Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Graham Forward and Evan Forward

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Citizenship and Immigration Canada

Respondent

Decision

Member: J. Grant Sinclair
Date: February 15, 2008
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I. The Complainants

[1] Graham Forward and Evan Forward are the complainants in this case. They are brothers. Both were born outside Canada in the United States and are American citizens.

[2] Graham Forward was born in 1982 and has always lived in the United States except between 2000 and 2004 when he attended Mount Allison University in New Brunswick.

[3] Evan Forward was born in 1984. He was a student at McGill University in Montreal from September 2002 to December 2003. Otherwise, he has always lived in the United States.

[4] In late 2001 or early 2002, Graham and Evan applied for a certificate of citizenship. They claimed citizenship through their mother, Patricia Brushett.

[5] Patricia Brushett was born in the United States on May 10, 1955. She has always resided in the United States. Her parents are Ethel and Donald Brushett. They are Graham and Evan's grandparents.

[6] When Patricia was born, Ethel was then and still is a Canadian citizen. Her father, Donald, once a Canadian citizen, became a naturalized American citizen on February 23, 1955, about three months before Patricia was born. At that point in time, he was no longer a Canadian citizen.

[7] Jeff Forward is Graham's and Evan's father. He is an American citizen.

A. The 1947 *Citizenship Act*

[8] In 1955, when Patricia was born, the 1947 *Canadian Citizenship Act* (1947 *Act*) determined citizenship. Under s. 5(1)(*b*) of this *Act*, a person born outside Canada is a Canadian citizen if, at the time of his birth, his father is a Canadian citizen (or if born out of wedlock, his

mother is a Canadian citizen). Canadian fathers could pass their citizenship to their children born abroad, but Canadian mothers (unless unwed) could not.

B. The 1977 *Citizenship Act*

[9] The 1947 *Act* was repealed and replaced by the 1977 *Citizenship Act*, R.S.C. c. C-29 (1977 *Act*). It created three categories of Canadian citizenship based on parental lineage for those born outside Canada:

(1) persons born outside Canada after February 14, 1977 are citizens at birth, if either of their parents, other than an adoptive parent, is Canadian at the time of their birth. (s. 3(1)(*b*));

(2) persons born outside Canada before February 15, 1977 of a Canadian father or out of wedlock of a Canadian mother are citizens at birth if their birth is registered within a specified time. (s. 3(1)(*e*), incorporating s. 5(1)(*b*) of the 1947 *Act*);

(3) persons born outside Canada before February 15, 1977 of a Canadian mother must apply for citizenship and pass a security check, a criminal clearance check and swear an oath of citizenship. Citizenship is effective not from birth but from the date granted. (ss. 5(2)(*b*), 3(1)(*c*), 12 and 22).

C. Patricia Brushett's Grant of Canadian Citizenship

[10] At the time of her birth in 1955, Patricia was not eligible for Canadian citizenship which could only be passed through paternal lineage under the 1947 *Act.* However, she became eligible under s. 5(2)(*b*) of the 1977 *Act*. In February 2001, she applied for Canadian citizenship and she received her grant of citizenship effective December 2001.

D. Graham Forward and Evan Forward - Application for Canadian Citizenship

[11] Graham and Evan applied for Canadian citizenship in late December 2001 or early January 2002 under s. 3(1)(*b*) of the 1977 *Act*. They claimed citizenship through their mother, Patricia.

[12] Their application was denied in a letter dated June 5, 2002, from Citizenship and Immigration Canada (CIC). The reason for the denial was that at the time of their birth, neither of their parents were Canadian citizens. They did not qualify for citizenship under any of the parental lineage provisions of the 1977 *Act*.

E. Graham Forward and Evan Forward - Complaints to the Canadian Human Rights Commission

[13] Graham filed a complaint with the CHRC dated January 3, 2004. Evan's complaint is dated January 16, 2004. In their complaints, they allege that the CIC has discriminated against them contrary to s. 5(b) of the *Canadian Human Rights Act* (*CHRA*), on the grounds of family status and sex.

F. *Prima Facie* Case of Discrimination

[14] In complaints under the *CHRA*, it is well established that the complainants have the initial onus of establishing a *prima facie* case of discrimination. The allegation in this case, under s. 5(b) of the *CHRA* is that the respondent differentiated adversely in relation to the complainants on a prohibited ground (family status and sex) in the provision of a service customarily available to the general public.

[15] The determination of a *prima facie* case in respect of this allegation gives rise to the following questions:

(1) does the grant of a Canadian citizenship pursuant to the *Citizenship Act* constitute the provision of a "service"?

(2) were the complainants, in their attempt to obtain Canadian citizenship, subjected to adverse differentiation?

(3) if so, was this adverse differentiation based on a prohibited ground of discrimination?

G. Citizenship as a Service – *Singh, Druken, McKenna*

[16] Dealing first with the question of whether the granting of citizenship is a service, central to the complainants' position are three decisions, Re *Singh*, [1989] 1 F.C. 430 (F.C.A.); *Canada (A.G.) v. Druken*, [1989] 2 F.C. 24 (F.C.A.); and *McKenna & CHRC v. Secretary of State*, (1993) 22 C.H.R.R. 486 (CHRT); *Canada (A.G.) v. McKenna*, [1994] F.C.J. No. 1880 (FCTD); *Canada (A.G.) v. McKenna*, [1999] 1 F.C. 401 (CA).

[17] *Singh* involved ten references by the CHRC to the Federal Court of Appeal. The references arose out of ten complaints made to the CHRC against the Department of External Affairs and the Canadian Employment and Immigration Commission. The complaints alleged discrimination under the *CHRA*, because the respondents denied visitors visas for family members of the complainants and denied the complainants the right to sponsor a close relative to immigrate to Canada.

[18] The CHRC attempted to investigate these complaints but the government took the position that the complaints were beyond its jurisdiction and refused to allow the CHRC to pursue its investigation.

[19] One of the grounds for the refusal was that the government departments responsible for these matters were not engaged in the "provision of services customarily available to the general public".

[20] For the Court of Appeal, the question to be answered on the references was whether the complaints cannot possibly relate to discriminatory practices in the provision of services customarily available to the general public.

[21] As to this question, the Court concluded that:

> It is indeed arguable that the qualifying words of s. 5, provision of services customarily available to the general public, can only serve a limiting role in the context of services rendered by private persons or bodies; that, by definition,

> services rendered by public servants at public expense are services to the public; and therefore fall within the ambit of s. 5. It is not however, necessary to make any final determination on this point at this stage and it is enough to state that it is not by any means clear that the services rendered, both in Canada and abroad, by the officers charged with the administration of the *Immigration Act* are not services customarily available to the general public (at p. 440).

[22] In *Druken*, the complainants were employees of businesses owned by their spouses and were denied unemployment insurance benefits. Under the *Unemployment Insurance Act, 1971*, persons employed by their spouses or by companies controlled by their spouses were not eligible for unemployment insurance benefits.

[23] The complainants filed complaints with the CHRC alleging discrimination under s. 5 of the *CHRA* on the grounds of marital status and/or family status. On referral to the Human Rights Tribunal, the Tribunal had to determine whether the provision of unemployment insurance benefits is a "service customarily available to the general public". The Tribunal concluded that it was a "service" and went on to find that the impugned provisions of the *Unemployment Insurance Act, 1971* were discriminatory.

[24] On application of the Attorney General to the Federal Court of Appeal to set aside the Tribunal decision, the question of services was not argued before the Court. The Court only commented that the Attorney General appeared to find persuasive the dictum in *Singh*.

[25] *McKenna* involved three decisions, that of the Tribunal, the Federal Court Trial Division by way of judicial review and the Federal Court of Appeal on appeal from the Trial Division.

[26] Shirley McKenna was the complainant before the Tribunal. She was a Canadian citizen who resided with her family in Ireland. She had two sons, both born in Canada and two adopted daughters both born outside Canada. Both of her adopted daughters were born before February 15, 1997.

[27] She applied for Canadian passports for her two daughters but was advised by officials at the Canadian Embassy in Ireland that they could not claim citizenship under the 1977 *Act* through parental lineage.

[28] Ms. McKenna filed a complaint with the CHRC alleging discrimination contrary to s. 5 of the *CHRA* on the ground of family status. Her complaint was referred to the Human Rights Tribunal for hearing.

[29] On the question of whether the granting of citizenship is a service within s. 5 of the *CHRA*, the Tribunal reasoned that the 1977 *Act* is general in scope and when government officials apply the provisions of this *Act*, they provide a service to the public.

[30] On judicial review of the Tribunal decision, the Federal Court set aside the Tribunal decision, one of the reasons being a failure of natural justice in the Tribunal proceedings. The Trial Court did not address the question of s. 5 of the *CHRA*.

[31] Ms. McKenna appealed to the Federal Court of Appeal. This Court agreed with the Trial Court that there had been a denial of natural justice, and affirmed the decision of the Trial Division Court setting aside the Tribunal decision. But the Court of Appeal referred the matter back to the Tribunal to reconsider its decision in light of the Court's findings of a breach of natural justice. There is no evidence that the matter was reconsidered by the Tribunal.

[32] The scope of s.5 of the *CHRA* as applied to citizenship was not argued before the Court of Appeal. However, the two majority judges did express their views on the scope of s. 5 of the *CHRA*. Robertson J.A. had this to say:

> While on focusing on this particular issue, I do not wish to leave the impression that I agree with the Tribunal's conclusion that the granting of citizenship constitutes a service customarily available to the general public within the meaning of the *Canadian Human Rights Act* and, therefore, that the Tribunal has the jurisdiction to negotiate with the responsible Minister the manner in which the provisions of the *Citizenship Act* are to be applied in future. As this particular issue was not pursued before either the Motions Judge or this Court, I do not

> propose to deal with it other than to lay to rest the mistaken view that this Court's decision in *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24 (C.A.) somehow supports the proposition that the denial of citizenship constitutes the denial of a service.
>
> In my opinion, *Druken* does not stand for the proposition that denial of unemployment insurance benefits constitutes denial of service within the meaning of the *Canadian Human Rights Act*, but only that the Attorney General conceded as much.

[33] Strayer J.A. shared the doubts of Robertson J.A. as to whether the grant of citizenship to a person born outside Canada can be considered a service customarily available to the general public.

[34] Although it remains to be authoritatively decided, clearly the weight of judicial opinion is that the denial of citizenship in not a denial of a 'service" under the *CHRA.*

H. The Ambit of "Services" – S. 5 of the CHRA

[35] The complainants/Commission take the position that the rejection of Graham's and Evan's citizenship applications amounts to adverse differentiation in the provision of services.

[36] In their argument, they specified that what is at issue in this case is not citizenship *per se*, but rather the right of someone claiming citizenship to have his or her application reviewed and administered in a non-discriminatory manner. The service at issue was the reviewing of applications for citizenship.

[37] I do not accept this characterization of the complaint. The evidence and argument in the case was not directed at the conduct of ministerial officials, the exercise of discretion, or at the implementation of departmental policies and practices.

[38] The sole source of the alleged discrimination in this case is the legislative language of the 1977 *Act*. In reviewing the application for citizenship, the officials did nothing more than apply

categorical statutory criteria to undisputed facts. Any issue taken with the application review process is really an issue taken with the *Act*.

[39] The respondent takes the position that citizenship cannot properly be considered a service. It relies on authorities holding that citizenship is a privilege – and not a right – that granting states can bestow or withhold on conditions they see fit.

[40] The jurisprudence also indicates that citizenship confers a special, political status on a person that not only incorporates rights and duties but serves a highly symbolic function. The distinction between citizens and non-citizens is recognized in the *Canadian Charter of Rights and Freedoms*. See *Law Society of British Columbia v. Andrews* [1989] 1 S.C.R. 143; *Canada v. Chiarelli*, [1992] 1 S.C.R. 711.

[41] In my opinion, the granting of citizenship does not constitute a service under the *CHRA*. Unlike other statutes such as the *Unemployment Insurance Act*, the *Citizenship Act* has a definitive and transformative impact on those individuals whom it recognizes as Canadians. As is indicated in the authorities, citizenship is a distinct status granted by the state, a status with constitutional dimensions. To characterize it as a mere service is to ignore its fundamental role in defining the relationship between individuals and the state.

[42] Although not necessary for my finding above, I would add that Parliament might reasonably have intended the ambit of the word "services" in s. 5 to be informed by its placement alongside the words "goods", "facilities" and "accommodation" (*noscitur a sociis*, "*the associated words rule*"). Viewed in this way, it is very difficult to conclude that the grant of citizenship is a service having a similar character to goods, facilities or accommodation.

[43] For these reasons, I have concluded that the complainants/Commission have not established a *prima facie* case of discrimination. I do not need to deal with the remaining questions relating to *prima facie* case.

I. Discrimination by Association – Who are the Victims? – Retroactive/Retrospective Application of the *CHRA*

[44] The complainants/Commission argued that the discrimination in this case originated with the victimization of the complainant's grandmother, Ethel. Ethel experienced discriminatory differential treatment under the 1947 *Act*, based on her sex. Moreover, the discrimination experienced by Ethel was visited upon her daughter Patricia (born in 1955), who was unable to claim an entitlement to Canadian citizenship.

[45] According to the complainants/Commission, the 1977 *Act* continued to treat Patricia unequally. They argue that the differential treatment affecting Patricia – based on her mother's gender – in turn victimized her sons, the complainants Graham and Evan.

[46] Portrayed in this light, key aspects of the case for the complainants clearly implicate events and legal situations that occurred or existed prior to the coming into force of the *CHRA* in 1978.

(i) The *Benner* decision

[47] The Supreme Court of Canada's decision in *Benner v. Canada (Secretary of State)* [1997] 1 S.C.R. 358 is fundamental to the resolution of the issues raised in the complaints.

[48] Mr. Benner was born in 1962 in the United States, of a Canadian mother and an American father. He applied for Canadian citizenship on October 27, 1988 under the 1977 *Act.* As a person born outside Canada before February 15, 1977, of a Canadian mother, Mr. Benner was eligible for citizenship under s. 5(2)(*b*) of the 1977 *Act*. As such, he had to pass a security check and a criminal clearance check.

[49] Mr. Benner's criminal clearance check revealed that he had been charged with several criminal offenses. The Registrar of Citizenship advised him that he was prohibited from acquiring citizenship and his application was denied on October 17, 1989.

[50] He challenged this decision claiming that the 1977 *Act* imposed more onerous requirements on those claiming Canadian citizenship based on maternal lineage than on those claiming such citizenship based on paternal lineage. He argued that this differential treatment of persons born outside Canada to Canadian mothers before February 15, 1977, offended s. 15(1) of the *Canadian Charter of Rights and Freedoms*.

[51] The case proceeded to the Supreme Court of Canada. The threshold question for the Supreme Court was whether applying s. 15(1) of the *Charter* involved an illegitimate retroactive or retrospective application of the *Charter* to this fact situation.

[52] In considering whether Mr. Benner's claim required a retrospective application of the *Charter*, the Court said that it is necessary first of all to characterize whether the facts in question establish a "discrete event" or constitute a "continuing or ongoing status". In Mr. Benner's case, his status at the time of his birth was that of a person born outside of Canada before February 15, 1977, of a Canadian mother and an American father. This was a status that continued after the *Charter* came into effect and at the time the decision was made to deny his application for citizenship.

[53] For the Supreme Court in applying s. 15 of the *Charter*, the critical time was not when Mr. Benner acquired the status in question, but when that status was held against him and disentitled him to a benefit. The Court found that moment occurred when the Registrar of Citizenship considered and rejected his application, namely, on October 17, 1989. That was the date when the alleged discrimination occurred.

[54] The Court concluded that the *Charter* is not given retrospective effect if it is applied to persons who have acquired a particular status before the enactment of the *Charter* and that status continued after the *Charter* came into effect. Thus Mr. Benner's claim of discrimination was subject to *Charter* scrutiny.

[55] The Court also dealt with the argument that Mr. Benner was attempting to raise the infringement of a third party's rights for his own benefit. That is the alleged discrimination under the 1977 *Act* was imposed upon his mother, not upon him.

[56] The Court rejected this argument reasoning that Mr. Benner was the primary target of the sex based discrimination mandated by the 1977 *Act*. Section 5(2)(*b*), which Mr. Benner challenged, did not determine his mother's right to citizenship. His mother was only implicated because his rights were dependent on his maternal lineage.

J. Discrimination by Association - Who is the Victim of the Discrimination?

[57] *Benner* is of assistance in the current case by chronologically situating the alleged discrimination to which the complainants were subjected. The relevant time at which to conduct the analysis is the moment at which Graham and Evan's status was held against them or disentitled them to a benefit. They have the status of being foreign born grandchildren of a Canadian grandmother since birth. But until their application for citizenship, they had not engaged the legislation governing their entitlement to citizenship.

[58] Following *Benner*, the alleged discrimination did not take place until 2002, when their application for citizenship was denied on the basis of criteria which they allege violate s. 5 of the *CHRA*.

[59] Having situated the alleged discrimination in time (well after the enactment of the *CHRA*), it remains to be decided whether the complainants were subjected to adverse differentiation on a prohibited ground, namely sex and family status.

[60] Again, *Benner* is of assistance. Insofar as it establishes that the 1977 *Act* carries on the discrimination of the 1947 *Act*, it may itself be reviewed under s. 15 of the *Charter*. Similarly, in the current matter, it is no defence to the complainants' claim to say that any differential treatment has its true source in the now repealed 1947 *Act*. They were denied citizenship under the 1977 legislation. It is the operation of that statute that forms the basis of their complaint.

[61] This brings us to a consideration of precisely which provisions of the 1977 *Act* the complainants seek to impugn. Both were born after 1977. As such, the provisions which affect them directly are paras. 3(1)(*a*) and 3(1)(*b*), which exclude them from citizenship since neither of their parents were citizens at that time of their birth, and they were not born in Canada. However, they do not argue that 3(1)(*a*) and 3(1)(*b*) discriminate on the grounds of sex and family status.

[62] Although not specified, it appears (from their final argument) that they argue that 3(1)(*e*), which preserves the status of foreign born children of Canadian men (and unmarried women) under the 1947 *Act*, differentiates adversely against the foreign born children of Canadian married women. Moreover – and by extension – they argue that 3(1)(*e*) differentiates adversely against *the foreign born children of foreign born children* of Canadian married women.

[63] This argument raises a problem of standing. The complainants do not stand in the shoes of Mr. Benner. Rather, they stand in the shoes of *Mr. Benner's children* – children born outside Canada. The complainants/Commission say that this is a distinction without a difference. *Benner* applies with equal force to grandchildren. The respondent pleads the contrary.

[64] It seems incontrovertible that *Benner* would be more analogous if Patricia had been the complainant in this case. Patricia, like Mr. Benner, would be able to withstand the argument that any discrimination imposed by 3(1)(*e*) is really imposed on the claimant's mother. For Patricia, like Mr. Benner, would be viewed as the "primary target" of the sex based discrimination mandated by the legislation. As the first generation victim of the exclusionary regime continued in s. 3(1)(*e*), Patricia would possess the necessary standing to raise the issue. She, like Mr. Benner, could be portrayed as the "real target" of the provision, and the one with "the most direct interest" in having them subjected to scrutiny under anti-discrimination law.

[65] But Patricia is not asserted to be a victim in the current complaint; no order is sought for her benefit.

[66] The complainants cannot be said to be the "primary targets" of s. 3(1)(*e*), nor the ones having the most direct interest in having them subjected to scrutiny under the *CHRA*. That claim belongs to Patricia. Unlike their mother, the complainants cannot be directly affected by s. 3(1)(*e*) because they were not born before 1977 and, as such, they were never entitled, immediately before 1977, to become a citizen under the 1947 *Act*. Since they were not directly affected by the impugned legislation, and since they do not claim a remedy for the benefit of an individual who is, the complainants do not possess the requisite standing to obtain relief under the *CHRA*.

[67] The complainants/Commission still insist that the brothers can be "victims" under the *CHRA* without running afoul of the statement in *Benner* that a party cannot rely upon the violation of a third party's *Charter* rights. First of all, the *CHRA* regime is more generous with standing; complainants can pursue remedies on behalf of other, victimized individuals (ss. 40(2), 50(1), 53(2)). More importantly, in *Benner* itself, the Court implicitly endorses a form of derivative standing, whereby the victim's treatment is dictated by the discriminatory differentiation visited upon his parents.

[68] The Supreme Court pointed out that there was "a connection" between Mr. Benner's rights and the differentiation made by the legislation between men and women. The impugned provisions made Mr. Benner's citizenship rights dependent upon whether his Canadian parent was male or female. To deprive Mr. Benner of standing would allow a legislature to circumvent anti-discrimination rules by providing for indirect discrimination rather than mention its targets directly.

[69] Further, the Court pointed out that the link between child and parent is of a particularly unique and intimate nature; a child has no control over who his or her parents are. Where access to benefits such as citizenship is restricted on the basis of something so intimately connected to and so completely beyond the control of an applicant as the gender of his or her Canadian parent, that applicant has standing to invoke s. 15 of the *Charter*.

[70] On the other hand, these comments of the Court were *obiter*, prefaced as they were by the following statement:

> I hasten to add that I do not intend by these reasons to create a general doctrine of 'discrimination by association'. I expressly leave this question to another day, since it is not necessary to address it in order to deal with the appeal. (Iaccobucci J. at para. 82)

[71] The fact remains that the Court was not dealing with a situation where a grandchild was invoking the identity of his grandparent.

K. Retroactive/Respective Application of the *CHRA*

[72] There is another key distinction; in *Benner* the Court was faced with the task of granting citizenship to the son of a woman who was Canadian at the time of his birth. In the current view, the Tribunal is asked to recognize Canadian citizenship for Graham and Evan whose mother was not a Canadian at the time of their birth.

[73] Thus, even if there were no other remedial obstacles in this case – which there are – in order for the Tribunal to grant the complainants citizenship, it would be necessary to alter the citizenship of their mother Patricia so that she would be deemed to have been Canadian at the time of their birth. Only then would they be in a situation analogous to Mr. Benner's.

[74] But as mentioned earlier, Patricia does not seek relief before this Tribunal and the complainants have not done so for her. In addition, viewing the complainants as having been born to a woman who was notionally Canadian at birth (i.e. had she been born to a Canadian father instead of a Canadian mother) involves applying the *CHRA* so as to change Patricia's status at the time of her birth (1955). This would require the retroactive application of legislation; that is to say, the *CHRA* which came into force in 1978 would be invoked to alter the legal status, at birth, of Patricia born in 1955.

[75] It has been held (*Latif v. Canada*, [1980] 1 F.C. 687 (CA)) and the common law presumes that the legislature does not intend new legislation to be applied so as to change the past legal effect of a past situation. There is no indication that Parliament intended the *CHRA* to be applied otherwise. The presumption against retroactivity remains in effect.

[76] Barring a change to Patricia's status, Graham and Evan are children born to two non-Canadians. As such they are not readily comparable to Mr. Benner, or anyone else who was denied automatic citizenship based on the gender of his or her parent.

II. Conclusion

[77] For the above reasons, I have concluded that the complaints of Graham Forward and Evan Forward should be dismissed.

Signed by

J. Grant Sinclair
Tribunal Member

Ottawa, Ontario
December 5, 2008

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1152/3406

Style of Cause: Graham Forward and Evan Forward v. Citizenship and Immigration Canada

Decision of the Tribunal Dated: December 5, 2008

Date and Place of Hearing: April 10 to 12, 2007

Montréal, Quebec

Appearances:

Graham Forward and Evan Forward, for themselves

Daniel Pagowski and Ruben East, for the Canadian Human Rights Commission

Derek Rasmussen, for the Respondent