

IMMIGRATION ISSUES—2015 UPDATE  
PAPER 3.1

# Redefining Citizenship: Major Changes and Issues of Note under the 'Strengthening' Canadian Citizenship Act (SCCA)

These materials were prepared by Aris Daghighian of Edelman & Company, BC, Vancouver for the Continuing Legal Education Society of British Columbia, December 2015.

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## REDEFINING CITIZENSHIP: MAJOR CHANGES AND ISSUES OF NOTE UNDER THE ‘STRENGTHENING’ CANADIAN CITIZENSHIP ACT (SCCA)

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### I. Introduction

Bill C-24 which fundamentally changed the *Citizenship Act* is now law, having garnered royal assent on June 19, 2014. The last of the provisions came into effect on June 11, 2015. The purpose of this paper is to highlight some of the many changes, issues of note, and potential concerns. Please note, this paper is not exhaustive; the following are some of the many changes and issues that arise under the SCCA.

## II. Residency Requirements

**Previous Law:** Residence for 3 out of 4 years (1,095 days). No requirement that the resident be physically present in Canada for any number of days per year.

**New Law:** *Physical presence* for 4 out of 6 years (1,460 days). Also requires a minimum of 183 days of physical presence in each calendar year.

Issues of note:

- The 183 day requirement is likely meant to ensure applicants are resident in Canada for tax purposes (see below).
- The result is two separate tests which are somewhat mutually exclusive. An applicant may have much more than 1,460 days of presence in the last 6 years but still not meet the 183 days in at least 4 years requirement. Conversely, an applicant can have at least 183 days in 4 calendar years but fall well short of the 1,460 days required. On the other hand, may be of benefit to some applicants who are absent from Canada for periods of time by widening the scope of assessment.
- CIC has clarified that any portion of a day spent in Canada counts as a day of physical presence. Note, however, that CIC still requires declaring all trips including day trips or overnight trips despite the fact they will not count as absences. CIC recommends attaching a note indicating the dates of such day trips are approximate if exact dates cannot be recalled. Ultimately, CIC may send a notice requesting the client obtain an entry record from the U.S. or any other country.
- Under s. 21(a)-(c), when calculating physical presence, an applicant cannot count any time spent incarcerated, on parole, or under probation. But the following notable exceptions apply:
  - Time on probation as a result of a **conditional discharge** can count towards physical presence if the probation was completed successfully (i.e. the applicant was not charged with a breach of probation or a failure to comply during that probation). This time does not have to be declared for the purposes of the physical presence calculation.
  - Further, if the applicant received a **pardon/record suspension** for a conviction, time spent imprisoned, on parole or on probation because of that conviction does not have to be declared.
  - Likewise it does not count if the applicant was convicted under the *Youth Criminal Justice Act* (or previous *Young Offenders Act*) and successfully completed that sentence.
- The date of signature on the application is the date used to calculate residency, not the date upon which the application is received. This is counterintuitive as compared to other applications in which the date of receipt is paramount. The situation has arisen where the applicant incorrectly dates the application or waits a few months after signing to send the application, and it later turns out they were short on residency at the time of signature. CIC has refused to go by the later date of receipt and has held the clients to the date of signature. In the past, this could be remedied at a citizenship hearing under the discretion of a citizenship judge, which is likely no longer possible.

## A. Removal of Residency Assessment

The Act clarifies the divergent jurisprudence on residency. Actual physical presence is required and the *Koo* test is no longer applicable. A citizenship judge no longer has discretion to evaluate whether an individual maintained their “central mode of existence” in Canada despite not being physically present for the requisite number of days. This simplifies the calculation and advice to be given to clients. The grant of citizenship will no longer depend on the presiding adjudicator and which test they choose to adopt.

Issues of note:

- Without even a *de minimis* exception to the strict presence requirements, a shortfall of even a single day overall or in any one year (e.g. 182 instead of 183) could result in a denied application. Best advice for clients may be to allow themselves a buffer of time beyond the requirements so as to account for any discrepancy.
- Notably, the Act allows for a waiver from a strict application of the physical presence requirement on compassionate grounds for minors (at s. 5(3)(b)(ii)) but not adults. This also applies to other requirements of the Act as follows:
  - 5(3) The Minister may, in his or her discretion, after having reviewed a person’s particular circumstances, waive on compassionate grounds,
    - (a) in the case of any person, the requirements of paragraph (1)(d) or (e) or (2)(c) or (d);
    - (b) in the case of a minor,
      - (i) the requirement respecting age set out in paragraph (1)(b),
      - (ii) the requirement respecting length of physical presence in Canada set out in paragraph (1)(c),
      - (iii) the requirement respecting intent set out in paragraph (1)(c.1), or
      - (iv) the requirement respecting the taking of the oath of citizenship;
    - (b.1) in the case of any person who is incapable of forming the intent referred to in paragraph (1)(c.1) or 11(1)(e) because of a mental disability, the requirement respecting that intent; and
    - (c) in the case of any person who is prevented from understanding the significance of taking the oath of citizenship by reason of a mental disability, the requirement to take the oath.
- Therefore minors may claim H&C relief for a residence shortfall, but adults cannot. May presumably result in situations where the child can ask for an exception and be granted citizenship while the parents will have to reapply. The solution may be to extend this discretionary exception to adults as well; tantamount to the catchall relief provided by IRPA s. 25.
- An argument to the benefit of clients can now be made that neither residency questionnaires nor citizenship officials can inquire into the details of an applicant’s travel or actions outside the relevant period of examination. Previously, a broad scope of examination into the details of an applicant’s life was allowed insofar as it was relevant under the *Koo* analysis, in order to “place the application in context”:

[22] I would add that while the citizenship judge did refer to the time spent by the applicant in Colombia after submitting his citizenship application and thus outside of the relevant time period, it is clear that this is similar to the recent case of *Chen v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1140 (CanLII), 2007 FC 1140, at para. 15, wherein Layden-Stevenson J. stated that

“[i]n referring to absences outside the relevant period, the judge was merely placing [the] application in its context. There was nothing within that overall context that pointed to a result different than the one arrived at with respect to the relevant period.” I believe the same reasoning holds true in this case.

*Hernando Paez v. Canada (Citizenship and Immigration)*, 2008 FC 204 (CanLII) at para. 22 [emphasis added]

- Arguably, this is no longer the case as the only test is an objective one. What an applicant does before, after, or even during the relevant period is irrelevant so long as they prove the requisite days of physical presence.
- However, such assessments may become relevant for other reasons due to the amorphous new “intention to reside” provision (see discussion below).

## B. Removal of Credit for Time Spent in Canada Prior to Permanent Residency

**Previous Law:** Time spent lawfully in Canada before becoming a permanent resident, e.g. as a student, live-in caregiver, refugee claimant, could be credited toward residency requirements at a calculation of 0.5 days credit for every 1 day of presence up to a maximum of 1 year.

**New Law:** Removes this credit entirely.

Opinion:

- This further simplifies the process and eliminates the need for more complex formulas or calculations. However, eliminating consideration and credit for time spent in Canada before becoming a permanent resident contradicts the stated goal of ensuring applicants spend enough time in Canada to know the country.
- In the oft-cited reasoning of *Paurghasemi*, Muldoon J. explained the purpose of the residency requirements:

It is very clear that the purpose of para. 5(1)(c) is to insure that everyone... has been compulsorily presented with the everyday opportunity to become, "Canadianized." This happens by "rubbing elbows" with Canadians in shopping malls, corner stores, libraries... in a word wherever one can meet and converse with Canadians during the prescribed three years...

...So those who would throw in their lot with Canadians by becoming citizens must first throw in their lot with Canadians by residing among Canadians...for Canadian life and society exist only in Canada and nowhere else.

*Canada (MCI) v. Chan*, 2000 CanLII 16553 (FC) at para. 3

- Contrary to this logic, the removal of pre-PR credit specifically and disproportionately affects: students, workers, refugees, and live-in caregivers. These groups spend years in Canada, working, gaining a Canadian education, living with Canadian families, and looking after our children and elders, before they become permanent residents. This is valuable time which should be commended and credited.

## III. Prohibitions

New prohibitions have been introduced with respect to foreign criminality as well as misrepresentation. Under s. 31(1)(b) of the transitional provisions, the prohibitions apply

retroactively to all existing applications, including those filed before the coming into force of the amendments. Each sub-issue is addressed in turn.

## A. Foreign Criminality

- The SCCA extends many of the existing prohibitions for domestic criminality to foreign criminality. This includes a prohibition on citizenship while serving a sentence abroad equivalent to *any* enactment in Canada, regardless of whether indictable or summary or under an Act of Parliament:
  - s.22(1)(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;
  - (a.2) while the person is serving a sentence outside Canada for an offence under any Act of Parliament;
- With respect to convictions, under s. 22(3), an individual is prohibited for a period of 4 years from applying for citizenship, if the conviction is equivalent to an indictable offence under an Act of Parliament:
  - (3) 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 if the person has been convicted of an offence outside Canada that, if committed in Canada, would constitute an indictable offence under any Act of Parliament, regardless of whether the person was pardoned or otherwise granted amnesty for the offence, and the conviction occurred during
    - the four-year period immediately before the date of the person's application; or
    - the period beginning on the date of the person's application and ending on the date that he or she would otherwise be granted citizenship or take the oath of citizenship.
- Issues of note:
  - Individuals may be convicted in a foreign jurisdiction without due process on spurious charges. By example, adultery or premarital relations may be charged as 'rape' under the Islamic Penal Code of Iran. Such issues with respect to any applicant may be more properly addressed under IRPA in the context of full inadmissibility hearings.
  - Moreover, the new provisions create a paradox relative to the existing prohibitions for domestic criminality. In essence, they create a prohibition for any foreign offence which could be indictable in Canada. In contrast, the treatment of domestic criminality has not changed. Unlike IRPA s. 36(3)(a) which deems hybrid offences to be indictable, the Federal Court has determined that for the purposes of the Citizenship Act a hybrid offence must be characterized according to the Crown's election:

[41] Given that the Crown had expressly elected to proceed summarily in Mr. Ahmed's case long before his citizenship hearing, it follows that at the time of his citizenship hearing, he was no longer facing charges in relation to an indictable offence.

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As a consequence, the statutory bar contained in paragraph 22(1)(b) of the Citizenship Act did not apply.

*Ahmed v. Canada (MCI)*, 2009 FC 672 at para. 41.

But see also *Vithinyanathan v Canada (AG)* (2003) 3 FC 576 (TD)[holding a hybrid offence is considered indictable until a conviction is registered, even if Crown elects to proceed summarily. Once a conviction is registered, the hybrid offence is considered indictable or summary depending on the final outcome.]

- In practice, it is possible to request CIC hold off making a determination until the Crown has made an election on how to proceed. After which, counsel can provide CIC with the charging document or in some cases the Crown may provide a letter or email as to their intention, which can suffice.
- Importantly, under the SCCA, such an approach does not appear possible with respect to foreign criminality. The question is not how the conviction was actually disposed of, but only how it could have been treated if it were in Canada. Therefore applicants may be prohibited from Canadian citizenship for being convicted of an offence outside Canada that would not lead to prohibition if committed and convicted in Canada.
- On the other hand, another interpretation is that - absent a deeming provision - the Minister must look behind the face of the charge and determine whether the nature of the conduct would likely be pursued indictably in Canada. This interpretation would also accord with the rule against surplusage, insofar as the deeming provision in IRPA would otherwise be redundant. Counsel should likely advocate for this approach and provide submissions to this effect, until the courts provide guidance.
- Further, unlike in cases of inadmissibility, the complex determination as to equivalency is left to a CIC officer, instead of the Board after a full hearing on the merits of the case. Our office has already encountered the scenario where CBSA has decided not to refer an inadmissibility report for foreign criminality, but CIC has sent notice the client may be prohibited from citizenship under the new provisions. While CBSA may have concluded there was insufficient evidence to proceed before the Board, CIC is not burdened by such 'obstacles' before prohibiting citizenship.
- Similarly, s. 22(1)(b.1) prohibits citizenship for anyone charged with a foreign offence that would constitute an indictable offence:
  - s.22(1) (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;
- Issues of note:
  - This provision elicits the same concerns referred to with respect to foreign convictions, and adds the issue that it is not time barred. While an individual is eligible for citizenship four years after a foreign conviction, the same is not true if no conviction was ever registered. This may lead to circumstances in which an individual was charged in a foreign jurisdiction decades in the past, or even in

absentia, but no adjudication was ever held on the merits of the charge. In such circumstances, the individual remains prohibited from citizenship indefinitely.

- Perhaps recognizing this potential inequity, s. 22(1.1) specifically provides for a potential waiver from the applicability of s. 22(1)(b.1) on compassionate grounds. This also serves to highlight how little discretion the Minister is allowed with respect to the application of all other provisions regardless of the H&Cs.
- Finally, s. 22(4) introduces a series of specific national security related domestic convictions, which result in a permanent bar to citizenship, subject to exceptional circumstances under s.22(5).

## B. Misrepresentation

- New prohibitions under s. 22(1)(e.1-2) mirror the language of the misrepresentation provisions in IRPA and impose a 5 year ban on reapplication:
  - s.22(1)(e.1) if the person directly or indirectly misrepresents or withholds material circumstances relating to a relevant matter, which induces or could induce an error in the administration of this Act;
  - (e.2) if, during the five years immediately before the person's application, the person was prohibited from being granted citizenship or taking the oath of citizenship under paragraph (e.1);
- As such, these sections are likely intended to operate in the same manner as in the immigration context insofar as any discrepancy or omission in the application process, even unintentional or indirect, that could 'foreclose a relevant avenue of inquiry' may suffice. It is still open to argue, as with IRPA, that the information was innocuous or immaterial.
- See *Rogan*, 2011 FC 1007 (CanLII) at para. 31
- Importantly, however, in stark contrast to IRPA, the Federal Court has recently held revocation of citizenship for fraud or misrepresentation requires a showing of mens rea or an element of intentionality. In *Savic*, the Court reasoned:

[68] The overall goal of section 10 is to ensure that persons who have obtained permanent resident status and citizenship by providing false information or by withholding information that is material to the decision will not continue to benefit from that status. In my view, intent to mislead the decision maker is required for all conduct referred to in section 10. That intention must be established on a balance of probabilities; the plaintiff must provide some evidence of intention or some evidence from which a reasonable inference of intention to mislead can be drawn.

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[74] This leaves for consideration the conduct contemplated by false representations, which the plaintiff alternatively submits does not require an intention to mislead. As noted above, I do not agree. **Simply making a false statement (i.e., a false representation) in error or inadvertently should not result in a declaration under section 10. Some intention to mislead is required. This intention must be established on a balance of probabilities.**

*Canada (MCI) v Savic*, 2014 FC 523 (CanLII) at paras. 68, 74 [emphasis added]

- The holding in *Savic* has been numerously affirmed by the Court, see also:

- *Canada (MCI) v. Achkar*, 2015 FC 605 (CanLII) at para. 30
- *Canada (MCI) v Thiara*, 2014 FC 220 (CanLII) at para. 49
- *Canada (MCI) v. Zakaria*, 2014 FC 864 (CanLII) at para. 77

## IV. Investigations and Suspensions

### A. Investigations

Previously, citizenship officers did not have the statutory authority to compel in-person examination and were arguably limited in the documentation that could be requested. Section 23.1 now allows officers seemingly broad latitude to examine, investigate, and compel production with respect to anything which may be relevant to the requirements of citizenship:

**23.1** The Minister may require an applicant to provide any additional information or evidence relevant to his or her application, specifying the date by which it is required. For that purpose, the Minister may require the applicant to appear in person or by any means of telecommunication to be examined before the Minister or before a citizenship judge, specifying the time and the place — or the time and the means — for the appearance.

Issues of note:

- There is uncertainty and concern about how broadly this may be interpreted. By example, citizenship interviews have been used in order to investigate grounds for bringing a cessation application against a permanent resident's refugee status. Arguably this is relevant to citizenship insofar as cessation leads to loss of permanent residency, which is a prerequisite for citizenship. The counter argument can be made that there must be reasonable limits and a resident should not have to subject themselves to a fishing expedition simply by virtue of applying for citizenship.
- In practice, it is advisable to caution clients about the potential for their application to trigger investigations into previously latent grounds of inadmissibility. Similarly, clients should be aware that by submitting an application they may be compellable for production and examination that they would not otherwise have been if they simply remained a PR.
- This is all the more imperative as the SCCA introduces new penalties and offences for failing to produce requested material evidence, and merely refusing to answer any question during an interview:
  - s. 29.2(2)** Every person commits an offence who knowingly
    - (a) for any of the purposes of this Act, directly or indirectly, makes any false representation, commits fraud or conceals any material circumstances;
  - ...or
  - (c) **refuses to answer a question put to him or her at an interview or a proceeding held under this Act.**

Penalties

- (3) Every person who commits an offence under subsection (1) or (2)

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(a) is guilty of an indictable offence and is liable to a fine of not more than \$100,000 or to imprisonment for a term of not more than five years, or to both; or

(b) is guilty of an offence punishable on summary conviction and is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than two years, or to both.

- In addition, section 13.2 allows CIC to declare an application abandoned if the materials requested under s. 23.1 are not provided within the requested timeframe or if the person does not appear for examination when requested, without good reason.
- We have recently encountered a case where this new power has been exercised broadly. The applicant who had made an application under the old Act, was asked for documentation that would help prove residency, including rental lease agreements and university transcripts. The applicant provided some of these but was unable to provide others. CIC then declared the application abandoned as all requested documents had not been provided, even though none of them were requirements of citizenship.
- After a rule 9 application, the officer's notes showed that residency could not be determined absent the documents. However, section 14 of the new Act is clear that questions of residency, and by implication tangential documents related to residency, must be forwarded to a Citizenship Judge for final determination if the officer is unable to make a positive determination. This is the last remaining purview of Citizenship Judges. Counsel should be careful that applications are not being refused by CIC on this ground, or declared abandoned based solely on a failure to provide supplemental documents related to residency.

## B. Suspensions

**Previous Law:** Section 17 allowed suspension before the application was referred to a citizenship judge for up to 6 months. Policy required the applicant be served with notice of such suspension and the reasons thereof, which could then be challenged.

**New Law:** Section 13.1 allows unlimited, indefinite suspension pending investigation with respect to any matter relevant to the requirements of citizenship. Section 14 bars a citizenship judge from rendering a decision until such an investigation is complete. Full text as follows:

- **13.1** The Minister may suspend the processing of an application for as long as is necessary to receive
  - (a) any information or evidence or the results of any investigation or inquiry for the purpose of ascertaining whether the applicant meets the requirements under this Act relating to the application, whether the applicant should be the subject of an admissibility hearing or a removal order under the *Immigration and Refugee Protection Act* or whether section 20 or 22 applies with respect to the applicant; and
  - (b) in the case of an applicant who is a permanent resident and who is the subject of an admissibility hearing under the *Immigration and Refugee Protection Act*, the determination as to whether a removal order is to be made against the applicant.
- **14 (1.1)** Despite subsection (1), the citizenship judge is not authorized to make a determination until

- (a) the completion of any investigation or inquiry for the purpose of ascertaining whether the applicant should be the subject of an admissibility hearing or a removal order under the *Immigration and Refugee Protection Act* or whether section 20 or 22 applies to the applicant; and
- (b) if the applicant is the subject of an admissibility hearing under the *Immigration and Refugee Protection Act*, a determination as to whether a removal order is to be made against that applicant.

Issues of note:

- Under previous policy guidelines as well as jurisprudence, the Minister was required to provide notice the application had been suspended pursuant to s. 17 and detail the information that was missing or unclear:

Pursuant to section 17 of the Regulation, should the Minister wish to suspend the processing of an application, he may do so provided...the applicant so advised.

*Lam v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8738 (FC) at para. 23.

- See also *Wang v. Canada (MCI)*, 2010 FC 841 at para 14 [“... Insofar as the Applicant understands, she has completed all requirements for the processing of her citizenship application. Her application is *prima facie* complete. The Applicant was not informed of the investigation into her Canadian residence and was left without any idea of how much processing time she could expect to her application to take.”] [emphasis added]
- This was confirmed by Policy Manual CP 2 at s. 3.6:

#### 3.6. Section 17 allows six-month suspension

The Minister of Citizenship and Immigration can suspend the processing of an application for up to six months. The Federal Court of Canada says a grant application can only be suspended under section 17 when more information is needed from the applicant and the applicant has been asked to provide more information.

- Under the new provisions, it is unclear whether notice is still required. Counsel can argue it remains obligatory under the principles of procedural fairness and previous jurisprudence. The recent case of *Godinez Ovalle* supports this position in parts of its reasoning:

[45] The Applicant filed his mandamus application on October 23, 2014, and, on the same day, CIC Officer Ko filled out a form that purported to suspend processing of the Applicant’s citizenship application under s 13.1 of the new Citizenship Act pending CBSA’s “cessation investigation.” Once again, the Applicant was not informed of the purported s 13.1 suspension or permitted to make any submissions about it.

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[47] The Respondent has not been forthcoming with relevant information about these purported suspensions **or why the Applicant was not informed about them**. In written submissions in this application the Respondent says the Applicant’s citizenship application was formally suspended by Officer Ko in October 2014 pursuant to s 13.1 which came into force on August 1, 2014.

*Godinez Ovalle v. Canada (Citizenship and Immigration)*, 2015 FC 935 (CanLII) at paras. 45,

- There have been a number of recent decisions with respect to the appropriateness and authority for suspending citizenship applications. Many of these, however, were in the context of the prior Act. In *Stanizai*, the application had been approved by a citizenship judge and no appeal was taken from that decision by the Minister. However, CIC suspended the file and refused to allow him to swear the oath pending further investigations and ‘clearances’. Based on these investigations, CBSA subsequently filed an application with the RPD for cessation. Affirming a long line of jurisprudence, the Federal Court held CIC’s actions were improper as the decision of a citizenship judge is final:

The jurisprudence of this Court is clear: ‘unless there is an appeal, the approval or refusal by a citizenship judge, is a final matter as to the applicant’s Canadian citizenship. The Minister has no further function to perform or other remedy other than an appeal’.

*Stanizai v. Canada (Citizenship and Immigration)*, 2014 FC 74 (CanLII) at para. 31

- *Much the same decision was reached in Murad, where the application had been suspended pending residency concerns and investigations.* The case is also noteworthy as the Court implied the right to citizenship vests at the time citizenship should have been granted and what happens after the filing of mandamus is irrelevant:

**What has taken place after the application for mandamus was filed is not relevant to this application.** The respondent argued that Rule 302 of the Federal Courts Rules prevents a consideration of any further decision. I agree. At the same time, **had citizenship been granted when it should have been, whatever travel done by the applicant would have been of no moment** given that the Constitution guarantees the right to enter and leave Canada (subsection 6(1) of the Charter). I note that an inadmissibility report, pursuant to section 44 of the IRPA, can only be made about “a permanent resident or a foreign national who is in Canada”. It cannot be made about a citizen of this country.

*Murad v Canada (MCI)*, 2013 FC 1089 (CanLII) at para. 61 [emphasis added]

- In *Magalong*, CIC had suspended an application pending a RCMP investigation, which eventually led to charges five months after the fact. The Court agreed that s. 22 does not prohibit taking the oath while under investigation for an indictable offence (this has *not* changed under the new Act) and also held: “I agree with the applicant that the Minister had no right to put on ‘hold’ his granted citizenship application.” However, only partial relief was afforded as, at the time of hearing, the applicant was prohibited from taking the oath.

*Magalong v. Canada (Citizenship and Immigration)*, 2014 FC 966 (CanLII) at para. 42

- The applicability of these cases is now unclear with the introduction of s. 13.1. Counsel may argue aspects of the reasoning in these decisions are still applicable. In one of the first cases after the introduction of s. 13.1, the Court cited the above decisions in holding there are still limits to the discretion under s. 13.1 despite the broad framing:

[63] Clearly, the wording of this new provision allows suspension beyond the narrow security and admissibility context and permits it “for as long as necessary” to receive “any information or evidence or the results of any investigation or inquiry for the purpose of ascertaining whether the applicant meets the requirements under the Act relating to the application...” The issue for me is whether these words authorize the Minister to suspend a citizenship application in order to allow CBSA to conduct cessation proceedings before the RPD.

[64] As the Applicant points out, he is currently a permanent resident and will remain one until such time as that status is removed, which may never happen. So he does meet the permanent residence requirement under the Act. No inquiry is needed to establish that fact. The purpose of the suspension in this case is to allow CBSA to conduct cessation proceedings that may result in the Applicant losing permanent residence status at some time in the future. I do not think that either the old s 17 or the present s 13.1 authorize suspension for that reason. The Minister has suspended the application not because the Applicant does not meet the permanent residence requirement (it was reconfirmed in 2011 after the Applicant's final visit to Guatemala with a full knowledge of the Applicant's comings and goings). The Minister has suspended the citizenship application to give CBSA time to, possibly, strip the Applicant of his permanent residence status at some time in the future so that he will no longer be eligible for citizenship. In my view, that is a misplaced and abusive use of s 13.1.

*Godinez Ovalle v. Canada (Citizenship and Immigration)*, 2015 FC 935 (CanLII) at paras. 63-64

- The case is also noteworthy as, unlike the prior cases, the application had not yet been referred to or approved by a citizenship judge:

[76] ...However, for purposes of this mandamus application and the citizenship process, I do think there has been an abuse of process on the facts of this case. I cannot find conclusive evidence that the Applicant's application had actually been referred to a citizenship judge before the de facto suspension, thus bringing s 14(1) of the *Citizenship Act* into play, but I think the evidence is clear that the Applicant's file was complete and ready for referral and should have been referred to a citizenship judge on February 14, 2014 when the CIC official completed the Citizenship Application Review form that showed that the Applicant had fulfilled all of the statutory requirements for citizenship.

*Id.* at para. 76

- But see also *Valverde*, in which the Honourable Mr. Justice O'Keefe held a similar suspension was not authorized under the old Act but implied it may have been upheld had s. 13.1 been in force at the time.

*Valverde v. Canada (Citizenship and Immigration)*, 2015 FC 1111 (CanLII) at paras. 52, 66

- In practice, counsel may potentially argue the findings in *Godinez Ovalle* are controlling as *Valverde* discussed the operation of s. 13.1 in hypothetical or *obiter* after determining the section was inapplicable to the case at bar.

## V. Knowledge and Language Requirements

**Previous Law:** Applicants aged 18-54 years were required to take language and knowledge tests. Oral language and knowledge examination were administered by citizenship judges.

**New Law:** Knowledge and language test requirements are extended to those aged 14-64 years. Oral language and knowledge examinations are now administered by citizenship officers.

### A. Interpretation:

- Interpreters are no longer allowed to attend written knowledge examinations. This creates a difficulty whereby the language ability required to pass the knowledge examination may

be more than what is required to achieve the objective benchmarks for the language requirements themselves.

- Interpreters are allowed to attend an *oral* examination of an applicant's knowledge of Canada, which is now administered by an officer. CIC's published policy explains:

While it is possible for applicants to have sufficient knowledge of English or French to meet the language requirement, they may have difficulty either understanding or expressing themselves in response to questions concerning knowledge of Canada and the responsibilities and privileges of citizenship. For this reason, applicants are permitted to rely on the assistance of an interpreter in order to demonstrate that they satisfy the *Citizenship Act's* knowledge of Canada requirement.

- This is further entrenched by s.14 of the Charter and s. 2(g) of the Bill of Rights, which guarantee the right to interpretation in any legal proceeding as follows:

2. ... no law of Canada shall be construed or applied so as to

... (g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

*Canadian Bill of Rights*, S.C. 1960, c. 44 at s. 2(g) [emphasis added]

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

*Canadian Charter of Rights and Freedoms*, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s. 14.

- It should be noted, CP-13 provides that in the event the examiner questions the faithfulness of the interpretation, the hearing should be suspended and the applicant asked to come back with a different interpreter:

The citizenship judge, at any time during a hearing or ceremony, or a citizenship officer, at any time during an interview, may decide to suspend the proceedings if the judge/officer feels that the interpreter is not providing a faithful interpretation of the questions asked or the answers provided by the client. The appointment will be rescheduled and the client will be directed to provide a different interpreter.

Citizenship Policy Manual CP-13: Administration at s. 3.7

- The same is now replicated on CIC's website. At no point should an applicant be forced to answer interview questions without the assistance of an interpreter. Recently, in Zindran the Federal Court remanded a decision in which the Citizenship Judge had interfered with the interpreters ability to freely interpret throughout the duration of the hearing:

[21] The Applicant argues that given the Citizenship Judge's interference with her interpreter and counsel during the course of her hearing, his ability to serve as her interpreter was effectively extinguished early on in the hearing. As such, the Applicant's failure to understand and fully reply to the Citizenship Judge's questions led to an unfair hearing given her inability to meaningfully participate in the proceeding.

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[27] In my opinion the Applicant was denied procedural fairness. While the right to counsel is not guaranteed in citizenship hearings, the right to continuous

and contemporaneous interpretation is a fundamental right and is necessary for ensuring a full and fair hearing.

*Zarandi v. Canada (Citizenship and Immigration)*, 2015 FC 1036 at paras. 21, 27.

- But see also *Indran v. MCI*, 2015 FC 412 where a similar argument was rejected based on inconsistent statements provided during cross-examination, leading the Court to conclude insufficient evidence had been provided regarding the alleged interference with interpretation.
- In practice, if counsel are not attending the interview, clients should be advised to request the hearing be rescheduled if there are questions about interpretation or if access to interpretation is being fettered. More generally, clients should be advised to voice any objection to procedural fairness during the examination so as to avoid the argument of “implied waiver” should judicial review become necessary.

## B. Language Testing:

- Oral language testing is being conducted by officers now for legacy cases, including those that did not require proof of language testing at the time of application. The Federal Court upheld this practice with respect to citizenship judges, and the process has now been taken over by citizenship officers.

*Liu v. Canada (Citizenship and Immigration)*, 2008 FC 836 (CanLII)

- Counsel should have clients be prepared to answer language testing questions when called in for an interview with an officer. The standards for oral language testing and grounds for refusal are not clearly defined. Much may depend on an officer's subjective impression of the applicant's ability to communicate. Judicial review of such a determination is thus extremely difficult, especially as the examinations are not recorded.
- Of greater concern is that our office has encountered a case in which the applicant had in fact provided objective language testing results in the form of IELTS which satisfied the requirements for citizenship; yet a CIC officer nevertheless convened an oral language examination and denied the application on the basis of that conversation. Notably, the Federal Court has never held a citizenship judge could hold an oral language examination in cases where evidence of language proficiency had already been submitted. Similarly, the Court has never held a citizenship judge or officer has the discretion to override the objective testing requirements and substitute their own opinion regarding an applicant's fluency.
- In fact, the Federal Court has distinguished application types in which there are no set objective language testing benchmarks such as TFW applications, where an officer's discretion is controlling, versus applications where there are set language test requirements that must be followed such as CEC applications.

*Singh Grewal v. Canada (Citizenship and Immigration)*, 2013 FC 627 (CanLII) at para. 16

- Citizenship applications fall in the latter category and the argument must be put forward that an applicant has a legitimate expectation they will be found to satisfy the language requirements should they meet the predetermined testing scores. This ensures objective uniformity.

## VI. Tax Filings and Other Requirements

- The SCCA requires applicants to show proof of tax filings in at least 4 of the 6 years prior to applying for citizenship. This ties into the requirement to be present in Canada for 183 days in each of 4 years. Clients are advised to file their taxes every year, even if they have nothing to declare. Properly filed notices of assessment which show a NIL income can nevertheless satisfy the requirements of the citizenship application.
- Notably, however, CIC and Revenue Canada now have broader information sharing privileges and it remains to be seen to what extent either agency will use the shared information to look behind an applicant's filings.
- Moreover, the SCCA does not simply require an applicant to prove taxes were filed or to provide notices of assessment. The language of the provision is broader and more onerous:

**s.5(1)(c)(iii)** ...met any applicable requirement under the *Income Tax Act* to file a return of income in respect of four taxation years that are fully or partially within the six years immediately before the date of his or her application;

- As such, arguably, the SCCA requires an applicant to have been in compliance with all requirements of the *Income Tax Act*. Therefore the possibility exists for discrepancies in tax declarations to be treated as fraud or misrepresentation for the purposes of acquiring citizenship, thereby prohibiting the applicant.
- Likewise, it is unclear if tax violations that are discovered after an individual has been granted citizenship, can be used as grounds to revoke citizenship as the individual had not met the requirements of s.5(1)(c)(iii) at the time of application. If so, the discussion above with respect to misrepresentation and intentionality may become highly relevant.
- In addition, the wording of s. 5(1)(c) now requires a permanent resident to have “no unfulfilled conditions” under IRPA at the time of application. There is no further explanation provided, however, conditions may logically include the requirements placed on entrepreneurs, or on spouses following a spousal sponsorship. In this manner, the SCCA opens the scope of examination following a citizenship application. Applicants should be aware many of these findings may lead not just to a denial of citizenship but a revocation of permanent residence.
- In the end, given the broad powers of investigation discussed above, counsel should work with clients to give careful consideration to the applicant’s background, immigration history, tax liability, and both domestic and foreign criminality, before venturing to submit an application for citizenship.

## VII. Intention to Reside Provision

**Previous Law:** There was no intent to reside provision.

**New Law:** Introduces a requirement that a person applying for citizenship, “intends, if granted citizenship, to continue to reside in Canada” (s. 5(1)(c.1)(i)). In practice, applicants must sign a statement to this effect when applying.

Section 5(1.1) qualifies that “the person’s intention must be continuous from the date of his or her application until they have taken the oath of citizenship.” Arguably, therefore, an individual must only intend to reside in Canada up until taking the oath. If they change their mind after obtaining citizenship, it should not affect their status. In practice, it is unclear how these provisions will be interpreted and applied.

Issues of note:

- On its face, the provision allows broad discretion for a citizenship officer to speculate on the future intentions of a citizenship applicant and deny citizenship based on an alleged lack of intention to reside in Canada. There is no indication as to what type of action or duration of absence will constitute grounds to believe an individual does not continue to hold the intention to reside in Canada.
- Some inference may potentially be drawn by the accompanying provisions. Sections 5(1)(c.1)(ii)-(iii) provide that, in the alternative, the applicant may intend to work outside of Canada but only for the Canadian Armed Forces, the federal public administration or

the public service of a province (or accompany their spouse who is employed as such). This implies accepting employment abroad in any other capacity is not allowed; nor is accompanying a spouse abroad for any other reason.

- It may also be helpful to examine the immigration context, whereby immigration officials are given expansive discretion to refuse applications based on their belief as to an applicant's intention to reside in Canada. Notably, however, a citizenship applicant will not have access to a full fact-based appeal whereby a neutral arbiter will make the final determination as is the case at the IAD.
- The existing jurisprudence demonstrates such decisions are left within the purview of the administrative decision-maker, and the Federal Court is reluctant to intervene:

The applicant bases this claim upon the assertion that the Appeal Division erred in its examination of the facts underlying its findings as to his wife's credibility and **intention to reside permanently** with him in Canada...Findings of fact made by the Appeal Division should not be overturned unless they are **clearly wrong**...The standard of judicial deference that applies to findings of fact and to the weight given to the evidence by the Appeal Division is **quite high**.

*Singh v. Canada (MCI)*, 2002 FCT 347 (CanLII) [emphasis added]

- Since misrepresentation or fraud in relation to any condition of citizenship is grounds for revocation, a naturalized citizen is vulnerable to revocation of her citizenship if she leaves Canada and takes up residence elsewhere for whatever reason including a new career opportunity, helping an NGO, studying abroad, marrying a foreigner etc.
- Even if this power is exercised infrequently, its existence creates uncertainty and insecurity for naturalized citizens. Clients must be advised that leaving Canada for an extended duration might expose them to the accusation of fraud on the grounds they did not intend to reside in Canada permanently at the time they obtained citizenship. Therefore a naturalized citizen may be justifiably afraid to accept an offer of employment abroad or anything similar at the risk of losing their Canadian citizenship.
- In addition, the provision does not apply to citizens who are born here. This creates a dichotomy between naturalized versus birth citizens, and the obligations that apply to each. While birth citizens are still free to travel and live where they wish without concern, naturalized citizens cannot. This separation between two classes of citizenship is a concerning theme throughout the legislation.
- These issues trigger concerns under the *Charter of Rights and Freedoms*. Specifically, section 6 of the *Charter* guarantees to all citizens the right to leave, enter and remain in Canada. Section 15 of the *Charter* guarantees equality before and under the law, and equal benefit of the law. These are among the grounds cited in the challenge brought by CARL and the BCCLA currently before the courts.
- Finally, even if the intention requirement is only applied to the period between application and oath, there remain concerns about how it will be applied and under what circumstances. In essence, it imposes additional residency requirements after application. Not only will applicants require 4 years of residence prior to applying, but they will be required to remain resident for the intervening years until they take the oath, or risk jeopardizing their application.
- The average processing times for citizenship applications are 24 months for 'regular' applications, and 36 months for 'irregular' applications (such as when there are concerns regarding criminality or residency). Therefore applicants may now be required to be

resident in Canada for a total of 6-7 years before they finally take the oath. This is more than double the previous requirement of 3 years.

- There is a line of case law with respect to residency assessments, which holds an applicant's actions after submitting the application for citizenship are irrelevant:

[11] ... The correct test involves counting physical presence during the four years prior to filing the application for citizenship. **It is irrelevant that Mr. Chen has been in Canada 240 days since filing his application for citizenship.**

*Canada (MCI) v. Chen*, 2004 FC 848 (CanLII) at para. 11 [emphasis added]

[17] In my view it was quite proper for the citizenship judge to have particular regard to the letter of September, 2003 which accompanied the application for citizenship. **In applying the residency requirements, the citizenship judge must consider the events and expressed intentions leading up to the application submitted on September 26, 2003, not what has transpired since the application:** see, for example, *Canada (Secretary of State) v. Yu*, [1995] F.C.J. No. 919 (T.D.) at para. 8. It was not improper or irrelevant for the citizenship judge to take note of the letter of September 3, 2006 the thrust of which was to ask for the acceleration of a grant of citizenship to the Applicant in order that he could leave the country and go to the United States where he planned to spend the next four years. The phrase "I do have intentions of coming back to Edmonton... I would like to work here and make this my home once again." could reasonably be interpreted by the citizenship judge as the words of a person who did not regard himself as a resident of Canada in 2003.

[18] Similarly counsel for the Applicant complains that the citizenship judge should have taken into account the statement in a "residence questionnaire" completed by the Applicant to the effect that he intends to practice as a doctor in Alberta. **This form was completed on December 4, 2004 some three months after the date of his application for citizenship which for the reasons stated above is the critical date: the citizenship judge should address his mind to events and expressions of intent prior to and including that date.**

*Nulliah v. Canada (MCI)*, 2006 FC 1423 (CanLII) at paras. 17-18 [emphasis added]

- This analysis may now be inapposite. Under the new provision, an applicant's actions since applying for citizenship are perhaps even more relevant than their actions prior to application. This opens a wide scope of examination and enquiry for citizenship officers. Questions will certainly arise regarding the latitude to which officials are entitled in conducting their investigations and drawing inferences from those investigations.
- The case of *Sotade* presents a good example of conduct which may now be used against an applicant's signed intention to reside in Canada:

[15] ...the references by the Citizenship Judge to the period after May 30, 2008 were to events that were linked to the claims and actions of the Applicant during the relevant period. In particular, **the sale of his house in 2009, even though after the relevant time period, was not inconsistent with an intention of the Applicant to live in the United States and not in Canada.** This provides additional support for the Citizenship Judge's conclusion that the Applicant had actually moved to the United States as of some time prior to May 30, 2008. The Citizenship Judge was not counting days of absence from Canada after the relevant period; there is no error.

*Sotade v. Canada (MCI)*, 2011 FC 301 at para. 15 [emphasis added]

- Until the lines are more clearly drawn in terms of policy guidelines and jurisprudence, it will be difficult for counsel to advise what actions clients should or should not be taking. Enrolling in education abroad, or spending extended time taking care of an ailing relative overseas, are just some actions which were previously innocuous but may now have severe consequences.

## VIII. Leave for Judicial Review

**Previous Law:** could appeal a negative citizenship decision as a matter of right to the Federal Court. Had 60 days to do so.

**New Law:** must seek leave, much the same as with immigration applications (s. 22.1). The application must be served and filed within 30 days of notice (s. 22.1(2)(a)).

### Issues of Note:

- As with the immigration context, appeal to Federal Court of Appeal is now possible if a question of general importance is certified (s. 22.2(d)). Will help avoid conflicts such as the divergent lines of jurisprudence surrounding the appropriate test for residency that had developed under the old Act.
- The Federal Court has determined questions may be certified with respect to all applications, even legacy cases submitted under the old Act, as long as the appeal is filed after the coming into force of the new provisions:

[23] The relevant provisions of the *Strengthening Canadian Citizenship Act*, SC 2014, c 22 governing applications for judicial review of Citizenship Court judges came into force on August 1, 2014, by Order in Council (PC Number: 2014-0891) – before Mrs Indran applied for judicial review in this case. The parties were therefore given an opportunity to propose serious questions of general importance in keeping with section 22.2 of the Act as it now reads. No questions were proposed and none will be certified.

*Indran v. Canada (MCI)*, 2015 FC 412 at para. 23

- Pursuant to transitional provision s. 39, existing appeals and judicial review applications filed prior to the coming into force of the SCCA must still be determined under the terms of the previous Act and *Federal Courts Act*.
- Pursuant to transitional provision s. 35, a citizenship decision that was made under the old Act and is now remanded by the Federal Court must be redetermined in accordance with the provisions of the SCCA as it currently reads.
- From Justice Gleason at CBA National, May 2015: Since August 1, 2014, approximately 218 applications for judicial review have been filed with the Federal Court and 46 leave applications have been granted (which is roughly analogous to the percentage of leave applications granted in immigration matters).

## IX. Revocation of Citizenship

Sweeping new changes have been made to both the procedure for revocation as well as the grounds upon which citizenship may be revoked. Each sub-issue is addressed in turn.

### A. Changes to Procedure

**Previous Law:** In order to revoke citizenship on grounds of fraud or false representation, a three step process was required:

- (1) Minister had to give notice of intent to revoke
- (2) In response, individual could request the matter be referred to Federal Court as a matter of right (previous s. 18).
  - Federal Court would be trier of fact and engage in a full hearing on the merits.
  - Burden was on Minister to prove its case on a balance of probabilities.
  - Full disclosure, discovery and other procedural safeguards at trial were applicable.
- (3) If Federal Court found against the individual concerned, or the individual chose not to contest the allegation in Federal Court, then Governor in Council could make an ultimate decision.
  - GIC was allowed to consider H&Cs and other considerations beyond the mere elements of the offence.

**New Law:** The new revocation regime includes new procedures for revocation as well as new grounds for revocation (see below). For a majority of cases, the process now entails 1 step: a decision made at the discretion of the Minister or his delegate. There is no longer a judicial or quasi-judicial process.

In detail the *Act* provides:

**10.** (1) Subject to subsection 10.1(1), the Minister may revoke a person's citizenship or renunciation of citizenship **if the Minister is satisfied** on a balance of probabilities that the person has obtained, retained, renounced or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances.

Similarly, s. 10(2) provides the Minister can unilaterally revoke citizenship for a list of new offences related to national security (detailed below). An individual who has their citizenship revoked by the Minister under this section, automatically becomes a foreign national under s. 10.3.

Issues of Note:

- Section 10(3) outlines the extent of procedural fairness offered. It consists of the ability to make written submissions prior to the Minister making a decision:
  - s. 10(3) Before revoking a person's citizenship or renunciation of citizenship, the Minister shall provide the person with a written notice that specifies
    - (a) the person's right to make written representations;

(b) the period within which the person may make his or her representations and the form and manner in which they must be made; and

(c) the grounds on which the Minister is relying to make his or her decision.

- Notably, there is no requirement for disclosure. The Minister must merely cite the general grounds upon which they are relying, not the evidence upon which they are relying to establish guilt.
- In the absence of a full hearing before the Federal Court or any statutory requirements for disclosure, it is important for counsel to request disclosure of all evidence under the common law and *Charter* right to know the case against the accused in order to be able to prepare a full answer and defence. Our office has begun making such requests in response to revocation letters and notices alleging a pending applicant is now prohibited under the new provisions.
- Importantly, while the Act provides an applicant the right to make submissions in defence, the Supreme Court has been clear an individual has the right to disclosure of all evidence being relied upon in an allegation *prior to making any submissions*:

[I]t is useful to distinguish here between two discrete aspects of the right to make full answer and defence. One aspect is the right of the accused to have before him or her the full "case to meet" before answering the crown's case by adducing defence evidence. The right to know the case to meet is long settled, and it is satisfied once the crown has called all of its evidence, because at that point all of the facts that are relied upon as probative of guilt are available to the accused in order that he or she may make a case in reply: see *R. v. Krause*, 1986 CanLII 39 (SCC), [1986] 2 S.C.R. 466 at p. 473, per McIntyre J.; John Sopinka, Sidney Lederman and Alan Bryant, *The Law of Evidence in Canada* (1992), at p. 880. This aspect of the right to make full answer and defence has links with the right to full disclosure ...and is concerned with the right to respond, in a very direct and particularized form, to the Crown's evidence. Inherent in this aspect of the right to make full answer and defence is the requirement that the Crown act prior to the defence's response.

*R. v. Rose*, 1998 CanLII 768 (SCC) at para. 102 [emphasis added]

- Likewise, in *R. v. Latimer*, 2001 SCC 1, the Court held the "case to meet" principle requires that an accused person, before answering an allegation, know the evidence being relied upon in order to establish the allegation:

The "case to meet" principle is a component of the accused's constitutional right to make full answer and defence. It means that an accused has the right to know the case he must meet before answering the Crown's case: *R. v. Underwood*, 1998 CanLII 839 (SCC), [1998] 1 S.C.R. 77, at para. 6; *R. v. Rose*, 1998 CanLII 768 (SCC), [1998] 3 S.C.R. 262, per Cory, Iacobucci and Bastarache JJ., at para. 102. The rationale behind this principle is that the accused, before embarking on his defence, should be able to assume that the Crown has called all the evidence it will rely on to establish guilt.

*R. v. Latimer*, 2001 SCC 1 (CanLII) at para. 47 [emphasis added]

- Further, a hearing may now only be held if the Minister is of the opinion one is required based on prescribed factors:

<sup>10</sup> (4) A hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required.

- Section 7.2 of the citizenship regulations lists the prescribed factors:

7.2 A hearing may be held under subsection 10(4) of the Act on the basis of any of the following factors:

- (a) the existence of evidence that raises a serious issue of the person's credibility;
- (b) the person's inability to provide written submissions; and
- (c) whether the ground for revocation is related to a conviction and sentence imposed outside Canada for an offence that, if committed in Canada, would constitute a terrorism offence as defined in section 2 of the Criminal Code.

#### Citizenship Regulations SOR/93-246

- Even in these cases, however, a hearing is only required if the Minister believes it is warranted.
- In short, in these circumstances, an individual facing revocation of citizenship has less procedural safeguards than a permanent resident who may access both the ID and IAD for a full oral hearing before an independent adjudicator.

#### Hearing Required:

- There remain some limited circumstances in which the Minister must still seek a finding from the Federal Court as outlined in s. 10.1. This includes if the fraud is in relation to sections 34, 35, and 37 of IRPA (s.10.1(1)); or if the Minister has reasonable grounds to believe the individual engaged in armed conflict against Canada while a citizen of Canada (s. 10.1(2)). In all other cases, a hearing before the Federal Court is not required and the above process applies.
- Notably, s. 10.5 allows the Ministers to 'streamline' the process by including an inadmissibility application alongside an application under s. 10.1. The Federal Court will thereby first determine the revocation under s. 10.1 and then inadmissibility based on the same facts and grounds under s. 10.5. The individual would then become a foreign national subject to removal.

#### Issues of Note:

- The new procedures are being challenged on numerous grounds, by Waldman & Associates as well as other counsel. They are asking the Federal Court for writs of prohibition and a stay denying the Minister the ability to revoke citizenship until the issues are decided on the merits.
- Some of the grounds for the challenge include section 2(e) of the *Canadian Bill of Rights*, which protects the right to a fair hearing whenever an individual's "rights and obligations" are at issue and whenever the determination process is one that comes under the legislative authority of the Parliament of Canada.
- Also being argued is section 7 of the *Charter* insofar as revocation of citizenship restricts an individual's liberty and security interest. This reasoning was affirmed by the Federal Court in *Taylor*:

A person's right to security (such as obtaining state protection) and liberty of movement is inextricably linked with his national, or as the case may be, his citizenship status. Nationality and citizenship are so intimately attached to an individual that I am ready to accept that any deprivation or loss of nationality or citizenship by an act of the state – whether or not it renders someone 'stateless' – engages an individual's rights to 'liberty' and 'security of the person.'

*Taylor v Canada* (Minister of Citizenship and Immigration), 2006 FC 1053 at para 232.

- Finally, there is an additional issue with respect to individuals who had previously been issued a notice of intention to revoke, but had never received a hearing despite their request for such. The Minister is now serving new notices declaring an intention to revoke under the new process, without access to the Federal Court to which they were previously entitled. This includes individuals who had originally been served numerous years ago.
- The challengers are opposing this on numerous grounds including the principle against retroactivity. Moreover, section 43 of the *Interpretation Act* governs the effect of a repeal. According to s. 43, rights that have already accrued should not be affected by a repeal (s. 43 (c)), nor should the right to a related legal proceeding be affected (s. 43 (e)). In pertinent parts section 43 states:

43. Where an enactment is repealed in whole or in part, the repeal does not:

...

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,

...

(e) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c) or in respect of any punishment, penalty or forfeiture referred to in paragraph (d),

*Interpretation Act*, R.S.C., 1985, c. I-21, ss. 43

## B. New Grounds of Revocation

The new law will allow for revocation of citizenship based on convictions inside and outside of Canada for treason, spying or terrorism related offences. It will apply to all Canadians regardless of how they obtained their citizenship (even if it was by birth). However, it will only apply to those who are dual-nationals or who may be dual-nationals.

### 1. Grounds:

- Section 10.2 lists numerous national security and terrorism related grounds under which the Minister may unilaterally revoke citizenship:
  - 10(2) The Minister may revoke a person's citizenship if the person, before or after the coming into force of this subsection and while the person was a citizen,
    - (a) was convicted under section 47 of the Criminal Code of treason and sentenced to imprisonment for life or was convicted of high treason under that section;
    - (b) was convicted of a terrorism offence as defined in section 2 of the Criminal Code — or an offence outside Canada that, if committed in Canada, would constitute a terrorism offence as defined in that section — and sentenced to at least five years of imprisonment;
    - (c) was convicted of an offence under any of sections 73 to 76 of the National Defence Act and sentenced to imprisonment for life because the person acted traitorously;
    - (d) was convicted of an offence under section 78 of the National Defence Act and sentenced to imprisonment for life;
    - (e) was convicted of an offence under section 130 of the National Defence Act in respect of an act or omission that is punishable under section 47 of the Criminal Code and sentenced to imprisonment for life;

(f) was convicted under the National Defence Act of a terrorism offence as defined in subsection 2(1) of that Act and sentenced to at least five years of imprisonment;

(g) was convicted of an offence described in section 16 or 17 of the Security of Information Act and sentenced to imprisonment for life; or

(h) was convicted of an offence under section 130 of the National Defence Act in respect of an act or omission that is punishable under section 16 or 17 of the Security of Information Act and sentenced to imprisonment for life.

- Notably the provision applies retroactively to facts which occurred prior to the section coming into force. However, the individual must have been a Canadian citizen at the time of the offence.
- Further, s. 10.1(2) allows revocation by way of the Federal Court for having engaged in armed conflict against Canada while a citizen of Canada.

## 2. Statelessness:

- Under section 10.4(1) the Minister can only revoke citizenship if it would not render the individual stateless, in compliance with international law and obligations.
- The scope of the provisions is therefore extremely broad. While the measures are often couched as applied to 'dual-citizens', the SCCA is framed only in terms of statelessness. Recently, the Federal Court of Appeal ruled that an individual is not truly stateless if they have the possibility of obtaining citizenship or national status elsewhere:

It is true that as a result of the facts described above, the appellant is not recognized as a citizen of any country at the present time. But that is not statelessness in the international law sense.... [A] person is stateless only where...**as a legal or practical matter the person cannot get citizenship or national status elsewhere.**

*Budlakoti v. Canada* (Citizenship and Immigration), 2015 FCA 139 at para. 23 [emphasis added]

- Therefore, an individual born in Canada, who has never held the citizenship of another country, may be subject to revocation by virtue of the fact he may be entitled to another citizenship through parental lineage or otherwise.
- Furthermore, s. 10.4(2) of the SCCA imposes a reverse onus. The burden of proof is placed on the individual to show he or she would become stateless and is not entitled to another nationality.
- By comparison, in the first U.K. citizenship revocation case to reach the Supreme Court, the Court ruled against the British government on the basis that citizenship cannot be revoked on speculation that an individual 'could' be the citizen of another nation. The Court held the onus was on the government to show the individual *was* in fact also a citizen of another country.

*Secretary of State for the Home Department v Al-Jedda* [2013] UKSC 62.

### Issues of Note:

- Citizenship revocation for fraud, misrepresentation, or concealment, targets conduct that occurs prior to obtaining citizenship, and is justified on the basis that it corrects an erroneous grant of citizenship. By contrast, the new grounds revoke citizenship as

punishment or penalty for misconduct as a citizen. It is in effect a form of medieval banishment or exile.

- These provisions are being challenged under a number of grounds including section 6(1) of the *Charter*, which is not subject to legislative override under s. 33, and provides: “Every citizen of Canada has the right to enter, remain in and leave Canada.”
- The Supreme Court has held: “the central thrust of s. 6(1) is against exile and banishment, the purpose of which is the exclusion of membership in the national community.” *United states of America v. Cotroni; united states of america v. el zein*, [1989] 1 SCR 1469.
- More recently, the Court affirmed:

The common theme is that extradition, unlike exile and banishment, does not lie at the core of the right to remain in Canada under s. 6(1) of the *Charter*. A Canadian citizen who is extradited to stand trial in a foreign state does not necessarily become *persona non grata*: the accused may return to Canada if he is acquitted or, if he is convicted, at the end of his sentence....

*Sriskandarajah v. United States of America*, 2012 SCC 70 at para. 20

- And finally, in *Sauvé* the Court explained:

The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen’s continued membership in the self-governing polity. **Indeed, the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order.** Certain rights are justifiably limited for penal reasons, including aspects of the rights to liberty, security of the person, mobility, and security against search and seizure. But whether a right is justifiably limited cannot be determined by observing that an offender has, by his or her actions, withdrawn from the social compact.

*Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 47 [emphasis added]

## X. LPC Platform

The Liberal Party has made commitments to amend significant aspects of the SCCA, addressing a number of the issues raised in this paper. Specifically, the mandate letter from the PMO to the Minister of Immigration, Refugees and Citizenship, provides the following with respect to citizenship matters:

- Work with the Minister of Justice and the Minister of Public Safety and Emergency Preparedness to repeal provisions in the Citizenship Act that give the government the right to strip citizenship from dual nationals.
- Eliminate regulations that remove the credit given to international students for half of the time that they spend in Canada and regulations that require new citizens to sign a declaration that they intend to reside in Canada.