

RESIDENCY APPEALS – TIPS & BEST PRACTICES

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Questions of residency and meeting the requirements of section 28(1) of the IRPA arise, typically, after the permanent resident has already been found to be in default of their obligation. If they are fortunate, they have consulted immigration counsel before they have been found not to have met the requirements of the Act; however, in most cases all counsel can do is seek to appeal the decision to the Immigration Appeal Division. My goal in preparing this paper is to set out tips, strategies, and considerations that I have found to be effective and useful in representing my client's interests before the IAD.

Residency Obligation

28. (1) A permanent resident must comply with a residency obligation with respect to every five-year period.

Application

(2) The following provisions govern the residency obligation under subsection (1):

- (a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are
 - (i) physically present in Canada,
 - (ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,
 - (iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,
 - (iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or
 - (v) referred to in regulations providing for other means of compliance;
- (b) it is sufficient for a permanent resident to demonstrate at examination
 - (i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident;
 - (ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination; and
- (c) a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of permanent resident status overcomes any breach of the residency obligation prior to the determination.

The Consultation

1. **Has a finding already been made under A28(1)?** Not everyone in default of their residency has been found to be in violation of A28(1). If the individual is in Canada, that person still has the opportunity to meet the requirements so long as they do not seek to leave Canada. A28(1) is not a

discretionary provision; consequently, even a person who may not meet the requirements presently may meet the requirements by waiting some months to apply to renew their permanent resident card.

For an individual who is substantially short on days, even if there is over a year left on their permanent residence card, departure from Canada bears risk. While the individual may intend to promptly return to Canada, circumstances such as illness, child birth, etcetera, may intervene requiring a travel document for re-entry. On the other hand, even prompt return may lead to a finding under A28(1), as even was the person to remain in Canada for every single day remaining on their permanent resident card 730 days would not be obtained. These pre-emptive findings, pursuant to subsection 28(2)(b)(i), are becoming increasingly common and have been seen with individuals who have over a year left before their card expires, when they cannot establish that they have been in Canada for at least a year of the preceding four years.

2. **Know the timelines** – 30 or 60 days.

If the individual has been found to be in default of A28(1), they have a refusal letter or have been issued a departure order. If, upon examination, the individual is found not to have met (or not able to meet) the residency requirement, there will only be 30 days to file the appeal from the date of the departure order (Rule 7(2)). This occurs upon entrance to Canada or may be tied to the refusal of the request to renew a permanent resident card. If the decision is made overseas to refuse a travel document, then there will be 60 days to file the appeal from the date that the decision was received (Rule 9(3)).¹

3. **Family members** – It is important to ascertain the importance of permanent residence to the individual. For some, they are not worried about their own residence, but that of their adult child. As residency attaches to individuals rather than families, it is important to consider the interests and merits of each family member's particular situation and their interests in maintaining permanent residence.

¹ An individual remains a permanent resident, despite a departure order or refusal to issue a travel document, until a final determination has been reached. This extends to the IAD, and has implications even where a request to extend the time for filing an appeal is required. Ikhuiwu v. Canada (M.C.I.), 2008 FC 344:

[16] In my view, the correct interpretation of paragraph 46(1)(b) is that a section 28 determination is final when the time prescribed by the Rules for bringing an appeal from the decision has expired... However, a harmonious interpretation of those provisions with the IAD's jurisdiction to grant an extension of time to appeal the section 28 determination requires that any removal order deriving from the loss of permanent resident status be suspended upon the filing of a motion for an extension and, if granted, until the appeal is decided.

For families who have travelled at different times and have different interests, this will have a bearing on the complexity of the appeal. Each family member will have received their own decision and will be required to file their own appeal. While most family members have their appeals joined by the IAD, this does not occur in every case and counsel must be ready to prepare for more than one appeal.

4. **Expectations** – likelihood of success in residency appeals, as with many appeals, may depend greatly on your client’s behaviour after the date of filing the appeal. Particularly with current timelines, taking easily over a year to reach a hearing, much can be done to rehabilitate residency on humanitarian grounds. Consequently, a prospective client with a relatively low number of days spent in Canada and minimal establishment may still be able to demonstrate sufficient H&C considerations to have their appeal allowed.

However, if the prospective client does not intend to change their behaviour in the coming months, the appeal may only prolong their loss of residency. It is possible that other avenues exist, by which the client could regain their permanent residency in the future, when they are actually prepared to resettle permanently in Canada.

Documentation & Preparation

1. **Previous Counsel** – in the majority of residency appeals, your client will not have been represented by counsel prior to seeking assistance on the appeal. However, this must be canvassed as, particularly with travel document and permanent residence card applications, previous counsel may have been involved. If previous counsel was involved, ensure that you have obtained the complete application from their office.

While a Record will be provided, which ought to contain the application, the Record is not always complete and will not be provided for up to 120 days. (Rule 10(4) provides for 120 days to provide the Record when the decision was made outside of Canada; Rule 8(4) provides for 45 days for decisions made within Canada.) A jump start, particularly when canvassing legal validity, could provide sufficient information to stream your client’s application towards a paper-based resolution at an earlier opportunity.

2. **ATIPS** – the CBSA travel record is always a benefit. However, carefully review the document as it will catch individuals with your client’s name, whether or not they share the same date of birth or even citizenship.

Depending on the countries where your client regularly travels, they may be able to request a travel record from that jurisdiction. This may be a great benefit in overcoming Canada’s failure to stamp passports on exit from the country.

3. **Legal Validity** – If there is any possibility that the decision under A28(1) is wrong and that your client has obtained the necessary 730 days, proper documentation will be 90% of the battle. The key is to corroborate as many of the 730 days as are possible with documentation. Such documentation may lead to settlement with the Hearing’s Officer without the need to participate in a hearing.

Calculating Days – unlike citizenship, individuals receive credit for each day that they are in Canada – even if they are in Canada for only a part of that day (i.e., either arriving or departing). This is discussed in section 6.4 of Overseas Processing Manual 10.

Active vs. Passive Evidence – Active evidence is capable of placing your client physically in Canada, while passive evidence only demonstrates that your client has assets in Canada. This is the difference between a credit card bill and a hydro bill. While the hydro bill will demonstrate that your client is paying utilities in Canada, it will not demonstrate that your client is actually living in the property for which the bill is attached. The credit card bill, on the other hand, will provide an itemised list of your client’s shopping habits, listing the name of the store and typically the location. When location is not provided, the store number is provided which may be searched online to match store number with store location (particularly important for stores which are also present outside of Canada).

Canadian Business – under subsection 28(2)(a), both a permanent resident employed by a Canadian business abroad and their dependents will be considered to have maintained their residence in Canada. However, there are limitations to such employment and not everyone will benefit from his section of the IRPA. Section 61 of the IRPR defines what is meant by a Canadian Business:

Canadian Business

61. (1) Subject to subsection (2), for the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act and of this section, a Canadian business is

- (a) a corporation that is incorporated under the laws of Canada or of a province and that has an ongoing operation in Canada;
- (b) an enterprise, other than a corporation described in paragraph (a), that has an ongoing operation in Canada and
 - (i) that is capable of generating revenue and is carried on in anticipation of profit, and
 - (ii) in which a majority of voting or ownership interests is held by Canadian citizens, permanent residents, or Canadian businesses as defined in this subsection; or
- (c) an organization or enterprise created under the laws of Canada or a province.

Exclusion

(2) For greater certainty, a Canadian business does not include a business that serves primarily to allow a permanent resident to comply with their residency obligation while residing outside Canada.

Employment outside Canada

(3) For the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act, the expression “employed on a full-time basis by a Canadian business or in the public service of Canada or of a province” means, in relation to a permanent resident, that the permanent resident is an employee of, or under contract to provide services to, a Canadian business or the public service of Canada or of a province, and is assigned on a full-time basis as a term of the employment or contract to

- (a) a position outside Canada;
- (b) an affiliated enterprise outside Canada; or
- (c) a client of the Canadian business or the public service outside Canada.

Accompanying outside Canada

(4) For the purposes of subparagraphs 28(2)(a)(ii) and (iv) of the Act and this section, a permanent resident is accompanying outside Canada a Canadian citizen or another permanent resident — who is their spouse or common-law partner or, in the case of a child, their parent — on each day that the permanent resident is ordinarily residing with the Canadian citizen or the other permanent resident.

Compliance

(5) For the purposes of subparagraph 28(2)(a)(iv) of the Act, a permanent resident complies with the residency obligation as long as the permanent resident they are accompanying complies with their residency obligation.

Child

(6) For the purposes of subparagraphs 28(2)(a)(ii) and (iv) of the Act, a child means a child of a parent referred to in those subparagraphs, who is not and has never been a spouse or common-law partner and is less than 22 years of age.

For clarity on what CIC Officers will consider, Overseas Processing Manual 10, section 6 sets out the definitions meant to assist Officers.

Evidence confirming the tenants of R61 will be required. It is not enough merely that the business is incorporated in Canada, it must be demonstrated that the business is actually active in Canada (i.e., has Canadian employees working in Canada, financial records showing business in Canada, etc.) and that it was not created for the purposes of confirming residence under A28(2).² Furthermore, evidence will also be required that your client’s terms of employment overseas are clearly of a temporary duration and that his connection to the company extends beyond the overseas posting.³

However, such evidence will be relative to the size of the company and the type of business.⁴ Consequently, the types of the evidence that will substantiate your client’s case under R61 will vary greatly and will depend upon the “*nature and degree of activity of the companies in each individual*

² Ambat v. Canada (M.C.I.), 2011 FC 292, par. 20. For additional context on application, see the IAD decision at Ambat v. Canada (M.C.I.), 2010 CanLII 80733 (IRB).

³ Canada (M.C.I.) v. Jiang, 2011 FC 349, par. 52. For additional discussion on the application of Jiang, see: Bi v. Canada (M.C.I.), 2012 FC 293, paras. 15-21 and Wei v. Canada (Citizenship and Immigration), 2012 FC 1084, paras. 47-60

⁴ Durve v. Canada (M.C.I.), 2011 FC 995, paras. 9-10.

case and no particular indicia is determinative.” For certain types of employment, the Court has indicated that requiring a clean break from former clients makes little sense, as an entrepreneur may logically continue to market a product or service to clients held before obtaining permanent residence in Canada. Other business behaviours would need to be assessed against this continuity of clientele to determine the overall scope of business and whether it may now be considered “Canadian.”⁵ Similarly, the failure to have Canadian-based employees may also not be determinative.⁶

Family Members – a double-edged sword. The presence of family members in Canada makes active indicia of physical presence less convincing. For example, a spouse may also carry a credit card for the same account, meaning that transactions on the credit card bill corroborate that the spouse was in Canada, not your client. However, if the entire family travels together then evidence from the entire family can be used to establish physical presence.

4. **Humanitarian and Compassionate Considerations** – even if legal validity may be established, it is still worthwhile to gather H&C documents. While “intention” as a primary consideration was not continued under the *IRPA*, a demonstrated intention to make Canada one’s residence is still a relevant consideration for the H&C analysis under A67(1)(c).⁷ The IAD has provided a non-exhaustive list⁸ of factors that may be considered in assessing H&C merit, in addition to the best interests of the child:

- (i) the extent of the non-compliance with the residency obligation;
- (ii) the reasons for the departure and stay abroad;
- (iii) the degree of establishment in Canada, initially and at the time of hearing;
- (iv) family ties to Canada;
- (v) whether attempts to return to Canada were made at the first opportunity;
- (vi) hardship and dislocation to family members in Canada if the appellant is removed from or is refused admission to Canada;
- (vii) hardship to the appellant if removed from or refused admissions to Canada; and.

⁵ *Ibid.*, pars. 17-18.

⁶ *Ibid.*, par. 21

⁷ *Shaath v. Canada (M.C.I.)*, 2009 FC 731, par. 59. See also: *Dudhnath v. Canada (M.C.I.)*, 2009 FC 386, pars. 18-19.

⁸ Approved by the Federal Court in *Nekoie v. Canada (M.C.I.)*, 2012 FC 363, pars. 32-33:

The criteria used by the IAD are appropriate for this type of analysis... This Court has affirmed their use for analyses by the IAD regarding departure orders issued for failure to fulfill residency obligations pursuant to section 28 of the Act (*Canada (Minister of Citizenship and Immigration) v Sidhu*, 2011 FC 1056 at para 43; *Tai v Canada (Minister of Citizenship and Immigration)*, 2011 FC 248 at para 36, 47). These factors are not exhaustive and can vary, depending on the special circumstances of each case. Furthermore, it is at the discretion of the IAD to determine the weight to be accorded to each factor and to each piece of evidence; this Court ought not to interfere with those determinations...

(viii) whether there are other unique or special circumstances that merit special relief.

Reasons for Absence – if your client was absent from Canada for family reasons (i.e., illness, death, etc.), this will be far more compelling than absence for financial reasons (i.e., did not leave employment in country of origin, did not find employment in Canada, etc.). In either case, corroboration will be required. If your client was outside of Canada for family reasons, this will typically involve a long-term illness and/or convalescence, in which case it will also be important to establish why your client, in particular, had to attend to this relative.

There is an expectation that the individual return to Canada as soon as possible, regardless of the reason for absence. If your client was working overseas to support family, then s/he should be able to provide evidence of their efforts to find Canadian employment and/or have their credentials accredited in Canada. Some clients do not want to bear any risk; if they do not have a job, they may not want to buy property and so they may not establish their family in Canada, due to the costs of supporting two households. In such cases, even evidence of efforts to find employment in Canada will likely be insufficient, as there may be no other indicia of establishment. Immigrating to another country is a risk and so it is unrealistic for a client to expect that they may maintain their residency without bearing both physical and financial risks.

Establishment in Canada – if your client lived in Canada for some years before more recent absences, this will be in his/her favour. Letters of employment, from community/religious organisations, neighbours, etcetera can be used to prove that Canada is home, despite recent absences. This argument will be stronger if your client has not been returning to their country of origin, but to a third country when overseas.

Family – the presence of family members who are Canadian citizens or permanent residents can provide ties linking your client to Canada. Confirmation that the individual is a citizen or permanent resident is not enough, without evidence that the person also resides in Canada (ideally in close proximity to your client's residence). However, even with spouse and children in Canada, this may not be enough if your client has not done anything to establish personally in Canada.⁹

As a counter point, if your client has substantial family abroad evidence of where those family members live – in relation to your client's overseas residence – and the closeness in the relationship

⁹ Shaath v. Canada (M.C.I.), 2009 FC 731, par. 63

between that family member and your client are relevant. While having a brother in your client's country of origin may appear to be a connection to that country, evidence of estrangement or closer connection to a sister in Canada may tip the scale in your client's favour.

Between Filing Appeal and Hearing – much can be done to redeem a client's residency shortfall between the time of filing the appeal and when the appeal is heard. If your client is outside of Canada at the time of filing their appeal, it is best if a travel document is sought to permit their entry into Canada as soon as can be arranged. While a new permanent resident card may be obtained after filing the appeal, frequent departures from Canada will not be beneficial in demonstrating the intention to reside in Canada.

5. **Jurisprudence** – residency appeals tend to be fact specific, but do not discount the persuasive value of similar factual scenarios. While the IAD is not bound by other IAD Members' decisions, reviewing those decisions will show what arguments have worked (or not) in the past, and also provide Members with guidance if they are on the fence with their decision.

Jurisprudence from the Federal Court may also assist in establishing key principles and considerations. If relying on significant tracts from the Court (and not simple legal principles), ensure that copies of the case are provided to both the Member and the Hearing's Officer at the hearing.

6. **Early Resolution** – keep in mind that while an IAD Member is ultimately responsible for deciding the appeal, it is the Hearing's Officer who maintains the appeal with the IAD. If sufficient documentary evidence can corroborate that your client was in Canada for 730 days, making the A28(2) finding in error, you may seek settlement with the Hearing's Officer. A joint request could be made on paper for the appeal to be allowed, should the Hearing's Officer be satisfied with the evidence presented.

Disclosure

1. **Deadlines** – 20 days before the hearing, or 10 days before the hearing if responding to a document filed by another party (Rule 30). While the Board Member may consent to allow documents to be filed late, there must be good reason that the document was not available at the time when disclosure was due.

2. **Table of Contents** – organisation of disclosure cannot be understated. A clear table of contents, with clearly named materials, organised by category of document and date, will provide significant benefit to the Member.
3. **Calendar** – for appeals where your client has either met the 730 days or is close to meeting the days, consider creating a calendar for the entirety of the five year period (and up until the date of the hearing, if the 730 days were not quite made out during the requisite period). For each month, list every date that can be proven with documentary evidence. Cross-reference the dates to the page number within the disclosure (and Record) where the Board Member and Hearing’s Officer may look for confirmation.
4. **Know Your Facts** – particularly when dealing with letters of support, well-intentioned individuals may do more harm than good with the letters they provide. While your client should be doing everything possible to ensure their dates of travel are known and confirmed, those requested to provide letters may not put as much care into remembering the dates pertinent to your client. Consider that most people have no reason to remember the circumstances, in detail, of another individual (why would one’s neighbour remember precisely when you were absent from your home?).

One of the most important roles of counsel is to be the master of the evidence, and to know the facts even better than your client. For each piece of evidence, it must be reviewed against the dates that are known and already confirmed. When considering letters of reference, ensure that they are obtained enough in advance that revisions are possible should such be needed.

5. **Affidavits & Statutory Declarations** – there is limited time to hear an appeal, meaning that every possible witness may not be called upon to give testimony. If an individual was meant to attest to a simple factual situation, consider whether a sworn statement could suffice.

There are both pros and cons to this strategy, as the individual is not presented for examination by the Member and Hearing’s Officer. Should there be other concerns with credibility and should the deponent be providing opinion-based evidence, then the Member may chose to give the sworn statement little weight. It is the Appellant who bears the risk of not calling the deponent as witness.

The Hearing

1. **Concessions** – if there is no doubt that your client has failed to meet the residency requirements, concede to the legal validity of the A28(1) finding at the outset of the hearing. This paves the way to focus only on H&C considerations, without requiring unnecessary time and attention be paid to ascertaining the number of days spent in Canada. However, you should still be prepared to provide an approximate number of days as a starting point for the Member in considering the H&C merit.
2. **Direct Examination** – as counsel, you have the ability to commence the examination and so shape the message that is conveyed to the IAD Member. There is sometimes a tendency to portray one's clients in the best possible light; however, if they were living their lives in accordance with the law, they would likely not be at risk of losing their permanent residency. Seeking to conceal or minimise negative aspects of your clients' behaviour is of little benefit, as either the Hearing's Officer, Member, or both will have the opportunity to explore this information. It is far better to control how this information is presented to the IAD, as by being able to immediately lead the examination into a discussion as to why the client acted in that manner or how they have changed their behaviour. Further, by leading the discussion as to why the client failed to comply with his/her residency, the Appellant is not seen to be minimising his/her behaviour.
3. **Cross-Examination** – take careful notes of the questions asked by the Hearing's Officer. These notes can be of great benefit in structuring examination in reply, oral submissions, clarifications, or for when the hearing does not conclude in a single sitting.
4. **Examination in Reply** – must be limited to those matters arising from the examination by the Hearing's Officer and Member. At times questioning may appear off-point in the reply, and counsel must be prepared to justify to the Member why a particular line of questioning is in response to the cross-examination.
5. **Interpreters** – objections to poor interpretation or other concerns arising from the interpreter must be raised at the first opportunity. When challenging the interpretation provided, be prepared to explain to the Member precisely what concern has arisen, including examples. The interpreter will have the opportunity to speak in his/her defence or to clarify the concern presented. Ultimately, it is in no parties' interests to continue with a proceeding if confidence in the interpreter has been lost.

Many counsel represent clients who do not speak the same language. When counsel does not know the language of interpretation, consider having your client bring a friend to the hearing who is conversant in both English/French and the language of interpretation. Should a concern with interpretation arise, a break to speak with this individual may provide clarity as to whether an actual concern with interpretation exists.

6. **Adjournments** – while the IAD does have a schedule to keep and does anticipate that a hearing should conclude in the time allotted, adjournments are a regular part of proceedings. Be prepared, with your calendar, to schedule a new hearing date before leaving the hearing.

For your client, if his/her testimony was not concluded, then your client is still under oath. This will have significant implications for discussing the hearing with him/her and preparing for the next sitting, as neither counsel nor other witnesses may discuss the hearing with that individual. Even if the Appellant has finished his/her testimony, it is important to advise your client on the importance of not discussing the questions s/he was asked with other family or witnesses who are still waiting to give their testimony.

7. **Closing Submissions** – take this opportunity to concisely summarise your client's position, tying his/her actions to the legal test and any jurisprudence on the matter. This is also the best opportunity to highlight the disclosure, by drawing attention to those key documents that most strongly support your client's appeal.

There is some benefit to anticipating the submissions of the Hearing's Officer. This can assist in the preliminary submission, but is also useful for holding back a key point or argument for your submissions in reply. It is good strategy to close your final statements on a strong point.