he was not given proper notice of those provisions and that the refusal of his citizenship application on the basis of his parents' marital status at the time of his birth and on the basis of his age violated his rights under section 15 of the *Charter*. These arguments were all accepted by Martineau J.

[14] In his Notice of Constitutional Question filed September 6, 2007, the respondent attacks "the following sections of statutes:

(a) *Citizenship Act* RSC 1947, section 4(b);
(b) *Citizenship Act* RSC 1951, section 4(b)(ii);
(c) *Citizenship Act* RSC 1953, section 4(b) and section 6;
(d) *Citizenship Act* RSC 1970, section 4(1) and 4(2);
(e) *Citizenship Act* RSC 1977, section 3(1); and,
(f) *Citizenship Act* RSC 1985, section 3(1)(d) and section 3(1)(e)."

Analysis

[15] The 1947 *Canadian Citizenship Act* came into force on January 1, 1947. In order to determine whether the respondent was a "Canadian citizen" under the 1947 Act, his status both prior to and after January 1, 1947 must be examined.

I Status of Mr. Taylor

A) Prior to January 1, 1947

[16] In order to determine the status of Mr. Taylor prior to January 1, 1947, one has to examine legislation that pertains to Canadians in general (i.e. the *Immigration Act* of 1910, the *Naturalization Act* of 1914 and the *Canadian Nationals Act* of 1921) and orders in council that apply to dependents of members of the Canadian Armed Forces (i.e., in particular, Order in Council P.C. 858, dated February 9, 1945).

a) Canadians in General

[17] Prior to January 1, 1947, the "political status" of Canadians was determined through the interrelationship of three statutes: the *Immigration Act*, S.C. 1910, c. 27, as revised R.S.C. 1927, c. 93 (the 1910 *Immigration Act*); the *Naturalization Act*, S.C. 1914, c. 44, as revised R.S.C. 1927, c. 138 (the 1914 *Naturalization Act*); and the *Canadian Nationals Act*, S.C. 1921, c. 4, as revised R.S.C. 1927, c. 21 (the *Canadian Nationals Act*).

[18] For all practical purposes, as we shall see, Canadians could be “British subjects” or “aliens”, and/or “Canadian Nationals” or “Naturalized”, and/or for the purpose of Canadian immigration law, “Canadian citizens”.

i) the 1910 *Immigration Act*

[19] The concept of “Canadian citizenship” first appears in the 1910 *Immigration Act*. Paragraph 2(*b*) of that Act provides that in the Act and in all orders in council, proclamations and regulations made thereunder:

2. (*b*) “Canadian citizen” means (i) a person born in Canada who has not become an alien; (ii) a British subject who has Canadian domicile; or (iii) a person naturalized under the laws of Canada who has not subsequently become an alien or lost Canadian domicile;	**2.** *c*) “citoyen canadien” ou “citoyen du Canada” signifie (i) quiconque est né au Canada et n’est pas devenu un étranger; (ii) un sujet britannique qui a un domicile au Canada; ou (iii) quiconque a été naturalisé sous le régime des lois du Canada et n’est pas, depuis, devenu un étranger ou n’a pas cessé d’avoir son domicile au Canada;
Provided that for the purpose of this Act a woman who has not been landed in Canada shall not be held to have acquired Canadian citizenship by virtue of her husband being a Canadian citizen; neither shall a child who has not been landed in Canada be held to have acquired Canadian citizenship through its father or mother being a Canadian citizen; …	Mais pour les objets de la présente loi, une femme qui n’a pas été débarquée au Canada n’est pas réputée avoir acquis la qualité de citoyenne du Canada du fait que son mari est un citoyen du Canada; aucun enfant qui n’a pas été débarqué au Canada n’est réputé avoir acquis la qualité de citoyen canadien du fait que son père ou sa mère sont des citoyens canadiens; (…)

[20] The *Act* also provides a definition of Canadian domicile at subparagraph 2(*e*)(i):

2. (*e*) "domicile" means the place in which a person has his home, or in which he resides, or to which he returns as his place of permanent abode, and does not mean the place where he resides for a mere special or temporary purpose; (i) Canadian domicile can only be acquired, for the purposes of this Act, by a person having his domicile for at least five years in Canada after having been landed therein within the meaning of this Act: …	**2.** (*f*) « domicile » signifie l'endroit où une personne a sa demeure, ou dans lequel elle réside, ou auquel elle retourne comme au lieu de son habitation permanente, et ne signifie pas l'endroit où elle réside pour un objet particulier ou temporaire; (i) Le domicile au Canada ne peut s'acquérir, pour les fins de la présente loi, que par un séjour d'au moins cinq ans au Canada par une personne qui y est débarquée aux termes de la présente loi. (…)

[21] Under the Act, no person, "unless he is a Canadian citizen, or has Canadian domicile, shall be permitted to enter or land in Canada, or in case of having landed in or entered Canada shall be permitted to remain therein" if he belongs to any of a long list of prohibited classes (s. 3). Every person "seeking to enter or land in Canada shall first appear before and make application to an immigration officer at a port of entry for permission to enter or land in Canada" (s. 33). The expression "landed", "as applied to passengers or immigrants, means their lawful admission into Canada by an officer under this Act…" (paragraph 2(*l*)). (My emphasis)

[22] When persons are coming to Canada on board a vessel, they have to comply with specific health requirements. Pursuant to section 28, medical officers have to "make a physical and mental examination of all… passengers …, except in the case of Canadian citizens and persons who have Canadian domicile". (My emphasis).

[23] Pursuant to section 29, the immigration officer in charge, "after satisfying himself that the requirements of this Act, and of any Order in Council… made hereunder, have been carried out, shall grant written permission to the master of the vessel to allow the passengers to leave the vessel". (My emphasis).

[24] Canadian citizens and persons who have Canadian domicile are exempted, upon landing, of regulations imposing monetary requirements (paragraph 37(*a*)) and, after landing, cannot be deported (s. 40). (My emphasis)

ii) the 1914 *Naturalization Act*

[25] In 1914, an Act to be cited as the *Naturalization Act* (1914, c. 44) comes into force.

[26] Part I deems to be natural-born British subjects any person born within His Majesty's dominions and any person born out of His Majesty's dominions whose father was, at the time of the birth, a British subject and who fulfilled certain conditions (s. 3).

[27] Part II gives the Secretary of State for Canada the power to grant a certificate of naturalization to an alien who, *inter alia*, has resided in His Majesty's dominions for no less than five years (s. 4). A naturalized person is entitled "to all political and other rights, powers and privileges" and is "subject to all obligations, duties and liabilities, to which a natural-born British subject is entitled or subject, and as from the date of his naturalization has to all intents and purposes

the status of a natural-born British subject" (s. 5) (My emphasis). Should the naturalized person so wish, the certificate may include the name of any minor child (s. 7).

[28] Part III deals with various topics, including the status of aliens. Under section 20ff., aliens may apply to the Court to be declared qualified to be naturalized. If the Court decides that the alien is qualified, the Minister may in his absolute discretion issue a certificate of naturalization.

iii) the *Canadian Nationals Act*

[29] In 1921, the *Canadian Nationals Act* (1921, c. 4) comes into force. As is discussed in paragraph [40] below, this Act was enacted to meet the needs of Canadian participation in the international community. Section 2 defines the following persons as being Canadian Nationals:

2. The following persons are Canadian Nationals, viz: — (*a*) Any British subject who is a Canadian citizen within the meaning of the Immigration Act; (*b*) The wife of any such citizen; (*c*) Any person born out of Canada, whose father was a Canadian National at the time of that person's birth, or with regard to persons born before the third day of May, one thousand nine hundred and twenty-one, any person whose father at the time of such birth, possessed all the qualifications of a Canadian National, as defined in this Act. 1921, c. 4, s. 1.	**2.** Est ressortissant du Canada : *a)* Tout sujet britannique qui est citoyen canadien au sens de la *Loi de l'immigration*; *b)* L'épouse de ce citoyen; *c)* Toute personne née en dehors du Canada, dont le père était ressortissant du Canada à l'époque de la naissance de cette personne, ou, à l'égard des personnes nées avant le troisième jour de mai mil neuf cent vingt et un, toute personne dont le père possédait, à l'époque de cette naissance, toutes les qualités d'un ressortissant du Canada, tel que défini en la présente loi. 1921, c. 4, art. 1.

[30] When debating the second reading on March 8, 1921 of Bill no. 17 which became the *Canadian Nationals Act*, the Minister of Justice, the Hon. C.J. Doherty, stated:

> Mr. DOHERTY: We have already a definition of a Canadian citizen in the Immigration Act, but that definition is expressly limited to the Act itself, and we have no definition of a Canadian citizen which can be of general application.
>
> House of Commons Debates, (8 March 1921) at 645.

[31] It flows from the above-quoted legislation that prior to January 1, 1947, the legal concept of "Canadian citizenship" existed only for the purpose of Canadian immigration law, i.e. to allow a person to come in and out of Canada and to remain therein. However, a "Canadian citizen within the meaning of the *Immigration Act*", if he was a British subject, was a Canadian National, and, if a male, so was any child of his born out of Canada.

[32] Based on the foregoing, prior to January 1, 1947, a person could have simultaneously the status of a natural-born British subject, a Canadian National and, for the purpose of Canadian immigration law, a Canadian citizen with Canadian domicile. At the time he was serving in England, Mr. Taylor Sr. was a natural-born British subject, a Canadian National and, for the purpose of Canadian immigration law, a Canadian citizen with Canadian domicile.

b) Dependents of Members of Canadian Armed Forces

[33] Dependents of members of the Canadian Armed Forces were given special and preferential treatment in order to facilitate their entry into Canada under Canadian immigration law. Such treatment was accorded through the making by the Governor General in Council of orders in council (hereinafter referred to as "P.C.") pursuant to powers granted by the *War Measures Act*,

R.S.C. 1927, c. 206 and by the *National Emergency Transitional Powers Act*, 1945, S.C. 1945, c. 25. These orders in council have force of law while in effect. They were continued in effect until May 15, 1947 (P.C. 7414, December 28, 1945; P.C. 1112, March 25, 1947).

[34] On September 21, 1944, P.C. 7318 is adopted. It is replaced on February 9, 1945 by P.C. 858. In view of the importance given to P.C. 858 by counsel and in the judgment below, it is worth reproducing it in its totality:

> Whereas the Minister of Mines and Resources, with the concurrence of the Secretary of State for External Affairs, and with the approval of the Cabinet War Committee, reports that it is desirable to facilitate entry into Canada of dependents of members of the Canadian Armed Forces and, where the said members are Canadian citizens or have Canadian domicile, to provide such dependents with the same status; and
>
> That the medical examination overseas of dependents of members of the Canadian Armed Forces establishes, in some instances, that the person examined is not admissible to Canada under the provisions of the immigration laws of Canada.
>
> Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Mines and Resources, with the concurrence and approval aforesaid, and under the authority of the *War Measures Act*, Chapter 206 of the Revised Statutes of Canada, 1927, and notwithstanding any other law of Canada relating to immigration, is pleased to make and doth hereby make the following Order:
>
> 1. In this Order, unless the context otherwise requires:
>
> (*a*) "dependent" means the wife, the widow or child under eighteen years of age of a member or former member of the Canadian Armed Forces who is serving or who has served outside of Canada in the present war;
>
> (*b*) "approved medical practitioner" means a doctor of medicine approved by the Immigration Medical Service of the Department of National Health and Welfare.
>
> 2. Every dependent applying for admission to Canada shall be permitted to enter Canada and upon such admission shall be deemed to have landed within the meaning of Canadian immigration law.
>
> 3. Every dependent who is permitted to enter Canada pursuant to section two of this Order shall for the purpose of Canadian immigration law be deemed to be a Canadian citizen if the

member of the forces upon whom he is dependent is a Canadian citizen and shall be deemed to have Canadian domicile if the said member has Canadian domicile.

4. Before proceeding to Canada the dependent shall be examined by a medical officer in the service of the Government of Canada or an approved medical practitioner and on request the Chief Officer of the Medical Immigration Service shall be furnished with full particulars of the medical examination of the dependent and such particulars may be transmitted to the Public Health Service of the Province to which the dependent is destined, with a view to securing necessary treatment and as a protection to public health.

5. In any case in which medical examination discloses that a dependent is suffering from an infectious or contagious disease, or a disease which may become dangerous to the public health, or that travel would be dangerous to the dependent in his present condition, the admission to Canada of such dependent may be deferred until the production of a medical certificate from an approved medical practitioner establishing that the condition of the person concerned is not infectious or contagious and that he may travel with reasonable safety.

6. In any case in which a medical certificate is furnished by an approved medical practitioner who is not in the service of the Government of Canada, the cost shall be paid at the approved rate by the Immigration Branch, Department of Mines and Resources, out of the War Appropriation.

7. Order in Council P.C. 7318 of the twenty-first day of September, 1944, is hereby revoked.

(My emphasis)

[35] On October 11, 1946, P.C. 858 is amended by P.C. 4216. The second paragraph of the preamble, of P.C. 4216 states:

> And whereas the Acting Minister of Mines and Resources represents that it is necessary to limit the provisions of P.C. 858 dated the 9th day of February, 1945, which relates to the immigration status and the granting of free medical examination to dependents to conform with the said Order in Council P.C. 4044 ;
>
> (My emphasis)

[36] P.C. 4216 adds the following paragraph to P.C. 858:

> (8) The provisions of this Order in Council shall only apply to dependents on whose behalf application for free transportation to Canada has been filed on or before October 15, 1946, and who embark for Canada on or before June 30, 1947, in accordance with the provisions of P.C. 4044 of the 26th day of September, 1946.

[37] The terms used in P.C. 858 and P.C. 4216 clearly indicate that they were made for the sole purpose of facilitating the entry into Canada of dependents of members of the Canadian Armed Forces, within the meaning of the 1910 *Immigration Act*. The specific requirements prescribed by the 1910 *Immigration Act* were either waived through deeming provisions (landing, citizenship and domicile), alleviated (medical certificate) or eliminated (monetary requirements).

[38] The fact is, however, that once properly admitted into Canada in accordance with immigration laws, these dependents became subject to Canadian laws and entitled to their benefit. As a result, upon being landed in July, 1946, Mr. Taylor was, as was his father, a natural-born British subject, a Canadian National and, for the purpose of Canadian immigration law, a Canadian citizen with Canadian domicile.

B) After January 1, 1947

[39] To understand the dramatic effect in Canadian law of the adoption of the 1947 *Canadian Citizenship Act*, it is useful to quote from the speech of the Hon. Paul Martin (Sr.), Secretary of State, when he moved for the second reading, on April 2, 1946, of the Bill respecting *Citizenship, Nationality, Naturalization and Status of Aliens*, which became the 1947 *Canadian Citizenship Act*:

> In moving second reading of this bill may I state at the outset I believe this measure parallels the development of Canada as a nation.
> …
> As I shall endeavour to show, it seeks to avoid many complexities and confusions which arise from existing legislation. For some time now, indeed for many years, it has been felt in the country and in the house that the time has arrived when ambiguities arising out of the *Naturalization Act* – both the act before 1914, and the one of 1914 – the *Canadian Nationals Act*, and the *Immigration Act*, should be treated in such a way as to provide an unambiguous definition of the status of Canadian citizenship.

…
Under this bill we are seeking to establish clearly a basic and definite Canadian citizenship which will be the fundamental status upon which the rights and privileges of Canadians will depend. We hope at the same time to remove a great many anomalies and difficulties which exist under present legislation, as I have noted, and which have not only been irksome and troublesome to the country and its people, but occasioned real hardship to persons who have had the misfortune to be caught in them.
…
There are few countries in the world who define their citizenship within the clause of an immigration act. Even the definition within the *Immigration Act* is a limited one. It is a definition of citizenship only for the purposes of that act, namely for the purposes of immigration.
…
My colleague, the Minister of Mines and Resources (Mr. Glen), authorizes me to say that when this measure becomes law it will be followed by an amendment to the *Immigration Act* which will remove from section 2 of that act the only real definition, although for a limited purpose, of Canadian citizenship that is to be found.
…
Part I of the bill deals with natural-born Canadian citizens. The first section of this part attempts to set forth that persons now in being are immediately to have the status of Canadian citizens as of right of birth. The people who will be natural-born Canadian citizens are of two classes, those who are born in Canada or on a Canadian ship, and those who were born to Canadian parents outside Canada before the passing of the act, …
…
I believe the bill, complicated and necessarily so in regard to some of its provisions, does meet as far as may be humanly possible the hundreds of different situations that arise out of the status of citizenship; out of the acquisition of nationality by birth, by blood relationship or by any one of the many combinations which may create, in one form or another, the legal status of nationality, here as well as in other countries.
…
With this bill we are linking our past with our future. We are saying to history and to our posterity: Here is the definition of Canadianism. Here is the common status in Canada, a common stake in the welfare of the country, a common Canadian citizenship.
…

House of Commons Debates, (2 April 1946) at 502 to 510. (My emphasis)

[40] Of interest, also, are the following remarks by the Hon. James Hugh Faulkner, Secretary of State, when he moved on May 21, 1975, for the second reading of the Bill that was to become the 1977 *Citizenship Act*:

> In Canada, the citizenship or nationality laws were determined by three statutes: the *Canadian Immigration Act* of 1910, designed to meet the needs of immigration and deportation; the *Naturalization Act* of 1914, adopted in order to meet the needs of imperial nationality; and the *Canadian Nationals Act* of 1921, enacted to meet the needs of participation in the international community, the League of Nations particularly.
>
> It is interesting to note that not everyone who was a Canadian national under the *Canadian Nationals Act* was a Canadian under the *Canadian Immigration Act* and nowhere was provision made for Canadian citizenship. In 1930, these anomalies were brought forward and a report on nationality problems in Canada was presented to the secretary of state. A bill to revise and consolidate the laws of naturalization and citizenship was introduced in 1931 but was withdrawn before third reading.
>
> Finally, in 1946, the secretary of state, the Hon. Paul Martin, introduced a new bill to revise and consolidate naturalization and citizenship laws and to introduce Canadian citizenship instead of British subject status or Canadian nationality.
>
> House of Commons Debates, (21 May 1975) at 5983 and 5984. (My emphasis)

[41] Parliament's intent was clearly carried into the wording of the 1947 *Canadian Citizenship Act*.

[42] Thus, on January 1, 1947, *The Canadian Citizenship Act*, which had been assented to on June 27, 1946 and whose official title is "*An Act respecting Citizenship, Nationality, Naturalization and Status of Aliens*", comes into force. The official title in itself confirms the avowed purpose of consolidating previous legislation and status. The 1947 Act is a complete code for Canadian citizenship. It deals with persons born before January 1, 1947, as well as with those born thereafter. It deals with persons born in Canada as well as with those born outside Canada. It determines which of these persons are Canadian citizens as of right and, with respect to those persons who are not Canadian citizens as of right, it determines which may apply for a grant of Canadian citizenship,

and how, and subject to what requirements. The 1947 Act also determines when or how Canadian citizens lose their citizenship.

[43] To ensure that there would be in the future only one statute defining Canadian citizenship, the *Naturalization Act* of 1914 and the *Canadian Nationals Act* of 1921 are repealed by section 45 of the 1947 *Canadian Citizenship Act*. In addition the 1910 *Immigration Act*, which hitherto contained a definition of "Canadian citizen" for the purpose of immigration law, is amended as of January 1, 1947 by *An Act to amend the Immigration Act* (10 Geo. VI, c. 54). Under the latter amendment, a "Canadian citizen", for the purpose of the *Immigration Act*, means "a person who is a Canadian citizen under the [1947] *Canadian Citizenship Act*".

[44] The relevant provisions of the 1947 *Canadian Citizenship Act* at this stage are the following:

PART I.	**PARTIE I.**
NATURAL-BORN CANADIAN CITIZENS.	**CITOYENS CANADIENS DE NAISSANCE.**
4. A person, born before the commencement of this Act, is a natural-born Canadian citizen: -	**4**. Une personne, née avant l'entrée en vigueur de la présente loi, est citoyen canadien de naissance
…	(…)
b) if he was born outside of Canada elsewhere than on a Canadian ship and his father, or in the case of a person born out of wedlock, his mother	*b*) Lorsqu'elle est née hors du Canada ailleurs que sur un navire canadien et que son père ou, dans le cas d'une personne née hors du mariage, sa mère
(i) was born in Canada or on a Canadian ship and had not become an alien at the time of that person's birth, or	(i) est né (ou née) au Canada ou sur un navire canadien et n'était pas devenu étranger (ou devenue étrangère) lors de la naissance de ladite personne, ou
(ii) was, at the time of that person's birth, a British subject who had Canadian domicile,	(ii) était, à la naissance de ladite personne, un sujet britannique possédant un domicile

canadien,

if, at the commencement of this Act, that person has not become an alien, and has either been lawfully admitted to Canada for permanent residence or is a minor.

si, à l'entrée en vigueur de la présente loi, ladite personne n'est pas devenue étrangère, et a été licitement admise au Canada en vue d'une résidence permanente ou est mineure.

PART II.

CANADIAN CITIZENS OTHER THAN NATURAL-BORN.

PARTIE II.

CITOYENS CANADIENS AUTREMENT QUE PAR LE FAIT DE LA NAISSSANCE.

9. (1) A person other than a natural-born Canadian citizen, is a Canadian citizen, if he
(*a*) was granted, or his name was included in a certificate of naturalization and he has not become an alien at the commencement of this Act; or
(*b*) immediately before the commencement of this Act was a British subject who had Canadian domicile;
…

9. (1) Une personne, autre qu'un citoyen canadien de naissance, est citoyen canadien
a) si elle a obtenu un certificat de naturalisation, ou si son nom était inclus dans un tel certificat, et qu'elle ne soit pas devenue étrangère lors de l'entrée en vigueur de la présente loi; ou
b) si, immédiatement avant la mise en vigueur de cette loi, elle était un sujet britannique possédant un domicile canadien;
(…)

PART IV.

STATUS OF CANADIAN CITIZENS AND RECOGNITION OF BRITISH SUBJECTS

PARTIE IV.

STATUT DES CITOYENS CANADIENS ET RECONNAISSANCE DES SUJETS BRITANNIQUES.

26. A Canadian citizen is a British subject.

26. Un citoyen canadien est sujet britannique.

27. A Canadian citizen other than a natural-born Canadian citizen shall, subject to the provisions of this Act, be entitled to all rights, powers and privileges and be subject to all obligations, duties and liabilities to which a natural-born Canadian citizen is entitled or subject and, on and after becoming a Canadian citizen, shall, subject to the provisions of this Act, have a like status to that of a natural-born Canadian citizen.

27. Un citoyen canadien, autre que celui qui l'est de naissance, jouit, subordonnément à la présente loi, de tous les droits, pouvoirs et privilèges et est assujetti à tous les devoirs, obligations et responsabilités, auxquels un citoyen canadien de naissance est admis ou assujetti. À compter du moment où il devient citoyen canadien, il possède, sous réserve des dispositions de la présente loi, un statut semblable à celui d'un citoyen canadien de naissance.

28. A person, who has acquired the status of British subject by birth or naturalization under the laws of any country of the British Commonwealth other than Canada to which he was subject at the time of his birth or naturalization, shall be recognized in Canada as a British subject.

28. Quiconque a acquis le statut de sujet britannique par le fait de la naissance ou de la naturalisation, sous le régime des lois de quelque pays de la Communauté des nations britanniques autre que le Canada, auxquelles il était assujetti lors de sa naissance ou de sa naturalisation, est reconnu au Canada sujet britannique.

PART VII.

GENERAL.

…

45. (1) The *Naturalization Act*, chapter one hundred and thirty-eight of the Revised Statutes of Canada, 1927 and the *Canadian Nationals Act*, chapter twenty-one of the Revised Statutes of Canada, 1927 are repealed.

(2) Where, in any Act of the Parliament of Canada or any order or regulation made thereunder, any provision is made applicable in respect of

(*a*) a "natural-born British subject" it shall apply in respect of a "natural-born Canadian citizen" ; or

(*b*) a "naturalized British subject" it shall apply in respect of a "Canadian citizen other than a natural-born Canadian citizen"; or

(*c*) a "Canadian national" it shall apply in respect of a "Canadian citizen" ;

under this Act, and where in any Act, order or regulation aforesaid any provision is made in respect of the status of any such person as a Canadian national or British subject it shall apply in respect of his status as a Canadian citizen or British subject under this Act.

PARTIE VII.

GÉNÉRALITÉS.

(…)

45. (1) Sont abrogées la *Loi de naturalisation*, chapitre cent trente-huit des Statuts revisés du Canada, 1927, et la *Loi des ressortissants du Canada*, chapitre vingt et un des Statuts revisés du Canada, 1927.

(2) Si, dans une loi du Parlement du Canada ou un arrêté ou règlement établi sous son régime, quelque disposition vise

a) un « sujet britannique de naissance », elle s'applique à l'égard d'un « citoyen canadien de naissance », ou

b) un « sujet britannique naturalisé », elle s'applique à l'égard d'un « citoyen canadien autre qu'un citoyen canadien de naissance », ou

c) un « ressortissant du Canada », elle s'applique à l'égard d'un « citoyen canadien »;

sous le régime de la présente loi et lorsque, dans quelque loi, arrêté ou règlement susdit, une disposition est établie sur le statut d'une telle personne comme ressortissant du Canada ou sujet britannique, elle s'applique à l'égard de son statut de citoyen canadien ou sujet britannique aux termes de la présente loi.

46. (1) Notwithstanding the repeal of the *Naturalization Act* and the *Canadian Nationals Act*, this Act is not to be construed or interpreted as depriving any person who is a Canadian national, a British subject or an alien as defined in the said Acts or in any other law in force in Canada of the national status he possesses at the time of the coming into force of this Act. (2) This Act is to be construed and interpreted as affording facilities for any person mentioned in the last preceding subsection if he should so desire to become a Canadian citizen if he is not a natural-born Canadian citizen as defined in this Act, and if he possesses the qualifications for Canadian citizenship as defined in this Act.	**46**. (1) Nonobstant l'abrogation de la *Loi de naturalisation* et de la *Loi des ressortissants du Canada*, la présente ne doit pas s'interpréter comme privant quiconque est ressortissant canadien, sujet britannique ou étranger selon la définition contenue dans lesdites lois ou une autre loi en vigueur au Canada, du statut national qu'il possède lors de l'entrée en vigueur de la présente loi. (2) La présente loi doit s'interpréter comme accordant des facilités à toute personne mentionnée dans le paragraphe précédent, si elle le désire, pour devenir citoyen canadien lorsqu'elle n'est pas citoyen canadien de naissance défini dans la présente loi et qu'elle possède les qualités requises pour la citoyenneté canadienne définie dans cette même loi.

[45] Under paragraph 2(*a*) of the 1947 *Canadian Citizenship Act*, a "Canadian citizen" is defined as "a person who is a Canadian citizen under this Act". A person can only be a Canadian citizen if he meets the requirements set out in the 1947 *Canadian Citizenship Act*. That can happen in three ways, two as of right and one upon request. (I exclude the discretionary grant of citizenship by the Minister, which is not at issue here).

[46] Persons born before January 1, 1947 are Canadian citizens as of right if they are either a natural-born Canadian within the meaning of section 4 in Part I of the Act; or a person other than a natural-born Canadian within the meaning of section 9 in Part II of the Act. Pursuant to section 46, persons who are not natural-born Canadian citizens as defined in the Act and who, before January 1,

1947, enjoyed a “national status” as a “Canadian national”, a “British subject” or an “alien”, can apply to the Minister under section 10 of the Act to become Canadian citizens if they possess the qualifications for Canadian citizenship as defined in the Act. There could be no clearer signal that the possession by a non natural-born Canadian citizen of a national status prior to January 1, 1947 does not automatically confer the status of Canadian citizen from January 1, 1947 onwards.

[47] As I read the 1947 *Canadian Citizenship Act* and to use the words of Secretary of State Faulkner in 1975, the Act “introduced Canadian citizenship instead of British subject status or Canadian nationality”. Whatever status existed under whatever prior statute or order in council, including P.C. 858, was, as of January 1, 1947, replaced by a new status, that of Canadian citizen as defined in the new Act.

[48] This interpretation of the pre-January 1, 1947 statutes and orders in council is, in my opinion, in line with the decision rendered by the Supreme Court of Canada in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 (*Benner*).

[49] In *Benner*, which dealt with the status of a person born after January 1, 1947 and with the constitutionality of certain provisions of the 1977 *Citizenship Act* that were applicable and in force at the time of the ruling, Iacobucci J., for the Court, expressed the view, at paragraph 30, that

> “Before 1947, there was no concept of Canadian citizenship.”

In the course of his reasons, he stated that:

> "Under the old 1947 Act, individuals in the appellant's position had no special claim to citizenship whatsoever -- no provision was made for them in the 1947 legislation." (at paragraph 58).

[50] Our Court, in *Solis v. Canada (Minister of Citizenship and Immigration)* (2000), 186 D.C.R. (4th) 512 (F.C.A.), leave to appeal to Supreme Court of Canada denied [2002] S.C.C.A. No. 249 (Q.L.), has held that Canadian citizenship is a creature of federal statute and has no meaning apart from statute and that in order to be a Canadian citizen, a person must satisfy the applicable statutory requirements. (see, also, *McLean v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 127 (C.A.), conf. (1999) 177 F.T.G. 219, and *Veleta v. Canada (Minister of Citizenship and Immigration)*, (2006), 268 D.L.R. (4th) 513 (F.C.A.).

[51] Mr. Taylor's argument, as I understand it, is that he was a Canadian citizen under the 1947 Act either because P.C. 858 had granted him that status or because paragraph 4(*b*) of the 1947 Act, in drawing a distinction between persons born in wedlock and persons born out of wedlock, offends the equality provisions of section 15 of the *Charter*.

a) Order in Council P.C. 858

[52] When Mr. Taylor landed in Canada in 1946, P.C. 858 could not in and of itself confer the status of "Canadian citizenship" under the 1947 *Canadian Citizenship Act*, because no such status existed until the coming into force of the Act on January 1, 1947.

[53] With respect to the effect of P.C. 858 (in particular section 3) after January 1, 1947 until its expiration on May 15, 1947, the Minister had conceded before Martineau J., as quoted at paragraph 173 of Martineau J.'s reasons, that:

> For those arriving after January 1, 1947 and prior to May 15, 1947, P.C. 858 could have led to an automatic grant of Canadian citizenship if their supporting member of the Armed Forces had also become a citizen or they were a British subject. [emphasis in original]

[54] The Minister further conceded, as quoted at paragraph 173 of Martineau J.'s reasons, that:

> While P.C. 858 itself limited its reach "for the purpose of Canadian immigration law", the amendments to the [1910] *Immigration Act*, also coming into force on January 1, 1947 changed the definition of citizen to incorporate the definition found in the new [1947] Canadian Citizenship Act. Additionally, the combination of being granted domicile and being a British subject would have themselves met the requirements of the 1947 Canadian Citizenship Act [emphasis in original].

[55] Martineau J. stated at paragraph 174 of his reasons that "if Order in Council, P.C. 858, could have led to an automatic grant of Canadian citizenship for the dependents arriving after January 1, 1947 and prior to May 15, 1947, as admitted by the [Minister], it must also have granted such rights at the coming into force of the 1947 [*Canadian*] *Citizenship Act* to dependents who also had 'citizen status' at that date."

[56] I have some doubt as to the correctness of the Minister's legal concession, but I appreciate that it led the Judge to give to P.C. 858 a more generous effect than it perhaps actually has. I need not, however, say anything further on this point. As stated before, I find that because of paragraph 2(*a*) of the 1947 *Canadian Citizenship Act*, a dependent landing pursuant to P.C. 858, before or after January 1, 1947, could only gain Canadian citizenship status after January 1, 1947, under the 1947

Canadian Citizenship Act if he came within a provision of the Act (see paragraphs [42] to [47] of these reasons).

[57] In order for Mr. Taylor to qualify as a "Canadian citizen" under the 1947 *Canadian Citizenship Act*, as a person born before January 1, 1947, he therefore had to satisfy section 4 or section 9, or apply for a grant of citizenship on the basis of subsection 46(2) of the Act. As we shall see subsection 46(2) is not applicable to Mr. Taylor, and any citizenship status Mr. Taylor could have acquired under sections 4 or 9 was lost under the applicable loss provisions.

b) Subsection 46(2)

[58] No arguments were made that Mr. Taylor acquired Canadian citizenship under subsection 46(2).

c) Paragraph 4(*b*)

[59] With respect to the constitutionality of the "out of wedlock" provision in paragraph 4(*b*) of the Act, I have reached the view that to apply section 15 of the *Charter*, in the circumstances, to the 1947 provision would give the *Charter* a retrospective effect it cannot have. I have reached the view, further, that even if the *Charter* applied and paragraph 4(*b*) was found to be unjustified discrimination, the applicable loss provision (subsection 4(2)) would continue to apply to persons born outside Canada whatever the marital status of their parents.

[60] While it is an undisputed principle that the *Charter* is not to be applied retroactively or retrospectively (see *Benner*, supra, at paragraph 40), the Supreme Court of Canada has held that not every situation involving events which took place before the *Charter* came into force will necessarily involve a retrospective application of the *Charter* (*Benner*, paragraph 41).

[61] A distinction in the application of the *Charter* to pre-*Charter* factual contexts was thus created in *Benner*. To use the words of Iacobucci J. in *Benner*, at paragraph 45:

> The question, then, is one of characterization: is the situation really one of going back to redress an old event which took place before the *Charter* created the right sought to be vindicated, or is it simply one of assessing the contemporary application of a law which happened to be passed before the *Charter* came into effect?

Iacobucci J. added at paragraph 46:

> I realize that this distinction will not always be as clear as one might like, since many situations may be reasonably seen to involve both past discrete events and on-going conditions…

[62] In *Benner*, the issue was whether the equal benefit of the law guaranteed by section 15 of the *Charter* was denied where, under ss. 3(1)(*c*), 5(2)(*b*) and 22 of the 1977 *Citizenship Act*, children born outside of Canada of a Canadian mother before February 14, 1977 are required to undergo a security check and to swear the oath of citizenship before their application for citizenship can be granted by the Minister, while children born outside of Canada of a Canadian father before February 14, 1977 are simply required to register their birth. In other words, applications for citizenship under the Act currently in force were treated differently depending on whether a person was from a paternal citizenship lineage or a maternal citizenship lineage.

[63] The discrimination at issue in *Benner* was not that resulting from the 1947 *Canadian Citizenship Act*, which did not exist anymore, but that resulting from a remedy devised by Parliament in the 1977 *Citizenship Act* to correct a discrimination in the 1947 *Canadian Citizenship Act*. It is the 1977 remedy which was the issue, not the repealed 1947 discriminatory provision. As I read his reasons, Iacobucci J. in *Benner* found that the discrimination created in the 1947 Act could not in and of itself be challenged under the *Charter* because the 1947 Act did not exist anymore. What could be challenged, however, was the imperfect correction, in the 1977 legislation, which continued after the coming into force of the *Charter* to affect the "on-going status" of Mr. Benner.

[64] The following statements by Iacobucci J. seem to confirm my reading of his reasons:

> 32 Recognizing the injustice of this situation, Parliament enacted a new *Citizenship Act* in 1976. In this new Act, both parents received the right to pass on Canadian citizenship to children born abroad. However, this only applied to children born after February 14, 1977, the date the new Act came into effect. Parliament dealt separately with children born before this date. Clearly not wishing to abrogate the citizenship rights already possessed by children born abroad of Canadian fathers, Parliament maintained in s. 3(1)(e) of the new Act the rights of these paternal lineage claimants to citizenship upon simple registration of their birth…
>
> 33 Parliament did not, however, extend the same entitlement to citizenship to children of Canadian mothers born before the new Act came into force. It instead allowed them access to citizenship through an application process…
>
> 58 I note that in fact these rights changed between the time the appellant was born and the time when he applied for citizenship. Under the old 1947 Act, individuals in the appellant's position had no special claim to citizenship whatsoever -- no provision was made for them in the 1947 legislation. The 1977 Act changed this and created a qualified right to citizenship for people like the appellant. When he finally applied for citizenship in 1989, these were the rights which applied to his situation, not the rights prescribed by the earlier Act in effect at his birth.
>
> 75 …Confronted by the clearly discriminatory 1947 Act, Parliament attempted to remedy the inequity by amending the legislation. That Parliament chose to do so is laudable,

> but it does not insulate the amended legislation from further review under the *Charter*. For example, if Parliament amended an old law which imposed a special 20 percent income tax on all Chinese Canadians so that the tax was only 10 percent, this would not prevent the 10 percent tax from itself coming under *Charter* attack. As the intervener, Federal Superannuates National Association, pointed out, the whole point of delaying s. 15's coming into force until April 17, 1985, was to give governments the chance to bring their legislation in line with its constitutionally entrenched equality requirements. After that date, the legislation was intended to be subject to s. 15 scrutiny, whether or not it had been amended.
>
> 76 Nor is it enough simply to say that the true source of the differential treatment for children born abroad of Canadian mothers is the 1947 Act, not the current Act. The 1947 Act does not exist anymore. More importantly, it was not challenged by the appellant and is not the subject of debate here. The appellant's quarrel is purely with the operation of the current Act and the treatment it accords to him because only his mother was Canadian. To the extent that the current Act carries on the discrimination of its predecessor legislation, it may itself be reviewed under s. 15, which is all the appellant has asked us to do. …
>
> (My emphasis)

[65] It is further revealing that Iacobucci J., at paragraph 37, in summing up the effect of the 1947 Act, referred to "three classes of 'applicants' for Canadian citizenship based on parental lineage", none of which refers to children born before 1947. For all practical purposes the rights, be they absolute or qualified, of children born before 1947 were spent by the time the 1977 Act came into force. Indeed, thirty years had gone by, long enough for any minor born before 1947 to have ceased to be a minor.

[66] In the case at bar, the challenge by Mr. Taylor is, in reality, with respect to paragraph 4(*b*) of the 1947 *Canadian Citizenship Act*, which was repealed by the 1977 *Citizenship Act*.

[67] Iacobucci J., in *Benner*, noted in paragraph 46 that:

> …Successfully determining whether a particular case involves applying the *Charter* to a past event or simply to a current condition or status will involve determining whether, in all the

> circumstances, the most significant or relevant feature of the case is the past event or the current condition resulting from it.…

[68] My conclusion, in the end, is the same as that reached by Harrington J., in *Wilson v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1475 and that reached by Nadon J. (then sitting in the Trial Division of the Federal Court) in *Dubey v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 582, 222 F.T.R. 1.

[69] In *Wilson*, Harrington J. stated, at paragraphs 25 and 26 of his reasons:

> [25] In my opinion the 1977 Act snapped the chain of causality, so that Mr. Wilson is really asking us to redress an old event.
>
> [26] I am fortified in this opinion by the decision of Nadon J. (as he then was) in *Dubey v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 582, 222 F.T.R. 1. He noted that the 1977 Act purported to redress distinctions between Canadian fathers and Canadian mothers for persons born outside Canada after 1 January 1947, and before 15 February 1977. Since the 1977 Act does not deal with people such as Mr. Wilson who were born in 1946, the 1977 Act did not carry forward legislative discrimination which would have to be assessed against the *Charter*. Whether the trigger point was the date when the 1977 Act came into force, as stated by Nadon J., or earlier dates when Mr. Wilson could or should have done something, but did not, the result is the same. The Acts which did not give Mr. Wilson the status he asserts have no current application and thus are not subject to the *Charter*.
>
> (My emphasis)

[70] It is interesting to note, finally, that the 1977 *Citizenship Act* was intended by its authors not to have a retroactive effect. This clearly appears from the Commons Debates, where Secretary of State Faulkner stated:

> "In our opinion, a retroactive citizenship law has unknown consequences. It could be as derogatory of right in some cases as the original law."
>
> House of Commons Debates, (21 May 1975) at 5984.

and from the presentation of Mr. Lewis Levy, Director of Legal Services, Department of the Secretary of State, before the Parliamentary Standing Committee, when he expressed the following view:

> "…When you are changing legislation you have to start at a given period and it is generally considered bad policy to try to do things retroactively.
> …
> With the children it was a different situation. They have never been covered before and we felt that to open this up we did not know where to start, where to end. Above and beyond that, as we are now making the law equal between men and women, you have to consider this in historical context; you had a situation where children who were born out of the country derived their citizenship from a father if the children were born in wedlock and from the mother if not.
>
> Now we are proposing to create a complete equality in there which would mean that children will derive their citizenship from either parent whether born in wedlock or not. If we were to go back to provide a sort of retroactive catchall there, the government and the country would be in the position of having to accept as citizens all sorts of – perhaps this might sound a little farfetched but if you want to go back to say the Korean war or Canadian Forces policing expeditions in the Middle East or in Cyprus and so on, and 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; they might be people that if they were to apply for immigration the Immigration Department would not want to let them in. That was one factor; it may be a minor factor but when you are looking at it philosophically as to what you might be doing, that would be one thing."

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, Issue N^{o}. 36 (Friday, February 27, 1976) at 6.

[71] It would be odd to use the *Charter*, in 2005, to challenge a 1947 statute which was repealed by a 1977 statute that Parliament did not wish to have retroactive effects.

[72] I fully appreciate that unfortunate circumstances and timing are in the end the reasons why Mr. Taylor did not become, on January 1, 1947, a natural-born Canadian citizen. Had his parents obtained permission to marry before his father's deployment to France, he would have qualified. As unfortunate as this result may be, this is a situation which is not within the domain of the Courts to redress. I find that to apply the *Charter* to paragraph 4(*b*) of the 1947 *Canadian Citizenship Act* would in the circumstances give the *Charter* a retrospective effect, which it cannot have.

d) Section 9 of the 1947 *Canadian Citizenship Act*

[73] It is not clear whether Mr. Taylor argues, in the alternative, that he qualifies as a non-natural-born Canadian citizen under paragraph 9(1)(*b*) of the Act because he would have been

> "immediately before the commencement of this Act … a British subject who had Canadian domicile".

[74] He was, most certainly, a British subject prior to January 1, 1947. He had, arguably, Canadian domicile at the time as a result of the deeming provision of section 3 of P.C. 858. I say "arguably" because he was no longer in Canada on January 1, 1947, having left with his mother in October 1946 with, it appears, no intention to return. Subparagraph 2(*e*)(ii) of the 1910 *Immigration Act* provides that:

2. (*e*)(ii) Canadian domicile is lost, for the purposes of this Act, by a person voluntarily residing out of Canada not for a mere special or temporary purpose but with the present intention of making his permanent home out of Canada. …	**2.** (*f*)(ii) Cesse d'avoir domicile au Canada, pour les fins de la présente loi, toute personne qui réside volontairement en dehors du Canada, non pas simplement pour quelque objet particulier ou temporaire, mais avec l'intention réelle de demeurer permanemment en dehors du Canada, ainsi que toute personne qui appartient aux catégories interdites ou non

désirables aux termes de la présente loi;
(…)

[75] The Minister submits that Mr. Taylor lost his Canadian domicile when he left for England in October 1946 and as a result did not have a Canadian domicile "immediately, before the commencement of [the 1947] *Canadian Citizenship Act*". The argument may not be without merit, but I would hesitate, based on the little evidence there is in the file, to find that Mr. Taylor lost in October 1946 the Canadian domicile he was deemed by P.C. 858 to have acquired in July 1946.

[76] As it turns out, however, the fact that Mr. Taylor might have been a non-natural born-Canadian citizen within the meaning of section 9 of the 1947 Act, would be of no assistance to him. As we shall see in the following paragraphs, he would in any event, have been caught by the loss provision contained in section 20 of the 1947 Act.

II The loss provisions in the 1947 *Canadian Citizenship Act*

[77] In the event I am wrong in finding that Mr. Taylor is not a natural-born Canadian citizen within the meaning of paragraph 4(*b*) of the 1947 Act; or if as stated above I assume for the sake of discussion that Mr. Taylor was a non-natural-born Canadian citizen within the meaning of section 9 of the 1947 Act, the question then arises as to whether any loss provisions contained in the statute are applicable to him.

- Subsection 4(2)

[78] A finding that the *Charter* applies to paragraph 4(*b*) of the 1947 *Canadian Citizenship Act* would be of no use to Mr. Taylor. The remedy the Court would grant would be to strike the words "in the case of a person born out of wedlock" from that paragraph, thereby removing the distinction between children obtaining their citizenship through paternal or maternal lineage.

[79] Mr. Taylor would then remain subject to the loss provision, like all other minors, contained in subsection 4(2) of the Act. Subsection 4(2) was assented to in 1953 in *An Act to amend the Canadian Citizenship Act*, 1-2 Eliz.11, c. 23. It came into force retroactively as of January 1, 1947. (As a result of that 1953 amendment, section 4 of the 1947 *Canadian Citizenship Act* was renumbered and former paragraph 4(*b*) became paragraph 4(1)(*b*). To avoid confusion I will continue to refer to paragraph 4(*b*) in the remainder of these reasons).

[80] The loss provision, i.e. subsection 4(2), reads as follows:

4.(2) A person who is a Canadian citizen under paragraph (*b*) of subsection one and was a minor on the first day of January, 1947, ceases to be a Canadian citizen upon the date of the expiration of three years after the day on which he attains the age of twenty-one years or on the first day of January, 1954, whichever is the later date, unless he *(a)* has his place of domicile in Canada at such date; or *(b)* has, before such date and after attaining the age of twenty-one years, filed, in accordance with the regulations, a declaration of	**4.**(2) Une personne qui est un citoyen canadien aux termes de l'alinéa *b*) du paragraphe premier et qui était mineure au premier jour de janvier 1947, cesse d'être un citoyen canadien à la date d'expiration de trois années après le jour où elle a atteint l'âge de vingt et un ans ou le premier jour de janvier 1954, selon la plus tardive de ces dates, à moins *a*) qu'elle n'ait son lieu de domicile au Canada à pareille date; ou *b*) qu'elle n'ait, avant pareille date et après avoir atteint l'âge de vingt et un ans, produit, en conformité

retention of Canadian citizenship. (*an Act to amend the Canadian Citizenship Act*, 1 – 2 Eliz. II, c. 23)	des règlements, une déclaration de rétention de citoyenneté canadienne. (*Loi modificative de la Loi sur la citoyenneté canadienne* 1-2 Eliz. II, c. 23)

[81] Mr. Taylor does not contest that he was not domiciled in Canada on the date of his twenty-fourth birthday or that he did not file a declaration of retention before that date.

- Section 20

[82] If Mr. Taylor is assumed to be a non-natural-born Canadian citizen by reason of section 9 of the 1947 Act, then the loss provision contained in section 20 of the 1947 Act comes into play. Section 20 provides that a Canadian citizen, other than a natural-born Canadian citizen,

> "…ceases to be a Canadian citizen if he resides outside of Canada for a period of at least six consecutive years …"

This period of "six consecutive years" was extended, retroactive to January 1, 1947, to "ten consecutive years" (*an Act to amend the Canadian Citizenship Act*, 1953, 1-2 Eliz. II, c. 23, s.8).

[83] Mr. Taylor does not contest that he resided outside of Canada for a period of at least ten consecutive years starting January 1, 1947.

[84] The two loss provisions are therefore applicable to Mr. Taylor, unless he is successful in his attack on these provisions with the *Bill of Rights* and the *Charter*.

- Due Process and Fundamental Justice

[85] The respondent's position and the Applications Judge's reasons on the issue of the loss provisions are unclear. They rely simultaneously on the concepts of due process, principles of fundamental justice and procedural fairness. Reference is made in the Notice of Constitutional Question filed by the respondent to paragraph 1(*a*) of the *Bill of Rights* (the right not to be deprived of security of the person except by due process of law), paragraph 2(*e*) of the *Bill of Rights* (no legislation to be construed or applied so as to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights) and section 7 of the *Charter* (the right not to be deprived of the right to security of the person except in accordance with the principles of fundamental justice).

[86] I will assume at this stage and for the sake of discussion that both the *Bill of Rights* and the *Charter* are applicable to the 1947 *Canadian Citizenship Act*.

[87] There being no administrative proceedings in issue, neither the concept of fair hearing referred to in paragraph 2(*e*) of the *Bill of Rights*, nor that of procedural fairness come into play (see *MacBain v. Lederman*, [1985] 1 F.C. 856 (C.A.) *per* Heald J. at pages 877-878). In *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40 (*Authorson*), Major J. also stated at paragraph 61:

> Section 2(*e*) of the *Bill of Rights* does not impose upon Parliament the duty to provide a hearing before the enactment of legislation. Its protections are operative only in the application of law to individual circumstances in a proceeding before a court, tribunal or similar body.

[88] With respect to the principle of fundamental justice, the respondent failed to identify any such principle. This Court has recently examined, in *Prentice v. Canada (Royal Canadian Mounted*

Police), 2005 FCA 395, the burden facing a litigant asserting a breach of a principle of fundamental justice under section 7 of the *Charter*.

[89] In his memorandum of fact and law, at paragraph 104, Mr. Taylor seems to suggest that the principal issue, under section 7 of the *Charter*, is "that there be a fair hearing and notice" before a citizen loses his citizenship. In his reasons, although it is not entirely clear, the Judge appears to decide that the principle of fundamental justice at issue is the "arbitrary" method with which Mr. Taylor was deprived of his citizenship.

[90] In other words, as I understand Mr. Taylor's argument and the Judge's reasons, the fundamental principle at issue here is that no person should be deprived of his citizenship unless some form of notice is provided for in the statute or regulation and given to the person (see the Judge's reasons, at paragraph 249). No authority was cited to support the proposition that such a principle, if it exists, is a fundamental one. At best, the proposition is a different way of saying that "due process" requires a notice to be given, which brings us back to the concept of "due process of law" and paragraph 1(*a*) of the *Bill of Rights*. What we are essentially left with, therefore, is the argument that due process of law, under paragraph 1(*a*) of the *Bill of Rights*, requires that prior notice be given to persons at risk of being deprived through forthcoming legislation of their citizenship.

[91] The determination by the Judge that due process requires that persons be given what the Judge calls “proper notice” of the loss provisions in the 1947 Act is contrary to long-standing parliamentary tradition and well-established legal principles.

[92] The legislative process in Canada is a public process. Any proposed federal legislation must receive three readings in the House of Commons and Senate and royal assent before it becomes an enacted law. When an Act comes into force, it becomes binding on all those persons to whom it applies. In *Authorson*, Major J. stated the following at paragraphs 12 and 37:

> 12 Due process does not require that the veterans receive notice and a hearing before Parliament prior to the passage of expropriative legislation. As unfortunate as it is for the respondent, long-standing parliamentary tradition has never required that procedure.
>
> 37 The respondent claimed a right to notice and hearing to contest the passage of s. 5.1(4) of the *Department of Veterans Affairs Act*. However, in 1960, and today, no such right exists. Long-standing parliamentary tradition makes it clear that the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent. Once that process is completed, legislation within Parliament's competence is unassailable.

These statements apply, in my view, whether the right at issue is the right to “enjoyment of property” as was the case in *Authorson*, or the right asserted by Mr. Taylor “to life, liberty, security of the person”. Paragraph 1(*a*) of the *Bill of Rights* does not suggest that any distinction should be made in that regard.

[93] It is a well-recognized principle that ignorance of the law is no excuse. A person is presumed to know the law and is bound by the law. (See, in a citizenship context, *McNeil v. Canada*

(Secretary of State), [2000] F.C.J. No. 1477 (T.D.); see, more generally, *R. v. Molis*, [1980] 2 S.C.R. 356 at p. 363.)

[94] In the same vein, this Court has recently held that there is no basis in law for imposing a positive duty on government officials to forewarn persons that they might be impacted by pending legislation. (See *dela Fuente v. Canada (Minister of Citizenship and Immigration) (F.C.A.)*, at [2007] 1 F.C.R. 387 at paragraph 20.)

[95] In this regard, the decision of this Court in *Veleta v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 138, does not support a determination that as a matter of principle there is a notice requirement in citizenship cases. The notice requirement, in that case, resulted largely from the fact that the determination of the Court had a direct effect on the citizenship status of third parties. Furthermore, the citizenship of one of the third parties had already been recognized and that third party had a reasonable legitimate expectation that he would receive some form of notice from the Minister that his citizenship status had changed.

[96] Requiring additional notice of particular provisions in an Act would create obvious practical problems. With respect to the 1947 Act, it is unclear how the government, in practice, could have notified the persons potentially affected by the loss provisions, many of whom would have been outside of Canada and the existence, identity and place of residence of whom were unknown. Requiring additional notice would also create a situation where laws of general application would

not, in fact, apply equally to all persons since their application would depend on whether the persons had proper notice.

[97] The loss provisions are contained in the 1947 Act, which was debated in Parliament and published. The three readings in the Senate and the House of Commons and publication were proper notice of all of the provisions in the 1947 Act including loss provisions. The entire 1947 Act became binding on all persons to whom it applied when it came into force on January 1, 1947. The same applies, of course, to the 1953 amendment.

[98] Parliament, in the 1947 Act, gave minor persons born outside of Canada a special opportunity to manifest their citizenship status within a considerable number of years - 24 to be exact. In the case of non-natural-born Canadians, Parliament also preserved their citizenship status, requiring them to reside outside of Canada for 10 consecutive years before their citizenship status was lost. It is unfortunate that Mr. Taylor was not aware in due course of these provisions. These are not, however, under the Canadian parliamentary system, situations that attract the application of the concept of "due process of law".

III Age discrimination

[99] The respondent also challenges paragraphs 3(1)(*d*) and (*e*) of the current Act as being a violation of section 15 of the *Charter* based on differential treatment because of his date of birth. These paragraphs read 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; or (*e*) the person was entitled, immediately before February 15, 1977, to become a citizen under paragraph 5(1)(*b*) of the former Act.	**3.** (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne : (…) *d*) ayant cette qualité au 14 février 1977; *e*) habile, au 14 février 1977, à devenir citoyen aux termes de l'alinéa 5(1)*b*) de l'ancienne loi.

[100] The Applications Judge summarized the argument at paragraph 257 of his decision, where he states that the respondent submits:

> [257] … that both the prior and current legislative citizenship schemes are "discriminatory". Children born outside Canada, in wedlock or out of wedlock, prior and after February 15, 1977, are treated differently with respect to both the acquisition and the extinguishment of citizenship status. The differential treatment is currently based on one's date of birth (an analogous ground to age) and, in effect, perpetuates former differential treatment based on the marital status and sex of one's parents, which are the key factors to determine whether citizenship is derived from one's father or mother. The Applicant submits that such differential treatment reflects a demeaning and prejudicial view of "illegitimate children" which is discriminatory and infringes the rights to equality guaranteed by subsection 15(1) of the *Charter*.
>
> (My emphasis)

[101] Before proceeding with a section 15 analysis on an issue as multi-layered as this, it is important to sift through the submissions to find the heart of the alleged discrimination. I find that the root source of the discrimination alleged by the respondent remains the differential treatment based on the marital status of his parents in paragraph 4(*b*) of the 1947 *Canadian Citizenship Act*. To clarify, it is helpful to quote from the memorandum of fact and law of the respondent, where at paragraph 122 he states:

> 122. It is submitted that the 1977 statute therefore sets up a scheme that those persons born before January 1, 1947, must have exercised their citizenship rights by landing and declaring allegiance (before age 24) before February 15, 1977 or those persons will never be able to claim citizenship. This then differentiates between those born before and those born after January 1, 1947, having the effect of preventing the application of section 4(b) of the previous

> Act by reference. The differential treatment is based on the date of birth, i.e., whether one was born before or after January 1, 1947 having exercised the right by 1977 (that is, analogous to age).
>
> (My emphasis)

[102] What the respondent is attempting to achieve with the section 15 *Charter* argument based on differential treatment because of his date of birth, is to have the repealed paragraph 4(*b*) of the 1947 *Canadian Citizenship Act* "referenced" or read into the current *Citizenship Act*. Even if such a remedy were open to the Court, I find that I do not need to go further on this issue. In order for the respondent to ultimately succeed, I would be required, at some point, to return again to the marital status distinction made in paragraph 4(*b*) of the 1947 *Canadian Citizenship Act* (carried through in the Revised Statues of 1970, to paragraph 4(1)(*b*) of the *Canadian Citizenship Act*). We are, it seems, running in circles. To illustrate even more the extent to which Mr. Taylor is asking the Court to "reference" into the current Act paragraph 4(*b*) of the 1947 Act, suffice it to note that in his Notice of Constitutional Question, he attacks provisions found in statutes dated, respectively, 1985, 1977, 1970, 1953, 1951 and 1947.

[103] *Augier v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 613 (*Augier*) is distinguishable for the same reason as was discussed earlier for *Benner*. In *Augier*, Mosley J. found that a distinction made in paragraph 5(2)(*b*) of the current *Citizenship Act* based on gender and marital status was an unjustified violation of section 15. Key to the analysis and remedy granted in *Augier* was that the impugned provision was live and in force.

[104] This Court, in *Mclean* (*supra*), and the Federal Court, in *Dubey* (*supra*) and *Wilson* (*supra*), have dismissed constitutional attacks made against paragraphs 3(1)(*d*) and (*e*) of the 1977 Act. There is no point repeating here what was said in these cases.

[105] In any event, if I am wrong in my determination of the respondent's section 15 argument related to discrimination based on his date of birth, any entitlement to citizenship status the respondent had under paragraph 4(*b*) of the 1947 *Canadian Citizenship Act* was already lost under the loss provision in subsection 4(2) of the 1947 *Canadian Citizenship Act* (as amended in 1953). When paragraph 4(*b*) and subsection 4(2) were repealed in the 1977 *Citizenship Act*, the respondent was already older than 24 years of age, and therefore the respondent could not retain any entitlement to Canadian citizenship under paragraph 4(*b*).

[106] Courts must be careful in their temporal application of section 15 of the *Charter*. Section 15 was not intended by the *Charter*'s framers to apply retroactively or retrospectively. The evidence for this is found in the very fact that section 15 came into force three years after the rest of the *Charter* (see section 32(2) of the *Charter*). I am supported in this view by *R. v. Seo* (1986), 54 O.R. (2d) 293 (C.A.), *Davidson v. Davidson Estate 33* (1986), D.L.R. (4th) 161 at paragraph 38 (B.C.C.A.) and *Mack v. Canada (Attorney General)* (2002) 217 D.L.R. (4th) 583 (Ont.C.A.).

[107] There is some wisdom in not having the *Charter* apply retroactively or retrospectively to a 1947 statute that was repealed before the *Charter* came into force. It seems to me it would be unfair to the Parliament and to the government of that day to judge moral values of a distant past in the

light of today's values. It could also be an unbearable burden on today's government to demonstrate today that the measures taken then were then justified in a free and democratic society. And since we would be moving in the realm of history, speculation and hypothesis, could we not contemplate the possibility that Parliament, in the circumstances prevailing in 1947, would have invoked the notwithstanding clause? For if we are to apply the *Charter* to the past, should we not apply it with its checks and balances? All this is to suggest that courts may not be the best instruments for rewriting history.

Conclusion

[108] Mr. Taylor’s desire to be recognized as a Canadian citizen from the date of his birth or, at least, from January 1, 1947 onwards, cannot therefore be satisfied by this Court. Mr. Taylor may still apply for a grant of citizenship pursuant to subsection 5(4) of the current Act. This is the avenue, I assume, counsel for the Minister had in mind at the beginning of the hearing before us, when he encouraged Mr. Taylor to avail himself of the opportunity given to him by the current Act.

Disposition

[109] I would allow the appeal, set aside the decision of Martineau J. dated September 1, 2006, and restore the decision of Citizenship Officer Hefferon, dated April 5, 2005, dismissing Mr. Taylor’s application for a citizenship certificate.

[110] The appellant Minister did not seek costs and none should be granted in this Court or in the Federal Court.

Robert Décary
J.A.

"I concur.
Alice Desjardins J.A."

"I agree.
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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