THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Bill C-6, *Citizenship Act* amendments

CANADIAN BAR ASSOCIATION
IMMIGRATION LAW SECTION

April 2016

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Immigration Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Immigration Law Section of the Canadian Bar Association.

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EXECUTIVE SUMMARY

The Immigration Law Section of the Canadian Bar Association (CBA Section) appreciates the opportunity to comment on Bill C-6, *An Act to Amend the Citizenship Act,* introduced in February 2016.

The CBA Section supports the changes proposed in Bill C-6, many of which would return Canadian citizenship law to its state before the changes introduced by Bill C-24, the *Strengthening Canadian Citizenship Act.* In 2014, the CBA Section largely opposed the changes introduced by Bill C-24, and so in general we support reversing those changes. We also recommend additional changes to Bill C-6 to further restore or improve procedural protections in the *Citizenship Act* about the revocation of citizenship.

A. Grants of citizenship (Section 5)

The CBA Section supported the goal in Bill C-24 of clarifying the meaning of "residence" under the *Citizenship Act* (the Act). We recommend the definition in Immigration, Refugees and Citizenship's processing manual CP-5, which would retain discretion to recognize situations where applicants cannot be physically present in Canada for the required time. A bright-line physical presence test is administratively efficient, but should not be a barrier to recognizing the "Canadian-ness" of deserving persons who fail to meet the test, particularly due to educational or employment commitments. Some examples include permanent residents who receive scholarships to study abroad or who are employed by international transportation companies.

These hard cases suggest that some kind of compromise is needed to allow most cases to be processed efficiently and quickly using the bright-line physical presence test, but that an alternative route be available for exceptional cases where discretion is warranted. We recommend amending section 5(4) of the Act to expand the Minister's discretion to grant citizenship in deserving cases.

We also support restoring the half-time credit for temporary residents prior to the acquisition of permanent residence.

B. Physical presence in Canada 183 days during each of the four calendar years within six years

The CBA Section supports repealing section 5(1)(c)(ii) of the Act. It requires 183 days of physical presence in each of the four calendar years before the application.

The Act does not define a physical day as including any time spent physically in Canada in a calendar day. This is recognized in IRCC policy, and Bill C-6 presents an opportunity to specifically define this to avoid the vagaries of policy.

C. Requirement to file a tax return

Embedding income tax requirements in citizenship legislation raises significant concerns, given the complexity of the *Income Tax Act* and the serious consequences for misrepresentation in citizenship applications. An innocent income tax misrepresentation could lead to rejection of a citizenship application – for instance, a misunderstanding about whether one was required to file a tax return. The requirement may force applicants to delay filing applications for citizenship, which could in turn affect their eligibility. As in the CBA Section's 2014 submission, we recommend eliminating this requirement.

D. Intent to reside in Canada if granted citizenship

In 2014, the CBA Section recommended eliminating the requirement to demonstrate an intent to reside in Canada if granted citizenship. This remains our position.

E. Knowledge of official languages

The CBA Section continues to recommend eliminating the requirement that an applicant take the citizenship knowledge test in one of Canada's official languages. This amounts to a second language evaluation, in addition to the language test that is already mandatory for many applicants. The knowledge test taken in a second language will not accurately assess an applicant's knowledge of Canada, nor serve as an assurance that those who become Canadian citizens have a strong connection to Canada.

F. Authority to grant citizenship

Bill C-24 made granting citizenship primarily a departmental process by delegating authority to individual officers. The system that existed before Bill C-24 should be restored. Independent decision makers should determine who is entitled to become a Canadian citizen.

G. Revocation of citizenship

Bill C-24 significantly expanded the grounds on which citizenship may be revoked. In its 2014 submission, the CBA Section cautioned that these provisions may violate the *Charter.* The CBA Section supports their repeal by Bill C-6.

H. Lack of hearing, equitable considerations in revocation matters

The CBA Section expressed concerns in 2014 about procedural changes introduced by Bill C-24. Bill C-6 does not repeal these changes. The revocation process is now primarily paper-based. The Minister gives notice of intent to revoke, the affected citizen responds and the Minister decides. The Minister may hold a hearing in some cases, and in limited circumstances there will continue to be a hearing before a Federal Court judge. This abbreviated process does not reflect the value of Canadian citizenship.

Bill C-24 eliminated the right to a Federal Court hearing for those subject to revocation of citizenship, except in limited circumstances. In all other cases, the Minister now makes the decision without being required to hold a formal hearing. The CBA Section believes that the right to a formal hearing before an independent and impartial decision maker must be maintained for a matter as serious as the revocation of citizenship. The proper forum is the Federal Court.

Another concern is the absence of consideration of equitable factors. Neither the Minister nor the Federal Court has discretion to consider humanitarian or compassionate factors. Some form of safety valve is warranted for deserving cases.

Bill C-24's reduced procedural entitlements stand in stark contrast to those for permanent residents in similar circumstances. The CBA Section recommends that persons whose citizenship is revoked should revert to permanent resident status rather than inadmissible foreign nationals. The government would then decide whether to pursue removal through the mechanisms under IRPA, with an appeal to the Immigration Appeal Division and consideration of humanitarian and compassionate grounds.

I. Section 13.1 suspension of proceedings

In 2014, the CBA Section opposed, and continues to oppose, section 13.1 of the Act, introduced by Bill C-24. This permits the Minister to suspend citizenship applications and other proceedings while additional information or evidence is gathered. The indefinite suspension of application processing allows the Minister to "lift" the application of the law, while the suspension also prevents access to judicial review in the Federal Court. The CBA Section opposes this dangerous precedent of the administrative suspension of law.

J. Eliminating the right of appeal

In 2014, we opposed eliminating citizenship appeals and criticized the introduction of judicial review as diminishing the value of citizenship. We continue to urge the Government to reverse these changes.

K. Bars to citizenship

In 2014, the CBA Section opposed expanding bars to citizenship, specifically the bar for foreign criminality that is much broader than for criminality occurring in Canada. If the foreign criminality is serious, proceedings under IRPA can address it before the Immigration and Refugee Board. Section 22(4) of the *Citizenship Act*, introduced by Bill-24 and barring citizenship for these individuals, is unnecessary.

L. Citizenship by birth

In 2014, we called for plain language drafting for Bill C-24. The Bill used cross-referencing within the *Citizenship Act* and with previous legislation to the point of near incoherence. Section 3 of the *Citizenship Act* is incomprehensible for the average person. While the legislative changes on citizenship by birth were welcome, using plain language is in the interest of all parties.

M. Statelessness

The "first-generation-abroad" limit on the transmission of citizenship in the *Citizenship Act* creates a risk of statelessness for some. Some countries grant citizenship to persons only through birth to citizen parents. The CBA Section recommends amending Bill C-6 to prevent statelessness by exempting from the "first-generation abroad" limit a child who would be stateless.

Bill C-6, *Citizenship Act* amendments

I. INTRODUCTION

The Immigration Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to comment on Bill C-6, an *Act to Amend the Citizenship Act,* introduced in February 2016.

The CBA Section supports the Government's intent to repeal many problematic amendments to the *Citizenship Act* (the Act) that appeared Bill C-24, the *Strengthening Canadian Citizenship Act*. In particular, we support provisions in Bill C-6 eliminating the revocation provisions introduced by Bill C-24.

Citizenship is precious. It represents full inclusion in civil society and participation in deliberations over how we should live as Canadians. Those fully integrated into Canadian society should not be unfairly denied this privilege through bright-line tests that do not reasonably account for individual circumstances. In addition, Canadians should not face revocation of their status as citizens except in the most exceptional circumstances, and in a fair manner that respects Canada's constitutional and international obligations.

II. GRANTS OF CITIZENSHIP (SECTION 5)

The CBA Section supported Bill C-24's attempt to clarify the meaning of "residence." This would give applicants greater certainty, achieve shorter processing times, reduce the volume of litigation, and impose fewer demands on limited Immigration, Refugees and Citizenship Canada (IRCC) resources. Greater certainty about residence is compatible with providing flexibility to accommodate a deserving applicant with a strong attachment to Canada but who cannot satisfy the physical presence requirement. For this reason, we recommend expanding the Minster's discretionary powers in section 5(4) of the *Citizenship Act* to grant citizenship.

A. Physical residence: 1095 days in five years

The proposed change in Bill C-6 – from 1460 days in six years to 1095 days in five years – goes a long way to achieve a workable balance between requiring some demonstration of "Canadianization" through presence in Canada and allowing time outside of the country. The

return in Bill C-6 to providing half-time credit for time in Canada before permanent residency is also welcome.

Still, the CBA Section calls for a "safety valve" where, despite considerable establishment in and commitment to Canada, employment, education or other valid reasons require the applicant to be outside Canada. The applicant may never be able to become a citizen. For example, a recent immigrant's skills and connections to their country of origin may result in employment to represent Canadian businesses there. Canadian businesses may lose these international commerce "assets" if applicants decline postings abroad that will jeopardize or delay future citizenship applications.

To preserve the processing efficiency gains of the bright-line physical presence test, we recommend amending section 5(4) of the *Citizenship Act* to deal with these exceptional cases. The process should be set out in regulations and could be modelled on the guidelines in IRCC's Operational Manual Citizenship Policy (Residence)(CP-5). The manual sets out allowable exceptions to physical residence:

> *Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?*
>
> Example of an allowable exception: an applicant lived in Canada for three years before leaving for a period of several months. The applicant then returns to permanently live in Canada and files a citizenship application at that time.
>
> *Where are the applicant's immediate family and dependents (and extended family) resident?*
>
> Example of an allowable exception: an applicant leaves Canada for several days each month, but her mother-in-law, husband and children continue to live in Canada while she is outside of the country.
>
> *Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?*
>
> Example of an allowable exception: an applicant leaves Canada each month for seven or ten days, but stays abroad at hotels where the applicant conducts business or at the home of someone the applicant is visiting. The applicant always returns to Canada at a home owned or rented by the applicant.
>
> *What is the extent of the physical absences: if an applicant is only a few days short of the 1,095 total it is easier to find deemed residence than if those absences are extensive.*
>
> Example of an allowable exception: an applicant was physically present in Canada the vast majority of the time, despite repeated absences.
>
> *Is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a course of study abroad as a student, accepting temporary employment abroad, accompanying a spouse who has accepted temporary employment abroad?*

> Example of an allowable exception: the applicant obtains permanent residence in Canada and is offered a job here. After beginning employment here, she is asked by her employer to serve abroad for one year to help manage an important business venture. The applicant then returns here after the assignment is completed to resume her work in Canada.
>
> *What is the quality of the connection with Canada: is it more substantial than that which exists with any other country?*
>
> Example of an allowable exception: an applicant has been spending a few months abroad, each year, to look after his elderly parents. When in Canada, however, the applicant is involved in his work and business ventures. He also is involved with community organizations and the vast majority of his personal contacts (professional and social) are people who live here in Canada. Finally, the applicant pays income tax in Canada and in no other country.

It is appropriate for independent citizenship judges to make qualitative decisions, taking into account the factors in CP-5. Canadian citizenship is valuable and deserves this careful attention and consideration. However, we recognize that in an environment of limited resources, where citizenship processing cannot be allowed to return to three- or four-year processing times, this exceptional system should be clearly separate from the regular physical processing system.

The *Citizenship Act* does not define a physical day as including any time spent physically in Canada in a calendar day. This is recognized in IRCC policy. A specific definition in Bill C-6 would avoid the vagaries of policy.

RECOMMENDATIONS

1. **The Minister should be empowered to recognize "residency" on a discretionary basis for deserving situations, by expanding the criteria and scope of special grants under section 5(4) of the *Citizenship Act*:**

   Special cases

   (4) Despite any other provision of this Act, the Minister may, in his or her discretion, grant citizenship to any person to alleviate cases of special and unusual hardship, to reward services of an exceptional value to Canada, or to relieve an applicant from any requirement under section 5 of this Act.

2. **Bill C-6 should amend the *Citizenship Act* to specify that a day includes any time spent physically in Canada in a calendar day, by adding after section 5(1) of the Act:**

Any portion of a day during which an applicant for citizenship is physically present in Canada shall be treated as equivalent to one day of physical presence in Canada for the purposes of paragraphs 5(1)(c) and 11(1)(d)(i) of the Act.

B. Requirement to file a tax return

We continue to recommend eliminating the condition to meet requirements under the *Income Tax Act* in order to apply for citizenship. Bill C-24 introduced this provision. Everyone should meet *Income Tax Act* obligations. However, these obligations are best enforced by the Canada Revenue Agency. As a general principle, the CBA Section opposes using immigration or citizenship law as an indirect way of enforcing other laws that already contain appropriate penalties and enforcement mechanisms.

Embedding income tax requirements in citizenship legislation raises significant concerns, given the complexity of the *Income Tax Act* and the serious consequences for making any misrepresentation under the proposed provisions. For instance, it is not clear if a minor breach of a reporting requirement under the *Income Tax Act* could form the basis for a loss of citizenship in the future. This is of particular concern when a single officer will decide what constitutes a material misrepresentation.

At present, applicants may have to delay filing applications for citizenship until they have proof that they filed tax returns. This could affect their ability to meet the eligibility requirement of physical presence.

RECOMMENDATION

3. **Bill C-6 should repeal the requirement to meet any requirement under the *Income Tax Act* to file a return of income in respect of three taxation years that are fully or partially within the five years immediately before the date of the citizenship application.**

C. Knowledge of official languages

The CBA Section continues to recommend that applicants not be required to take the knowledge test in one of Canada's official languages. This requirement amounts to a second language evaluation and might not accurately assess an applicant's knowledge of Canada. Language competency required to pass a knowledge test is significantly different than that

required to live and work in Canada. Over the last century, many immigrants came to Canada to work in areas that did not require them to read or write in English or French. They pay taxes, attend religious institutions, volunteer in their communities, raise children and maintain few or no ties to their country of birth. They may lack the ability to complete a knowledge test in English or French, but still possess the language skills needed to be long-term, contributing members of Canadian society. Besides, nearly all economic class immigrants have already met far more stringent language requirements. Family Class and Protected Persons are primarily affected by the obligation to take the knowledge test in an official language. This requirement would preclude those with a lower education and less adequate English or French skills from qualifying for citizenship and does not achieve the intended goal of ensuring that those who become Canadian citizens have a greater connection to Canada.

RECOMMENDATION

4. **The requirement to take the knowledge test in one of the official languages should be eliminated.**

D. Authority to grant citizenship

Bill C-24 made the process of granting citizenship primarily a departmental one by delegating authority to individual officers. This does not reflect the value of Canadian citizenship. Decisions about who is entitled to become a Canadian citizen are at the foundation of our democracy and should be exercised by independent decision makers. This independence should not be sacrificed in the name of saving costs or for administrative expediency.

The CBA Section does support the transition from Cabinet to ministerial decision making on special grants of citizenship under section 5(4). This will increase efficiency in deciding special grants – all the more important given our recommendation that section 5(4) be expanded.

III. REVOCATION OF CITIZENSHIP

The CBA Section supports the repeal of the revocation provisions introduced by Bill C-24. We had serious concerns about the constitutionality of these provisions. It is important that they be repealed. Revocation of citizenship should be limited to naturalized Canadians who acquired citizenship by false representations. Anyone who stands to lose citizenship should have the right to a full hearing before the Federal Court.

A. Lack of hearing, equitable considerations

Bill C-24 fundamentally altered the process for revoking citizenship. The process in place before Bill C-24 involved three steps. The first was a report under section 10 of the *Citizenship Act* that the Minister was satisfied a person obtained citizenship fraudulently. Second, once notified of the report, the person could request that the matter be referred to the Federal Court for a hearing. Third, if the Federal Court made the finding requested by the Minister, citizenship could be revoked by the Governor in Council, which could consider equitable factors.

Bill C-24 eliminated the Federal Court hearing. The Minister now decides on revocation with no requirement for a hearing. For such a serious matter, a formal hearing before an independent and impartial decision maker is essential. A fair process for revocation, including an oral hearing before the Federal Court, reflects the value of Canadian citizenship and respect for the rule of law.

Bill C-24 also eliminated consideration of equitable factors that could prevent a legal, but unjust, outcome. Before then, the Governor in Council could consider equitable factors when deciding whether to revoke citizenship. This is no longer possible. The decision on revocation is determinative and there is no further opportunity for equitable factors to be considered. Where the Minister is responsible for revoking citizenship, there is no discretion. Even if discretion could be implied, the Minister is not an independent or impartial decision maker. At a minimum, Bill C-6 should explicitly recognize that officers may consider humanitarian and compassionate factors, and must allow the citizen to make written submissions on these factors.

The citizenship revocation process compares poorly with the process for loss of permanent resident status for misrepresentation under IRPA. A permanent resident alleged to have made misrepresentations to obtain status under IRPA has the opportunity to make written submissions to an officer before being referred to the Immigration Division for an admissibility hearing. The officer has (limited) discretion not to refer the matter. If the Immigration Division finds the permanent resident inadmissible and issues a removal order, the person has a right to appeal to the Immigration Appeal Division. The Immigration Appeal Division then considers the legal validity of the decision to issue the removal order, but also considers equitable or humanitarian and compassionate factors. However, once a citizen, the same person would lose their citizenship and immediately become an inadmissible foreign national. This occurs based

on a decision by a single officer. Citizens benefit from fewer humanitarian and procedural protections than permanent residents.

Persons whose citizenship is revoked as a result of a finding of a misrepresentation when they obtained their permanent residence (under s.10.2 of the Act) should revert to permanent resident status rather than to being inadmissible foreign nationals. Immigration officers could then write a report under s. 44 of IRPA if warranted. If a removal order is issued, the matter could be appealed to the Immigration Appeal Division, which would include consideration of humanitarian and compassionate grounds, as for other permanent residents in the same circumstances. A permanent resident should not be placed in a more precarious situation by obtaining citizenship than if they remained a permanent resident.

RECOMMENDATIONS:

5. **A citizen facing revocation of citizenship should have the right to a hearing before the Federal Court.**
6. **Citizenship should not be revoked without the officer assessing humanitarian and compassionate factors.**
7. **A citizen whose citizenship is revoked should revert to permanent resident status, rather than immediately becoming an inadmissible foreign national.**

IV. SECTION 13.1 SUSPENSION OF PROCEEDING

The CBA Section opposed Bill C-24's addition of section 13.1 to the *Citizenship Act*. This permits the Minister to suspend citizenship applications and other proceedings while additional information or evidence is gathered. Applicants in administrative processes should have their applications processed in a reasonable time and be given adequate notice of issues involving their applications so that they can respond. Section 13.1 would permit the government to delay processing citizenship applications indefinitely. Recent Federal Court decisions demonstrate the need for a statutory timeframe for making decisions to avoid inordinate and unexplained delays.[1]

[1] *Asad Stanziai v. Canada (Minister of Citizenship and Immigration),* 2014 FC 74; *Murad v Canada (Minister of Citizenship and Immigration)*, 2013, FC 1089.

RECOMMENDATION:

8. **Section 13.1 of the *Citizenship Act* should be repealed.**

V. ELIMINATION OF RIGHT OF APPEAL

Bill C-24 introduced a Federal Court judicial review process modelled on that in IRPA. At that time, the CBA Section recommended maintaining the existing system and adding an appeal to the Federal Court of Appeal. We continue to advocate for an appeal mechanism that reflects the importance of Canadian citizenship.

RECOMMENDATION:

9. **The system prior to Bill C-24 – permitting an appeal of citizenship decisions to the Federal Court – should be maintained, and an appeal to the Federal Court of Appeal should be permitted to resolve jurisprudential issues.**

VI. BARS TO CITIZENSHIP

The CBA Section expressed concerns about the substantial expansion of bars to citizenship introduced by Bill C-24.

Section 22(1)(a.1) of the Act creates a bar for foreign criminality much broader than for criminal conduct in Canada. The section is not limited to indictable offences or offences under an Act of Parliament. Even setting aside problems with trial fairness in some countries and determining equivalence of foreign criminality, differences between jurisdictions make the application inequitable. In some jurisdictions (the U.S., for example), it is not uncommon for prohibition orders to last five to ten years, and the person is "serving a sentence." In Canada, a prohibition order cannot be longer than three years, after which the sentence is complete.

If the foreign criminality is serious, proceedings before the Immigration and Refugee Board to address it under IRPA are better suited to make such determinations for permanent residents. IRPA proceedings suspend the citizenship process until they are resolved. As any permanent resident convicted of the listed offences would almost certainly face loss of permanent residence, section 22(4) barring their citizenship appears unnecessary.

RECOMMENDATION:

10. Sections 22(1) and (2) of the Act should be restored to their state prior to the changes introduced by Bill C-24.

VII. CITIZENSHIP BY BIRTH

A. Principles of legislative drafting

Excessive cross-referencing within the Act and to other legislation makes section 3 incomprehensible for the average person. The legislation is inaccessible to the public and to many public servants, politicians, lawyers and judges. The section should be redrafted to make it understandable.

11. Section 3 of the *Immigration Act* section should be redrafted to make it understandable.

B. Statelessness

The *Citizenship Act* creates a risk of statelessness for some persons. It is possible for a child born abroad to be excluded from Canadian citizenship and yet have no claim to citizenship in their country of birth. Many countries restrict giving citizenship to a child born there to foreign national parents. A child born abroad to Canadian parents may be stateless, given the generational limitations on passing citizenship. To address this issue, we recommend that Bill C-6 be amended to create an exemption from the "first-generation-abroad" rule to allow the transmission of citizenship if the child would otherwise be stateless.

RECOMMENDATION:

12. Bill C-6 should include a provision to fulfill Canada's international obligations to prevent statelessness.

VIII. CONCLUSION

The CBA Section supports Bill C-6's objective of repealing some controversial elements of Bill C-24. The *Citizenship Act* is a fundamental law in our democracy. It should only be amended after comprehensive consultations have generated a consensus in Canadian society about what the Act should contain. We recommend that the Government consider consultations as part of a comprehensive reassessment of Canadian citizenship.

In the interim, the CBA Section supports the amendments in Bill C-6 that repeal the problematic and sometimes potentially unconstitutional amendments introduced by Bill C-24 – amendments that were themselves introduced without broad consultation.

IX. SUMMARY OF RECOMMENDATIONS

1. **The Minister should be empowered to recognize "residency" on a discretionary basis for deserving situations, by expanding the criteria and scope of special grants under section 5(4) of the *Citizenship Act*:**

   Special cases

   (4) Despite any other provision of this Act, the Minister may, in his or her discretion, grant citizenship to any person to alleviate cases of special and unusual hardship, to reward services of an exceptional value to Canada, or to relieve an applicant from any requirement under section 5 of this Act.

2. **Bill C-6 should amend the *Citizenship Act* to specify that a day includes any time spent physically in Canada in a calendar day, by adding after section 5(1) of the Act:**

   Any portion of a day during which an applicant for citizenship is physically present in Canada shall be treated as equivalent to one day of physical presence in Canada for the purposes of paragraphs 5(1)(c) and 11(1)(d)(i) of the Act.

3. **Bill C-6 should repeal the requirement to meet any requirement under the *Income Tax Act* to file a return of income in respect of three taxation years that are fully or partially within the five years immediately before the date of the citizenship application.**

4. **The requirement to take the knowledge test in one of the official languages should be eliminated.**

5. **A citizen facing revocation of citizenship should have the right to a hearing before the Federal Court.**

6. **Citizenship should not be revoked without the officer assessing humanitarian and compassionate factors.**

7. **A citizen whose citizenship is revoked should revert to permanent resident status, rather than immediately becoming an inadmissible foreign national.**
8. **Section 13.1 of the *Citizenship Act* should be repealed.**
9. **The system prior to Bill C-24 – permitting an appeal of citizenship decisions to the Federal Court – should be maintained, and an appeal to the Federal Court of Appeal should be permitted to resolve jurisprudential issues.**
10. **Sections 22(1) and (2) of the Act should be restored to their state prior to the changes introduced by Bill C-24.**
11. **Section 3 of the *Immigration Act* section should be redrafted to make it understandable.**
12. **Bill C-6 should include a provision to fulfill Canada's international obligations to prevent statelessness.**