Federal Court of Appeal Cour d'appel fédérale

Date: 20140331

Docket: A-154-13

Citation: 2014 FCA 85

CORAM: NOËL J.A.
MAINVILLE J.A.
WEBB J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

Nanakmeet Kaur KANDOLA by her guardian at law Malkiat Singh KANDOLA

Respondent

Heard at Vancouver, British Columbia, on February 11, 2014.

Judgment delivered at Ottawa, Ontario, on March 31, 2014.

REASONS FOR JUDGMENT BY:	**NOËL J.A**
CONCURRED IN BY:	**WEBB J.A.**
DISSENTING REASONS BY:	**MAINVILLE J.A**

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of the Federal Court, wherein Blanchard J. (the Federal Court judge) allowed Ms. Nanakmeet Kaur Kandola's (the respondent) application for judicial review filed in her name by her guardian at law Malkiat Singh Kandola (Mr. Kandola or the legal guardian) of the decision of a citizenship officer of the Minister of the Citizenship and Immigration

(the appellant or the Minister) rejecting her application for a Canadian citizenship certificate pursuant to paragraph 3(1)(*b*) of the *Citizenship Act*, R.S.C., 1985, c. C-29 (the Act).

[2] The issue turns on whether the Canadian father of a child conceived through assisted human reproduction (AHR) technology, without any genetic link to him or to her foreign birth mother obtains derivative citizenship pursuant to paragraph 3(1)(*b*) of the Act.

[3] The citizenship officer answered this question in the negative and the Federal Court judge came to the opposite conclusion. For the reasons that follow, I am of the view that the appeal should be allowed and the citizenship officer's decision restored.

STATUTORY PROVISIONS

[4] The statutory provisions which are relevant to the analysis are the following:

Citizenship Act, RSC 1985, c C-29	*Loi sur la citoyenneté*, LRC 1985, c C-29
Definitions	*Définitions*
2. (1) In this Act,	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
…	[…]
"certificate of citizenship" *« certificat de citoyenneté »*	« certificat de citoyenneté » *"certificate of citizenship"*
"certificate of citizenship" means a certificate of citizenship issued or granted under this Act or under the former Act;	« certificat de citoyenneté » Le certificat de citoyenneté délivré en vertu de la présente loi ou accordé en vertu de l'ancienne loi.
…	[…]

"child" *« enfant »*	« enfant » "child"
"child" includes a child adopted or legitimized in accordance with the laws of the place where the adoption or legitimation took place;	Tout enfant, y compris l'enfant adopté ou légitimé conformément au droit du lieu de l'adoption ou de la légitimation.
…	[…]
Persons who are citizens	*Citoyens*
3. (1) Subject to this Act a person is a citizen if	**3.** (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne :
(*a*) the person was born in Canada after February 14, 1977;	*a*) née au Canada après le 14 février 1977;
(*b*) the person was born outside Canada after February 14, 1977 and at the time of his birth one of his parents, other than a parent who adopted him, was a citizen;	*b*) née à l'étranger après le 14 février 1977 d'un père ou d'une mère ayant qualité de citoyen au moment de la naissance;
…	[…]
Adoptees — minors	*Cas de personnes adoptées — mineurs*
5.1 (1) Subject to subsection (3), the Minister shall on application grant citizenship to a person who was adopted by a citizen on or after January 1, 1947 while the person was a minor child if the adoption	**5.**1 (1) Sous réserve du paragraphe (3), le ministre attribue, sur demande, la citoyenneté à la personne adoptée par un citoyen le 1er janvier 1947 ou subséquemment lorsqu'elle était un enfant mineur. L'adoption doit par ailleurs satisfaire aux conditions suivantes :
(*a*) was in the best interests of the child;	*a*) elle a été faite dans l'intérêt supérieur de l'enfant;
(*b*) created a genuine relationship of parent and child;	*b*) elle a créé un véritable lien affectif parent-enfant entre l'adoptant et l'adopté;
(*c*) was in accordance with the laws of the place where the	*c*) elle a été faite conformément au droit du lieu de l'adoption et du

adoption took place and the laws of the country of residence of the adopting citizen; and	pays de résidence de l'adoptant;
(*d*) was not entered into primarily for the purpose of acquiring a status or privilege in relation to immigration or citizenship.	*d*) elle ne visait pas principalement l'acquisition d'un statut ou d'un privilège relatifs à l'immigration ou à la citoyenneté.

[5] It is also useful for comparative purposes to quote paragraph 3(1)(*b*) of the Act as it read immediately prior to the enactment of the above quoted version (*Citizenship Act*, S.C. 1974-75-76, c. 108 (the 1977 Act)):

3. (1) Subject to this Act, a person is a citizen if	**3.** (1) Sous réserve des autres dispositions de la présente loi, est citoyen toute personne
…	[…]
(*b*) 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;	(*b*) qui est née hors du Canada après l'entrée en vigueur de la présente loi et dont, au moment de sa naissance, le père ou la mère, mais non un parent adoptif, était citoyen canadien
…	[…]

FACTUAL BACKGROUND

[6] The respondent was born in India on June 3, 2009 (appeal book, p. 114; reasons, para. 3). At the time of her birth, her legal guardian and her birth mother (Mrs. Kandola) were already married (appeal book, p. 115). Both are respectively listed as father and mother on the respondent's Indian birth certificate (appeal book, pp. 133 and 257). At the time of the respondent's birth, Mr. Kandola

was a Canadian citizen, while Mrs. Kandola had undertaken steps to become a permanent resident through the sponsorship process (reasons, paras. 3 and 4).

[7] The respondent was conceived through *in vitro* fertilization, where embryos created from sperm and eggs from two anonymous donors were implanted in the respondent's birth mother (reasons, para. 3). Mr. and Mrs. Kandola resorted to this technique because they were infertile and incapable of making a genetic contribution of their own (appeal book, pp. 116 to 132). Rather than adopting, they opted for child bearing through AHR. The result is the unusual situation where the respondent was carried by Mrs. Kandola with the view of giving birth to her and raising her as a child of the couple, in circumstances where she has no genetic connection with either parent.

[8] The appellant was made aware of this information through proceedings incidental to Mrs. Kandola's sponsorship application (appeal book, pp. 51 to 64; reasons, para. 4). As part of these proceedings, a DNA test was conducted at the request of Canadian immigration authorities, which confirmed the absence of a genetic link between the respondent and both her legal guardian and her birth mother (appeal book, pp. 197 and 198).

[9] Parallel to his spouse's sponsorship application, Mr. Kandola made two unsuccessful applications for a citizenship certificate on behalf of the respondent pursuant to paragraph 3(1)(*b*) of the Act. In both cases, Mr. Kandola checked the box "Natural father" as opposed to "Adoptive father", the only other option available on the citizenship form to describe his relationship with the respondent (appeal book, pp.189 and 244). In both cases, however, the respondent's applications

were denied on the basis that she was genetically unrelated to her Canadian parent (appeal book, pp. 166, 167, 177 and 178).

[10] The present appeal stems from Mr. Kandola's second citizenship application filed on September 30, 2011 (appeal book, pp. 101 to 109). In support of this second application, the respondent and his counsel both made submissions regarding Indian law, namely section 112 of the *Indian Evidence Act, 1872*, which provides that a child born during the course of her birth mother's marriage is presumed to be the legitimate child of the mother's husband (appeal book, pp. 96 to 99).

[11] On April 25, 2012, this second application was denied based on the DNA evidence proving that the respondent was not genetically related to her Canadian parent, that is Mr. Kandola (appeal book, pp. 29 and 30). The citizenship officer explained that:

> [f]or the purposes of determining citizenship by birth outside Canada to a Canadian parent (derivative citizenship), Canadian law relies on evidence of a blood connection (or genetic link) between parent and child which can be proven by DNA testing. This principle of *jus sanguinis* has deep historical roots both in Canada and internationally, and it is evident from the legislative history of the [Act] that Parliament has always intended the term "parent" to refer to genetic parents for derivative citizenship purposes.

[12] The respondent's subsequent judicial review application against the citizenship officer's decision was successful. The Minister now appeals from the Federal Court's decision before this Court.

DECISION OF THE FEDERAL COURT

[13] Applying a standard of correctness, the Federal Court judge found that the citizenship officer erred by requiring "a genetic link thereby refusing to consider parents by legitimization to be parents for the purposes of paragraph 3(1)(*b*) of the Act" (reasons, paras. 21 and 43).

[14] At the outset, the Federal Court judge took the position that the respondent's Indian birth certificate, which designates her legal guardian and birth mother as her parents, provides satisfactory evidence that there exists a child/parent relationship under Indian law, which the appellant does not contest (reasons, para. 33). The Federal Court judge inferred from that evidence that "the [respondent] is the legitimized child of her birth mother and her Canadian legal guardian under Indian law" (*ibidem*).

[15] The Federal Court judge rejected the narrow interpretation of the term "parent" based on the case law and the scheme of the Act. According to the Federal Court judge, this case should be distinguished from the decisions *Valois-d'Orleans v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1009, paragraph 16 and *Azziz v. Canada (Citizenship and Immigration)*, 2010 FC 663, paragraph 73 (*Azziz*), which appear to have restricted the notion of "parent" to a person having blood relationships with his or her child; unlike the present case, these decisions involved fraud and did not concern a situation of legitimization by a foreign state (reasons, paras. 26 and 27).

[16] The Federal Court judge further discarded the appellant's assertion that Parliament intended that the term "parent" be circumscribed to genetic parents, as evidenced by the fact that adopted children are explicitly excluded from paragraph 3(1)(*b*) of the Act (reasons, para. 31). On the

contrary, "[b]y excepting only an adoptive parent from this provision under the Act, an inference arises from the legislation that any other type of parent (genetic or legitimized) is sufficient to satisfy paragraph 3(1)(*b*)" (reasons, para. 39).

[17] The Federal Court judge then turned to the definition of the term "child" in section 2 of the Act (reasons, para. 36). Given that the definition of "child" includes both adopted and legitimized children, and given that the concepts of child and parent are necessarily correlative, the Federal Court judge concluded that the parent of a legitimized child should be recognized as a "parent" for the purposes of paragraph 3(1)(*b*) of the Act (reasons, paras. 37 and 38).

[18] In the Federal Court judge's opinion, the term "parent" in paragraph 3(1)(*b*) "include[s] the lawfully recognized parents of a legitimized child in accordance with the laws of the place where the legitimization took place: in this instance, India" (reasons, para. 41). Since one of the respondent's parents, her legal guardian, was a Canadian citizen at the time of her birth pursuant to paragraph 3(1)(*b*) of the Act, there was no reason to deny her application for citizenship due to the absence of genetic link (reasons, para. 42).

POSITION OF THE MINISTER

[19] The Minister raises three main grounds of appeal.

[20] First, concerning the standard of review, the Minister argues that the Federal Court judge erred in reviewing the citizenship officer's decision on a standard of correctness (appellant's memorandum, paras. 5 and 30). Relying on the Supreme Court's decision in *Agraira v. Canada*

(Public Safety and Emergency Preparedness), 2013 SCC 36 (*Agraira*), the Minister contends that the standard of reasonableness applies to an officer's interpretation of his home statute as in the case at bar (appellant's memorandum, paras. 33 to 36).

[21] Second, the Minister argues that the Federal Court judge erred in extending the interpretation of the term "parent" in paragraph 3(1)(*b*) of the Act to include the parents of a legitimized child with whom there exists no genetic connection (appellant's memorandum, paras. 6 and 31). The Minister's basic position is that "the term 'parent' [in paragraph 3(1)(*b*) of the Act] refers to a person who has begotten or borne a child and who is genetically related to the child" (appellant's memorandum, para. 52) [emphasis added].

[22] In support of this contention, the Minister submits that the unambiguous French text of paragraph 3(1)(*b*) of the Act – which confirms that a parent must have contributed to his or her child's genes – must prevail under the shared meaning rule. Indeed, while the English term "parent" gives rise to some ambiguity, the French words "née […] d'un père ou d'une mère" clearly emphasize the requirement of a genetic link (appellant's memorandum, para. 56). This is further supported by the fact that the legislature did not see the need to exclude adopted children in the French text of paragraph 3(1)(*b*), because the term "parent" is already restricted to a person who has begotten or borne a child (appellant's memorandum, para. 57).

[23] In addition, the legislative evolution and history of the Act show that parenthood based on a genetic connection remains an essential feature of the derivative citizenship process provided for in paragraph 3(1)(*b*). Although Parliament has expressed willingness to expand the ways in which a

child may acquire citizenship – for example by making the parents' marital status irrelevant under paragraph 3(1)(*b*) and minimizing distinctions between foreign-born adopted children and foreign-born children genetically-related to a Canadian citizen – it has always sought to preserve the genetic nature of the *jus sanguinis* concept (appellant's memorandum, paras. 58 to 76). The Minister adds that Parliament has implemented legislative responses to reproductive technologies in other areas of the law and that failure to do so with respect to citizenship matters reflects a clear intent to leave the current regime unchanged (appellant's memorandum, para. 77).

[24] Consistent with this are the Minister's policy guidelines (Operational Bulletin 381) and Canadian case law, which have both reiterated that the term "parent" in paragraph 3(1)(*b*) refers to a person who shares a genetic connection to his or her child (appellant's memorandum, paras. 82 to 89). Furthermore, the original meaning rule also points to a narrow interpretation of the term "parent"; AHR technologies were still in their infancy at the time the Act came into force and thus could not have been contemplated by the legislature (appellant's memorandum, para. 90). A dynamic interpretation of the term "parent" is inappropriate in the case at bar, since this would lead the Court to intrude unduly on the role of Parliament in defining the scope of derivative citizenship (appellant's memorandum, paras. 92 to 94).

[25] Third, the Minister alleges that the Federal Court judge erred in finding that the respondent was a "legitimized" child within the meaning of section 2 of the Act, despite the fact that her birth mother and legal guardian were already married at the time of her birth (appellant's memorandum, paras. 7 and 32). Indeed, the legislative history of the Act demonstrates that the term "legitimized" traditionally refers to a child born out of wedlock, and whose paternity is recognized by subsequent

marriage (appellant's memorandum, paras. 95 to 101). Since the respondent was born in wedlock, and was thus legitimate at birth, she cannot be considered as having been "legitimized" (appellant's memorandum, paras. 101, 102 and 106).

POSITION OF THE RESPONDENT

[26] With respect to the standard of review, the respondent supports the Federal Court judge's finding that the standard of correctness applies to the citizenship officer's interpretation of statutory definitions contained in the Act. The respondent underscores that the Supreme Court's decision in *Agraira* did not overrule this Court's reasons in *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40 at paragraph 6 (*David Suzuki Foundation*), wherein Mainville J.A. refused to grant any deference to an officer of the Minister on a question of statutory interpretation (respondent's memorandum, para. 11). The respondent adds that contrary to *Agraira*, the present case does not involve Ministerial discretion, but rather turns on the interpretation of a section of the Act, and more specifically the scope and definition to be given to the term "parent" (respondent's memorandum, paras. 12 and 13).

[27] The respondent objects to the Minister's construction of the term "parent" in paragraph 3(1)(*b*) (respondent's memorandum, paras. 15 to 52). Focusing on the link between mother and child, the respondent argues that the term "parent" in paragraph 3(1)(*b*) must necessarily include "the woman from whom that person first emerged as a live human being unless that relationship has subsequently been replaced by operation of law" (respondent's memorandum, para. 15). According to the respondent, this interpretation is supported by the ordinary meaning of the term "parent" and the definition of the correlative term "child" (respondent's memorandum, paras. 20 and 38). The

respondent establishes a distinction between a blood relationship resulting from child bearing and a blood relationship resulting from a genetic contribution and claims that neither are required for the purposes of paragraph 3(1)(*b*) of the Act (respondent's memorandum, paras. 20 to 23).

[28] With respect to legitimization, the respondent concedes that the Federal Court judge improperly characterized her as a "legitimized child". The respondent explains that at no point in time was she considered illegitimate (respondent's memorandum, para. 53). Since her birth mother and legal guardian were married at the time of her birth, her legitimacy is presumed under both Indian law and the law of most Canadian provinces (respondent's memorandum, paras 53 and 54). This presumption is codified by the *Indian Evidence Act, 1872*, an act of the Imperial Parliament, which the Federal Court judge could take judicial notice of pursuant to section 17 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5 and which applicability was never called into question (respondent's memorandum, paras. 57 and 58).

ANALYSIS

Applicable standard of review

[29] It is now well established that "[i]n appeal of a judgment concerning a judicial review application, the role of this Court is to determine whether the applications judge identified and applied the correct standard of review, and in the event [he or] she has not, to assess the impugned decision in light of the correct standard of review" (*Canada (Citizenship and Immigration) v. Jayamaha Mudalige Don*, 2014 FCA 4, para. 37; *Keith v. Correctional Service of Canada*, 2012 FCA 117, para. 41; and *Yu v. Canada (Attorney General)*, 2011 FCA 42, para. 19). Concretely, "[w]hat this means in practice is that in 'step[ping] into the shoes' of the lower court, an appellate

court's focus is, in effect, on the administrative decision …" [emphasis added] (*Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, para. 247 and *Agraira*, para. 46) .

[30] The standard of review being dependent on the nature of the question to be decided, regard must be had to the specific determination which the citizenship officer was called upon to make in the case. It is undisputed that the central issue in the case is one of statutory interpretation, and more particularly whether the respondent's qualifies as a "parent" within the meaning of paragraph 3(1)(*b*) of the Act.

[31] The parties disagree as to the standard which should apply to the review of the citizenship officer's interpretation. Relying on *Agraira*, the appellant suggests that an administrative body's interpretation of its home statute attracts a standard of reasonableness (appellant's memorandum, para. 34). For her part, the respondent argues that *Agraira* should be distinguished from the present case because it involved the exercise of Ministerial discretion, which inherently calls for deference, and that in any event, this Court should follow the precedent set in the *David Suzuki Foundation* case.

[32] At the outset, it should be noted that *Agraira* did not alter the two-step analysis put forth in *Dunsmuir v. New Brunswick*, 2008 SCC 9, paragraph 62 (*Dunsmuir*) to identify the proper standard of review to be applied:

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[Emphasis added]

[33] Therefore, it must first be determined whether judicial precedents have satisfactorily established the standard of review applicable to the Minister's interpretation of the Act. In this regard, the Federal Court judge observed that recent case law from this Court suggests that the standard of review applicable to questions of law decided by the Minister is that of correctness (reasons, para. 21, citing *David Suzuki Foundation*, para. 6 and *Takeda Canada Inc. v. Canada (Health)*, 2013 FCA 13 (*Takeda*), leave to appeal denied 2013 CanLII 33948 (SCC)).

[34] Consistent with this are decisions of the Federal Court which have applied the standard of correctness to a citizenship officer's interpretation of paragraph 3(1)(*b*) of the Act (*Azziz*, para. 27; *Chang Lee v. Canada (Citizenship and Immigration)*, 2008 FC 614, para. 20) (see *contra*, where the standard of reasonableness was applied to the citizenship officer's interpretation of statutory requirements under the Act: *Jabour v. Canada (Citizenship and Immigration)*, 2012 FC 98, paras. 21 to 28; *Kinsel v. Canada (Citizenship and Immigration)*, 2012 FC 1515, paras. 17 to 21; *Rabin v. Canada (Citizenship and Immigration)*, 2010 FC 1094, paras. 16 and 17).

[35] However, regardless of the state of the jurisprudence as to the standard of review applicable in similar situations, the Supreme Court cautioned in *Agraira* that it may prove necessary to proceed to the second stage of the analysis where the relevant precedents are incompatible with recent developments (*Agraira*, para. 48). Among such developments is a recent Supreme Court decision which held that reviews of an administrative body's interpretation of its home statute must begin with the presumption that the standard to be applied is reasonableness (see *Alberta (Information and*

Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61, para. 39 (*Alberta Teachers'*)).

[36] The application of this presumption to non-judicial bodies, and more particularly to Ministerial decisions has given rise to diverging opinions. Two main trends are discernable. On the one hand, some decisions stand for the proposition that the presumption of deference laid out in *Alberta Teachers'* does not apply to decision-makers who do not exercise adjudicative functions. For example, in *David Suzuki Foundation* at paragraphs 88 and 96, Mainville J.A. writing for Nadon and Sharlow JJ.A. found that:

> [88] … deference on a question of law will not always apply, notably where the administrative body whose decision or action is subject to review is not acting as an adjudicative tribunal, is not protected by a privative clause, and is not empowered by its enabling legislation to authoritatively decide questions of law. A standard of review analysis is still required in appropriate cases. …
>
> [96] [T]his presumption must be understood in the context in which they were developed: they concern adjudicative tribunals. The presumption is derived from the past jurisprudence which had extensively considered the standard of review applicable to the decisions of such tribunals. By empowering an administrative tribunal to adjudicate a matter between parties, Parliament is presumed to have restricted judicial review of that tribunal's interpretation of its enabling statute and of statutes closely connected to its adjudicative functions. …
>
> [Emphasis added]

[37] This approach has been followed in a number of cases (*Takeda* (reasons by Dawson J.A., concurred by Pelletier, J.A.); *Canada (Citizenship and Immigration) v. Tobar Toledo*, 2013 FCA 226, para. 43 (reasons by Pelletier J.A, concurred by Gauthier and Trudel JJ.A.); *Prescient Foundation v. Canada (National Revenue)*, 2013 FCA 120, para. 13 (reasons by Mainville J.A, concurred by Pelletier and Gauthier JJ.A.); *Bartlett v. Canada (Attorney General)*, 2012 FCA 230,

para. 46 (reasons by Mainville J.A, concurred by Sharlow and Pelletier JJ.A.); *Sheldon Inwentash and Lynn Factor Charitable Foundation v. Canada*, 2012 FCA 136, para. 23 (reasons by Dawson J.A., concurred by Trudel and Stratas JJ.A.).

[38] The second approach is that adopted in Stratas J.A.'s dissenting opinion in *Takeda* (followed by *Northern Ontario Compassion Club v. Canada (Attorney General)*, 2013 FC 700, paras. 15 to 17, reasons by Annis J.; see also *Hernandez Febles v. Canada (Citizenship and Immigration)*, 2012 FCA 324, reasons by Evans J.A., concurred by Sharlow J.A., concurring reasons by Stratas J.A., leave to appeal granted 2013 CanLII 40344 (SCC)). In his reasons, Stratas J.A. chose to follow the direction given by the Supreme Court in *Alberta Teachers*', stating that (*Takeda*, para. 33):

> I am reluctant to carve out administrative decisions from the *Alberta Teachers' Association* approach merely because the administrative decision-maker is a Minister, as is the case here. For one thing, the *Alberta Teachers' Association* approach aptly handles the breadth of Ministerial decision-making, which comes in all shapes and sizes, and arises in different contexts for different purposes. In addition, Ministerial decision-making power is commonly delegated, as happened here. It would be arbitrary to apply the *Alberta Teachers' Association* approach to decisions of administrative board members appointed by a Minister (or, practically speaking, a group of Ministers in the form of the Governor in Council), but apply the [*David Suzuki Foundation*] approach to decisions of delegates chosen by a Minister. Finally, although this Court's decision in [*David Suzuki Foundation*] postdates that of the Supreme Court in *Alberta Teachers' Association*, I consider myself bound by the latter absent further direction from the Supreme Court: see *Canada v. Craig*, 2012 SCC 43 (CanLII), 2012 SCC 43 at paragraphs 18-23 …
>
> [Emphasis added]

[39] Stratas J.A. however commented that the presumption of deference for which *Alberta Teachers*' stands for could be rebutted based on an analysis of the *Dunsmuir* factors (*Takeda*, para. 28). He found that the presumption was overcome, as the nature of the question was purely legal,

there was no privative clause, and the Minister had no expertise in legal interpretation (*Takeda*, para. 29).

[40] In my respectful view, the question whether all decisions, including those properly labelled as Ministerial, are presumed to be reasonable was open to debate before *Agraira* as the Supreme Court had only applied the presumption in the context of decisions made by adjudicative tribunals (see *Alberta Teachers'*, *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, the Nova Scotia Human Rights Commission; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, the Canadian Human Rights Tribunal; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, a labour arbitration board). However, it now seems clear that the presumption extends to Ministerial decisions. I refer in particular to the following passage in *Agraira* which dealt with the review of a decision made by a Ministerial officer (para. 50):

> The applicability of the reasonableness standard can be confirmed by following the approach discussed in *Dunsmuir*. As this Court noted in that case, at para. 53, "[w]here the question is one of fact, discretion or policy, deference will usually apply automatically". Since a decision by the Minister under [subsection] 34(2) is discretionary, the deferential standard of reasonableness applies. Also, because such a decision involves the interpretation of the term "national interest" in [subsection] 34(2), it may be said that it involves a decision maker "interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54). This factor, too, confirms that the applicable standard is reasonableness.
>
> [Emphasis added]

[41] Significantly, the quoted words from *Dunsmuir* in the above excerpt are the words which were quoted in *Alberta Teachers'* to support the creation of the presumption that the standard of

reasonableness applies (*Alberta Teachers'*, para. 34). The only difference is that the word "Tribunal" which precedes the quote in *Alberta Teachers'* was replaced by the broader term "decision-maker". The same broad language was more recently used, seemingly for the same purpose, in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, para. 21 (*McLean*) in the context of a decision made by the British Columbia Securities Commission.

[42] It therefore appears that the analysis must start from the premise that reasonableness applies to the review of the citizenship officer's interpretation of paragraph 3(1)(*b*). However, as in *Takeda* (paras. 28 and 29), this presumption can be quickly rebutted (*McLean*, para. 22; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada,* 2012 SCC 35, para. 16).

[43] Specifically, there is no privative clause and the citizenship officer was saddled with a pure question of statutory construction embodying no discretionary element. The question which he was called upon to decide is challenging and the citizenship officer cannot claim to have any expertise over and above that of a Court of Appeal whose sole reason for being is resolving such questions.

[44] In this respect, I note that construing paragraph 3(1)(*b*) requires a consideration of the shared meaning rule in the application of bilingual enactments as well as the use that may be made of the French text given that it was enacted in the context of a revision. There is no suggestion that an immigration officer was ever asked to consider either of those questions and nothing in the structure or scheme of the Act suggests that deference should be accorded to the immigration officer on the question which he had to decide.

[45] I am therefore satisfied that the presumption is rebutted.

The use of words

[46] In the reasons which follow, the expression "gestational mother" is used in relation to the respondent to identify the person who carried her. The expression "genetic mother" is used to identify the person who contributed the eggs. The connection between the respondent and her gestational mother is described as "gestational" and her connection with the persons who contributed the eggs and the sperm from which she was conceived is described as "genetic".

[47] Further, while the relevant consideration for the conveyance of derivative citizenship was identified by reference to the Latin words *jus sanguinis* (blood relationship) in 1977, the means of testing the existence of this relationship has evolved with the emergence of genetic science. Although the reasons make continuous reference to a "genetic link or connection", the issue remains the same as it was in 1977, *i.e.* whether there is proof of filiation pursuant to paragraph 3(1)(*b*).

Interpretation of the term parent in paragraph 3(1)(b) of the Act

[48] Before turning to the analysis, it is useful to retrace the origin of paragraph 3(1)(*b*). This provision was introduced by the 1977 Act which came into force on February 17, 1977.

[49] Paragraph 3(1)(*b*) allowed a child born outside Canada after February 14, 1977 to be automatically recognized as a Canadian citizen when born of a Canadian parent, regardless of the parent's marital status at the time of birth. As the appellant points out, this made a child's

"legitimacy" irrelevant to derivative citizenship under paragraph 3(1)(*b*) (appellant's memorandum, para. 66). However, the notion of legitimacy did not thereby become irrelevant since subsection 5(2) of the 1977 Act allowed for a grant of citizenship for a permanent resident who was the minor child of a citizen, including children who were adopted or "legitimized".

[50] Further amendments were brought to the Act in 2007 (*An Act to Amend the Citizenship Act*, (adoption), S.C. 2007, c. 24). The effect of these amendments was to streamline the treatment of children born to a Canadian parent and children adopted by a Canadian parent. Before these amendments, a child born to a Canadian parent outside Canada automatically became a Canadian citizen whereas a foreign child adopted by a Canadian parent had no such right. Section 5.1 of the Act somewhat equalizes the playing field by providing that on application the Minister "shall" grant citizenship to a foreign child adopted by a Canadian parent subject to certain terms and conditions.

[51] Against this background, one can understand why the Federal Court judge attempted to construe paragraph 3(1)(*b*) so as to confer citizenship on the respondent. As he explained, citizenship can now be conveyed as of right through parentage or by adoption (reasons, para. 40). In this case the respondent, by reason of the fact that she was carried by her gestational mother in the course of a legitimate family project, has a closer connection with her parents than she would with adoptive parents. Yet, the interpretation given by the citizenship officer denies the respondent this entitlement. The difficulty which flows from this result is compounded by the fact that because the respondent is presumed to be the legitimate child of her father, adoption may not to be an option (appeal book, pp. 153 to 156; reasons para. 40). As a result, the respondent cannot obtain citizenship

otherwise than by way of Ministerial discretion or the citizenship process designed for foreign nationals (appeal book, p. 30).

[52] Faced with the ambiguous meaning of the term "parent" in paragraph 3(1)(*b*) of the Act, the Federal Court judge relied on the correlative definition of "child" in section 2 of the Act, which "includes a child adopted or legitimized in accordance with the laws of the place where the adoption or legitimization took place". The crux of the Federal Court judge's reasoning is contained in paragraph 33 of his reasons, where he held that the respondent was the "legitimized child" of her mother and father according to her birth certificate and therefore came under the definition of "child" within the meaning of the definition set out in section 2 of the Act. The Federal Court judge reasoned that as the respondent was the child of her parents pursuant to this definition, the word "parent" in paragraph 3(1)(*b*) should be construed as including them.

[53] In order to arrive at that conclusion, the Federal Court judge made two inferences: 1) that the birth certificate satisfactorily established the existence of a child/parent relationship; 2) that this relationship provided sufficient evidence that the respondent was the <u>legitimized child</u> of her gestational mother and her legal guardian under Indian law.

[54] However, this second inference cannot stand given that only a child who is illegitimate at birth can be said to be subsequently "legitimized". In this respect, the respondent recognized before us that "[t]here was no stage of her life at which she was an illegitimate child" and that "her legitimacy is to be presumed from the moment of her birth until the contrary has been proven" (respondent's memorandum, para. 53). For the same reason, the respondent insists that the use of

the term "legitimized" in the Federal Court judge's reasons was inappropriate. Further as we have seen, the notion of "legitimatization" is not relevant to the application of paragraph 3(1)(*b*) as derivative citizenship is obtained without regard to issues of legitimacy (see paras. 48 and 49 above).

[55] It was therefore not open to the Federal Court judge to hold that citizenship was granted to the respondent on the basis that she was the legitimized child of her legal guardian.

[56] The question that remains is whether, leaving aside the definition of "child" as an interpretative aid, the respondent's legal guardian falls under the category of "parent" pursuant to paragraph 3(1)(*b*) of the Act. This gives rise to a pure question of statutory construction. As in all such cases, the question must be addressed with the following principle in mind:

> [t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Re Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27, paras. 21 and 22).

[57] The appellant invites this Court to apply the shared meaning rule for the interpretation of bilingual enactments, arguing that the French text of paragraph 3(1)(*b*) of the Act is clear and unequivocal ("née d'un père ou d'une mère") and should be preferred to the term "parent" in the English text, which carries a latent ambiguity.

[58] According to the appellant, the words "née d'un père" and "née […] d'une mère" presuppose that the mother or father contributed to the child's genes. The appellant adds that the

fact that an adoption cannot be contemplated when a child is "née d'un père" or "née […] d'une mère" explains why the words "other than a parent who adopted him" which appear in the English text were omitted from the French text of paragraph 3(1)(*b*).

[59] I agree that this omission cannot be explained otherwise and that the French text by reason of its greater precision should be preferred to the English text. I also agree that the words "née d'un père" presuppose that the father, in this case the respondent's legal guardian, contributed to the child's genes as there is no other way in which a child can conceivably be said to be "née d'un père". In the case of the father, the conclusion that there must be a genetic link seems inescapable.

[60] That said, the panel raised the question during the hearing whether the French text of paragraph 3(1)(*b*) could be relied upon in construing the intent of Parliament given that it was enacted through a revision. The parties were invited to make written submissions on this point, which have since been received.

[61] The French text of paragraph 3(1)(*b*) was adopted in the course of the 1985 revision of the Act. Sections 3 and 4 of the *Revised Statutes of Canada*, 1985 Act, R.S.C., 1985, c. 40 (3rd Supp.) provide respectively:

> **3.** Immediately before the coming into force of the Revised Statutes, the several Acts and portions of Acts listed in the schedule to the Statute Roll are repealed to the extent mentioned in the schedule.
>
> **4.** The Revised Statutes shall not be held to operate as new law, but shall be construed and have effect as a consolidation of the law as contained in the Acts and portions of Acts repealed by section 3 and for which the Revised Statutes are substituted.

[62] The goal of a general revision is to produce coherent and elegant statutes that are clear, consistent, stylistic and readable (Ruth Sullivan, *Sullivan on the Construction of* Statutes, 5th ed, (Toronto: Lexis Nexis, 5th ed, 2008), pp. 653 and 654; Pierre-André Côté, *The Interpretation of Legislation in Canada*, (Toronto: Carswell, 4th ed, 2011), p. 58). There is a presumption that changes in terminology in a revised statute are technical or aesthetic in nature and do not change the state of the law (Côté, p. 61). However, I agree with my colleague Mainville J.A. that if new law can be gleaned from the legislative text enacted through this process, it must be ignored, and reliance must be placed on the original text (see *Fluta Cubana de Pesca v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1713, 154 D.L.R. (4th) 577 (FCA), para. 42). I do not believe that the appellant says anymore than that in the so-called "concession" which my colleague quotes at paragraph 93 of his reasons.

[63] The issue therefore is whether the French text of paragraph 3(1)(*b*) creates new law when compared to the text which it replaces (the text in question is reproduced at para. 5, above). As explained above, the effect of the revision was to delete the reference to adoptive parents ("mais non un parent adoptif"), and add the expression "née d'un" and "née d'une" before the words "père" and "mère". The revision also deleted the words "hors du Canada" and replaced them with the more idiomatic phrase "à l'étranger". In my view, the words "née d'un/née d'une", while more precise, did not add anything to the prior French text. Indeed, the terms "père" and "mère", in the prior text, already conveyed the idea that there had to be a genetic/gestational connection, as evidenced by the primary definition of the word "père" – "Homme qui a engendré, qui a donné naissance à un ou plusieurs enfants" and the word "mère" – "Femme qui a mis au monde un ou plusieurs enfants" (*Le*

Petit Robert, 2006; to the same effect see *Le Grand Robert*, 1996; *Le Petit Larousse*, 1999; *Multidictionnaire de la langue française*, 2003). For the same reason, the exclusion relating to adoption "mais non un parent adoptif" in the prior French text was redundant as by definition, the words "père" and "mère" exclude adoptive parents.

[64] Such efforts of linguistic simplification fall within the mandate of the revisers. The revision makes the prior French text more precise, but does not alter its meaning. The revisers focused on the grammatical meaning of the words "père" and "mère" and made clear Parliament's prior reliance on a genetic/gestational connection to determine who can procure derivative citizenship. In my view, the French text does not deviate from the prior version. It merely makes it more readable stylistically, thereby bringing out more clearly the intention of Parliament.

[65] I should add that giving the words "père" and "mère" in the prior French text a meaning which requires a genetic/gestational connection is consistent with the purpose of paragraph 3(1)(*b*) which is to confer derivative citizenship, that is citizenship which arises by the operation of law, whenever a child is born outside of Canada to a Canadian father or mother. Because citizenship conferred by virtue of paragraph 3(1)(*b*) crystallizes at the moment of birth, the only events which can impact on this grant are those which precede in time the moment of birth. It follows for instance that this presumption of legitimacy under Indian law on which the respondent relies can have no bearing on derivative citizenship since the presumptive status, which has its source in the common law, is cast on "a child born in wedlock" [emphasis added] (*Presumption of Legitimacy of a Child Born in Wedlock*, (1919) 33: 2 Harvard Law Review, pp. 306 to 308). By definition, this status cannot arise before the child comes into being. The same would apply to any equivalent common

law presumption arising in Canada. Similarly, the fact that the respondent is in a legitimate parental relationship pursuant to Canadian or foreign law can have no bearing since a parental relationship with a child does not begin before the act of birth.

[66] Regard must also be had to the automatic nature of the grant. In this respect, derivative citizenship pursuant to paragraph 3(1)(*b*) operates the same way as the automatic grant of citizenship conferred on a child by reason of being born on Canadian soil, *i.e. jus solis* (paragraph 3(1)(*a*) of the Act). A mother who comes to Canada with the strategic view of giving birth and conveying citizenship on her child achieves this goal the same way as a mother who gives birth in Canada in the normal course. Similarly, a Canadian parent who conceives a child with no intention to parent confers citizenship upon the child at birth in the same way as a parent who assumes his or her parental responsibilities. In short, paragraph 3(1)(*b*), in contrast with section 5.1 which deals with adoption, is totally divorced from family law considerations.

[67] When regard is had to the manner in which paragraph 3(1)(*b*) operates, it is apparent that the only type of connection which can confer derivative citizenship is a genetic/gestational one. As in the case at hand, the respondent's legal guardian has no genetic connection with the respondent, he cannot have conveyed to her citizenship by birth.

[68] In so holding, I am mindful that according to Operation Bulletin 381 published under the title "Assessing who is a parent for citizenship purposes where AHR and/or surrogacy arrangements are involved", a different approach is being used in assessing the entitlement to citizenship for children born through AHR. Despite its broad title, I note that this Bulletin cannot apply to children

born through AHR in Canada as they are Canadian citizens by reason of being born on Canadian soil regardless of any other considerations. The relevant portions read:

> ISSUE
> Children born abroad through assisted human reproduction (AHR) and/or surrogacy arrangements undertaken by Canadian parents are not eligible for Canadian citizenship by descent when no genetic lineage to the Canadian parent can be established.
>
> CURRENT STATUS
> The existence of a genetic parent – someone whose child contains their genetic information – is what current citizenship relies on to determine who can receive citizenship by descent (see CP 3). Under norms of Canadian family law, the determination of whether a person is a "parent" is not merely dependent on a genetic link between the biological parent and the child, but also based on evidence of intention to parent and demonstration of parentage as displayed by the existence of a legal parent/child relationship. In most cases, where there is no question with respect to the genetic relation between the parent and the child, birth certificates are accepted as valid evidence in the establishment of who is the parent.
>
> However, cases involving AHR and/or surrogacy arrangements undertaken by Canadian citizens may result in children born abroad who are not genetically related to the Canadian parents. DNA will not be requested systematically, but rather only when there is evidence suggesting that the Canadian parent (through whom a claim by descent or derivative claim of citizenship is made) is not the genetic parent. See Appendix A below for the template letter requesting DNA.
>
> [Emphasis added]

[69] While these guidelines are not easy to follow because they focus on the circumstances in which DNA testing will be requested, they can be read as suggesting that in addition to the existence of a genetic link, there must be a legal parent/child relationship before derivative citizenship can be conveyed. Read in that light, the first paragraph under the heading "current status" provides that when the genetic relation is not in issue, only the existence of the second condition needs be proven and for that purpose, a birth certificate suffices.

[70] However, the Operation Bulletin 381 also makes it clear that in the absence of a genetic link, derivative citizenship cannot be conveyed even where there is a legal parent/child relationship, such as is the case here. This last position finds support in paragraph 3(1)(*b*). In contrast, it is clear for the reasons already given, that there is no basis under the Act for imposing the existence of a legal parent/child relationship as a condition precedent for the grant of derivative citizenship.

[71] Based on the above reasoning, it is clear that a child cannot be said to be "née d'un père" in the absence of a genetic link. However, the same clarity does not exist in the case of a mother as the word "mère" does not implicitly or explicitly exclude the genetic or the gestational mother. Notably, although of a different kind, both the genetic mother and the gestational mother have a blood connection with their child. It follows that a child could be said to be "née […] d'une mère" when referring to either the genetic mother or the gestational mother. While the wording of paragraph 3(1)(*b*) was unambiguous when it was first introduced in 1977, the now established AHR technology which allows distinct women to carry a child and contribute the eggs eliminates the prior clarity altogether . Operation Bulletin 381 by-passes this issue as it is drafted on the assumption that a gestational mother can never be the mother of the child which she bears.

[72] The appellant for his part posits that the term "parent" is restricted "to a person who has begotten (father) or borne a child (mother) <u>and</u> who is genetically related to the child" [emphasis added] (appellant's memorandum, para. 52). During the hearing, counsel confirmed that both these elements had to be present before derivative citizenship can be conferred.

[73] In an AHR context, these combined elements would have no impact in the case of the father because a genetic contribution, however made, is the only way in which a child can be begotten. However, in the case of the mother, they would prevent both the genetic mother and the gestational mother from conveying derivative citizenship.

[74] The correctness of the appellant's proposed interpretation needs not to be addressed as it does not change the applicable test for the father and derivative citizenship conveyed by the mother is not in issue in the present case. However, I note that it would give rise to an unequal treatment between father and mother as the father would convey derivative citizenship by way of a genetic link and the mother would not. I also note that this interpretation is inconsistent with the Operation Bulletin 381 according to which a genetic connection can convey derivative citizenship regardless of whether it is with the father or the mother.

[75] The more pressing policy issue which arises from the analysis is that Operation Bulletin 381, inasmuch as it provides for different and more demanding conditions for the grant of derivative citizenship to children born through AHR, has no legal foundation. While no Charter issue had been raised before this Court, I note that this interpretation would create an unequal treatment between children of Canadian citizens depending on the manner in which they are conceived.

[76] Several important policy issues also arise because of the novelty which this case presents. For instance, because a genetic link is the only connection required in order to convey derivative citizenship under the Act, a Canadian donor conveys that right like any other Canadian procreator. Also, by reason of the new reality created by AHR technology, it cannot be excluded that a child is

"né […] d'une mère" when borne by a gestational mother, in which case the gestational link would also be capable of conveying derivative citizenship. These questions are worthy of further consideration and risk being answered by the Courts unless Parliament exercises its prerogative to deal with them by way of legislation.

[77] Before closing, a brief comment on the alternative conclusion reached by my colleague is in order. He concludes based on an analysis which focuses on the English text, that in enacting paragraph 3(1)(b), Parliament intended to refer to a legally recognized parent. His reasons make it clear that this does not make the genetic link inconsequential as according to the civil law and common law traditions, the legal notion of parent largely overlaps with the genetic link.

[78] I do not take issue with that. However, the difficulty which this case presents is that there is no overlap so that a decision must be made as to precise factor which conveys derivative citizenship, *i.e.* is it a genetic link, the legal notion of parent or both? My colleague concludes that the legal notion of parent is the determinative factor. Specifically, he holds that derivative citizenship was conveyed and this is the only factor that is present in this case.

[79] I agree with my colleague that the outcome which he proposes would resolve a number of the policy issues which this case has highlighted. However, it would also give rise to issues of its own. For instance, what is family law when considered from a federal law perspective, and if it refers to the laws of the provinces, which law would be applied in the context of 3(1)(*b*) given that this provision contemplates situations where the parents are outside Canada at the time of their child's birth.

[80] In my respectful view, the outcome proposed by my colleague would constitute a significant departure from the existing state of the law which, as I have attempted to demonstrate, is to the effect that derivative citizenship is conveyed by a blood connection. Only Parliament can bring about the type of change contemplated by my colleague.

DISPOSITION

[81] I am satisfied that paragraph 3(1)(*b*) requires a genetic link between the respondent and her legal guardian and that as there is no such link, derivative citizenship was not conveyed.

[82] I would allow the appeal, set aside the decision of the Federal Court judge, and giving the decision which he ought to have given, I would dismiss the application for judicial review.

"Marc Noël"
J.A.

"I agree
Wyman W. Webb J.A."

MAINVILLE J.A. (Dissenting Reasons)

[83] I have read the reasons of my esteemed colleague Noël J.A., and I respectfully reach another conclusion. In my view, the appeal should be dismissed. My reasons for reaching this conclusion follow.

Factual background and context

[84] The factual background and context of this proceeding are set out in the reasons of my colleague and need not be repeated. I would simply add that no misrepresentation of facts or perversion of the citizenship process is alleged in this case. In addition, all parties agree that the respondent's parents have pursued in good faith a legitimate family project by bringing the respondent into the world. Moreover, it is not challenged that the respondent is the child of her parents under either the laws of India, where the respondent was born, or under the laws of British Columbia, where the family has taken residence.

The standard of review

[85] I agree with my colleague that correctness is the applicable standard under which to judicially review the citizenship officer's interpretation of paragraph 3(1)(*b*) of the *Citizenship Act*, R.S.C. 1985, c. C-29.

[86] The recent decisions of the Supreme Court of Canada in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 50 (*Agraira*) and *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paras. 20-21 and 33 (*McLean*) stand for the proposition that the presumption of reasonableness set out in *Alberta (Information and Privacy Commissioner)*

v. Alberta Teacher's Association, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 39 extends to any administrative decision maker (including a ministerial decision maker) interpreting his or her home statute. I deeply disagree with this approach on a principled basis for the reasons I extensively set out in *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40, 427 N.R. 110 at paras. 65 to 105. As I indicated there, assuming without clear legislative authority that Parliament intends to defer to the executive for the interpretation of its laws is, in my view, a paradigm shift in the fabric of Canada's constitution. Our Court is, however, bound by *Alberta Teacher's Association* and *McLean* and must comply unless the Supreme Court of Canada instructs otherwise.

[87] Nevertheless, as noted in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283 at para. 16, and reiterated in *McLean* at para. 22, a contextual analysis may rebut the presumption of reasonableness for questions involving the interpretation of the home statute. That analysis in this case leads to that rebuttal for the reasons offered by my colleague at paras. 42-45 of his reasons above.

<u>*Analysis*</u>

The pertinent legislative provision

[88] The pertinent legislative provision in this case is found in the text of paragraph 3(1)(*b*) of the *Citizenship Act*, S.C. 1974-75-76, c. 108 (the 1977 Act). That text is reproduced in the reasons of my colleague, and I reproduce it again here for ease of reference:

3. (1) Subject to this Act, a person is a citizen if	**3.** (1) Sous réserve des autres dispositions de la présente loi, est citoyen toute personne
…	[…]

(*b*) 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;	(*b*) qui est née hors du Canada après l'entrée en vigueur de la présente loi et dont, au moment de sa naissance, le père ou la mère, mais non un parent adoptif, était citoyen canadien
…	[…]

[89] The text of the French version of that paragraph as currently found in the *Citizenship Act* is reproduced at paragraph 4 of the reasons of Noël J.A. That version is different from the 1977 Act adopted by Parliament, since it does not contain the specific exclusion of adopted children and uses the words "née … d'un père ou d'une mère". This change did not result from a legislative amendment approved by Parliament, but rather it derives from an administrative redrafting under the *Revised Statutes of Canada, 1985 Act*, R.S.C. 1985, c. 40 (3rd Supp.).

[90] In *Flota Cubana de Pesca (Cuban Fishing Fleet) v. Canada (Minister of Citizenship and Immigration) (C.A.)*, [1998] 2 F.C. 303, 154 D.L.R. (4th) 577 ("*Flota Cubana*"), this Court considered a similar divergence between the English and French texts of a legislative enactment which resulted from changes to the French text made under the 1985 statute consolidation exercise. Relying on the principles set out by this Court in *Goodswimmer v. Canada (Attorney General)*, [1995] 2 F.C. 389, 123 D.L.R. (4th) 93, Stone J. concluded at para. 42 of *Flota Cubana* that a modification to the French text of a legislative enactment resulting from a consolidation must only be construed as a consolidation of the law as it existed prior to 1985, and that consequently, the French version must be given the meaning it had as originally adopted by Parliament. This approach was also applied by Chief Justice Isaacs J.A. in *Beothuk Data Systems Ltd., Seawatch Division v. Dean (C.A.)*, [1998] 1 F.C. 433 at paras. 43-44, and recently reiterated by Chief Justice Lutfy in

Felipa v. Canada (Minister of Citizenship and Immigration), 2010 FC 89, [2011] 1 F.C.R. 365 at paras. 151 to 154, rev'd on other grounds 2011 FCA 272, [2012] 1 F.C.R. 3.

[91] As noted in Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed., Carswell, at pp. 54-55, changes in terminology introduced in revised statutes are merely technical or aesthetic in nature and are not intended to change the law. P.A. Côté further notes that this is particularly true when the revision only modifies one of the two linguistic versions of the enactment, as is the case here: *ibid.* Furthermore, because the revised statutes are simply a reformulation of existing enactments, it seems reasonable to draw on the earlier texts to clear up genuine problems of interpretation: *ibid*.

[92] Moreover, the approach set out in *Flota Cubana* has been repeated in sections 30 and 31 of the *Legislation Revision and Consolidation Act*, R.S.C. 1985, c. S-20, which read as follows:

30. The consolidated statutes and consolidated regulations do not operate as new law.	**30.** Les lois codifiées et les règlements codifiés ne sont pas de droit nouveau.
31. …	**31.** […]
(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act,* the original statute or amendment prevails to the extent of the inconsistency.	(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.
…	[…]

[93] In light of all this, the appellant Minister rightfully concedes in this appeal that “the revised version of the French text of [paragraph] 3(1)(*b*) cannot be relied upon to interpret the previous French text version of [paragraph] 3(1)(*b*) in the 1977 Act to the extent of changing the substantive legal meaning of [paragraph] 3(1)(*b*)”: Appellant’s further submissions at para. 14.

[94] In effect, this means that our Court ought not to rely on the words “née … d’un père ou d’une mère” in interpreting paragraph 3(1)(*b*) of the *Citizenship Act*: *Sarvanis v. Canada*, 2002 SCC 28, [2002] 1 S.C.R. 921 at para. 13; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 at paras. 30-31.

The interpretation of paragraph 3(1)(b)

[95] The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find the meaning that is harmonious with the Act as a whole: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 27.

[96] Applying a textual, contextual and purposive analysis to the interpretation of paragraph 3(1)(*b*) of the *Citizenship Act* - which reads exactly the same in its French and English versions adopted by Parliament under the 1977 Act - I conclude that the term “parent” is used therein in its legal sense rather than in its biological or genetic sense.

[97] In both the common law and civil law traditions, the parent/child relationship is essentially grounded on a biological or genetic link between the parent and the child. As a result, the legal

notion of parenthood largely overlaps with the biological or genetic link. Nevertheless, the common and civil law traditions do not restrict the child/parent relationship to genetics, but also expands that relationship so as to include a small and discrete group of persons who are parents by operation of the legal presumption of paternity. This is what is at issue in this appeal.

[98] Therefore, while a parent in the legal sense more often than not is a child's biological or genetic progenitor, in some discrete cases both the common law and civil law traditions of Canada also recognize as a parent an individual that may have no biological or genetic connection to a child. In this sense, the legal notion of parent is not necessarily always tied to genetics. The legal notion of parent includes in this case the relationship which exists between the respondent and her Canadian father. As a result, I find that paragraph 3(1)(*b*) of the *Citizenship Act* refers to the legal notion of parent, and that the respondent is, in law, a child of her father. I would consequently dismiss this appeal.

[99] I now turn to the textual, contextual and purposive analysis which, in my view, supports this interpretation of paragraph 3(1)(*b*).

i) textual analysis

[100] First, applying a textual analysis, I note that had Parliament intended to use the term "parent" exclusively in its biological or genetic sense, it would not have been necessary to expressly exclude adoptive parents from the ambit of paragraph 3(1)(*b*). By specifically adding the words "other than a parent who adopted him" ("mais non un parent adoptif" in the French version of the 1977 Act), Parliament has clearly indicated that the notion of "parent" which it uses in that

paragraph is intended to refer to a legally recognized parent. Indeed, an adoptive parent has no genetic or biological link with his or her adopted child, but is nevertheless a "parent" under the legal meaning of the term. Had only a biological or genetic link been intended, that exclusion would have not been required, or the words used would have been quite different.

[101] In my view, this textual analysis is a complete answer to the issue before us. The words used in the paragraph are all precise and unambiguous, and the words themselves alone do, in this case, best indicate that the intention of Parliament was to refer to the legal notion of "parent". Thus, though a child/parent legal relationship may well result from a biological or genetic link, it also extends to other situations which are not necessarily exclusively based on biology.

[102] I am also confirmed in this view by a contextual and purposive analysis of the provision at issue.

ii) contextual analysis

[103] Turning to a contextual analysis, it is important to note that in 1977, when the *Citizenship Act* was amended to include paragraph 3(1)(*b*), the legal notion of parent was well understood as including a man who was legally presumed to be the child's biological father even though he may not have necessarily had, in fact, a genetic connection to the child. The well-known legal presumptions of paternity in common and civil law jurisdictions would certainly have been known by Parliament at the time of the adoption of the 1977 Act. Had Parliament intended to exclude from the concept of parent set out in paragraph 3(1)(b) fathers who did not have a genetic connection to the child, but who were nonetheless deemed in law to be the child's father, it would have used precise language to that effect, as it did when it excluded adoptive parents.

[104] At the time of the 1977 Act, the woman who gave birth to a child necessarily had a genetic and biological (gestational) connection to her child which resulted in a legal parent/child relationship. This legal relationship could be severed when the mother gave up the child for adoption. However, the approach of the law was different in the case of the father. In both the common law and civil law traditions of Canada, the law presumed that when a wife gave birth, her husband was the father.

[105] This presumption of paternity originated in Roman law and was adopted into the common law in the sixteenth century: Angela Campbell, "Conceiving Parents through Law" (2007) 21 *International Journal of Law, Policy and the Family* 242 at p. 250. As Professor Mykitiuk has explained, "[a]t common law, the legal connection with the child's mother rather than any direct biological connection with a child established paternity…Although the presumption could be disavowed by the husband of the child's mother, it could not be rebutted by any other man, even if he could prove he was the biological progenitor. Thus the biological anchoring of legal paternity was more elusive and illusory – legal truths were not always consistent with biological facts: Roxanne Mykitiuk, "Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies" (2002) 39:4 Osgoode Hall Law Journal 771 at p. 780.

[106] That approach was followed in the common law provinces of Canada at the time of the 1977 Act, and some provinces legislated specifically to that effect. As an example, in 1977 Ontario's Legislative Assembly passed the *Children's Law Reform Act*, S.O. 1977, c. 41. Section 8 of that Act set out a modified version of the common law presumption of paternity. Subsection 8(1) read as follows:

> **8.** (1) Unless the contrary is proven on a balance of probabilities, there is a presumption that a male person is, and he shall be recognized in law to be, the father of a child in any one of the following circumstances:
>
> 1. The person is married to the mother of the child at the time of the birth of the child.
> 2. The person was married to the mother of the child by a marriage that was terminated by death or judgment of nullity within 300 days before the birth of the child or by divorce where the decree *nisi* was granted within 300 days before the birth of the child.
> 3. The person marries the mother of the child after the birth of the child and acknowledges that he is the natural father.
> 4. The person was cohabiting with the mother of the child in a relationship of some permanence at the time of the birth of the child or the child is born within 300 days after they ceased to cohabit.
> 5. The person and the mother of the child have filed a statutory declaration under subsection 8 of section 6 of *The Vital Statistics Act* or a request under subsection 5 of section 6 of that Act, or either under a similar provision under the corresponding Act in another jurisdiction in Canada.
> 6. The person has been found or recognized in his lifetime by a court of competent jurisdiction in Canada to be the father of the child.

[107] Similar principles applied under the civil law. In the late 1970's, the *Civil Code* then applicable in Quebec contained explicit provisions reflecting a strong presumption that a birth mother's husband was the child's father. For instance, article 218 stated that a child conceived during the marriage was legitimate and was held to be the child of the husband, and that a child born on or after 180 days following the solemnization of the marriage or within 300 days of its dissolution was held to have been conceived during the marriage. The birth mother's husband could only rebut the presumption of paternity in very limited circumstances. For instance, article 219 of the then applicable *Civil Code* stated that the husband could not disown the child, even for adultery, unless the child's birth was concealed from him. Moreover, under article 223, a husband who could disown the child was required to do so within two months of the child's birth if he was present at the

time, or within two months of his return if he was away at the time of the birth or within two months of discovery of fraud if the birth was concealed from him.

[108] Parliament had to be aware of these well-known presumptions of both the common and civil law traditions of Canada when it first adopted paragraph 3(1)(*b*) of the *Citizenship Act*. Yet it chose not to exclude these non-genetic fathers from the ambit of the paragraph, as it did for adoptive parents. It can only be assumed that this was a deliberate choice.

[109] Parliament would have also been aware in the 1970's that individuals were already using artificial insemination using donated sperm. This method of conceiving a child is reported to have been first used in the 19th Century, and by the time the *Citizenship Act* was amended to include paragraph 3(1)(*b*), the Civil Code Revision Office was discussing a set of reforms to Quebec's *Civil Code* to explicitly address parentage in cases where donated sperm was used: Bartha Maria Knoppers, "The "Legitimization" of Artificial Insemination: Promise or Problem?" (1978) 1:2 Family Law Review 108 at pp. 108 and 114 endnote 8. If the genetic interpretation of parent is to prevail, this means that a Canadian provider of genetic material to a sperm bank could confer Canadian citizenship on all children born from his genetic contribution, including the children of foreigners with no connection to Canada, while the children of Canadian citizens residing abroad and born from sperm donated by a foreigner would be denied citizenship. In my view, Parliament could never have intended such a result.

[110] Rather, in my view, Parliament intended to use the legal concept of parent in paragraph 3(1)(*b*). In this way, derivative Canadian citizenship is conferred to a child born to a Canadian

parent following a fertilization technique, and this irrespective of the nationality of the genetic donors. On the other hand, derivative citizenship is not conferred to a child born to foreigners following a fertilization technique which uses genetic material from a Canadian citizen, since in such circumstances the genetic contributor is not deemed in law to be a parent.

iii) purposive analysis

[111] A purposive analysis also supports this interpretation.

[112] The first statute to give Canadian citizenship a status separate from British nationality was the *Canadian Citizenship Act*, S.C. 1946 c. 15, which came into force on January 1, 1947 (the 1947 Act). Under section 5 of the 1947 Act, a person born outside Canada after its commencement was deemed to be a Canadian citizen if "his father, or in the case of a child born out of wedlock, his mother, at the time of that person's birth, is a Canadian citizen… and … the fact of his birth is registered at a consulate or with the Minister, within two years of its occurrence…".

[113] There was no impediment in the 1947 Act with respect to derivative citizenship acquired through a father for a child born in wedlock, and this irrespective of the genetic or biological link between the father and the child. All the 1947 Act required was a legal link to the father acquired through birth in wedlock.

[114] One of the purposes for introducing paragraph 3(1)(*b*) through the 1977 Act was clearly to <u>expand</u> the ambit of derivative citizenship so as to recognize derivative Canadian citizenship for a child born to a Canadian parent outside wedlock. This <u>expansion</u> of derivative citizenship was

consistent with a gradual evolution in law towards the recognition of equal rights for so-called "illegitimate" children. For instance, section 1 of Ontario's 1977 *Children's Law Reform Act*, referred to above, abolished any distinction between the status of children born in wedlock and those born out of wedlock.

[115] One of the principal purposes for introducing paragraph 3(1)(*b*) into the *Citizenship Act* was therefore to <u>expand</u> derivative citizenship through the 1977 Act by eliminating the prior legal restrictions affecting illegitimate children.

[116] In light of this legislative purpose, and in light of my aforementioned finding that the term parent was not meant to denote exclusively biological parents, I fail to understand how this provision can be interpreted so as to restrict derivative citizenship with respect to children born in wedlock to Canadian fathers with whom they have a legitimate and enforceable legal link, even though a genetic link may be absent.

[117] Moreover, Parliament subsequently amended the *Citizenship Act* so as to largely set aside the prior distinctions which applied to adopted children of Canadian citizens. The new statutory provision, section 5.1 of the *Citizenship Act*, allows a foreign-born child adopted by a Canadian citizen to apply directly for a grant of citizenship without requiring that the child first become a permanent resident, provided the adoption satisfies certain legal criteria. The clear purpose of this provision is again to expand derivative citizenship by largely setting aside prior legal distinctions between children of Canadian citizens.

[118] The appellant nevertheless submits that although Parliament has sought to eliminate or reduce prior legal distinctions made with respect to illegitimate and adopted children, it would have somehow maintained a distinction with respect to children of Canadian citizens who do not have a genetic link to their Canadian parents. This interpretation could exclude from the ambit of paragraph 3(1)(*b*) a child born outside Canada to a Canadian citizen a result of the use of genetic material donated by a foreigner through a sperm bank, *in vitro* fertilization or some other medical technique. I do not accept that Parliament intended to create such a distinction.

[119] The clear purpose of all the above-mentioned amendments to the *Citizenship Act* is to treat all children of Canadian citizens substantially equally, irrespective of the circumstances of their birth. That purpose is consistent with treating the child of a Canadian citizen who is born as a result of a medical fertilization technique in substantially the same manner as a child born with a genetic link or an adopted link to a Canadian citizen.

[120] This approach is moreover consistent with Canadian human rights legislation, most notably the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, which prohibits discrimination on the ground of family status, which certainly includes circumstances of birth or manner of conception. Moreover, circumstances of birth or manner of conception may well be an analogous ground of discrimination under the *Canadian Charter of Rights and Freedoms* (*Charter*). In this respect, it is useful to note that it has been recently accepted that "manner of conception" is an analogous ground under ss. 15(1) of the *Charter*: *Pratten v. British Columbia*, 2012 BCCA 480, 357 D.L.R. (4th) 660 at paras. 18 and 36, leave to appeal to SCC refused May 30, 2013 (file 35191).

[121] When presented with competing interpretations of a statutory provision, the meaning consistent with the respect of basic human rights and *Charter* rights should be preferred: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at p. 1078; *R. v. Swain*, [1991] 1 S.C.R. 933 at p. 1010; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at p. 660; *R. v. Lucas*, [1998] 1 S.C.R. 439 at para. 66; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 at para. 33.

[122] Finally, I note that the Federal Court of Australia has recently dealt with a similar citizenship issue in *H v. Minister for Immigration and Citizenship*, [2010] FCAFA 119, where it concluded that the word "parent" found in an Australian legislative provision similar to paragraph 3(1)(b) of the *Citizenship Act* should be given its ordinary meaning, thus firmly rejecting the submission that it could only mean a biological or genetic parent.

<u>*Conclusions*</u>

[123] In this case, under general principles of common law and of civil law, the respondent is deemed, for all legal purposes, to be the child of her Canadian father. Moreover, as I have already noted, it is not disputed that the respondent is deemed the child of her Canadian father under the laws of India, where she was born, and under the laws of British Columbia, where the family resides.

[124] Consequently, I conclude that paragraph 3(1)(*b*) of the *Citizenship Act* applies to the respondent so as to confer on her derivative Canadian citizenship.

[125] I would consequently dismiss the appeal, with costs in favour of the respondent.

"Robert M. Mainville"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: **A-154-13**

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BLANCHARD OF THE FEDERAL COURT OF CANADA DATED APRIL 4, 2014, DOCKET NUMBER T-897-2.

DOCKET:	A-154-13
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. Nankmeet Kaur KANDOLA by her guardian at law Malkiat Singh KANDOLA
PLACE OF HEARING:	Vancouver, B.C.
DATE OF HEARING:	February 11, 2014
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	WEBB J.A.
DISSENTING REASONS BY:	MAINVILLE J.A.
DATED:	March 31, 2014

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