Court File No: A-417-06

FEDERAL COURT OF APPEAL

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

APPELLANT

AND:

JOSEPH TAYLOR

RESPONDENT

APPELLANT'S MEMORANDUM OF FACT AND LAW

OVERVIEW

1. The Respondent, Joseph Taylor, is a citizen of the United Kingdom. He was born in England in December 1944. His mother was English and his father was a Canadian soldier who was based in England during the Second World War. Mr. Taylor has lived in England for essentially his entire life. He came to Canada with his mother for a few weeks in 1946 when he was an infant to join his father but he and his mother returned to England before the end of the year.

2. At the end of the Second World War, the Canadian government facilitated the entry into Canada of the spouses and children of members of the Canadian Armed Forces who had served overseas. The Governor General in Council made a series of Orders in Council including P.C. 858 (the "Order in Council") that permitted the dependents of Canadian servicemen to enter

Canada and granted them status and domicile in Canada for the purpose of Canadian immigration law.[1]

3. On January 1, 1947, the original *Canadian Citizenship Act* (the "1947 Act") came into force. The 1947 Act set out the requirements for a person to be or to become a "Canadian citizen" under that Act. It also set out when a person ceased to be a Canadian citizen.

4. When the 1947 Act came into force, Mr. Taylor, unlike many of the other dependents of Canadian servicemen who had come to Canada under the Order in Council and remained, was not domiciled in Canada and he did not satisfy the requirements under that Act for Canadian citizenship. Furthermore, the Order in Council did not grant him citizenship under the 1947 Act. Finally, if he acquired Canadian citizenship under the 1947 Act, which the Minister expressly denies, he subsequently lost his citizenship because he did not comply with the provisions (the "loss provisions") in that Act relating to the retention of citizenship.

5. Even more significantly for the purpose of these proceedings, Mr. Taylor does not satisfy the requirements for Canadian citizenship under the current *Citizenship Act* (the "1977 Act") since he was not a Canadian citizen when it came into force in 1977.

6. In 2003, Mr. Taylor applied for proof of Canadian citizenship under the 1977 Act. Mr. Taylor's application for proof of citizenship was refused by a citizenship officer. Mr. Taylor sought judicial review of the officer's decision and on September 1, 2006, the Honourable Mr. Justice Martineau of the Federal

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[1] The first Order in Council enacted to facilitate the immigration to Canada of dependents of members of the Canadian Armed Forces was Order in Council P.C. 7318, which was enacted under the *War Measures Act* in September 1994. Order in Council P.C. 7318 was repealed and replaced by Order in Council P.C. 858 in February 1945. Finally, Order in Council P.C. 858 was amended by Order in Council P.C. 4216 in October 1946.

Court (the "Applications Judge") granted his application and determined that Mr. Taylor is a Canadian citizen.

7. The Appellant, the Minister of Citizenship and Immigration (the "Minister"), appeals from the decision that Mr. Taylor is a Canadian citizen on the basis that the Applications Judge committed various errors of law including:

- determining that Canadian citizenship pre-dates the coming into force of the 1947 Act;
- determining that the Order in Council was tantamount to a grant of Canadian citizenship;
- determining that the loss provisions in the 1947 Act, which was repealed in 1977, were contrary to Mr. Taylor's right to due process under the *Canadian Bill of Rights* (the "Bill of Rights") and the *Canadian Charter of Rights and Freedoms* (the "Charter"); and
- retroactively applying section 15 of the Charter to the 1947 Act, which has been repealed.

PART I – FACTS

8. Mr. Taylor was born in England on December 8, 1944. Mr. Taylor's mother was a United Kingdom national and a British subject and his father was a Canadian soldier. They were not married at the time of Mr. Taylor's birth. Mr. Taylor's parents subsequently married in May 1945.

Affidavit of Joseph Taylor, sworn July 21, 2005 ("Taylor Affidavit") paras. 2, 4, 5, 10 and 12 / Appeal Book Vol. 2, pp. 172 – 173.

9. In 1946, Mr. Taylor's father returned to Canada without Mr. Taylor and his mother and he was discharged from the army.

Taylor Affidavit, paras. 13 and15 / Appeal Book, Vol. 2, pp. 173 – 174.

10. In July 1946, Mr. Taylor and his mother arrived in Canada and were landed. Mr. Taylor's official status at that time was that of a "landed immigrant".

Taylor Affidavit, para. 18 and Exhibit "J" / Appeal Book, Vol. 2, p. 174 and p. 196.

11. Mr. Taylor and his mother moved to British Columbia where they reunited with Mr. Taylor's father. Mr. Taylor's parents' marriage did not last and Mr. Taylor's mother decided to return to England with Mr. Taylor. In October 1946, Mr. Taylor and his mother left Canada and returned to England.

Taylor Affidavit, paras. 20 – 23 / Appeal Book, Vol. 2, pp. 174 – 175.

12. On January 1, 1947, the 1947 Act came into force. On that date, Mr. Taylor was living in England.

Taylor Affidavit, para. 77 / Appeal Book, Vol. 2, p. 183.

13. Mr. Taylor did not make any attempt to return to Canada until he was twenty-five years old. He approached Canadian officials at the Canadian High Commission (the "High Commission") in London, explained that he was the son of a repatriated Canadian Armed Forces person from World War II and he had previously lived in Canada, and he inquired "if it would be possible" to go to Canada.

Taylor Affidavit, paras. 36 – 37 / Appeal Book, Vol. 2, p. 176.

14. In response to his inquiry, the Canadian officials sent Mr. Taylor the standard application forms for immigration to Canada, which included the requirement for a sponsor. Mr. Taylor attempted to complete the forms but he was unable to contact his father to sponsor his immigration application.

Taylor Affidavit, paras. 38 – 41 / Appeal Book, Vol. 2, pp. 176 - 177.

15. In 1999, Mr. Taylor came to Canada as a visitor. Upon his return to England, he again inquired with officials at the High Commission and he was informed that he had lost his citizenship on his twenty-fourth birthday because he had not made an application to retain his citizenship.

> Taylor Affidavit, paras. 44 and 46 – 47 / Appeal Book, Vol. 2, pp. 177 – 178.

16. In February 2003, Mr. Taylor submitted an application under the 1977 Act for proof of citizenship to the High Commission in London. However, the officials at the High Commission did not forward that application for further processing because they believed Mr. Taylor had lost his citizenship on his twenty-fourth birthday.

> Taylor Affidavit, paras. 52 – 53 / Appeal Book, Vol. 2, pp.169 – 170.

17. In late 2003, Mr. Taylor submitted a second application under the 1977 Act for proof of Canadian citizenship. In support of his application, Mr. Taylor relied on the fact that he was the son of a Canadian soldier. He also relied on the Order in Council, which he claimed deemed him to have Canadian citizenship.

> Taylor Affidavit, para. 56 (1) and Exhibit "P" / Appeal Book, Vol. 2, pp. 179 and 206.
>
> Certified Tribunal Record ("CTR") pp.16 – 17 / Appeal Book, Vol. 1, pp. 156 – 157.

18. In May 2005, Citizenship Officer M. Hefferon (the "Officer") refused Mr. Taylor's second application for proof of citizenship. She determined that Mr. Taylor had not established Canadian citizenship status based on citizenship legislation.

> CTR pp. 2 – 3 / Appeal Book Vol. 1, pp. 142 – 143.

19. Mr. Taylor sought judicial review of Officer's decision, arguing that the Order in Council gave him the status of a "natural-born Canadian citizen", that the loss provisions in the 1947 Act violated his right to due process under the Bill of Rights and the Charter because he was not given proper notice of those provisions and that the Officer's refusal of his citizenship application on the basis of his parents' marital status at the time of his birth violated his rights under section 15 of the Charter.

20. In response to Mr. Taylor's arguments, the Minister submitted that the Order in Council did not deem Mr. Taylor to be a Canadian citizen under the 1947 Act. Furthermore, Mr. Taylor did not meet the requirements for citizenship under the 1947 Act and he never acquired Canadian citizenship under that Act. In the alternative, if he acquired citizenship under the 1947 Act, Mr. Taylor subsequently ceased to be a citizen under the loss provisions contained in that Act. These loss provisions did not violate Mr. Taylor's rights under the Bill of Rights of the Charter. Finally, the 1977 Act does not discriminate against Mr. Taylor on the basis of parents' marital status when he was born. Any finding of discrimination would require the Charter to be applied retroactively to the 1947 Act and the Charter does not apply retroactively.

21. The Applications Judge heard Mr. Taylor's application for judicial review in May 2006 and he released his decision in September 2006. The Applications Judge determined that Mr. Taylor is a Canadian citizen under the 1977 Act. More particularly, he held that the Order in Council was tantamount to a grant of Canadian citizenship and that the loss provisions in the 1947 Act violated Mr. Taylor's right to due process and were contrary to the Bill of Rights and the Charter. Furthermore, to the extent that the provisions of the 1977 Act prevented Mr. Taylor from obtaining citizenship because he was born out of wedlock, those provisions were contrary to section 15 of the Charter.

Taylor v. Canada (Minister of Citizenship and Immigration), 2006 FC 1053 ("Reasons"), Appeal Book, Vol. 1, Tabs "B" and "C".

PART II – ISSUES

22. The Minister appeals from the Applications Judge's decision that Mr. Taylor is a Canadian citizen on the following grounds:

- That the Applications Judge erred in law in holding that, for the purposes of the 1947 Act and subsequent Citizenship Acts, Canadian citizenship existed prior to January 1, 1947;

- That the Applications Judge erred in law in holding that the Order in Council granted Mr. Taylor Canadian citizenship for the purposes of the 1947 Act and subsequent Citizenship Acts;

- That the Applications Judge erred in law in holding that the loss provisions in the 1947 Act violated Mr. Taylor's right to due process and were contrary to sections 1(a) and 2(e) of the Bill of Rights and section 7 of the Charter; and

- That the Applications Judge erred in law in holding that the 1977 Act violates Mr. Taylor's rights under section 15 of the Charter.

PART III – SUBMISSIONS

A. INTRODUCTION

23. Canadian citizenship is a creature of federal statute and has no meaning apart from statute. In order to be a Canadian citizen, a person must satisfy the applicable statutory requirements.

24. The Order in Council did not deem Mr. Taylor to be a Canadian citizen under the 1947 Act. He still had to meet the requirements for Canadian citizenship under the 1947 Act. By leaving Canada for a permanent purpose in 1946, Mr. Taylor lost his Canadian domicile and therefore he did not meet the

requirements for Canadian citizenship under the 1947 Act and he never acquired Canadian citizenship.

25. In the alternative, if Mr. Taylor acquired Canadian citizenship under the 1947 Act, which the Minister expressly denies, he subsequently lost it pursuant to the loss provisions in that same Act. These provisions did not violate Mr. Taylor's right to due process or procedural fairness under the Bill of Rights or the Charter. The loss provisions were contained in a public statute and the government was not required to give Mr. Taylor additional notice of those provisions.

26. Even more significantly for the purpose of these proceedings, Mr. Taylor is not a Canadian citizen under section 3(1)(d) of the 1977 Act because he was not a Canadian citizen in 1977 when it came into force. Section 3(1)(d) of the 1977 Act does not discriminate against Mr. Taylor on the basis of his parents' marital status at the time of his birth. Any finding of discrimination under the Charter would require the Charter to be applied retroactively to the 1947 Act and it is well-settled law that the Charter does not apply retroactively.

B. LEGISLATIVE FRAMEWORK

27. Section 3 of the 1977 Act defines who is a Canadian citizen. The relevant portion of section 3 provides:

> 3(1) Subject to this Act, a person is a citizen if
> ...
> (d) the person was a citizen immediately before February 15, 1977....
>
> *Citizenship Act*, S.C. 1974-75-76, c. 108, section 3.

28. In order to be a citizen immediately before February 15, 1977, a person had to meet the requirements of the 1947 Act immediately before that date. As already discussed, the 1947 Act came into force on January 1, 1947,

and it was amended several times and revised in 1970. It remained in force until its repeal on the coming into force of the 1977 Act on February 15, 1977.

Canadian Citizenship Act, S.C. 1946, c. 15.

Citizenship Act.

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

29. The 1947 Act defined who was a "Canadian citizen" under that Act and it set out the requirements that a person had to satisfy to be either a "natural-born Canadian citizen" or a "Canadian citizen other than a natural-born Canadian citizen".

Canadian Citizenship Act, Parts I and II.

House of Commons Debates, April 2, 1946, p. 503 / Appeal Book Vol. 2, pp. 307 - 311.

30. Section 4 of the 1947 Act defined when a person who had been born before January 1, 1947, was a "natural-born Canadian citizen". The relevant portion of section 4 provided that:

> **4.** A person, born before the commencement of this Act, is a natural-born Canadian citizen: -
> ...
> (b) if he was born outside of Canada elsewhere than on a Canadian ship and his father, or in the case of a person born out of wedlock, his mother
>
> > (i) was born in Canada or on a Canadian ship and had not become an alien at the time of that person's birth, or
> > (ii) was, at the time of the person's birth, a British subject who had Canadian domicile,
>
> if, at the commencement of this Act, that person has not become an alien, and has either been lawfully admitted to Canada for permanent residence or is a minor.

Canadian Citizenship Act, section 4.

31. Section 9 of the 1947 Act defined when a person was a "Canadian citizen other than a natural-born Canadian citizen". The relevant portion of section 9 provided that:

> **9.** (1) A person other than a natural-born Canadian citizen, is a Canadian citizen, if he
> ...
> (b) immediately before the commencement of this Act was a British subject who had Canadian domicile
> ....
>
> *Canadian Citizenship Act*, section 9.

32. The 1947 Act also set out when a person ceased to be a Canadian citizen. For example, section 4(2) of the 1947 Act, as amended in 1953, provided that:

> **4.** (2) A person who is a Canadian citizen under paragraph 4(1)(b) and was a minor on the 1st day of January 1947 ceases to be a Canadian citizen upon the date of the expiration of three years after the day on which he attains the age of twenty-one years or on the 1st day of January 1954, whichever is the later date, unless he
> (a) has his place of domicile in Canada on such date; or
> (b) has, before such date and after attaining the age of twenty-one years, filed, in accordance with the regulations, a declaration of retention of Canadian citizenship.
>
> *Canadian Citizenship Act*, section 4.

33. As a further example, section 20 of the 1947 Act, as amended, provided that:

> **20.** A Canadian citizen, other than a natural-born Canadian citizen..., ceases to be a Canadian citizen if he resides outside of Canada for a period of at least six consecutive years....
>
> *Canadian Citizenship Act*, section 20.
>
> See also: *Canadian Citizenship Act*, Parts I – III.

C. ERRORS BY THE APPLICATIONS JUDGE

1. Canadian Citizenship Is Defined By The Citizenship Act

34. This Court has held that Canadian citizenship is a creature of federal statute and that it has no meaning apart from statute. In order to be a Canadian citizen, a person must satisfy the applicable statutory requirements.

> *Solis v. Canada (Minister of Citizenship and Immigration)* (2000), 186 D.L.R. (4th) 512 (F.C.A.) at para. 4 (Leave to appeal to SCC refused [2002] S.C.C.A. No. 249 (QL)).

35. The Supreme Court of Canada and other Courts have consistently held that the concept of Canadian citizenship was introduced on January 1, 1947, with the enactment of the 1947 Act.

> See also: Hogg, Peter. Constitutional Law of Canada (5th), 2006 (Toronto: Thomson Carswell) loose leaf edition at pp. 26-5 to 26-6

36. In *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 at page 377, the appellant, who was born after 1947, challenged the constitutional validity of various provisions of the 1977 Act. The Supreme Court of Canada began its analysis by discussing the legislative and historical context of the 1977 Act and it stated:

> [30] Before 1947, there was no concept of Canadian citizenship. In 1946, Parliament passed the first Canadian Citizenship Act.
>
> *Benner v Canada (Secretary of State)*, [1997] 1 S.C.R. 358.

37. Both this Court and the Federal Court have also held that the concept of Canadian citizenship was introduced in 1947. In *McLean v. Canada (Minister of Citizenship and Immigration)* (1999), 177 F.T.R. 219, the Federal Court stated:

> Much of this decision turns on statutory interpretation. As such, it is important to highlight the provision which the Program Support

> Officer sought to apply as well as the historical development of the *Citizenship Act*.
>
> The concept of Canadian citizenship was introduced on January 1st 1947 with the creation of the Canadian Citizenship Act....

This Court subsequently upheld the Federal Court's decision in *McLean* and reaffirmed that the concept of Canadian citizenship was introduced in 1947:

> In order to situate the issue raised by the appeal, it is useful to recall that the concept of Canadian citizenship was introduced on January 1, 1947, with the enactment of the *Canadian Citizenship Act*.
>
> *McLean v. Canada (Minister of Citizenship and Immigration)* (1999), 177 F.T.R. 219 at paras. 12 and 13.
>
> *McLean v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 127 (C.A.) at para. 5.
>
> See also: *Kelly v. Canada (Minister of Citizenship and Immigration)* (1998), 161 F.T.R. 93.

38. Even more recently, the Federal Court discussed citizenship and nationality law before 1947 in detail in *Veleta v. Canada (Minister of Citizenship and Immigration)* (2005), 273 F.T.R. 108. In that case, the Federal Court held again that:

> [27] David Giesbrecht was born in 1933. At the time, the relevant citizenship legislation in force in Canada was the *Naturalization Act*, 1914, R.S.C. 1927, c. 138. The *Naturalization Act* did not provide for Canadian citizenship, there being no such thing at the time. Instead, the legislation stipulated who was and was not a British subject.
>
> ...
>
> [32] Canadian citizenship was created with the coming into force of the 1947 *Citizenship Act* on January 1 of that year.
>
> *Veleta v. Canada (Minister of Citizenship and Immigration)* (2005), 273 F.T.R. 108 at paras. 27 – 32.

39. This Court overturned the Federal Court's decision in *Veleta* on various grounds. However, this Court confirmed again in its decision that

Canadian citizenship was created with the coming into force of the original *Citizenship Act.*

> *Veleta v. Canada (Minister of Citizenship and Immigration)* (2006), 268 D.L.R. (4th) 513 (F.C.A.). at para. 9.

40. Despite all of the contrary authority, the Applications Judge found that the concept of Canadian citizenship existed prior to 1947. In doing so, he downplayed the fact that Canadian citizenship is a creature of statute and blurred the distinctions between various legal statuses that existed before the 1947 Act came into force.

> Reasons, paras. 49 – 113 / Appeal Book Vol. 1, pp. 22 – 44.

41. Prior to January 1, 1947, a person in Canada might have qualified for various statuses including "Canadian national", "British subject" and "naturalized British subject". A person could also have been a "Canadian citizen" under the *Immigration Act, 1910,* (the "1910 Immigration Act") for the limited purpose of entering and remaining in Canada. However, Canadian citizenship did not exist as a single legal concept prior to 1947. Furthermore, a person who qualified for one of the legal statuses existing prior to 1947 did not necessarily qualify for the other ones and he or she may or may not have satisfied the statutory requirements for Canadian citizenship under the 1947 Act when it came into force. In summary, the Applications Judge erred by suggesting that a status equivalent to Canadian citizenship under the 1947 Act existed prior to January 1, 1947.

> *Immigration Act, 1910*, R.S.C. 1927, c. 93.
>
> *Naturalization Act*, 1914 R.S.C. 1927 c. 138.
>
> *Canadian Nationals Act*, R.S.C. 1927, c. 2.

2. The Order in Council Did Not Grant Mr. Taylor Citizenship Under The 1947 *Citizenship Act*

44. The Applications Judge determined that the Order in Council was tantamount to a statutory grant of Canadian citizenship to war brides and their children, including Mr. Taylor, for all purposes including the 1947 Act.

Reasons, paras. 165 – 177 / Appeal Book, Vol. 1, pp, 67 – 73.

45. As submitted earlier, the Applications Judge's determination that the Order in Council granted Mr. Taylor citizenship under the 1947 Act largely ignores the fact that Canadian citizenship is a creature of statute and blurs the distinctions between various legal statuses. Furthermore, the Applications Judge's determination is contrary to the plain language of both the Order in Council and the 1947 Act as well as the intention of both the Governor General in Council and Parliament. It is well-settled law that the words of an Act are to be read in their entirety, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21.

Deacon v. Canada (Attorney General) (2006), 352 N.R. 380 (F.C.A.) at para. 30.

46. The Order in Council noted the desirability of facilitating the entry into Canada of the dependents of Canadian servicemen and it explicitly stated that it was granting those dependents Canadian citizenship or domicile only for the purpose of immigration law. The relevant portions of the Order in Council read as follows:

> Whereas the Minister of Mines and Resources, with the concurrence of the Secretary of State for External Affairs, and with the approval of the Cabinet War Committee, reports that it is desirable to facilitate entry into Canada of dependents of members of the Canadian Armed Forces and, where the said members are Canadian citizens or have Canadian domicile, to provide such dependents with the same status; and

> That the medical examination overseas of dependents of members of the Canadian Armed Forces establishes, in some instances, that the person examined is not admissible to Canada under the provisions of the immigration laws of Canada.
>
> Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Mines and Resources, with the concurrence and approval aforesaid, and under the authority of the War Measures Act, Chapter 206 of the Revised Statutes of Canada, 1927, and notwithstanding any other law of Canada relating to immigration, is pleased to make and doth hereby make the following Order: -
>
> 1. In this Order, unless the context otherwise requires:
> (a) "dependent" means the wife, the widow or child under eighteen years of age of a member or former member of the Canadian Armed Forces who is serving or who has served outside Canada in the present war;
> ...
>
> 2. Every dependent applying for admission to Canada shall be permitted to enter Canada and upon such admission shall be deemed to have landed within the meaning of Canadian immigration law.
>
> 3. Every dependent who is permitted to enter Canada pursuant to section two of this Order shall <u>for the purpose of Canadian immigration law</u> be deemed to be a Canadian citizen if the member of the forces upon whom he is dependent is a Canadian citizen and shall be deemed to have Canadian domicile if the said member has Canadian domicile.
> . . .
>
> 7. Order in Council P.C. 7318 of the twenty-first day of September, 1944, is hereby revoked."
>
> [Emphasis Added]
>
> Order in Council P.C. 858 (February 9, 1945).

47. The Applications Judge noted that the Order in Council deemed a serviceman's dependent to be a Canadian citizen only for the purpose of immigration law but he reasoned:

> [172] As noted earlier, the only law in Canada prior to 1947 which referred to the words "Canadian citizen" was immigration law.

> Therefore, the reference in paragraph 3 of Order in Council, P.C. 858 "for the purposes of Canadian immigration law to be a Canadian citizen" is not determinative.
>
> Reasons, para. 172 / Appeal Book, Vol. 1, p. 70.

48. Having determined that the only law in Canada that defined Canadian citizenship was immigration law and having noted that the Order in Council stated that it was for the purposes of immigration law, the Applications Judge erred when he found that there was a requirement to look beyond the Immigration Act to interpret the Order in Council.

49. The Applications Judge also found that he had no doubt that if the Order in Council had been made after the 1947 Act came into force, the Governor General in Council would have used words that reflected an intention to confer Canadian citizenship on war brides and their children for all purposes.

> Reasons, para. 177 / Appeal Book, Vol. 1, p. 73.

50. However, the Applications Judge's finding that the Governor General in Council intended to confer Canadian citizenship on the dependents of Canadian servicemen for all purposes is contradicted by the evidence. After Parliament had already passed the 1947 Act, the Governor General in Council made another Order in Council, Order in Council P.C. 4216[2], which amended the earlier Order in Council P.C. 858. Even knowing that Parliament had passed the 1947 Act and that it would be coming into force shortly, the Governor General in Council affirmed again that the earlier Order in Council related only to the immigration status of the war brides and their children:

> And whereas the Acting Minister of Mines and Resources represents that it is necessary to limit the provisions of P.C. 858 dated the 9th day of February, 1945, <u>which relates to the immigration status</u> and granting of free medical examination to

[2] Order in Council P.C. 4216 was not before the Applications Judge.

dependents to conform with the said Order in Council P.C. 4044;

[Emphasis Added]

Order in Council P.C. 4216 (October 11, 1946).

51. Furthermore, Parliament incorporated the terms of the Order in Council into the Immigration Act in 1947 and when it did so, it did not mention the 1947 Act, which was already in force at that time.

Act to Amend the Immigration Act and to repeal the Chinese Immigration Act, S.C. 1947 c. 19.

52. In short, the evidence shows that the Governor General in Council did not intend the Order in Council to confer automatically Canadian citizenship under the 1947 Act on the dependents of Canadian servicemen. Instead, the Governor General in Council's intention simply was to facilitate their immigration.

53. Finally, there is nothing in the language of the 1947 Act that suggests that persons who entered Canada under the Order in Council automatically became Canadian citizens under that Act. As submitted earlier, Canadian citizenship is a creature of federal statute and the concept of Canadian citizenship has no meaning apart from statute. In order to be a Canadian citizen, a person must satisfy the applicable statutory requirements.

3. Mr. Taylor Did Not Satisfy the Statutory Requirements For Citizenship

54. As set out earlier, section 4 of the 1947 Act provided that a person who was born outside of Canada and out of wedlock before January 1, 1947, was a Canadian citizen if his or her mother was, at the time of his or her birth, a British subject who had Canadian domicile.

Canadian Citizenship Act, section 4.

55. Section 9 of the 1947 Act provided that a person was also a Canadian citizen if he or she was, immediately before January 1, 1947, a British subject who had Canadian domicile.

Canadian Citizenship Act, section 9.

56. In the present case, there is no dispute that Mr. Taylor's mother did not have Canadian domicile when Mr. Taylor was born in England in December 1944. Accordingly, Mr. Taylor had to be a British subject who had Canadian domicile immediately before January 1, 1947, to satisfy the requirements for Canadian citizenship under the 1947 Act.

57. Mr. Taylor did not have Canadian domicile immediately before January 1, 1947. Sections 2(e)(ii) and (iii) of the 1910 Immigration Act provided that if a person left Canada with the present intention of living elsewhere permanently, he or she immediately lost his or her Canadian domicile. Furthermore, certain citizens or British subjects lost their Canadian domicile regardless of intent once they had resided outside of Canada for one year:

> **2.** (e) "domicile" means the place in which a person has his home, or in which he resides, or to which he returns as his place of permanent abode, and does not mean the place where he resides for a mere special or temporary purpose;
>
> (ii) Canadian domicile is lost, for the purposes of this Act, by a person voluntarily residing out of Canada not for a mere special temporary purpose but with the present intention of making his permanent home outside of Canada, or by any person belonging to the prohibited or undesirable classes within the meaning of this Act.
>
> (iii) Notwithstanding anything contained in the preceding paragraph, when any citizen of Canada who is a British subject by naturalization, or any British subject not born in Canada having Canadian domicile shall have resided for one year outside of Canada, he shall be presumed to have lost Canadian domicile and shall cease to be a Canadian citizen for the purposes of this Act, and his usual place of residence shall be deemed to be his place of domicile during said year:

Immigration Act, 1910, section 2.

See also: *Canadian Citizenship Act*, section 2(j).

58. Mr. Taylor was a British subject at birth. He was not born in Canada and there was no law deeming him to have been born in Canada. Therefore, he was subject to the loss of domicile provisions in the 1910 Immigration Act.

59. Mr. Taylor immediately lost his Canadian domicile under the 1910 Immigration Act upon leaving Canada to make his permanent home in England with his mother. Furthermore, on January 1, 1947, Mr. Taylor was residing permanently in England with his mother. Accordingly, he was no longer a British subject who had Canadian domicile immediately before the commencement of the 1947 Act and he did not satisfy the requirements for Canadian citizenship under that Act.

60. The Applications Judge found that Mr. Taylor did not lose his Canadian domicile because he was a minor when he returned to England with his mother:

> While there is no evidence of the Applicant's mother's intent on January 1, 1947, I do not need to dismiss the Respondent's argument on this basis. None of those computations of time should affect a minor child who was considered a "disabled person" under statute. This is clearly against due process. As a minor child, the Applicant did not voluntarily make any choices.
>
> Reasons, para. 222 / Appeal Book, Vol. 1, pp. 92 – 93.

61. The Applications Judge's statement is not supported by the relevant law. The Supreme Court of Canada has held in several decisions that parents have a fundamental right to make choices for their children and that state interference in such choices is the exception rather than the rule.

R.B. v. Children's Aid Society, [1995] 1 S.C.R. 315.

Winnipeg Child and Family Service v. K.L.W., [2000] 2 S.C.R. 519.

See also: *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 (leave to appeal to SCC refused June 22, 2006).

62. This particular statement is also inconsistent with the rest of the Applications Judge's reasons since he did not have any difficulty with the impact on Mr. Taylor of his parents' decision to bring him to Canada in the first place. By eliminating the impact of parental decisions on children, the Applications Judge ultimately created a system whereby an individual can ignore the decisions made by their parents, and instead choose their preferred option upon becoming an adult. While Mr. Taylor's mother may not have stated her intention explicitly, her intention was shown clearly by her returning to England to live permanently. Mr. Taylor's own actions as an adult also show an intention to live outside of Canada permanently.

Taylor Affidavit, para. 37 / Appeal Book, Vol. 1, p. 176.

4. Mr. Taylor Lost Any Canadian Citizenship He Might Have Acquired

63. In the alternative, if Mr. Taylor acquired Canadian citizenship under the 1947 Act, he lost it pursuant to the loss provisions in that same Act.

64. The 1947 Act did not always grant a person Canadian citizenship in perpetuity. Instead, it provided that a person could acquire citizenship with conditions for its retention and that he or she ceased to be a Canadian citizen if those conditions were not satisfied. For example, as set out earlier, section 4(2) of the 1947 Act provided that a person who was a Canadian citizen under paragraph 4(1)(b) of that Act and was a minor on January 1, 1947, ceased to be a Canadian citizen on the date of his or her twenty-fourth birthday unless he or she was domiciled in Canada on that date or had filed a declaration of retention of Canadian citizenship before that date. As a further example also set out earlier, section 20 of the 1947 Act provided that a Canadian citizen other than a

natural-born Canadian citizen ceased to be a Canadian citizen if he or she resided outside of Canada for at least six consecutive years.

Canadian Citizenship Act, Parts I – III.

65. Mr. Taylor does not contest that he was not domiciled in Canada on the date of his twenty-fourth birthday or that he did not file a declaration of retention before that date. He also does not contest that he has resided outside of Canada for essentially his entire life. However, the Applications Judge determined that the loss provisions in the 1947 Act were unenforceable against Mr. Taylor because they were contrary to due process and procedural fairness. More particularly, the Applications Judge held that some form of proper notice of the loss provisions should be given to a person before he or she lost his or her Canadian citizenship. Since the loss provisions were contrary to due process, they infringed the rights guaranteed by sections 1(a) and 2(e) of the Bill of Rights and section 7 of the Charter.

Reasons, paras. 219 – 252 / Appeal Book, Vol. 1, pp. 91 – 104.

66. The Applications Judge's determination that due process or procedural fairness required that persons be given "proper" or additional notice of the loss provisions in the 1947 Act is contrary to long-standing parliamentary traditions and well-established legal principles. The legislative process is a public process. Any proposed federal legislation must receive three readings in the Senate and House of Commons and royal assent before it becomes an enacted law or Act. After enactment, an Act must still come into force. It is common for an Act to provide that it is to come into force at a time to be fixed by Order in Council. When an Act comes into force, it becomes binding on all those persons to whom it applies.

67. It is a well-recognized principle that ignorance of the law is no excuse. A person is presumed to know the law and is bound by the law. As an example of the application of this principle in a citizenship context, the applicant

in *McNeil v. Canada (Secretary of State)* [2000] F.C.J. No. 1477 (Q.L.), sought a declaration that she was still a Canadian citizen even though she had assumed American citizenship. The Federal Court dismissed the applicant's action and held that "it is well-recognized that ignorance of the law is no excuse and...there was an onus on [the applicant] to satisfy herself, in a reasonable time, as to the consequences of assuming American citizenship." The Courts have also recognized frequently in a criminal law context that ignorance of the law is not an excuse for committing an offence.

> *McNeil v. Canada (Secretary of State)*, [2000] F.C.J. No. 1477 (T.D.) (Q.L.).
>
> *R. v. Molis*, [1980] 2 S.C.R. 356 at p. 363.

68. This Court has also held that there is no basis in law for imposing a positive duty on government officials to forewarn persons that they might be impacted by pending legislation.

> *Canada (Minister of Citizenship and Immigration) v. dela Fuente*, 2006 FCA 186.

69. Requiring additional notice of particular provisions in an Act would create obvious practical problems. With respect to the 1947 Act, it is unclear how the government practically could have notified the persons potentially affected by the loss provisions, many of whom would have been outside of Canada. Requiring additional notice would also create a situation where laws of general application would not, in fact, apply equally to all persons since their application would depend on whether the persons had proper notice.

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

Authorson v. Canada (Attorney General), [2003] 2 S.C.R. 40 at paras. 37 – 46.

Tourki v. Canada (Minister of Public Service and Emergency Preparedness), 2006 FC 50 at para. 25.

71. The onus was on Mr. Taylor, who testified that he has known since his youth that he was a Canadian citizen, to satisfy the statutory conditions to retain his claimed citizenship. There is no evidence that Mr. Taylor took any action or sought any advice or information about his claimed citizenship until he was twenty-five years old. His failure to act does not amount to a violation of due process or procedural fairness by government officials.

McNeil v. Canada (Secretary of State), [2002] F.C.J. No.1477 (T.D.) (QL) at para. 36.

72. Furthermore, the Applications Judge misapplied both the Bill of Rights and the Charter. Section 1(a) of the Bill of Rights protects a person's right to life, liberty, security of the person and the right not to be deprived thereof except by due process of law. In turn, section 2(e) provides that no law shall be construed or applied to abrogate, abridge or infringe any of the rights or freedoms recognized in the Bill of Rights.

Canadian Bill of Rights, S.C. 1960, sections 1 and 2.

Authorson v. Canada (Attorney General), [2003] 2 S.C.R. 40 at para. 33.

73. The Bill of Rights protects only rights that existed prior to its passage in 1960. By that time, even if Mr. Taylor had acquired Canadian citizenship under the 1947 Act, he had already ceased to be a citizen. Nevertheless, the Applications Judge found that Mr. Taylor had a right in 1960 not to be arbitrarily deprived of his citizenship based on Article 15 of the *Universal Declaration of Human Rights* and section 46(1) of the 1947 Act which read as follows:

Article 15

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Section 46(1)

Notwithstanding the repeal of the *Naturalization Act* and the *Canadian Nationals Act*, this Act is not to be construed or interpreted as depriving any person who is a Canadian national, a British subject or an alien as defined in the said Acts or in any other law in force in Canada of the national status he possesses at the time of the coming into force of this Act.

74. The Application Judge's analysis is flawed. The UN General Assembly adopted and proclaimed Article 15 in 1948, after the 1947 Act came into force. The Applications Judge gave Article 15 equivalent status to Canadian domestic law but there was no enabling legislation passed by Parliament to incorporate it as such. Furthermore, the intent of the 1947 Act was clear.

> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 69.

75. With respect to section 46 of the 1947 Act, it is circular reasoning to suggest that it somehow preserved citizenship in all cases in the face of the explicit loss provisions in the same Act. Furthermore, the wording of section 46 refers to national status, subject status and alien status, and any other law. It does not refer to citizenship.

76. If Mr. Taylor had any right to Canadian citizenship in 1960, it was a limited right that required him to take active steps to maintain his citizenship. Mr. Taylor was obligated to know his rights and the limitations on those rights. The Bill of Rights did not remove this obligation.

77. Section 7 of the Charter provides that everyone 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.

Canadian Charter of Rights and Freedoms, section 7.

78. Even if section 7 of the Charter is engaged by the loss provisions, it is well-settled law that the Charter should not be applied retroactively. The loss provisions in the 1947 Act were enacted and repealed long before the Charter came into force.

Mack v. Canada (Attorney General) (2002), 217 D.L.R. (4th) Ont. C.A. at para. 20.

5. The 1977 Act Is Consistent With The Charter

79. Finally, the Applications Judge held that the 1977 Act, particularly section 3 of that Act, violated section 15 of the Charter. He found that it discriminated against Mr. Taylor on the basis that he was born outside of Canada and out of wedlock prior to February 15, 1977.

Reasons, paras. 253 – 283 / Appeal Book, Vol. 1, pp. 104 – 115.

80. Although the Applications Judge declared various subparagraphs in section 3 of the 1977 Act inoperative, the only subparagraph that is relevant to Mr. Taylor is section 3(1)(d). As set out earlier, that section provides that a person is a citizen if the person was a citizen immediately before February 15, 1977.

Citizenship Act, sections 3(1) and 8.

81. The Applications Judge's finding that section 3(1)(d) of the 1977 Act violates section 15 of the Charter is contrary to the Supreme Court of Canada's decision in *Benner*, which is the leading case on the proper application

of section 15 of the Charter in a citizenship context. His finding is also contrary to previous decisions of the Federal Court.

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

82. As submitted earlier, it is well-settled law that the Charter should not be applied retroactively. In *Benner*, the appellant challenged provisions in the 1977 Act that treated persons born abroad before February 1977 differently depending on whether they had a Canadian father or mother. The Court held that it was not a retroactive application of the Charter to review under section 15 the contemporary application of the provisions of the 1977 Act. Significantly, the Court carefully noted that it was not reviewing the provisions of the 1947 Act. The Court ultimately held that the provisions of the 1977 Act discriminated against the appellant and violated the Charter. Similarly, in *Augier v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 613, a decision relied on by the Applications Judge, the Federal Court found that the provisions of the 1977 Act were discriminatory because they explicitly incorporated sections of the 1947 Act. However, the Court again was not reviewing the 1947 Act.

Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358 at pp. 388 – 389 and 396 – 397.

Augier v. Canada (Minister of Citizenship and Immigration), 2004 FC 613.

83. The Court in *Benner* held that the important point in time in applying section 15 of the Charter to questions of status is not the moment at which a person acquires the status in question but is instead the moment at which the status is held against the person or disentitles him or her to a benefit. "Status" generally refers to immutable characteristics that are ascribed to a person at birth such as race or the marital status of the person's parents at the time of his or her birth. If a person's status was first held against him or her or first disentitled him or her to a benefit before section 15 of the Charter came into

force, then the Charter does not apply since that would require a retroactive application.

84. Section 3(1)(d) of the 1977 Act, unlike the provisions that were under review in *Benner* and *Augier*, does not discriminate against Mr. Taylor on the basis of any of the enumerated or analogous grounds under section 15 of the *Charter*. Mr. Taylor is treated under section 3(1)(d) like every other person who was not a citizen immediately before February 15, 1977.

85. The constitutional validity of section 3(1)(d) of the 1977 Act was considered previously by the Federal Court in *Dubey v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 582. In *Dubey*, the Honourable Mr. Justice Nadon found that the real source of any discrimination was the 1947 Act and he concluded that the plaintiffs were seeking a retroactive application of the *Charter*. At paragraphs 31 – 32 of his reasons, Mr. Justice Nadon stated:

> [31] In conclusion, there can be no doubt that what the plaintiffs are complaining of is that the 1947 Act did not allow them to acquire Canadian citizenship by a simple formality before the 1977 Act came into effect, unlike persons born abroad before 1947 whose father had the status of a British subject. In my opinion, that inequality occurred before s. 15 of the *Charter* came into effect.
>
> [32] Accordingly, in my view, the plaintiffs' approach is not based on contemporaneous application of legislation adopted before the Charter came into effect. What the plaintiffs are actually asking the Court is to go back into the past and correct an event they regard as "unjust". As I have already noted, this "unjust" event results solely from the 1947 Act, which did not allow them to become Canadian citizens by a simple declaration of intent before February 15, 1977.
>
> *Dubey v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 582.

86. In *Wilson v. Canada (Minister of Citizenship and Immigration)*, (2003) FC 1475, the Honourable Mr. Justice Harrington agreed with Mr. Justice Nadon's reasoning in *Dubey*. Since the 1977 Act does not deal with persons

born prior to 1947, it does not carry forward any legislative discrimination that has to be assessed against the Charter. Whether the trigger point was the date when the 1977 Act came into force or earlier dates when the applicant could or should have done something, the result is the same. The Acts that did not give the applicant the status he asserted had no current application and thus were not subject to the Charter. The 1977 Act snapped the chain of causality.

> *Wilson v. Canada (Minister of Citizenship and Immigration)*, (2003) FC 1475.

87. Since section 3(1)(d) does not discriminate against him, Mr. Taylor, like the plaintiffs in *Dubey*, necessarily challenged section 4(1)(b) of the 1947 Act, which treated a person differently depending on whether he or she was born in or out of wedlock and which of his or her parents was born in Canada, under section 15 of the Charter. However, the 1947 Act disentitled Mr. Taylor to Canadian citizenship when it came into force on January 1, 1947, and this disentitlement under the 1947 Act continued up until the coming into force of the 1977 Act. In short, Mr. Taylor's status disentitled him to Canadian citizenship well before the Charter came into force. Accordingly, any application of the Charter to the 1947 Act is, based on the test set out in *Benner*, a retroactive application.

88. The Applications Judge misapplied the test in *Benner* when he stated in the Reasons:

> [215] The Applicant made an application for proof of citizenship which was rejected on April 5, 2005. I agree with the Applicant that the "discrimination" complained of in this case coincides with the Citizenship Officer's decision to apply the requirement that his mother be Canadian since he was born out of wedlock. According to the un-contradicted evidence submitted by the Applicant, it is the first and only occasion where he was confronted with "discrimination" based on the lineage and sex of his natural parents who were not married at the time of his birth. For this reason, the facts in the present case are quite different from the factual situation considered by the Federal Court of Appeal in *McLean, supra.*

Reasons, para. 215 / Appeal Book, Vol. 1, p. 90.

89. The test in *Benner* requires a Court to determine when a person's status was first held against him or her or first disentitled him or her to a benefit rather than when the specific discrimination now complained of arose. By misapplying the test in *Benner* and not considering when Mr. Taylor was first disentitled to a benefit, the Applications Judge has erred in law and applied the Charter retroactively.

90. The analysis set out in *Dubey* and *Wilson* leads to more equitable results than the analysis proposed by the Applications Judge as demonstrated by the following example. Two persons, Person "A" and Person "B", were born overseas and out to wedlock to a non-Canadian mother prior to 1947. They apply for citizenship at different times. Person "A" attempts to assert her right to Canadian citizenship as soon as possible and she applies for proof of citizenship when she becomes an adult. However, her application is refused in the late 1960s because of the marital status of her parents. Meanwhile, Person "B" takes no action to assert her right to citizenship does nothing until 2000. In that year, both Person "A" and "B" apply for citizenship in 2000. Each is refused because they do not meet the requirements of the 1977 Act since neither was a citizen immediately prior to the coming into force of that Act and do not otherwise meet the criteria. Applying the analysis used by the Applications Judge, Person "B" would have a Charter right to citizenship while Person "A" would not. In this situation, the person who has taken the least interest in their rights and obligations is the one who will receive the greater benefit of the law. In contrast, the analysis in *Dubey* and *Wilson* would lead to the same result for both Person "A" and "B".

91. In summary, section 3(1)(d) of the 1977 Act does not violate section 15 of the Charter. Furthermore, any discrimination against Mr. Taylor under the 1947 Act occurred before the Charter came into force. Accordingly, the

Applications Judge erred in law by applying the Charter to the 1947 Act. It is well-settled that the Charter should not be applied retroactively.

PART IV – CONCLUSION and ORDER SOUGHT

92. In conclusion, Mr. Taylor has never acquired Canadian citizenship. Furthermore, if he did acquire citizenship at some point, he subsequently lost it by operation of law. Accordingly, the Minister seeks an Order setting aside the Order of the Applications Judge and dismissing Mr. Taylor's application for judicial review, all without costs.

93. In the event that the Minister is not successful on this appeal, she requests that the stay of the Application Judge's Order that was granted by Mr. Justice Letourneau be continued until the time for leave to appeal expires or until such time as the Supreme Court of Canada finally determines this matter, or by further order of the Court.

Schreiber v. Canada (Attorney General), [1997] 2. F.C. 176 (C.A.) at para. 89.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED January 29, 2007, at the City of Vancouver, in the Province of British Columbia.

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PART V – LIST OF AUTHORITIES

Appendix A – Statutes and Regulations

Act to Amend the Immigration Act and to repeal the Chinese Immigration Act, S.C. 1947 c. 19.

Canadian Bill of Rights, S.C. 1960, sections 1 and 2.

Canadian Charter of Rights and Freedoms, section 7.

Canadian Citizenship Act, S.C. 1946, c. 15.

Canadian Nationals Act, R.S.C. 1927, c. 2.

Citizenship Act, S.C. 1974-75-76, c. 108.

Immigration Act, 1910, R.S.C. 1927, c. 93.

Naturalization Act, 1914, R.S.C. 1927, c. 138.

Order in Council P.C. 7318 (September 21, 1944).

Order in Council P.C. 858 (February 9, 1945).

Order in Council P.C. 4216 (October 11, 1946).

Appendix B – Authorities

Augier v. Canada (Minister of Citizenship and Immigration), 2004 FC 613.

Authorson v. Canada (Attorney General), [2003] 2 S.C.R. 40.

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

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

Canada (Minister of Citizenship and Immigration) v. de la Fuente, 2006 FCA 186.

Deacon v. Canada (Attorney General) (2006), 352 N.R. 380 (F.C.A.).

De Guzman v. Canada (Minister of Citizenship and Immigration), 2005 FCA 436 (leave to appeal to SCC refused June 22, 2006).

Dubey v. Canada (Minister of Citizenship and Immigration), 2002 FCT 582.

Kelly v. Canada (Minister of Citizenship and Immigration) (1998), 161 F.T.R. 93

Mack v. Canada (Attorney General) (2002), 217 D.L.R. (4th) Ont. C.A.

McLean v. Canada (Minister of Citizenship and Immigration) (1999), 177 F.T.R. 219.

McLean v. Canada (Minister of Citizenship and Immigration), [2001] 3 F.C. 127 (C.A.).

McNeil v. Canada (Secretary of State), [2002] F.C.J. No.1477 (QL).

R. v. Molis, [1980] 2 S.C.R. 356.

R.B. v. Children's Aid Society, [1995] 1 S.C.R. 315.

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27.

Solis v. Canada (Minister of Citizenship and Immigration) (2000), 186 D.L.R. (4th) 512 (F.C.A.) (Leave to appeal to SCC refused [2002] S.C.C.A. No. 249 (QL)).

Tourki v. Canada (Minister of Public Service and Emergency Preparedness), 2006 FC 50.

Veleta v. Canada (Minister of Citizenship and Immigration) (2005), 273 F.T.R. 108.

Veleta v. Canada (Minister of Citizenship and Immigration) (2006), 268 D.L.R. (4th) 513 (F.C.A.).

Wilson v. Canada (Minister of Citizenship and Immigration), (2003) FC 1475.

Winnipeg Child and Family Service v. K.L.W., [2000] 2 S.C.R. 519.

Hogg, Peter. Constitutional Law of Canada (5th), 2006 (Toronto: Thomson Carswell) loose leaf edition at pp. 26-5 to 26-6.