I hereby certify this to be a true copy of the original.
for Clerk of the Court

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
JUL 20 2017
Clerk of the Court

COURT FILE NO.:	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, as am.
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19 ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANT	MAURICE FELIX STONEY ON HIS OWN BEHALF AND THAT OF HIS LIVING SISTERS AND BROTHERS
DOCUMENT:	CONSENT ORDER OF EXCEPTION TO MR. JUSTICE THOMAS INTERIM COURT FILING RESTRICTION ORDER FOR MAURICE FELIX STONEY DATED JULY 14, 2017
DATE:	July 19, 2017
JUDGE:	Associate Chief Justice

UPON THE APPLICATION of the Applicant, Maurice Felix Stoney, IT IS ORDERED THAT:

1. The direction of Master Schulz in Alberta Q.B. Action 1603 03761 *Gabriel Nussbaum v. Maurice Felix Stoney and Eliza Marie Stoney* is an exception to the Interim Court Filing Restriction Order of Mr. Justice Thomas issued on July 12, 2017.

Associate Chief Justice J.D. Rooke

for Rooke, ACJ July 19, 2017

AGREED TO:

D.C. Bonora

Edward Molstad, Q.C.

CAN: 25026988.1

Dentons LLP
Counsel for 1985 Sawridge Trustees

Parlee McLaws, LLP
Counsel for Sawridge Band (Intervenor)

Graeme Mesham Q.C.

per J.L. Hutchison
Hutchison Law LLP
Counsel for the OPTG

Priscilla Kennedy
DLA Piper (Canada) LLP
Counsel for Maurice Felix Stoney

Clerk's Stamp

COURT FILE NO.:	1103 14112
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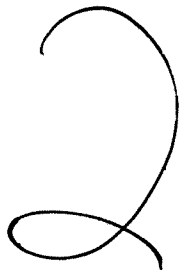

Huzar v. Canada, 2000 CanLII 15589 (FCA)

Date: 2000-06-13
Docket: A-326-98
Citation:Huzar v. Canada, 2000 CanLII 15589 (FCA), <http://canlii.ca/t/4kzg>, retrieved on 2017-08-01

Date:*20000613*

Docket:*A-326-98*

CORAM: *DÉCARY, J.A.*

SEXTON, J.A.

EVANS, J.A.

BETWEEN:

HER MAJESTY THE QUEEN, IN RIGHT OF CANADA, DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS CANADA and WALTER PATRICK TWINN, as Chief of the Sawridge Indian Band and the SAWRIDGE INDIAN BAND

Defendants

(Appellants)

- and -

ALINE ELIZABETH HUZAR, JUNE MARTHA KOLOSKY, WILLIAM BARTHOLOMEW McGILLIVRAY, MARGARET HAZEL ANNE BLAIR, CLARA HEBERT, JOHN EDWARD

JOSEPH McGILLIVRAY, MAURICE STONEY, ALLEN AUSTIN McDONALD, LORNA JEAN ELIZABETH McREE, FRANCES MARY TEES, BARBARA VIOLET MILLER (nee McDONALD)

Plaintiffs

(Respondents)

Heard at Toronto, Ontario, Tuesday, June 13, 2000

Judgment delivered from the Bench at Toronto, Ontario

on Tuesday, June 13, 2000

REASONS FOR JUDGMENT OF THE COURT BY: EVANS, J.A.

Date: 20000613

Docket: A-326-98

CORAM: DÉCARY J.A.

SEXTON J.A.

EVANS J.A.

BETWEEN:

HER MAJESTY THE QUEEN, IN RIGHT OF CANADA, DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS CANADA and WALTER PATRICK TWINN, as Chief of the Sawridge Indian Band and the SAWRIDGE INDIAN BAND

Defendants

(Appellants)

- and -

ALINE ELIZABETH HUZAR, JUNE MARTHA KOLOSKY, WILLIAM BARTHOLOMEW McGILLIVRAY, MARGARET HAZEL ANNE BLAIR, CLARA HEBERT, JOHN EDWARD JOSEPH McGILLIVRAY, MAURICE STONEY, ALLEN AUSTIN McDONALD, LORNA JEAN ELIZABETH McREE, FRANCES MARY TEES, BARBARA VIOLET MILLER (nee McDONALD)

Plaintiffs

(Respondents)

REASONS FOR JUDGMENT

(*Delivered from the Bench at Toronto, Ontario*

on Tuesday, June 13, 2000)

EVANS J.A.

[1] This is an appeal against an order of the Trial Division, dated May 6th, 1998, in which the learned Motions Judge granted the respondents" motion to amend their statement of claim by adding paragraphs 38 and 39, and dismissed the motion of the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, to strike the statement of claim as disclosing no reasonable cause of action.

[2] In our respectful opinion, the Motions Judge erred in law in permitting the respondents to amend and in not striking out the unamended statement of claim. The paragraphs amending the statement of claim allege that the Sawridge Indian Band rejected the respondents" membership applications by misapplying the Band membership rules (paragraph 38), and claim a declaration that the Band rules are discriminatory and exclusionary, and hence invalid (paragraph 39).

[3] These paragraphs amount to a claim for declaratory or prerogative relief against the Band, which is a federal board, commission or other tribunal within the definition provided by section 2 of the *Federal Court Act*. By virtue of subsection 18(3) of that Act, declaratory or prerogative relief may only be sought against a federal board, commission or other tribunal on an application for judicial review under section 18.1. The claims contained in paragraphs 38 and 39 cannot therefore be included in a statement of claim.

[4] It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it

asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.

[5] It is clear that, until the Band"s membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

[6] For these reasons, the appeal will be allowed with costs in this Court and in the Trial Division.

"John M. Evans"

J.A.

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

DOCKET: ***A-326-98***

STYLE OF CAUSE: HER MAJESTY THE QUEEN, IN RIGHT OF CANADA, DEPARTMENT

OF INDIAN AND NORTHERN AFFAIRS CANADA and WALTER

PATRICK TWINN, as Chief of the Sawridge Indian Band and the

SAWRIDGE INDIAN BAND

- and -

ALINE ELIZABETH HUZAR, JUNE MARTHA KOLOSKY, WILLIAM BARTHOLOMEW McGILLIVRAY, MARGARET HAZEL ANNE BLAIR, CLARA HEBERT, JOHN EDWARD JOSEPH McGILLIVRAY, MAURICE STONEY, ALLEN AUSTIN McDONALD, LORNA JEAN ELIZABETH McREE, FRANCES MARY TEES, BARBARA VIOLET MILLER (nee McDONALD)

DATE OF HEARING: ***TUESDAY, JUNE 13, 2000***

PLACE OF HEARING: ***TORONTO, ONTARIO***

REASONS FOR JUDGMENT BY: ***EVANS J.A.***

Delivered at Toronto, Ontario on

Tuesday, June 13, 2000

APPEARANCES BY: ***Mr. Philip P. Healey***

For the Defendants

(Appellants)

Mr. Peter V. Abrametz

For the Plaintiffs

(Respondents)

SOLICITORS OF RECORD: *Aird & Berlis*
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Toronto, Ontario
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For the Defendants

(Appellants)

Eggum, Abrametz & Eggum

Barristers & Solicitors

101-88-13th Street East

Prince Albert, Saskatchewan

S6V 1C6

For the Plaintiffs

(Respondents)

FEDERAL COURT OF APPEAL

Date: 20000613

Docket: A-326-98

BETWEEN:

HER MAJESTY THE QUEEN, IN RIGHT OF CANADA, DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS CANADA and WALTER PATRICK TWINN, as Chief of the Sawridge Indian Band and the SAWRIDGE INDIAN BAND

Defendants

(Appellants)

- and -

ALINE ELIZABETH HUZAR, JUNE MARTHA KOLOSKY, WILLIAM BARTHOLOMEW McGILLIVRAY, MARGARET HAZEL ANNE BLAIR, CLARA HEBERT, JOHN EDWARD JOSEPH McGILLIVRAY, MAURICE STONEY, ALLEN AUSTIN McDONALD, LORNA JEAN ELIZABETH McREE, FRANCES MARY TEES, BARBARA VIOLET MILLER (nee McDONALD)

Plaintiffs

(Respondents)

REASONS FOR JUDGMENT

3

Federal Court | Cour fédérale

Date: 20160816

Docket: T-436-15

Ottawa, Ontario, August 16, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

MARYANN POWDER, JEAN POWDER, ELMER CREE, FLORA POWDER, ALLAN AND FLOYD POWDER AND THEIR CHILDREN AND THE CHILDREN OF LILA POWDER LAFONTAINE, ALL OF THE LIVING MEMBERS OF THE PAUL CREE BAND (ALSO CALLED THE CLEARWATER RIVER BAND #175)

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT AND FORT MCMURRAY FIRST NATION

Defendants

ORDER

UPON Her Majesty the Queen in right of Canada (the "Applicant" in this motion) ["Canada"], bringing a motion seeking an order to strike the Paul Cree Band's Statement of

Claim, as provided for by Rule 221(1) of the *Federal Courts Rules*, SOR/98-106 [the Rules], thereby disposing of the cause of action;

AND UPON hearing this motion in person in Edmonton, Alberta, on May 24, 2016;

AND UPON further written submissions filed after the hearing regarding costs;

[1] Canada, the Defendant in the action and Applicant on the motion, takes the position that Maryann Powder et al ["Paul Cree Band"], the Plaintiffs in the action and Respondents on the motion, are estopped from bringing Federal Court Action No. T-436-15. Canada alleges that the Statement of Claim filed by the Paul Cree Band discloses the same causes of action that were previously pleaded and dismissed by way of a Consent Dismissal Order in Federal Court Action No. T-986-99 [First Action].

[2] Canada submits that the pleading be struck out on the ground that it: (a) discloses no reasonable cause of action; (b) is scandalous, frivolous or vexatious; or (c) is otherwise an abuse of the process of this Court.

[3] I believe that the motion should be dismissed for the reasons that follow.

I. Background

[4] In 2003, counsel for the Paul Cree Band in the First Action advised counsel for Canada before examinations for discovery were held that he had received instructions to discontinue the

action and requested Canada's consent. The Paul Cree Band's legal counsel told Canada that the instructions from the Plaintiffs were to discontinue the action because the Plaintiffs were without funds to continue the litigation.

[5] Counsel for Canada advised that consent was not required to file a notice of discontinuance. Further and more important to this matter, Canada's counsel said they were seeking instructions to claim costs against the Paul Cree Band if the First Action was discontinued.

[6] Counsel for the Paul Cree Band clarified that he was requesting "consent to a discontinuance with each side bearing their own costs."

[7] Counsel for Canada would not consent to a discontinuance with the parties bearing their own costs. Counsel for Canada indicated that a simple discontinuance without costs "would not prevent some, or all of [the plaintiffs], from launching an action at a future time with respect to the issues raised in [the] statement of claim." She then proposed a consent order dismissing the action with each party bearing its own costs, noting that "[i]n doing so, those issues would then be res judicata." With a consent motion before him, Prothonotary Hargrave of the Federal Court on February 12, 2004, ordered that the "action be dismissed with each side bearing its own costs" [Consent Dismissal Order].

[8] Some sixteen (16) years later, Federal Court Action No. T-436-15 was filed on March 28, 2015 [the Second Action]. The named Plaintiffs are: Maryann Powder, Jean Powder, Elmer

Cree, Flora Powder, Allan and Floyd Powder, and their children and the children of Lila Powder Lafontaine, all the living members of the Paul Cree Band (also called the Clearwater River Band #175). At the hearing, counsel for the Plaintiffs conceded the Plaintiffs in this action meet the criterion of "b) the parties to the subsequent litigation must have been parties to or privy with the parties to the prior action;" set out in *Beattie v Canada*, 2001 FCA 309 at paragraph 19, for cause of action estoppel.

II. Issues

[9] In accordance with Rule 221, Canada submits that the issues to be decided in this motion are whether the Second Action should be struck on the grounds that the doctrine of *res judicata* specifically action estoppel applies as it is a collateral attack on an order of this court and is an abuse of process as "...it offends the integrity of the administration of justice." Canada asks that the action be struck on the grounds that it:

- Discloses no reasonable cause of action - Rule 221(1)(a);
- Is scandalous, frivolous or vexatious - Rule 221(1)(c); or
- Is otherwise an abuse of process - Rule 221(1)(f)

[10] Fort McMurray First Nation [FMFN] has been named as a co-Defendant in the Second Action and supports the motion of Canada to strike the pleadings of the Paul Cree Band in the matter.

III. Abuse of Process

[11] Canada submits that it is an abuse of process for the Paul Cree Band to twice sue Canada for the same cause (*Black v Creditors of the Estate Nsc Diesel Power Inc*, 183 FTR 301 at para

11). Canada notes that the doctrine of abuse of process is unencumbered by the specific requirements of *res judicata* and submits that re-litigation alone is sufficient to give rise to abuse of process and "it cannot be said that any additional element of misconduct is required" (*Sanofi-Aventis Canada Inc v Novopharm* Ltd, 2007 FCA 163 at para 43 [*Sanofi*]).

[12] The doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process, and may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency (*Toronto (City) v CUPE, Local* 79, 2003 SCC 63 at para 35 [*CUPE*]).

[13] However, not all instances of re-litigation will impeach the integrity of the judicial system. There are many circumstances in which the bar against re-litigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness; therefore, it can be understood that the discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result (*CUPE*, above, at para 52).

[14] The correspondence exchanged prior to the issuance of the Consent Dismissal Order indicates that counsel for the Paul Cree Band originally sought to discontinue the action with each party bearing its own costs. The reason for they sought the discontinuous at this early stage of the proceedings was due to the Paul Cree Band's lack of funds. However, as noted in the correspondence, counsel for Canada recognized that a simple discontinuance would not prevent

representatives of the Paul Cree Band from launching a future action with respect to these issues. As a result, counsel for Canada ostensibly agreed to bear its own costs on the condition that a consent judgment for dismissal is requested in lieu of a discontinuance; the effect of which would render the issues arising in the First Action *res judicata*. While counsel for the Paul Cree Band seemingly indicated a reluctance to agree to the consent judgment for dismissal, he did eventually file a motion to this effect.

[15] Canada presented me with strong detailed arguments of why I should strike the Second Action. I agree that the Consent Dismissal Order is a final decision of this Court and further agree that if counsel for the Paul Cree Band in the First Action did not have the proper instructions from the Plaintiffs because they now allege it was a representative action, the Plaintiffs should have sought to have the judgment lawfully quashed.

[16] However, in light of the foregoing facts, I believe that this is a situation where the abuse of process doctrine should not be invoked to strike the Statement of Claim. The merits of this action need to be determined. I agree with the Paul Cree Band that it appears that Canada took advantage of the poverty of the Plaintiffs in the First Action to try to ensure that a long resolved aboriginal claim was quickly disposed of by the dismissal at an early stage in the litigation. The substances of the claims advanced by the Paul Cree Band have never been properly heard. I am of the view that the application of either the *res judicata* or abuse of process doctrines would create an injustice in this instance (*Danyluk v Ainsworth Technologies*, 2011 SCC 44 at para 80 [*Danyluk*]).

[17] I will not strike this action as an abuse of process as in the administration of justice it would be unfair to do so as the Plaintiffs wished to discontinue the action only because they had no funds to continue. The Plaintiffs requested the discontinuance at an early stage in the proceeding, before the examination for discovery process began and only consented to the dismissal to avoid the Motion for costs that the Plaintiffs said they would seek against them. The Plaintiffs already had no money to continue the litigation and were left with little options but to consent to a dismissal. To date the merits of this action have not been examined by the parties at examinations for discovery or by the Courts.

[18] In exercising my discretion, I believe that this is an exceptional instance where applying the abuse of process doctrine in order to strike the Paul Cree Band's Statement of Claim would create unfairness.

[19] Even though I believe this is the determinative issue, I will comment briefly on other issues raised by Canada.

IV. No Reasonable Cause of action

[20] Relying on the doctrine of *res judicata*, Canada argues that the Paul Cree Band is estopped from bringing the same cause of action that was previously brought and dismissed by way of the Consent Dismissal Order from the First Action.

[21] Canada acknowledges that there has been no adjudication on the merits of the issues raised in the First Action, but argues that the doctrine of *res judicata* also operates to prevent re-litigation where the cause of action is the same (*Innes v Bui*, 2010 BCCA 322 at para 19).

[22] The Plaintiffs argued that the claims of the Paul Cree Band have never been properly heard and the application of *res judicata* or issue estoppel creates an injustice (*Danyluk*, above, at para 80).

[23] The test to strike out pleadings is whether it is "plain and obvious" that the claim discloses no reasonable cause of action (*Hunt v Carey Can Inc*, [1990] 2 SCR 959). The onus of proof on the party seeking to strike pleadings is a heavy one (*Apotex Inc v Syntex Pharmaceuticals International Ltd*, 2005 FC 1310, aff'd 2006 FCA 60).

[24] Where a party requests that a pleading be struck for failing to disclose a reasonable cause of action, no evidence is admissible; the Court will simply look at the pleading on its face (*Canada (Attorney General) v Inuit Tapirisat of Canada*, [1980] SCJ No 99).

[25] I do not agree with Canada's submissions on this issue. Furthermore, in relying on the argument that the issues which underpin the Statement of Claim are *res judicata*, Canada introduces, by way of affidavit, evidence relating to the First Action. I believe that this is contrary to the rule in *Inuit Tapirisat*, above, which prohibits the introduction of evidence when considering whether a pleading should be struck for failing to disclose a reasonable cause of action. This was recently confirmed by the Federal Court in *NOV Downhole Eurasia Ltd v TLL*

Oil Field Consulting, 2014 FC 889 at paragraph 21, where it was held that when considering a motion under Rule 221(1)(a), the Court is limited to the language in the pleadings and it cannot consider any evidence in support of a motion to strike.

[26] From reading the pleading on its face, I find that the Paul Cree Band's Statement of Claim in the Second Action does disclose a reasonable cause of action: the Statement of Claim alleges material facts against Canada (*Chavali v Canada*, 2002 FCA 209) and sets out effective relief which it seeks to recoup (*Weiten v Canada*, [1993] 1 CTC 2, aff'd [1995] 1 CTC 25 (FCA)). A chart of the material facts as they relate to the cause of action listed in the Statement of Claim are found in the annex to Canada's written representations. The relief sought by the Paul Cree Band is clearly set out on pages 7-8 of the Statement of Claim.

V. Scandalous and frivolous - Collateral Attack

[27] Canada argues that ".....the Paul Cree Band is attempting to re-litigate matters already settled by court order and discount the authority of this Court's previous judgment in this matter." I do not find that this is a collateral attack on the court order as I find this issue factually linked to the determinative issue of abuse of process.

VI. Costs

[28] Counsel for the parties provided written arguments and draft bills of costs post hearing. In the normal course, costs would be granted to the successful party.

[29] Costs can be awarded against the successful party but only on exceptional circumstances:

> [1] Costs may be awarded to an unsuccessful litigant in rare and exceptional cases. The question here is whether this is one of those rare and exceptional cases. After much consideration, I find that it is....
>
> [13] Awarding costs to an unsuccessful applicant even in cases where there are important public interest dimensions is "highly unusual" and only permitted in "very rare cases."[8] Examples are few and far between. Indeed, both sides agree that costs have been awarded to an unsuccessful constitutional litigant in only a handful of cases.
>
> *Thompson v Ontario (Attorney General)*, 2013 ONSC 6357

[30] I will not award costs on this motion against the unsuccessful litigant (Canada) because this matter was of public interest to be brought before the court by Canada.

[31] After lengthy consideration, I will not order costs against the successful litigant as even though it was an unusual case, I do not believe it rose to the level of a very rare and exceptional matter.

[32] I will order that the parties provide the court with a consent timetable regarding the next steps of the litigation on or before September 29, 2016.

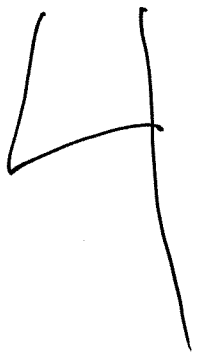
THIS COURT ORDERS that:

1. The motion be dismissed;

2. No costs are ordered and the parties will bear their own costs;

3. The parties are to provide the court with a consent draft timetable for the next steps in the litigation on or before September 29, 2016.

"Glennys L. McVeigh"
Judge



Federal Court  Cour fédérale

Date: 20130515

Docket: T-923-12
Docket: T-922-12

Citation: 2013 FC 509

Ottawa, Ontario, May 15, 2013

PRESENT: The Honourable Mr. Justice Barnes

Docket: T-923-12

BETWEEN:

MAURICE FELIX STONEY

Applicant

and

SAWRIDGE FIRST NATION

Respondent

Docket: T-922-12

BETWEEN:

ALINE ELIZABETH (MCGILLIVRAY) HUZAR AND JUNE MARTHA (MCGILLIVRAY) KOLOSKY

Applicants

and

SAWRIDGE FIRST NATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7. The Applicants are all descendants of individuals who were at one time members of the Sawridge First Nation, but who, either voluntarily or by operation of the law at the time, lost their band memberships. As a result the Applicants were excluded from membership in the Sawridge First Nation. They now ask this Court to review the Sawridge First Nation Appeal Committee's decision to uphold the Sawridge Chief and Council's decision which denied their applications for membership.

[2] The father of the Applicant Maurice Stoney was William J. Stoney. William Stoney was a member of the Sawridge First Nation but in April 1944 he applied to the Superintendent General of Indian Affairs to be enfranchised under section 114 of the *Indian Act*, c 98, RSC 1927. In consideration of payments totalling $871.35, William Stoney surrendered his Indian status and his membership in the Sawridge First Nation. By operation of the legislation, William Stoney's wife, Margaret Stoney, and their two children, Alvin Stoney and Maurice Stoney, were similarly enfranchised thereby losing their Indian status and their membership in the Sawridge First Nation.

[3] The Applicants Aline Huzar and June Kolosky are sisters and, like Mr. Stoney, they are the grandchildren of Johnny Stoney. The mother of Ms. Huzar and Ms. Kolosky was Johnny Stoney's daughter, Mary Stoney. Mary Stoney married Simon McGillivray in 1921. Because of her marriage Mary Stoney lost both her Indian status and her membership in Sawridge by operation of law. When Ms. Huzar and Ms. Kolosky were born in 1941 and 1937 respectively Mary Stoney was

not a member of the Sawridge Band First Nation and she did not reacquire membership before her death in 1979.

[4] In 1985, with the passing of Bill C-31, *An Act to amend the Indian Act*, 33 – 34 Eliz II c 27, and pursuant to section 10 of the *Indian Act*, the Sawridge First Nation delivered its membership rules, supporting documentation and bylaws to the Deputy Minister of Indian and Northern Affairs, who accepted them on behalf of the Minister. The Minister subsequently informed Sawridge that notice would be given pursuant to subsection 10(7) of the *Indian Act* that the Sawridge First Nation had control of its membership. From that point on, membership in the Sawridge First Nation was determined based on the Sawridge Membership Rules.

[5] Ms. Kolosky submitted her application for membership with the Sawridge First Nation on February 26, 2010. Ms. Huzar submitted her application on June 21, 2010. Mr. Stoney submitted his application on August 30, 2011. In letters dated December 7, 2011, the Applicants were informed that their membership applications had been reviewed by the First Nation Council, and it had been determined that they did not have any specific "right" to have their names entered in the Sawridge Membership List. The Council further stated that it was not compelled to exercise its discretion to add the Applicants' names to the Membership list, as it did not feel that their admission would be in the best interests and welfare of Sawridge.

[6] After this determination, "Membership Processing Forms" were prepared that set out a "Summary of First Nation Councils Judgement". These forms were provided to the Applicants and outlined their connection and commitment to Sawridge, their knowledge of the First Nation, their

character and lifestyle, and other considerations. In particular, the forms noted that the Applicants had not had any family in the Sawridge First Nation for generations and did not have any current relationship with the Band. Reference was also made to their involvement in a legal action commenced against the Sawridge First Nation in 1995 in which they sought damages for lost benefits, economic losses, and the "arrogant and high-handed manner in which Walter Patrick Twinn and the Sawridge Band of Indians has deliberately, and without cause, denied the Plaintiffs reinstatement as Band Members...". The 1995 action was ultimately unsuccessful. Although the Applicants were ordered to pay costs to the First Nation, those costs remained unpaid.

[7] In accordance with section 12 of the Sawridge Membership Rules, the Applicants appealed the Council's decision arguing that they had an automatic right to membership as a result of the enactment of Bill C-31. On April 21, 2012 their appeals were heard before 21 Electors of the Sawridge First Nation, who made up the Appeal Committee. Following written and oral submissions by the Applicants and questions and comments from members of the Appeal Committee, it was unanimously decided that there were no grounds to set aside the decision of the Chief and Council. It is from the Appeal Committee's decision that this application for judicial review stems.

[8] The Applicants maintain that they each have an automatic right of membership in the Sawridge First Nation. Mr. Stoney states at para 8 of his affidavit of May 22, 2012 that this right arises from the provisions of Bill C-31. Ms. Huzar and Ms. Kolosky also argue that they "were persons with the right to have their names entered in the [Sawridge] Band List" by virtue of section 6 of the *Indian Act*.

[9] I accept that, if the Applicants had such an acquired right of membership by virtue of their ancestry, Sawridge had no right to refuse their membership applications: see *Sawridge v Canada*, 2004 FCA 16 at para 26, [2004] FCJ no 77.

[10] Ms. Huzar and Ms. Kolosky rely on the decisions in *Sawridge v Canada*, 2003 FCT 347, [2003] 4 FC 748, and *Sawridge v Canada*, 2004 FCA 16, [2004] FCJ no 77 in support of their claims to automatic Sawridge membership. Those decisions, however, apply to women who had lost their Indian status and their band membership by virtue of marriages to non-Indian men and whose rights to reinstatement were clearly expressed in the amendments to the *Indian Act*, including Bill C-31. The question that remains is whether the descendants of Indian women who were also deprived of their right to band membership because of the inter-marriage of their mothers were intended to be protected by those same legislative amendments.

[11] A plain reading of sections 6 and 7 of Bill C-31 indicates that Parliament intended only that persons who had their Indian status and band memberships directly removed by operation of law ought to have those memberships unconditionally restored. The only means by which the descendants of such persons could gain band membership (as distinct from regaining their Indian status) was to apply for it in accordance with a First Nation's approved membership rules. This distinction was, in fact, recognized by Justice James Hugessen in *Sawridge v Canada*, 2003 FCT 347 at paras 27 to 30, 4 FC 748, [2003] 4 FC 748:

> 27 Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic

entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."

28 The debate in the House of Commons, prior to the enactment of the amendments, reveals Parliament's intention to create an automatic entitlement to women who had lost their status because they married non-Indian men. Minister Crombie stated as follows (*House of Commons Debates*, Vol. II, March 1, 1985, page 2644):

> ... today, I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.

29 A little further, he spoke about the careful balancing between these rights in the Act. In this section, Minister Crombie referred to the difference between status and membership. He stated that, while those persons who lost their status and membership should have both restored, the descendants of those persons are only automatically entitled to status (*House of Commons Debates*, idem, at page 2645):

> This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. [page766] While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.

30 Still further on, the Minister stated the fundamental purposes of amendments, and explained that, while those purposes may conflict, the fairest balance had been achieved (*House of Commons Debates*, idem, at page 2646):

> ... I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals...
>
> [Emphasis added]

This decision was upheld on appeal in *Sawridge v Canada*, 2004 FCA 16, [2004] FCJ no 77.

[12] The legislative balance referred to by Justice Hugessen is also reflected in the 2010 Legislative Summary of Bill C-3 titled the *Gender Equity in Indian Registration Act*, SC 2010, c 18. There the intent of Bill C-31 is described as follows:

> Bill C-31 severed status and band membership for the first time and authorized bands to control their own membership and enact their own membership codes (section 10). For those not exercising that option, the Department of Indian Affairs would maintain "Band Lists" (section 11). Under the legislation's complex scheme some registrants were granted automatic band membership, while others obtained only conditional membership. The former group included women who had lost status by marrying out and were reinstated under paragraph 6(1)(c). The latter group included their children, who acquired status under subsection 6(2).
>
> [Emphasis added]

[13] While Mary Stoney would have an acquired right to Sawridge membership had she been alive when Bill C-31 was enacted, the same right did not accrue to her children. Simply put neither Ms. Huzar or Ms. Kolosky qualified under section 11 of Bill C-31 for automatic band membership. Their only option was to apply for membership in accordance with the membership rules promulgated by Sawridge.

[14] This second generation cut-off rule has continued to attract criticism as is reflected in the Legislative Summary at p 13, para 34:

> 34. The divisiveness has been exacerbated by the Act's provisions related to band membership, under which not all new or reinstated registrants have been entitled to automatic membership. As previously mentioned, under provisions in Bill C-31, women who had "married out" and were reinstated did automatically become band members, but their children registered under subsection 6(2) have been eligible for conditional membership only. In light of the high volume of new or returning "Bill C-31 Indians" and the scarcity of reserve land, automatic membership did not necessarily translate into a right to reside on-reserve, creating another source of internal conflict.

Notwithstanding the above-noted criticism, the legislation is clear in its intent and does not support a claim by Ms. Huzar and Ms. Kolosky to automatic band membership.

[15] I also cannot identify anything in Bill C-31 that would extend an automatic right of membership in the Sawridge First Nation to William Stoney. He lost his right to membership when his father sought and obtained enfranchisement for the family. The legislative amendments in Bill C-31 do not apply to that situation.

[16] Even if I am wrong in my interpretation of these legislative provisions, this application cannot be sustained at least in terms of the Applicants' claims to automatic band membership. All of the Applicants in this proceeding, among others, were named as Plaintiffs in an action filed in this Court on May 6, 1998 seeking mandatory relief requiring that their names be added to the Sawridge membership list. That action was struck out by the Federal Court of Appeal in a decision issued on June 13, 2000 for the following reasons:

> [4] It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.
>
> [5] It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

See *Huzar v Canada*, [2000] FCJ no 873, 258 NR 246.

[17] It is not open to a party to relitigate the same issue that was conclusively determined in an earlier proceeding. The attempt by these Applicants to reargue the question of their automatic right of membership in Sawridge is barred by the principle of issue estoppel: see *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460.

[18] The Applicants are, nevertheless, fully entitled to challenge the lawfulness of the appeal decision rejecting their membership applications.

[19] The Applicants did not challenge the reasonableness of the appeal decision but only the fairness of the process that was followed. Their argument is one of institutional bias and it is set out with considerable brevity at para 35 of the Huzar and Kolosky Memorandum of Fact and Law:

> 35. It is submitted that the total membership of Sawridge First Nation is small being in the range of 50 members. Only three applicants have been admitted to membership since 1985 and these three are (were) the sisters of deceased Chief, Walter Twinn. The Appeal Committee consisted of 21 of the members of Sawridge and three of these 21 were the Chief, Roland Twinn and Councillors, Justin Twinn and Winona Twin, who made the original decision appealed from.

[20] In the absence of any other relevant evidence, no inference can be drawn from the limited number of new memberships that have been granted by Sawridge since 1985. While the apparent involvement of the Chief and two members of the Band Council in the work of the Appeal Committee might give rise to an appearance of bias, there is no evidence in the record that would permit the Court to make a finding one way or the other or to ascertain whether this issue was waived by the Applicants' failure to raise a concern at the time.

[21] Indeed, it is surprising that this issue was not fully briefed by the Applicants in their affidavits or in their written and oral arguments. It is of equal concern that no cross-examinations were carried out to provide an evidentiary foundation for this allegation of institutional bias. The issue of institutional bias in the context of small First Nations with numerous family connections is nuanced and the issue cannot be resolved on the record before me: see *Sweetgrass First Nation v Favel*, 2007 FC 271 at para 19, [2007] FCJ no 347, and *Lavalee v Louison*, [1999] FCJ no 1350 at paras 34-35, 91 ACWS (3d) 337.

[19] The Applicants did not challenge the reasonableness of the appeal decision but only the fairness of the process that was followed. Their argument is one of institutional bias and it is set out with considerable brevity at para 35 of the Huzar and Kolosky Memorandum of Fact and Law:

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[20] In the absence of any other relevant evidence, no inference can be drawn from the limited number of new memberships that have been granted by Sawridge since 1985. While the apparent involvement of the Chief and two members of the Band Council in the work of the Appeal Committee might give rise to an appearance of bias, there is no evidence in the record that would permit the Court to make a finding one way or the other or to ascertain whether this issue was waived by the Applicants' failure to raise a concern at the time.

[21] Indeed, it is surprising that this issue was not fully briefed by the Applicants in their affidavits or in their written and oral arguments. It is of equal concern that no cross-examinations were carried out to provide an evidentiary foundation for this allegation of institutional bias. The issue of institutional bias in the context of small First Nations with numerous family connections is nuanced and the issue cannot be resolved on the record before me: see *Sweetgrass First Nation v Favel*, 2007 FC 271 at para 19, [2007] FCJ no 347, and *Lavalee v Louison*, [1999] FCJ no 1350 at paras 34-35, 91 ACWS (3d) 337.

[22] The same concern arises in connection with the allegation of a section 15 Charter breach. There is nothing in the evidence to support such a finding and it was not advanced in any serious way in the written or oral submissions. The record is completely inadequate to support such a claim to relief. There is also nothing in the record to establish that the Crown was provided with any notice of what constitutes a constitutional challenge to the *Indian Act*. Accordingly, this claim to relief cannot be sustained.

[23] For the foregoing reasons these applications are dismissed with costs payable to the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications are dismissed with costs payable to the Respondent.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-923-12 T-922-12
STYLE OF CAUSE:	STONEY v SAWRIDGE FIRST NATION and HUZAR ET AL v SAWRIDGE FIRST NATION
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	March 5, 2013
REASONS FOR JUDGMENT:	BARNES J.
DATED:	May 15, 2013

APPEARANCES:

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Edward H. Molstad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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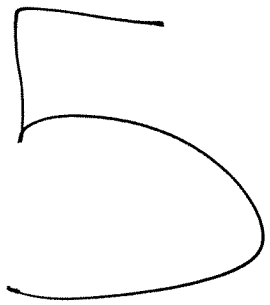

Mark Donald Benner *Appellant*

v.

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

and

The Federal Superannuates National Association *Intervener*

INDEXED AS: BENNER *v.* CANADA (SECRETARY OF STATE)

File No.: 23811.

1996: October 1; 1997: February 27.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Equality rights — Citizenship — Children born abroad before February 15, 1977 of Canadian fathers granted citizenship on application but those of Canadian mothers required to undergo security check and to take citizenship oath — U.S.-born son of a Canadian mother denied citizenship because of criminal charges — Whether applying s. 15(1) of Charter involves illegitimate retroactive or retrospective application — If not, whether the treatment accorded to children born abroad to Canadian mothers before February 15, 1977 by the Citizenship Act offending s. 15(1) — If so, whether saved by s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Citizenship Act, R.S.C., 1985, c. C-29, ss. 3(1), 4(3), 5(1)(b), (2)(b), 12(2), (3), 22(1)(b), (d), (2)(b) — Citizenship Regulations, C.R.C., c. 400, s. 20(1).

The appellant, who was born in 1962 in the United States of a Canadian mother and an American father, applied for Canadian citizenship and perfected his application on October 27, 1988. The *Citizenship Act* provided that persons born abroad before February 15, 1977, would be granted citizenship on application if born of a Canadian father but would be required to undergo a security check and to swear an oath if born of

Mark Donald Benner *Appelant*

c.

Le secrétaire d'État du Canada et le greffier de la citoyenneté *Intimés*

et

L'Association nationale des retraités fédéraux *Intervenante*

RÉPERTORIÉ: BENNER *c.* CANADA (SECRÉTAIRE D'ÉTAT)

N° du greffe: 23811.

1996: 1er octobre; 1997: 27 février.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Droits à l'égalité — Citoyenneté — Citoyenneté attribuée sur demande aux enfants nés à l'étranger avant le 15 février 1977 d'un père canadien, alors que ceux nés d'une mère canadienne sont tenus de se soumettre à une enquête de sécurité et de prêter le serment de citoyenneté — Refus, en raison de l'existence d'accusations criminelles, d'accorder la citoyenneté à un enfant né aux États-Unis d'une mère canadienne — Le fait d'appliquer le par. 15(1) de la Charte entraîne-t-il l'application rétroactive ou rétrospective illégitime de ce texte — Si la réponse est non, le traitement appliqué par la Loi sur la citoyenneté aux enfants nés à l'étranger d'une mère canadienne avant le 15 février 1977 viole-t-il le par. 15(1)? — Dans l'affirmative, peut-il être sauvegardé par l'article premier? — Charte canadienne des droits et libertés, art. 1, 15(1) — Loi sur la citoyenneté, L.R.C. (1985), ch. C-29, art. 3(1), 4(3), 5(1)b), (2)b), 12(2), (3), 22(1)b), d), (2)b) — Règlement sur la citoyenneté, C.R.C., ch. 400, art. 20(1).

L'appelant, qui est né aux États-Unis en 1962 d'une mère canadienne et d'un père américain, a présenté une demande de citoyenneté canadienne, demande qu'il a complétée le 27 octobre 1988. La *Loi sur la citoyenneté* prévoyait que les personnes nées à l'étranger d'un père canadien avant le 15 février 1977 acquéraient la citoyenneté sur demande, mais que si c'était leur mère qui était canadienne les demandeurs devaient se soumettre à une

a Canadian mother. The appellant therefore underwent a security check, during which the Registrar of Citizenship discovered that he had been charged with several criminal offences. The Registrar advised that he was prohibited from acquiring citizenship and his application was rejected.

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

Held: The appeal should be allowed.

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

enquête de sécurité et prêter serment. L'appelant a en conséquence fait l'objet d'une enquête de sécurité au cours de laquelle le greffier de la citoyenneté a découvert qu'il avait été accusé de plusieurs infractions criminelles. Le greffier l'a informé qu'il était inadmissible à la citoyenneté canadienne et a rejeté sa demande.

L'appelant a demandé une ordonnance de la nature d'un *certiorari* portant annulation de la décision du greffier ainsi qu'une ordonnance de la nature d'un *mandamus* enjoignant à ce dernier de lui attribuer la citoyenneté sans l'obliger à prêter serment et à se soumettre à une enquête de sécurité. La Section de première instance de la Cour fédérale a rejeté cette demande et la Cour d'appel fédérale a rejeté l'appel formé contre cette décision. L'appelant a été expulsé. Le pourvoi soulève les trois questions suivantes: (1) Le fait d'appliquer le par. 15(1) — la garantie du droit à l'égalité — de la *Charte canadienne des droits et libertés* entraîne-t-il l'application rétroactive ou rétrospective illégitime de la *Charte*? (2) Si la réponse est non, le traitement appliqué par la *Loi sur la citoyenneté* aux enfants nés à l'étranger d'une mère canadienne avant le 15 février 1977 viole-t-il le par. 15(1) de la *Charte*? (3) Si oui, la validité des mesures législatives contestées est-elle sauvegardée par l'article premier? Le libellé des questions constitutionnelles a été jugé inadéquat.

Arrêt: Le pourvoi est accueilli.

La *Charte* ne s'applique pas rétroactivement. La Cour n'a pas adopté un critère rigide de détermination des situations particulières dans lesquelles l'application de la *Charte* serait rétrospective. Chaque cas doit plutôt être apprécié selon le contexte factuel et législatif qui lui est propre, en portant attention à la nature du droit garanti par la *Charte* qui est en cause. Une situation comportant des événements antérieurs à l'entrée en vigueur de la *Charte* n'entraînera pas toujours l'application rétrospective de la *Charte*. Dans le cas où la situation factuelle en cause est un statut ou une caractéristique, on n'attribue aucun effet rétrospectif à un texte de loi lorsqu'il est appliqué à des personnes ou à des choses qui ont acquis ce statut ou cette caractéristique avant l'édiction du texte en question, pourvu qu'elles possèdent toujours le statut ou la caractéristique au moment de l'entrée en vigueur du texte. Par contre, dans le cas où la situation factuelle est un événement, on attribuerait un effet rétrospectif au texte de loi s'il était appliqué pour imposer une nouvelle obligation, peine ou incapacité par suite d'un événement survenu avant son édiction. La question à trancher consiste donc à caractériser la situation: s'agit-il réellement de revenir en arrière pour corriger un événement passé survenu avant que la

porary application of a law which happened to be passed before the *Charter* came into effect?

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

The appellant's situation should instead be seen in terms of status or ongoing condition. His status from birth — as a person born abroad prior to February 15, 1977 of a Canadian mother and a non-Canadian father — is no less a "status" than being of a particular skin colour or ethnic or religious background: it is an ongoing state of affairs. People in the appellant's condition continue to be denied the automatic right to citizenship granted to children of Canadian fathers. The presence of a date in a piece of legislation, while it may suggest an "event-related" focus rather than a "status-related" one, cannot alone be determinative. Consideration must still be given to the nature of the characteristic at issue. A difference exists between characteristics ascribed at birth (e.g., race) and those based on some action taken later in life (e.g., being a divorced person). Immutable characteristics arising at birth are generally more likely to be correctly classified as a "status" than are characteristics resulting from a choice to take some action.

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

Charte crée le droit revendiqué, ou s'agit-il simplement d'apprécier l'application contemporaine d'un texte de loi qui a été édicté avant l'entrée en vigueur de la *Charte*?

La présente affaire n'entraîne pas l'application rétroactive ou rétrospective de la *Charte*. Le concept de la cristallisation des droits au moment de la naissance, plus particulièrement dans le contexte de l'art. 15 de la *Charte*, suggère que, chaque fois qu'une personne née avant l'entrée en vigueur de l'art. 15 (le 17 avril 1985) subit les effets discriminatoires d'une mesure législative, ces effets seraient à l'abri des contestations fondées sur la *Charte*. Ce n'est pas le cas.

La situation de l'appelant doit plutôt être considérée comme un statut ou une condition en cours. Son statut à la naissance — le fait d'être une personne née à l'étranger, avant le 15 février 1977, d'une mère canadienne et d'un père non canadien — est tout autant un «statut» que le fait d'avoir la peau d'une certaine couleur ou celui d'appartenir à une origine ethnique ou religieuse donnée: c'est un état de fait en cours. Les personnes dans la situation de l'appelant continuent aujourd'hui d'être privées du droit à la citoyenneté qui est conféré d'office aux enfants nés d'un père canadien. Bien que la mention d'une date dans une mesure législative puisse tendre à indiquer que celle-ci s'attache d'avantage à un «événement» qu'à un «statut», ce fait à lui seul ne saurait être déterminant. Il faut également tenir compte de la nature de la caractéristique en cause. Il y a une différence entre les caractéristiques acquises à la naissance (par exemple la race) et celles qui découlent d'un acte quelconque, accompli plus tard dans la vie (par exemple l'état de personne divorcée). Les caractéristiques immuables acquises à la naissance sont, en général, plus susceptibles d'être qualifiées à juste titre de «statut» que celles résultant de la décision d'accomplir un acte.

Lorsque l'art. 15 est appliqué à des questions de statut, l'élément important n'est pas le moment où la personne acquiert le statut en cause, mais celui auquel ce statut lui est reproché ou la prive du droit d'obtenir un avantage. En l'espèce, ce moment est celui où le greffier a examiné et rejeté la demande de l'appelant. Étant donné que cela s'est produit bien après l'entrée en vigueur de l'art. 15, l'examen en regard de la *Charte* du traitement réservé à l'appelant par l'intimé ne met pas en jeu l'application rétroactive ou rétrospective de ce texte. Si l'appelant avait demandé la citoyenneté avant l'entrée en vigueur de l'art. 15 et qu'on la lui avait refusée, il ne pourrait maintenant se présenter devant la Cour et demander l'application de cet article à ce refus. Toutefois, ce n'est que lorsque l'appelant a présenté sa

made an application for citizenship, the law set out only what his rights to citizenship would be if and when he applied, not what they were.

Several approaches to s. 15 have been advanced in the recent jurisprudence of this Court. It is not necessary for the purposes of this appeal to say determinatively which of these approaches is the most appropriate since the result is the same no matter which test is used in the application of s. 15.

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

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

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

demande, en 1988, que la loi régissant son droit à la citoyenneté s'est appliquée à lui. Jusqu'à ce qu'il présente effectivement une demande de citoyenneté, la loi établissait simplement quels seraient ses droits en matière de citoyenneté lorsqu'il ferait une demande en ce sens, et non quels étaient ces droits.

Plusieurs façons d'aborder l'application de l'art. 15 de la *Charte* ont été avancées dans la jurisprudence récente de notre Cour. Pour trancher le présent pourvoi, il n'est pas nécessaire de déterminer de façon décisive laquelle est la plus appropriée, car le résultat serait identique, peu importe le critère retenu pour l'application de l'art. 15.

Le fait que les enfants nés à l'étranger d'une mère canadienne sont tenus de se soumettre à une enquête de sécurité et de prêter serment, alors que ceux nés à l'étranger d'un père canadien ne le sont pas, constitue une négation du droit à l'égalité de bénéfice de la loi garanti par l'art. 15 de la *Charte*. L'accès au précieux privilège qu'est la citoyenneté canadienne est limité, à des degrés divers, selon que c'est la mère ou le père du demandeur qui est canadien; le sexe est l'un des motifs énumérés à l'art. 15.

Le fait que le Parlement ait tenté de corriger l'iniquité créée par la Loi de 1947 en y apportant des modifications n'a pas pour effet de soustraire la loi modifiée à tout examen ultérieur fondé sur la *Charte*. Il est impossible d'affirmer que la source véritable du traitement différent appliqué aux enfants nés à l'étranger d'une mère canadienne est la Loi de 1947, et non la loi actuelle, car l'ancienne loi n'existe plus. Ce qui est en litige, ce n'est que le fonctionnement de la Loi actuelle et le traitement qu'elle applique à l'appelant du fait que seule sa mère était canadienne. Dans la mesure où la Loi actuelle perpétue la discrimination créée par la loi qui l'a précédée, elle peut elle-même être examinée en regard de l'art. 15.

L'appelant ne tente pas d'invoquer, à son propre profit, la violation des droits d'une autre personne. Il est la cible principale de la discrimination fondée sur le sexe établie par la législation et il a la qualité requise pour la contester. Sa mère n'est concernée que parce que l'étendue des droits de l'appelant est tributaire du sexe de celui de ses parents qui est canadien. Lorsque l'accès à des avantages tels que la citoyenneté est restreint pour un motif aussi intimement lié à un demandeur et aussi indépendant de sa volonté que le sexe de celui de ses parents qui est canadien, le demandeur peut invoquer la protection de l'art. 15. Le fait d'autoriser l'examen, en regard de l'art. 15, du traitement appliqué à la demande de citoyenneté de l'appelant ne fait qu'étendre la protec-

to him by s. 15 to extend to the full range of the discrimination. This is precisely the "purposive" interpretation of *Charter* rights mandated by earlier decisions of this Court.

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

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

The impugned legislation was not saved under s. 1 of the *Charter*. Ensuring that potential citizens are committed to Canada and do not pose a risk to the country are pressing and substantial objectives which are not reasonably advanced by the two-tiered application system created by the impugned provisions. The impugned legislation was not rationally connected to its objectives. The question to be asked in this regard is not whether it is reasonable to demand that prospective citizens swear an oath and undergo a security check before being granted citizenship but whether it is reasonable to make these demands only of children born abroad of Canadian mothers, as opposed to those born abroad of Canadian fathers. Clearly no inherent connection exists between this distinction and the desired legislative objectives.

Although retroactively imposing automatic Canadian citizenship in 1977 on children already born abroad of

tion contre la discrimination qui lui est garantie par l'art. 15 à la pratique discriminatoire dans son ensemble. Il s'agit précisément de l'interprétation «fondée sur l'objet» des droits garantis par la *Charte* qu'a prescrite notre Cour dans des arrêts antérieurs.

Les présents motifs ne créent pas un principe général de «discrimination par association». Le lien entre un enfant et son père ou sa mère a un caractère particulièrement unique et intime. L'enfant ne choisit pas ses parents. La question de savoir si cette analyse devrait s'étendre aux situations dans lesquelles l'association d'une personne à un groupe est volontaire plutôt qu'involontaire, ou dans lesquelles la caractéristique appartenant au père ou à la mère et sur laquelle est fondé le traitement différent n'est pas un motif énuméré ou analogue sera examinée à une autre occasion.

Le fait que le traitement différent appliqué aux enfants nés à l'étranger d'une mère canadienne par rapport à ceux nés d'un père canadien puisse être le produit d'événements législatifs historiques, et non d'une attitude discriminatoire stéréotypée, n'est pas pertinent pour décider si les dispositions contestées sont discriminatoires. Les motifs à l'origine de la décision du Parlement de maintenir une négation discriminatoire du droit à l'égalité de traitement ne peuvent atténuer le caractère discriminatoire de cette négation. Ces mesures législatives continuent de suggérer que, à tout le moins dans certains cas, les hommes et les femmes n'ont pas une capacité égale de transmettre à leurs enfants ce qu'il faut pour être un bon citoyen canadien.

La validité des mesures législatives contestées n'est pas sauvegardée par l'article premier de la *Charte*. Le fait de s'assurer de l'engagement envers le Canada des citoyens potentiels et celui de s'assurer qu'ils ne constituent pas un risque pour le pays sont des objectifs urgents et réels, mais dont le régime de demande à deux niveaux créé par les dispositions contestées ne peut raisonnablement favoriser la réalisation. Il n'existe pas de lien rationnel entre les dispositions législatives contestées et les objectifs qu'elles visent. À cet égard, la question n'est pas de savoir s'il est raisonnable de demander aux éventuels citoyens de prêter serment et de se soumettre à une enquête de sécurité avant de leur attribuer la citoyenneté, mais plutôt s'il est raisonnable de l'exiger uniquement des enfants nés d'une mère canadienne, et non de ceux nés d'un père canadien. Il n'y a manifestement aucun lien inhérent entre cette distinction et les objectifs législatifs poursuivis.

Même si en accordant rétroactivement d'office, en 1977, la citoyenneté canadienne aux enfants nés à

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

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

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

Cases Cited

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

l'étranger d'une mère canadienne, on aurait pu leur causer des problèmes d'incompatibilité avec les droits et les devoirs qu'ils avaient déjà en tant que citoyens d'autres pays, la Loi démontre clairement que la citoyenneté fondée sur la filiation n'a jamais été imposée d'office, même aux enfants nés à l'étranger d'un père canadien. Le fait de traiter de la même manière les enfants nés à l'étranger d'une mère canadienne et ceux nés d'un père canadien n'aurait donc entraîné aucun effet rétroactif indésirable. Quiconque n'aurait pas voulu profiter de la citoyenneté canadienne par l'extension des droits reconnus aux enfants nés d'un père canadien à ceux nés à l'étranger d'une mère canadienne aurait eu la faculté de tout simplement s'abstenir d'enregistrer sa naissance. Seuls les enfants nés à l'étranger d'une mère canadienne et désirant acquérir la citoyenneté canadienne se la verraient reconnaître. Il convient également de souligner que la Loi actuelle n'impose pas ces formalités aux enfants nés à l'étranger, après le 15 février 1977, d'une mère ou d'un père canadiens, et ce quel que soit l'âge des enfants. Si ces enfants ne constituent pas, du point de vue de la sécurité nationale, une menace potentielle telle qu'il est nécessaire de leur faire prêter serment et de les soumettre à une enquête de sécurité, il est difficile d'imaginer en quoi les personnes dans la situation de l'appelant constitueraient une telle menace.

Il est vraisemblable que les mesures législatives contestées ne satisferaient pas non plus au critère de la proportionnalité.

Les mesures législatives attentatoires sont déclarées inopérantes.

Jurisprudence

Arrêts examinés: *R. c. Gamble*, [1988] 2 R.C.S. 595; *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *R. c. Sarson*, [1996] 2 R.C.S. 223; *Murray c. Canada (Ministre de la Santé et du Bien-être social)*, [1994] 1 C.F. 603 ; *Miron c. Trudel*, [1995] 2 R.C.S. 418; *Egan c. Canada*, [1995] 2 R.C.S. 513; *Thibaudeau c. Canada*, [1995] 2 R.C.S. 627; *Cheung c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1993] 2 C.F. 314; *Elias c. U.S. Department of State*, 721 F.Supp. 243 (1989); **distinction d'avec les arrêts:** *R. c. Edwards*, [1996] 1 R.C.S. 128; *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342; **arrêts mentionnés:** *Reference re Workers' Compensation Act, 1983 (T.-N.)*, [1989] 1 R.C.S. 922; *R. c. Stevens*, [1988] 1 R.C.S. 1153; *R. c. Stewart*, [1991] 3 R.C.S. 324; *Dubois c. La Reine*, [1985] 2 R.C.S. 350; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Crease c. Canada*,

[1989] 1 S.C.R. 1296; *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872; *R. v. Big M Drug Mart, Ltd.*, [1985] 1 S.C.R. 295; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C., 1985, App. III, s. 1(*b*).
Canadian Charter of Rights and Freedoms, ss. 1, 15.
Canadian Citizenship Act, R.S.C. 1970, c. C-19 [formerly R.S.C. 1952, c. 33], s. 5(1).
Citizenship Act, R.S.C., 1985, c. C-29 [formerly S.C. 1974-75-76, c. 108], ss. 3(1), 4(3), 5(1)(*b*), (2)(*b*), 12(2), (3), 22(1)(*b*), (*d*), (2)(*b*).
Citizenship Regulations, C.R.C., c. 400, s. 20(1).

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

Mark M. Yang, for the appellant.

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

Neil R. Wilson, for the intervener.

The judgment of the Court was delivered by

IACOBUCCI J. — This appeal raises the constitutionality of certain provisions of the *Citizenship Act*, S.C. 1974-75-76, c. 108, and proclaimed in force February 15, 1977 by SI/77-43, (hereinafter

[1994] 3 C.F. 480; *R. c. Turpin*, [1989] 1 R.C.S. 1296; *Weatherall c. Canada (Procureur général)*, [1993] 2 R.C.S. 872; *R. c. Big M Drug Mart, Ltd.*, [1985] 1 R.C.S. 295; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Schachter c. Canada*, [1992] 2 R.C.S. 679.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 15.
Déclaration canadienne des droits, L.R.C. (1985), app. III, art. 1*b*).
Loi sur la citoyenneté, L.R.C. (1985), ch. C-29 [auparavant S.C. 1974-75-76, ch. 108], art. 3(1), 4(3), 5(1)*b*), (2)*b*), 12(2), (3), 22(1)*b*), *d*), (2)*b*).
Loi sur la citoyenneté canadienne, S.R.C. 1970, ch. C-19 [auparavant S.R.C. 1952, ch. 33], art. 5(1).
Règlement sur la citoyenneté, C.R.C., ch. 400, art. 20(1).

Doctrine citée

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Driedger, Elmer A. "Statutes: Retroactive Retrospective Reflections" (1978), 56 *R. du B. can.* 264.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1994] 1 C.F. 250, (1993), 105 D.L.R. (4th) 121, 155 N.R. 321, 16 C.R.R. (2d) 15, [1993] F.C.J. 658, qui a rejeté l'appel du jugement du juge en chef adjoint Jerome, [1992] 1 C.F. 771, (1991), 43 F.T.R. 180, 14 Imm. L.R. (2d) 266, ayant refusé la demande de *certiorari* et de *mandamus* présentée relativement au rejet, par le greffier de la citoyenneté, d'une demande de citoyenneté. Pourvoi accueilli.

Mark M. Yang, pour l'appelant.

Roslyn J. Levine, *c.r.*, et *Debra M. McAllister*, pour les intimés.

Neil R. Wilson, pour l'intervenante.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Le présent pourvoi soulève la constitutionnalité de certaines dispositions de la *Loi sur la citoyenneté*, S.C. 1974-75-76, ch. 108, proclamées en vigueur le 15 février 1977