THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: Emily.Barrette@sen.parl.gc.ca; Rosemary.Moodie@sen.parl.gc.ca

The Honourable Senator Rosemarie Moodie
Chair
The Standing Senate Committee on Social Affairs, Science and Technology
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4

Dear Senator Moodie:

Re: Bill C-71 – Amendments to the *Citizenship Act*

I am writing on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) to share our recommendations on Bill C-71 – *An Act to amend the Citizenship Act*.

The CBA is a national association of 40,000 members, including lawyers, notaries, academics, and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Section has approximately 1,200 members practising all areas of citizenship and immigration law. CBA Section members deliver professional advice and representation to thousands of clients in Canada and abroad.

The Canadian Bar Association ("CBA") Immigration Law Section makes the following recommendations regarding Bill C-71 – *An Act to amend the Citizenship Act*:

1. **Support for Automatic Citizenship by Descent**: The CBA Section supports provisions allowing automatic citizenship by descent beyond the first generation, particularly when a strong connection to Canada is demonstrated.
2. **Concerns for Adoptees**: The CBA Section highlights the need for improvement in how adoptees are treated under the *Citizenship Act*. Currently, adoptees gain citizenship only from the date their application is approved, in contrast to natural-born children who obtain citizenship from birth. This can disadvantage adoptees, particularly if they apply for Canadian citizenship later in life, potentially affecting their children's eligibility for Canadian citizenship.

Support for Specific Provisions of Bill C-71

The CBA Section has a longstanding interest in ensuring that Canadian citizenship law is fair, just, and inclusive. We support the inclusion of provisions in Bill C-71 that allow for automatic citizenship by descent beyond the first generation, particularly in cases where a substantial connection to Canada can be demonstrated.

In our March 6, 2023 submission to this very committee, we noted the enduring gender discrimination built into the *Citizenship Act*.[1] We applaud the government's efforts to correct the gender-based discrimination which we had noted.

We further note that Bill C-71 will bring us close to the standard that is applied in the United States law on citizenship by descent. As suggested by a CBA member in a 2020 article, "Citizenship law is too rigid for those abroad with family ties to Canada".[2]

History and background of the restoration of the rights of "Lost Canadians"

The first *Canadian Citizenship Act* came into force on January 1, 1947, based, in part, on a new sense of national pride following the end of World War II. While a step forward in advancing Canada's unique national identity, the first *Citizenship Act* carried forward several antiquated concepts from the 1914 *Nationalization Act*, and also introduced a number of new limitations on the acquisition of citizenship. These limitations included the following:

- For a child born in wedlock, citizenship by descent could be acquired only through a Canadian father, not through a Canadian mother. If the parents were unmarried, citizenship could be acquired only through the mother.
- Citizenship for children born outside Canada could be acquired only if the birth was registered with the Canadian government within two years of the birth, and most births were not registered.
- Naturalization in the United States or other foreign country caused a loss of Canadian citizenship for the naturalized person. If the person naturalizing was the "responsible parent" (usually the father), the person's minor children also lost their citizenship. As a result, a child born outside Canada would not become a citizen if their father (in most cases) naturalized either before or after the child's birth.
- Even if a child born outside Canada prior to 1977 somehow managed to clear all these hurdles, there remained a retention requirement that applied to all births outside Canada. In its original form this included a requirement that the person renounce the citizenship of the country in which he or she was born (most frequently the United States) after reaching the age of 21.

As a result of these and other conditions, very few persons born outside Canada became or remained Canadian citizens, even in the first generation. While there was no formal limitation to the first generation born abroad, it was even more rare that a second generation (or later) person became a Canadian citizen.

The 1977 Act

The *Citizenship Act*, which came into force on February 15, 1977, eliminated the restrictive requirements of the former Acts, but not retroactively. For example, a person born in Canada who naturalized in the United States prior to February 15, 1977, was still not a Canadian citizen, and that person's children, even though first generation born abroad, were not Canadian citizens either. A person born before February 15, 1977, whose mother was born in Canada, was still not a Canadian citizen, nor were the children of that person. Therefore, the 1977 Act had limited impact on the acquisition of citizenship by descent.

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1 CBA, *Bill S-245 – Citizenship Act Amendments*, House of Commons Committee on Citizenship and Immigration, 2023 March 6, online.

2 Amandeep S. Hayer, *Citizenship law is too rigid for those abroad with family ties to Canada*, 2020 March 09, online.

The 2009 amendments

Many persons subject to the lingering restrictions of the 1947 and 1977 Acts lived in Canada and believed themselves to be Canadian citizens. With the imposition of mandatory passport requirements in the United States following the September 11 attack on the World Trade Center, many of these persons applied for Canadian passports, only to discover they were not citizens. These and other cohorts became known as "lost Canadians."

The purpose and impact of the 2009 amendments was to restore the citizenship of "lost Canadians" by making the 1977 legislative changes retroactive. For example, persons whose mother was born in Canada, or whose father naturalized in the U.S., became Canadian citizens, retroactive to their birth (or to January 1, 1947). Section 8 of the current Act was repealed as well, but not retroactively.

The Canadian government celebrated this expansion of the right to citizenship by running television ads throughout the United States titled "waking up Canadian." The ads showed Americans getting out of bed only to find a new Canadian flag on their dressing table. The ads contained information on how these newly minted Canadians could obtain citizenship certificates.

In 2015, Parliament passed new legislation to close loopholes in the 2009 amendments that impacted persons born before January 1, 1947, or whose parents were born before January 1, 1947. The combined effect of the 2009 and 2015 legislation is that, for all practical purposes, anyone with a parent born in Canada is now considered a Canadian citizen.

As a result, the paternalistic and outdated provisions of the 1947 Act were finally remedied—at least for the first generation born abroad.

Impact of the 2009 amendments on second generation and later descendants

Parliament was concerned that the 2009 amendments, while clearly justified in the case of "lost Canadians", would cause a large increase in the number of persons entitled to Canadian citizenship, and therefore sought to impose a limit. This took the form of the first generation limit.

For the first time in Canadian citizenship history, the 2009 amendments imposed an explicit limitation of acquisition of citizenship beyond the first generation. This limitation, now found in subsection 3(3) of the Act, applies only to people born after the coming into force of these amendments on April 17, 2009. No one lost their citizenship as a result of the 2009 amendments, due to subsection 3(4). This subsection states that the first-generation limit does not apply to people who were already citizens prior to April 17, 2009, based on the law as it existed prior to April 17, 2009.

Therefore, as applied to second generation and later people born before April 1, 2009, the provisions of the 1947 Act are still operative despite being anachronistic. For instance, – even today – a person born in 2008 outside Canada to a Canadian citizen parent, who was in turn born outside Canada before 1977 to a Canadian mother (as opposed to a Canadian citizen father) is not a citizen. This remains a common scenario in the experience of practitioners in this field of law.

The *Bjorkquist* decision

On December 19, 2023, the Ontario Superior Court of Justice decided *Bjorkquist v Attorney General of Canada*, 2023 ONSC 7151[3]. This case was brought up on behalf of several families with second-generation children. All the families established significant ties to Canada such as employment or education. The plaintiffs challenged the constitutional validity of the first-generation limit. After

[3] Bjorkquist et al. v. Attorney General of Canada, 2023 ONSC 7152, online.

examining the history of Canadian citizenship legislation, the court held that subsection 3(1) violated the *Charter of Rights* on two grounds:

- The first-generation limit discriminates based on national origin, in violation of section 15(1) of the *Charter*, for first generation Canadian citizens born outside Canada lack the rights of Canadian citizens born in Canada. Moreover, this discrimination is particularly harmful to first generation women born outside Canada, who have or are planning to have children.
- The first-generation limit also violates the right of mobility contained in section 6(1) of the *Charter*, which states the "[e]very citizen of Canada has the right to enter, remain in and leave Canada." The first-generation limit violates the rights of both parents born in Canada and their foreign-born children to live, study, and work in a place of their choosing.

The Court therefore found that the first-generation limit violates the *Charter* and is of no force and effect. However, the Court suspended the declaration of invalidity for six months to allow Parliament to enact *Charter*-compliant legislation. The court later granted a six-month extension until December 19, 2024.

The Government did not appeal the *Bjorkquist* decision. On and after December 20, 2024, in the absence of new *Charter*-compliant legislation, there will no longer be a first-generation limit in the *Citizenship Act*. It is therefore incumbent upon Parliament to pass *Charter*-compliant legislation prior to that date, for such legislation to receive Royal Assent, and for such legislation to come into force.

The proposed legislation

As we understand it, the proposed legislation will extend the impact of the 2009 and 2015 amendments to all living descendants of persons born or naturalized in Canada. Persons born after the coming into force of C-71, whose parents were themselves born outside Canada, will become citizens only if their own Canadian citizen parents can demonstrate a "substantial connection" to Canada. C-71 defines substantial connection as having been physically present for 1,095 days in Canada prior to the person's birth.

We make the following recommendations regarding these provisions:

1. The distinction between children born before and after the coming into force of C-71 is reasonable and should be retained.

Creating a distinction between children born before and after the coming into force of C-71 is potentially problematic since it creates a second class of Canadian citizens - those who need to live in Canada for three years to pass on Canadian citizenship to their children, versus those who do not. This can, however, be justified by the importance of giving fair notice to second generation persons and their parents of the nature of the 1,095 day physical presence requirement, and the importance of maintaining documentation, such as school and employment records.

Second (or later) generation persons today are of all ages. As a practical matter, it would be impossible for a seventy-year-old second-generation applicant today to prove that their Canadian citizen parent lived in Canada for 1,095 days prior to their birth. Imposing this requirement on such persons would render C-71 an empty constitutional promise for such persons.

While the number of foreign-born descendants of persons born or naturalized in Canada is no doubt significant, the legislation is unlikely to result in an excessive number of citizenship applications. Documentation of the chain of births would itself be a severely limiting factor. In addition, persons with only remote connections to Canada are unlikely to go through the trouble

and expense of applying for proof of citizenship, let alone leave their country of residence - in many cases the United States - to move to Canada.

Only a small percentage of first-generation persons "who woke up Canadian" in 2009 applied for citizenship certificates. Practitioners report that many persons who did apply did so to honour their Canadian parents and Canadian family traditions, but had no intention to move to Canada. It is likely that a smaller fraction of second-generation and later citizens will do so. Those who do will likely resemble the plaintiffs in *Bjorkquist*, all of whom had strong and compelling ties to Canada.

2. The 1,095 day requirement will likely be upheld as *Charter*-compliant, but only if calculated as a cumulative requirement.

The plaintiffs in the *Bjorkquist* case all had substantial connections to Canada. The Court, in its decision, implied, but did not explicitly hold, that a distinction based on a substantial connection to Canada would be constitutionally acceptable. We believe that it would. The 1,095 day requirement is consistent with the residence requirements for grants of citizenship under section 5 of the Act, and is consistent with residence requirements in the United States, currently five years of physical presence.

However, any potential proposed amendments that would require the 1,095 days to be consecutive would clearly violate the *Charter* and would be struck down by the Court. Such a requirement would itself violate section 6(1) of the *Charter* by effectively prohibiting Canadian citizens from travel outside Canada, even for brief periods. Whether a person does, or does not, leave Canada for a vacation or business trip once every three years has no bearing on whether that person has a substantial connection to Canada. Therefore, conditioning the right to convey citizenship on a completely arbitrary circumstance of 1,095 days spent consecutively in Canada after the child's birth would not cure the *Charter* violations.

Consider the common activities that would break this conservative day requirement: a family trip to Disneyland, a vacation in Mexico, or even a cross-border shopping trip. These are common occurrences for many Canadians, particularly for those residing near the border. Punishing such trips with such a significant restriction as loss of citizenship by descent is not aligned with the practical realities faced by Canadian citizens.

3. Proposed subsection 3(1.5), "Citizen despite death of parent," needs to be re-worked to accomplish its intended purpose.

Proposed new subsection 1.5 is appears intended to ensure that second and later generation persons are not denied citizenship solely because one of the persons in their chain of parents and grandparents died before the coming into force of the legislative provision that made that particular ancestor a citizen. If citizenship depends on the accidental factor of the person being alive at the time the legislation is enacted, the proposed subsection does not achieve its purpose.

We suggest a broader and more generic re-working of subsection 1.5, such as the following:

> A person who would not become a citizen under one of the paragraphs of subsection (1) for the sole reason that any parent or ancestor, whose citizenship must be established for that person to become a citizen, died before the coming into force of the legislation by which that person would have become a citizen, is a citizen if that parent or ancestor, but for their death, would have become a citizen as a result of the coming into force of that legislation.

Concerns Regarding Adoptees and Citizenship by Descent

While we applaud the overall intent of Bill C-71, we must also highlight an area where the legislation could be further improved. The current framework for citizenship by descent continues to treat adoptees differently from children born to Canadian citizens.

To be a Canadian citizen at birth while born outside of Canada, one or both of your parents must be a Canadian citizen on the date of your birth. With those who are naturally born to Canadian parents, their citizenship starts the moment they are born. However, with adoptees they only gain Canadian citizenship when the application for citizenship is approved. As such, with natural born Canadians, all their children would be Canadian citizens, but with adoptees only those born after the application is approved are Canadian.

This leads to differential treatment as can be seen in this scenario.

1. Parent 1 is born in Seattle, WA and Parent 2 is born Vancouver, BC. While in Seattle, they have one natural born child ("natural born child") in 2000, and later adopt a second child ("adopted child") in 2002.
2. In 2024, both children have children of their own. After the children are born, they relocate to Canada and both apply for Canadian citizenship certificates for themselves.
    a. The natural born child receives a citizenship certificate which states that their citizenship is effective as of their date of birth. Therefore, their child is a Canadian citizen.
    b. The adopted child receives a citizenship certificate which states that their date of citizenship is the date on which the certificate is printed. Therefore, their child is not a Canadian citizen because they acquired citizenship after the children were born.

We believe that this framework raises concerns under Section 15 of the *Canadian Charter of Rights and Freedoms*, as it treats adopted children differently from those born to Canadian citizens. As the decision in *Bjorkquist et al. v Attorney General of Canada* and *Benner v Canada* differential treatment for citizens by descent based on arbitrary factors is impermissible under Section 15 of the *Charter*.

We urge the Committee to consider amending Bill C-71 to ensure that adoptees are granted Canadian citizenship retroactively to the date of birth. This would be consistent with the approach taken in the United States and would ensure that all children of Canadian citizens are treated equally under the law.

Conclusion

The CBA Immigration Law Section appreciates the Government's efforts to address historical injustices and to bring Canada's citizenship laws into alignment with contemporary values of fairness and equality. We support the passage of Bill C-71, with the caveats and recommendations outlined above, and we look forward to working with the Committee to ensure that the final legislation fully achieves its intended goals.

We thank you for your consideration and for your continued commitment to enhancing Canadian citizenship law.

Yours truly,

(original letter signed by Véronique Morissette for Kamaljit K. Lehal)

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