

Submissions to the Standing Committee on Citizenship and Immigration

By

Justice for Children and Youth

**Regarding Bill C-6 – An Act to Amend the Citizenship Act
8 April 2016**

About Justice for Children and Youth

Justice for Children and Youth (JFCY) is a child and youth rights organization, and a specialty legal clinic funded primarily by Legal Aid Ontario. For more than thirty-five years, JFCY has focused exclusively on the rights and legal issues facing children and young people in Canada. First, we provide direct legal services - representation, advice, and legal information to low-income children and youth across Ontario in a variety of legal areas, including youth criminal justice, child welfare, education, health and immigration law matters. Second, we regularly intervene, or are appointed as a friend to the court, in cases engaging the rights of young people. Third, we provide public legal education for young people and adults, including professionals who work with young people. Lastly, we engage in law reform initiatives on child and youth rights issues.

Of significance to these submissions, we regularly provide representation and public legal education on issues related to youth records, including police record checks. We have been advocating for a more careful approach to the use and consideration of police records that would accord with the *YCJA* for years. We are regularly involved with young people who are new-comers, including refugees, who have either arrived in Canada as unaccompanied minors, or who have experienced family breakdown such that they are in Canada without adult support and are without citizenship or permanent resident status.

Overview of Submissions - Concerns Regarding Bill C-6

JFCY's particular interest in Bill C-6 relates to the Citizenship applications for minors. We have two concerns:

A) Age restrictions on the ability of a young person to apply for citizenship on their own behalf should be eliminated.

JFCY's position is that minor applicants should not be restricted from applying for citizenship on their own behalf, and should not require the permission of a parent or guardian.

B) The lack of clarity in the *Citizenship Act* regarding the use and consideration of youth criminal justice records for the purpose of granting or taking the oath of citizenship results in violations of the *Youth Criminal Justice Act*.

JFCY's position is that the *Citizenship Act* should clearly prohibit the use and consideration of youth criminal justice records in any matter governed by the *Citizenship Act*, in particular for the purpose of granting or taking the oath of citizenship. Youth criminal justice records and ongoing proceedings before the youth criminal justice court **cannot** and should not be considered for the purpose of citizenship applications because to do so is contrary to the *Youth Criminal Justice Act (YCJA)*, specifically violates the privacy protections afforded to minors by the *YCJA*, and is inconsistent with the fundamental purpose of the *YCJA*.

A. Current Provisions of the *Citizenship Act* – Age Restriction

The *Citizenship Act*¹ (the “*Act*”), section 5(1), currently limits the right to apply for citizenship on one’s own behalf to individuals who are over the age of 18. It states:

Grant of citizenship

- 5 (1) The Minister shall grant citizenship to any person who
 - (a) makes application for citizenship;
 - (b) is eighteen years of age or over;[...]
- (2) The Minister shall grant citizenship to any person who is a permanent resident within the meaning of subsection 2(1) of the [*Immigration and Refugee Protection Act*](#) and is the minor child of a citizen, if
 - (a) an application for citizenship is made to the Minister by a person authorized by regulation to make the application on behalf of the minor child;
 - (b) the person has, subject to the regulations, no unfulfilled conditions under that Act relating to his or her status as a permanent resident;

There is one exemption built into the *Act* that may allow for a minor child to be exempt from the age requirement, and thus make a citizenship application on his or her own behalf. Section 5(3)(b)(i) allows for an applicant to make a request to the Minister on humanitarian grounds for a waiver of the age requirement. As we describe below, this humanitarian exemption poses a generally insurmountable barrier for children wishing to access citizenship and is not a reasonable limitation or a satisfactory solution to issues raised by the age requirement provision.

Effect of Section 5(1)(b) on Children

As lawyers who act exclusively for children, JFCY is in a unique position to assess the impacts of legislation and policy on children who seek to access their legal rights. We are keenly aware that children who do not have a parent or guardian to support or assist them often struggle to even access information about their rights and legal options, and regularly do not access their legal entitlements.

¹ *Citizenship Act*, R.S.C., 1985, c. C-29

A minor's application for citizenship is generally attached to that of their parent or guardian, per section 5(2) of the *Act*. Where a minor child has a parent or guardian wishing to obtain their citizenship at the same time, the legislation poses no issue.

However, minor children who are not in the care of a parent or guardian, or minors who wish to obtain their citizenship but have a parent who may not meet the other requirements set out in the *Act* (for example, parents who do not meet language proficiency requirements) are left with virtually no option but to wait until they become adults.

The provision in effect restricts access to Canadian citizenship for children - solely on the basis of age - who otherwise meet all the requirements. It restricts access to citizenship for the most marginalized children, i.e. unaccompanied minors, children without parents or lawful guardians,² and children with parents who do not have the capacity to meet the citizenship requirements or do not wish to apply. For some highly marginalized minors, the age restriction also places them at risk of removal into their young adult lives, for reasons that will be explained below.

Waiver under s.5(3)(b)(i) is ineffective and inappropriate

While it is possible to seek a waiver of the age requirement under s.5(3)(b)(i) of the *Act*, the waiver is inadequate to address the age barrier, and frustrates access to justice for children. To require a waiver request poses an additional barrier to children wishing to obtain citizenship, a barrier that is generally not

² In the experience of JFCY, children who are in the care of child welfare / protection agencies are still restricted from applying for Canadian citizenship due to the age requirement set out in s.5(1)(b) despite essentially having the government as their legal guardian. "Immigrants, Refugees and Citizenship Canada ("IRCC") has not recognized child welfare authorities as the lawful guardian of a child for the purposes of Citizenship applications, or have done so in a very limited number of cases.

overcome. First, a child would have to become informed about the possible exemption and the opportunity to request a waiver, which is not publicized on the Immigrants, Refugees, and Citizenship Canada (“IRCC”) website and is buried within the legislation. Second, the child would have to have the resources to make the waiver request. In fact, a child would have to have access to legal services from someone who is expert in child law issues – an impossibility in the lives of many children in the circumstances described. Given the real life context of an unaccompanied minor, or a child whose family supports have broken down, this is an insurmountable barrier, and entirely frustrates access to justice for children seeking citizenship.

B. Current Provisions of the *Citizenship Act* – Lack of clarity regarding the use and consideration of Youth Criminal Justice records for the purpose of granting or taking the oath of citizenship

The *Act* places limits on people who apply for citizenship if they are subject to ongoing criminal charges, facing trial, or have been convicted of an indictable offence under any act of parliament. The legislation reads:

Prohibition

22 (1) Despite anything in this Act, a person shall not be granted citizenship under subsection 5(1), (2) or (4) or 11(1) or take the oath of citizenship

(a) **while the person is, pursuant to any enactment in force in Canada,**

(i) **under a probation order,**

(ii) a paroled inmate, or

(iii) **confined in or is an inmate of any penitentiary, jail, reformatory or prison;**

[...]

(b) **while the person is charged with, on trial for, subject to or a party to an appeal relating to an offence under** subsection 21.1(1) or 29.2(1) or (2), or an indictable offence under subsection 29(2) or (3) **or any other Act of Parliament,** other than an offence that is designated as a contravention under the *Contraventions Act*; [Emphasis Added]

Prohibition

22(2) Despite anything in this Act, but subject to the *Criminal Records Act*, a person shall not be granted citizenship under subsection 5(1), (2) or (4) or 11(1) or take the oath of citizenship if the person **has been convicted** of an offence under subsection 21.1(1) or 29.2(1) or (2), or an indictable offence under subsection 29(2) or (3) or any other Act of Parliament, other than an offence that is designated as a contravention under the *Contraventions Act*,

- (a) during the four-year period immediately before the date of the person's application; or
 - (b) during the period beginning on the date of the person's application and ending on the date on which the person would otherwise be granted citizenship or take the oath of citizenship.
- [...] [emphasis added]

Sections 22(1)(a) and (b) of the *Act* prohibit the granting of citizenship to people who are subject to criminal justice system sanctions, and to those who have ongoing criminal justice system matters.

While these restrictions may make sense for adult applicants; for minor applicants these prohibitions:

1. Are contrary to the fundamental purpose of the *YCJA*, and specifically violate the privacy protections afforded to minors;
2. Are inconsistent with the "Policy Manual on Minor Applicants for Citizenship".

Citizenship Act Provisions Result in Violations of the *Youth Criminal Justice Act*

The *YCJA*

The *YCJA*³ recognizes the inherent vulnerability and unique needs of young people in the criminal justice system. The fundamental principles of the *YCJA*, including the special privacy protections are clearly articulated and are mandated by Canada's international obligations under the United Nations *Convention on the Rights of the Child*, and the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules"). The *YCJA* creates a youth criminal justice system that is unique, separate, and apart from the adult

³ *Youth Criminal Justice Act*, SC 2002, c 1 (*YCJA*)

criminal justice system. Young people are entitled to special protections, and are recognized as having reduced moral culpability. The primary purposes of the *YCJA* are the rehabilitation and reintegration of young people in the community and the protection of the public, and it mandates responses that address the underlying circumstances of the young person that lead to offending behavior.

One area where special protections are provided under the *YCJA* is the special privacy provisions and the restrictions placed on access to youth records. Part 6 (Sections 110 to 129) of the *YCJA* prohibits publication, disclosure, distribution and access to youth records.⁴ These privacy protections seek to protect young people from the negative long-term consequences of the stigma associated with criminal justice system involvement, and ensure Canada's compliance with international legal obligations.

Section 118 of the *YCJA* provides that no information contained in a youth record or police record may be given to any person, where it would identify the young person as having been dealt with under the *YCJA*. The only exception is with respect to a limited list of people who are entitled to access youth records⁵; IRCC is not on this enumerated list.

If a party, such as IRCC, that is not on the enumerated list wishes to request access to youth records, including police records, they must apply to a provincial youth court for a youth court order. In this application the requesting party must establish that they have a valid interest in the record and that access to the record is desirable in the interest of the proper administration of justice.⁶

⁴ *Ibid*, s. 110-129.

⁵ *Ibid*, s. 119 (1)

⁶ *Ibid*, s. 119(1)(s)(ii).

Additionally, there is an access period⁷ under section 119(2) of the *YCJA*. The provisions define periods of time after which youth records including police records are inaccessible. The periods of time depend on the circumstances of the offence and the sentence imposed, and may last beyond the young person's 18th birthday. After the access period has expired, with the exception of a young person or their counsel,⁸ a court order is required before any person (even those on the s.119(1) list) is able to access the record. The applicant must satisfy the Court that they have a valid and substantial interest in the record, access is necessary in the interest of the proper administration of justice, and disclosure is not prohibited by law.⁹

Current provisions of the *Citizenship Act*

Currently, s. 22(1) and s.22(2) of the *Act* read as though they apply to children applicants. In both provisions, s.5(2) of the *Act* is specifically referenced. Section 5(2) pertains only to minor children.

On its face, in order to comply with s.22(1) or s.22(2) of the *Act*, a child would have to inform IRCC as to whether or not they have an ongoing or completed *YCJA* matter. As such, they are in a position where they would have to disclose their *YCJA* record in order to obtain Canadian citizenship. If this is the case, s. 22(1) and s. 22(2) are in effect requiring the disclosure of protected youth records contrary to the *YCJA*.

In practice, when a minor applies for Canadian citizenship the application form that they must complete requires them to answer questions regarding: outstanding charges (for indictable offences) probation, and parole.

⁷ Access period refers to the period of time where *YCJA* records can be viewed by certain authorized persons, such as police departments. It does not refer to general public access of the records, which can never occur subject to s. 118 of the *YCJA*.

⁸ *YCJA*, SC 2002, c.1., s. 124

⁹ *Ibid*, s. 123(1)(a).

Similarly, on adult application forms, applicants are required to answer questions regarding: outstanding charges, probation and parole. There is no exemption built in for *YCJA* matters and youth records. However, s. 119(2) of the *YCJA* stipulates that the privacy protections afforded are for all youth sentences whether or not they continue beyond the child's 18th birthday. As such, even if section 5(2) is removed from the list of applicants subject to the prohibitions under s. 22(1) and 22(2), young adults may be subject to sentences imposed under the *YCJA*.

It is our position that these requirements contained within the citizenship application for minors and adults are in direct conflict with and a violation of Part 6 of the *YCJA*.

It is acknowledged that IRCC has posted instructions on its website with respect to child citizenship applications and on that webpage it states that s.21(1) and s.22(2) do not apply to children. It reads: "minors must not be subject to the prohibitions contained in sections 21 and 22 of the Act or the subject of a declaration by the Governor-in-Council made under section 20 of the Act."¹⁰

It is our view that the provisions in the *Act*, citizenship application forms, and IRCC instructions are inconsistent with each other. This sort of ambiguity leads to inconsistent results that violate the privacy provisions of the *YCJA*.

The *Act* should be amended to expressly prohibit the use or request of any youth criminal justice records. The *Act* as it stands does not conform to the *YCJA* as it allows for the request and disclosure of youth criminal justice records to unintended parties. The application forms for the citizenship application of minors is a specific example of this.

¹⁰ See IRCC website: <http://www.IRCC.gc.ca/english/resources/tools/cit/grant/minors.asp>

Immigration Law models protecting privacy of YCJA records

Compliance and consistency with YCJA privacy protections is addressed in other immigration legislation. It is done in a comprehensive manner under both the *Immigration and Refugee Protection Act (IRPA)* and *Immigration and Refugee Protection Regulations (IRPR)*. One example is s. 36(3)(e) of the *IRPA* - it sets out when someone may be inadmissible for criminality and the section directly prohibits the consideration of youth sentences imposed under the YCJA. It reads:

(3) The following provisions govern subsections (1) and (2):

[...] (e) inadmissibility under subsections (1) and (2) may not be based on an offence:

[...] (iii) for which permanent resident or foreign national received a youth sentence under the *Youth Criminal Justice Act*.¹¹

We suggest that the *Citizenship Act* be amended similarly and be drafted to expressly exempt youth records, YCJA charges or findings of guilt from the purview of s.22(1), s. 22(2) or any other section.

The YCJA is a complicated legislative scheme that requires a careful approach to ensure that the rights of children, and the special protections provided for in the YCJA, which have been seen to have a constitutional dimension¹² are protected. In order to ensure that the *Act* complies with the strict privacy protections afforded by the YCJA, the YCJA must be specifically excluded from consideration whenever there might be any ambiguity on the face of the law.

Conclusion and Recommendations

Age restrictions - JFCY recommends that the age restrictions placed on citizenship applications be amended so as to give access to Canadian citizenship to all minor children. This amendment will ensure that Canadian citizenship is

¹¹ IRPA, SC 2001, c. 27 s.36(3)(e)(iii)

¹² *R. v. D. B.*, [2008] 2 S.C.R. 3, 2008 SCC 25.

accessible to unaccompanied minors, minors in the care of Child welfare / protection agencies, minors whose family relationships have broken and they are living independently, and those whose parents are not eligible or will not apply for citizenship.

There is no reasonable basis for which a young person should be denied the right to apply for citizenship on his or her own. The most vulnerable children and youth in Canada are those without a parent or who are in the care of child welfare authorities. This includes children who have arrived in Canada as unaccompanied minors, and those whose family relationships have broken down, such that they are no longer part of a family unit. These are children who by reason of family break down as well as migration, are facing multiple vulnerabilities, additionally burdened by being unable to apply for citizenship.

JFCY further recommends that section 22(1) and 22(2) of the Act be amended to both remove the reference to child applicants under s. 5(2) and include an exception that no person shall be denied citizenship because they are presently before the court under the *YCJA*. The current provisions result in violations of the *YCJA* and also run contrary to the current policy manual for minor applicants that permit the granting of Canadian citizenship even if a minor is the subject of the prohibitions under 22(1) and 22(2) of the *Act*. At best these provisions create ambiguity which should be remedied.

Specific Recommendations for amending legislation

Section 5(1)(b) should be removed in order to allow a young person to apply for citizenship as a member of a family or as an individual as follows:

- 5 (1)** The Minister shall grant citizenship to any person who
 - (a)** makes application for citizenship;
 - ~~**(b)** is eighteen years of age or over;~~

Section 5(2)(a) of the Citizenship Act should be amended as follows:

5 (2) (a) an application for citizenship is made to the Minister by the child or by a person authorized by regulation to make the application on behalf of the minor child;

Section 22(1) should be amended to remove the reference to child applicants and to include a specific exception such that no person shall be denied citizenship because of a finding of guilt under the *YCJA*, or because they are presently before the court under the *YCJA*. The section should be amended as follows:

22 (1) Despite anything in this Act, a person shall not be granted citizenship under subsection 5(1), ~~(2)~~ or (4) or 11(1) or take the oath of citizenship

(a) while the person is, pursuant to any enactment in force in Canada,

(i) under a probation order,

(ii) a paroled inmate, or

(iii) confined in or is an inmate of any penitentiary, jail, reformatory or prison;

This section is inapplicable where the person was dealt with under the *Youth Criminal Justice Act*

(a.1) while the person is serving a sentence outside Canada for an offence committed outside Canada that, if committed in Canada, would constitute an offence under an enactment in force in Canada unless related to an offence under the Youth Criminal Justice Act;

(a.2) while the person is serving a sentence outside Canada for an offence under any Act of Parliament unless related to an offence under the Youth Criminal Justice Act;

(b) while the person is charged with, on trial for, subject to or a party to an appeal relating to an offence under subsection 21.1(1) or 29.2(1) or (2), or an indictable offence under subsection 29(2) or (3) or any other Act of Parliament, other than an offence that is designated as a contravention under the *Contraventions Act* or an offence under the Youth Criminal Justice Act;

(b.1) subject to subsection (1.1), while the person is charged with, on trial for, subject to or a party to an appeal relating to an offence committed outside Canada that, if committed in Canada, would

constitute an indictable offence under any Act of Parliament unless related to an offence under the Youth Criminal Justice Act;

Section 22(2) should be amended to specifically exclude consideration of child applicants, and to exclude consideration of matters dealt with pursuant to the YCJA. It should be amended as follows:

22(2) Despite anything in this Act, but subject to the *Criminal Records Act*, a person shall not be granted citizenship under subsection 5(1), ~~(2)~~ or (4) or 11(1) or take the oath of citizenship if the person has been convicted of an offence under subsection 21.1(1) or 29.2(1) or (2), or an indictable offence under subsection 29(2) or (3) or any other Act of Parliament, other than an offence that is designated as a contravention under the *Contraventions Act* or that was dealt with pursuant to the *Youth Criminal Justice Act*.