

# Fair and Equitable Citizenship for Children of Canadians

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**UNICEF Canada Policy Brief: Bill C-71**

**August 2024**

## Introduction

Canadian citizenship confers opportunities and freedoms such as universal healthcare, access to income support programs and the ability to travel across international borders on a Canadian passport.

The *Citizenship Act* limits citizenship in various ways. One limitation has been found by the courts to be unconstitutional: the automatic birthright of Canadian citizenship by descent is limited to the first generation for a certain group of children (the “first generation” limit introduced in 2009). **Canadian citizens who were born outside Canada cannot automatically pass on citizenship to their children born or adopted outside Canada.** Specifically, they cannot apply for a certificate of citizenship as a birthright (i.e., by descent) for a child born abroad nor for a direct grant of citizenship for a child born and adopted outside of Canada. Children of second- or subsequent-generation Canadians need to apply for immigrant or refugee status or for a citizenship grant to gain Canadian citizenship. Only individuals born outside Canada with at least one Canadian-born or naturalized parent are eligible for Canadian citizenship by descent.

This provision of the law discriminates against a class of children of Canadian parents. It creates a risk of statelessness for some children, depending on where they are born and to whom they were born. Second-generation children born abroad can apply for Canadian citizenship through s. 5(5) of the *Citizenship Act*; however, they are at risk of statelessness if they do not meet the age and residency requirements and if the country in which they are born similarly does not confer citizenship to them. If born in a country without citizenship as a birthright, these children may be stateless,<sup>1</sup> which in turn creates other risks to their rights that are entailed to citizenship such as access to healthcare. It also undermines children’s rights to family relations and care because their citizenship is different than that of their parents.

While legislative amendments in 2017 reduced the risk that the first generation limitation could result in statelessness for some children, it did not eliminate the risk. A grant of citizenship is available for individuals who have Canadian parents but who are excluded from citizenship by the first-generation limitation and would be stateless. However, affected children rely on a parent or guardian to apply for the grant, rather than having the birthright. Politically and legally aware people may be more likely to pass on their citizenship to offspring born abroad, but some may lack knowledge and resources to obtain a grant of Canadian citizenship for their child.

On 19 December 2023, the Ontario Superior Court of Justice (*Bjorkquist et al. v. Attorney General of Canada*) ruled the first generation rule (introduced with a 2009 change to the *Citizenship Act* (paragraph 3(3)(a))) unconstitutional because it unjustifiably limited citizenship by descent to the first generation born outside Canada to or adopted by Canadian parents, and thereby created two classes of Canadian citizens—those who can pass on citizenship to their children and those who cannot. The law had inequitable impacts on women in particular as it prevented certain second-generation Canadian mothers who live abroad from passing citizenship to their children unless they returned to Canada to give birth. In effect, the law created classes of children with different and inequitable entitlements to Canadian citizenship. Due to the court ruling, the first-generation rule was of no force or effect as of June 19, 2024.

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<sup>1</sup> A stateless person is ‘a person who is not considered as a national by any State under the operation of its law.’

The Government of Canada agreed with the court's decision (i.e., did not appeal) and is bound to rectify the law. Bill C-71, *An Act to Amend the Citizenship Act (2024)*, aims to secure in statute the citizenship rights of a class of children who do not have the birthright of Canadian citizenship despite being born to or adopted by Canadian parents. Bill C-71 proposes to amend the *Citizenship Act* so that:

1. Canadians born abroad can pass on citizenship to their children born or adopted from abroad. This measure would extend citizenship by descent beyond the first generation of Canadians. Children born to Canadian parents in the second and subsequent generations abroad will now be able to apply directly for a Canadian citizenship certificate. Adopted children born abroad in the second and subsequent generations will be able to apply for a grant of citizenship, and once approved, will then be able to obtain a Canadian citizenship certificate. **This should allow for due diligence in relation to duties pursuant to the Hague Convention on Intercountry Adoption.**
2. There is a condition imposed on this entitlement: the parent must have spent at least 1,095 days (three years) in Canada before their child's birth or adoption to demonstrate a "substantial connection" to Canada. Details have not been provided regarding what kinds of evidence will be required to demonstrate the 1,095 cumulative days of physical presence in Canada. **This may sustain continuing, undue barriers for access to citizenship by some children and a risk of statelessness: for instance, if they are dependent on the acquisition of citizenship grants rather than citizenship as a birthright. The condition also fails to take into account that a child may have a substantial connection to Canada even if the parent does not.**
3. Citizenship is automatically conferred to those previously excluded by the existing law: individuals born abroad to a Canadian parent in the second or subsequent generations (who would have been citizens if not for the first-generation limit) even if their parent has not spent 1,095 days in Canada. Despite the intent to rectify a situation where these parents and children did not have the opportunity to meet the "substantial connection" condition, **this provision in effect creates inequalities between groups of children based on their birth date before or after Bill C-71 is in effect.**

## Discussion

Every child should be protected by Canadian laws, not left out due to discriminatory or arbitrary exclusions. Children have rights, under international treaties including the Convention on the Rights of the Child, to a durable identity. Every child has the right to a nationality (article 7) and to preserve his or her nationality and family relations (article 8). Every child has rights to protection from arbitrary separation from parents (articles 7, 9 and 10) which can occur when children have different citizenship status than their parents. Every child has the right to non-discrimination (article 2). Canada is obligated to secure these rights in legislation and to ensure legislation is guided by the best interests of the child above other considerations (article 3).

The amendments proposed in Bill C-71 would help to fulfil these rights through the *Citizenship Act*. More children born to or adopted abroad by Canadian parents will have the same rights and privileges as other Canadian children.

However, these conditions could continue to expose some children to the risk of statelessness, even for a period of time, and/or of having different citizenship than their parents:

- **Exclusion and continuing inequitable treatment based on the “substantial connection” test:** The substantial connection test introduced by Bill C-71 based on a parent’s time spent in Canada may act as a barrier to children’s rights. Meeting these requirements could be difficult due to factors such as parent and family work commitments, financial or health constraints, family obligations or state-imposed barriers to travel, potentially resulting in some children being denied citizenship by birthright for circumstances that are arbitrary and out of their control. Furthermore, a child may have a “substantial connection” to Canada even if the parent does not.

Notably, children who were affected by the unconstitutional first-generation limit before the new law is passed will benefit from having this test waived. For Canadians who had children in the second or subsequent generations abroad before the legislation comes into force, no substantial connection test will be required. The substantial connection requirement will be required only for parents of children born after the enactment of the new legislation. In effect, this perpetuates differential treatment of those born before and after the passage of Bill C-71.

- **Citizenship grants can make citizenship farther out of reach than citizenship by birthright:** There remains a risk of statelessness for some children, such as children of Canadian parents who do not meet the substantial connection test, who are born in a country that does not afford them citizenship and whose parents do not apply for a Canadian citizenship grant. Furthermore, obtaining necessary documentation may be challenging for children born abroad especially in countries with inadequate civil registration systems. Establishing Canadian citizenship in such a situation can be an arduous effort with uncertain outcome, particularly for a child separated from their parent(s). Statelessness is not recognized in Canada as a condition eligible for humanitarian and compassionate applications for citizenship.

## Recommendations

### Recommendation 1

That the provisions affecting children within Bill C-71 be reviewed applying the Child Rights Impact Assessment (CRIA) process developed in 2023 by the federal Justice Department.

### Recommendation 2

That the law provide that the principle of the best interests of the child is the primary consideration in adjudicating the citizenship rights of minors and require a Best Interests Determination (BID) process be applied in cases where there is any risk of statelessness for children of Canadian parents born or adopted abroad so that there is a low-barrier and rapid path to Canadian citizenship.

### Recommendation 3

That Canada include in the *Citizenship Act* a definition of a stateless person in accordance with international law and ratify the Convention relating to the Status of Stateless Persons of 1954.

## A Child Rights-Based Approach to Citizenship

Children have rights under international treaties, including the Convention on the Rights of the Child, to a durable identity which includes the preservation of family ties and of citizenship. These rights apply to all persons under 18 (the definition of “child”). Under international agreements, states must introduce safeguards to prevent statelessness by granting their nationality to persons who would otherwise be stateless and are either born in their territory or are born abroad to one of their nationals. Children often require special protections such as exemptions or child-specific measures to limitations imposed by states in relation to citizenship.

In its 2012 Concluding Observations to Canada, the UN Committee on the Rights of the Child recommended that Canada:

*“...review the provisions of the [April] 2009 amendment to the Citizenship Act that are not in line with the Convention with a view to removing restrictions on acquiring Canadian citizenship for children born abroad to Canadian parents...”<sup>2</sup>*

In 2022 the Committee recommended that Canada”

*“Amend the Citizenship Act to include a definition of stateless person in accordance with international law and consider ratifying the Convention relating to the Status of Stateless Persons of 1954.”<sup>3</sup>*

There is an extensive international framework for upholding children's rights to citizenship, including preventing arbitrary deprivation of nationality which can lead to statelessness and its associated human rights violations. Global recognition of the fundamental importance of citizenship rights is indicated by these human rights agreements which include<sup>4</sup>:

**Universal Declaration of Human Rights:** While not a binding treaty, the UDHR proclaims the right of every person to a nationality (article 15) and the right to not be arbitrarily deprived of nationality (article 15). These principles have influenced subsequent human rights treaties and are considered fundamental to the protection of stateless individuals.

**Convention Relating to the Status of Stateless Persons:** This convention aims to protect stateless individuals and prevent statelessness. It establishes minimum standards for the treatment of stateless persons, including their right to access education, employment and other social services, as well as their right to travel documents. Canada is not a party to this convention.

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<sup>2</sup><https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsh8%2FU426pHwccUxzN5kmnhLtdnrWm1hJzGwfirOtSF7im%2Btj4%2BJ5n5CPlpIDWXA35DpHXskxTdDvCoa0RW9yOJTACORyOJ17Auf%2Bpplgz6CB>

<sup>3</sup>[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FCAN%2FCO%2F5-6&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FCAN%2FCO%2F5-6&Lang=en)

<sup>4</sup> There are many international instruments with normative standards in relation to nationality and statelessness:

<https://www.ohchr.org/en/nationality-and-statelessness/international-standards-relating-nationality-and-statelessness>

**Convention on the Reduction of Statelessness:** This convention focuses on preventing and reducing statelessness by regulating nationality laws and providing safeguards against statelessness. It outlines principles for the acquisition and loss of nationality, as well as procedures for determining the nationality of individuals who would otherwise be stateless.

**International Covenant on Civil and Political Rights:** This treaty includes provisions related to the right to nationality (article 24) and the prohibition of arbitrary deprivation of nationality (article 12). It affirms the principle that everyone has the right to a nationality and that no one shall be arbitrarily deprived of their nationality.

**International Convention on the Elimination of All Forms of Racial Discrimination:** This convention includes provisions relevant to statelessness, particularly in its recognition of the right to nationality without discrimination based on race, color, or national or ethnic origin (article 5).

**International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families:** This convention addresses the rights of migrant workers and their families, including children. Article 29 emphasizes the right of migrant workers and their families to enjoy legal protection against arbitrary deprivation of nationality.

## Conclusion

UNICEF Canada welcomes Bill C-71 toward ensuring that every child of Canadian parents is recognized in law and afforded their rights to citizenship in Canada. The Bill should be reviewed with a Child Rights Impact Assessment to ensure it is fulfilling its intent to eliminate all disparities in the acquisition of Canadian citizenship by all children born to and adopted by Canadian parents.

## About UNICEF Canada

UNICEF is the world's farthest-reaching humanitarian organization for children. With a presence in more than 190 countries and territories, we work tirelessly in the world's most complex situations to bring life-saving aid and long-term support to children and their families. From our role as the world's largest provider of vaccines, to supporting child health, nutrition and education, we are determined to create a better world for every child. And we won't give up.

UNICEF Canada works to address and advance children's rights in Canada and around the world. Our life-saving work for every child is funded entirely through voluntary donations. Visit [unicef.ca](http://unicef.ca) and follow us on Facebook, X/Twitter and Instagram to learn more.

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