

January 2002

## **Babies as Bargaining Chips - In Defence of Birthright Citizenship in Canada**

Sarah Buhler

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/jlsp>

---

### **Citation Information**

Buhler, Sarah. "Babies as Bargaining Chips - In Defence of Birthright Citizenship in Canada." *Journal of Law and Social Policy* 17. (2002): 87-114.

DOI: <https://doi.org/10.60082/0829-3929.1045>

<https://digitalcommons.osgoode.yorku.ca/jlsp/vol17/iss1/5>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized editor of Osgoode Digital Commons.

# **BABIES AS BARGAINING CHIPS? IN DEFENCE OF BIRTHRIGHT CITIZENSHIP IN CANADA**

**SARAH BUHLER\***

## **RÉSUMÉ**

La loi qui accorde d'office la citoyenneté par le droit de naissance à tous les enfants nés au Canada a fait l'objet d'attaques de plus en plus nombreuses au cours des dernières années. Des déclarations comme celle qui est mentionnée ci-dessus sont faites par la classe politique, les experts juridiques et, selon certaines études, des membres du public canadien au parler de plus en plus franc. La position de ceux qui s'opposent à l'attribution de la citoyenneté par le droit de naissance est souvent semblable à celle qui est exprimée dans le passage cité ci-dessus : un sens général d'alarme quant à la possibilité que des immigrants illégaux au Canada abusent de la loi permettant l'attribution de la citoyenneté par le droit de naissance en ayant des enfants au Canada et en utilisant par la suite ces enfants pour augmenter leurs chances de demeurer au pays. Les opposants à l'attribution de la citoyenneté par le droit de naissance affirment que ce principe pose une menace suffisamment grave pour le Canada pour justifier une modification à la loi qui refuserait l'attribution d'office de la citoyenneté à la naissance dans le pays.

Outre le fait que le danger posé par ce qu'on appelle les « bébés monnaie d'échange » est largement exagéré, la question consistant à définir qui peut être citoyen dans notre pays est une question profonde qui doit être examinée par les Canadiens à l'aube du XXI<sup>e</sup> siècle. Au cours de la dernière session parlementaire, le gouvernement libéral a déposé à la Chambre des Communes une nouvelle *Loi sur la citoyenneté*. Bien que le projet de loi ait maintenu l'attribution de la citoyenneté par le droit de naissance, ce principe a été sérieusement contesté par les partis de l'opposition. Le projet de loi, qui est resté inerte à l'ordre du jour lors des dernières élections fédérales, est actuellement rédigé de nouveau. Bien que le texte de loi qui est nouvellement rédigé puisse fort bien maintenir la disposition de la citoyenneté par le droit de naissance, la question continuera probablement à être vivement débattue dans notre société à mesure que la rhétorique anti-immigration devient de plus en plus courante. L'opposition au principe de la citoyenneté par le droit de naissance montre que nous ne pouvons plus simplement tenir cette partie de notre droit pour acquise. Il importe donc de commencer à penser sérieusement à la signification de la disposition en droit canadien qui garantit

---

\* Sarah Buhler (LL.B. Osgoode Hall Law School, 2002) is currently clerking at the Saskatchewan Court of Queen's Bench. Gratitude is extended to Geraldine Sadoway of the Immigration and Refugee Law Division of Parkdale Community Legal Services for her assistance with this article.

le statut de la citoyenneté par le droit de naissance à tous les bébés nés au Canada, sans égard au statut d'immigrant de leurs parents.

Nous commencerons le présent article par une analyse du contexte dans lequel les pressions en vue d'avoir des contrôles plus stricts en matière d'immigration et de citoyenneté a lieu. Nous poursuivrons en insistant sur l'importance de la citoyenneté par le droit de naissance sur les plans pratique et symbolique. Après un bref résumé de l'historique de la citoyenneté par le droit de naissance au Canada, nous examinerons les hypothèses qui sous-tendent la tendance dans la société canadienne à vouloir abandonner la citoyenneté par le droit de naissance et ferons une critique de ces hypothèses. De plus, nous tâcherons d'exposer les courants sous-jacents de racisme et de xénophobie dans ces propositions. Aussi, nous analyserons et défendrons les fondements politiques, moraux et juridiques du principe de la citoyenneté par le droit de naissance. Pour ce qui est des fondements juridiques qui sous-tendent la citoyenneté par le droit de naissance, nous montrerons comment la loi actuellement en vigueur est conforme à la *Charte canadienne des droits et libertés* et aux conventions internationales de droits de la personne auxquelles le Canada est partie signataire. L'argument avancé est que la tendance à refuser la citoyenneté au motif de naissance au Canada est très grave sur les plans juridique, politique et moral et que notre pays devrait rester à l'écart des propositions visant à changer la citoyenneté par le droit de naissance.

## I. INTRODUCTION

*Canada is setting itself up for a problem. We have a provision which allows citizenship at birth. . . . Because of this incentive structure, parents who are not Canadian citizens will bear a child in Canada and that child will become a Canadian citizen. Then the child is, in a sense, used as a bargaining chip for that family to stay in Canada.*

– Alliance Party Member of Parliament Rob Anders<sup>1</sup>

The law that grants automatic citizenship to all children born on Canadian soil has come under mounting attack in recent years. Statements such as the one in the opening quote are being made by politicians, by legal experts, and according to some studies, by increasingly vocal members of the Canadian public.<sup>2</sup> The position of those who oppose birthright citizenship is often similar to that expressed in the opening quote: a general sense of alarm about the possibility that illegal immigrants<sup>3</sup> in Canada are

1. *House of Commons Debates*, No. 102 (29 May 2000) at 1230 (R. Anders).

2. See for example, Immigration Legislative Review, *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Minister of Public Works and Governmental Services Canada, 1997) at 40. See also S. Thobani, *Nationalizing Citizens, Bordering Immigrant Women: Globalization and the Racialization of Citizenship in Late Twentieth Century Canada* (PhD. Thesis Simon Fraser University 1998) [unpublished] at 312, who reports that a 1996 Angus Reid poll found that 57% of Canadians did not support the granting of citizenship to all children born in Canada.

3. In writing this paper, I am aware of the problematic nature of the term "illegal immigrant". As Kevin

abusing the birthright citizenship law by having children on Canadian soil, and then “using” these children to increase their chances of staying in the country. This, opponents of birthright citizenship contend, threatens Canada enough to justify a change in the law that would deny automatic citizenship upon birth in the country.

Aside from the fact that alarm about the threat posed by so-called “bargaining chip babies” is vastly exaggerated,<sup>4</sup> the question of who may be a citizen in our country is a profound one for Canadians to consider as we enter the twenty-first century. In the last Parliamentary session, a new *Citizenship Act*<sup>5</sup> was tabled in the House of Commons by the Liberal government. Although the Bill maintained the principle of birthright citizenship, this principle was strongly challenged by opposition party members. The Bill died on the order table when the last Federal election was called, and is currently being rewritten. Although the reworked legislation may very well maintain the birthright citizenship provision,<sup>6</sup> the issue will likely continue to be a live one in our society as anti-immigration rhetoric becomes increasingly commonplace. The challenges to birthright citizenship show that this part of our law can no longer simply be taken for granted. It is therefore important to begin thinking deeply about the meaning and significance of the provision in Canadian law that ensures citizenship status for all babies born in Canada, regardless of the immigration status of their parents.

This paper will begin with an analysis of the context in which the push for stricter immigration and citizenship controls is taking place. It will go on to underscore the significance of citizenship in both practical and symbolic terms. After a brief synopsis of the history of the birthright citizenship law in Canada, an examination and critique of the assumptions that underpin the push in Canadian society to abandon birthright citizenship will be presented leading to the exposure of underlying currents of racism and xenophobia in these proposals. Further, this paper will analyse and defend the political, moral and legal foundations of birthright citizenship and show how the present law accords with the *Canadian Charter of Rights and Freedoms* and with international human rights instruments to which Canada is a signatory. The argument throughout is that the push to deny citizenship on the basis of birth on Canadian soil

---

Johnson points out, language is incredibly powerful, and terminology such as “illegal immigrant” and “illegal alien” often function to justify oppressive and inhumane treatment of people who are in Canada in violation of the country’s immigration laws. See K.R. Johnson, “‘Aliens’ and the US Immigration Laws: the Social and Legal Construction of Nonpersons” (1996-97) 28 *Inter-American L. Rev.* 263.

4. Parents without legal status in Canada, yet who have Canadian-born children, are being regularly removed from Canada. This is despite the holding in *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4<sup>th</sup>) 193, 243 N.R. 22, 14 Admin. L.R. (3d) 173, and is evinced in many cases at the Immigration Division at Parkdale Community Legal Services. So, if babies are “bargaining chips” in the eyes of the Government, they are accorded precious little value. This will be discussed further below.
5. Bill C-16, *Citizenship Act of Canada*, 2d Sess., 36<sup>th</sup> Parl., 2000.
6. The Liberal government has seriously considered abandoning birthright citizenship in the past, so there is no guarantee that this will not resurface in legislative changes initiated by the Liberal government. See historical discussion below.

is problematic legally, politically, and morally, and that our nation should steer far clear of proposals to change birthright citizenship.

## II. THE CONTEXT

### (i) Immigration in the Age of Globalization

The challenges to birthright citizenship in Canada are taking place in an era where consumer goods and money move across borders freely, but where restrictions on the movement of people remain rigid.<sup>7</sup> In a striking juxtaposition, the Free Trade Area of the Americas Agreement promises to further collapse restrictions on trade in our continent,<sup>8</sup> while the proposed new *Immigration and Refugee Protection Act*<sup>9</sup> promises increased barriers for immigrants.<sup>10</sup>

One likely explanation for this phenomenon is that as the global economic system continues to immeasurably benefit the countries of the North, increasingly intolerable pressures are placed on the poorer nations of the South.<sup>11</sup> This pressure leads to migration of people in search of better lives for themselves and greater opportunities for their children. This analysis shows that Canada is complicit in the "production" of immigration, both legal and illegal, yet is striving to maintain its privilege at the expense of would-be immigrants. Moreover, the advantage of privileged members of Canada is also maintained by the existence of unequal structures within the country. As Anthony Richmond writes:

economically developed countries are practising global apartheid through their restrictive immigration and refugee policies. The select few who are deemed admissible are exposed to the prospect of further systemic discrimination, personal prejudice, and structured inequality when they attempt to settle in their new country.<sup>12</sup>

The push to abandon birthright citizenship in Canada can be characterized as part of the movement towards an increasingly rigid approach to immigration in our country.

- 
7. C. Dauvergne, "Amorality and Humanitarianism in Immigration Law" (1999) 37 *Osgoode Hall L.J.* 597 at 598.
  8. See M. Barlow, "The Free Trade Area of the Americas and the Threat to Social Programs, Environmental Sustainability and Social Justice in Canada and the Americas" online: <<http://www.canadians.org/campaigns/campaigns-trade/pub-ftaa2.html>> (accessed March 26, 2001).
  9. Bill C-11, *Immigration and Refugee Protection Act*, 1<sup>st</sup> Sess., 37<sup>th</sup> Parl., 2001.
  10. See Canadian Council for Refugees, for briefs and critiques of Bill C-11, which has been widely criticized for its many draconian measures in relation to immigrants. See <<http://www.web.net/~ccr/statelss.htm>>.
  11. S. Razak "Making Canada White: Law and the Policing of Bodies of Colour in the 1990s" (1999) 14 *Can. J. of Law and Society* 159 at 175. See also S. Anderson & J. Cavanagh, *Field Guide to the Economy* (New York: The New Press, 2000) at 89: "[i]n one of free trade's brutal ironies, many of these Mexican trade policy refugees are joining the swelling flow of immigrants who are harvesting and processing US food in often dangerous and low-wage conditions."
  12. A.H. Richmond, *Global Apartheid: Refugees, Racism, and the New World Order* (Toronto: Oxford University Press, 1994) at 115. I would add that since the restrictions also create the situation where "illegal immigrants" enter Canada to find work, these people are usually even more vulnerable to systemic inequality and other abuses.

As immigration laws become harsher, and the political pressure to curtail “illegal immigration” becomes more intense, the question of birthright citizenship may become symbolic of who can be considered a legitimate member of the community. Thus, it is proposed that the Canadian-born children of people who are not legally in the country should not be considered legitimate members because of the status of their parents. When these children are rhetorically constructed as “bargaining chips” who are not deserving of citizenship, it becomes easier for many Canadians to justify harsh treatment towards them and their families. This trend is deeply problematic. Indeed, “[i]n a world which exhibits gross disparities in economic and social well-being . . . immigration controls which prevent those born in poverty from enjoying the privileges taken for granted in a wealthy country seem particularly susceptible to declaimers of injustice.”<sup>13</sup>

## (ii) The Significance of Citizenship in Canada

In *Benner v. Canada (Secretary of State)*, Justice Iacobucci wrote “I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship.”<sup>14</sup> Similarly, the Parliamentary Secretary to the Minister of Citizenship and Immigration stated that “citizenship is about truly belonging to this society. . . . Our citizenship law sets the ground rules for those who can truly call themselves Canadian. It captures the common understanding among Canadians about what it means to be one of us.”<sup>15</sup> Indeed, citizenship functions on a symbolic and legal level as a powerful indicator of legitimate membership and legal entitlements in Canada.

From a legal perspective, citizenship has often been understood as a source of rights. That is, citizenship has been a prerequisite for the enjoyment of rights and entitlements and the protection of the individual by the state in which they hold citizenship. In some very significant ways, this is true in Canada. For example, only citizens have the right not to be deported from Canada.<sup>16</sup> Individuals who are not identified as belonging to the community are not of primary concern to the state: indeed, the person who arrives at the border claiming a political right to the same advantages of membership as a citizen “will meet a state apparatus which appears to be deaf to all political rights except those of members.”<sup>17</sup> Thus, the way in which Canada accords citizenship

---

13. D. Galloway, “Strangers and Members: Equality in an Immigration Setting” (1994) 7 Can. J. L. & Jur. 149 at 152. I would add to Galloway’s quote the observation that many immigrants who are accepted in Canada continue to find that they are excluded from the privilege which so many (white, middle-class) people enjoy.

14. *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, (1997), 143 D.L.R. (4<sup>th</sup>) 577 at 601 (cited to D.L.R.).

15. *House of Commons Debates*, No. 52 (18 February 2000) (A. Telegdi).

16. Despite the dismissive statement in *Hurd v. Canada* (1988), 90 N.R. 31, [1989] 2 F.C. 594 (Fed. C.A.) that deportation is more analogous to the simple loss of a license than to a criminal sanction, deportation is a severe sanction. Indeed, it has been acknowledged by the Supreme Court of the United States that deportation is a consequence which “may result in the loss of all that makes life worth living”. Quoted in K. Johnson, “Race and Immigration Law and Enforcement: A Response to ‘Is There a Plenary Power Doctrine?’” (2000) 14 Geo. Imm. L.J., 289 at 297.

17. Galloway, *supra* note 13 at 157-58.

speaks to *who* is considered eligible to be a legitimate member of society, and who is not considered worthy to fully belong.

Recently, some commentators have considered the notion of citizenship as a source of legal rights, pointing out that there is a fundamental contradiction between universal human rights – in which a person is considered to be entitled to rights by virtue of her “humanness” and nationalism, which “denotes special attachment to particular . . . persons.”<sup>18</sup> Conceptions of international human rights put pressures on individual states to treat resident non-citizens – even those with no legal status, in ways that increasingly erode distinctions between citizens and non-citizens with respect to the possession of rights. Thus, it becomes problematic for governments to argue that they are entitled to ignore the rights of non-citizens. This argument is true to some extent in Canada. It is true that non-citizens have successfully invoked the *Charter* to ensure recognition of certain legal rights in Canada.<sup>19</sup> However, it is also true that the courts have been excruciatingly careful to defer to Parliament in the matter of immigrant and citizen selection and the deportation of non-citizens.<sup>20</sup>

It could be argued that a paper about the importance of maintaining birthright citizenship is misguided in that it unwittingly places an emphasis on citizenship as a category, when in fact the emphasis should be to ensure that all individuals – regardless of citizenship status – are treated with respect by the state. For example, Linda Bosniak warns that placing an excessive emphasis on citizenship means hardening the distinction between citizens and non-citizens and this can lead to increasing exclusion of immigrants.<sup>21</sup> By defending birthright citizenship this paper does not seek in any way to imply that citizenship ought to be the prerequisite for legal rights in a society. Nor does it mean that babies born on Canadian soil are more deserving of rights and protections than children of immigrants in Canada who were not born here.<sup>22</sup>

A cause for serious worry, however, is that the basis for the law which grants birthright citizenship to every baby born in Canada is being chipped away at by those who wish to further restrict immigration to Canada.<sup>23</sup> Precisely because the notion of citizenship carries such important symbolic and legal significance, those who are interested in preventing further restrictions on who is entitled to “belong” in Canada ought to vigilantly seek to maintain accessible and open citizenship laws and policies, and to be suspicious of proposals about that would narrow access to citizenship in this country.

---

18. L. Bosniak, “Citizenship Denationalized” (2000) 7 *Indiana J. Global Leg. Stud.* 447 at 501.

19. See *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, 17 D.L.R. (4d) 422 and *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4d) 1.

20. See, for example, *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] SCR 711 at 733-34.

21. L. Bosniak, “The Citizenship of Aliens” (1998) 16 *Social Text* 24 at 30.

22. It is dangerous to privilege certain children over others based on their status. See S. Aiken & S. Scott, “*Baker v. Canada (Minister of Citizenship and Immigration)* and the Rights of Children” (2000) 15 *J.L. & Social Pol’y* 211 at 250.

23. In the words of Thobani, “[o]nce the shift in principle is made and politically accepted, future changes might extend . . . the grounds for exclusion from legal citizenship.” S. Thobani, *supra* note 2 at 311.

### III. "BARGAINING CHIP BABIES": ALREADY SECOND CLASS CITIZENS?

Although citizenship is often understood as a universal concept in which all citizens of a particular nation are equal before the law, this is not reflective of lived experience. Rather, race, class, gender, and other factors all work to affect a person's access to the rights promised by "citizenship".<sup>24</sup> For example, it is abundantly clear that babies born in Canada of parents who do not have legal immigration status do not enjoy equal citizenship with children born here of "legal" parents. One of the most vivid examples of this is the fact that citizen children of parents who do not have immigration status are routinely being denied health coverage by the provincial government in Ontario.<sup>25</sup> However, even though citizenship itself may not lead to equal rights and full participation in Canadian society, *access to citizenship* is often a pre-condition for the chance, however slim, of enjoying these rights.<sup>26</sup>

The recent Supreme Court of Canada decision in *Baker v. Canada (Minister of Citizenship and Immigration)*<sup>27</sup> seemed to hold the promise of an increased respect for Canadian citizen children whose parents do not have legal immigration status. The Court in *Baker* declared that immigration officers must consider the "best interests of the child" when deciding whether to remove their parents from Canada. Since a Canadian-born child of an illegal immigrant has the legal right to remain in the country, the parent-child separation that could result from removing the parent from Canada must be considered by the officer.

Unfortunately, courts have already begun to limit the promise that children's "best interests" will be significantly taken into consideration. In a decision by Mr. Justice Blais of the Federal Court, it was decided that evidence of Canadian children to an illegal immigrant was irrelevant to the issue of the immigrant's removal from Canada,<sup>28</sup> and that the ensuing hardships were within the normal range suffered by all of those who are removed from Canada.<sup>29</sup> In another case, an immigration officer asked counsel to provide submissions to show that foster care for the Canadian children would be less favourable than the care of their mother, who was to be removed from Canada.<sup>30</sup> Clearly, the officer's paramount concern was the removal from Canada of the mother, and the "best interests" of the citizen children were accordingly devalued.<sup>31</sup>

---

24. R. Rosaldo, "Cultural Citizenship, Inequality, and Multiculturalism" in R. Torres, L. Miron & J. Inda, eds., *Race, Identity and Citizenship: A Reader* (Malden, MA: Blackwell Publishers, 1999) 253 at 253.

25. This information was obtained from Parkdale Community Legal Services, a legal aid clinic in Toronto, Ontario.

26. S. Castles, *Here For Good: Western Europe's New Ethnic Minorities* (London: Pluto Press, 1984) at 161.

27. *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra* note 4.

28. *Hazel Florene Ramessar v. Minister of Citizenship and Immigration* (12 December 2000), Toronto IMM-6196-99 (F.C.T.D.) at 12.

29. *Ibid.* at 15.

30. This information was obtained from Parkdale Community Legal Services, a legal aid clinic in Toronto.

31. According to many experts, including the Children's Aid Society of Toronto, it is in almost every situation in the child's best interests to remain in the care of his or her parents. Letter from Children's



Nevertheless, those who oppose birthright citizenship are of the opinion that decisions such as *Baker* are indicative of a problem which could be eliminated by the removal of that citizenship. A change to the legislation could arguably overrule *Baker*, so that the interests of a child to stay in Canada would not have to be considered in deporting the child's parents. For example, opposition to the *Baker* decision by a Member of Parliament who criticized the Supreme Court of Canada for failing to "consider that Mavis Baker could return to her home country, that the children would be citizens of that country and that they could live together as a family in the country of origin." He went on to say that "[a]s a result of inaction on the part of the government, this situation will lead to a lot more abuse in our country."<sup>32</sup> Although the Supreme Court of Canada in *Baker* did not specifically state that only citizen children's best interests are to be considered, it can be assumed that children without citizenship status will be more readily removed than those who are not citizens.

Since the ability of Canadian children born of illegal immigrants parents to enjoy their rights as citizens is already so limited, it is arguable that the denial of citizenship altogether is not an impossible leap for the legislature to make in relation to such children. It is foreseeable that if citizenship itself were denied, the doors would be open to increasingly discriminatory treatment of immigrants and their children generally. Essentially, Canada would be able to say, with much more impunity than currently possible, that it owes nothing to innocent children born on its soil.

#### IV. THE BIRTHRIGHT CITIZENSHIP LAW IN CANADA AND ITS HISTORY

The current *Citizenship Act* states that with few exceptions (such as for the children of foreign diplomats) everyone born in Canada is automatically deemed to be a Canadian citizen.<sup>33</sup> With recent debate about the need for stricter immigration controls and the denial of birthright citizenship, it is important to understand the context and the history of birthright citizenship in Canada. Our history reveals that birthright citizenship was virtually unquestioned until the 1990s. Indeed, the impetus in earlier citizenship legislation was generally towards cementing the notion of equality (or at least the rhetoric of equality) of all those born on Canadian soil. Thus, disallowing birthright citizenship would be regressive and contrary to the historical emphasis on the move towards greater inclusiveness in Canadian citizenship law.

The concept of conferring citizenship at birth in Canada has its roots in the British common law tradition. *Calvin's Case*,<sup>34</sup> decided in 1608, is the earliest articulation of the *jus soli* or "law of the soil" concept which ties citizenship to the territory of birth, regardless of the citizenship status of one's parents.<sup>35</sup> The case, which involved all the

---

Aid Society of Toronto to Parkdale Community Legal Services (22 March 2001).

32. *House of Commons Debates*, No. 94 (10 May 2000) (L. Benoit).

33. *Citizenship Act*, R.S.C. 1985, c.C-29, s. 3(1)(a).

34. 77 Eng. Rep. 377 (K.B. 1608).

35. There are two major ways in which citizenship can be acquired at birth, *jus soli* and *jus sanguinis*.

important English judges of the day, decided that all persons born within any territory held by the King of England were to enjoy the benefits of England as subjects of the King. In his decision, Lord Coke stated: "Calvin was born under the King's power or protection; *ergo* he is no alien."<sup>36</sup>

The first Canadian *Citizenship Act* was proclaimed in 1947.<sup>37</sup> Before that time, there was no legal concept of Canadian citizenship. Rather, Canadians were either British subjects or "aliens".<sup>38</sup> Interestingly, early Canadian immigration legislation referred to "Canadian citizenship" as a way of distinguishing "aliens" from those who were seen as desirable for the country. For example, the *Immigration Act* of 1910 stipulated that Canada could deny entry to immigrants who "are deemed undesirable owing to their peculiar customs, habits, modes of life . . . or because of their probable inability to become readily assimilated or to assume the duties and responsibilities of Canadian citizenship."<sup>39</sup> Thus, it appears that even before there was legal citizenship in Canada, "citizenship" terminology was used as a rhetorical tool to contrast those deemed worthy of membership in Canadian society (white, British people) from those who were constructed as "aliens".

The 1947 *Citizenship Act*<sup>40</sup> allowed for birthright citizenship, thereby codifying the common law principle set out in *Calvin's Case*. A reading of the 1946 House of Commons Debates leading up to the passage of this *Act* reveals that birthright citizenship was never seriously questioned. Indeed, there is a sense that birthright citizenship is one of the essential foundations of citizenship in Canada. One Member of Parliament simply stated that "nationality is something that is cast upon a person by birth."<sup>41</sup> Interestingly, the question of birthright citizenship *could have* been raised in the midst of one of the most contested issues throughout the debates of the proposed Bill – the "Japanese question"<sup>42</sup> – but it was not. Although unrepeatably anti-Japanese statements were made repeatedly throughout the 1946 Debates, birthright citizenship remained unchallenged by Members of Parliament. The only remark that could be interpreted as a challenge to the notion of birthright citizenship was by a Member of Parliament who said "[w]e are granting extensive rights to natural-born Canadians and yet there are natural-born Canadians who do not deserve these rights."<sup>43</sup> Despite its anti-Japanese rhetoric, much of the debate about the new citizenship law centred on

---

The second concept, known as *jus sanguinis* or "law of blood", relies on the citizenship of the parents, regardless of where the child is born.

36. *Calvin's Case*, *supra* note 34 at 407.

37. *Citizenship Act*, S.C. 1946, c.15.

38. Richmond, *supra* note 12 at 148.

39. *Immigration Act*, S.C. 1910, c.27, s.38(c).

40. *Citizenship Act*, *supra* note 37.

41. *House of Commons Debates* (2 May 1946) at 1154 (McMaster).

42. At that time, anti-Japanese sentiment was at hysterical levels, and Canadian oppression of Japanese-Canadians, including the internment of thousands, was still in full force.

43. *House of Commons Debates* (5 April 1946) at 615 (Green).

the importance of "a new citizenship without regard to racial origin",<sup>44</sup> and the importance that there be no "first- or second-class citizenship".<sup>45</sup>

The current *Citizenship Act*,<sup>46</sup> enacted in 1977, maintained the birthright citizenship provision. Although it has undergone several amendments over the years, the 1977 *Act* essentially remains the present law. It is relevant to note that one of the explicit goals of the 1977 *Act* was to modernize the law of citizenship in Canada and to make it more inclusive in its scope. As well as increasing the access of married women to Canadian citizenship status more transparent criteria for the awarding of citizenship were included.<sup>47</sup> Once again, the 1975 House of Commons Debates about the proposed new law reveal no questioning of the birthright citizenship provision, despite some marked anti-immigrant remarks by several members of the official Opposition.<sup>48</sup>

Indeed, it appears that there was no significant national discussion or debate on the topic of birthright citizenship in Canada until 1994, when Citizenship and Immigration Canada raised the matter for discussion in a paper called *A Citizenship Strategy*, prepared for the Standing Committee on Citizenship and Immigration (hereinafter, the Standing Committee). This document put into words the question which is now being taking so seriously by those who yearn for tighter controls on citizenship and immigration: "Should the current practice of extending an automatic right to Canadian citizenship as a result of being born on Canadian territory be dependant on one of the parents being a permanent resident or a citizen?"<sup>49</sup>

Soon after this question was posed, the Standing Committee reported that birthright citizenship could be subject to abuse, stating that "it appears that some women may be coming to Canada as visitors solely for the purpose of having their babies on Canadian soil, thereby ensuring Canadian citizenship for their children."<sup>50</sup> The Committee recommended that children born in Canada should be citizens only if one or both parents was either a citizen or a permanent resident. It stated that the rule should not apply if the child would otherwise be stateless, and also recommended that there be an exception for children born to Convention refugees and refugee claimants whose claims are accepted.<sup>51</sup> In 1996, the Minister of Citizenship and Immigration was quoted in the media as stating that the issue was being studied for possible inclusion in the new citizenship bill.<sup>52</sup> However, because there were no statistics available to

---

44. *House of Commons Debates* (30 April 1946) at 1045 (J. Diefenbaker).

45. *House of Commons Debates* (7 May 1946) at 1301 (J. Diefenbaker).

46. *Citizenship Act*, *supra* note 33.

47. See *House of Commons Debates* (21 May 1975) at 5983, 5984.

48. *House of Commons Debates* (8 December 1975) at 9815 (A. Brewin).

49. Quoted in Parliamentary Research Branch, *Canadian Citizenship Act and Current Issues: Background Paper* by M. Young (Ottawa: Parliamentary Research Branch, 1998) at 3.

50. Standing Committee on Citizenship and Immigration, *Canadian Citizenship: A Sense of Belonging* (Ottawa: Public Works and Government Services Canada, 1994) at 17.

51. *Ibid.*

52. Young, *supra* note 49 at 3.

back up this concern, the Minister later said that she would postpone the change until exact data was available.<sup>53</sup> A year later, in 1997, the Immigration Legislative Review Committee noted what was becoming an increasingly familiar refrain: that there was widespread public concern about the abuse of the birthright citizenship provision in Canadian law.<sup>54</sup>

## V. COMPARISONS TO OTHER COUNTRIES

An analysis of other western countries that have experienced significant immigration reveals that countries which have traditionally adhered to the *jus soli* principle have either abandoned, or seriously questioned, this aspect of their law in recent years. Moreover, countries such as Germany have never followed the *jus soli* principle. However, an analysis of the apparent trend towards abandoning or seriously questioning birthright citizenship can disclose racist motivations behind the push for change. Furthermore, increasing emphasis on an “ethnically defined” nationalism is another impetus for change in this regard. In this section, I will specifically look at the approaches in Germany, the United States, the United Kingdom and Australia to the question of birthright citizenship, and attempt to glean some lessons for Canada.

Citizenship in Germany has always been based on the concept of an ethnic German nation. Thus, citizenship is not conferred based on birth in Germany, but rather by parentage. The situation has been criticized in that it produces the unjust situation in which a person

who speaks no German, has never lived there, and whose only connection with Germany is . . . his paternal grandparents . . . has a better legal claim on German citizenship than the child of Turkish worker in Germany, born in Germany, educated there, culturally German, and speaking no other language than German.<sup>55</sup>

This refusal to grant citizenship status to children born in Germany of non-citizens ensures that the vulnerability of those without legal status in Germany can be passed down through several generations. In addition, it perpetuates the notion that “whiteness” and a particular ethnic heritage are prerequisites to German citizenship. Given current racial tensions in Germany, many Germans are rethinking and challenging the current exclusive and restrictive citizenship and immigration policies. Indeed, some have suggested implementing birthright citizenship in order to reduce the vulnerability of immigrants.<sup>56</sup>

---

53. The numbers are estimated to be quite small – about 0.2% of births in Canada. See Canadian Council for Refugees, “Statelessness – Addressing the Issues” (Nov 1996) 28 paragraphs at para 27 online: <<http://www.web.net/~ccr/statelss.htm>> (accessed March 23, 2001).

54. Immigration Legislative Review, *supra* note 2 at 40.

55. Quoted in J. Hampton, “Immigration, Identity, and Justice”, in W. Schwartz, ed., *Justice in Immigration* (Cambridge: Cambridge University Press, 1995) 67 at 71.

56. Radio documentary, A. Dvorson, “Dispatches: Report from Germany” Canadian Broadcasting Corporation (4 April 2001).

The United Kingdom, from which Canada's current law of *jus soli* originated, changed its law in 1981 so that babies born in the country are no longer automatic citizens unless their parents are citizens or are "settled".<sup>57</sup> Writers have pointed out that the change to the law was rooted in anti-immigrant sentiment during and after the devolution of the British Colonial Empire. Indeed, it has been said that Britain stands out as the western world's foremost "would be zero-immigration country", and that the only true impetus for restricting *jus soli* was a desire for more rigid immigration control.<sup>58</sup> Although there is a provision in the 1981 *British Nationality Act* which allows a child to register for citizenship after living in the United Kingdom for ten years continuously from birth,<sup>59</sup> it is arguable that the law generally points towards an ethnic redefinition of "Britishness" and away from any semblance of openness towards immigrants.

Of all the western countries with histories of immigration, the United States stands out as the nation with the strongest guarantee of birthright citizenship. This is because birthright citizenship is guaranteed in the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment was adopted following the American Civil War to ensure citizenship status for newly freed slaves. Despite this inclusion, birthright citizenship has come under sustained and severe attack in the United States by those who understand it as an incentive for illegal immigration. In 1996, several proposed constitutional amendments which would revoke the birthright citizenship law were tabled in the United States Congress. Although the constitution has not been changed, U.S. law journals have been filled since 1996 with heated arguments about the appropriate interpretation of the fourteenth Amendment, and whether or not it should be amended to revoke automatic birthright citizenship. Clearly, the law continues to be under attack, despite its constitutional status.

Australia traditionally conferred citizenship on the basis of the *jus soli* principle. However, the law was changed in 1986 so that a person born in Australia is only a citizen if one of her parents was an Australian citizen or permanent resident at the time of her birth; or if she has lived in Australia for ten years from the time of her birth.<sup>60</sup> The 1986 decision to limit birthright citizenship was the result of the *Kioa v. West*<sup>61</sup> case, where it had been argued that the citizen child of parents who were illegal immigrants should not be removed from the country. Even though the court did not support this argument, the legislature decided to change the law in order to prevent any such future challenges by "illegal immigrants" who attempted to "use" their children to stay in the country.<sup>62</sup>

---

57. "Settled" in this context applies to any person who is ordinarily resident in the United Kingdom and is not in violation of United Kingdom immigration laws. See I. Stanbrook, *British Nationality: The New Law* (London: Clement Publishers, 1982) at xvii.

58. C. Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain* (Oxford: Oxford University Press, 1999) at 100 and 113.

59. Stanbrook, *supra* note 57 at xvii.

60. *Australian Citizenship Act*, 1948, s.10(2)(a), (b).

61. *Kioa v. West* (1985), 159 C.L.R. 550 (Australia).

62. G. Zappala & S. Castles, "Citizenship and Immigration in Australia" in T. Aleinikoff & D. Klusmeyer, eds., *From Migrants to Citizens: Membership in a Changing World* (Washington: Carnegie Endow-

## VI. BIRTHRIGHT CITIZENSHIP UNDER ATTACK: POLITICAL AND MORAL DEFENCES

It appears that the attacks on birthright citizenship in Canada are not occurring in isolation, but in a global context where economic pressures are contributing to increased migration, and where "countries of immigration" – such as Germany, the United Kingdom, the United States and Australia, as well as Canada, have been increasingly pressured to limit access to citizenship, or to maintain already limited criteria for citizenship. This section will describe and critique the various political and economic arguments which have been or might in the future be put forward by opponents of birthright citizenship for babies of illegal immigrants in Canada. It will contend that the arguments are rooted in a racist, xenophobic perspective which must be critiqued and challenged if Canada is to even remotely justify its self-proclaimed status as a country with humanitarian and open-minded citizenship and immigration policies.<sup>63</sup>

Although Canada often touts itself as "an immigrant-receiving nation [which] welcomes newcomers and encourages them to become citizens",<sup>64</sup> its history since Confederation reveals deeply racist laws and policies in relation to non-white prospective immigrants.<sup>65</sup> Jakubowski shows that despite rhetoric to the contrary, subtle and overt racism continue to operate in Canadian immigration law and policy.<sup>66</sup> It seems clear that the push to abandon birthright citizenship for children of illegal immigrants is related to general anti-immigrant sentiment, which in turn is linked to a racist perspective.<sup>67</sup> In the words of Dorothy Roberts, denial of birthright citizenship would send the message that Canada can "use the cheap labour of dark-skinned, undocu-

---

ment for International Peace, 2000) 32 at 43.

63. Immigration Legislative Review, *supra* note 2 at 29.

64. Citizenship and Immigration Canada, *A Broader Vision: Immigration and Citizenship Plan 1995-2000, Annual Report to Parliament* (Hull: Minister of Supply and Services Canada, 1994) at 25.

65. For example, the so-called "White Canada policy" (which was not officially abandoned until 1962) made possible statements such as the following, found in an immigration promotional pamphlet in the early twentieth century: "the climate [in Canada] is particularly suited to the white race. . . . British people soon find themselves at home in Canada." Quoted in L. Jakubowski, *Immigration and the Legalization of Racism* (Halifax: Fernwood Press, 1997) at 15.

66. Jakubowski, *ibid.*

67. According to Delgado, "efforts to limit citizenship are efforts to maintain a system of white supremacy and to give that system the veneer of fairness and principle." R. Delgado, "Citizenship", in Torres, *supra* note 24 at 251. But note that Houston warns of assertions of racism are problematic because they are "devoid of logical analysis with respect to the policy arguments made by opponents of territorial birthright citizenship. Such accusations – whether true or not – denigrate the entire level of debate to *ad hominem* attacks": M. Houston, "Birthright Citizenship in the United Kingdom and the United States: a Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants" (2000) *Vand. J. of Transnat'l L.* 693 at 724. I disagree. Analyses of underlying racism in Canada's immigration law and policy are vital to an understanding of the fabric of this country. Further, a discussion of racism is not an empty attack, but an analysis of a systemic problem.

mented immigrants” but that these people are not worthy to give birth to citizens. This kind of proposal, she says, sends “a message of the ideal white identity.”<sup>68</sup>

It has been noted that there is a current trend for nations to move toward more nationalistic and ethnically-defined identities,<sup>69</sup> in the midst of, and perhaps because of, global migratory pressures. That is, as globalization leads to migration of poor people to rich countries, rich countries try to make it more difficult for these people to attain membership. This is certainly the case in the United Kingdom, as noted above, where “Britishness” is increasingly associated with “whiteness”. In Canada, where “because of our diverse origins, the land itself is our common bond”,<sup>70</sup> proposals which smack of a concept of citizenship based on ethnicity are profoundly problematic. While citizenship rights in countries such as Canada have already been compared to the modern-day equivalent of feudal privileges,<sup>71</sup> removing birthright citizenship altogether would be a further step towards enshrining this privilege for some, and eliminating it for others. For some, the campaign to eliminate birthright citizenship is a struggle over the future racial, linguistic and cultural development of Canadian society. Critical thinkers must ask whether it is appropriate to move in this direction, and further whether it is appropriate to wage this struggle through the citizenship of babies born in Canada.

Not only do racist policies hurt those seeking recognition and status in Canada, but they also Canadian people of colour. It seems clear that a move to change the law of birthright citizenship would feed negative and xenophobic images of immigrants to the public. After all, parents would be forced to prove their immigration status to authorities in order for their child to be granted citizenship. It seems reasonable to assume that people of colour would face disproportionate scrutiny in this regard, and that the citizenship status of all people of colour could thereby become suspect. Indeed, it has been written that the stigmatizing of people of colour and immigrants has the effect of devaluing and undermining the citizenship status of all people of colour in Canada.<sup>72</sup> Denying birthright citizenship could simply become another method for excluding and discriminating against members of traditionally disadvantaged groups. For example, a Member of Parliament expressed his apprehension on the arrival of Chinese migrants to British Columbia when he stated that

[w]omen from other countries will make the assumption, because of [the birthright citizenship provision], that by hook or by crook they will make their way . . . in rusty buckets of boats so they will have the chance to bear a child on Canadian soil.<sup>73</sup>

---

68. D. Roberts, “Who May Give Birth to United States Citizens?” (1996) 17 *Women’s Rights Law Reporter* 275 at 275.

69. Canadian Council for Refugees, “Statelessness”, *supra* note 53 at para 28.

70. J.W. Guendelsberger, “Access to Citizenship for Children born within the State to Foreign Parents” (1992) 40 *Am. J. Comp. L.* 379 at 409.

71. In *Dauvergne*, *supra* note 7 at 597.

72. Razak, *supra* note 11 at 160.

73. *House of Commons Debates*, No. 102 (29 May 2000) at 1230 (R. Anders).

Again, another remarked that changing the birthright citizenship provision "is long overdue and will remove some of the abuse in our immigration system."<sup>74</sup> These statements attribute connivance and criminality to those who wish to make their home in Canada, while simultaneously erasing the economic and political context in which this illegal immigration is occurring. Furthermore, these statements reflect a desire to use children to punish and "teach" their immigrant parents to follow Canada's immigration rules. While some have argued that children should be forced to abide by the so-called immigration "sins" of their parents, it can also be persuasively argued that morally blameless children should never be used to punish parents whose only "crime", usually, is to have contravened Canada's immigration laws in a socio-economic context that leaves them feeling that there is no other option.<sup>75</sup>

It is important to note that in addition to its potentially negative impact on people of colour in Canada, the repealing of the birthright citizenship law would have also have a gendered impact insofar as it would disproportionately affect the mothers of children who are denied citizenship. Because social norms tend to place primary responsibility for children on women, a revocation of birthright citizenship for children would force many women to either leave Canada in order to prevent their children from being born without any right to citizenship, or to continue living in Canada with children who are vulnerable and not necessarily protected by the state. This law would ensure that women migrant workers, who are already so vulnerable, would not be able to escape their vulnerable status through their children's citizenship.<sup>76</sup>

Opponents of birthright citizenship often claim that they are not anti-immigration *per se*, but rather that they are against *illegal* immigration. They are dismayed by the idea that illegal immigrant mothers would have a "bargaining chip" advantage in their favour by having a child on Canadian soil. Other law-abiding immigrants, they say, are patiently waiting in line for their turn to come to Canada, and the birthright citizenship rule is simply a "slap in the face" to those who are abiding by immigration laws.<sup>77</sup> One American commentator argues that "[i]t only requires a few cases of abuse of the generous birthright citizenship law to offend a traditional sense of equity and fairness in the eyes of those who play by the rules."<sup>78</sup>

It is interesting that these arguments claim to be in defence of the patient lineup of immigrants who follow the rules yet they tend to pit "good" and "bad" immigrants against each other while simultaneously deflecting attention away from the often

---

74. *House of Commons Debates*, No. 94 (10 May 2000) (L. Benoit).

75. Indeed, Joseph Carens expresses this point very clearly: "[t]hese people are . . . ordinary, hard-working people, willing to abide by all the laws except the one that would have excluded them from the chance for a decent life." J. Carens, "Who Belongs? Theoretical and Legal Questions about Birthright Citizenship in the United States" (1987) 37 U.T.L.J. 413 at 429.

76. Thobani, *supra* note 2 at 312.

77. A. Abrahams, "Closing the Immigration Loophole: the 14<sup>th</sup> Amendment's Jurisdiction Requirement" (1998) 12 Geo. Imm. L.J. 469 at 476.

78. C. Hsieh, "American Born Legal Permanent Resident? A Constitutional Amendment Proposal" (1998) 12 Geo. Imm. L.J. 511 at 520.



white, privileged speaker, who arguably has the most to gain from the implementation of restrictive citizenship policies. It is also important to note that these arguments ignore the fact that many immigrants are unable to follow the rules because the game is simply not designed for them. As described earlier, many economic migrants are forced by global pressures to leave their home countries and migrate to countries where there may be employment opportunities and hope for their children's futures. Thus, the push to abandon birthright citizenship appears to be inspired by a desire to limit access to citizenship for those perceived as undeserving, and is likely linked to a general anti-immigrant sentiment in society, *not* just an anti-illegal immigration sentiment.

Finally, those who oppose birthright citizenship often point to rational economic arguments to justify their position. As Jakubowski points out, in times of economic crisis, immigrants, who are often vulnerable members of society, become "ideal targets of blame for all of the host country's economic, social and political ills."<sup>79</sup> It is perhaps not surprising that a push towards circumscribing the ambit of citizenship would occur at a time of perceived economic crisis.<sup>80</sup> This would ensure that more people can be easily defined as outsiders who have no place in Canadian society. Opponents of birthright citizenship therefore can be expected to appeal to so-called rational economic arguments, claiming that the country can simply not afford birthright citizenship. For example, the American commentator Peter Schuck writes that it is irrational to allow illegal immigrants to automatically have citizen children "at the expense of taxpayers."<sup>81</sup>

These rational economic arguments fall apart when there is abundant evidence that Canada relies on immigrants (legal and illegal) for the functioning of its economy. The arguments also fail to note the wealth of Canadian taxpayers is made on the backs of poor countries, and that there must therefore be *some* recognition of an obligation to welcome those workers, and their children, who, in so many cases, can no longer survive in their own countries because of economic and political pressures.

At a time where some are predicting "an era of rapid rollback in gains for ethnic minorities, foreigners, and other outsider groups,"<sup>82</sup> the economic and political arguments that have an anti-immigrant agenda will have increasing sway in society. The proposed new *Citizenship Act* maintains birthright citizenship. Nevertheless, it has been criticized for having a tilt towards a nationalistic conception of citizenship.<sup>83</sup> Increasing erosion of the notion of the rights of migrants to enter and remain in Canada is encouraged by the rhetoric of closed borders and increasingly limited access to citizenship. The denial of birthright citizenship would effectively demarcate and

---

79. Jakubowski, *supra* note 65 at 12.

80. Delgado, *supra* note 67 at 247.

81. P. Schuck, "The Reevaluation of American Citizenship" (1998) 12 Geo. Imm. L.J. 1 at 20.

82. Delgado, *supra* note 67 at 249.

83. D. Galloway, "The Dilemmas of Canadian Citizenship Law" (1999) 13 Geo. Imm. L.J. 201 at 202.

solidify the notion that already privileged Canadians are entitled to their privilege, and that others, such as the vulnerable babies of illegal immigrants, are undeserving.

## VII. BIRTHRIGHT CITIZENSHIP UNDER ATTACK: LEGAL DEFENCES

This paper has attempted to show that birthright citizenship is important from a political and social standpoint in our society. This section will concentrate on the legal arguments in favour of birthright citizenship in Canada. Specifically, it will describe Canada's international legal obligations which suggest that Canada should maintain birthright citizenship. Finally, a potential *Charter* argument against a change in the *Citizenship Act* which would repeal birthright citizenship will be discussed and analysed.

### (i) Birthright Citizenship and Canada's International Legal Obligations

One of the strongest legal and political arguments for the repeal the birthright citizenship provision of the *Citizenship Act* is that Canada's sovereignty gives it the unequivocal right to do so. Opponents of birthright citizenship will simply declare that the right of states to decide their criteria for citizenship has long been considered a pillar of international law. Indeed, it has been stated that "no area is more sensitive to State sovereignty than the conferment or withdrawal of nationality."<sup>84</sup> For example, according to Article 1 of the Hague Convention of 1930, "It is for each state to determine under its own law who are its nationals."<sup>85</sup> This notion of a state's absolute sovereignty over issues of who may be granted citizenship is illustrated vividly by Prime Minister Mackenzie King's 1947 Statement on Immigration. In this statement, he declared, "I wish to make it quite clear that Canada is perfectly within her rights in selecting persons who we regard as desirable future citizens."<sup>86</sup>

Canadian courts have traditionally deferred to this principle of state sovereignty over the conferring of citizenship. For example, the Federal Court of Appeal has stated that citizenship is entirely a "creature of federal statute law."<sup>87</sup> The attitude of judges has seemed to reflect an understanding that any obligations imposed on nations regarding the granting of citizenship denies the nation its fundamental power to "define its polity and itself".<sup>88</sup> The train of thought seems to be that having refused to consent to

---

84. J.M. Chan, "The Right to a Nationality as a Human Right: the Current Trend Towards Recognition" (1991) 12 H.R.L.J. 1 at 6.

85. Quoted in W. Kaplan, "Who Belongs? Changing Concepts of Citizenship and Nationality" in W. Kaplan, ed., *Belonging: the Meaning and Future of Canadian Citizenship* (Montreal: McGill-Queen's University Press, 1993) 245 at 249-50.

86. Quoted in L. Jakubowski, "'Managing' Canadian Immigration: Racism, Ethnic Selectivity, and the Law" in E. Comack, ed., *Locating Law: Race/ Class/ Gender Connections* (Halifax: Fernwood Publishing, 1999) 98 at 107.

87. *Solis v. Canada (Minister of Citizenship and Immigration)* (28 March 2000), 360-98 (F.C.A.). Indeed, in *Kindler v. Canada (Minister of Justice)* Mr. Justice La Forest quoted with approval a 1906 Privy Council case, *Canada (A.G.) v. Cain*, [1906] A.C. 542 (P.C.): "one of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State . . . and to expel or deport from the State, at pleasure, even a friendly alien", [1991] 2 S.C.R. 779.

88. Abrahams, *supra* note 77 at 475.

membership of illegal immigrants, it can hardly be claimed that a country consented to the membership of their children – children who are born while their parents are in “clear violation of the law”.<sup>89</sup>

Despite the apparent sacredness of state sovereignty over the determination of citizenship in international and domestic law, this principle has been seriously critiqued, and is arguably now tempered by international law. As Guy Goodwin-Gill writes,

It was for long argued that the only rule of international law concerning nationality had nothing to do with international law. Yet . . . today it is accepted that there are certain restrictions upon State's discretion, or freedom of decision, in the field of nationality.<sup>90</sup>

The rise of international human rights obligations on states, as well as the promotion of free movement of goods and labour across borders, has altered the notion that nations have absolute discretion over issues of nationality and the treatment of people within their borders.<sup>91</sup> Indeed, the practice of according citizenship has been increasingly perceived as a human rights issue.<sup>92</sup> Furthermore, it has been argued that the ideal of absolute state sovereignty may be a vestige of nineteenth century law and politics, which is simply not compatible with modern notions of universal human rights.<sup>93</sup> In the words of Fourlanos, “sovereignty is what remains after the enforcement of all kinds of restrictions provided by international law.”<sup>94</sup> Thus, it is currently possible to argue that regardless of the right a nation may have to stake out its rules about citizenship, this right cannot be sufficiently powerful to trump all other rights held by those within its borders. As will be shown below, there are indications that a law providing birthright citizenship conforms with these international obligations.<sup>95</sup> However, as Hodgson writes, “humanitarian sentiment has taken second place to a perceived fear of erosion of state sovereignty. . . . States continue to begrudge an acceptance of the *jus soli* principle, whose wide application is critical to reducing the problem of child statelessness.”<sup>96</sup>

---

89. *Ibid.* at 476.

90. G. Goodwin-Gill, *International Law and the Movement of Persons Between States* (Oxford: Clarendon Press, 1978) at 51.

91. K. Rubenstein & D. Adler, “International Citizenship” (2000) 7 *Ind. Global Legal Studies* 519 at 527.

92. V. Leary, “Citizenship, Human Rights, and Diversity” in A. Cairns, ed., *Citizenship, Diversity and Pluralism: Canadian and Comparative Perspectives* (Montreal: McGill-Queen's University Press, 1999) 247 at 253.

93. M. Scaperlanda, “Polishing the Tarnished Golden Door” in S. Goulbourne, ed., *Law and Migration* (Cheltenham, UK: Edward Elgar Publishing, 1998) 3 at 5. See also M. Somerville & S. Wilson “Crossing Boundaries: Travel, Immigration, Human Rights and AIDs” (1998) 43 *McGill L.J.* 781 at 815.

94. G. Fourlanos, *Sovereignty and the Ingress of Aliens: With Special Focus on Family Unity and Refugee Law* (Stockholm: Almqvist & Wiksell International, 1986) at 85.

95. Although it would be difficult to unequivocally claim that birthright citizenship is a “human right” simply because so many nations do not confer citizenship in this way, my analysis shows that birthright citizenship is the best way for Canada to conform with its international human rights obligations.

96. D. Hodgson, “The Child's Right to a Legal Identity” 7 *Australian J. of Family L.* (1993) 121 at 136.

One of the major international legal problems that is created by the absence of birthright citizenship is the proliferation of statelessness. Statelessness is defined as the condition in which a person is not recognized by any nation as a member, and is thus not legally entitled to the protection of any country. Also described as the "contrary of citizenship",<sup>97</sup> statelessness can be encouraged by the refusal of a country to grant citizenship to children born on its soil. It has been noted that statelessness is on the rise in the world, due in large part to the trend towards defining nations by ethnicity.<sup>98</sup> Interestingly, the above analysis shows that the push within Canada to abandon birthright citizenship is motivated, at least in part, by a desire to maintain, or create, a more ethnically defined citizenry.

In addition to actual statelessness, the Canadian Council for Refugees points out that even if an individual is technically entitled to citizenship in another country, they may face "*de facto* statelessness", insofar as they are unable to enjoy protection and assistance from the state in which they are entitled to nationality.<sup>99</sup> Although some such persons can make refugee claims, there are often significant gaps in international protection for such *de facto* stateless persons.<sup>100</sup> It may be possible to argue that a baby born in Canada to illegal immigrant parents who would face no opportunities and no substantive protection in her parents' home country is a *de facto* stateless person, and should be accordingly protected by Canada.

Desiring to counter the problem posed by statelessness, the international community has agreed to several conventions which have as their goal the reduction of this condition. Most significant is the *Convention on the Reduction of Statelessness*, adopted in 1961, to which Canada is a signatory. Article 1 of this major convention stipulates that a contracting state should grant its nationality to a person born in its territory who would otherwise be stateless. This is, as Douglas Hodgson points out, an adoption of the *jus soli* principle to some extent.<sup>101</sup> However, some commentators have pointed out that although this *Convention* takes steps towards the elimination of statelessness, it stops short of explicitly imposing on states the obligation to grant nationality to particular individuals.<sup>102</sup> Indeed, it has been written that "[s]tatelessness is considered undesirable but is not prohibited by international law."<sup>103</sup>

It is instructive to note that the 1981 *British Nationality Act* which denies birthright citizenship to children of illegal immigrants, has been criticized as violating the spirit of international conventions on the reduction of statelessness – *even though* it contains several provisions which purport to comply with international obligations.<sup>104</sup> This is

---

97. Canadian Council for Refugees, "Statelessness" *supra* note 53 at para. 2.

98. *Ibid.* at para. 6.

99. *Ibid.* at para 2.

100. C. Batchelor, "Stateless Persons: Some Gaps in International Protection" (1995) 7 Int'l J. of Ref. L. 233.

101. Hodgson, *supra* note 96 at 128.

102. Leary, *supra* note 92 at 253.

103. Hsieh, *supra* note 78 at 526.

104. For example, the *British Nationality Act* stipulates that abandoned children will be presumed to be

because the general impetus of the British citizenship law is towards a more narrowly definition of citizenship. Therefore, if Canada were to revoke birthright citizenship but retain it for children who would otherwise be stateless in order to comply with international law, it could still come under attack for violating the spirit of international legal obligations.

The *Convention on the Rights of the Child*,<sup>105</sup> to which Canada is also a signatory, also provides some insight into Canada's ability to revoke birthright citizenship. Article 7(1) provides that every child shall "have the right to a name [and] the right to acquire a nationality". Thus, although the *Convention* guarantees the right of every child to a nationality, it does not state which nationality, and it does not guarantee the right of the child to acquire citizenship at birth. However, since the primary aspiration of the *Convention* is to promote the best interests of children, it may be possible to argue that birthright citizenship is indeed in the best interests of children, and that it therefore should be retained in Canadian law. Citizenship at birth is arguably in children's interests for several reasons which are themes in this paper, including the elimination of statelessness, and the assurance of state protection for children.

In addition, Article 2 of the *Convention on Rights of the Child*, which prohibits discrimination on any ground including the status of the parent, lends strong support to the assertion that Canada should not decide whether or not to confer citizenship on a child born on its soil based on the status of the child's parent. Finally, Article 41 states that "Nothing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in the law of the State Party". Thus, it might be argued that Canada can not simply abandon birthright citizenship, which is arguably very "conductive" to children's rights, even though the *Convention on the Rights of the Child* might not specifically mandate birthright citizenship.

The *Universal Declaration of Human Rights*<sup>106</sup> also speaks to nationality issues. Unfortunately, the *Declaration* did not include birthright citizenship as a universal human right, despite very strong arguments in favour of this prior to its adoption.<sup>107</sup> Article 15 mandates that every person has a "right to a nationality", and that "no one shall be arbitrarily deprived of his nationality."<sup>108</sup> Although the *Declaration* was not

---

British citizens, as well as any child who would otherwise be stateless. See *BNA* s.1(2). But S. Juss criticizes this by saying the tone of the *Act* as a whole encourages statelessness. See S. Juss, "Nationality Law, Sovereignty, and the Doctrines of Exclusive Domestic Jurisdictions" (1994) 9 *Fla J. Int. Law* 219.

105. Adopted 20 Nov. 1989, G.A. Res. 44/25, UN G.A.O.R., 44<sup>th</sup> Sess., Supp. No.49, UN Doc. A/44/49 (1989) (entered into force 2 Sept.1990).

106. *Universal Declaration of Human Rights*, GA Res. 217 (III), UN G.A.O.R., 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

107. Chan, *supra* note 84 at 3.

108. M Gunlicks, "Citizenship as a Weapon in Controlling the Flow of Undocumented Aliens: Evaluation of Proposed Denials of Citizenship to Children of Undocumented Aliens Born in the United States" (1995) 63 *Geo. Wash. L. Rev.* 551 at 563.

intended to be legally binding, it has been argued that it has since acquired the force of customary international law.<sup>109</sup> Again, as in the *Convention on the Rights of the Child*, this *Declaration* does not specify which state has a duty to grant nationality to the individual. However, Article 2 provides that all are entitled to the rights in the *Declaration* "without distinction . . . such as . . . national or social origin . . . birth or other status." If all children have a basic human right to a nationality, and if states are not to discriminate in conferring citizenship, then perhaps there is a duty on Canada to grant citizenship to all babies born on its soil, not just those who have parents of a certain status.

Another major international instrument to which Canada is a signatory is the 1966 *International Covenant on Civil and Political Rights*.<sup>110</sup> The only significant reference to nationality in this *Convention* is Article 24(3), which provides that "every child has the right to acquire a nationality." Although this Article does not necessarily make it an obligation for states to give their nationality to every child born on their territory, it can be argued that states are required to adopt every appropriate measure, both internally and in cooperation with other states, to ensure that every child has a nationality when born.<sup>111</sup> A liberal reading of this Article could imply an obligation upon states to provide birthright citizenship to all babies born in their territory. If it is argued that this Article does not mandate birthright citizenship, it can also be pointed out that this *Convention*, like the *Universal Declaration of Human Rights*, contains equal protection and anti-discrimination provisions (Article 26 and Article 2) that specifically forbid states from discriminating against people based on their status in society. Article 26 states that the "law shall prohibit any discrimination on any ground such as . . . national or social origin, . . . birth or other status."<sup>112</sup> Article 2 requires states to ensure equal treatment without any distinction, including birth and origin.<sup>113</sup> The revocation of birthright citizenship could be interpreted as discriminatory because it makes a distinction based on status in Canada. It would therefore be contrary to the letter, and spirit, of this instrument.

An examination of the international instruments to which Canada is a signatory shows that maintaining birthright citizenship is certainly consistent with Canada's obligations under international law. It is not certain, however, if Canada could revoke birthright citizenship and still honour its international commitments in this regard.<sup>114</sup>

---

109. Chan, *supra* note 84 at 3.

110. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976).

111. Chan, *supra* note 84 at 5.

112. Art. 26, 999 U.N.T.S. at 179.

113. *Ibid.* at 173.

114. Opponents of birthright citizenship will surely argue that Canada could revoke birthright citizenship and still remain firmly committed to its obligations to reduce statelessness. For example, they could argue that Canada could adopt a policy similar to that in the United Kingdom, where a child who is born in the country to illegal immigrant parents and who would otherwise be stateless, is granted British citizenship. However, this is problematic in that it would sometimes be difficult to ascertain

It is this paper's assertion that a liberal and generous reading of the international obligations points towards birthright citizenship as being a certain mechanism by which Canada can comply with international law. Of course, opponents of birthright citizenship will point to the many countries (including the United Kingdom and Germany) which do not follow the *jus soli* principle. Opponents will inevitably engage in the "dubious discourse" in which the "central rhetorical plank has been various versions of the question: Given that others are, on the whole, worse at respecting human rights, how can *we* be criticized?"<sup>115</sup> In reply, it is argued that it is precisely *because* of Canada's desire to maintain its reputation as a strong proponent of human rights that Canada should ensure that there is no possibility that any child born here would be stateless, or without any meaningful nationality.

In order to more fully comply with international law, a state should be required to grant citizenship to every individual who normally would be eligible for citizenship in that country, without reference to the citizenship laws of other states. According to Michael Gunlicks, this practice would ensure that

governments could not use the fact that a potential citizen is or might be able to claim the citizenship of another state as an excuse to deny that person citizenship because both states could deny the potential citizen citizenship and leave that person stateless.<sup>116</sup>

Thus, granting citizenship based on birth in Canada is the safest way for Canada to ensure that it is complying with its human rights obligations, especially when other countries do not comply with theirs. This would ensure that people are not left unprotected and without any meaningful access to citizenship.

A broad and human rights-oriented reading of the international treaties and other instruments to which Canada is a signatory must reflect that the children of illegal immigrants have as much to gain from membership as the children of current citizens and almost as much to lose from its deprivation. Therefore, any human rights approach will find it difficult to draw sharp distinctions between the children of members and the children of non-members when it comes to assigning rights of membership.<sup>117</sup>

Canada has historically felt free to ignore international human right conventions which had not been implemented into domestic law. However, the Supreme Court of Canada in *Baker v. Canada* can be said to have recently adopted a "cosmopolitan conception of the rule of law"<sup>118</sup> in which the interpretation of Canadian law is to harmonize with that of international treaties to which Canada is a signatory. The Supreme Court of

---

which babies would be "otherwise stateless". Problems in administering such a policy, in addition to the increased room for discrimination against vulnerable people that this kind of provision would create, would seem to advise against this course of action.

115. C. Scott "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10 *Constitutional Forum* 97 at 105.

116. Gunlicks, *supra* note 108 at 581.

117. Carens, *supra* note 75 at 423.

118. *Ibid.* at 100.

Canada also held that legislatures should make laws in accordance with international obligations.<sup>119</sup> Thus, Parliament is under an obligation to make laws which are consistent with the international human rights treaties to which it is a signatory.

Former Chief Justice Lamer said

For international human rights law to be effective, . . . it must be supported by a 'human rights culture,' by which I mean a culture in which there is a firm and deep-seated commitment to the importance of human rights in our world.<sup>120</sup>

This vision is reiterated by Jean Hampton, who calls for states to take seriously a "human rights/responsibility" model in their legislating. This model encompasses a notion that states have unavoidable obligations towards vulnerable people, in order to redistribute wealth on a more global scale.<sup>121</sup> By revoking birthright citizenship, Canada would send a message to the world that its commitment to human rights is waning, that it is more committed to protecting current members than to its obligations towards those who make their way to our shores, seeking a better life for their children. As Sherene Razak reminds us, we would do well to remember that "human rights without citizen's rights, are extremely limited rights."<sup>122</sup>

## (ii) *The Charter of Rights and Freedoms and Birthright Citizenship*

Clearly, there are international legal obligations which vitiate to some extent Canada's ability to repeal birthright citizenship. However, the paramountcy of the notion of each nation's jurisdiction over citizenship may ultimately mean that there is *not* an absolute obligation in international law for Canada to maintain birthright citizenship. Because of this, there may have to be a strong legal basis for maintaining birthright citizenship in domestic constitutional law; specifically, the *Charter of Rights and Freedoms* (the *Charter*). Of course international human rights arguments are arguably incorporated by implication into Canadian law "by way of the more generally phrased Charter".<sup>123</sup> Indeed, the Supreme Court of Canada has stated that the *Charter* provides at least as much protection as Canada's international human rights obligations,<sup>124</sup> and that "international human rights law . . . is . . . a critical influence on the interpretation of the rights included in the Charter."<sup>125</sup>

---

119. L'Heureux-Dube J., quoting R. Sullivan: "[T]he legislature is presumed to respect those values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read." in *Baker v. Canada*, *supra* note 4 at para 70.

120. The Rt. Honourable Antonio Lamer, Chief Justice of Canada, quoted in Scott, *supra* note 116 at 110.

121. Hampton, *supra* note 55 at 98.

122. S. Razak, "'Simple Logic': Race, the Identity Documents Rule and the Story of a Nation Besieged and Betrayed" (2000) 15 J.L. & Social Pol'y. 179 at 209.

123. V. Yolles, *The United Nations Convention on the Rights of the Child: A Practical Guide for Its Use in Canadian Courts* (Toronto: UNICEF, 1998) at 20.

124. *Reference Re Public Services Employee Relations Act*, [1987] 1 S.C.R. 313 at 349. and *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-57.

125. *Baker v. Canada*, *supra* note 4 at para 70.



There are strong arguments supporting the assertion that the repeal of the birthright citizenship provision of the *Citizenship Act* would violate the *Charter's* section 15 constitutional guarantee of equality, that provides in part that "[e]very individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin . . ." <sup>126</sup> This section will provide an overview of the strengths and potential pitfalls of a section 15 *Charter* challenge. First, however, it will explore whether the current definition of who may receive citizenship in Canada is in itself inherently constitutional and therefore not subject to being repealed by simple Parliamentary legislative changes. Although a full technical *Charter* analysis is far beyond the scope of this paper, hopefully the major relevant issues will be touched upon in this section.

First, it is often assumed that the *Citizenship Act* is the primary source of citizenship law, and since it is an ordinary statute, it can simply be changed by an act of Parliament. However, the fact that citizenship is recognized as a status in the *Charter* raises the question of whether citizenship can be accorded a certain constitutional status, <sup>127</sup> and whether the *Charter* may be a source of citizenship law. Although the *Charter* simply mentions citizenship in several sections without defining it, it is arguable that the *Charter* presumes some basic characteristics of who is entitled to citizenship in Canada. This raises the question of whether there are implied constitutional standards that must be met by a citizenship act. According to Donald Galloway,

[t]he entrenchment of the Charter raises the possibility that a moral conception of citizenship, binding on the legislature, should be regarded as being the fundamental source of citizenship rather than the positive law conception found in the Citizenship Act. <sup>128</sup>

There may thus be an inherent constitutional legal impediment to simply removing the right to automatic citizenship of a whole class of people (*i.e.*, certain babies born in Canada).

In response to this argument, Peter Hogg suggests that the definition of citizen in the *Charter* should be flexible, with the legislature determining its content. <sup>129</sup> However, Galloway points out that Hogg's argument is problematic because it could lead to the anomalous situation where

if the legislature could redefine those who are the beneficiaries of *Charter* rights, one would think that, analogously, it could also redefine "Government", the which is subject to *Charter* obligations, and thereby immunize itself from Charter obligations. <sup>130</sup>

---

126. *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s.15.

127. P. Monahan writes that the *Citizenship Act* deals with fundamental principles of a constitutional nature. *Constitutional Law* (Toronto: Irwin Law, 1997) at 11.

128. Galloway, *supra* note 83 at 202.

129. P. Hogg, *Constitutional Law of Canada*, 4<sup>th</sup> ed. (Toronto: Carswell, 1998) at 671.

130. Galloway, *supra* note 83 at 203.

Thus, it seems possible that there is a constitutional character to citizenship itself, and that Parliament cannot simply change the categories of people who are eligible for citizenship without reference to the effect this will have on the rights of those who will be thereby denied citizenship.

Is there a *Charter* right to citizenship for babies born in Canada? In the hypothetical situation where a child born in Canada to illegal immigrant parents is not granted citizenship, her first challenge will be to show that she has standing to raise this issue. Standing might be a problem because it is possible to argue that a person claiming that denial of citizenship upon birth based on their parents' immigration status is really raising the infringement of her parents' rights. On a related point, it might be argued that there is a problem in establishing that one can claim discrimination on the basis of one's parents' status in Canada.

The Supreme Court of Canada dealt with a situation somewhat analogous to a challenge to the repeal of birthright citizenship in a case called *Benner v. Canada*. The case involved a challenge to a provision in the *Act* which stated that a child born abroad to a Canadian father could claim Canadian citizenship simply by registering his or her birth; while a similar child of a Canadian mother was required to apply for citizenship. This application process involved passing a criminal clearance check and security check, as well as the swearing of an oath of allegiance. The respondent argued that the applicant, who raised a section 15 challenge based on gender discrimination, was really trying to raise the infringement of his mother's rights for his own benefit.<sup>131</sup> However, the Court unanimously rejected this argument, stating that "the appellant is the primary target of the sex-based discrimination mandated by the legislation, and in my opinion possesses the necessary standing to raise it before us."<sup>132</sup>

Similarly, since the denial of birthright citizenship would be based on the status of the child's parents, the child can still show that since she is the primary target of the discrimination, she can raise the *Charter* challenge. Applicants are thus able to challenge laws which discriminate against them on the basis of their parent's status. As the Court in *Benner* stated,

[t]he link between child and parent is of particularly unique and intimate nature. A child has no choice who his or her parents are. Their nationality, skin.colour, or race is as personal and immutable to a child as his or her own.<sup>133</sup>

The Court went on to explain that the impugned provision constitutes a denial of equal benefit of the law. "Access to the valuable privilege of Canadian citizenship is restricted in different degrees depending on the gender of an applicant's Canadian parent."<sup>134</sup> The Court continued that

---

131. *Benner v. Canada*, *supra* note 14 at 604.

132. *Ibid.*

133. *Ibid.* at 605-6.

134. *Ibid.* at 602.

[w]here 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 may, in my opinion, invoke the protection of s. 15.<sup>135</sup>

It seems that a person who is denied citizenship by the Canadian government because of the country of origin of his or her parents, and because of their lack of immigration status, could similarly invoke the protection of section 15. After all, if the purpose of section 15 is "to protect the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance",<sup>136</sup> then denying a baby citizenship because of her parentage is indubitably discriminatory. Indeed, the question must be asked, would a restriction on who is entitled to citizenship be "a legitimate way of protecting the interests of current members or an illegitimate way of maintaining privilege and parochialism?"<sup>137</sup>

It seems likely that a section 15 finding of discrimination is possible for a law which refused to grant citizenship based on birth in Canada. However, given the political justifications underlying a change in the law, the main challenge would likely be in showing that such a law cannot be upheld by section 1 of the Charter.<sup>138</sup>

The section 1 test involves an analysis of whether the discrimination (the refusal to grant citizenship to babies born in Canada because of their parents' immigration status) is rationally connected to the legislative objectives of the repeal of the birthright citizenship law. For the government the major objective of the law would be to provide a disincentive to prospective illegal immigrants by denying the possibility of citizenship for their children. Given current anti-illegal immigration sentiment in Canada, it seems likely that a court may find that such an objective is pressing and substantial.

However, the difficulty for the government would be to show that the method employed in achieving this objective is a reasonable way to achieve this end. First, the rights violation of the child who is denied citizenship is not rationally connected to the aim of the legislation, which would be to punish illegal immigrant parents, and to deter future illegal immigrants. Indeed, punishing innocent children seems completely antithetical to the spirit of the *Charter*. It must be remembered that babies born

---

135. *Ibid.* at 606.

136. *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 486-87.

137. J. Carens, "Immigration, Welfare and Justice," in W. Schwartz, ed., *Justice in Immigration* (Cambridge: Cambridge University Press, 1995) 1 at 7-8.

138. The *Oakes* section 1 analysis was set out in *Egan v. Canada*, [1995] 2 S.C.R. 513 at 605: "A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgment of the right."

on Canadian soil have themselves not done anything illegal. They have not violated Canada's immigration laws in any way. As Houston says, it is "difficult to conceive of a rational justification for penalizing these children for their presence" in the country.<sup>139</sup>

As for the second branch of the *Oakes* test, the law which would deny citizenship to children because of their parents' status does not minimally impair the section 15 guarantee for equality under the law. Finally, there is no meaningful proportionality between the effect of the measure – which is arguably devastating for children. As Michael Gunlicks points out, children who are denied citizenship would lose many protections – including the right not to be deported. They also might be rendered stateless. They would suffer economically and socially, unable to find legal employment, and ineligible for most health care. Basically, they would be "outcasts: illegal members of the society in which they live."<sup>140</sup> As the Supreme Court of Canada has pointed out, whether one's mother or father is Canadian is entirely irrelevant to the quality of one's candidacy for citizenship.<sup>141</sup>

Although the maintenance of birthright citizenship is strongly supported by the *Charter*, today's political climate points towards possible deference by the courts to Parliamentary changes to the law. For example, courts may simply place an emphasis on the idea that there is no inherent right to citizenship and that it is entirely up to the legislature to define Canadian citizenship. They could then justify a finding that there is no discrimination in a law which denies citizenship to some babies, and grants it to others, and thus no section 15 claim. Ultimately, then, the question of who is accorded citizenship status in Canada will almost surely be a political decision. However, legal arguments such as the ones I have presented show clearly how birthright citizenship is consistent with the spirit of the *Charter* equality guarantees, and thus can be used to influence political decision-making.

## VIII. CONCLUSION

The proposal to deny birthright citizenship of children of illegal immigrants is flawed as a matter of law and policy. It is discriminatory and unjustified to single out these children to punish their parents for violating Canada's immigration laws, especially when the consequences for these children would be so grave. As I have shown in this paper, such a change of this long-standing law would be widely perceived as sending to the world a message that the "gates are no longer open in Canada". Of course, the gates have not been completely open for a long time. However, the commitment to openness remains a strong theme in Canada, and denying birthright citizenship would help to erode this theme.<sup>142</sup> The spectre of the removal of birthright citizenship for children born in Canada would render these children even more vulnerable. Babies

---

139. Houston, *supra* note 67 at 720.

140. Gunlicks, *supra* note 108 at 555.

141. *Benner v. Canada*, *supra* note 14 at 559.

142. Carens, *supra* note 75 at 441.

are not bargaining chips: they represent the future of our country and our communities. In the 1946 House of Commons debates leading up to the passage of Canada's first *Citizenship Act*, John Diefenbaker stated, "[w]e will give a great citizenship to Canadians hereafter."<sup>143</sup> Surely this vision of a "great citizenship" is diminished by proposals to deny citizenship to some babies born in Canada.

---

143. *House of Commons Debates* (2 April 1946) at 514 (J. Diefenbaker).