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

Mark Donald Benner *Appellant*

v.

The Secretary of State of Canada and the Registrar of Citizenship *Respondents*

and

The Federal Superannuates National Association *Intervener*

Indexed as: Benner *v.* Canada (Secretary of State)

File No.: 23811.

1996: October 1; 1997: February 27.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the federal court of appeal

Constitutional law -- Charter of Rights -- Equality rights -- Citizenship -- Children born abroad before February 15, 1977 of Canadian fathers granted citizenship on application but those of Canadian mothers required to undergo security check and to take citizenship oath -- U.S.-born son of a Canadian mother denied citizenship because of criminal charges -- Whether applying s. 15(1) of Charter involves illegitimate

retroactive or retrospective application -- If not, whether the treatment accorded to children born abroad to Canadian mothers before February 15, 1977 by the Citizenship Act offending s. 15(1) -- If so, whether saved by s. 1 -- Canadian Charter of Rights and Freedoms, ss. 1, 15(1) -- Citizenship Act, R.S.C., 1985, c. C-29, ss. 3(1), 4(3), 5(1)(b), (2)(b), 12(2), (3), 22(1)(b),(d), (2)(b) -- Citizenship Regulations, C.R.C., c. 400, s. 20(1).

The appellant, who was born in 1962 in the United States of a Canadian mother and an American father, applied for Canadian citizenship and perfected his application on October 27, 1988. The *Citizenship Act* provided that persons born abroad before February 15, 1977, would be granted citizenship on application if born of a Canadian father but would be required to undergo a security check and to swear an oath if born of a Canadian mother. The appellant therefore underwent a security check, during which the Registrar of Citizenship discovered that he had been charged with several criminal offences. The Registrar advised that he was prohibited from acquiring citizenship and his application was rejected.

The appellant applied for an order in the nature of *certiorari* quashing the Registrar's decision and for an order in the nature of mandamus requiring the Registrar to grant him citizenship without swearing an oath or being subject to a security check. The application was dismissed by the Federal Court, Trial Division and an appeal from that decision to the Federal Court of Appeal was also dismissed. The appellant was deported. The appeal raised three issues: (1) whether applying s. 15(1) -- the equality provision--of the *Canadian Charter of Rights and Freedoms* involved an illegitimate retroactive or retrospective application of the *Charter*; (2) if not, whether the treatment accorded to children born abroad to Canadian mothers before February 15, 1977 by the *Citizenship Act* offends s. 15(1) of the *Charter*; and (3) if so, whether the impugned legislation was saved by s. 1. The constitutional questions as stated were found wanting.

Held: The appeal should be allowed.

The *Charter* does not apply retroactively. The Court has not adopted a rigid test for determining when a particular application of the *Charter* would be retrospective. Rather, each case is to be weighed in its own factual and legal context, with attention to the nature of the particular *Charter* right at issue. Not every situation involving events which took place before the *Charter* came into force will necessarily involve a retrospective application of the *Charter*. Where the fact situation is a status or characteristic, the enactment is not given retrospective effect when it is applied to persons or things that acquired that status or characteristic before the enactment, if they have it when the enactment comes into force; but where the fact situation is an event, then the enactment would be given retrospective effect if it is applied so as to attach a new duty, penalty or disability to an event that took place before the enactment. The question 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?

This case does not involve either a retroactive or a retrospective application of the *Charter*. The notion that rights or entitlements crystallize at birth, particularly in the context of s. 15 of the *Charter*, suggests that whenever a person born before s. 15 came into effect (April 17, 1985) suffers the discriminatory effects of a piece of legislation these effects may be immunized from *Charter* review. This is not so.

The appellant's situation should instead be seen in terms of status or ongoing condition. His status from birth -- as a person born abroad prior to February 15, 1977

of a Canadian mother and a non-Canadian father -- is no less a "status" than being of a particular skin colour or ethnic or religious background: it is an ongoing state of affairs. People in the appellant's condition continue to be denied the automatic right to citizenship granted to children of Canadian fathers. The presence of a date in a piece of legislation, while it may suggest an "event-related" focus rather than a "status-related" one, cannot alone be determinative. Consideration must still be given to the nature of the characteristic at issue. A difference exists between characteristics ascribed at birth (e.g., race) and those based on some action taken later in life (e.g., being a divorced person). Immutable characteristics arising at birth are generally more likely to be correctly classified as a "status" than are characteristics resulting from a choice to take some action.

In applying s. 15 to questions of status, the critical time is not when the individual acquires the status in question but when that status is held against the person or disentitles the person to a benefit. Here, that moment was when the Registrar considered and rejected the appellant's application. Since this occurred well after s. 15 came into effect, subjecting the appellant's treatment by the respondent to *Charter* scrutiny involves neither retroactive nor retrospective application of the *Charter*. Had the appellant applied for citizenship before s. 15 came into effect and been refused, he could not now come before the Court and ask that s. 15 be applied to that refusal. The appellant, however, had not engaged the legislation governing his entitlement to citizenship until his application in 1988. Until he actually made an application for citizenship, the law set out only what his rights to citizenship would be if and when he applied, not what they were.

Several approaches to s. 15 have been advanced in the recent jurisprudence of this Court. It is not necessary for the purposes of this appeal to say determinatively

which of these approaches is the most appropriate since the result is the same no matter which test is used in the application of s. 15.

The fact that children born abroad of a Canadian mother are required to undergo a security check and to swear the oath, when those born abroad of a Canadian father are not required to do so, constitutes a denial of equal benefit of the law guaranteed by s. 15 of the *Charter*. Access to the valuable privilege of Canadian citizenship is restricted in different degrees depending on the gender of an applicant's Canadian parent; sex is one of the enumerated grounds in s. 15.

The fact that Parliament attempted to remedy the inequity found in the 1947 legislation by amending it does not insulate the amended legislation from further review under the *Charter*. The true source of the differential treatment for children born abroad of Canadian mothers cannot be said to be the 1947 Act, as opposed to the current Act, because the earlier Act does not exist anymore. It is only the operation of the current Act and the treatment it accords the appellant because his Canadian parent was his mother which is in issue. The current Act, to the extent that it carries on the discrimination of its predecessor legislation, may itself be reviewed under s. 15.

The appellant is not attempting to raise the infringement of someone else's rights for his own benefit. He is the primary target of the sex-based discrimination mandated by the legislation and possesses the necessary standing to raise it. The appellant's mother is implicated only because the extent of his rights are made dependent on the gender of his Canadian parent. Where access to a benefit such as citizenship is restricted on the basis of something so intimately connected to and so completely beyond the control of an applicant as the gender of his or her Canadian parent, that applicant may invoke the protection of s. 15. Permitting s. 15 scrutiny of the treatment of the

appellant's citizenship application simply allows the protection against discrimination guaranteed to him by s. 15 to extend to the full range of the discrimination. This is precisely the "purposive" interpretation of *Charter* rights mandated by earlier decisions of this Court.

These reasons do not create a general doctrine of "discrimination by association". The link between child and parent is of a particularly unique and intimate nature. A child has no choice who his or her parents are. Whether this analysis should extend to situations where the association is voluntary rather than involuntary or where the characteristic of the parent upon which the differential treatment is based is not an enumerated or analogous ground are questions for another day.

That the differential treatment of children born abroad with Canadian mothers as opposed to those with Canadian fathers may be a product of historical legislative circumstance, not of discriminatory stereotypical thinking, is not relevant to deciding whether or not the impugned provisions are discriminatory. The motivation behind Parliament's decision to maintain a discriminatory denial of equal treatment cannot make the continued denial any less discriminatory. This legislation continues to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen.

The impugned legislation was not saved under s. 1 of the *Charter*. Ensuring that potential citizens are committed to Canada and do not pose a risk to the country are pressing and substantial objectives which are not reasonably advanced by the two-tiered application system created by the impugned provisions. The impugned legislation was not rationally connected to its objectives. The question to be asked in this regard is not whether it is reasonable to demand that prospective citizens swear an oath and undergo

a security check before being granted citizenship but whether it is reasonable to make these demands only of children born abroad of Canadian mothers, as opposed to those born abroad of Canadian fathers. Clearly no inherent connection exists between this distinction and the desired legislative objectives.

Although retroactively imposing automatic Canadian citizenship in 1977 on children already born abroad of Canadian mothers could have caused difficulties for those children by interfering with rights or duties of citizenship already held in other countries, the Act clearly demonstrates that citizenship based on lineage was never imposed automatically, even on children born abroad of Canadian fathers. Treating children born abroad of Canadian mothers similarly to those born of Canadian fathers would therefore not have caused any undesirable retroactive effects. Anyone not wanting Canadian citizenship through an extension of those rights enjoyed by children of Canadian fathers to those born abroad of Canadian mothers would have had the option of simply not registering his or her birth. Only those children born abroad of Canadian mothers willing to take on Canadian citizenship would have it. It should also be noted that the current Act does not require these procedures for any children born abroad of a Canadian parent after February 15, 1977, no matter how old. If such children do not pose a potential threat to national security such that an oath and security check are required, it is difficult to see why someone in the appellant's class does.

It was probable that the impugned legislation would likely fail the proportionality test as well.

The offending legislation was declared to be of no force or effect.

Cases Cited

Considered: *R. v. Gamble*, [1988] 2 S.C.R. 595; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Sarson*, [1996] 2 S.C.R. 223; *Murray v. Canada (Minister of Health and Welfare)*, [1994] 1 F.C. 603; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314; *Elias v. U.S. Department of State*, 721 F.Supp. 243 (1989); **distinguished:** *R. v. Edwards*, [1996] 1 S.C.R. 128; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; **referred to:** *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922; *R. v. Stevens*, [1988] 1 S.C.R. 1153; *R. v. Stewart*, [1991] 3 S.C.R. 324; *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Crease v. Canada*, [1994] 3 F.C. 480; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872; *R. v. Big M Drug Mart, Ltd.*, [1985] 1 S.C.R. 295; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C., 1985, App. III, s. 1(*b*).

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

Canadian Citizenship Act, R.S.C. 1970, c. C-19 [formerly R.S.C. 1952, c. 33], s. 5(1).

Citizenship Act, R.S.C., 1985, c. C-29 [formerly S.C. 1974-75-76, c. 108], ss. 3(1), 4(3), 5(1)(*b*), (2)(*b*), 12(2), (3), 22(1)(*b*), (*d*), (2)(*b*).

Citizenship Regulations, C.R.C., c. 400, s. 20(1).

Authors Cited

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Driedger, Elmer A. "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. B. Rev.* 264.

APPEAL from a judgment of the Federal Court of Appeal, [1994] 1 F.C. 250, (1993), 105 D.L.R. (4th) 121, 155 N.R. 321, 16 C.R.R. (2d) 15, [1993] F.C.J. 658, dismissing an appeal from a judgment of Jerome A.C.J., [1992] 1 F.C. 771, (1991), 43 F.T.R. 180, 14 Imm. L.R. (2d) 266, dismissing an application for *certiorari* and mandamus with respect to the dismissal of an application for citizenship by the Registrar of Citizenship. Appeal allowed.

Mark M. Yang, for the appellant.

Roslyn J. Levine, Q.C., and *Debra M. McAllister*, for the respondents.

Neil R. Wilson, for the intervener.

//*Iacobucci J.*//

The judgment of the Court was delivered by

1 IACOBUCCI J. -- This appeal raises the constitutionality of certain provisions of the *Citizenship Act*, S.C. 1974-75-76, c. 108, and proclaimed in force February 15, 1977 by SI/77-43, (hereinafter cited from R.S.C., 1985, c. C-29 (the "Act")), which

provide for differential treatment of persons wishing to become citizens of Canada who had Canadian mothers, as opposed to those whose fathers were Canadian. For the reasons which follow, I find that this differential treatment violates s. 15 of the *Canadian Charter of Rights and Freedoms* and cannot be saved under s. 1 of the *Charter*. The offending provisions are therefore, to the extent of the unconstitutionality, of no force or effect.

1. Facts

2 Sections 3 to 6, inclusive, of the Act set out the requirements for entitlement to Canadian citizenship. These requirements depend to some extent on the date of birth of the applicant. Persons born abroad after February 14, 1977, are Canadian citizens if either of their parents was a Canadian citizen at the time of the birth: s. 3(1)(*a*). For people born abroad before February 14, 1977, the process of acquiring citizenship varies depending upon whether their mother or their father was Canadian.

3 According to s. 3(1)(*e*), a person is a citizen if he or she was entitled to citizenship under s. 5(1)(*b*) of the earlier 1947 *Canadian Citizenship Act*, R.S.C. 1970, c. C-19 (formerly R.S.C. 1952, c. 13, which was first enacted by S.C. 1946, c. 15, and declared to be in force January 1, 1947). This section provided that a person born outside Canada was still a "natural-born citizen" if his or her father (or, in the case of a child born out of wedlock, his or her mother) was a Canadian citizen at the time of that person's birth and if his or her birth was registered within two years of its occurrence or within such extended period as the Minister might authorize. A person, therefore, whose father was a Canadian citizen is entitled under the current Act to citizenship upon registration of his or her birth.

4 The situation is different for those persons who have Canadian mothers but not Canadian fathers. Section 5(2)(*b*) of the Act provides that the Minister shall grant citizenship to a person who was born abroad before February 15, 1977 and whose mother, but not father, was Canadian, only if an application for citizenship is made before February 15, 1979, or within such extended period as the Minister may authorize. That is, while a child born abroad before February 15, 1977, to a Canadian father may claim citizenship upon registration of his or her birth, a similar child of a Canadian mother must apply for citizenship. This application process involves, *inter alia*, swearing an oath of allegiance, passing a criminal clearance check, and passing a security check: ss. 3(1)(*c*), 12(2), (3) and 22.

5 The appellant, Mark Donald Benner, was born on August 29, 1962, in the United States. His mother was Canadian and was married to his father, a U.S. citizen. The appellant grew up in California and entered Canada on October 10, 1986. An inquiry into his status in Canada was commenced on July 9, 1987, but was interrupted on September 24, 1987, by an application for citizenship from the appellant under s. 5(2)(*b*) of the current Act.

6 The appellant failed to produce the required documentation, and a deportation order was issued against him. On October 27, 1988, however, he provided the necessary material and on November 3 of that year, the deportation order was set aside so that his application could be processed. The respondent Registrar of Citizenship began a process of examination which included a criminal clearance check and a security check.

7 The Registrar discovered that the appellant had been charged with several criminal offences, including murder. The Registrar wrote to the appellant on August 31,

1989, advising him that he was prohibited from acquiring citizenship by s. 22 of the Act because of these outstanding charges, and giving him 30 days to demonstrate that he was in fact not prohibited from acquiring citizenship. The appellant did not reply, and on October 17, 1989, his application for citizenship was rejected.

8 The appellant pleaded guilty to manslaughter and was sentenced to three years' imprisonment. He applied for an order in the nature of *certiorari* quashing the respondent Registrar's decision to deny him citizenship, and for an order in the nature of mandamus requiring the Registrar to grant him citizenship without requiring an oath. This application was dismissed by Jerome A.C.J. of the Federal Court, Trial Division, on July 9, 1991. The Federal Court of Appeal dismissed his appeal, Linden J.A. concurring in the result only, and in September of 1993, he was deported to the United States. Leave to appeal his case was granted by this Court on March 10, 1994 ([1994] 1 S.C.R. v), and three constitutional questions were stated:

1. Do ss. 3(1)(*e*), 5(2)(*b*), and 22 of the *Citizenship Act*, R.S.C., 1985, c. C-29, and s. 20 of the *Citizenship Regulations*, C.R.C., c. 400, violate, in whole or in part, s. 15(1) of the *Canadian Charter of Rights and Freedoms*, in so far as they impose more onerous requirements on those claiming Canadian citizenship based on maternal lineage than on those claiming Canadian citizenship based on paternal lineage?

2. If the answer to (1) is "yes", do ss. 3(1)(*e*), 5(2)(*b*), and 22 of the *Citizenship Act*, R.S.C., 1985, c. C-29, and s. 20 of the *Citizenship Regulations*, C.R.C., c. 400, constitute a reasonable limit prescribed by law pursuant to s. 1 of the *Charter*?

3. Do ss. 3(1)(*e*), 5(2)(*b*), and 22 of the *Citizenship Act*, R.S.C., 1985, c. C-29, and s. 20 of the *Citizenship Regulations*, C.R.C., c. 400, infringe, in whole or in part, the right contained in s. 1(*b*) of the *Canadian Bill of Rights*, R.S.C., 1985, App. III, in so far as they impose more onerous requirements on those claiming Canadian citizenship based on maternal lineage than on those claiming Canadian citizenship based on paternal lineage?

9 After an original hearing at which it was suggested that the questions were incomplete and needed to be restated, the parties were unfortunately unable to come to an agreement as to all the legislative provisions implicated by the issues raised in this appeal.

2. Relevant Statutory and Constitutional Provisions

10. *Canadian Citizenship Act*, R.S.C. 1970, c. C-19

> **5.** (1) A person born after the 31st day of December 1946 is a natural-born Canadian citizen,
>
> (*a*) if he is born in Canada or on a Canadian ship; or
>
> (*b*) if he is born outside of Canada elsewhere than on a Canadian ship, and
>
> (i) 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
>
> (ii) the fact of his birth is registered, in accordance with the regulations, within two years after its occurrence or within such extended period as the Minister may authorize in special cases.

Citizenship Act, R.S.C., 1985, c. C-29. (For convenience, I refer generally in these reasons to the most recent version of the law, even though the 1985 revisions did not come into force until December 12, 1988, several weeks after the appellant's application was received by the respondent. No relevant change was made by these revisions.)

> **3.** (1) Subject to this Act, a person is a citizen if
>
> (*a*) the person was born in Canada after February 14, 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;

(*c*) the person has been granted or acquired citizenship pursuant to section 5 or 11 and, in the case of a person who is fourteen years of age or over on the day that he is granted citizenship, he has taken the oath of citizenship;

(*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.

4. . . .

(3) For the purposes of paragraph 3(1)(*e*), a person otherwise entitled under paragraph 5(1)(*b*) of the former Act to become a citizen immediately before February 15, 1977 remains so entitled notwithstanding that his birth is registered, after February 14, 1977, in accordance with the regulations made under the former Act,

(*a*) within two years after the occurrence of his birth; or

(*b*) within such extended period as the Minister may authorize after February 15, 1977 or has authorized before that date.

(Material was admitted at the hearing of the appeal indicating that the date for registration pursuant to ss. 4(3) and 5(2)(*b*) of this Act has been extended up to and including the hearing date of this case.)

5. . . .

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

. . .

(*b*) was born outside Canada, before February 15, 1977, of a mother who was a citizen at the time of his birth, and was not entitled, immediately before February 15, 1977, to become a citizen under subparagraph 5(1)(*b*)(i) of the former Act, if, before February 15, 1979, or within such extended period as the Minister may authorize, an application for citizenship is made to the Minister by a person authorized by regulation to make the application.

12. . . .

(2) Where an application under section 5 or 8 or subsection 11(1) is approved, the Minister shall issue a certificate of citizenship to the applicant.

(3) A certificate issued pursuant to this section does not take effect until the person to whom it is issued has complied with the requirements of this Act and the regulations respecting the oath of citizenship.

22. (1) Notwithstanding anything in this Act, a person shall not be granted citizenship under section 5 or subsection 11(1) or take the oath of citizenship

. . .

(*b*) while the person is charged with, on trial for, subject to or a party to an appeal relating to, an offence under subsection 29(2) or (3) or to an indictable offence under any Act of Parliament;

. . .

(*d*) if the person has been convicted of an offence in respect of an act or omission referred to in subsection 7(3.71) of the *Criminal Code*;

(2) Notwithstanding anything in this Act, but subject to the *Criminal Records Act*, a person shall not be granted citizenship under section 5 or subsection 11(1) or take the oath of citizenship if,

(*a*) during the three year period immediately preceding the date of the person's application ...

the person has been convicted of an offence under subsection 29(2) or (3) or of an indictable offence under any Act of Parliament.

Citizenship Regulations, C.R.C., c. 400

20. (1) Subject to subsection 5(3) of the Act and section 22 of these Regulations, a person who is 14 years of age or over on the day that he has been granted citizenship under subsection 5(2), 5(4) or 10(1) of the Act shall take the oath of citizenship by swearing or affirming it. . . .

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

3. Judicial History

A. *Federal Court, Trial Division*, [1992] 1 F.C. 771

11. Jerome A.C.J. held that the *Charter* could not be applied to the appellant's case. He examined the decisions of this Court in *R. v. Gamble*, [1988] 2 S.C.R. 595, and *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922, and concluded at p. 788 that the appellant was seeking a retrospective application of the *Charter*:

> The Charter is clearly not intended to apply retrospectively and subsection 15(1) particularly was not intended to have effect until April 17, 1985. The difficulty here arises because the applicant's citizenship application was delayed post-Charter in 1990. However, the citizenship legislation provides that the date of [the appellant's] birth is the date by which his eligibility for preferred Canadian citizenship status is determined and the "discrete event" at issue, therefore, is whether the date of his birth is pre- or post-February 14, 1977.

12. The fact that the appellant did not apply for citizenship until after s. 15(1) had come into effect was not determinative for Jerome A.C.J., because the citizenship legislation fixed the date of birth as the relevant date for purposes of determining citizenship status (either before or after February 15, 1977). Applying s. 15(1) to the appellant's situation would involve applying the *Charter* to rights which crystallized at the point of the appellant's birth -- long before the *Charter* came into effect.

13. Jerome A.C.J. recognized that where a continuing discriminatory practice exists, then applying s. 15(1) to it will generally not involve retrospective application of the *Charter*. On these facts, however, he did not find such a continuing practice. In fact, he found that any discrimination was corrected in 1977 by the new Act which provided for equal citizenship status for children born abroad after 1977, whether their mother or father was Canadian.

14. Although he felt the appellant's claim could be rejected for these reasons, Jerome A.C.J. went on to address the *Charter* arguments made by the appellant. He held that, while the application process imposed on children born abroad of Canadian mothers by s. 5(2)(*b*) of the new Act constituted a burden, this burden was not discriminatory in purpose or effect, and therefore did not offend s. 15(1). He wrote at pp. 793-94:

> It is evident then that, with the passage of the 1977 *Citizenship Act*, Parliament chose to grant preferred access to Canadian citizenship to all individuals born to a Canadian parent from its effective date, February 14, 1977. . . . This type of "line drawing," however, is clearly within the authority of Parliament and has occurred on many occasions, notably with respect to income tax, unemployment insurance and other benefits legislation. In the 1977 *Citizenship Act* Parliament chose as well to extend a limited preferential access to a group of persons previously denied such treatment. This, too, is a decision that Parliament is competent to make.
>
> . . .
>
> When it amended the citizenship legislation, Parliament clearly considered "the social and political setting" and determined that an application procedure, subject to an oath requirement, would adequately protect the rights of the existing citizenry and at the same time, extend preferential status to individuals like [the appellant]. Therefore, although a "distinction" exists between the group of individuals previously entitled to preferential citizenship status before February 14, 1977 and those who were conferred a more limited right to preferred citizenship if born before the effective date of the new legislation, this distinction is not based upon the personal characteristics of the individuals. Rather, it is based on their merits

> and capacities and, in any event, it cannot be said that it is based on irrelevant personal differences.

15. According to Jerome A.C.J., any difficulties encountered by someone in the appellant's position would be due to his or her unwillingness to swear an oath of citizenship or to failure to pass a security check. Neither of these was sufficient, in his view, to constitute a s. 15(1) violation.

B. *Federal Court of Appeal*, [1994] 1 F.C. 250

16. The Federal Court of Appeal unanimously dismissed the appellant's appeal. Marceau and Létourneau JJ.A. held that the appellant sought a retrospective or retroactive application of s. 15(1), and that moreover, the impugned provisions were not discriminatory within the meaning of s. 15(1). Linden J.A. concluded that s. 15(1) applied to the appellant's case, and that the legislation was discriminatory, but that it was saved under s. 1.

17. Marceau J.A. stated, at pp. 259-60, that "[i]t is not the moment when a claimant has been actually affected by the provisions of an Act . . . that is relevant to determine whether he or she seeks a retroactive application of the Charter; it is whether the contended discrimination would flow from the provisions themselves or rather from the previously acquired legal situation that those provisions acted upon." Since the appellant's non-acquisition of citizenship by birth was definitively settled at the time of his birth according to the law in force at the time, to go back and review that non-acquisition now in light of the *Charter* would clearly be to make the *Charter* apply retroactively. It would apply the *Charter* to an entitlement of rights which crystallized at the time the appellant was born.

18. Moreover, he held, "sex" should not be confused with "parental lineage". The idea that children born abroad in wedlock acquire the citizenship of their fathers may have something to do with the sex of the parents, but it has nothing to do with the sex of the children. The appellant, one of these children, raised only his own s. 15(1) rights, not those of his mother. Marceau J. did not believe these rights were infringed by the impugned legislation.

19. Létourneau J.A. pointed out that the real source of the appellant's complaint was the old 1947 Act, which assigned Canadian citizenship only to children born abroad in wedlock who had Canadian fathers. The 1977 Act sought to correct this by making citizens any children born abroad of either Canadian parent after February 14, 1977 (the date the new Act came into effect). The appellant's complaint, according to Létourneau J.A., was that by not addressing persons born before February 14, 1977, the new Act did not go far enough in correcting the injustices of the old Act, and just as s. 15(1) could not be applied retroactively to bring the 1947 Act in line with the *Charter*, neither could it be applied to the 1977 Act.

20. Nor, he continued, was this a case of a "continuing discriminatory practice". As he stated at p. 291:

> For section 15 to apply, there has to be an actual or an on-going discrimination which deprives one of equal protection and benefit of the law. It is not enough for one to say that one still suffers from a discriminatory event or legislation which took place or existed prior to the Charter. Otherwise, just about every instance of past discrimination since the turn of the century could be reviewed under section 15, provided the victims still suffer from that past discrimination.

21. According to Létourneau J.A., any discrimination against the appellant crystallized on the date of his birth in a foreign country when the old Act refused him citizenship because his father was not Canadian. It was at the point of his birth -- August 29, 1962 -- that legal consequences were attached to his situation. Section 15 was not intended to have retrospective effect and therefore cannot be used to go back and review that discrimination. The *Charter* cannot make the appellant a Canadian citizen as of the date of his birth. There is no "actual or . . . on-going discrimination" for the *Charter* to correct because the 1977 Act corrected the injustices of the old Act as of the date of its coming into force (i.e., for persons born after February 14, 1977).

22. Létourneau J.A. was also of the view that the impugned provisions were not discriminatory within the meaning of s. 15(1). For one thing, any discrimination was on the basis of marital status, not sex, since even under the old Act, an unwed Canadian mother could pass her citizenship on to her child.

23. More importantly, the impugned provisions represented a reasonable compromise of the situation faced by Parliament when creating the 1977 Act. Rather than forcing Canadian citizenship on everyone in the appellant's position, Parliament chose to give them access to citizenship through a process of application involving minimal conditions. This in his view was not discrimination.

24. Linden J.A., however, disagreed. In his opinion, the *Charter* could be applied to the appellant's case. He noted that the appellant was not seeking to have his citizenship changed retroactively to the point of his birth; rather, he was simply seeking to become a Canadian citizen on the date of his application -- October 27, 1988. The law in force in Canada at that time was the 1977 Act and that law was liable to *Charter* scrutiny. Whether he was a Canadian citizen prior to his application was not directly

relevant, since the real question was the constitutional legitimacy of the access to citizenship provided for in the Act at the time of his application. No retroactive or retrospective application of the *Charter* was therefore required. The relevant date was that of the rejection of the appellant's application for citizenship, not his date of birth.

25. According to Linden J.A., the Act set out two separate schemes for those applicants born before February 15, 1977: one for those relying on maternal lineage and one for those relying on paternal lineage. Only those relying on maternal lineage were required to satisfy a criminal clearance and to swear an oath of citizenship. The requirements of claiming citizenship were therefore more onerous for those who, like the appellant, had Canadian mothers but not Canadian fathers. This difference in treatment was enough, in his opinion, to constitute discrimination under s. 15(1).

26. This was not a case of one individual trying to assert the *Charter* rights of another, since to deny the appellant access to citizenship on the grounds of his mother's sex was (at p. 277) "surely as unjust as if the discrimination were aimed at the child directly". It was an indirect form of sex discrimination, based upon the appellant's association with a group of individuals -- women -- discriminated against on the basis of their sex.

27. Linden J.A. found that the discrimination was justified under s. 1, however, largely for the reasons of Létourneau J.A. The objectives of requiring people in the appellant's position to go through an application process -- establishing allegiance to Canada and maintaining security -- were pressing and substantial. The oath and security check embodied in the process were modest measures rationally connected to these objectives. In order to make children born abroad of Canadian fathers undergo these requirements, Parliament would (in passing the new Act) have had to derogate

from the already existing power to acquire citizenship upon registration granted to such children in the old Act. Linden J.A. was unable to say that faced with a choice between taking rights away from one group of people or refusing to grant them to another one, Parliament had made an unreasonable choice in opting for the second. Accordingly, he, too, dismissed the appellant's claim.

4. Issues

28. This appeal raises three issues:

1. Does applying s. 15(1) to the appellant's case involve an illegitimate retroactive or retrospective application of the *Charter*?

2. If not, does the treatment accorded to children born abroad to Canadian mothers before February 15, 1977, by the 1977 *Citizenship Act* offend s. 15(1) of the *Charter*?

3. If so, is it saved by s. 1 of the *Charter*?

5. Analysis

29. In order to address these issues fully, it is necessary to understand the legislative and historical context of the impugned provisions. Accordingly, I will start by briefly discussing this context.

A. *The Development of the 1977 Citizenship Act*

30. Before 1947, there was no concept of Canadian citizenship. In 1946, Parliament passed the first *Canadian Citizenship Act*. Section 5(1)(*b*) (R.S.C. 1970, c. C-19) of that Act provided that Canadian fathers could pass their citizenship to their children born abroad, but that Canadian mothers could not, unless they were unwed at the time of the child's birth. Section 5(1)(*b*) read as follows:

> **5.** (1) A person born after the 31st day of December, 1946 is a natural-born Canadian citizen,
>
> . . .
>
> (*b*) if he is born outside of Canada elsewhere than on a Canadian ship, and
>
> (i) 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
>
> (ii) the fact of his birth is registered, in accordance with the regulations, within two years after its occurrence or within such extended period as the Minister may authorize in special cases.

31. Children of Canadian fathers were entitled to claim Canadian citizenship upon registration of their birth; there were no provisions for similarly placed children of Canadian mothers.

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. It read (and still reads) as follows:

> **3.** (1) Subject to this Act, a person is a citizen if
>
> . . .
>
> (*e*) the person was entitled, immediately before February 15, 1977, to become a citizen under paragraph 5(1)(*b*) of the former Act.

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. Subsection 5(2)(*b*) of the new Act provides as follows:

> **5.** . . .
>
> (2) The Minister shall grant citizenship to any person who
>
> . . .
>
> (*b*) was born outside Canada, before February 15, 1977, of a mother who was a citizen at the time of his birth, and was not entitled, immediately before February 15, 1977, to become a citizen under subparagraph 5(1)(*b*)(i) of the former Act, if, before February 15, 1979, or within such extended period as the Minister may authorize, an application for citizenship is made to the Minister by a person authorized by regulation to make the application.

34. This application process contemplated by the new Act includes swearing an oath of citizenship and passing a security check. Sections 3(1)(*c*), 12(2) and (3) provide that:

> **3.** (1) Subject to this Act, a person is a citizen if

. . .

(*c*) the person has been granted or acquired citizenship pursuant to section 5 or 11 and, in the case of a person who is fourteen years of age or over on the day that he is granted citizenship, he has taken the oath of citizenship;

12. . . .

(2) Where an application under section 5 or 8 or subsection 11(1) is approved, the Minister shall issue a certificate of citizenship to the applicant.

(3) A certificate issued pursuant to this section does not take effect until the person to whom it is issued has complied with the requirements of this Act and the regulations respecting the oath of citizenship.

35. The regulations referred to in s. 12(3) reinforce the obligation of swearing the citizenship oath in order to become a citizen: see *Citizenship Regulations*, C.R.C., c. 400, s. 20(1). The significance of the security check is made evident by ss. 22(1)(*b*) and 22(2) of the new Act. They read as follows:

22. (1) Notwithstanding anything in this Act, a person shall not be granted citizenship under section 5 or subsection 11(1) or take the oath of citizenship

. . .

(*b*) while the person is charged with, on trial for, subject to or a party to an appeal relating to, an offence under subsection 29(2) or (3) or to an indictable offence under any Act of Parliament;

. . .

(2) Notwithstanding anything in this Act, but subject to the *Criminal Records Act*, a person shall not be granted citizenship under section 5 or subsection 11(1) or take the oath of citizenship if,

(*a*) during the three year period immediately preceding the date of the person's application . . .

the person has been convicted of an offence under subsection 29(2) or (3) or of an indictable offence under any Act of Parliament.

36. I note that the appellant's application for citizenship in this case was rejected because of his outstanding criminal charges.

37. To sum up, then, the new Act created three classes of "applicants" for Canadian citizenship based on parental lineage:

1. *Children born abroad after February 14, 1977.* These children will be citizens at birth if either of their parents is Canadian: ss. 3(1)(*b*);

2. *Children born abroad before February 15, 1977, of a Canadian father or out of wedlock of a Canadian mother.* These children are automatically entitled to Canadian citizenship upon registration of their birth within two years of that birth or within an extended period authorized by the Minister: ss. 3(1)(*e*) (continuing ss. 5(1)(*b*) of the old Act).

3. *Children born abroad before February 15, 1977, of a Canadian mother*. These children must apply to become citizens and are required to swear an oath and pass a security check in order to qualify for citizenship: ss. 5(2)(*b*), 3(1)(*c*), 12(2), (3), 22(2) and (3).

38. Having outlined the statutory context within which the appellant's application was rejected and having briefly canvassed the development of the relevant statutory provisions, I should now like to address the issues raised by this appeal, beginning with the questions of retroactivity and retrospectivity.

B. *Retroactivity and/or Retrospectivity*

39. The terms, "retroactivity" and "retrospectivity", while frequently used in relation to statutory construction, can be confusing. E. A. Driedger, in "Statutes:

Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at pp. 268-69, has offered these concise definitions which I find helpful:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

40. The *Charter* does not apply retroactively and this Court has stated on numerous occasions that it cannot apply retrospectively: see, e.g., *R. v. Stevens*, [1988] 1 S.C.R. 1153, at p. 1157; *R. v. Stewart*, [1991] 3 S.C.R. 324, at p. 325*; Reference re Workers' Compensation Act, 1983 (Nfld.), supra*; *Dubois v. The Queen*, [1985] 2 S.C.R. 350.

41. At the same time, however, the Court has also rejected a rigid test for determining when a particular application of the *Charter* would be retrospective, preferring to weigh each case in its own factual and legal context, with attention to the nature of the particular *Charter* right at issue. Not every situation involving events which took place before the *Charter* came into force will necessarily involve a retrospective application of the *Charter*. In *Gamble*, *supra*, Wilson J. wrote at pp. 625-27 for the majority that:

> In approaching this crucial question it seems to me preferable . . . to avoid an all or nothing approach which artificially divides the chronology of events into the mutually exclusive categories of pre and post-*Charter*. Frequently an alleged current violation will have to be placed in the context of its pre-*Charter* history in order to be fully appreciated. . . .

> Another crucial consideration will be the nature of the particular constitutional right alleged to be violated. . . . Such an approach seems to me to be consistent with our general purposive approach to the interpretation of constitutional rights. Different rights and freedoms, depending on their purpose and the interests they are meant to protect, will crystallize and protect the individual at different times.

42. In considering the application of the *Charter* in relation to facts which took place before it came into force, it is important to look at whether the facts in question constitute a discrete event or establish an ongoing status or characteristic. As Driedger has written in *Construction of Statutes* (2nd ed. 1983), at p. 192:

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

43. I believe this is consistent with Wilson J.'s comments in *Gamble*, *supra*, particularly with regard to the use of s. 15. Wilson J. wrote at p. 628:

> Some rights and freedoms in the *Charter* seem to me to be particularly susceptible of current application even although such application will of necessity take cognizance of pre-*Charter* events. Those *Charter* rights the purpose of which is to prohibit certain conditions or states of affairs would appear to fall into this category. Such rights are not designed to protect against discrete events but rather to protect against an ongoing condition state of affairs. . . . Section 15 may . . . fall into this category.

44. Section 15 cannot be used to attack a discrete act which took place before the *Charter* came into effect. It cannot, for example, be invoked to challenge a pre-*Charter* conviction: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Gamble*,

supra. Where the effect of a law is simply to impose an on-going discriminatory status or disability on an individual, however, then it will not be insulated from *Charter* review simply because it happened to be passed before April 17, 1985. If it continues to impose its effects on new applicants today, then it is susceptible to *Charter* scrutiny today: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

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?

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. A status or on-going condition will often, for example, stem from some past discrete event. A criminal conviction is a single discrete event, but it gives rise to the on-going condition of being detained, the status of "detainee". Similar observations could be made about a marriage or divorce. 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. This is, as I already stated, a question of characterization, and will vary with the circumstances. Making this determination will depend on the facts of the case, on the law in question, and on the *Charter* right which the applicant seeks to apply.

47. Some examples of how this characterization has been applied in other cases may be helpful. This Court ruled in *R. v. Sarson*, [1996] 2 S.C.R. 223, that the

appellant could not use *habeas corpus* to challenge his continued detention under a provision of the *Criminal Code* which was later ruled unconstitutional. The appellant in that case had not attempted to attack the validity of his original conviction, only his continued detention under a law which was ultimately struck down. Nevertheless, we held that, in the circumstances, to allow the *habeas corpus* claim to proceed would really be to go back and revisit the original conviction. Since it was based on the merits of the appellant's case (i.e., whether or not he had committed a criminal offence), the appellant's application was, in the words of Sopinka J., at p. 240, "an indirect or collateral attack on his conviction." The appellant's claim was better understood and characterized as event-driven, rather than as status-driven.

48. Conversely, in *Gamble*, the majority of this Court held that the appellant could challenge the constitutionality of her on-going detention, notwithstanding the fact that her conviction took place before the *Charter* came into effect. The complaint of the appellant in that case was not that she was convicted under an unconstitutional law, but rather that she was convicted under the wrong provision, resulting in a longer period of ineligibility for parole than she would have suffered had the appropriate provision been applied. Wilson J. held for the majority that this parole ineligibility constituted a current and continuing deprivation of the appellant's liberty interest, analogous in some ways to a case of on-going arbitrary detention or cruel and unusual punishment. Just as it would not involve retrospective application of the *Charter* to address a claim of current cruel and unusual punishment carried out pursuant to a sentence imposed pre-*Charter*, so the appellant's situation did not require the *Charter* to be applied retrospectively.

49. The trial judge in the present case characterized the appellant's situation as relating essentially to the pre-*Charter* event of his birth, and therefore as requiring a retrospective or retroactive application of the *Charter*. The majority in the Federal Court

of Appeal agreed with this characterization. With respect, I cannot agree. In my view, this case does not involve either a retroactive or a retrospective application of the *Charter*.

50. The respondent urged us to find that the key point in the chronology of events was the appellant's birth in 1962. The respondent argued that the focus placed on birth by the impugned citizenship legislation suggests that the rights granted under that legislation "crystallize" at birth: see *Crease v. Canada*, [1994] 3 F.C. 480 (T.D.). Whatever discrimination took place in the appellant's case, therefore, took place when he was born, since that is when his rights were determined under the impugned legislation. To revisit these rights in light of s. 15, according to the respondent, is therefore inescapably to go back and alter a distribution of rights which took place years before the creation of the *Charter*.

51. I am uncomfortable with the idea of rights or entitlements crystallizing at birth, particularly in the context of s. 15. This suggests that whenever a person born before April 17, 1985, suffers the discriminatory effects of a piece of legislation, these effects may be immunized from *Charter* review. Our skin colour is determined at birth -- rights or entitlements assigned on the basis of skin colour by a particular law would, by this logic, "crystallize" then. Under the approach proposed by the respondent, individuals born before s. 15 came into effect would therefore be unable to invoke the *Charter* to challenge even a recent application of such a law. In fact, Parliament or a legislature could insulate discriminatory laws from review by providing that they applied only to persons born before 1985.

52. The preferable way, in my opinion, to characterize the appellant's position is in terms of status or on-going condition. From the time of his birth, he has

been a child, born outside Canada prior to February 15, 1977, of a Canadian mother and a non-Canadian father. This is no less a "status" than being of a particular skin colour or ethnic or religious background: it is an ongoing state of affairs. People in the appellant's condition continue to this day to be denied the automatic right to citizenship granted to children of Canadian fathers.

53. The respondent relied on *Murray v. Canada (Minister of Health and Welfare)*, [1994] 1 F.C. 603 (T.D.). That case concerned s. 53.2(1) of the *Canada Pension Plan*, R.S.C. 1970, c. C-5, which provided for the splitting of pension benefits for couples divorced on or after January 1, 1978. The plaintiff wished to challenge the section in order to receive part of her ex-husband's pension benefits even though her divorce occurred before 1978. Rothstein J. wrote that the presence of a date in the legislation indicated that its focus was primarily "event-related", rather than "status-related", in other words, that the key to the law was not the fact that the plaintiff was divorced, but rather <u>when</u> she was divorced. Since the date set by the legislation for the determination of entitlement to pension-splitting was prior to the *Charter*'s coming into force, the legislation could not be reviewed under the *Charter*. Similarly, the respondent argued here, the reference in the impugned provisions of the *Citizenship Act* to birth either before or after February 14, 1977, indicates that the primary focus of the legislation is the event of birth, not whatever on-going conditions may arise from it.

54. While I agree that the presence of a date in a piece of legislation may suggest an "event-related" focus rather than a "status-related" one, it cannot alone be determinative. Consideration must still be given to the nature of the characteristic at issue. As I have stated above, there is a difference between characteristics which are ascribed at birth (e.g., race), and those which arise based on some action taken later in life (e.g., being a divorced person). Immutable characteristics arising at birth are, in my

opinion, generally more likely to be correctly classified as a "status" than are characteristics resulting from a choice to take some action, e.g., the choice to get married or divorced. Moreover, the judge in *Murray* relied for his conclusion on the decision of the Federal Court of Appeal in this case. I would therefore distinguish *Murray* to the extent that it relies on the Court of Appeal judgment which I find to be in error.

55. In my opinion, the appellant's situation is more analogous to that of the plaintiff in *Andrews, supra*. Mr. Andrews applied to practise law in British Columbia. Section 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, required him to be a Canadian citizen, which he had never been. In holding that this provision violated s. 15(1) of the *Charter*, this Court did not focus on the date on which Mr. Andrews became an alien (the date of his birth), but rather on the date on which he was confronted by a law which took his lack of Canadian citizenship into account. I believe the same approach is appropriate here, and I agree with Linden J.A.'s dissenting characterization of the appellant's situation in the Federal Court of Appeal. The fact that the 1977 Act did not grant the appellant automatic citizenship rights explains why he applied for citizenship in 1989, but it does not mean that applying the *Charter* to that application process involves a retroactive or retrospective application of the *Charter*.

56. In applying s. 15 to questions of status, or what Driedger, *supra*, calls "being something", the important point is not the moment at which the individual acquires the status in question, it is the moment at which that status is held against him or disentitles him to a benefit. Here, that moment was when the respondent Registrar considered and rejected the appellant's application. Since this occurred well after s. 15 came into effect, subjecting the appellant's treatment by the respondent to *Charter* scrutiny involves neither retroactive nor retrospective application of the *Charter*.

57. Létourneau J.A. stated, at p. 291, that "[i]t is not enough for one to say that one still suffers from a discriminatory event or legislation which took place or existed prior to the Charter. Otherwise, just about every instance of past discrimination since the turn of the century could be reviewed under section 15, provided the victims still suffer from that past discrimination." This is certainly true, but I do not believe, with respect, that it accurately describes the appellant's situation. Had he applied for citizenship before s. 15 came into effect and been refused, he could not now come before the court and ask that s. 15 be applied to that refusal. But this is not what happened. Until his application in 1988, the appellant had not engaged the legislation governing his entitlement to citizenship at all. The law set out only what his rights to citizenship would be if and when he applied, not what they were.

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.

59. Simply put, I believe the discrimination, if it was discrimination, did not take place until the state actually denied the appellant's application for citizenship on the basis of criteria which he alleges violate s. 15 of the *Charter*. Until he tried to obtain citizenship and was refused, the appellant could not really claim to have been discriminated against. He had no cause of action upon which to base a claim: *Reference re Workers' Compensation Act,1983 (Nfld.), supra*. The denial of his application took

place on October 17, 1989, long after s. 15 came into effect. This denial is therefore open to *Charter* scrutiny.

C. *Discrimination Under Section 15(1)*

60. This Court has recently treated the application of s. 15 in a trilogy of cases released May 25, 1995: *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627. In *Miron*, McLachlin J. (Sopinka, Cory and Iacobucci JJ. concurring) set out, at p. 485, the following process for establishing discrimination under s.15:

> The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established.

61. This is substantially similar to the test outlined by Cory J. (Iacobucci J. concurring) in *Egan*, at p. 584:

> The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics.
>
> Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated and second, whether

> that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others.

62. In my view, the methodologies adopted by my colleagues Cory and McLachlin JJ. are essentially alike. While McLachlin J. specified that the differential treatment must be based on "the stereotypical application of presumed group or personal characteristic[s]", and Cory J. refers simply to distinctions based on "personal characteristics", I do not believe this constitutes a significant difference in approach. I note, for example, Cory J.'s concurrence in McLachlin J.'s reasons in *Miron* and McLachlin J.'s comment in *Egan*, at p. 625, that she was "in substantial agreement" with the reasons of Cory J. The two justices did differ as to the correct result in *Thibaudeau*, but in my opinion their disagreement in that case was more one of application of the law to the facts than of methodology. As Cory and Iacobucci JJ. stated at p. 704 in their reasons in *Thibaudeau*:

> In so far as we disagree with McLachlin J.'s conclusion . . . , our disagreement is limited to an application of her approach to the facts of this case, not with her methodology *per se*, which we endorse.

63. This approach to s. 15, which I ascribe to McLachlin and Cory JJ., had the majority in *Miron*. It was subscribed to by Sopinka, McLachlin, Cory and Iacobucci JJ. However, it was not victorious in *Egan*. La Forest J. (the Chief Justice and Gonthier and Major JJ. concurring) applied the s. 15 methodology outlined by Gonthier J. for the minority (the Chief Justice, La Forest and Major JJ. and himself) in *Miron*, and found that the impugned legislation was not discriminatory within the meaning of s. 15.

64. This second approach to s. 15 focuses on the relevancy of a distinction to the purpose of the legislation where that purpose is not itself discriminatory and

recognizes that certain distinctions are outside the scope of s. 15. Finding discrimination, therefore, requires an analysis of "the nature of the personal characteristic and its relevancy to the functional values underlying the law.": *Miron*, *supra*, *per* Gonthier J., at p. 436. It is not enough that the denial of equality be based on an enumerated or analogous ground since the same ground may be discriminatory in some cases but not in others depending on the context: see, e.g., *R. v. Turpin*, [1989] 1 S.C.R. 1296, at pp. 1331-32. The grounds of distinction must also be irrelevant to the values underlying the legislation, as Gonthier J. concluded in *Miron*, at p. 442, or s. 15 will not be violated:

> To the extent, then, that a law in any given case mirrors or reflects a distinction drawn on such a basis that is relevant to its functional values which are not themselves discriminatory, the distinction drawn by the law will not be discriminatory.

65. This second approach was adopted in *Miron* and *Egan* by the Chief Justice and La Forest, Gonthier and Major JJ. The difference in result in these two cases is explained by the fact that in *Egan*, Sopinka J. found that while the impugned legislation violated s. 15, the violation was justified in the circumstances under s. 1. A majority of the Court therefore upheld the legislation, while in *Miron*, the majority had struck it down.

66. Yet a third approach to s. 15 is found in the reasons of L'Heureux-Dubé J. in *Miron*, *Egan* and *Thibaudeau*. According to this third methodology, once a distinction has been shown to result in the denial of one of the four rights of equality on the basis of membership in an identifiable group, the distinction must then be shown to be discriminatory. This will require determining that it is "capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less

capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration": *Egan*, *supra*, *per* L'Heureux-Dubé J., at pp. 552-53. Making this determination will require consideration of both the group adversely affected by the distinction and the nature of the interest adversely affected by it. The interaction of the group's social vulnerability, in light of the social and historical context, and the constitutional and societal significance of the interest will determine whether the impact of the distinction constitutes discrimination.

67. As I have previously concurred with the test of Cory and McLachlin JJ., my own preference is for their approach, and I apply it in these reasons. However, the result in this appeal is in my opinion the same no matter which test is applied. As I explain further below, the gender of a citizenship applicant's Canadian parent has nothing to do with the values of personal safety, nation-building or national security underlying the *Citizenship Act.* Whether one's mother or father was Canadian is entirely irrelevant to the quality of one's candidacy for Canadian citizenship. Even if relevance is a factor to be considered in weighing legislation in the context of s. 15, it is of no help to the respondent in this case.

68. Nor, in my view, is the respondent's position assisted by consideration of the factors favoured by my colleague, L'Heureux-Dubé J. Children born abroad of Canadian mothers and applying for citizenship are a vulnerable group and extremely sensitive to the kind of legislative distinctions made by the impugned legislation. Moreover, the effects of these distinctions can be extremely severe, leading to delay or even permanent rejection in the attempt to become a citizen of Canada. I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian

citizenship. The impugned provisions of the Act are no more likely to survive s. 15 scrutiny under this test than under either of the previous ones.

69. A s. 15 applicant, then, must show a denial of one of what have been termed the "four equalities", namely, equality before the law, equality under the law, equal protection of the law, and equal benefit of the law. The applicant must also show that the denial is "discriminatory". Where the denial is based on a ground expressly enumerated in s. 15(1), or one analogous to them, it will generally be found to be discriminatory, although there may, of course, be exceptions: see, e.g., *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872.

70. The impugned provisions of the 1977 *Citizenship Act* expressly distinguish between children born abroad before 1977 to Canadian mothers and children born abroad before 1977 to Canadian fathers. Linden J.A. aptly explained the operation of these provisions in his reasons in the Federal Court of Appeal, at p. 266:

> . . . for those born before 1977, there are now two separate citizenship schemes in place in Canada: one for those relying on maternal lineage and one for those relying on paternal lineage. Those claiming Canadian citizenship based on maternal lineage encounter a more onerous process with more burdensome requirements and more serious implications than individuals relying on a paternal link.

71. Individuals wishing to claim Canadian citizenship on the basis of their mother's citizenship must apply to become citizens. They must swear an oath and are required to undergo security and criminal record checks. If these checks reveal that they have been charged with an offence, they are prevented by s. 22 from taking the oath (and therefore from becoming citizens) until the charges are resolved. If convicted of an indictable offence, they are barred from becoming Canadian citizens for three years after

the conviction. Certain convictions may bar them permanently from citizenship. Individuals claiming Canadian citizenship on the basis of their father's citizenship need undergo none of those procedures. They are not required to swear an oath, and their criminal record is not scrutinized. They may claim citizenship by simply registering their birth within two years or (more likely) within an extended period authorized by the Minister. Material added to the record at the hearing of this appeal indicates that the period for registering such births has been extended up to and including the date of this hearing.

72. This appears clearly to demonstrate a lack of equal benefit of the law. It would be a mistake to conclude that since the ultimate decision as to whether citizenship is granted is based on the results of the security check and the swearing of the oath, any difference in treatment is therefore based simply on the presence of an applicant's criminal history or a refusal to swear the oath. The fact is that, if an applicant's father is a Canadian citizen, his or her criminal history forms no part whatsoever of the application procedure. It just does not matter, in so far as obtaining citizenship is concerned. Similarly, children born abroad of Canadian fathers are entitled to claim citizenship even if they are unwilling to swear an oath -- the oath is not one of their requirements for citizenship. Only if the applicant's mother (and not father) is Canadian is the presence or absence of a criminal history relevant. Only children born abroad of Canadian mothers may be legally denied citizenship because of unwillingness to swear an oath. This, in my view, constitutes a denial of equal benefit of the law. Access to the valuable privilege of Canadian citizenship is restricted in different degrees depending on the gender of an applicant's Canadian parent.

73. The respondent recognized this explicit differential treatment created by the impugned legislation, but submitted that it still does not constitute discrimination against the appellant for several reasons which I will now address.

74. The respondent submitted first that the 1977 changes to the *Citizenship Act* were intended to remedy the injustice caused by the earlier Act's failure to recognize children of Canadian mothers at all. Rather than discriminating against certain types of applicants for Canadian citizenship, the Act provides access to citizenship in a manner which takes into account a variety of criteria, including, *inter alia*, an applicant's situation under the old Act, his or her connection to Canada, and various other personal circumstances. Since the whole point of the new Act was to increase access to citizenship, the respondent argued, the mere fact that one group may derive a greater benefit from it than another group does not alone make the Act discriminatory.

75. I cannot accede to this submission. It is true that in some cases where Parliament has in fact acted to confer a benefit, the fact that one group benefits more from the legislation than other groups will not automatically trigger s. 15: see, e.g., *Thibaudeau*, *supra*, at p. 702. But this is not the situation here. 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. For these reasons, I reject the respondent's first argument.

77. The respondent also submits that any discrimination imposed by the Act is really imposed upon the appellant's mother, not upon him. No reference whatsoever to the sex of applicants themselves is made in the impugned provisions -- only the sex of the applicant's parent is important. As a result, the respondent claims, the appellant is attempting to raise the infringement of someone else's rights for his own benefit. This argument was accepted by Marceau J.A. in the Federal Court of Appeal. With respect, I cannot agree. As I will now discuss, the appellant is the primary target of the sex-based discrimination mandated by the legislation, and in my opinion possesses the necessary standing to raise it before us.

78. It now appears to be settled law that a party cannot generally rely upon the violation of a third party's *Charter* rights: *R. v. Edwards*, [1996] 1 S.C.R. 128, at p. 145; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 367. If the appellant were truly attempting to raise his mother's s. 15 rights, he would not have the requisite standing. I am not convinced, however, that he is attempting to do so. The

impugned provisions of the *Citizenship Act* are not aimed at the parents of applicants but at applicants themselves. That is, they do not determine the rights of the appellant's mother to citizenship, only those of the appellant himself. His mother is implicated only because the extent of his rights is made dependent on the gender of his Canadian parent.

79. This is surely very different from the situations in *Edwards* and *Borowski*. The appellant in *Edwards* was attempting to invoke s. 24(2) to prevent the introduction at his trial of evidence found in his girlfriend's apartment. Cory J. found that the appellant had no reasonable expectation of privacy in the apartment, and that he could therefore not rely on a breach of someone else's privacy rights to prevent evidence from being admitted at his trial. The appellant had no connection to the apartment, other than the fact that he chose to hide evidence there. The search of the apartment did not affect his rights in any way. It was, in other words, a true attempt to assert the rights of a third party. Similarly, in *Borowski*, the appellant wished to raise the rights of fetuses. He had no connection with these fetuses other than concern for their well-being, and his own rights were not implicated by the legislation in question. Again, it was a clear example of attempting to raise the rights of third-parties.

80. In this case, on the other hand, there is a connection between the appellant's rights and the differentiation made by the legislation between men and women. The impugned provisions clearly make Mr. Benner's citizenship rights dependent upon whether his Canadian parent was male or female. In these circumstances, I do not believe permitting s. 15 scrutiny of the respondent's treatment of his citizenship application amounts to allowing him to raise the violation of another's *Charter* rights. Rather, it is simply allowing the protection against discrimination guaranteed to him by s. 15 to extend to the full range of the discrimination. This is precisely the "purposive" interpretation of *Charter* rights mandated by this Court in

many earlier decisions: see, e.g., *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Andrews, supra*, at p. 169. If it were not so, applicants would be unable to challenge a law which prevented them from acquiring citizenship, not because, for example, they were Italian, but because their parents were Italian. A Parliament or legislature intent on circumventing the protections of s. 15 could insulate legislation from *Charter* review by providing for this kind of indirect discrimination rather than mentioning its targets directly. I draw support for this view from several other courts that have reached similar conclusions, both in Canada and in the United States.

81. In *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314, the Federal Court of Appeal held that the second child of a Chinese woman could qualify for refugee status in Canada because of the treatment she would receive as a second child in China. The court recognized that persecution could occur based not on something the actual victim had done, but rather on something to do with the victim's parent. In that case, the grounds for discrimination were that the victim's parents had had a previous child. Here, they are that the appellant's mother, not father, was Canadian. Similarly, in *Elias v. U.S. Department of State*, 721 F.Supp. 243 (N.D. Cal. 1989), the court held that a statute which granted citizenship to foreign-born offspring of male U.S. citizens and foreign mothers, but not to that of female U.S. citizens and foreign fathers, violated the equal protection clause in the 14th Amendment of the U.S. Constitution. The plaintiff in that case was the child of a U.S. mother and a Canadian father, the exact reverse of the situation here. I see no reason not to adopt the approach of the U.S. court, and I accordingly reject the respondent's second argument. The appellant does not lack standing to raise the discrimination created by the impugned provisions of the *Citizenship Act.* On the contrary, he is the real target of these provisions, and the one with the most direct interest in having them subjected to *Charter* scrutiny.

82. I hasten to add that I do not intend by these reasons to create a general doctrine of "discrimination by association". I expressly leave this question to another day, since it is not necessary to address it in order to deal with this appeal. The link between child and parent is of a particularly unique and intimate nature. A child has no choice who his or her parents are. Their nationality, skin colour, or race is as personal and immutable to a child as his or her own. In *Miron*, *supra*, McLachlin J. wrote at p. 495 that the fundamental consideration in identifying analogous grounds under s. 15 is:

> . . . whether the characteristic may serve as an irrelevant basis of exclusion and a denial of essential human dignity in the human rights tradition. In other words, may it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual?

83. One indicator suggested by McLachlin J. that a characteristic may be able to serve as a basis for such unequal treatment is the personal nature of the characteristic. As McIntyre J. wrote at pp. 174-75 in *Andrews*, *supra*:

> Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

84. This was echoed in the reasons of Cory J. and myself in *Egan*, *supra*, at p. 599, and also those of Gonthier J. in *Miron*, *supra*, at p. 435. Cory J. and I wrote that the main issue underlying the analogous grounds analysis was "whether the basis of distinction may serve to deny the essential human dignity of the *Charter* claimant". I agree with McLachlin J. that the personal or immutable nature of a characteristic may indicate that it falls into this category. While this case is not, strictly speaking, about

analogous grounds but rather the extension of standing to raise discrimination upon an enumerated ground, I believe similar considerations may nevertheless be applied, in keeping with what McLachlin J. called in *Miron, supra*, at pp. 486-87, "the overarching purpose" of the s. 15 guarantee of equality, namely:

> . . . to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance.

85. Where access to benefits such as citizenship is restricted on the basis of something so intimately connected to and so completely beyond the control of an applicant as the gender of his or her Canadian parent, that applicant may, in my opinion, invoke the protection of s. 15. As Linden J.A. noted in dissent in the Federal Court of Appeal, at p. 277, "[i]n this situation, the discrimination against the mother is unfairly visited upon the child. This is surely as unjust as if the discrimination were aimed at the child directly".

86. In fact, as I stated above, the guarantees of s. 15 regarding race, skin colour, or ethnic background could otherwise be rendered nugatory by consistently making the parent of the actual target the focus of discrimination rather than the target him- or herself. Whether, however, this analysis should extend to cover situations where, for example, the association is voluntary rather than involuntary, or where the characteristic of the parent in question upon which the differential treatment is founded is not an enumerated or analogous ground are questions for another day.

87. McLachlin J. pointed out in *Miron, supra*, that stereotypes play a large role in determining when differential treatment will constitute unconstitutional

discrimination. In order to be successful, my colleague stated (at p. 485), a s. 15 applicant must show not only unequal treatment resting upon an enumerated or analogous ground, but also "that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics".

88. As I noted earlier, the respondent suggested that any unequal treatment in the impugned legislation is not due to stereotypical reasoning on the part of Parliament, but rather to the distinctions already made between children of Canadian mothers and those of Canadian fathers in the original *Citizenship Act.* Parliament wanted to address this inequity but also wanted to ensure the safety of existing Canadian citizens. It therefore chose to require an oath of allegiance and a security check from those children of Canadian mothers born before February 15, 1977, who wished to become citizens under the new Act. The respondent suggested that Parliament could not require this of children of Canadian fathers born before this date because they already had citizenship rights pursuant to the old Act, and to require them retroactively to apply for citizenship would invite constitutional challenge. The differential treatment of children with Canadian mothers as opposed to those with Canadian fathers is therefore, according to the respondent, a product of historical legislative circumstance, not of discriminatory stereotypical thinking.

89. Even if what the respondent suggested were the case, I do not believe it is relevant in this appeal to deciding whether or not the impugned provisions are discriminatory. Surely the old Act embodied precisely the stereotypes contemplated by McLachlin J. in *Miron*, *supra*. For reasons never justified before a court, women were deemed incapable of passing their citizenship to their children unless there was no legitimate father from whom the child could acquire citizenship. The 1977 Act increased access to citizenship for children of Canadian mothers, but it maintained the distinction

between children born of Canadian mothers and those born of Canadian fathers. By maintaining this distinction, it seems to me that the legislation maintained the stereotype.

90. The current Act continues to establish two classes of persons born abroad wishing to become citizens: those whose Canadian parent was male and those whose Canadian parent was female. I fail to see how the motivation behind Parliament's decision to maintain a discriminatory denial of equal treatment can make the continued denial any less discriminatory. This legislation continues to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen. In fact, it suggests that children of Canadian mothers may be more dangerous than those of Canadian fathers, since only the latter are required to undergo an oath and security check. Parliament's reasoning in deciding to maintain the differential treatment established by the earlier Act may be relevant to s. 1 analysis, but I do not believe that it affects the legislation's status under s. 15.

91. For the above reasons, I conclude that the impugned provisions of the *Citizenship Act* are indeed discriminatory and violate s. 15 of the *Charter*. I now turn to s. 1 and consider whether this violation is demonstrably justifiable in a free and democratic society.

D. *Justification Under Section 1*

92. The general principles governing s. 1 analysis have been set out many times since the leading case of *R. v. Oakes*, [1986] 1 S.C.R. 103, and they were recently re-stated in *Egan*, *supra*, at p. 605:

> A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

93. While the legislation in question here passes the first of these conditions, I believe that it fails on the first branch of the second -- rational connection -- and is therefore not justified under s. 1.

94. The appellant accepted that the objectives of the impugned provisions -- to provide access to citizenship while establishing a commitment to Canada and safeguarding the security of its citizens -- were sufficiently pressing and substantial to warrant limiting a *Charter* right. I believe he was correct to do so. Ensuring that potential citizens are committed to Canada and do not pose a risk to the country are pressing and substantial objectives.

95. I do not see, however, how these goals are reasonably advanced by the two-tiered application system created by the impugned provisions. The respondent submitted that requiring an oath and a security check are perfectly rational ways of ensuring that those who become citizens share our commitment to Canada and that they do not pose a threat to national security. Linden J.A. accepted this argument in the Federal Court of Appeal. With respect, I must disagree. The relevant question is whether the discrimination is rationally connected to the legislative objectives. We must therefore ask not whether it is reasonable to demand that prospective citizens swear an

oath and undergo a security check before being granted citizenship, but whether it is reasonable to make these demands only of children of Canadian mothers, as opposed to those of Canadian fathers. There is clearly no inherent connection between this distinction and the desired legislative objectives: children of Canadian mothers are not in and of themselves less committed or more dangerous than those of Canadian fathers. The respondent nevertheless suggested several reasons why, in the circumstances, the distinction was a reasonable way to seek the desired objectives. I will deal with these suggestions in turn.

96. The respondent argued that to have retroactively extended citizenship rights in 1977 to children already born abroad of Canadian mothers could have caused difficulties for those children by interfering with rights or duties of citizenship they already held in other countries. It was therefore reasonable to make the granting of Canadian citizenship to these children dependent upon first receiving an application. I see the respondent's point, but s. 4(3) of the Act clearly demonstrates that citizenship based on lineage was never imposed automatically, even on children of Canadian fathers. The section reads as follows:

> **4.** . . .
>
> (3) For the purposes of paragraph 3(1)(*e*), a person otherwise entitled under paragraph 5(1)(*b*) of the former Act to become a citizen immediately before February 15, 1977 remains so entitled notwithstanding that his birth is registered, after February 14, 1977, in accordance with the regulations made under the former Act,
>
> (*a*) within two years after the occurrence of his birth; or
>
> (*b*) within such extended period as the Minister may authorize after February 15, 1977 or has authorized before that date.

97. Section 5(1)(*b*) of the 1947 Act required the birth of a child of a Canadian father to be registered (within either two years of the birth or an extended

period authorized by the Minister) in order to claim citizenship. If for whatever reason Canadian citizenship was not desired, the birth would simply never be registered. Section 4(3) of the current Act carries this registration requirement forward. A child born before February 15, 1977 of a Canadian father who currently does not wish to become a Canadian citizen does not have to -- he or she can simply refrain from registering his or her birth.

98. Treating children born abroad of Canadian mothers similarly to those born abroad of Canadian fathers would therefore not have caused any undesirable retroactive effects. Had the 1977 legislation extended the rights granted to children of Canadian fathers to people in Mr. Benner's situation, anyone not wanting Canadian citizenship would have had the option of simply not registering his or her birth. Only those children born abroad of Canadian mothers willing to take on Canadian citizenship would have it. Accordingly, I reject this submission.

99. The respondent also suggested that Parliament was unable in 1977 to rescind retroactively citizenship rights of children of Canadian fathers by requiring them to undergo an oath and security check, and that it was therefore reasonable to institute these protective measures where it could, that is, for children of Canadian mothers.

100. Even if this were true, however, and Parliament could not have required children born abroad of Canadian fathers before February 15, 1977, to undergo the oath and security check, the current Act does not require these procedures for any children of a Canadian parent born abroad after that date, no matter how old the children are. That is, of the three "classes" of applicants contemplated by the impugned provisions -- children born abroad of Canadian mothers before February 15, 1977, children born abroad of Canadian fathers before that date, and children born abroad of either Canadian

parent after that date -- only the first is deemed a potential threat to national security such that an oath and security check are necessary before citizenship can be granted. A 20-year-old applicant born in 1977 can come to Canada having spent his whole life abroad and claim citizenship based on his Canadian lineage. If this applicant does not pose a potential threat to the goals of the *Citizenship Act*, I find it difficult to see why someone in the affected class does. I cannot, therefore, find a rational connection between the stated objectives of the impugned legislation and the decision to require an oath and security check only from children born abroad of Canadian mothers prior to 1977.

101. Even assuming without deciding that the legislation would withstand analysis on the basis of minimal impairment, it therefore founders on the shoals of rational connection. While it is not necessary to decide this in order to dispose of the appeal, I suspect that it would also fail the proportionality test in the third branch of the second criterion. It would, in my opinion, be difficult to justify a *Charter* violation as proportional to the attainment of an objective when Parliament does not even feel the violation is necessary in order to obtain that objective. In conclusion, the impugned provisions do not meet the requirements of the *Oakes* test and are accordingly not saved by s. 1.

102. I note that the appellant argued that even if the *Charter* cannot be applied to his case, the impugned provisions nevertheless fall afoul of the *Canadian Bill of Rights*, R.S.C., 1985, App. III. In light of my conclusions regarding the applicability of the *Charter* and its effect on the challenged legislation, there is no need to address this issue.

6. Remedy

103. The differential treatment of children born abroad before February 15, 1977, of Canadian mothers under the *Citizenship Act* and *Regulations* violates s. 15(1) of the *Charter* and is not saved by s. 1. It is the intention of these reasons to declare the legislation in question of no force or effect in so far as it authorizes this differential treatment: *Constitution Act, 1982*, s. 52.

104. I recognize that by taking this course, I am giving to children of Canadian mothers the access to citizenship granted by Parliament only to children of Canadian fathers. An alternative remedy would have been to read down the law and make all applicants for Canadian citizenship by lineage subject to the oath and security check, regardless of who their Canadian parent was. Given that the Act does not require children born after February 14, 1977, to undergo these procedures, however, I am confident that the course I have taken interferes far less with the overall legislative scheme introduced by Parliament than would this alternative remedy: see *Schachter v. Canada*, [1992] 2 S.C.R. 679.

105. I would therefore declare those provisions which make applicants under s. 5(2)(*b*) subject to oaths, security and criminal record checks not required of children born abroad of Canadian fathers before February 15, 1977, inapplicable to these s. 5(2)(*b*) applicants. However, because the parties were jointly unable to specify all the legislative provisions which could be affected by this constitutional challenge, the Court will remain seized of the case in the hope that the parties will now use their best efforts to agree quickly on the precise terms of the order. Following their agreement, the order will be incorporated into these reasons. Should the parties remain unable to agree, future submissions may be required.

106. I would answer the three constitutional questions as follows:

1. Do ss. 3(1)(*e*), 5(2)(*b*), and 22 of the *Citizenship Act*, R.S.C., 1985, c. C-29, and s. 20 of the *Citizenship Regulations*, C.R.C., c. 400, violate, in whole or in part, s. 15(1) of the *Canadian Charter of Rights and Freedoms*, in so far as they impose more onerous requirements on those claiming Canadian citizenship based on maternal lineage than on those claiming Canadian citizenship based on paternal lineage?

Answer: Yes.

2. If the answer to (1) is "yes", do ss. 3(1)(*e*), 5(2)(*b*), and 22 of the *Citizenship Act*, R.S.C., 1985, c. C-29, and s. 20 of the *Citizenship Regulations*, C.R.C., c. 400, constitute a reasonable limit prescribed by law pursuant to s. 1 of the *Charter*?

Answer: No.

3. Do ss. 3(1)(*e*), 5(2)(*b*), and 22 of the *Citizenship Act*, R.S.C., 1985, c. C-29, and s. 20 of the *Citizenship Regulations*, C.R.C., c. 400, infringe, in whole or in part, the right contained in s. 1(*b*) of the *Canadian Bill of Rights*, R.S.C., 1985, App. III, in so far as they impose more onerous requirements on those claiming Canadian citizenship based on maternal lineage than on those claiming Canadian citizenship based on paternal lineage?

Answer: It is not necessary to answer this question.

7. Disposition

107. The appeal is allowed with costs throughout. The judgment of the Federal Court of Appeal is set aside and the following order is substituted therefor: the decision of the Registrar of Canadian Citizenship dated October 17, 1989, rejecting the appellant's application for citizenship is hereby quashed; and the Registrar is directed to deal with his application in accordance with these reasons. The Court remains seized of the matter pending submissions from the parties as to the precise nature of the order

that the Court should make regarding the effect of these reasons on specific provisions of the legislation in question.

Appeal allowed with costs.

Solicitors for the appellant: Clark, Wilson, Vancouver.

Solicitor for the respondents: The Attorney General of Canada, Ottawa.

Solicitors for the intervener: Gowling, Strathy & Henderson, Ottawa.