CITATION: Bjorkquist et al. v. Attorney General of Canada, 2023 ONSC 7152
COURT FILE NO.: CV-21-673419-0000
DATE: 20231219

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Sara Ann Bjorkquist, Douglas Roy Brooke, AB (by their litigation guardian Douglas Roy Brooke), Gregory Burgess, QR (by their litigation guardian Gregory Burgess), Patrick Chandler, Paul Chandler, MN (by their litigation guardian Patrick Chandler), OP (by their litigation guardian Patrick Chandler), Emma Kenyon, Marian Kenyon, Roger Kenyon, IJ (by their litigation guardian Emma Kenyon), Victoria Maruyama, CD (by their litigation guardian Victoria Maruyama), EF (by their litigation guardian Victoria Maruyama), Alexander Kovacs, KL (by their litigation guardian Alexander Kovacs), Thomas Setterfield, Timothy Setterfield, GH (by their litigation guardian Timothy Setterfield), Daniel Warelis, and William Warelis	)	*Sujit Choudhry* and *Ira Parghi*, for the Applicants
Applicants	)	
– and –	)	
Attorney General of Canada	)	*David Tyndale, Hillary Adams* and *Kevin Spykerman*, for the Respondent
Respondent	)	
	)	**HEARD:** April 19 and 20, 2023

J.T. AKBARALI J.:

Overview

[1] At issue in this case is the ability of Canadian citizens who were born abroad, and who have a substantial connection to Canada, to pass on their citizenship to their children if those children are also born abroad.

[2] In this application, the applicants challenge the constitutionality of s. 3(3)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the "*Act*"). This provision was incorporated into the *Act* through Bill C-37, *An Act to Amend the Citizenship Act*, S.C. 2008, c. 14 ("*Bill C-37*"). Its effect is to prohibit Canadian citizens born abroad from passing Canadian citizenship on to their children automatically if their children are also born abroad. There is no mechanism to remove this limitation from the citizenship status of Canadian citizens born abroad to Canadian-born parents. The parties refer to this effect as the "second-generation cut-off". I will use that terminology in these reasons.

[3] The applicants allege that s. 3(3)(a) of the *Act* confers second-class citizenship status on those Canadians born abroad who acquire citizenship by descent from their Canadian-born parents, treating such Canadians differently than Canadians born in Canada, and differently than naturalized Canadians. They argue that the second-generation cut-off violates ss. 15, 6, and 7 of the *Charter of Rights and Freedoms*, and is not saved by s. 1.

[4] The respondent argues that there is no *Charter* right to citizenship, and the *Act* provides mechanisms for a child who is subject to the second-generation cut-off to obtain citizenship through other means. The respondent denies any breach of the *Charter*.

Brief Conclusion

[5] For the reasons below, I find that s. 3(3)(a) of the *Act* contravenes ss. 6 and 15 of the *Charter* and it is not saved by s. 1. Under s. 52 of the *Constitution Act, 1982*, I declare the provision to be of no force or effect, but I suspend the declaration of invalidity for a period of 6 months from the date of the release of these reasons.

[6] I do not find any breach of s. 7 of the *Charter*. Nor do I grant any award of *Charter* damages.

[7] I grant an order exempting each of Victoria Maruyama, Timothy Setterfield and Alexander Kovacs from s. 3(3)(a) of the *Act* with immediate effect, such that they are Canadian citizens as if s. 3(1)(a) of the *Act* applied to them. As a result, their children, CD, EF, GH, and KL are Canadian citizens because s. 3(1)(b) of the *Act* applies to them.

Background

[8] The applicants in this proceeding allege that their *Charter* rights have been violated as a result of the operation of s. 3(3)(a) of the *Act*.

[9] The applicants are members of seven Canadian families, spanning multiple generations. I refer to the different generations as follows:

a. gen zero: the applicants belonging to gen zero are Canadian-born citizens who had children abroad, or naturalized Canadian citizens who had children abroad after their naturalization, and whose children acquired Canadian citizenship automatically by descent.

b. first generation born abroad: the applicants belonging to the first generation born abroad are the children who were born outside of Canada to parents belonging to gen zero, and who automatically received Canadian citizenship by descent through their gen zero Canadian parent or parents.

c. second generation born abroad: the applicants belonging to the second generation born abroad are the children of the first generation born abroad, and who, as a result of s. 3(3)(a) of the *Act*, did not receive citizenship automatically at birth from their Canadian parent or parents.

[10] The facts underlying each family's history are not in dispute on this application. I briefly describe each family's circumstances. At this juncture, I do not address in detail the reasons each family had for having children abroad, or the barriers that existed to their return to Canada for their children to be Canadian born. To the extent that evidence is necessary, I deal with it in my analysis of the issues.

The Bjorkquist/Brooke Family

[11] Sara Bjorkquist and Roy Brooke are Canadian citizens who were born in Canada. Ms. Bjorkquist and Mr. Brooke met while working for the Minister of the Environment in Ottawa. They desired international work experience and to represent Canada internationally. In 2003, they moved to Geneva, Switzerland. Ms. Bjorkquist worked at the World Health Organization, while Mr. Brooke worked at the United Nations Environment Programme. They married in 2004, and had a child, AB, in 2010, in Geneva. AB obtained Canadian citizenship by birth. In 2011, the family relocated to Victoria, British Columbia, where they have lived ever since. If AB were to follow in their parents' footsteps by having a child abroad while gaining international work experience, AB could not pass on Canadian citizenship to that child because, for reasons AB could not control, AB was born in Geneva.

The Burgess Family

[12] Gregory Burgess is a first generation born abroad Canadian. His mother was a Canadian-born citizen who married an American whom she had met in Edmonton. Mr. Burgess's parents relocated to the United States for his father's work. Mr. Burgess was born in Connecticut in 1975. He holds dual American and Canadian citizenship, having acquired his Canadian citizenship by descent from his Canadian-born mother. The family returned to Canada in 1982, when Mr. Burgess was approximately seven years old. Mr. Burgess's sister was born in Canada. Mr. Burgess grew up in Alberta, and completed his education and university education there.

[13] Mr. Burgess moved to South Korea in 2004 to gain international work experience. He returned to Canada in 2007, but had difficulty finding work, so returned to Asia in 2009. He met and married his wife, Viktoriya, a Russian citizen, in China. They currently reside in Hong Kong. Mr. Burgess and his wife did not want to wait to start a family, as Mr. Burgess was 45 years old, and his wife was 39. Their child, QR, was born in Hong Kong in 2021. Mr. Burgess and his wife have only the temporary right to reside in Hong Kong. QR is not entitled to citizenship or permanent residence status in Hong Kong because neither of their parents are citizens or permanent

residents of Hong Kong. QR did not receive Canadian citizenship automatically because of the second-generation cut-off.

[14] Mr. Burgess has made efforts to acquire Canadian citizenship for QR. He applied for, but QR did not receive, a discretionary grant of citizenship under s. 5(4) of the *Act*. Immigration, Refugees and Citizenship Canada ("IRCC") has advised Mr. Burgess that QR may not be stateless, as he may have a claim to American citizenship through Mr. Burgess or to Russian citizenship through Mr. Burgess's wife. Mr. Burgess has demonstrated that he cannot transmit American citizenship to QR. QR may be entitled to Russian citizenship, but Mr. Burgess has no right to go to Russia, and the Canadian government currently advises its citizens not to travel to Russia, and to leave Russia if already there.

[15] I am advised that, on April 12, 2023, one week before the hearing of this application, QR was granted Canadian citizenship. There was some confusion because QR originally received citizenship documents belonging to someone else, unconnected with this application, apparently in error, and it was unclear whether QR had been granted citizenship or PR status. The Attorney General of Canada advised me that QR has been granted citizenship status.

The Chandler Family

[16] Paul Chandler is a naturalized Canadian citizen. He met his wife, Janan, an America citizen, in Tripoli, Libya where they had each temporarily moved to teach. They married in 1986 and decided, because of their ages, to start their family in Libya. Patrick Chandler was born in Libya in 1987. He acquired Canadian citizenship automatically through his father. The family returned to Canada when Patrick Chandler was three years old. He completed his elementary, secondary, and university education in Canada. Janan Chandler received her Canadian citizenship in 2011 through her marriage to Paul Chandler.

[17] In 2008, Patrick Chandler decided to gain international work experience. He moved to China in 2008, where he met his wife, Fiona, a Chinese citizen. In 2009, before Patrick Chandler and his partner married, their child, MN, was born in Beijing. MN could not obtain Canadian citizenship due to the second-generation cut-off. MN could not obtain Chinese citizenship under Chinese law because their parents were unmarried at the time of MN's birth. MN eventually obtained Irish citizenship through their grandfather, Paul Chandler.

[18] In 2014, Patrick Chandler and his wife had a second child in Beijing, OP. OP also had no right to Canadian citizenship. The family decided they wanted to raise their children in Canada. Because MN and OP had no right to enter Canada except on a visitor's visa, precluding them from obtaining provincial health insurance or attending public schools, Patrick Chandler relocated to British Columbia on his own, to take up a job as a public servant. He sought permanent residency ("PR") status for MN and OP immediately. About a year later, the children received PR status and the family was able to reunite permanently. The children eventually received citizenship status in 2022. However, during the time MN and OP were separated from their father, their ability to speak English deteriorated, making it difficult for them to communicate with their father once they were permanently reunited. The separation also caused tremendous stress and suffering for the family.

The Kenyon/Warelis Family

[19] Emma Kenyon and Dan Warelis are both first generation born abroad Canadians.

[20] Emma Kenyon's parents, Marian and Roger Kenyon, are naturalized citizens. They married in 1982, the same year their first child was born. The family moved to Tokyo, Japan, temporarily for work, intending to return to Canada. Emma Kenyon was born in 1985 in Tokyo and received Canadian citizenship by descent through her parents. The family returned to Canada for work in 1986. In 1989, the family moved, again for work, to the United Kingdom, and returned to Canada again in 1992. Emma Kenyon spent most of her youth in Canada, where she attended primary school, CEGEP, and university, and where she worked in the public sector.

[21] Dan Warelis's father, Bill Warelis, is a Canadian citizen by birth. He married Dan Warelis's mother, Judith, in 1981. They temporarily moved to New York City in 1984 to pursue employment opportunities, and decided to start their family in the United States. In 1985, Dan Warelis was born in New York, and received Canadian citizenship by descent from his father. In 1986, the Warelis family moved to London, England for Bill Warelis's work. In 1991, the family moved back to the United States, again for Bill Warelis's work. In 1993, Bill Warelis returned to Canada for work, and the rest of the family followed in 1994. Dan Warelis completed his primary school, high school, and university in Canada, and thereafter worked in the public sector in Canada, including some time at the Canadian Embassy to Argentina in Buenos Aires.

[22] Dan Warelis and Emma Kenyon met in 2010 at university. In 2016, they travelled to Hong Kong, and decided to stay to work for a few years before returning home.

[23] In 2017, Dan Warelis and Emma Kenyon began trying to have a baby. They married in 2018. Their plan was to return to Canada to raise their child.

[24] Unfortunately, the couple had difficulty conceiving; their journey to a successful pregnancy was long and hard. Their child, IJ, was born stateless in Hong Kong in 2021.

[25] In 2022, the family returned to Canada. They applied for a discretionary grant of citizenship for IJ under s. 5(4) of the *Act*, and, with the assistance of a private individual who leveraged contacts within IRCC, were eventually successful in obtaining Canadian citizenship for IJ.

The Kovacs Family

[26] Alexander Kovacs' father was a naturalized Canadian citizen. His mother was a Canadian citizen by birth. His parents married in 1953 and had three sons in Canada. In 1965, the family moved to Libya for professional reasons, although they planned to return to Canada. In 1968, the family moved to the Netherlands, as the first stage in a plan to return to Canada.

[27] In 1972, Mr. Kovacs was born in the Netherlands. He returned to Canada in 1980. He attended high school, CEGEP, and college in Montreal. In 1997, Mr. Kovacs took up a two-year contract position in Hong Kong, to gain international experience. He has continued to look for work in Canada but has not been able to find a suitable position.

[28] Mr. Kovacs married his wife, an Indian citizen, in 2010. Their child, KL, was born in 2011 in Hong Kong.

[29] The family temporarily relocated to Dubai, United Arab Emirates, in 2019 for work. Also in 2019, the application Mr. Kovacs had made for Canadian citizenship for KL under s. 5(4) of the *Act* was refused.

[30] The Kovacs family only has the right to reside in Dubai because of Mr. Kovacs' employment. The family wants to return to Canada. They want KL to go to school in Canada. They have strong family ties to Mr. Kovacs' family and godfather who live in Canada. However, KL has no status to live in Canada.

The Maruyama Family

[31] Victoria Maruyama's father became a naturalized Canadian in 1971. He moved to Hong Kong for work, where he met Ms. Maruyama's mother. The pair married in 1976.

[32] Ms. Maruyama was born in 1979 in Hong Kong. She received Canadian citizenship by descent from her father. In 1980, the family returned to Edmonton, Alberta. Ms. Maruyama grew up in Canada, and attended school and university in Canada.

[33] In 2001, Ms. Maruyama moved to Japan temporarily to teach English. In 2002, she met her husband, a Japanese national. They married in 2007, and became pregnant in 2008. In 2009, their first child, CD, was born in Japan. In 2011, their second child, EF, was born in Japan. Neither was eligible for Canadian citizenship due to the second-generation cut-off.

[34] In the summer of 2017, Ms. Maruyama and her family returned to Edmonton to settle there. CD and EF were being bullied at school in Japan for being of mixed Chinese and Japanese heritage, and the family sought a better environment for them. The children arrived on visitor's visas. Ms. Maruyama applied for a discretionary grant of citizenship under s. 5(4) of the *Act*. While the applications were in progress, Ms. Maruyama managed to get the children into Edmonton public schools (after being denied admission initially), and to obtain temporary health insurance coverage for them.

[35] The family returned to Japan for two months over the summer of 2018 because their visitor's visas had run out and the children's health insurance coverage had expired. They returned to Edmonton in the fall of 2018 on temporary residence permits, and the children attended public school again.

[36] The children's applications for citizenship were denied in January 2019. IRCC told Ms. Maruyama to sponsor her children for permanent residency. She did so, and based on assurances from IRCC that the children could obtain PR status, she dropped any challenge to the denial of citizenship under s. 5(4).

[37] In March 2019, the family returned to Japan for an employment opportunity, and because at that time, the children had no legal right to remain in Canada permanently. In 2020, IRCC denied the children's applications for PR status.

[38] In Japan, the children continue to experience racist mistreatment. In addition, in early 2021, CD began identifying as transgender. The record indicates that Japanese society holds to traditional norms of gender identity. CD hides their transgender identity in public and at school for fear of bullying, and suffers from anxiety and despair. CD has engaged in self-harm and experienced suicidal ideation. The family wants to live permanently in Canada but despite their efforts, they have been unable to secure a legal right for CD and EF to live in Canada.

The Setterfield Family

[39] Tim Setterfield's father, Tom Setterfield, is a Canadian citizen by birth. He met Tim Setterfield's mother, Penelope Setterfield, a citizen of the United Kingdom, in Thailand in 1982. The pair married in Ottawa in 1983. In 1984, they moved temporarily to Fiji for Tom Setterfield's work, and decided to begin their family in Fiji.

[40] Tim Setterfield was born in Fiji in 1985, and received Canadian citizenship by descent from his father. Between 1988 and 1991, the family resided in the United Kingdom where Tim Setterfield's father completed his PhD at Cambridge University. The family returned to Canada in 1991.

[41] Tim Setterfield attended school and university in Canada. In 2013, he moved to the United States to start his PhD in Aeronautics and Astronautics at Massachusetts Institute of Technology. In 2017, he applied for the Canadian Space Agency's Astronaut Corps and reached the final 72 applicants. Also in 2017, he accepted a position at the Jet Propulsion Laboratory of the National Aeronautics and Space Administration ("NASA").

[42] In 2018, Mr. Setterfield married his wife, who is an American citizen. They had a child, GH, in the United States in 2020. GH was denied Canadian citizenship because of the second-generation cut-off.

Issues

[43] This application raises the following issues for determination:

a. Do Sara Bjorkquist, Roy Brooke, Paul and Janan Chandler, Marian and Roger Kenyon, Judith and William Warelis, Thomas and Penelope Setterfield, CD, EF, GH, KL, and QR have standing to bring this application?

b. Should this court cede its jurisdiction over the issues raised in this application to the Federal Court?

c. Does the second-generation cut-off discriminate based on national origin against the first generation born abroad in violation of s. 15(1) of the *Charter*?

d. Does the second-generation cut-off discriminate against women in the first generation born abroad based on the intersection of national origin and sex in violation of s. 15(1) of the *Charter*?

e. Does the second-generation cut-off violate the s. 6(1) *Charter* rights of members of gen zero and the first generation born abroad?

f. Does the second-generation cut-off violate the s. 7 *Charter* rights of the first generation born abroad and the second generation born abroad, viewing their *Charter* rights as intertwined?

g. If the second-generation cut-off violates any of s. 6(1), 7, or 15(1) of the *Charter*, are the violations justified under s. 1?

h. If there is a *Charter* violation that is not saved under s. 1, what is the appropriate remedy under s. 24(1) of the *Charter* and/or s. 52(1) of the *Constitution Act, 1982*? In particular, (a) should any declaration of invalidity be suspended; (b) should any constitutional exemptions be granted to any specific applicants; and (c) should any damages be awarded pursuant to s. 24(1) of the *Charter* to specific applicants?

Standing

[44] The respondent raises preliminary objections on the basis of standing. It argues that because the gen zero applicants (Sara Bjorkquist Roy Brooke, Paul and Janan Chandler, Marian and Royger Kenyon, Judith and William Warelis, and Thomas and Penelope Setterfield) are all either naturalized or Canadian-born citizens, they do not have a personal and direct interest in the litigation because their legal rights are not specifically affected by s. 3(3)(1) of the *Act*, and as such they have no standing. The gen zero applicants allege a violation of their s. 6(1) *Charter* rights. As a result, I address this argument in the context of my s. 6(1) analysis, below.

[45] The respondent also argues that CD, EF, GH, KL, and QR do not have standing to bring a *Charter* claim because they are non-citizens outside of Canada. I address this argument in the context of my s. 7 analysis below, which is the only alleged *Charter* breach the applicants assert on behalf of the second generation born abroad.

Jurisdiction

[46] The respondent acknowledges that this court has jurisdiction to deal with constitutional issues raised in citizenship matters, but argues that the jurisprudence supports the conclusion that this court should defer its jurisdiction to the Federal Court, given that court's experience and expertise in citizenship and immigration matters.

[47] The jurisprudence on which the respondent relies arises principally in the context of immigration and refugee determinations, and rests significantly on the fact that Parliament has created a comprehensive scheme of review of immigration matters, which includes directing appeals or judicial review of administrative decisions to the Federal Court. Much of the jurisprudence cited deals with assertions of *Charter* rights in the context of deportation orders, or applications for *habeus corpus* in the context of detention orders: see, for example, *Oberlander v. Canada (Attorney General)*, 2004 CanLII 15504 (ON SC); *John (Litigation Guardian of) v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 14757 (ON SC); *Shepherd v. Canada (Minister of Employment and Immigration* (1989) 70 O.R. (2d) 765, 1989 CanLII 4359 (Ont. C.A.).

[48] Of these, *Oberlander* is the only case relied on by the respondents involving citizenship rather than immigration, and it deals with a deportation order made in the context of a revocation of citizenship. In that case, while acknowledging the Federal Court's expertise in immigration matters, the Ontario Superior Court of Justice held, at para. 24, that most of the issues raised in *Oberlander* focused "on the process by which Mr. Oberlander's citizenship was revoked and the constitutional issues which arise as a result thereof". The court noted the lack of jurisprudence supporting the proposition that the Federal Court was a more appropriate court to determine the validity of revocation of citizenship, and concluded that the Superior Court of Justice was at least as capable of dealing with the issue, "particularly when constitutional issues are raised."

[49] None of the authorities cited to me deal with a constitutional challenge to legislation that is divorced from some kind of administrative decision. Moreover, the jurisprudence speaks to the expertise of the Federal Court in immigration matters. No jurisprudence cited by the respondent supports the contention that the Federal Court has a greater expertise with respect to the constitutionality of provisions of the *Citizenship Act*.

[50] I find that the rationale for ceding jurisdiction to the Federal Court in matters involving judicial review of immigration decisions does not apply to the application before me. I am as well placed to determine the issues raised in this application as the Federal Court is, assuming the application before me could have been brought in that court. The parties have invested significant resources in preparing and arguing this application. Moreover, especially now, at a time when courts across the country are facing significant backlogs, it is efficient, having regard to the court's and the parties' resources, for this court not to cede jurisdiction. For these reasons, I would not cede jurisdiction in this matter to the Federal Court.

[51] In any event, I have concerns that the application as structured could not have been brought in the Federal Court. The applicants point out that many of the claimants have not been the subject of federal administrative decisions that could be reviewed at the Federal Court. They argue that the applicants who were not the subject of a federal administrative decision would not have standing to bring a claim in Federal Court.

[52] This argument is supported by recent jurisprudence of the Federal Court. In *Grossman-Hensel v. Minister of Citizenship and Immigration*, 2022 FC 193, [2022] F.C.J. No. 186, the father and litigation guardian of two minor applicants brought applications for judicial review of a decision denying the children a discretionary grant of citizenship under s. 5(4) of the *Act*. The Federal Court found, at paras. 47-49, that the decision to refuse a discretionary grant of citizenship to the children did not directly affect the father. Although the court recognized that the father had an obvious interest in the issues raised in the application, it concluded that the father had no standing.

[53] The application before me is structured as a multi-generational *Charter* claim, and advances, among other things, a s. 7 rights argument premised on the notion of an intertwined right asserted by a parent and child, and s. 6(1) rights of gen zero Canadians.

[54] As the Supreme Court of Canada noted in *Windsor v. Canadian Transit*, 2016 SCC 54, [2016] 2 S.C.R. 617, at para. 33, the Federal Court has only the jurisdiction conferred upon it by statute, and is without inherent jurisdiction. The *Federal Courts Act*, R.S.C. 1985, c. F-7 is

completely determinative of the scope of that court's jurisdiction. It is not clear to me whether the application as structured would fall within the Federal Court's jurisdiction. The applicant argued that it did not; the respondent argued that it did. But as I have noted, the cases that they cited concentrated on the Federal Court's jurisdiction in judicial review of immigration matters, and did not address where in the *Federal Courts Act* the jurisdiction to hear this application as it is structured can be found.

[55] In *Francis (Litigation Guardian of) v. Canada (Minister of Citizenship and Immigration)* (1999) 49 O.R. (3d) 136 (Ont. C.A.), the court described the relationship between the jurisdiction of the Federal Court and the Ontario Superior Court of Justice in immigration matters, at para. 12:

> … This court has expressed the view that, generally, immigration matters are best dealt with under the comprehensive scheme established under that Act. Judicial review of decisions made under the Act are left to the Federal Court. That is not to say that the provincial superior court should always yield to the jurisdiction of the Federal Court. There will be situations in which the Federal Court is not an effective or appropriate forum in which to seek the relief claimed. In those rare cases, the superior court can properly exercise its jurisdiction.

[56] I make no finding as to whether this matter falls within or outside of the Federal Court's jurisdiction. The question was not fully argued before me. However, based on the incomplete argument before me, I conclude that it is at least arguable that the application as structured could not be advanced in the Federal Court. As a result, the Federal Court may not be an effective or appropriate forum in which the applicants could seek the relief they claim. This risk bolsters my conclusion that I ought not to cede jurisdiction in the circumstances of this case.

Does s. 3(3)(a) of the *Act* violate s. 15(1) of the *Charter*?

Framework for the s. 15 Analysis

[57] Substantive equality is protected under s. 15(1) of the *Charter* through the application of the two-step test repeatedly affirmed by the Supreme Court of Canada in, for example, *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 S.C.R. 113, *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464 and, most recently, *R. v. Sharma*, 2022 SCC 39, 165 O.R. (3d) 398, at para. 37.

[58] The two-step test is set out neatly in *Withler*, at para. 30, and was most recently cited with approval in *Sharma*, at para. 38: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? In *Fraser*, at para. 42, and in *Sharma*, at para. 51, the second branch of the test is described slightly differently; it asks whether the impugned law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the group's disadvantage.

[59] At the first stage, claimants must demonstrate, through evidence, a disproportionate impact of the alleged discriminatory law on a protected group, as compared to non-group members:

Sharma, at para. 40, *Withler*, at para. 62. The impugned law must have created or contributed to the disproportionate impact on the claimant group: *Sharma*, at para. 45. The causal connection may be satisfied by reasonable inference: *Sharma*, at para. 49.

[60] Once the first hurdle has been cleared, the applicant must satisfy the second branch of the test. The goal at this stage is to examine the impact of the harm caused to the affected group: *Fraser*, at para. 76.

[61] The Supreme Court of Canada has identified several factors that may assist the court in determining whether the claimant has discharged its burden at the second stage of the analysis: arbitrariness, prejudice, and stereotyping. None of these factors are necessary components, but courts may consider whether these factors are present: *Sharma*, at para. 53.

[62] In its analysis under the second step of the test, courts should also consider the broader legislative context, including the objects of the legislative scheme, particular policy goals sought to be achieved, and whether the lines are drawn mindful as to those factors: *Sharma*, at para. 59; *Withler*, at para. 67.

Step One: Does s. 3(3)(a) of the *Act* discriminate on the basis of national origin?

[63] The applicants argue that s. 3(3)(a) of the *Act* is discriminatory because it creates a distinction based on national origin in relation to the first generation born abroad.

[64] Section 15(1) provides that "[e]very 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."

[65] While the scope of s. 15 has expanded since the enactment of the *Charter* to include analogous grounds of discrimination, in this case, the applicants rely on the enumerated ground of "national … origin". I thus do not address the respondent's argument about analogous grounds, since the applicants seek no relief based on any analogous grounds.

[66] In *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, [2015] 2 F.C.R. 267, at para. 750, the Federal Court held that the use of the disjunctive "or" in s. 15(1) suggests that the terms "national origin" and "ethnic origin" are not synonymous, a conclusion bolstered by the fact that it is "clear that an individual can have one national origin while having a different, or even several different ethnic origins."

[67] The court went on to conclude that the plain meaning of "national origin" is broad enough to include people who are born in a particular country and, separately, people who come from a particular country: *Canadian Doctors*, at para. 767.

[68] The court found that interpreting "national origin" to include people who come from a particular country is consistent with the term "designated countries of origin," used in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"). In immigration and refugee law, the term "country of origin" is used to refer to a refugee's country of citizenship or country of habitual residence. The term is used in Article 3 of the *Refugee Convention* and incorporated

into the *IRPA* in s. 109.1. The *Refugee Convention* itself is a defined term under the *IRPA* that means "the *United Nations Convention Relating to the Status of Refugees*, signed at Geneva on July 28, 1951 and the Protocol to that Convention, signed at New York on January 31, 1967."

[69] In other words, the court in *Canadian Doctors* concluded that discrimination based on a refugee's country of origin is prohibited under s. 15(1) because national origin includes people who come from a particular country (that is, their country of origin).

[70] Separately, the court in *Canadian Doctors* found that national origin also includes a person's country of birth. It is on this meaning of "national origin" that the applicants rely.

[71] The respondent argues that s. 3(3)(a) of the *Act* has already been found not to discriminate on the basis of national origin, based on the decision of the Federal Court in *Tully v. Canada (MCI)*, 2020 FC 547, [2020] F.C.J. No. 568.

[72] In *Tully*, the applicant was an American citizen, born in 1973 in the United States to parents who were also born in the United States. The applicant's maternal grandfather had been born in Canada, giving the applicant's mother a potential claim to Canadian citizenship through her father based on the *Citizenship Act*, R.S.C. 1985, c. C-29, first in force in 1977. The applicant applied for Canadian citizenship in 2018, and was denied because he did not qualify under s. 3(3)(a) of the current *Act* — the provision at issue in this case.

[73] The applicant argued that s. 3(3)(a) of the *Act* discriminated against him based on national origin. In rejecting his claim, the Federal Court noted the decision in *Canadian Doctors*, and particularly, the portion of the decision that held that the "prohibition on discrimination between classes of non-citizens based on their country of origin is one that is also consistent with the provisions of the Refugee Convention". This is the portion of the decision I refer to above, at para. 68, to explain that "country of origin" is protected under "national origin" in s. 15 because it protects "people who come from a particular country".

[74] However, the court in *Tully* makes no note of the portion of the decision in *Canadian Doctors* that found that "national origin" also includes "country of birth."

[75] Having not noted that the decision accepted that "national origin" is inclusive of (at least) two separate conditions, the Federal Court went on to conclude that s. 3(3)(a) of the *Act* does not make a distinction based on national origin, because it applies regardless of country of origin. The court held that: "…paragraph 3(3)(a) applies to every person born outside Canada to a Canadian parent who was also born outside Canada. The country of origin is not part of the examination of whether paragraph 3(3)(a) applies": *Tully*, at paras. 56-57.

[76] In *Tully,* the court's relatively brief discussion of whether s. 3(3)(a) of the *Act* violates s. 15(1) did not include any analysis of the portion of the *Canadian Doctors* decision that found "country of birth" to be distinct from "the country from which one comes". It never considered whether s. 3(3)(a) of the *Act* could violate the *Charter* based on one's country of birth.

[77] I accept the conclusion in *Canadian Doctors*, that "national origin" includes "country of birth" (as distinct from "country of origin, or the country from which someone comes"). If discrimination on the basis of country of birth is protected under s. 15(1), on the plain meaning of

the phrase, s. 15(1) must protect against discrimination based, not only on whether one was born in, for example, Germany or Namibia, or an Asian country or a South American one, but also on whether one was born in Canada or in a different country.

[78] My conclusion would seem to be inconsistent with the five-paragraph decision of the Federal Court of Appeal in *Pawar v. Canada*, 1999 CanLII 8760 (FCA). Although the respondent did not rely on *Pawar*, it was cited by the court in *Canadian Doctors*. For completeness of my analysis, given that my reasoning diverges from its conclusion, I consider it here.

[79] In *Pawar*, the Federal Court of Appeal considered the appeal from the dismissal of a class action that alleged that the residency requirement imposed in the *Old Age Security Act*, R.S.C. 1985, c. O-8 violated the equality rights embodied in s. 15(1) of the *Charter*.

[80] The Federal Court of Appeal rejected the appellant's argument that the residency requirement constituted indirect discrimination because, although neutral on its face, it prejudiced senior Canadian residents born abroad. The Federal Court of Appeal found that the group that was denied benefits was "people born abroad or former residents of countries without reciprocal agreements with Canada," which was not a discrete and insular group who have suffered historical disadvantage because of immutable personal characteristics or vulnerability to political and social prejudice: *Pawar*, at para. 3.

[81] The Federal Court of Appeal also concluded that "being born abroad" is not an enumerated ground in s. 15, not being embraced in the concept of "national and ethnic origin": *Pawar*, at para. 2. The reasons on this point seem to rely on the analysis of the trial judge in *Pawar v. Canada (T.D.)*, 1998 CanLII 9096 (FC), [1999] 1 FC 158. But the trial judge's decision did not examine the scope of the "national and ethnic origin" ground under s. 15. Rather, the trial judge focused on the distinction arising out of the length of residency of a person in Canada, finding that "the expansion [of the group entitled to benefits] by reference to entitlement under various [old age security] plans of other countries is peripheral". More importantly, the trial court noted that expansion is not based on citizenship or national origin, but based on entitlement under the plans that exist in those countries.

[82] Thus, without any analysis in either decision on the question of the content of "national origin," all *Pawar* offers is a conclusory statement in a five-paragraph decision.

[83] In *Canadian Doctors*, the court distinguished *Pawar*, noting that the distinction advanced in that case was "prior residency in countries without reciprocal pension agreements with Canada," which had nothing to do with the plaintiffs' national or ethnic origin. I agree that *Pawar* is distinguishable.

[84] For all of these reasons, I conclude that s. 3(3)(a) creates a distinction based on national origin; it treats differently those Canadians who became Canadians at birth because they were born in Canada from those Canadians who obtained their citizenship by descent on their birth outside of Canada. The latter group holds a lesser class of citizenship because, unlike Canadian-born citizens, they are unable to pass on Canadian citizenship by descent to their children born abroad.

[85] Canadians who obtained their citizenship by descent on their birth also hold a lesser class of citizenship because, unlike Canadians born in Canada, they do not have the automatic right to return to Canada to live with their born-abroad children.

[86] I thus conclude that the applicants who are first generation born abroad Canadians have met the first branch of the test under s. 15(1) to demonstrate that the impugned law creates a distinction based on an enumerated ground.

[87] Before I turn to the second stage of the analysis under s. 15 as it relates to distinctions based on national origin, I consider the applicants' argument that s. 3(3)(a) of the *Act* also violates s. 15 based on the intersection of national origin and sex against women in the first generation born abroad.

Step One: Does s. 3(3)(a) violate s. 15(1) of the *Charter* based on the intersection of national origin and sex, because of its disproportionate impact on women in the first generation born abroad?

[88] The Supreme Court of Canada has recognized that discrimination can occur based on an intersection of grounds, and found that there is no reason in principle why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s. 15(1): *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, para. 94. See also *Corbiére v. Canada,* [1999] 2 S.C.R. 203, 1999 CanLII 687, at paras. 60 and 72 where the Court (in reasons written by L'Heureux-Dubé J. for the minority but on which point the majority did not differ) concluded that discrimination was founded on a combination of traits.

[89] The impact of an intersection of grounds was again addressed by the Court in *Withler*, at para. 58, where it noted that discrimination may implicate more than one prohibited ground:

> An individual's or a group's experience of discrimination may not be discernible with reference to just one prohibited ground of discrimination, but only in reference to a conflux of factors, any one of which taken alone might not be sufficiently revelatory of how keenly the denial of a benefit or the imposition of a burden is felt.

[90] The Supreme Court of Canada has not yet set out a method or approach for adjudicating intersectional discrimination claims.

[91] The applicant urges me to adopt the approach proposed by Professor Shreya Atrey in her book "Intersectional Discrimination", Oxford University Press, at p. 157, where she defines four kinds of relationship between discrimination and grounds in intersectional claims:

a. Discrimination which is directly based on multiple grounds and causes impact on those grounds;

b. Discrimination which is based on neutral criteria and causes indirect impact on multiple grounds;

c. Discrimination which is based facially on a single ground but causes impact on that and other grounds; and

d. Discrimination which is based on one or more grounds, coupled with a neutral consideration, and causes discriminatory impact on multiple grounds.

[92] Of these four definitions, it is the third which the applicants allege applies here; that is, s. 3(3)(a) discriminates facially on the basis of national origin (an argument I have already accepted subject to the second phase of the s. 15 analysis), and causes impact on that and other grounds – in this case, sex.

[93] In other words, the applicants argue that while all first generation born abroad Canadians are impacted by the discriminatory impact of s. 3(3)(a) insofar as it relates to their national origin, first generation born abroad women are particularly impacted because of the intersection of their country of birth and their sex.

[94] I accept that one type of intersectional discrimination claim is that which arises when a distinction is based facially on a single ground (either enumerated or analogous) under s. 15 of the *Charter*, but has impacts based on that and one or more other enumerated or analogous grounds.

[95] Thus, in undertaking the first stage of the analysis of whether s. 3(3)(a) of the *Act* breaches s. 15(1) of the *Charter* on the basis of an intersectional claim of discrimination, the question I must ask is:

> With respect to the first-generation born abroad women applicants, does s. 3(3)(a) create a distinction based on their national origin (that is, their country of birth), which has impacts on them based on their national origin and their sex?

[96] Or, to pose the question using the words of the Supreme Court of Canada in *Withler*, do first generation born abroad women applicants feel the denial of a benefit or imposition of a burden differently, or more keenly, because of the effect of the distinction on more than one prohibited ground of discrimination?

[97] Given that I have already determined that s. 3(3)(a) creates a distinction based on national origin, the factual question is whether the evidence reveals that first generation born abroad women feel the denial of the ability to pass on citizenship by descent to their second generation born abroad children differently, or more keenly, because they are women.

[98] The evidence in the record makes it clear that, factually, the answer to this question is yes. The different impact on the first generation born abroad women applicants because they were the ones who were pregnant, and it is exacerbated by the fact that, as is common, they became pregnant when they were establishing their careers.

[99] Take, for example, Emma Kenyon, a first generation born abroad woman. Ms. Kenyon began trying to have a baby with her partner, Dan Warelis, also a first generation born abroad Canadian, when they were 32 and living in Hong Kong for work. They married shortly thereafter.

[100] Unfortunately, they had difficulty conceiving and began fertility treatments in 2019 in Hong Kong. Ms. Kenyon lost her first pregnancy at 22 weeks in 2020. When the COVID-19 pandemic began, they decided to remain in Hong Kong, where they continued to have jobs, and to be in a position to afford the ongoing fertility treatments. They were unsure whether they would

be able to find employment in Canada at a time when people were being laid off due to the pandemic.

[101] After a couple of failed attempts to conceive, Ms. Kenyon became pregnant again in 2021.

[102] When Ms. Kenyon contacted the Consulate General of Canada in Hong Kong shortly after she found out she was pregnant to enquire about her future child's citizenship, she was advised to find out if she could return to Canada to give birth so that the child could acquire Canadian citizenship.

[103] Ms. Kenyon and Mr. Warelis made the difficult decision to remain in Hong Kong, despite the fact that their child would be born stateless, because returning to Canada at that time posed both health and financial difficulties. Ms. Kenyon did not have a doctor in Canada, while in Hong Kong she was under the care of a fertility doctor and an obstetrician. She would not have been eligible for government-provided health care in Canada until after she completed a waiting period, leading to the potential for significant financial costs to deal with any health issues that might arise, which were a real possibility given her pregnancy history.

[104] Moreover, maternity leave in Hong Kong is only five weeks for women, while men are entitled only to a five-day paternity leave. With quarantining requirements in place during the COVID-19 pandemic, it would have been impossible for Mr. Warelis to be present for the birth of their child were Ms. Kenyon to have travelled to Canada.

[105] Could Ms. Kenyon have travelled alone to Canada? Leaving aside the implications of giving birth in Canada without a physician or health insurance, given that there are restrictions on how far into pregnancy a woman can fly, and the inherent uncertainty of when a pregnant woman will go into labour, Ms. Kenyon would likely have had to be absent from work to give birth in Canada beyond the five-week maternity leave period available to her. And she would have had to fly back to Hong Kong alone with an unvaccinated infant on a 15-hour flight during a global pandemic.

[106] The decisions faced by Ms. Kenyon implicated her health, her physical integrity, her job, and her finances in a way that they did not impact Mr. Warelis. It was Ms. Kenyon who would have had to miss work to travel to Canada. It was Ms. Kenyon whose health would have been at risk due to not having a physician. It was Ms. Kenyon's bodily integrity at issue. It was Ms. Kenyon who would have been responsible for uninsured health care costs. If Ms. Kenyon had lost her job, or had to take unpaid leave, it would have been her income that would have been affected.

[107] Thus, the burdens of the second-generation cut-off were felt differently, and more keenly, by Ms. Kenyon because the discrimination based on her country of birth had different impacts on her because of her sex.

[108] Another example is found in the evidence of Victoria Maruyama. Ms. Maruyama is a first generation born abroad woman. In 2001, after she graduated university, she moved to Japan to teach English, to gain international work experience, to travel, and to earn money to pay off her student loans.

[109] Ms. Maruyama met her husband, a Japanese citizen, in Japan in 2002. They married in 2007. In 2008, when Ms. Maruyama was 29, she became pregnant. Ms. Maruyama and her husband had decided to start a family because, at her age, she did not want to put off pregnancy any longer. They were both employed and could provide a child with financial stability. Ms. Maruyama intended to return to Canada with her family, but did not learn that she could not pass on Canadian citizenship to her child automatically without returning to Canada to give birth until she was well into her third trimester of pregnancy.

[110] Like Ms. Kenyon, Ms. Maruyama was concerned because she did not have a health care provider or health insurance in Canada. She was also working and had an employment contract to complete. She was not in a financial position to drop everything, return to Canada, and pay for her health care to give birth in Canada.

[111] Like Ms. Kenyon, the inability to pass on citizenship was felt more keenly by Ms. Maruyama because of her sex. It was Ms. Maruyama's health, job, and finances that were at risk were she to return to Canada to give birth.

[112] In *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, the Supreme Court of Canada held that discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.

[113] I pause here to note that society's views about gender have evolved since 1989, and are continuing to evolve. In finding that discrimination on the basis of pregnancy is a form of sex discrimination, I refer to biological sex, not gender. It is in that light that I quote the Supreme Court of Canada in *Brooks*; that is to say, women in this context ought to be understood as people with biologically female reproductive organs, not women as a gender identifier.

[114] In conclusion on this issue, I find that the first generation born abroad applicants have demonstrated that s. 3(3)(a) impacts them differently based on the intersection of two prohibited grounds: their national origin and their sex.

Step Two: Does the distinction create a disadvantage?

[115] I turn next to the second branch of the test: does the impugned law impose burdens or deny benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the group's disadvantage?

[116] The applicants argue that the distinction created by s. 3(3)(a) reinforces, perpetuates and/or exacerbates the disadvantage faced by children born to Canadian citizens abroad, which has been created by the rules regarding derivative citizenship in Canada's citizenship legislation from its inception. They also argue that the second generation cut off reinforces, perpetuates, and exacerbates sex-based disadvantage against women. I consider each of these in turn.

[117] At this juncture it is necessary to consider the history of Canada's citizenship laws. Doing so brings me to the assessment of the admissibility of the expert evidence offered by the applicants on the history and context of Canada's citizenship legislation.

The Applicants' Proposed Expert Witness

[118] The history of Canada's citizenship laws and the social context in which they were enacted is described in the affidavits of Dr. Lois Harder, who is offered as an expert by the applicants. The respondent does not contest Dr. Harder's expertise, nor does it offer any expert evidence of its own.

[119] Nevertheless, the court has a gatekeeping role whenever a party seeks to admit expert evidence, and I must consider whether Dr. Harder's proposed evidence is admissible.

[120] Determining whether to admit expert evidence is a two-stage analysis. In the first stage, there are four threshold requirements that must be established (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] S.C.R. 182, at paras. 19 and 23, citing *R. v. Mohan*, [1994] 2 S.C.R. 9, at pp. 20-25; see also *R. v. Abbey*, 2017 ONCA 640, [2017] O.J. No. 4083, at para. 48):

a. Relevance, which at this stage means logical relevance;

b. Necessity in assisting the trier of fact;

c. Absence of an exclusionary rule; and

d. A properly qualified expert, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is impartial, independent and unbiased.

[121] If the threshold requirements are met, the court moves on to the second stage of the analysis. There, the judge, as gatekeeper, determines whether the benefits of admitting the evidence outweigh its potential risks, considering factors such as legal relevance, necessity, reliability, and absence of bias.

[122] Dr. Harder holds a PhD in political science from York University. Her major fields of study were comparative politics and gender and politics. She was a faculty member at the University of Alberta, where she held numerous positions, and is now Dean of the Faculty of Social Sciences and Professor of Political Science at the University of Victoria. She has received numerous honours, grants, and scholarships.

[123] Dr. Harder has published repeatedly on the issues her evidence covers, since at least 2010. Most recently, Dr. Harder has written a book which, at least at the time her affidavit was sworn, was forthcoming: *Canadian Club: Birthright Citizenship and Belonging*, University of Toronto Press. As she describes it, the book explores the law and politics of territorial and derivative citizenship legislation from the origins of the *1947 Citizenship Act* to the current *Act.*

[124] I am satisfied that Dr. Harder's evidence is relevant to the issues raised in this application, and in particular, the development of Canada's citizenship laws over time and how that development has been connected politically to issues of gender and race. I am also satisfied that the evidence is necessary, in that Dr. Harder's scholarship goes well beyond the knowledge of a layperson, and I would benefit from having it available to me. No exclusionary rule has been

raised. And by her *curriculum vitae*, some of which I have summarized here, it is plain that she is a qualified person to provide the evidence she does. Dr. Harder's evidence passes the first stage of the analysis. It also passes the second stage, as the benefits of her evidence outweigh any potential risks of its admission.

[125] I thus conclude that Dr. Harder's evidence is admissible, and qualify her as an expert in the history, context, and development of Canada's citizenship laws, and particularly, the rules around derivative citizenship.

The History and Context of Canada's Citizenship Laws Regarding Derivative Citizenship

[126] Canada's first citizenship law was adopted in 1946 and had application beginning in 1947: the *Citizenship Act,* S.C. 1946, c. 15 (the "*1947 Act*"). Before that time, there was no Canadian citizenship; rather, to be a Canadian was to be a British subject.

[127] The *1947 Act* provided for rules for the acquisition of Canadian citizenship by children born abroad to Canadian citizens. The first generation born abroad acquired the citizenship of the "responsible parent", which was the child's father if the child was born to a married couple, and the mother if the parents were unwed.

[128] The *1947 Act* permitted Canadian women who married non-Canadians to retain their citizenship, but these women could not pass on their Canadian citizenship to their children born abroad, since those children were presumed to receive their citizenship from the responsible parent, their father. At the same time, the unmarried father of a child born abroad could not pass on Canadian citizenship to a child born abroad.

[129] As Dr. Harder points out, these derivative citizenship rules "relied on a patriarchal conception of social ordering". That much is obvious.

[130] What is less obvious is that these rules were also based on a racial conception of social ordering. As Dr. Harder describes, the *1947 Act* had a bright line start date of January 1, 1947. Together with the wedlock provisions, the *1947 Act* operated to allow Canada to eschew any responsibility to the first generation born abroad children of unmarried male soldiers and their non-citizen partners. Dr. Harder explains that over the course of the Second World War, permission to marry became increasingly difficult for soldiers to receive. "Once Canadian troops were engaged in battle on the European continent, marriages were governed by *Canadian Army North West Europe Routine Order No. 788* which instructed commanding officers to dissuade marriages in foreign lands, especially when 'differences of race, religion, and customs' left them 'open to obvious risks to future happiness'".

[131] There were thousands of out-of-wedlock births to Canadian fathers abroad during the war. By the autumn of 1946, the Canadian military refused requests to locate discharged men against whom paternity claims were made.

[132] If a Canadian father to a child born out of wedlock abroad later married the child's mother, the child's status remained for purposes of citizenship, i.e., they could not claim derivative citizenship.

[133] The *1947 Act* did not prohibit acquisition of derivative citizenship to the second generation born abroad, as long as a required declaration of retention was made. Naturalized Canadian citizens, however, had to keep an ongoing presence in the country; they would lose Canadian citizenship if they were absent from Canada for six consecutive years.

[134] In 1953, amendments were made to the rules regarding derivative citizenship through *An Act to Amend the Canadian Citizenship Act*, S.C. 1952-53, c. 23. These amendments extended the age for the first generation born abroad to declare Canadian citizenship by two years, from 22 to 24, with retroactive application. It also extended the time which a naturalized citizen had to be absent from Canada for them to lose their citizenship to ten years.

[135] Major revisions to the citizenship laws were undertaken in 1976, when Parliament adopted the *1977 Citizenship Act*. By 1976, the *1947 Act* was recognized to have become complex, unwieldy, illogical or not fully equitable, and out of tune with the times. There was a particular desire to address the gender inequality in the *1947 Act*.

[136] The *1977 Act* adopted a new derivative citizenship rule which conferred citizenship on the first generation born abroad regardless of the sex or marital status of their Canadian parent. On a go-forward basis, these amendments were designed to address the discriminatory aspects of the derivative citizenship rules in the *1947 Act*, but as originally crafted, it had no retroactive application, leaving those born before the *1977 Act* came into force governed by the *1947 Act*.

[137] As Dr. Harder describes, one basis for the non-retroactivity of the *1977 Citizenship Act* was that retroactivity would put Canada in the position of having to accept as citizens the children of soldiers who served abroad and fathered progeny. The non-retroactivity of the *1977 Act* thus not only continued to enshrine the idea that soldiers who fathered children during war need not take responsibility for those children, but that their racialized progeny were not welcome as Canadians.

[138] Ultimately, s. 5 of the *1977 Act* was agreed to. It required the Minister to grant citizenship to children born before the coming into force of the *1977 Act* if they were born abroad to a Canadian mother, were not entitled to be a citizen before the *1977 Act* came into force, and applied for citizenship within two years of the *1977 Act* coming into force. However, the *1977 Act* was not retroactive as it applied to the children born abroad to unmarried Canadian men.

[139] The *1977 Act* also did away with the requirement that the first generation born abroad affirm their citizenship. It allowed the second generation born abroad to acquire citizenship by descent at birth, although they were required to apply to retain their Canadian citizenship by age 28, and must have either resided in Canada for one year prior to the application date or establish a substantial connection with Canada. As long as the substantial connection requirement was met, there was no limit to the number of generations of Canadian citizens who could acquire their citizenship by descent.

[140] The non-retroactivity of the *1977 Act* created problems almost immediately. However, despite attempts by various governments to revise the *1977 Act*, no amendments were successfully passed, until the amendments at issue in this litigation were made.

[141] As Dr. Harder explains, two political developments created the environment to reopen the *1977 Act*. First, in 2007, the Western Hemisphere Travel Initiative was adopted. It required that Canadians crossing a land border into the United States hold a Canadian passport, rather than a driver's licence or birth certificate. This caused many Canadians to apply for a Canadian passport for the first time. A number of those people learned that their Canadian citizenship was in doubt or had been granted in error. Many of these people had lived their whole lives in Canada and even voted. The government of the day faced pressure to correct what were widely regarded as legal outrages, an injustice that became known as the "lost Canadians".

[142] By way of example, as Dr. Harder explains, many members of the Mennonite community were affected. In the 1920s, approximately 6000 Mennonites who had settled in Manitoba relocated to Mexico. Many children born to Mennonites in Mexico were born to parents who had had church weddings that were not registered with or recognized by the Mexican state. Many of those Mennonites subsequently returned to Canada. The children and their descendants of the Mennonites who had returned from Mexico, many of whom had lived all or almost all their lives in Canada, learned when they applied for a passport that they had never been Canadian citizens, because their parents or grandparents were not recognized as having been married by the Mexican government.

[143] Notice of citizenship status emerged as a key administrative issue. Many citizens who had the obligation to affirm their citizenship under the legislation were not aware of that obligation. And some that were aware were afraid to submit retention applications because of fear they would be advised that they were not citizens because of the wedlock issue.

[144] Second, in the summer of 2006, Israel invaded Lebanon, requiring mass evacuations of Canadians from Lebanon, funded by the Canadian government. As Dr. Harder explains, "public debate included expressions of surprise at the number of Canadians requiring evacuation, leading to questions regarding the legitimacy of the evacuees' status as citizens and speculation that the evacuees were 'citizens of convenience'". The public discussion raised questions about the acquisition of citizenship through birth, and the responsibilities of a citizen.

[145] In February 2007, Diane Finley, then Minister of Citizenship and Immigration, was prepared to act to address the problems in the *1977 Act* that had created the lost Canadians. She also indicated she would consider amendments to the *1977 Act* if they would protect the value and integrity of Canadian citizenship, particularly if there was unanimity on the Standing Committee on Citizenship and Immigration (the "Standing Committee") with respect to the amendments.

[146] The Standing Committee had produced a report in 2005 which, among other things, indicated that it had no objection to the principle of limiting derivative citizenship to the second generation born abroad with affirmation requirements, but the Standing Committee was concerned that the people required to affirm their citizenship must be aware of the requirement, given the serious consequence of the loss of citizenship if they failed to affirm.

[147] In 2007, Minister Finley introduced the bill that eventually became the amendments at issue in this litigation. Regarding derivative citizenship, she said that the solution lay in limiting citizenship to the first generation born abroad "but no further." As she explained, such an approach

would be stable, simple, and consistent, and would "protect the value of Canadian citizenship by ensuring that our citizens have a real connection to this country".

[148] As Dr. Harder describes it, the Minister's perspective on derivative citizenship was not that of a globally mobile life, but an arguably dated conception of how Canadians might conduct their lives in an increasingly transnational world. For example, Dr. Harder quotes Minister Finley describing a situation where a third generation Canadian never "set foot in the country or made any contribution to the country. I'm not sure that by the third generation they have any real interest, other than perhaps the convenience of being Canadian". As Dr. Harder notes, the Minister's statements did not seem to consider the possibility that families might move between Canada and other countries seeking temporary opportunities, but with their connection to Canada firmly entrenched.

[149] Bill C-37 was introduced on December 10, 2007. It replaced the substantial connection test under the *1977 Act* with the second-generation cut off. There was some opposition to the second-generation cut-off, but also support, at least some of which was based on reassurances by federal officials that there was an expedited process in place for citizenship for minor children of Canadians.

[150] Bill C-37 received Royal Assent on April 17, 2008, and came into force on April 17, 2009.

[151] The most recent reform to the derivative citizenship rules was enacted in 2014, through Bill C-24, *Strengthening Canadian Citizenship Act*. Dr. Harder explains that most of the amendments made the acquisition of Canadian citizenship more difficult, but the bill also addressed the precarious citizenship status of the children of Canada's World War Two veterans, finally extending citizenship to the born-abroad children and grandchildren of those who fought in the Second World War.

Analysis

[152] The distinction created by s. 3(3)(a) of the *Act* unquestionably places a burden and denies benefits on first generation Canadians born abroad based on their national origin. It denies them the ability to pass on Canadian citizenship to their born-abroad children when Canadians born in Canada or naturalized citizens have that ability. It also denies them the automatic ability to return to live in Canada with their (non-citizen) born abroad children.

[153] The question is whether that distinction reinforces, perpetuates, or exacerbates the group's disadvantage. The respondent argues that Canadians born abroad suffer from no historical disadvantage.

[154] But as the Supreme Court of Canada directed in *Withler*, at para. 67, and *Sharma*, at para. 59, I must consider the question in light of the legislative and political history of Canada's citizenship acts, and the objects and policy goals of the current scheme.

[155] Based on the evidence of Dr. Harder, I conclude that Canada's derivative citizenship laws have historically been animated by patriarchal and racist policy. Over time, different governments have made efforts to ameliorate some of those effects and have met with some success. At the

same time, the derivative citizenship rules have suffered from lack of clarity, which has caused great distress, particularly to the lost Canadians.

[156] The legislative goal, as described by the then-Minister, of the second-generation cut-off is to create a simple rule to protect the value of Canadian citizenship by ensuring that it is not held by so-called "Canadians of convenience", a term that must be understood to be pejorative.

[157] While the simplicity of the rule may respond to the desire for clarity, the inflexibility of the rule means that the first generation born abroad and their children are assumed to be Canadians of convenience, without ties to Canada, who have made no contribution to Canada, but who seek Canadian citizenship for themselves and their children for its benefits. In other words, the policy enacted through an inflexible second-generation cut off reinforces the stereotype that Dr. Harder explains was in part responsible for creating the political opening for amendments to the citizenship legislation: that first generation born abroad Canadians and their children are parasites or leeches, in the sense defined by the Merriam Webster dictionary as "a person who seeks support from another without making an adequate return".

[158] I thus conclude that the distinction based on national origin reinforces the disadvantage of the first generation born abroad by reinforcing the negative stereotyping to which they have been subjected, as people who offer nothing to Canada but seek to take advantage of the benefits of Canadian citizenship.

[159] These negative impacts are suffered by first generation born abroad women and men. However, in my view, the disadvantage the second-generation cut-off places on biological women is further exacerbated by the impact it has on them based on their sex.

[160] Dr. Harder's evidence makes clear that women who gave birth to children born abroad were historically disadvantaged by Canada's citizenship laws. Some effort has been made to redress that disadvantage in the amendments to the legislation over time. However, the second-generation cut-off exacerbates the disadvantage that the first generation born abroad women face as a result of pregnancy, and the choices and trade-offs that come with it.

[161] That pregnancy has historically disadvantaged women cannot be doubted; *Brooks* is but one example. Here, the second-generation cut-off disadvantages pregnant first-generation born abroad women who are living abroad when they get pregnant by placing them in the position where they have to make choices between their careers, financial stability and independence, and health care on the one hand, and the ability to ensure their child receives Canadian citizenship on the other. The lesser status of their citizenship is inalienable. Even if willing, their partners cannot bear any of the career, financial independence, or health risks for women in these circumstances to ensure the children could be born in Canada.

[162] I note that this resulting impact on women in particular is inconsistent with Article 11(1) of the *Convention on the Elimination of All Forms of Discrimination Against Women*, Can T.S. 1982 No. 31 ("CEDAW"), ratified by Canada in 1981. Article 11(1) requires States Parties like Canada to "take all appropriate measures to eliminate discrimination in the field of employment in order to ensure, on a basis of equality between men and women, the same rights…" including the right to work, the right to the same employment opportunities, and the right to free choice of

profession and employment. Rather than advancing these objectives, the second-generation cut-off exacerbates the historical disadvantages that women have suffered in the work force, a result that is in opposition to the goals of Article 11(1).

[163] In *Divito v. Canada (Public Safety and Emergency Preparedness*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 22, the Supreme Court of Canada held that the content of Canada's international human rights obligations is an important *indicium* of the meaning of the "full benefit of the *Charter's* protection". The *Charter* should be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. However, while international conventions can inform interpretation of *Charter* rights, they do not explicitly define their scope: *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at para. 28. Moreover, Canada's international obligations can inform the scope of the application of the *Charter* "where the express words are capable of supporting such a construction": *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 56.

[164] In this case, Article 11(1) is not textually similar to s. 15 of the *Charter*, and thus I do not consider it helpful in terms of defining the scope of s. 15. However, nor is Article 11(1) inconsistent with s. 15 of the *Charter;* it is directed at remedying existing discrimination. Thus, in my view, the inconsistency between the impacts of the second-generation cut-off and Canada's obligation under Article 11(1) of *CEDAW* is further confirmation that s. 3(3)(a) has intersectional impacts that affect the first generation born abroad women in a manner that reinforces, perpetuates, or exacerbates the historical disadvantage suffered by women in the employment sphere.

Conclusion: s. 15(1)

[165] In conclusion, I find that s. 3(3)(a) violates s. 15(1) of the *Charter* with respect to all first generation born abroad Canadians on the basis of the national origin, and in addition, with respect to all first generation born abroad women on the basis of the impacts it has given the intersection of their status as Canadians born abroad and as women.

Does the second-generation cut-off violate s. 6?

Standing

[166] The respondent raises preliminary objections in the context of s. 6(1) on the basis of standing. It argues that because the gen zero applicants (Sara Bjorkquist, Roy Brooke, Paul and Janan Chandler, Marian and Royger Kenyon, Judith and William Warelis, and Thomas and Penelope Setterfield) are all either naturalized or Canadian-born citizens, they do not have a personal and direct interest in the litigation because their legal rights are not specifically affected by s. 3(3)(1) of the *Act*, and as such they have no standing.

[167] I do not accept this argument. The gen zero applicants all allege a violation of their s. 6(1) *Charter* rights. They do not allege that the violation has led to the denial of their citizenship; rather, they argue that the violation has affected their ability to make the choice to freely exercise their s. 6 right, and has burdened their choices with negative impacts on their children and grandchildren. The respondent does not agree that their s. 6 rights have been violated, but that is a question that requires analysis. The gen zero applicants have established private interest standing.

Analysis

[168] The applicants argue that the second-generation cut-off infringes the s. 6 rights of gen zero and the first generation born abroad, because it attaches a penalty to their choice to pursue opportunities to work and study internationally and, in the course of doing so, have children.

[169] Section 6(1) provides that "[e]very citizen of Canada has the right to enter, remain in and leave Canada".

[170] The Supreme Court of Canada considered s. 6(1) in *Divito*. It noted that s. 6(1) in fact encompasses three rights: the right to enter, remain in, and leave Canada: *Divito*, at para. 18.

[171] In considering the scope of the s. 6(1) right, the Court began with its "primordial direction that rights be defined generously in light of the interests the *Charter* was designed to protect": para. 19. It thus turned to consider the purpose of the guarantee of the s. 6(1) right, focusing in that case on the right to enter Canada, since it was the s.6(1) right at issue.

[172] The Court held that the protection for citizens in s. 6(1) "had its origins in the cataclysmic rights violations of WWII": para. 21. It noted that from citizenship flows the "right to have rights", and that without the ability to enter into one's country of citizenship, the right to have rights cannot be fully exercised: para. 21. I note that the same may be said about the right to remain in Canada.

[173] The Court also recognized that the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified: para. 23.

[174] The Court thus had reference to art. 12 of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 ("ICCPR"), ratified by Canada, and described by the Court as the "international law inspiration for s. 6(1) of the *Charter*": para. 24.

[175] Article 12 states:

> 1. Everyone lawfully within the territory of a State shall, within that territory have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country.

[176] The Supreme Court of Canada went on to confirm that the right to enter protected by s. 6(1) of the *Charter* should be interpreted broadly, and that its expansive breadth is consistent with the fact that s. 6(1) is exempt from the legislative override in s. 33 of the *Charter*: paras. 27-28.

[177] The Federal Court of Appeal recently considered s. 6(1) in *Brar v. Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1168, [2022] F.C.J. No. 1193, a case dealing with an allegation that the applicant's mobility rights had been violated because his name had been placed on the no-fly list, denying him the ability to travel to other countries by air.

[178] In *Brar*, the court noted that the very basis of *Charter* interpretation is a purposive analysis, which calls for a generous and liberal interpretation of rights in light of the interests it is supposed to defend. It referred to Wilson J.'s dissent (but not on this point) in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469 at pp. 1504-1505, that s. 6(1) protects the liberty of a Canadian citizen to choose of his own volition whether he would like to enter, remain in or leave Canada: *Brar*, at para. 90. The Court also referred to the Ontario Court of Appeal's decision in *Black v. Canada (Prime Minister)*, 2001 CanLII 8537, (2001) 54 O.R. (3d) 215, at para. 54, where the court held that the granting of a passport is not a luxury but a necessity. "Possession of a passport offers citizens the freedom to travel and to earn a livelihood in the global economy. In Canada, the refusal to issue a passport brings into play *Charter* considerations; the guarantee of mobility under s. 6 and perhaps even the right to liberty under s. 7": *Brar*, at para. 100.

[179] The court in *Brar* concluded, at para. 101, that "mobility is part of the modern world and an essential component in fulfilling professional, personal, leisure, and family needs. Denying that these needs should be cherished and protected goes against basic liberties. From this perspective, the right to leave, return, and live in Canada encompassed in subsection 6(1) of the *Charter* are part of society's fundamental values and must be recognized as such." The Court held that the imposition of unreasonable, unrealistic, and impractical limits on the international mobility right must be justified in accordance with s. 1 of the *Charter*.

[180] The same theme can be found in *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125, at para. 345, where the court held that the rights protected in s. 6 are positive rights of mobility, meaning a right of action: "The right to choose. The right to travel for livelihood or residence. The right to come and go from Canada as one pleases."

[181] From these decisions, I take the following principles:

a. Section 6(1) includes the right to enter, remain in, and leave Canada.

b. One purpose of s. 6(1) is to ensure that citizens have the right to have rights in their country of citizenship. This purpose grew out of the terrible rights violations of the Second World War, and can be understood to include a component of safety and security, allowing a Canadian the right to enter, remain in, or leave Canada, to ensure they can protect themselves and their rights.

c. Another purpose of the international mobility rights in s. 6(1) is to guarantee the freedom of Canadians to travel and to earn a livelihood in the global economy, and to fulfill their personal, professional, leisure and family needs. Thus, s. 6(1) recognizes and protects the individual's choice to enter, remain in, or leave Canada, in the context of the individual's legitimate pursuits in an increasingly globalized world.

d. Any restriction on the mobility rights in s. 6(1) that is unreasonable, unrealistic, and impractical will violate s. 6(1) and must be justified in accordance with s. 1 of the *Charter*.

[182] The question thus becomes whether the second-generation cut-off interferes with a gen zero Canadian's or first generation born abroad Canadian's right to enter, remain in, or leave Canada, and if so, whether that interference is an unreasonable, unrealistic, and impractical limit on the international mobility rights held by gen zero and first generation born abroad Canadians.

[183] In my view, the second-generation cut-off interferes with the right of first generation born abroad Canadians to remain in Canada, because it interferes with their ability to remain in Canada with their dependent children. The second generation born abroad children may be able to enter Canada temporarily, and may succeed in obtaining permanent status in Canada or citizenship through other means, but it is not a given that the children of first generation born abroad Canadians will receive permanent residence status or Canadian citizenship.

[184] This is best illustrated by the case of Victoria Maruyama. Ms. Maruyama relocated to Alberta from Japan with her family, and managed to obtain temporary health care and schooling for her children. When the children's application for citizenship under s. 5(4) of the *Act* was denied, Ms. Maruyama was told by the Canadian government not to challenge it by way of judicial review, but rather, to apply for permanent residency for the children. She did so. While waiting for a determination on their permanent residency applications, and because the children had no legal right to remain in Canada, Ms. Maruyama and her family returned to Japan, intending it to be a temporary stay until the children's permanent residency applications were granted. But in the end, they were refused, because IRCC, with its lengthy processing times, was not certain that the family intended to remain in Canada.

[185] In my analysis of s. 7, below, I review the case law which holds that a parent's right to liberty under s. 7 includes the right to raise and care for their children, and make decisions of fundamental importance for their children without state interference. A custodial parent who has the choice to remain in Canada only if she does so without her dependent children is a parent to whom the state has given no choice but to leave Canada. Ms. Maruyama's parenting obligations and desires were incompatible with her right to remain in Canada due to the second-generation cut-off and the ineffective (at least in this case) alternatives for the children to gain permission to reside in Canada. In other words, the lesser quality of Ms. Maruyama's citizenship (that is, the impact of the state-imposed second-generation cut-off) meant that Ms. Maruyama's right under s. 7 to raise her children was incompatible with her right under s. 6 to remain in Canada.

[186] In particular, the second-generation cut-off creates an immutable second-class citizenship for the first generation born abroad. It unreasonably attaches permanent consequences suffered by the first generation born abroad as a result of the decision of their gen zero Canadian parents to have children while temporarily abroad. First generation born abroad children take an inferior citizenship by descent. In this way, the second-generation cut-off interferes with gen zero Canadians' decision to leave Canada for legitimate pursuits. For example, Sara Bjorkquist and Roy Brooke, both gen zero Canadians, went to Geneva to work in positions where they represented Canada in international organizations, including the World Health Organization, and different United Nations Organizations. Their child was born in Geneva, and received Canadian citizenship

by descent, but without the capacity to do what their parents did: take a temporary opportunity to work abroad, and perhaps to represent Canada abroad, and have Canadian children while doing so.

[187] The second-generation cut-off impacts first generation born abroad Canadians, in a way that is even more burdensome. The consequences attached to a first generation born abroad Canadian's decision to go abroad and have a child are greater; such a parent cannot pass on Canadian citizenship to their child at all, and runs the risk of their child being born stateless. It thus interferes with a first generation born abroad Canadian's right to leave Canada, and to remain in Canada with their born-abroad child.

[188] Take Timothy Setterfield, a first generation born abroad Canadian. Born in Fiji, Dr. Setterfield spent a good portion of his life in Canada. He eventually left for the United States, having been accepted to the Massachusetts Institute of Technology's PhD program in Aeronautics and Astronautics. He subsequently obtained a position at NASA's Jet Propulsion Laboratory. His evidence is that there were no jobs available in Canada at the time that would have allowed him to apply his expertise to interplanetary space missions.

[189] Dr. Setterfield married an American woman. They eventually had a child in the United States, who was denied Canadian citizenship because Dr. Setterfield is a first generation born abroad Canadian.

[190] Unlike Ms. Bjorkquist and Mr. Brooke who have returned to Canada, it is not clear whether Dr. Setterfield will return to Canada, though he may wish to do so in the future. However, it is clear that he continues to have strong ties to Canada. He continues to vote in Canadian elections. His family, and the guardians of his child, live in Canada. He visits Canada regularly. He has also pursued opportunities to serve Canada professionally. In 2017, he applied for the Canadian Space Agency's Astronaut Corps. and reached the final 72 applicants. He deposes that he would re-apply were the opportunity to arise again.

[191] Is it reasonable to impose on Dr. Setterfield the requirement that he not pursue his career in the United States where his specialized talents can be used and honed, and perhaps put to use for Canada one day, so that he, who lived and studied in Canada for 21 years, and maintains strong ties to Canada, can pass on Canadian citizenship to his child by ensuring the child is born in Canada? In my view, it is not reasonable.

[192] And as I have noted, in the case of the first generation born abroad, the unreasonableness of the second-generation cut-off is heightened, because their decision to have a child while abroad does not burden their child with a lesser class of citizenship, as it does for gen zero, but rather denies them Canadian citizenship entirely.

[193] The second-generation cut-off also creates an unrealistic and impractical restriction for both, gen zero Canadians and first generation born abroad Canadians, for all the reasons that I have already described in the context of the s. 15 analysis. That is, it is unrealistic and impractical to expect Canadian citizens abroad to return to Canada to give birth when the decision to do so will be accompanied by the financial difficulties, professional risks, and health risks I have described above.

[194] I thus conclude that the second-generation cut-off violates the s. 6(1) rights of gen zero Canadians and first generation born abroad Canadians.

Does the second-generation cut-off violate s. 7?

Standing

[195] The respondent raises a preliminary challenge based on standing in the context of s. 7. It argues that CD, EF, GH, and KL do not have standing to bring a *Charter* claim because they (all second generation born abroad children) are non-citizens outside of Canada. The respondent argues that an individual must have a "nexus to Canada" to benefit from *Charter* protections, which requires that (i) a person is a citizen of Canada; (ii) a person is present in Canada; or (iii) a person is subject to criminal proceedings in Canada: *Slahi v. Canada (Justice)*, 2009 FC 160, [2009] F.C.J. No. 141, at paras. 47, 48, 52; aff'd 2009 FCA 259, [2009] F.C.J. No. 1120.

[196] The applicants argue that the *Slahi* list is not closed, and the question to be asked is whether the claimants are connected to Canada: *Slahi*, at para. 47. They rely on paras. 51-52 in *Slahi*, where the court held that the *Charter* finds extraterritorial application, even in the context of a non-citizen asserting *Charter* rights, where Canadian state actors are involved in a foreign process that violates Canada's international law obligations. Thus, para. 51 of *Slahi* seems to expand the list of three conditions (described in para. 47 of that same decision) that would ground a nexus to Canada such that the *Charter* would apply.

[197] I agree with the applicants that *Slahi* does not limit the application of the *Charter* to non-citizens to only those circumstances where they are present in Canada, or subject to a criminal trial in Canada. Rather, *Slahi* holds that the *Charter* will, only in exceptional circumstances, apply to non-Canadians claiming abroad. The example given in *Slahi* is when Canadian state actors are involved in a foreign process that violates Canada's international law obligations, but I agree with the applicants that the list is not closed.

[198] In this case, the minor non-Canadian applicants have a sufficient nexus to Canada to claim protection of the *Charter*. Their claim arises out of that nexus – that but for the (alleged) violations of the *Charter*, they would have Canadian citizenship.

[199] On the respondent's argument, an unconstitutional law that has the effect of denying citizenship to non-Canadian applicants could not be challenged by those applicants because they are not Canadian citizens.

[200] It is a truism that every right must have a remedy. On the respondent's theory of standing, if the second-generation cut-off is a breach of the *Charter*, we will never know it with respect to these four applicants, because the second-generation cut-off is so successful in its effect that the constitutional challenge is cut off on the grounds of standing before it has begun.

[201] This argument is circular and would have the effect of defeating any remedy for the alleged breach of rights. I do not accept it.

[202] I thus conclude that the minor non-Canadian applicants have private interest standing to raise their claims.

Analysis

[203] Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[204] In arguing that the second-generation cut-off violates s. 7 of the *Charter*, the applicants advance intertwined s. 7 rights. That is, they assert that the liberty interest of the first generation born abroad parent and the security of the person interest of the second generation born abroad child together constitutionally protect the parent-child relationship, and that the second-generation cut-off violates the intertwined constitutional rights of parent and child. They argue that the violations do not accord with the principles of fundamental justice because they are disproportionate to the legislative goal behind the second-generation cut-off.

[205] Section 7 claims require a two-step analysis. A claimant who seeks to establish a violation of s. 7 must first show that a provision interferes with his or her right to life, liberty, or security of the person, and second, that the deprivation is not in accordance with the principles of fundamental justice: see, for example, *Ewart v. Canada*, 2019 SCC 30, [2018] 2 S.C.R. 165, at para. 68, *Begum v. Canada (Minister of Citizenship and Immigration)*, 2018 FCA 181, [2019] 2 F.C.R. 488, at para. 93.

[206] In *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, the Supreme Court of Canada discussed the nature of the liberty interest in s. 7. The Court noted, at para. 49, that liberty includes room for personal autonomy to live one's own life and make important personal decisions:

> '[L]iberty' is engaged where state compulsions or prohibitions affect important and fundamental life choices….In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference.

[207] At para. 51 of *Blencoe*, the Court quoted from LaForest J.'s decision in *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844, at para. 66, in which he wrote for himself, L'Heureux-Dubé J. and McLachlin J. (as she then was). In discussing the autonomy protected by the right to liberty enshrined in s. 7, LaForest J. held that the "right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence." In LaForest J.'s view, such choices included parental decisions respecting medical care provided to one's children, or choosing where to establish one's home.

[208] In *Blencoe*, the Court found that, in the same vein, "the parental interest in raising and caring for one's children would be protected", but only insofar as it encompassed those decisions that are of fundamental importance: *Blencoe*, at para. 52.

[209] The applicants rely on this line of authority to support their argument that the second-generation cut-off violates the first generation born abroad parent's right to liberty, because it interferes with their ability to make decisions of fundamental importance, that is, whether to raise their children in Canada.

[210] I note, however, that in *Drover v. Canada (Attorney General)*, 2023 ONSC 5529, at para. 33, Corthorn J. found that choice of residence "does not rise to the profound level or nature of personal decisions recognized to date by the Supreme Court of Canada as attracting the protection of the liberty interest under s. 7".

[211] With respect to the child's right to security of the person, the applicants rely on *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46. There, the Supreme Court of Canada noted that security of the person protects both the physical and the psychological integrity of a person, and that while case law generally had considered the right in the context of criminal law, the protection in s. 7 can be engaged in child protection proceedings as well: *G.(J.)*, at para. 58.

[212] The Court noted that the right to security of the person does not protect an individual from ordinary stresses. Rather, a violation of the right requires that the impugned state action "have a serious and profound effect on a person's psychological integrity": *G.(J.)*, at paras. 59-60.

[213] The Court concluded that the removal of a child from parental custody by the state constitutes a serious interference with the psychological integrity of the parent, noting that the parental interest in raising and caring for a child is an individual interest of fundamental importance in our society: *G.(J.)*, at para. 61.

[214] However, the Court also distinguished the interference with a parent's right to security of the person in circumstances when the state has removed a child from the parent's care, leading to stigmatization of the parent as "unfit", from the state depriving a parent of a child's companionship through, for example, conscription or jailing the child, which does not restrict the parent's right to security of the person: *G.(J.)*, at paras. 59-64.

[215] The applicants argue that *G.(J.)* provides support for their argument that, for the second generation born abroad children, the right to security of the person encompasses a right to be raised by their parent. They state that the parent-child separation that can be caused by the second-generation cut-off has a serious and profound effect on the child's psychological integrity. Interpreting security of the person in this way is consistent with Canada's obligations set out in Article 7(1) of the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, ratified by Canada in 1991. Article 7(1), while not textually similar to s. 7 of the *Charter*, guarantees a child "as far as possible, the right to know and be cared for by his parents".

[216] In other words, the argument goes, the parent has the right to raise their children, and make fundamental decisions for them, like where they will live; that is, the right to liberty. The child has the right to the psychological integrity that comes from being properly bonded and attached to their parent, which includes physical proximity; that is, the right to security of the person. The second-generation cut-off prevents the first generation born abroad parent from exercising their right to liberty in that they cannot choose to reside in Canada with their second generation born abroad child, and they cannot choose to reside in Canada without their second generation born abroad child without the child's right to security of the person being denied, due to the psychological impacts of being separated from one's parent.

[217] The respondent denies any violation. It relies on case law from the Federal Court arising in immigration matters.

[218] The Federal Court of Appeal considered alleged violations of s. 7 in the context of immigration law in *Begum*, where the adult Canadian citizen applicant suffered from depression and other mental health conditions, purportedly due to her long-term separation from her parents and siblings in Bangladesh, her lack of social supports in Canada, and the fact that she had no other family in Canada. She attempted to sponsor her parents and five siblings to Canada, but her application was refused because she did not meet the minimum necessary income requirement.

[219] The appellant characterized her right to liberty as the right to decide with whom she wished to live, the kind of relationship she wished to maintain with her family and the right to impart to her children cultural and family values as handed down by her parents consistent with their ethnic background. She argued that her right to security of the person was implicated as a result of her anxiety and depression.

[220] The court found that the appellant's s. 7 rights were not infringed. In particular, the right to liberty, rarely applied outside the context of the administration of justice, is narrow as it concerns the sphere of personal decision making. Without concluding on whether the interests she asserted were protected by s. 7, the court expressed doubt that the appellant's interest in being able to live close to her parents and siblings was "so intertwined with the 'intrinsic value of human life' and 'the inherent dignity of every human being'": *Begum*, at paras. 97-98.

[221] The court went on to draw upon the principles and policies underlying immigration law to define the right to liberty and security of the person protected by s. 7, noting that the most fundamental principle of immigration law "is that non-citizens…do not have an unqualified and untrammeled right to enter or remain in Canada", and noting that s. 6 limits international mobility rights to citizens: *Begum*, at para. 99.

[222] However, the reasons of the court in *Begum* make clear the distinction between that case and this one. At para. 98, the court wrote:

> The right to nurture a child and to make fundamental decisions for it, such as medical care, clearly falls within the core of what it means to enjoy individual dignity and independence.

[223] This holding in *Begum* would seem to suggest that a parent's liberty interest includes the right to nurture a child, which could apply in the immigration context. But *Begum* also goes on to discuss the application of the principles of s. 7 in the context of a separation between parent and child due to immigration laws:

> Nor does the removal of parents of Canadian born children to their countries of origin, when they are inadmissible to remain in Canada, engage the children's section 7 interests. Such children have no *Charter* right to demand that the Canadian government not impose on their parents the penalties for violating Canadian immigration laws.

[224] This holding flows from the decision of the Federal Court of Appeal in *Langner v. Canada (Minister of Employment and Immigration)* (1995), 184 N.R. 230 (F.C.A.), cited in *Idahosa v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 418, [2009] 4 F.C.R. 293, at para. 49: "the deportation of the parents of Canadian-born children violated the section 7 rights of neither the parents nor their children. The Court pointed out that the separation of parents from their children is the result of the parents' decision not to take their children with them when removed from Canada".

[225] Assuming without deciding that the first generation born abroad parent and the second generation born abroad child can assert intertwined s. 7 *Charter* rights, I cannot find a violation of s. 7 in this case. The evidence does not support it.

[226] There is no evidence of any parent not being able to raise their children, nor is there evidence of a separation of a child from a parent that rises to the level of a s. 7 *Charter* violation.

[227] The evidence that comes the closest is that of Patrick Chandler and his family. Mr. Chandler and his partner have two children, both of whom were born in Beijing. They are the second generation born abroad.

[228] Mr. Chandler and his spouse wanted to return to Canada to raise their children. In February 2017, Mr. Chandler applied for a position with the government of British Columbia. In July 2017, Mr. Chandler was offered the position which was to begin in September 2017.

[229] Mr. Chandler moved to British Columbia in September 2017 to prepare for his family's arrival. At the time, he hoped that their separation would be measured in weeks. Mr. Chandler deposes that he did not bring his children to Canada on visitor's visas because they would not have been eligible for provincial health insurance, nor would they have the right to attend public schools. The family could not afford private school or private healthcare insurance.

[230] Also in September 2017, Mr. Chandler submitted applications for permanent resident status for the children. In September 2018, the applications were granted.

[231] As it turned out, Mr. Chandler was separated from his children for about a year. During that year, he visited them in China for ten days, and the children and his partner visited him in Canada for two weeks. The family communicated by way of Skype while they were apart.

[232] Mr. Chandler had a difficult time with the separation from his family, and he deposes that the process to get permanent resident status was stressful and long. He deposes that, among other things, he suffered from depression as a result of the separation, and grew dependent on alcohol. The children missed their father during the separation, and their English language skills deteriorated.

[233] I do not seek to diminish what a difficult time this period of separation was for the family. The children were young, and wanted to see their father. Mr. Chandler was missing an important part of their lives. No doubt it was onerous for Mr. Chandler's wife to be the sole present parent and be apart from her husband. I accept that the family suffered during their time apart.

[234] However difficult it was, the evidence does not support a conclusion that Mr. Chandler was prevented from raising his children during this year. He continued to be a part of their lives, albeit in a way he found less than satisfactory. The children continued to have a relationship with him. There is no evidence to establish any real harm to their psychological well-being during their temporary separation. The family chose not to bring the children to Canada to live while their permanent resident applications were in progress because of the cost of private school and healthcare. At the same time, the family chose to separate to facilitate their planned move to Canada and Mr. Chandler's employment opportunity.

[235] Even assuming that s. 7 rights to liberty and security of the person have the content the applicants urge me to find (contrary to the immigration jurisprudence cited above), the evidence does not establish that the separation of the family was as a result of state action in enacting the second-generation cut-off, as opposed to the choices made by the family.

[236] I thus conclude there is no evidence of any breach of the s. 7 rights of the first generation born abroad parent or the second generation born abroad child, even when viewed as connected rights that protect the parent-child relationship.

[237] In view of this conclusion, I need not consider whether the second-generation cut-off is in accordance with the principles of fundamental justice.

Section 1

[238] Given my conclusion that the second-generation cut-off violates the s. 15 rights of first generation born abroad Canadians, and the s. 6 rights of gen zero and first generation born abroad Canadians, I turn to the s. 1 analysis.

[239] Section 1 provides that "[t]he *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."

[240] Justification under s. 1 requires the respondent to show that s. 3(3)(a) of the *Act* is reasonable and demonstrably justified in a free and democratic society because it: (i) pursues an objective that is pressing and substantial to justify limiting a *Charter* right; (ii) it is rationally connected to the objective; (iii) it minimally impairs the *Charter* right; and (iv) it does not have a disproportionate effect.

[241] Section 1 must be applied in a flexible manner having regard to the policy considerations inherent in the factual and social context of the case: *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 132.

<u>Is there a pressing and substantial objective?</u>

[242] The respondent describes the purpose and intent of the second-generation cut-off as follows:

> …to provide stability, simplicity and consistency in the citizenship process, to protect the value of Canadian citizenship by ensuring that citizens have a real

> connection to the country, and to protect citizenship for the future by limiting the automatic acquisition of citizenship to the first generation born abroad.

[243] In *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] A.C.R. 519 at paras. 21-24, a case where the impugned law purported to "enhance civic responsibility and respect for the rule of law, and to enhance the general purposes of the criminal sanction", the Supreme Court of Canada cautioned against accepting symbolic objectives as the basis for constitutional violations:

> This leaves the question of whether the objectives of enhancing respect for law and appropriate punishment are constitutionally valid and sufficiently significant to warrant a rights violation. Vague and symbolic objects such as these almost guarantee a positive answer to this question. Who can argue that respect for the law is not pressing? Who can argue that proper sentences are not important? Who can argue that either of these goals, taken at face value, contradicts democratic principles? However, precisely because they leave so little room for argument, vague and symbolic objectives make the justification analysis more difficult. Their terms carry many meanings, yet tell us little about why the limitation on the right is necessary, and what it is expected to achieve in concrete terms. The broader and more abstract the objective, the more susceptible it is to different meanings in different contexts, and hence to distortion and manipulation. One articulation of the objective might inflate the importance of the objective; another might make the legislative measure appear more narrowly tailored. The Court is left to sort the matter out.
>
> At the end of the day, people should not be left guessing about why their *Charter* rights have been infringed. Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remain constant throughout the justification process. … A court faced with vague objectives may well conclude… that 'the highly symbolic and abstract nature of th[e] objective…detracts from its importance as a justification for the violation of a constitutionally protected right'. If Parliament can infringe a crucial right such as the right to vote simply by offering symbolic and abstract reasons, judicial review either becomes vacuously constrained or reduces to a contest of "our symbols are better than your symbols". Neither outcome is compatible with the vigorous justification analysis required by the *Charter*.
>
> The rhetorical nature of the government objectives advanced in this case renders them suspect. The first objective, enhancing civic responsibility and respect for the law, could be asserted of virtually every criminal law and many non-criminal measures. Respect for law is undeniably important. But the simple statement of this value lacks the context necessary to assist us in determining whether the infringement at issue is demonstrably justifiable in a free and democratic society. To establish justification, one needs to know what problem the government is targeting, and why it is so pressing and important that it warrants limiting a *Charter* right. Without this, it is difficult if not impossible to weigh whether the infringement of the right is justifiable or proportionate.

[244] In my view, some of the objectives the respondent identifies as pressing and substantial suffer from the problem the Supreme Court of Canada identified in *Sauvé.* Protecting citizenship for the future by limiting the automatic acquisition of citizenship to the first generation born abroad is symbolic, and vague. It lacks the necessary context to allow me to understand the problem the government is targeting and why it is so pressing and important that it warrants limiting a *Charter* right.

[245] I have the same concerns about the respondent's stated objective to protect the value of Canadian citizenship by ensuring that citizens have a real connection to the country. The "value of Canadian citizenship" is also symbolic and vague.

[246] I considered whether it is a pressing and substantial objective to ensure that Canadian citizens have a real connection to Canada, or to limit the automatic acquisition of citizenship to the first generation born abroad. Separating these objectives from the nebulous "value of Canadian citizenship" or "protecting Canadian citizenship" at least eliminates the symbolic and vague nature of the identified objectives.

[247] However, the respondent has adduced no evidence of any problem that the government is targeting. There is no evidence of citizens who lack a connection to Canada at all, let alone in significant numbers. Moreover, there is no evidence that Canadians lacking a connection to Canada (assuming they exist) have created any kind of problem that the government has identified and is targeting.

[248] There is evidence that, during the evacuation of Canadians in Lebanon, public discourse raised concerns about "Canadians of convenience", and the cost associated with evacuating citizens who had little or no connection, and made little or no contribution, to Canada. But the highest the evidence goes is to show that some people were concerned about it. It does not demonstrate that there was any factual or reasonable basis for the concern. Even the respondent's affiant gave evidence that the problem exists "in theory", and admitted he was unaware of any research to substantiate the claim that there is a problem of citizenship being passed on through indefinite generations of "Canadians of convenience" abroad.

[249] Similarly, there is no evidence to explain why derivative citizenship beyond the first generation is problematic. If the issue is that it leads to citizens without a connection to Canada, as I have just explained, there is no evidence to demonstrate that there are citizens without a connection to Canada, nor that if any such citizens exist, that their existence or citizenship creates any kind of problem.

[250] Accordingly, I reject those objectives advanced by the government because they are vague and symbolic, and unsupported by the evidence.

[251] However, I find, and the applicants do not seriously oppose, that the objective of providing stability, simplicity and consistency in the citizenship process is a pressing and substantial objective of the legislation at issue, particularly in view of the history of citizenship legislation and the "lost Canadians" problem that the lack of clarity in earlier processes created (and which amendments to the *Act* were designed to address). Thus, the respondent has satisfied this branch

of the s. 1 test, but only with respect to the objective of providing stability, simplicity and consistency in the citizenship process.

Rational Connection

[252] To establish a rational connection, the respondent must show a causal connection between the infringement of the right and the benefit sought on the basis of reason or logic: *RJR Macdonald*, at para. 153. The rational connection requirement aims to ensure that rights are not being limited arbitrarily. It is enough to show that the limit may further the pressing and substantial objective, not that it will do so: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 48.

[253] I accept that the second-generation cut-off is rationally connected to the objective of providing stability, simplicity and consistency in the citizenship process. A blanket rule is simple and consistent. The previous law was unclear, and led to the lost Canadians, when first and second generation born abroad children were uncertain as to their rights to claim citizenship. The current iteration resolves the clarity problem that existed previously.

Minimal Impairment

[254] At this stage of the proportionality analysis, the respondent must demonstrate that the infringement adopted falls within a range of reasonable options to achieve the legislative objective. In *Hutterian Brethren*, at para. 53, the Supreme Court of Canada described the minimal impairment analysis:

> The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.

[255] The minimal impairment analysis is grounded by the pressing and substantial legislative goal. The minimal impairment test requires that the government choose the least drastic means of achieving its objective. Less drastic means that do not actually achieve the objective are not considered. The question is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner: *Hutterian Brethren*, at paras. 54-55.

[256] The respondent argues that where there are competing social interests, courts have accorded a high level of deference to legislation. For example, in *RJR Macdonald*, at para. 43, the Supreme Court of Canada held that:

> …a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing. For this reason, this Court

> has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives.

[257] In my view, the second-generation cut-off does not minimally impair the *Charter* rights of gen zero and first generation born abroad Canadians for the following reasons.

[258] First, the second-generation cut-off is a permanent and blanket ban on the ability of the first generation born abroad to convey citizenship to their children born abroad by descent. There is no way for a first generation born abroad Canadian to change the lesser quality of their citizenship to acquire the ability to pass on citizenship derivatively. Even if one considers the objective advanced by the respondent (which I have rejected as vague), if the respondent seeks to "preserve the value of Canadian citizenship" by only allowing Canadians with a substantial connection to Canada to pass on citizenship by descent, the blanket second-generation cut-off is overbroad, because it permanently excludes Canadian citizens, like the first generation born abroad applicants, from doing so. This is the case even if they have a substantial connection to Canada, as the applicants in this case do. As such, the limit imposed by s. 3(3)(a) of the *Act* is not truly a limit on *Charter* rights, but a negation of those rights.

[259] Second, I do not accept the respondent's argument that the second-generation cut-off is minimally impairing because there are other avenues in the *Act* for the second generation born abroad to obtain Canadian citizenship.

[260] Section 5(4) of the *Act* provides that the Minister, in his or her discretion, may "grant citizenship to any person to alleviate cases of statelessness or of special and unusual hardship or to reward services of an exceptional value to Canada." While s. 5(4) provides an avenue to attempt to secure Canadian citizenship for a second generation born abroad child, it is dependent upon the Minister's discretion. The Minister's refusal to grant citizenship under s. 5(4) can be judicially reviewed in the Federal Court, but that court has held that there is a "high threshold" for the Minister's exercise of discretion, and judicial review applications will only succeed in "exceptional cases of services to Canada": *Tabori v. Canada (Citizenship and Immigration)*, 2022 FC 1076, [2022] F.C.J. No. 1118, at paras. 29 and 30.

[261] There is evidence in the record that attempts to obtain citizenship for the second generation born abroad applicants were unsuccessful (for example, Ms. Maruyama's and Mr. Kovacs' children). There is also evidence that Ms. Kenyon and Mr. Warelis were eventually able to secure citizenship for their children born abroad through s. 5(4), but that they were only able to do so when they were introduced to an individual who had connections at IRCC and was willing to leverage their connections to assist. The evidence and the case law suggest that citizenship grants under s. 5(4) are rare, and at least somewhat inequitable, in that those with the right connections are more likely to obtain citizenship for their children under s. 5(4). The respondent denies that there is any inequity in the process. It has not, however, led any evidence on the point. The uncontested evidence before me is that connections with IRCC make a difference. I agree with Ms. Kenyon who deposes, "[t]his is not how a well-functioning and impartial system of public administration should work. [Her child's] access to citizenship should not have depended on [their] parents' network and the willingness of private citizens to advocate on their behalf."

[262] The respondent also relies on the sponsorship regime under s. 13(2) of the *IRPA* and s. 130(2) of the *Immigration and Refugee Protection Regulations ("IRPR")* which provide a process by which a first generation born abroad Canadian can sponsor their second generation born abroad child to Canada. This process requires satisfying an immigration officer that they will return to Canada when the children receive permanent residence visas. The evidence in the record demonstrates that there are flaws with this process too. Ms. Maruyama has been desperately trying to return to Canada with her family, but when, due to the length of time required to process sponsorship applications, she made the decision to return to Japan where her children had access to schooling and health care, the immigration officer assigned to her case decided she did not intend to live in Canada with her family.

[263] Problems in the sponsorship regime were also revealed through the evidence of the respondent's affiant, Patrice Milord. Mr. Milord, in his affidavit, describes the immigration history of the individual applicants. On cross-examination he testified that his source for this information were various unnamed IRCC case managers. However, the information Mr. Milord obtained from these case managers was replete with inaccuracies. With respect to Ms. Maruyama, these include misidentifying the year Ms. Maruyama's father was naturalized as a Canadian citizen, Ms. Maruyama's mother's citizenship, the reason for rejection of Ms. Maruyama's children's application for permanent residency, and the regulation in the *IRPR* under which their applications were made. There were also errors in Mr. Milord's evidence about how Mr. Chandler's child acquired Irish citizenship.

[264] I note that in addition to these errors, at the outset of the hearing, I was advised that Mr. Burgess had been told that his child, QR, had been granted permanent residency or citizenship status. However, counsel for Mr. Burgess was unable to confirm exactly what was going on, because in the mail, the Burgess family had received citizenship documents pertaining to someone else entirely, unrelated to the family or this application. We all had to take the word of counsel for the respondent that QR has received Canadian citizenship.

[265] Thus, taking these applicants only, of the six families who have had dealings with IRCC (thus excluding Ms. Bjorkquist and Mr. Brooke), three of them have demonstrated that there have been errors in the handling of their files. On this very small sampling, the error rate is 50%. I do not generalize from this that IRCC errs in some way or another in 50% of its files, but I do have concerns about the accuracy and integrity of the sponsorship program arising from this evidence. The respondent has not led any evidence on the quality and integrity of the sponsorship program; it simply points out that the program exists.

[266] Moreover, the sponsorship program offers no alternative to someone like Dr. Setterfield, who does not know when or if he will be able to obtain a position using his highly specialized jet propulsion skills in Canada.

[267] Thus, while there are technically avenues for permanent residency and citizenship available to second generation born abroad Canadians, they are not expedited (as legislators seemed to think they would be when the amendments were passed), at least not in an absolute sense. I have no evidence as to whether they are relatively speedier than the process available to others. But more importantly, they are not reliably effective, well-functioning or impartial. They are thus not satisfactory alternatives.

[268] Third, the applicants point to other, less impairing alternatives to the second-generation cut-off. The respondent agrees that the court can look to what other countries, provinces or territories are doing when determining whether a scheme is reasonably minimally impairing: *RJR-Macdonald*, at para. 138.

[269] In particular, the applicant argues that the respondent could institute a substantial connection test under which a first generation born abroad parent could demonstrate a substantial connection to Canada in order to be able to pass on derivative citizenship to a child. Different models of such substantial connection requirements are found in the record:

a. In the United States of America, married parents who are both American citizens and have a child born abroad can pass on derivative citizenship as long as one of the parents has had a residence in the United States or one of its outlying possessions prior to the birth of the child. Where only one parent is American, the child has the right to American citizenship if the American parent was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of 14, prior to the birth of the child.

b. In the United Kingdom, the second generation born abroad has two pathways to citizenship. In the first, if the first generation born abroad parent has lived in the United Kingdom for a continuous period of at least three years prior to the birth of the child, and a grandparent was a British citizen otherwise than by descent on January 1, 1982, or at the time of the parent's birth, the child can register prior to their 18th birthday for British citizenship. A child who obtains citizenship in this manner is a citizen by descent who does not have the ability to automatically pass British citizenship on to their child born abroad.

c. In the second pathway available in the United Kingdom, a second generation born abroad child who resides with their family in the United Kingdom continuously for three years prior to reaching 18 years of age, and whose parents consent to the application for citizenship, can obtain citizenship. Such a child is not a British citizen by descent, such that their children born abroad can become citizens by descent. There is no limit to the number of generations born abroad who can obtain British citizenship if the residence requirements are met.

d. In Australia, a child can apply for Australian citizenship if their Australian parent has been physically present in Australia for two years prior to the child's application. Australia also provides for citizenship in cases where a child born abroad to an Australian citizen would otherwise be stateless. Australia does not limit the number of generations to whom citizenship can be passed on when the child is born abroad.

e. Canada itself has another model in the *Act*, which provides for the grant of Canadian citizenship (by way of naturalization) to any person who fulfils the criteria which include that they be physically present in Canada for at least 1,095 days during the five years immediately before the date of their application for citizenship. The

> applicants note that this made-in-Canada process is clear, and the respondent has experience applying it. Moreover, the respondent has apparently satisfied itself that the connection demonstrated by an immigrant to Canada is sufficient to justify a grant of citizenship when that person has met the residency requirement in the *Act*. I also note that naturalized citizens (who are born abroad) are able to pass on Canadian citizenship to their children born abroad unlike citizens by descent (such as first generation born abroad Canadians), who cannot.

[270] Moreover, in submissions delivered after the hearing, the applicants rely on Bill S-245, *An Act to Amend the Citizenship Act (granting citizenship to certain Canadians)* which received third reading in the Senate on May 17, 2022, and second reading in the House on November 16, 2022, after which it was referred to the Standing Committee. On June 12, 2023, the Standing Committee issued its Seventeenth Report (44th Parl., 1st Sess.) in which it reported two amendments to Bill S-245 that together would replace the second-generation cut-off with a substantial connection test for the first generation born abroad.

[271] In effect, the amendments provide that the second generation born abroad children may receive Canadian citizenship by descent if the first generation born abroad parent had 1,095 days of cumulative physical presence in Canada before the birth of the second generation born abroad child.

[272] The applicants argue that the respondent has designed and proposed this new substantial connection test itself, and urge me to infer that the respondent has itself concluded that the new test achieves the objectives purportedly served by the second-generation cut-off. Although I have not accepted the respondent's purported objective of "preserving the value of Canadian citizenship", I note that the proposed new test would permit passing on citizenship to children born abroad to only those circumstances where a Canadian parent born abroad has spent a significant amount of time in Canada, thus has a demonstrated substantial connection to Canada. It is also a simple, clear rule, and familiar because it is similar to the requirement for immigrants seeking Canadian citizenship.

[273] I note that the respondent disagrees that it designed the new substantial connection test. Rather, an initial amendment which would have expanded the availability of citizenship by descent was proposed by a Member of Parliament, and the government proposed a sub-amendment limiting its scope to those citizens who could meet a substantial connection test by demonstrating 1095 days of physical presence in Canada. That may be how the amendments came about, but I note that when the amendments were adopted by the Standing Committee, all government Members of Parliament voted in favour of them.

[274] The applicants argue that the respondent breached its disclosure obligation at the minimal impairment stage of the analysis by not disclosing the proposed amendments adopted into Bill S-245. They cite *RJR-Macdonald*, at para. 186:

> Minimal impairment analysis requires this Court to consider whether the legislature turned its mind to alternative and less rights-impairing means to promote the legislative goal in question. In these appeals, I am concerned by the fact that the Attorney General of Canada chose to withhold from the factual record evidence

> related to the options it had considered as alternatives to the total ban it chose to put in place… These cases are of wide public interest constitutional litigation in which the government should remain non-adversarial and make full disclosure. Without this requirement, courts will be constrained to decide the constitutionality of legislation without full information. In any event, the burden of proof at the s. 1 stage lies solely with the government.

[275] For its part, the respondent argues that the amendments being considered 14 years after s. 3(3)(a) came into force are not a relevant consideration when determining whether s. 3(3)(a) is *Charter*-compliant. It notes that the amendments in Bill S-245 are subject to change, and have no legal effect.

[276] While the comments of the Court in *RJR-Macdonald* speak to pre-enactment options considered by the government, I see no reason why they would not apply to post-enactment options that were considered or are being considered. I agree that the new substantial connection test adopted as an amendment to Bill S-245 ought to have been disclosed by the respondent. Had it done so, it could have addressed why a blanket second-generation cut-off is minimally impairing in the face of the new substantial connection test that is currently part of Bill S-245.

[277] The record is replete with examples of clear, simple, understandable rules governing derivative citizenship, including those of other countries, Canada's own rules for immigrants seeking citizenship, and most recently, amendments being explored that would replace the second-generation cut-off with a substantial connection test to pass on citizenship by descent that may (or may not) become law. Some of these examples may be, as the respondent argues, more restrictive than the derivative rule in the current *Act*. But the question is not whether the options are more or less restrictive in terms of who is eligible for citizenship. This case, as the respondent repeatedly stated, is not about a *Charter* right to citizenship because there is no such right. Rather, this case is about s. 15 and s. 6 *Charter* rights, which I have found are violated by s. 3(3)(a). The question at this stage is whether the respondent has established that its regime is minimally impairing of the *Charter* rights while meeting the pressing and substantial objective the law is meant to serve. It is not whether its *Charter* non-compliant regime is more or less restrictive than other regimes in bestowing citizenship.

[278] In summary on this issue, I find that the respondent has failed to meet its burden to demonstrate that s. 3(3)(a) minimally impairs the ss. 15 and 6 *Charter* rights because: (i) it is a permanent, blanket ban that amounts to a negation, rather than a restriction of rights; (ii) the alternative methods for obtaining citizenship for second generation born abroad children can be error-riddled, highly discretionary, and inequitable in their application, and as such are unsatisfactory; and (iii) the record contains numerous examples of alternatives that would impair the applicants' *Charter* rights to a lesser extent, but the respondent has failed to demonstrate why the second-generation cut-off is reasonably minimally impairing to advance its objective in the context of those other alternatives.

Do the salutary effects outweigh the deleterious effects?

[279] In my view, the salutary effects of the second-generation cut-off do not outweigh its deleterious effects. This is particularly the case having regard to the evidentiary gaps in the

respondent's case relating to any specific, identified problem to be targeted (apart from addressing the confusion created in the prior regime), and the fact that I have found that the rights violation in question is not minimally impairing in light of other options to advance to respondent's objective of providing stability, simplicity and consistency in the citizenship process.

Remedy

Declaration of Invalidity

[280] The applicants seek a declaration of invalidity under s. 52 of the *Constitution Act, 1982*, declaring s. 3(3)(a) of the *Act* to be unconstitutional and of no force or effect.

[281] Given my conclusion that s. 3(3)(a) of the *Act* violates the *Charter* rights of the gen zero and first generation born abroad applicants, I agree that a declaration of invalidity is an appropriate remedy.

[282] The respondent argues that if I find the provision unconstitutional and declare it invalid, I ought to suspend the declaration of invalidity, because (i) the public is entitled to the benefit of legislation such that there is a public interest against an immediate declaration of invalidity, and (ii) Parliament has the exclusive authority to enact, amend, and repeal any law as it sees fit, such that it is the role and the obligation of Parliament to craft a solution that will survive *Charter* scrutiny: *Ontario (Attorney General) v. G.*, 2020 SCC 38, [2020] 3 S.C.R. 629, at paras. 96-98. The respondent seeks a twelve-month suspension of any declaration of invalidity to allow Parliament the time to remedy any constitutional invalidity.

[283] In this case, there are currently amendments under study by Parliament in the form of Bill S-245. Thus, while I am prepared to grant a suspended declaration of invalidity for purposes of allowing the respondent time to act so there is no legislative gap, the respondent has a head start on amendments addressing derivative citizenship. The respondent provided no evidence to demonstrate why twelve months is required in this case. Accordingly, I declare s. 3(3)(a) of the *Act* to be unconstitutional, and no force and effect, but I suspend the declaration of invalidity for a period of six months.

Constitutional Exemptions

[284] The applicants also seek remedies under s. 24(1) of the *Charter*. First, I consider their request for a constitutional exemption for the first generation born abroad Canadians, seeking to exempt each of them from s. 3(3)(a) of the *Act*.

[285] The applicants argue that it would be unjust for the applicants to derive no direct benefit from a ruling in which a declaration of invalidity was suspended. In *G*, at para. 144, the Supreme Court of Canada held that, to be appropriate and just, a s. 24(1) remedy must meaningfully vindicate the right of the claimant:

> In particular, an effective remedy that meaningfully vindicates the rights and freedoms of the claimant will take into account the nature of the rights violation and the situation of the claimant, will be relevant to the claimant's experience and address the circumstances of the rights violation, and will not be 'smothered' in

> procedural delays and difficulties. The court's approach to s. 24(1) remedies must stay flexible and responsive to the needs of a given case. [citations omitted]

[286] Moreover, there must be a compelling reason to deny the claimant an immediately effective remedy. In considering this issue, a court must ask itself whether and to what degree granting an exemption would undermine the interest motivating the suspension in the first place; for example, a suspension of invalidity that is designed to protect public safety should not permit an exemption that would endanger public safety: *G*, at paras. 149-150.

[287] The respondent argues that a constitutional exemption is not appropriate and just, because it would not respect the separation of functions among the legislature, the executive, and the judiciary. By granting a constitutional exemption, the respondent argues, I would be encroaching on an issue for resolution by Parliament. Moreover, it argues that neither this court, nor any other, has the power to grant Canadian citizenship.

[288] I confess I am baffled by the latter point, given that the respondent has repeatedly and forcefully argued that judicial review of decisions to grant citizenship under s. 5(4) belong in the Federal Court which has expertise on matters of citizenship. What is the successful result of a judicial review of the Minister's exercise of discretion under s. 5(4)?

[289] In any event, I take guidance from the Supreme Court of Canada in *G*, quoted above. Having regard to the circumstances of the rights violation, the potential for procedural delays and difficulties, and the situation of the first generation born abroad Canadians, I conclude that constitutional exemptions are warranted for those applicants whose children continue to have no status to live in Canada. Doing so provides tailored and limited relief to those applicants who ought to have their rights meaningfully and immediately vindicated, despite the suspended declaration of invalidity, while at the same time reserving the question of how derivative citizenship ought to be addressed (in a manner consistent with the *Charter*) to the legislature.

[290] Accordingly, I grant a constitutional exemption such that Victoria Maruyama, Dr. Timothy Setterfield, and Alexander Kovacs shall be exempted from s. 3(3)(a) of the *Act* with immediate effect, and as a consequence, are Canadian citizens as if s. 3(1)(a) of the *Citizenship Act* applied to them. It follows that their children, CD, EF, GH, and KL, will become citizens, not because I have bestowed citizenship on them, but because, given the constitutional exemptions I grant to their parents, s. 3(1)(b) of the *Act* applies to them.

[291] I would also grant such relief to any first generation born abroad Canadian who has a child born abroad between the time the application was heard and the end of the period of suspension of invalidity of s. 3(3)(a) of the *Act*. However, I am unaware of any first generation born abroad applicant to whom this relief may apply. Accordingly, counsel shall advise me if there are any children born abroad to first generation born abroad applicants in this time frame. I shall remain seized of the matter for the purpose of addressing additional constitutional exemptions should they be sought.

Charter Damages

[292] The applicants seek damages for certain applicants for the harms caused by the second-generation cut-off. First, they seek $150,000 in damages for Mr. Chandler, and his children, MN

and OP. Second, they seek $150,000 in damages for CD and EF, the children of Ms. Maruyama. As a threshold matter, I note that I have only found a *Charter* violation with respect to Mr. Chandler's rights, so among these applicants, it is only he who has a potential claim for damages.

[293] The applicants rely on *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick,* 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 82, where the Supreme Court of Canada, in denying *Charter* damages to an applicant, held that there was no evidence to suggest the respondent acted "negligently, in bad faith or by abusing its powers", and that it could not be reasonably suggested that the respondent displayed "negligence, bad faith or willful blindness with respect to its constitutional obligations at that time."

[294] The applicants argue this is a rare case of legislative negligence because Parliament violated two of the clearest legal rules regarding reasonable limits under s. 1. These are:

a. The second-generation is a blanket prohibition with no exceptions, thus negating *Charter* rights, not only limiting them. The applicants argue, based on *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at para. 66, that measures that negate rights are never reasonable limits and will always fail the minimal impairment branch of the *Oakes* test.

b. Second, they argue that there is absolutely no evidence supporting the purported objective behind the second-generation cut-off, that is, that it would end the (alleged and unsupported) problem of endless generations of Canadians of convenience.

[295] *Ford* does not go quite so far as the applicants argue. In *Ford*, at para. 66, the Supreme Court of Canada held that the distinction between a limit that permits no exercise of a guaranteed right or freedom in a limited area of its potential exercise and one that permits a qualified exercise of it, may be relevant to the proportionality test.

[296] I agree that the failure of the respondent to adduce any evidence of the claimed problem caused by endless generations of citizens by descent is unsatisfactory. Since at least *RJR-Macdonald*, it has been clear that the "s. 1 inquiry is by its very nature a fact-specific inquiry", requiring the court to examine the actual objective of the law, determine the actual connection between the objective and what the law will achieve, the actual degree to which it impairs the right, and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. "In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions": para. 133.

[297] The applicants argue that when Parliament enacted the second-generation cut-off, it knew it had to have a reasonable basis to conclude a problem existed, but it failed to meet this constitutional standard.

[298] The respondent denies that the applicants, or any of them, are entitled to damages under s. 24(1) of the *Charter.* It argues that the applicants have failed to establish why an award for *Charter* damages furthers the objects of the *Charter*, as outlined in *Ward v. Vancouver (City)*, 2010 SCC 27, [2010] 2 S.C.R. 28, at paras. 24-32. The applicants, for their part, argue that they do not seek

damages under *Ward*, but under *Mackin*, and that *Ward* does not speak to damages for legislative negligence.

[299] I have some difficulty with this argument. *Ward* holds that a functional approach to damages finds them to be appropriate and just to the extent they serve a useful function or purpose. The purposes that an award of damages under s. 24(1) may serve are identified in *Ward*, at para. 25, as: (i) compensation; (ii) vindication; and (iii) deterrence.

[300] Compensation is normally the most prominent of the three functions that *Charter* damages may serve, and focuses on the claimant's personal, physical, psychological, and pecuniary loss. Vindication focuses on the harm the infringement causes society. Deterrence seeks to regulate government behaviour, by influencing it to secure state compliance with the *Charter* in the future: *Ward*, at paras. 27-29.

[301] In *Ward*, at para. 40, the Court described the *Mackin* principle as recognizing that:

> the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion.

[302] The Court went on to find that *Mackin* holds that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down, unless the state conduct is clearly wrong, in bad faith, or an abuse of power. The Court held that where the state establishes that s. 24(1) damages raise governance concerns, a minimum threshold, "such as clear disregard for the claimant's *Charter* rights, may be appropriate": *Ward*, at paras. 39-41.

[303] *Ward* thus retreats from the *Mackin* holding that negligence might be sufficient to establish damages, given its focus on conduct that is wrong, in bad faith, an abuse of power, or clearly disregards the claimant's *Charter* rights.

[304] The same approach is seen in *Henry v. British Columbia (Attorney General*), 2015 SCC 24, [2015] 2 S.C.R. 214, at paras. 41-42, where the Supreme Court of Canada held that the availability of *Charter* damages should be "circumscribed through the establishment of a high threshold", and indicated, citing *Mackin*, at para. 78, that *Charter* damages were unavailable for state action taken pursuant to a law later found to be invalid unless the state action was "clearly wrong, in bad faith or an abuse of power".

[305] I thus conclude that *Charter* damages cannot be awarded for negligence; rather, the state conduct at issue that warrants deterrence through a damages award must be more than negligence; it must import a higher level of blameworthiness.

[306] The applicants have not established that the respondent acted in bad faith, or abused its power, or clearly disregarded the claimant's *Charter* rights, or that its actions were clearly wrong,

such that deterrence is warranted. I have found that the objective of creating a simple, understandable citizenship process is pressing and substantial, and that the second-generation cut-off is rationally connected to that objective. The lack of evidence from the respondent on other options is a reason why it failed to meet its burden to establish minimal impairment. It does not follow that the lack of evidence from the respondent meets the applicant's burden to establish state conduct that warrants sanction and deterrence.

[307] I thus find that no award of *Charter* damages is warranted in this case.

[308] In so finding, I do not wish to be taken as disregarding or minimizing the very real difficulties that the Chandler and Maruyama families, in particular, faced as a result of the operation of the second-generation cut-off. Mr. Chandler's family endured a painful separation from each other because of the unconstitutional law. Ms. Maruyama's family has had their file mismanaged by IRCC, as a result of which they have been forced to return with their children to Japan, where the children face racism and ostracization, and where one child's struggles with the traditional gender norms in Japan have led to self-harm and suicidal ideation. These consequences arose from the unconstitutional law.

[309] These families' experiences highlight the real-life impacts of the unconstitutional second-generation cut-off. It is particularly tragic that so much suffering was borne by the children. My finding that no *Charter* damages are warranted should not be taken to be a finding that the Chandler and Maruyama families did not suffer loss. They did. But it is not loss that is compensable in view of the importance of the legislative role and function, and the need not to chill the exercise of policy-making discretion.

Costs

[310] I turn now to the question of costs. The parties' costs outlines have been uploaded to CaseLines. As discussed with, and agreed to by, the parties, I viewed them only after my reasons on the merits of this application were written.

[311] Each party would have sought costs if successful in this litigation. By my calculations, the applicants' costs outline support costs of $310,000 all-inclusive on a partial indemnity scale. The respondent's costs outline support costs of about $167,000 all-inclusive on a partial indemnity scale.

[312] The three main purposes of modern costs rules are to indemnify successful litigants for the costs of litigation, to encourage settlement, and to discourage and sanction inappropriate behaviour by litigants: see *Fong v. Chan* (1999), 46 O.R. (3d) 330, at para. 22.

[313] Subject to the provisions of an act or the rules of this court, costs are in the discretion of the court, pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The court exercises its discretion considering the factors enumerated in r. 57.01 of the *Rules of Civil Procedure*, including the principle of indemnity, the reasonable expectations of the unsuccessful party, and the complexity and importance of the issues. Overall, costs must be fair and reasonable: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 38. A costs award should reflect what the court views as a fair and reasonable contribution by the unsuccessful party to the successful party rather than any exact measure of the

actual costs to the successful litigant: see *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.

[314] The applicants are the successful parties; they are presumptively entitled to their costs.

[315] The applicants argue they are entitled to an award of substantial indemnity costs. In part, they rely on what they argue was inappropriate behaviour of the respondent, such as raising issues at the hearing that had not been briefed in the respondent's factum. They also rely on *Victoria (City) v. Adams*, 2009 BCCA 563, [2009] B.C.J. No. 2451, at para. 188, to argue that this is an appropriate case for public interest litigants to receive substantial indemnity costs even where there has been no misconduct.

[316] In *Victoria*, at para. 188, the British Columbia Court of Appeal held that the most relevant factors to consider when asked to make an award of special costs to a successful public interest litigant are: (i) the case involves matters of public importance that transcend the immediate interests of the named parties, and which have not been previously resolved; (ii) the successful party has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically; (iii) as between the parties, the unsuccessful party has a superior capacity to bear the costs of the proceeding; and (iv) the successful party has not conducted the litigation in an abusive, vexatious or frivolous manner.

[317] In *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 140, the Supreme Court of Canada held that special costs may be awarded to public interest litigants where: (i) the case involves matters of public interest that are truly exceptional, in that they must have a significant and widespread societal impact; transcending the individual interests of the successful litigant is not enough; (ii) the litigant must have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds; and (iii) the litigant must show it would not have been possible to effectively pursue the litigation in question with private funding. "In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, *pro bono* counsel) to bear the majority of the financial burden associated with pursuing the claim."

[318] The applicants argue that the *Carter* test only applies where a request for full indemnity costs is made. They argue that the four factors identify in *Victoria* apply to requests for substantial indemnity costs, and that each is made out in this case.

[319] I do not agree with the applicants' reading of *Carter*. There, the Court writes that, when the four factors are met, "a court will have the discretion to depart from the usual rule on costs and award special costs". Although they were dealing with a request for full indemnity costs in *Carter*, the analysis does not draw a distinction between substantial indemnity and full indemnity costs.

[320] I cannot find that the third criteria in *Carter* is met in this case. The applicants have submitted that they obtained funding from the Court Challenges program, but they have made no submissions on whether it would not have been possible to effectively pursue the litigation with private funding.

[321] In my view, then, with one exception, this is an appropriate case for partial indemnity costs.

[322] The exception relates to the submissions delivered after the close of the hearing with respect to Bill S-245. As I have noted, the respondent ought to have placed before me the information about the new substantial connection test being considered in Bill S-245 as part of its efforts to justify the *Charter* violations, in particular in the context of the minimal impairment analysis. Because it did not, the applicants had to incur the cost of doing so, including a contested motion to deliver the submissions following the close of the hearing. The costs with respect to the motion and the submissions regarding Bill S-245 shall be awarded on a substantial indemnity scale. I find no other behaviour of the respondent warrants a substantial indemnity costs order with respect to any other aspect of the litigation.

[323] With respect to the quantum of costs, I note the following:

a. The record in this case is significant, comprised of multiple affidavits from multiple affiants and three expert witnesses;

b. The issues raised by this case were both new and complex;

c. Some of the arguments developed to advance the applicants' case were also new and complex;

d. The applicants and respondent each delivered three factums on the merits of the application;

e. The quality of advocacy was very high, as one would expect in litigation dealing with the constitutionality of legislation that received funding from the Court Challenges program;

f. The applicants' costs were significantly more than the respondent's costs despite each spending roughly the same amount of time. This is explained by the respondent's counsel's lower hourly rates. However, the hourly rates charged by the applicants' counsel are reasonable having regard to their experience.

g. Having said that, I would have expected the applicants' counsel to have higher costs given the additional cost associated with their development of their evidentiary record, comprising many affidavits, while the respondent had only one affiant. This suggests that the applicants' counsel worked efficiently on the litigation.

[324] Taking into account these factors, I conclude that costs in the all-inclusive amount of $275,000 are fair and reasonable, and shall be paid by the respondent to the applicants within thirty days.

Conclusion

[325] In summary, I make the following orders:

a. Section 3(3)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29 contravenes ss. 6 and 15 of the *Charter*, and is unconstitutional and of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*.

b. The balance of the relief claimed by the applicants pursuant to s. 52 of the *Constitution Act, 1982* is dismissed;

c. The declaration of invalidity set out in para. (a) above is suspended for a period of six months from the date of the release of these reasons;

d. Each of Victoria Maruyama, Timothy Setterfield, and Alexander Kovacs are exempted from s. 3(3)(a) of the *Citizenship Act*, with immediate effect, and as a consequence, are Canadian citizens as if s. 3(1)(a) of the *Citizenship Act* applied to them, pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms;*

e. As a result of the exemption of Victoria Maruyama, Timothy Setterfield, and Alexander Kovacs from s. 3(3)(a), their children, CD, EF, GH, and KL are Canadian citizens because s. 3(1)(b) of the *Citizenship Act* applies to them.

f. Within seven working days of the date of the receipt of applications under s. 12(1) of the *Citizenship Act* and s. 14 of the *Citizenship Regulations, No. 2,* SOR/2015-124, the respondent shall issue a certificate of citizenship to each of CD, EF, GH, and KL;

g. If any first generation born abroad applicant becomes the parent to another child born outside of Canada during the period between the hearing of this application and the end of the period of the suspension of invalidity of s. 3(3)(a) of the *Citizenship Act*, counsel shall advise me, and I shall remain seized of the matter in order to address any additional constitutional exemptions that may be required;

h. The balance of the relief claimed by the applicants pursuant to s. 24(1) of the *Charter* is dismissed;

i. The respondent shall pay the applicants their costs of this application, fixed at $275,000, within thirty days.

[326] I thank all counsel for the high quality of their work.

J.T. Akbarali J.

Released: December 19, 2023

CITATION: Bjorkquist et al. v. Attorney General of Canada, 2023 ONSC 7152
COURT FILE NO.: CV-21-673419-0000
DATE: 20231219

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Sara Ann Bjorkquist, Douglas Roy Brooke, AB (by their litigation guardian Douglas Roy Brooke), Gregory Burgess, QR (by their litigation guardian Gregory Burgess), Patrick Chandler, Paul Chandler, MN (by their litigation guardian Patrick Chandler), OP (by their litigation guardian Patrick Chandler), Emma Kenyon, Marian Kenyon, Roger Kenyon, IJ (by their litigation guardian Emma Kenyon), Victoria Maruyama, CD (by their litigation guardian Victoria Maruyama), EF (by their litigation guardian Victoria Maruyama), Alexander Kovacs, KL (by their litigation guardian Alexander Kovacs), Thomas Setterfield, Timothy Setterfield, GH (by their litigation guardian Timothy Setterfield), Daniel Warelis, and William Warelis

Applicants

– and –

Attorney General of Canada

Respondent

REASONS FOR JUDGMENT

J.T. Akbarali J.

Released: December 19, 2023