# *TAYLOR V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)*: DISCRIMINATION, DUE PROCESS, AND THE ORIGINS OF CITIZENSHIP IN CANADA

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## I. INTRODUCTION

The following is a case comment on the Federal Court of Canada's decision in *Taylor v. Canada (Minister of Citizenship and Immigration)*.[1] The significance of Martineau J.'s decision in this case, which the Minister has appealed to the Federal Court of Appeal, is threefold. First, this is the first time the Federal Court has made an attempt to clarify citizenship as a concept and, more particularly, to clarify the origins of Canadian citizenship. Although this task was an extraordinary feat, Martineau J.'s analysis and final conclusions in this area were flawed. He failed to distinguish the conceptual difference between "citizenship" for the purposes of immigration law and "citizenship" under Canadian citizenship law. To be a "citizen" under immigration law is to have the right to enter, remain, and leave Canada — nothing more. Immigration law, although very complex, is simply about mobility rights and is inherently exclusive. It distinguishes between two groups: citizens, who have an unfettered right to enter a state's borders, and aliens, who have no right of access except for those granted by the state. Immigration law acts as a gatekeeper protecting a state's borders by controlling who is admitted and the length of time they are permitted to stay. Citizenship law, on the other hand, confers much more than mobility rights. Not only does it incorporate the foundational right to enter, remain, and leave Canada found in immigration law, but it also guarantees a larger bundle of rights for individuals who are citizens by birth (*jus soli*), citizens by descent (*jus sanguinis*), and those who have acquired citizenship after immigration (a process known as naturalization). The legislative origins of this separate type of citizenship are found in the Canadian *Citizenship Act*[2] which entered into force on 1 January 1947. Conversely, the notion of Canadian citizenship for immigration purposes was formalized decades earlier with the passing of the first piece of Canadian immigration legislation in 1910.[3]

Justice Martineau's failure to appreciate this fundamental difference lead to the mistaken conclusion that the *Order in Council re entry into Canada of dependents of members of the Canadian Armed Forces*[4] — a piece of legislation that pre-dated the *Citizenship Act, 1947* — actually conferred citizenship status upon Mr. Taylor for all purposes. In coming to this conclusion, Martineau J. blurred the lines between immigration law and citizenship law and granted Taylor more status than Parliament ever intended him to have. Thus, it is questionable whether Martineau J.'s decision in *Taylor* has clarified our understanding of the origins of Canadian citizenship, or whether it has confused the issue even more.

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* B.A. Honours (2002), LL.B. (2007), University of Saskatchewan. This case comment was published just as the Federal Court of Appeal's decision on this matter was rendered. An additional comment will be forthcoming with respect to the decisions of the Federal Court of Appeal and potentially the Supreme Court of Canada.

1 2006 FC 1053, 56 Imm. L.R. (3d) 220, leave to appeal to F.C.A. granted [*Taylor*].

2 S.C. 1946, c. 15 [*Citizenship Act, 1947*].

3 *Immigration Act*, S.C. 1910, c. 27, as am. by R.S.C. 1927, c. 93 [*Immigration Act, 1910*].

4 P.C. 858 (entered into force 9 February 1945) [*Order in Council, 1945*].

Second, Martineau J.'s method of analysis in this case is unique. Instead of relying on the *Canadian Charter of Rights and Freedoms*[5] as the Federal Court and Supreme Court of Canada have done in similar cases in the past, Martineau J. took it upon himself to conduct an historical analysis of the origins of Canadian citizenship before concluding that Taylor is a Canadian citizen. Both the Federal Court and the Supreme Court have found that the denial of citizenship status based on one's date of birth, the gender of one's Canadian parent, or the marital status of one's parents at the time of birth, is discriminatory. In this case, discrimination on these three grounds seems almost apparent. Thus, it is questionable why Martineau J. went to such lengths to review the origins of Canadian citizenship to find that the *Order in Council, 1945* conferred citizenship status upon Taylor when he simply could have relied on the jurisprudence that had already been established in this area. Although Martineau J. did state in *obiter* that the effect of the citizenship provisions was discriminatory, he should have based his decision on the s. 15 *Charter* violation and left the analysis of the origins of Canadian citizenship to historians.

Third, the *Taylor* decision may affect the automatic loss provisions in the current *Citizenship Act*.[6] Currently, the Government of Canada does not give notice before a person's citizenship status is lost. Justice Martineau stated in *obiter* that the automatic loss provisions are contrary to due process, that they infringe ss. 1(d) and (e) of the *Canadian Bill of Rights*[7] and s. 7 of the *Charter*, and that the government has an obligation to provide some form of proper notice before a person's status is revoked. It will be interesting to see whether the Federal Court of Appeal agrees with Martineau J. on this point, and if it does, whether the government will be able to cope with this onerous task in the future.

## II. FACTS

Taylor, the son of a Canadian soldier and British mother, was born out of wedlock in England in 1944. His parents married on 5 May 1945. Taylor's father returned to Canada after the war and was joined by Taylor and his mother upon their arrival in Canada on 4 July 1946. Within a few months, the marriage broke down and Taylor returned to England with his mother, six weeks before the Canadian *Citizenship Act, 1947* came into force.

After a trip to Canada in 1999, Taylor approached the High Commission in London to inquire about moving to Canada. He was advised that, although he had been a Canadian citizen, he had lost his citizenship status on his twenty-fourth birthday because he had failed to make an application to retain his status.

In February 2003, Taylor applied for a certificate of Canadian citizenship on the basis that he was the son of a Canadian soldier. The Consulate refused to process his application on the ground that he had ceased to be a Canadian citizen on his twenty-fourth birthday. In November 2003, Taylor made a second application for proof of citizenship, which was accepted for processing. However, in April 2005, this application was dismissed by Canadian Citizenship

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5 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

6 R.S.C. 1985, c. C-29 [*Citizenship Act, 1985*].

7 S.C. 1960, c. 44.

Officer M.A. Hefferon, on the ground that Taylor had never acquired Canadian citizenship status. Relying on the *Citizenship Act, 1947*, Hefferon concluded that Taylor, like all children born out of wedlock, was required to take the citizenship status of his mother. Thus, as an illegitimate child, Taylor was denied Canadian citizenship because he could not derive his status from his father regardless of his parents' subsequent marriage after his birth. Taylor sought judicial review of the citizenship officer's decision by the Federal Court of Canada.

Justice Martineau set aside the officer's decision, declared Taylor a Canadian citizen, and directed the Minister to issue a certificate of citizenship to Taylor. According to Martineau J., Hefferon erred by failing to take into account the *Order in Council, 1945*, which was issued by the Government of Canada to assist the entry of Canadian soldiers' dependents into Canada after World War II.[8] After considering Parliament's intention for issuing the *Order*, Martineau J. concluded that the *Order* superseded the immigration legislation of the time and ultimately conferred Canadian citizenship status upon Taylor.[9] Thus, although the *Citizenship Act, 1947* required Taylor to assume the citizenship status of his mother at the time of his birth, the *Order* effectively allowed Taylor to acquire Canadian citizenship status from his father, regardless of his status as an illegitimate child.

Justice Martineau went on to reject the Minister's alternative argument that, even if Taylor had acquired Canadian citizenship, his status was lost on the day of his twenty-fourth birthday because he had failed to make an application to retain his status. In Martineau J.'s view, the automatic withdraw of citizenship under the *Citizenship Act, 1947* without notice was a denial of due process contrary to ss. 1(a) and (e) of the *Canadian Bill of Rights* and s. 7 of the *Charter*.[10]

After concluding that Taylor was a Canadian citizen and that this status was never lost, Martineau J. turned his mind to the provisions under the both *Citizenship Act, 1947* and the *Citizenship Act* of 1977[11] which provided for the differential treatment of children born before 15 February 1977 and those born after this day. Applying the *Charter*, Martineau J. held that the provisions that denied citizenship to children born out of wedlock were discriminatory and constituted a violation of the equality right in s. 15(1) of the *Charter*.[12] These provisions could not be saved by s. 1 of the *Charter*, and were therefore deemed to be of no force and effect. The Minister of Citizenship and Immigration appealed Martineau J.'s decision on all grounds.[13]

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8 *Taylor*, *supra* note 1 at para. 177.

9 *Ibid.* at paras. 249-52.

10 Justice Martineau rejected the Minister's argument that the issue in the case at bar involved a retrospective or retroactive application of the *Charter* (*Taylor*, *ibid.* at paras. 188-90). Keeping in line with the Supreme Court of Canada's decision in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 [*Benner*], Martineau J. found that the *Charter* could be applied in this case, as the relevant point in the analysis was not the date of Taylor's birth, which was pre-*Charter*, but the time when he first applied for a citizenship certificate, which was post-*Charter* (*Taylor*, *ibid.* at para. 217). Thus, because the provisions of the *Citizenship Act, 1947* in effect denied a person a benefit of the law in the post-*Charter* era, the provisions were not immune from *Charter* scrutiny. Further discussion on this topic can be found in Part III.C, below.

11 S.C. 1974-75-76, c. 108 [*Citizenship Act, 1977*].

12 *Taylor*, *supra* note 1 at para. 283.

13 The appeal was heard on 18 September 2007.

The accuracy of Martineau J.'s interpretation of the effect of the *Order in Council, 1945* is questionable. It will be interesting to see if the Federal Court of Appeal upholds his decision on these grounds, or whether it will place more emphasis on the equality rights at issue in this case. Furthermore, will the Federal Court of Appeal agree with Martineau J.'s comments made in *obiter* that proper notice must be given to citizens before their status is revoked by the automatic loss provisions? If so, this case will certainly have a profound effect on citizenship law in the future.

## III. ISSUES UNDER REVIEW

### A. PARLIAMENT'S PURPOSE AND INTENT BEHIND THE *ORDER IN COUNCIL, 1945*: A DECLARATION OF THE RIGHT TO ENTER AND REMAIN IN CANADA? OR A CONFERRAL OF CANADIAN CITIZENSHIP STATUS FOR ALL PURPOSES?

The parties agreed that Taylor's father, having been born in Canada, was a Canadian citizen, but differed on the citizenship status held by Taylor after his arrival in Canada. Taylor relied on the *Order in Council, 1945*, arguing that the *Order* effectively gave him Canadian citizenship status upon his landing in Canada in 1946. The *Order* was issued in 1945 by the Government of Canada in response to the influx of war brides and dependant children who came to Canada after World War II. The *Order* facilitated the entry of war brides and their children and, upon landing in Canada, automatically conferred upon them the same status held by the respective Canadian soldier they were joining.[14] Thus, Taylor and his mother, like all dependents coming to Canada under the *Order* prior to 1 January 1947, acquired either Canadian domicile or citizenship within the meaning of the *Immigration Act, 1910*.[15]

According to the Ministry, however, status as a Canadian citizen under the *Immigration Act, 1910* did not equate with citizenship status under the *Citizenship Act, 1947*. Considering the specific wording of the *Order in Council, 1945*, there may be some merit to the Ministry's position. The *Order* stated that:

> Every dependent … shall be permitted to enter Canada and upon such admission shall be deemed to have *landed within the meaning of Canadian immigration law* … [and] for the *purpose* of Canadian *immigration* law 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.[16]

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[14] The *Order in Council, 1945* waived many of the conditions of entry and landing for war brides and their dependants. All were automatically admitted, with the exception of those who either failed a medical examination, or failed to produce a medical certificate establishing that they did not suffer from an infectious or contagious disease.

[15] *Supra* note 3, s. 3. Under the *Act*, only Canadian citizens and Canadian domiciliaries were allowed to enter and remain in Canada. "Domicile" was defined in s. 2(d) *Act* as "the place in which a person has his present home, or in which he resides, or to which he returns as his place of present permanent abode, and not for a mere special or temporary purpose." Section 2(d) further outlined that Canadian domicile was acquired by a person if that person had been domiciled in Canada for at least three years after landing therein, excluding any time spent in a penitentiary, jail, asylum, etc.

[16] *Order in Council, 1945*, *supra* note 4 at paras. 2-3 [emphasis added].

The specific reference to immigration law in the *Order* may be trivial, since there existed no citizenship legislation at time the *Order* was enacted. The first piece of Canadian citizenship legislation did not come into force until 1947. Thus, Parliament's reference to "admission … within the meaning of Canadian immigration law … [and] for the purpose of Canadian immigration law"[17] in the *Order* cannot be interpreted as a deliberate exclusion of any citizenship legislation. But what was Parliament's intention behind the phrase: "for the purpose of Canadian immigration law be deemed a Canadian citizen … [and] deemed to have Canadian domicile"?[18] Did Parliament simply intend to give dependants status as citizens for the purposes of immigration law so they could enter and remain in Canada? Or, if the *Citizenship Act, 1947* existed at the time, would Parliament have also conferred this additional status upon the soldier's dependants? In other words, did the *Order in Council, 1945* declare dependents of Canadian soldiers citizens for the limited purpose of entry into Canada, or did it automatically give them complete citizenship status and the bundle of rights and responsibilities associated with such status? This was the issue before Martineau J. If the *Order* conferred only a right of entry, Taylor would not be considered a Canadian citizen today. However, if Parliament intended to confer all rights to those who came to Canada as dependents under the *Order*, Taylor would have acquired Canadian citizenship status as soon as he arrived in Canada, and would have remained a citizen until his twenty-fourth birthday (at which time, he would have been required to make an application to retain his status).

On its face, the phrase could simply be a clarification of the class under which the war brides and dependents were admitted — as Canadian citizens or domiciliaries as opposed to immigrants. Keeping in line with the intention to facilitate their admittance into Canada, Parliament automatically conferred upon them this "advanced" status instead of deeming them immigrants. As part of the immigrant class, they would be required to apply for, and receive, citizen or domiciliary status to be legally entitled to remain in Canada. However, Martineau J. found that Parliament intended the *Order in Council, 1945* to confer much more than just the right to remain in Canada. In addition to this basic right, Martineau J. held that Parliament's intention was to grant additional rights, those of "citizenship."[19]

The courts have been clear that Canadian citizenship is a creature of federal statute law and "has no meaning apart from statute."[20] Thus, until the first *Citizenship Act, 1947* was enacted the concept of Canadian citizenship existed only within the realm of immigration law. Under the *Immigration Act, 1910*, "Canadian citizen" was defined as:

i. a person born in Canada who has not become an alien;

ii. a British subject who has Canadian domicile; or,

iii. a person naturalized under the laws of Canada who has not subsequently become an alien or lost Canadian domicile.[21]

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17 *Ibid.*

18 *Ibid.* at para. 3.

19 *Taylor*, *supra* note 1 at para. 177.

20 *Solis v. Canada (Minister of Citizenship and Immigration)* (2000), 186 D.L.R. (4th) 512 at para. 4 (F.C.A.); Peter W. Hogg, Constitutional Law of Canada, 3rd ed. (Toronto: Carswell, 1992) at 833.

21 *Immigration Act, 1910*, *supra* note 3, s. 2(f).

All other persons admitted to Canada were either "aliens"[22] or "immigrants."[23]

Under the *Citizenship Act, 1947*, a person was a Canadian citizen if, prior to 1 January 1947, he or she was either a natural-born Canadian citizen or a Canadian citizen other than a natural-born citizen.[24] The *Citizenship Act, 1947* effectively extended the rights enjoyed by a citizen. Under the *Immigration Act, 1910*, a citizen only had the right to enter and remain in Canada. The *Citizenship Act, 1947* recognized this right but, more importantly, it officially created the concept of a "Canadian," ultimately creating a distinct sort of membership within the world, and within the British Empire.[25]

Whether Taylor was granted only the right to enter Canada or whether the *Order in Council, 1945* conferred upon him citizenship status in the fullest sense of the term is strictly an issue of statutory interpretation: is there any difference in the meaning of citizenship under the *Immigration Act, 1910* and the meaning of citizenship under the *Citizenship Act, 1947*? The difficulty in determining whether "citizenship" under the *Immigration Act, 1910* translated into citizenship status under the *Citizenship Act, 1947* arises out the absence of the definition of citizenship in both statutes.[26] As mentioned previously, within the context of immigration law, the term "citizen" is used to distinguish a person who has an unfettered right to enter, remain in, and leave Canada versus an "alien" who has no right of entry.[27] Citizenship in this context represents membership and "belonging," inherently creating an "us" versus "them" dichotomy. The advent of Canadian citizenship law expanded citizenship as a concept by recognizing additional rights and obligations of persons holding such status including, *inter alia*, the right to vote and hold public office, language rights, and privileged access to the Federal Public

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22 "Alien" is defined in the *Immigration Act, 1910*, *ibid.*, s. 2(e) as "a person who is not a British subject."

23 Under the *Immigration Act, 1910*, *ibid.*, "immigrant" meant any "person who enters Canada with the intention of acquiring Canadian domicile, and for the purposes of this Act every person entering Canada shall be presumed to be an immigrant unless belonging to one of the … 'non-immigrant classes.'" The non-immigrant classes included, *inter alia*, Canadian citizens and Canadian domiciliaries, diplomatic and consular officers, tourists and travelers passing through Canada to another country, students, performers, and athletes: see *ibid.*, s. 2(g).

24 *Citizenship Act, 1947*, *supra* note 2, ss. 4, 9. For the text of these provisions, see *infra* note 41 and accompanying text.

25 The *Naturalization Act, 1914*, R.S.C. 1927, c. 138, also did not provide for Canadian citizenship, but distinguished British subjects from non-British subjects; *Veleta v. Canada (Minister of Citizenship and Immigration*), 2005 FC 572, 254 D.L.R. (4th) 484, rev'd on other grounds, 2006 FCA 138, 268 D.L.R. (4th) 513. Justice Martineau also seems to have mistakenly placed more merit on the purpose and effects of the *Canadian Nationals Act*, R.S.C. 1927, c. 21 than the legislation deserved. Although he admits that the dominant purpose for enacting the legislation (and creating the concept of Canadian national status) was to permit participation in the Permanent Court of International Justice, Martineau J. found that the meaning of "nationality" under this legislation was akin to citizenship: *Taylor*, *supra* note 1 at paras. 96-98. Admittedly, the *Canadian Nationals Act* may have laid the foundations for the concept of citizenship; however, it did not go so far as to confer the rights of citizenship status upon Canadians. Had it done so, Parliament would not have found it necessary to enact the first *Citizenship Act, 1947* twenty-six years later.

26 The current *Citizenship Act* offers little assistance, as it merely defines "citizenship" for the purposes of that *Act* as meaning "Canadian citizenship": *Citizenship Act, 1985*, *supra* note 6, s. 2(1).

27 In *Canada (Minister of Citizenship and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at 732, the Supreme Court of Canada rejected the applicant's claim that a deportation order against him (a permanent resident) violated his s. 7 *Charter* rights, stating that the "most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country."

Service[28] – many of which are protected by the *Charter*.[29] It is within this context that Martineau J. correctly postulated "that Canadian citizenship represents a sharing of sovereignty and a social contract between individuals and our society as a whole."[30] However, in his decision, Martineau J. blurred this distinction between citizens in the context of immigration law and citizens for the purposes of citizenship law by failing to recognize that the rights of citizens for the purposes of immigration law are quite different (and much more limited) than the rights of citizens under citizenship law.

Ignoring previous jurisprudence that Canadian citizenship was non-existent before 1947,[31] Martineau J. held that, in 1945, Parliament intended to do more than facilitate the entry of war brides and their children; Parliament also intended to confer upon them citizenship status. He ultimately found that the *Order in Council, 1945* was "tantamount to a statutory grant of Canadian citizenship."[32] He supported this finding with the assertion that, in his opinion, had the *Order* been enacted after the coming into force of the *Citizenship Act, 1947*, the words of the *Order* "would have reflected the intention of the Governor in Council of conferring … 'citizenship status' for all purposes."[33]

However, Martineau J. failed to consider Parliament's decision not to extend the meaning of citizenship to include those extended rights granted under the *Citizenship Act, 1947* when it issued the *Order in Council amending P.C. 858, February 9, 1945, re immigrant status of dependents of members of the Armed Forces of Canada*.[34]As the Minister stated in its Memorandum of Law to the Federal Court of Appeal, "[e]ven knowing that Parliament had passed the 1947 [*Citizenship*] *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 war brides and their children."[35] Furthermore, when Parliament

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28 See *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769.

29 *Supra* note 5, ss. 3, 16, 23. Furthermore, the current *Citizenship Act, 1985*, *supra* note 6, s. 6, specifically states that "[a] citizen, whether or not born in Canada, is entitled to all rights, powers and privileges and is subject to all obligations, duties and liabilities to which a person who is a citizen under paragraph 3(1)(a) is entitled or subject and has a like status to that of such person."

30 *Taylor*, *supra* note 1 at para. 44.

31 In *Benner*, *supra* note 10 at para. 30, Iacobucci J., for a unanimous court, explicitly stated that "[b]efore 1947, there was no concept of Canadian citizenship." In *McLean v. Canada (Minister of Citizenship and Immigration)* (1999), 177 F.T.R. 219 at para. 13, aff'd 2001 FCA 10, [2001] 3 F.C.R 127 (C.A.) at para. 5 [*McLean*], the Federal Court and Federal Court of Appeal also addressed the foundations of Canadian citizenship and held "that the concept of Canadian citizenship was introduced on January 1, 1947, with the enactment of the *Canadian Citizenship Act*." Although Martineau J. did turn his mind to the jurisprudence established in *Benner* and *McLean* regarding the retrospective application of the *Charter*, he failed to recognize the courts' reasoning in those cases with regard to the date Canadian citizenship came into existence.

32 *Taylor*, *supra* note 1 at para. 177.

33 *Ibid.*

34 P.C. 4216 (entered into force 11 October 1946) [*Order in Council,1946*].

35 Appellant's Memorandum of Fact and Law to the Federal Court of Appeal in *The Minister of Citizenship and Immigration v. Taylor* at para. 50 [emphasis added] [Appellant's Memorandum]. Enacted shortly prior to the *Citizenship Act, 1947*, the *Order in Council, 1946*, *ibid.*, explicitly stated that the grant of citizenship and domiciliary status upon war brides and their dependents was only for immigration purposes: "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 of February, 1945, *which relates to the immigration status* and granting of free medical examination to dependents to conform with the said Order in Council P.C. 4044" [emphasis added].

introduced amendments to the *Immigration Act, 1910* in 1952,[36] the provisions of the *Order in Council, 1945* were included in that *Act*. Although Martineau J. made this observation in passing,[37] he failed to consider the significance of Parliament's decision not to include the terms of that *Order* in the *Citizenship Act, 1947* or its amending legislation in 1952[38] and 1953.[39] If Parliament intended to confer citizenship status on the war brides and their children as Martineau J. suggests, one would assume that Parliament would have also included the terms of the *Order in Council, 1945* in the various amendments to the *Citizenship Act, 1947* as it did when it amended the *Immigration Act, 1910* in 1952.[40] Parliament's decision not to include the terms of the *Order* in the *Citizenship Act, 1947* suggests that Parliament never intended to grant citizenship status to Canadian war brides and their children under the *Order in Council, 1945*.

If the preceding discussion is true and the *Order* simply conferred an "advanced" status upon war brides and their children to facilitate their entry into Canada then, at best, Taylor acquired immigrant status under the *Immigration Act, 1910* (or permanent resident status as we know it today) when he landed in Canada. To become a Canadian citizen under the *Citizenship Act, 1947*, Taylor, like any person born prior to 1 January 1947, would have been required to meet the criteria set out in either ss. 4 or 9(1):

> 4. A person, born before the commencement of this Act, is a natural-born Canadian citizen:—
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> (a) if he was born in Canada or on a Canadian ship and has not become an alien at the commencement of this Act; or
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> (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
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> (ii) was, at the time of the person's birth, a British subject who had Canadian domicile,
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> if, at the commencement of [the] Act, that person [had] not become an alien, and [had] either been lawfully admitted to Canada for permanent residence or [was] a minor.
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> …
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> 9.(1) A person other than a natural-born Canadian citizen, is a Canadian citizen, if he
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> (a) was granted, or his name was included in a certificate of naturalization and he has not become an alien at the commencement of this Act; or

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36 *An Act to amend the Immigration Act*, S.C. 1946, c. 54.

37 See *Taylor*, *supra* note 1 at para. 119.

38 *The Canadian Citizenship Act*, R.S.C. 1952, c. 33.

39 *Act to amend The Canadian Citizenship Act*, S.C. 1952-533, c. 23 [*Citizenship Amendment Act, 1953*].

40 In further support of Parliament's intention to maintain the separation between immigration and citizenship law, when Parliament introduced amendments to the *Immigration Act, 1910* in 1947 (*An Act to Amend the Immigration Act*, S.C. 1947, c. 19), it incorporated the terms of the *Order in Council, 1945*, but made no mention of the *Citizenship Act, 1947*, which was already in force at that time: see Appellant's Memorandum, *supra* note 35 at para. 51.

(b) immediately before the commencement of this Act was a British subject who had Canadian domicile.[41]

Since Taylor was not born in Canada and was a child born out of wedlock to a woman who, although a British subject, did not have a Canadian domicile at the time of Taylor's birth, Taylor did not satisfy the requirements in s. 4. He also failed to meet the criteria in s. 9, because he did not have domiciliary status immediately prior to 1 January 1947.[42] Thus, under the *Citizenship Act, 1947*, Taylor would not be considered a Canadian citizen. Consequentially, Taylor would not be considered a Canadian citizen under the current *Citizenship Act, 1985*, since he was not a citizen immediately prior to 15 February 1977.[43]

However, as previously mentioned, Martineau J. held that the status awarded to war brides and their dependents by the *Order in Council, 1945* was tantamount to a statutory grant of citizenship. A factor leading him to this conclusion was that any war brides and dependents arriving after 1 January 1947 and before 15 May 1947 (the date when the *Order in Council, 1945* expired) were automatically granted Canadian citizenship. Justice Martineau took issue with the possibility of differential treatment for those who arrived before and after 1 January 1947, stating:

> There is no distinction in *Order in Council*, [*1945*] between the dependents who have landed before and those who landed after January 1, 1947. The legal distinction … has the effect of placing the dependents who landed between January 1, 1947 and May 15, 1947 in a better position than dependents who landed prior to January 1, 1947. This was certainly not the intention of the drafters of the *Order in Council*, [*1945*] or of the Governor in Council in promulgating the same.[44]

Although this purported differential treatment seems irrefutably discriminatory, Martineau J. failed to give sufficient weight to a significant factor setting Taylor apart from those who arrived before and after 1 January 1947; that is, that Taylor left Canada prior to the enactment of the *Citizenship Act, 1947* and re-established domicile in Britain.[45] Thus, unlike many of the

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41 *Supra* note 2, ss. 4, 9(1). Section 4 was amended by the *Citizenship Amendment Act, 1953*, *supra* note 39, and replaced with a similar provision, under which Taylor also would not have satisfied the requirements to be deemed a "natural-born Canadian citizen."

42 Whether a person had Canadian domicile immediately prior to the coming into force of the *Citizenship Act, 1947* was assessed using the same criteria used to determine Canadian domicile under the *Immigration Act, 1910*: see *Citizenship Act, 1947*, *supra* note 2, s. 43. Under the *Immigration Act, 1910*, *supra* note 3, s. 2(d), Canadian domicile was acquired "by a person having his domicile for at least three years in Canada after having been landed therein within the meaning of this Act.… Canadian domicile is lost, for the purposes of this Act, by a person voluntarily residing out of Canada, not for a mere special or temporary purpose, but with the present intention of making his permanent home out of Canada."

43 The requirements for citizenship are set out in s. 3 of the *Citizenship Act, 1985*. Sections 3(d) and (e) apply to persons born prior to 15 February 1977. According to the current *Act*, a person is a Canadian citizen if she was a citizen immediately before 15 February 1977 or was entitled to citizenship under paragraph 5(1)(b) of the *Canadian Citizenship Act*, R.S.C. 1970, c. C-19 [*Citizenship Act, 1970*]. Since Taylor was not a citizen before 15 February 1977 and was not entitled to citizenship under s. 5(1)(b) of the former *Act*, he also fails to qualify for citizenship under the current *Act*. See *infra* note 50 and accompanying text for the provisions of ss. 3, 5(2)(b) of the current *Act* and s. 5(1)(b) of the former *Act*.

44 *Taylor*, *supra* note 1 at para. 175.

45 As a minor, Taylor's domicile would be one of dependency. Since his parents did not have the same place of domicile and he lived with only one parent, his mother, he would take the domiciliary status held by his mother.

war brides and dependents coming to Canada under the *Order*, Taylor did not have a Canadian domicile immediately before the coming into force of the *Citizenship Act, 1947*. Justice Martineau ignored this distinction and, consequentially, failed to place sufficient weight on this factor in coming to his decision.

To summarize the arguments made thus far, Martineau J. mistakenly found that Taylor acquired Canadian citizenship by blurring the distinction between immigration and citizenship law. He failed to appreciate Parliament's choice not to incorporate the terms of the *Order in Council, 1945* into citizenship legislation. Parliament's inclusion of the *Order* in the applicable immigration legislation suggests that Parliament did, in fact, intend to limit the citizenship status that was conferred upon war brides and their dependents for the purposes of immigration only. Thus, war brides and their dependents could only become Canadian citizens under the *Citizenship Act, 1947* if they satisfied the criteria set out in ss. 4 and 9 of the *Act*. Since Taylor's mother was not a Canadian citizen at the time of his birth and he did not have a Canadian domicile immediately before the coming into force of the *Citizenship Act, 1947*, Taylor failed to meet the criteria for acquiring Canadian citizenship status under that *Act*.

Last, Martineau J. placed insufficient weight on Taylor's loss of Canadian domicile prior to the enactment of the *Citizenship Act, 1947*. Admittedly, it would seem quite unfair to deny citizenship status to any wife or dependent who came to Canada under the *Order in Council, 1945*, simply because she came to Canada before the enactment of the *Citizenship Act, 1947*. However, the *Act* does not do so. If a person can show that she had the requisite domiciliary status before 1 January 1947, the *Act* will recognize that person as a Canadian citizen for the purposes of Canadian citizenship legislation. Taylor did not have a Canadian domicile immediately prior to 1 January 1947, nor has he ever re-established a Canadian domicile after returning to England in 1947. Thus, Taylor's situation can be distinguished from the situation of war brides and dependants who came to Canada under the *Order* and remained there until, at least, the enactment of the *Citizenship Act, 1947*. Unlike these people, Taylor never acquired Canadian citizenship under the *Citizenship Act, 1947* or any subsequent citizenship legislation.

### B. EQUALITY RIGHTS: DISCRIMINATORY TREATMENT UNDER THE *CITIZENSHIP ACT*

After concluding that Taylor had acquired Canadian citizenship under the *Order in Council, 1945*, Martineau J. examined Taylor's *Charter* challenge to ss. 3 and 8 of the current citizenship legislation.[46] On this ground, Taylor argued that the prior and current citizenship legislations were discriminatory, because the legislations treat illegitimate children born outside

[46] A person need not be a citizen in order to invoke a *Charter* right. For example, in *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 202, the Supreme Court of Canada held that "everyone" in s. 7 included "every human being who is physically present in Canada [is] by virtue of such presence amenable to Canadian law." In *R. v. A.*, [1990] 1 S.C.R. 995, the Supreme Court also suggested that even persons outside Canada are entitled to *Charter* rights. However, this is likely restricted to citizens: Peter W. Hogg, *Constitutional Law of Canada*, 2006 Student Edition (Scarborough, Ont.: Carswell, 2006) at 791. However, it is important to note that some *Charter* rights are restricted to citizens, for example, voting rights (s. 3) and mobility rights (s. 6). Section 15 is not restricted to citizens, as it explicitly confers equality rights on "every individual." Thus, Taylor had standing to challenge the *Citizenship Act, 1985* provisions under s. 15 of the *Charter*, as would any other individual.

Canada prior to 15 February 1977 differently with respect to the acquisition and extinguishment of citizenship status.[47] In response, the Minister argued that the differential treatment was not based on an analogous ground and that any such discrimination occurred under the *Citizenship Act, 1947*.[48] In addition, the Minister argued that, because the provisions of the *Act*, which drew a distinction between children born before and after 14 February 1977, were adopted in 1977 before the coming into force of the *Charter*, s. 15 of the *Charter* did not apply.[49]

With regards to the acquisition of citizenship, the differential treatment arises out of ss. 3(1)(b), (d) and (e) of the *Citizenship Act, 1985*, which state that:

> 3. (1) Subject to this Act, a person is a citizen if
>
> …
>
> (b) the person was born outside Canada *after* February 14, 1977 and at the time of his birth one of his parents, other than a parent who adopted him, was a citizen;
>
> …
>
> (d) the person was a citizen immediately *before* February 15, 1977; or
>
> (e) the person was entitled, immediately before February 15, 1977, to become a citizen under paragraph 5(1)(b) of the former Act.[50]

To determine whether a person was a citizen immediately before 15 February 1977, one must look to s. 4(1)(b) of the *Citizenship Act, 1970*, which states:

> 4.(1) A person born before the 1st day of January 1947 is a natural-born citizen, if
>
> …
>
> (b) he was born *outside* of Canada … and was not … an alien and either was a minor on that date, been lawfully admitted to Canada for permanent residence, 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 was not an alien at the time of that person's birth,

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47 *Taylor*, *supra* note 1 at para. 257.

48 *Ibid.* at para. 258.

49 *Ibid.*

50 *Supra* note 6, s. 3(1) [emphasis added]. Section 5(1)(b) of the *Citizenship Act, 1970*, *supra* note 43, provides that [emphasis added]:

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

Section 3(1)(e) of the *Citizenship Act, 1985* must also be read in conjunction with s. 5(2)(b) of the *Act*:

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

> (ii) was, at the time of that person's birth, a British subject who had Canadian domicile,
>
> (iii) was, at the time of that person's birth, a person who had been granted, or whose name was included in, a certificate of naturalization, or
>
> (iv) was a British subject who had his place of domicile in Canada for at least twenty years … before the 1st day of January 1947.[51]

The *Citizenship Act, 1985* clearly draws a distinction between those who are born before and after 15 February 1977. Furthermore, because it incorporates the provisions of the former citizenship legislation into ss. 3(d) and (e), the current *Act* perpetuates the differential treatment of children born in and out of wedlock and ultimately has the effect of denying Canadian citizenship to those who were born to unwed parents before 15 February 1977. Thus, illegitimate children (of Canadian fathers and non-Canadian mothers) born prior to 15 February 1977 are discriminated against on three grounds: their date of birth (which Taylor argued was an analogous ground to age); the marital status of their parents at the time of birth, and the gender of their Canadian parent.[52] The effect of this discrimination is that illegitimate children born prior to 15 February 1977 are prohibited from deriving citizenship status from their father. Framed from the father's perspective, unwed Canadian men with children born outside Canada prior to 15 February 1977 are denied the opportunity to pass their Canadian citizenship status onto their children.

Applying the test established by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*,[53] Martineau J. agreed that ss. 3 and 8 of the *Citizenship Act, 1985* violated s. 15 of the *Charter*. In coming to this conclusion, he found that the provisions of the *Act* draw a distinction based on personal characteristics that results in differential treatment, the differential treatment is based on one or more enumerated and analogous ground,[54] and this differential treatment is discriminatory. Ultimately, the legislation was found to withhold a benefit from Taylor (the benefit of deriving citizenship status from his father), and had the effect of perpetuating the view that since he was an illegitimate child, he was not worthy of deriving his father's citizenship status.[55] The provisions could not be saved under s. 1 of the *Charter* as Martineau J. could find no pressing and substantial objective that justified the continued denial of citizenship to persons born out of wedlock prior to 15 February 1977.

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51 *Ibid.*, s. 4(1) [emphasis added]. Section 4 of the *Citizenship Act, 1947*, *supra* note 2, was very similar to s. 4 of the *Citizenship Act, 1970*, *ibid.*, in that it distinguished between children born in and out of wedlock and provided that children born out of wedlock prior to 1 January 1947 were required to take the citizenship status of their natural mother: see *supra* note 43 and accompanying text.

52 Marital status has been recognized as an analogous ground of discrimination: see *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325.

53 [1999] 1 S.C.R. 497 [*Law*]. In *Law*, the Supreme Court of Canada set out the proper approach to determine whether a legislative provision violates s. 15(1) of the *Charter*.

54 Justice Martineau did not articulate upon which ground the differential treatment was based. However, it is likely that Martineau J. agreed with Taylor and found that the distinction based on one's date of birth is analogous to differential treatment based on age. Justice Martineau also quotes Iacobucci J. in *Benner*, acknowledging that differential treatment based on the gender of one's parent is unjustifiable, as "[a] child has no choice who his or her parents are. [A parent's] nationality, skin colour, or race is as personal and immutable to a child as his or her own": *Taylor*, *supra* note 1 at para. 271, citing *Benner*, *supra* note 10 at para. 82.

55 *Taylor*, *ibid.* at paras. 266-73.

Justice Martineau's decision is consistent with the jurisprudence in this area. In *Augier v. Canada (Minister of Citizenship and Immigration)*,[56] the Federal Court of Canada addressed a s. 15 *Charter* challenge, which in many respects, is similar to the issue in *Taylor*. In that case, the applicant challenged the constitutionality of s. 5(1)(b)(i) of the *Citizenship Act, 1970*, which subsequently challenged the constitutionality of s. 5(2)(b) of the *Citizenship Act, 1985*.[57] Under that section, an illegitimate child born outside of Canada was required to take the citizenship status of his mother. Thus, an unwed Canadian father could not pass his Canadian citizenship onto his child if the child was born outside of Canada. The Court held that the applicant was discriminated against on two grounds: the marital status of his parents at the time of his birth and the gender of his Canadian parent.[58] The Court held that the provision had the effect of denying the applicant the benefit of the law, specifically, the benefit of claiming Canadian citizenship. The provision was found to be unconstitutional unless it was read to include the word "father."[59]

In *Benner*, the Supreme Court declared ss. 3(1)(e), 5(2)(b), and 22 of the *Citizenship Act, 1977* unconstitutional, as they had the effect of treating applicants of Canadian mothers differently than applicants of Canadian fathers.[60] In that case, the provisions that required children to apply for citizenship and pass a security check were challenged under s. 15 of the *Charter*. These provisions applied only to children of Canadian mothers; children of Canadian fathers did not have to apply for citizenship and pass a security check, but were automatically permitted to register for citizenship. The Court held that these provisions were unconstitutional, as they differentiated between children of Canadian mothers and children of Canadian fathers, and placed more onerous conditions on children claiming citizenship based on maternal lineage.

Thus, where children are denied citizenship based on the gender of their Canadian parent or the marital status of their parents at the time of birth, the courts have declared the provisions denying the acquisition of citizenship unconstitutional. Keeping in line with this reasoning, Martineau J. correctly held that the effect of the legislation at issue in this case was discriminatory, and consequentially, unconstitutional.

### C. RETROACTIVE AND RETROSPECTIVE APPLICATION OF THE *CHARTER*

A further issue to consider is the Minister's contention that the *Charter* could not be applied in this case, because to do so would involve a retroactive or retrospective application of the *Charter*. It is a well-established principle of law that the *Charter* does not apply retroactively.[61] With regards to retrospective application of the *Charter*, the courts have not adopted a rigid test, but have stated that the determination must be made on a case-by-case basis and will

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56 2004 FC 613, [2004] 4 F.C.R. 150.
57 *Ibid.* at para. 1.
58 *Ibid.* at paras. 21-24
59 *Ibid.* at paras. 26-27.
60 *Supra* note 10 at para. 90.
61 *Benner*, *ibid.* at para. 40.

depend on the particular *Charter* right at issue.[62] This principle regarding the retroactive and retrospective application of the *Charter* has generally been undisputed; instead, the issue before the courts is normally framed in relation to whether the particular case does or does not involve a retrospective application of the *Charter*.[63]

In *Taylor*, the Minister argued that disentitlement to citizenship stemmed from the *Citizenship Act, 1947* and s. 3(1)(d) of the *Citizenship Act, 1977*. Since both pieces of legislation preceded the coming into force of the *Charter*, the *Charter* could not be invoked to correct any wrongs that may have occurred under either of those pieces of legislation because to do so would necessarily involve a retroactive application of the *Charter*. Rejecting this argument, Martineau J. held that the issue did not involve a retrospective or retroactive application of the *Charter* and thus, Taylor could invoke s. 15 of the *Charter*. In coming to this conclusion, Martineau J. relied on the Supreme Court of Canada's decision in *Benner*. In that case, the Supreme Court clarified the proper approach to be used when assessing whether a party is seeking a retrospective or retroactive application of the *Charter*. According to the Court in *Benner*, the outcome primarily depends on the characterization of the issue: whether it constitutes "a discrete event or establish[es] an ongoing status or characteristic."[64] The courts will not extend the protections guaranteed in s. 15 of the *Charter* to a discrete act that took place pre-*Charter*,[65] but,

> [w]here the effect of a law is simply to impose an on-going discriminatory status or disability on an individual…it will not be insulated from *Charter* review simply because it happened to be passed before April 17, 1985. If it continues to impose its effects on new applicants today, then it is susceptible to *Charter* scrutiny today.[66]

Applying the same reasoning of the Supreme Court in *Benner*, Martineau J. correctly concluded that the provisions that disentitled Taylor to Canadian citizenship were not immune from s. 15 of the *Charter*. The situation in *Taylor* is so similar to that considered in *Benner* that it is difficult to imagine how Martineau J. could have held otherwise. As decided in *Benner*, although one's citizenship status is determined at birth, this status, like other immutable characteristics, is an on-going condition. Following the Supreme Court's analysis in that case, Martineau J. looked to the point in time when the applicant was discriminated against based on his status and determined that the relevant point in time was not when Taylor was born, but when he first applied for a citizenship certificate. More specifically, although the potentially discriminatory legislation existed at the time of Taylor's birth, it was not until he actually applied for proof of citizenship and was rejected that a benefit from the law was withheld from him. This rejection occurred on 5 April 2005, which is well after the enactment of the *Charter*. Thus, Taylor was entitled to invoke s. 15 of the *Charter*.

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62 *Ibid*. at para. 41. See also *R. v. Stevens*, [1988] 1 S.C.R. 1153; *R. v. Stewart*, [1991] 3 S.C.R. 324; *R. v. Dubois*, [1985] 2 S.C.R. 350; *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335.

63 *R. v. James*, [1988] 1 S.C.R. 669, aff'g (1986), 55 O.R. (2d) 609 at 623.

64 *Benner*, *supra* note 10 at para. 42.

65 *Ibid.* at para. 44, referring to *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

66 *Benner*, *ibid.*, referring to *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

### D. AUTOMATIC REVOCATION OF CITIZENSHIP AND DUE PROCESS

Finally, Martineau J.'s comments in *obiter* regarding the government's duty to provide notice before revoking a person's citizenship are certain to have some future ramifications. Under the *Citizenship Act, 1970*, a child born outside Canada either before or after 1947 to a first-generation Canadian citizen, who was also born outside Canada, automatically lost his citizenship status unless he either made an application to retain his citizenship between their twenty-first and twenty-fourth birthdays or acquired a Canadian domicile before the age of twenty-four.[67] In addition, the parents of children born after 1947 were required to register their child's birth before the child's second birthday. Section 6 of the *Citizenship Act, 1970* provided that a child who had failed to submit an application could apply to the Minister for a resumption of their citizenship status. However, the last day on which a child born before 1947 could make an application to retain their citizenship was 31 December 1970. Any child who failed to do so was permanently estopped from making an application to resume his status.

Rejecting the Minister's argument that ignorance of the law is no excuse, Martineau J. found that the automatic loss provisions were contrary to due process and that they infringed ss. 1(a) and 2(e) of the *Canadian Bill of Rights* and s. 7 of the *Charter*.[68] Stressing the importance of the right to citizenship and the right not to be deprived of one's citizenship or nationality, Martineau J. declared that the government has an obligation to provide some form of proper notice before a person's status is revoked.[69]

Justice Martineau's decision comes at a time when thousands of Canadian residents are learning that they have lost their Canadian citizenship status because of a similar provision under the *Citizenship Act, 1985*. With the new entry requirements put forth by the United States, which require all persons entering the country to have a passport, many Canadians began applying for Canadian passports. According to media reports, most have paid income tax, received child tax benefits, paid into Canadian Pension plans, and have even voted in elections.[70] However, it was not until they were refused a passport that they learned that, because they were born outside Canada between 1946 and 1977, they were required to make an application before their twenty-fourth birthdays to retain their citizenship status. Most of these people will qualify for a grant of citizenship from the Minister under s. 5 of the *Citizenship Act, 1985*, however, they must still go through the process (and pay the fee) to acquire their citizenship status once more. One must wonder how Martineau J.'s comments will be treated in the future and whether or not the government will establish such a notice requirement.

If the purpose of citizenship is to create a sense of membership among citizens and to confer rights and obligations upon those with that special status, it may be justifiable that the government has such a revocation clause in its citizenship legislation. Otherwise, people could

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67 *Citizenship Act, 1970*, *supra* note 43, ss. 4(2), 5(2).

68 *Taylor*, *supra* note 1 at paras. 249-52.

69 *Ibid.* at para. 249.

70 "'Border babies' face fight for Canadian citizenship" *CBC News* (24 January 2007), online: CBC News <http://www.cbc.ca/canada/manitoba/story/2007/01/24/border-babies.html>; "Passport applicants find they're not Canadian" *CBC News* (23 January 2007), online: CBC News <http://www.cbc.ca/canada/story/2007/01/23/citizenship-passports.html>.

have Canadian citizenship but never actually have a sense of what it means to be Canadian: they may have never been to Canada, never lived in Canada, or never interacted with Canadians on a daily basis. In fact, although a part of this membership, they may never have met a Canadian, aside from their Canadian mother or father or other such family members. However, the right to citizenship is so fundamental that to strip someone of this right without notice before giving them the opportunity to challenge the revocation seems, as Martineau J. held, to deny them due process and to be contrary to procedural fairness. But how would the Canadian government undertake this monumental task of providing notice to all Canadian citizens? The requirement may place an impossible burden on the government, as it may not have the capability to inform all citizens of the revocation, especially those living abroad whom the government has no means of locating in order to provide this notification. That said, it may not be an unrealistic expectation to require the government to inform those people living in Canada who are subject to this automatic loss provision. This issue is a complex one and shall be left for further review another time.

## IV. CONCLUSION

The Minister of Citizenship and Immigration has been granted leave to appeal Martineau J.'s decision. The hearing is scheduled to take place this fall. It is questionable whether the Federal Court of Appeal will agree with Martineau J.'s finding that the status granted to war brides and their children under the *Order in Council, 1945* was tantamount to a statutory grant of citizenship. However, even if the Court of Appeal rejects Martineau J.'s interpretation of the *Order in Council,* it will likely affirm his in *obiter* comments regarding s. 15 of the *Charter*. After reviewing past jurisprudence surrounding the discriminatory effects of denying a people citizenship based on the marital status of their parents at the time of birth and the gender of their Canadian parent, the s. 15 *Charter* violation in this case seems apparent — so apparent, in fact, that one must wonder why Martineau J. went to such lengths in his decision to dissect the origins of citizenship in Canada and the questions surrounding the status of those who came to Canada under the *Order in Council, 1945* when a remedy under the *Charter* could have easily been attained. In the end, it seems that Martineau J. went to great lengths to find that the child of a Canadian soldier was a Canadian citizen.

It will be interesting to see whether the Federal Court of Appeal affirms Martineau J.'s *obiter* comments suggesting that the government has a positive obligation to give proper notice to citizens before they lose their status. If the Federal Court of Appeal finds that procedural fairness and due process require such notice to be given, the Minister will likely apply for leave to appeal to the Supreme Court of Canada, as this requirement would place an almost impossible burden on the government. Meanwhile, the government, by direction from the Court of Appeal, has imposed an interim order prohibiting determinations involving automatic losses of citizenship until a final determination is made on the appeal.[71] Undoubtedly, this case is certain to have a significant impact not only on other applications, but also on citizenship law in the future.

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[71] Citizenship and Immigration Canada (CIC), Operational Bulletin 30, "Interim Instructions on Handling Cases on Hold Pending the Taylor Appeal" (28 May 2007), online: CIC <http://www.cic.gc.ca/english/resources/manuals/bulletins/ob030.asp>.