PROHIBITION AND REVOCATION OF CANADIAN CITIZENSHIP

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Authors:

Stephen W. Green, Partner, Green & Spiegel, LLP
Cathryn D. Sawicki, Associate, Green & Spiegel LLP

INTRODUCTION:

Within the Canadian Immigration and Refugee legal framework, formal citizenship represents the pinnacle of attainment in status. In Canada, citizens are afforded a host of rights that distinguish them from permanent residents. These rights include: the right to vote in federal and provincial elections, the right to run for office, certain minority language educational rights, the right to hold office, the right to a Canadian passport and perhaps most importantly, the right to enter, remain in, and leave Canada.

In *Benner v. Canada* the Supreme Court of Canada referred to Canadian citizenship as a "valuable privilege". [1] Philosophically speaking, citizenship is the bedrock of any democratic society. It is the formal recognition of one half of the participants in the enduring "social contract" between the state and its electorate. It is in this context that citizenship will be addressed herein.

This paper examines the legal means employed by the Canadian government to allot and more specifically, to revoke and refuse citizenship status. It is a common misconception amongst clients that citizenship in Canada is inalienable or that its bestowment ensures legally entrenched rights which are both absolute and irrevocable. However, this is not the case.

Through the *Citizenship Act*, (the "Act") the Government of Canada retains and exercises the right to refuse citizenship by way of sections 5, 14 and 22. Furthermore, through Sections 10 and 18, the Minister of Citizenship, Immigration and Multiculturalism (the "Minister") may also revoke the status of an individual who has already attained citizenship. These processes are especially germane to claimants/clients who attain Canadian citizenship by way of naturalization (of which there are currently over 6 million

[1] *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, 143 D.L.R. (4th) 577.

in Canada). As advocates, it is imperative that we inform our clients of the dangers regarding refusal and revocation of citizenship by encouraging honest, accurate and full disclosure of all material facts upon entry into Canada.

REFUSAL OF CITIZENSHIP (PROHIBITION)

Applicable Legislation with respect to Granting and Prohibiting Citizenship:

Section 5(1) of the *Citizenship Act* sets out the criteria the Minister must take into consideration when allotting citizenship to an applicant. The constituent elements include being eighteen years of age or older (s. 5(1)(b)), adequate knowledge of one of the official languages of Canada (s. 5(1)(d)), adequate knowledge of Canada and the responsibilities and privileges of citizenship (s. 5(1)(e)) and is not under a removal order or prohibited from citizenship pursuant to s. 20 (s. 5(1)(f)). The most contentious condition is the residency requirement under s. 5(1)(c). This provision has been the subject of much jurisprudence which will be elucidated below. It is also important to note that s. 5(3) of the Act provides the Minister with the discretion to waive, on compassionate grounds, the requirements of s. 5(1)(d) or (e). In the case of a minor, this section also allows the Minister to waive the requirement of s. 5(1)(b) or (c) on the same basis.

Section 22(1) of the *Citizenship Act* set the conditions under which an applicant is prohibited from obtaining citizenship. These provisions bar applicants from obtaining citizenship if they are pursuant to any enactment in force in Canada such as probation orders, parole or incarceration (s. 22(1)(a)). Also excluded are the following: individuals who are charged with an indictable offence under any Act of Parliament (s. 22(1)(b)), under investigation for, charged with, on trial for or convicted of an offence under sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act* (s. 22(1)(c) and (d)).

Finally s. 22(2) states that an applicant is prohibited from obtaining citizenship if they have been convicted of an indictable offence during the three year period immediately preceding the date of application (2)(a) OR if they were convicted between the date of application and the date that the person would otherwise be granted citizenship.

The pertinent provisions read:

> **5.** (1) The Minister shall grant citizenship to any person who
> (*a*) makes application for citizenship;
> (*b*) is eighteen years of age or over;
> (*c*) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, and has, within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada calculated in the following manner:
>
> (i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and
> (ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;

(*d*) has an adequate knowledge of one of the official languages of Canada;

(*e*) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and

(*f*) is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.

Residence

(1.1) Any day during which an applicant for citizenship resided with the applicant's spouse who at the time was a Canadian citizen and was employed outside of Canada in or with the Canadian armed forces or the federal public administration or the public service of a province, otherwise than as a locally engaged person, shall be treated as equivalent to one day of residence in Canada for the purposes of paragraph (1)(*c*) and subsection 11(1).

Idem

(2) The Minister shall grant citizenship to any person who

(*a*) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, and is the minor child of a citizen if an application for citizenship is made to the Minister by a person authorized by regulation to make the application on behalf of the minor child; or

(*b*) was born outside Canada, before February 15, 1977, of a mother who was a citizen at the time of his birth, and was not entitled, immediately before February 15, 1977, to become a citizen under subparagraph 5(1)(*b*)(i) of the former Act, if, before February 15, 1979, or within such extended period as the Minister may authorize, an application for citizenship is made to the Minister by a person authorized by regulation to make the application.

Waiver by Minister on compassionate grounds

(3) The Minister may, in his discretion, waive on compassionate grounds,

(*a*) in the case of any person, the requirements of paragraph (1)(*d*) or (*e*);

(*b*) in the case of a minor, the requirement respecting age set out in paragraph (1)(*b*), the requirement respecting length of residence in Canada set out in paragraph (1)(*c*) or the requirement to take the oath of citizenship; 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.

Special cases

(4) In order to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada, and notwithstanding any other provision of this Act, the Governor in Council may, in his discretion, direct the Minister to grant citizenship to any person and, where such a direction is made, the Minister shall forthwith grant citizenship to the person named in the direction.

[…]

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

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

(i) under a probation order,

(ii) a paroled inmate, or

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

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

(*c*) while the person is under investigation by the Minister of Justice, the Royal Canadian Mounted Police or the Canadian Security Intelligence Service for, or is charged with, on trial for, subject to or a party to an appeal relating to, an offence under any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

(*d*) if the person has been convicted of an offence under any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

(*e*) if the person has not obtained the authorization to return to Canada required under subsection 52(1) of the *Immigration and Refugee Protection Act*; or

(*f*) if, during the five years immediately preceding the person's application, the person ceased to be a citizen pursuant to subsection 10(1).

Idem

(2) Notwithstanding anything in this Act, but subject to the *Criminal Records Act*, a person shall not be granted citizenship under section 5 or subsection 11(1) or take the oath of citizenship if,

(*a*) during the three year period immediately preceding the date of the person's application, or
(*b*) during the period between the date of the person's application and the date that the person would otherwise be granted citizenship or take the oath of citizenship,

the person has been convicted of an offence under subsection 29(2) or (3) or of an indictable offence under any Act of Parliament, other than an offence that is designated as a contravention under the *Contraventions Act*.

Overview of the Process Undertaken to Grant Citizenship:

Section 14 of the *Citizenship Act* sets out the procedural aspects of citizenship determination, and states,

14. (1) An application for
(*a*) a grant of citizenship under subsection 5(1),
(*b*) a retention of citizenship under section 8,
(*c*) a renunciation of citizenship under subsection 9(1), or
(*d*) a resumption of citizenship under subsection 11(1)

shall be considered by a citizenship judge who shall, within sixty days of the day the application was referred to the judge, determine whether or not the person who made the application meets the requirements of this Act and the regulations with respect to the application.

Interruption of proceedings

(1.1) Where an applicant is a permanent resident who is the subject of an admissibility hearing under the *Immigration and Refugee Protection Act*, the citizenship judge may not make a determination under subsection (1) until there has been a final determination whether, for the purposes of that Act, a removal order shall be made against that applicant.

(1.2) [Repealed, 2001, c. 27, s. 230]

Advice to Minister

(2) Forthwith after making a determination under subsection (1) in respect of an application referred to therein but subject to section 15, the citizenship judge shall approve or not approve the application in accordance with his determination, notify the Minister accordingly and provide the Minister with the reasons therefor.

Notice to applicant

(3) Where a citizenship judge does not approve an application under subsection (2), the judge shall forthwith notify the applicant of his decision, of the reasons therefor and of the right to appeal.

Sufficiency

(4) A notice referred to in subsection (3) is sufficient if it is sent by registered mail to the applicant at his latest known address.

Appeal

(5) The Minister or the applicant may appeal to the Court from the decision of the citizenship judge under subsection (2) by filing a notice of appeal in the Registry of the Court within sixty days after the day on which

(*a*) the citizenship judge approved the application under subsection (2); or
(*b*) notice was mailed or otherwise given under subsection (3) with respect to the application.

Decision final

(6) A decision of the Court pursuant to an appeal made under subsection (5) is, subject to section 20, final and, notwithstanding any other Act of Parliament, no appeal lies therefrom.

After an applicant completes his or her application form, it is sent to the Case Processing Centre (CPC) in Sydney, Nova Scotia. The CPC reviews the application and any supporting documents to ensure it meets the minimum processing requirements. The CPC will complete the necessary steps for a Citizenship Judge to make a decision on the application. If additional information or documents are needed, CIC contacts the applicant to request them. An interview with a Citizenship Judge may also be required. If necessary, the applicant is notified by mail regarding the time and place of the interview. S. 14(1) of the *Act* stipulates that the application will be considered by a Citizenship

judge who must determine within sixty days whether or not the application meets the requirements of the Act. Upon making the determination, the Citizenship Judge must either approve or deny the application, notify the Minister of his/her decision and provide reasons therefore (S. 14(2)). Pursuant to S. 14(5) allows the Minister or the applicant the right to appeal the citizenship judge's decision to the Federal Court, within 60 days of the decision being delivered. Subject to S. 14(6), a decision of the Federal Court made with regards to (5) cannot be appealed.

Judicial Interpretation of the Residency Obligation (s.5(1)(c)):

Perhaps the most common reason for an individual's application for citizenship to be denied is that he or she did not meet the "residency" requirements. Section 5(1)(c) of the *Citizenship Act* states that the Minister shall grant citizenship to any person who is a permanent resident and has within the four years immediately preceding the date of his or her application, accumulated at least three years of residence in Canada. The various judicial interpretations of the phrase "accumulated at least three years of residence" have proven to be quite problematic for Citizenship Judges, counsel and applicants alike. Currently, the Federal Court's interpretation of "residence" can be grouped into three categories. The first views it as actual, physical presence in Canada for a total of three years, calculated on the basis of a strict counting of days (*Re Pourghasemi*).[2] A less stringent reading of the residence requirement recognizes that a person can be resident in Canada, even while temporarily absent, so long as he or she maintains a strong attachment to Canada (*Re Papadogiorgakis*).[3] A third interpretation, similar to the second, defines residence as the place where one "regularly, normally or customarily lives" or has "centralized his or her mode of existence" (*Re Koo).*[4] While a Citizenship Judge may choose to rely on any one of the three tests, it is not open to him or her to "blend" the tests (*Tulupnikov v. Canada*).[5] It has also been recognized that any of these three tests may be applied by a Citizenship Judge in making a citizenship determination (*Lam v. Canada*).[6]

Given all of this, advocates for clients attempting to obtain citizenship are put in a very difficult position. They are often expected to provide clients with a probability of success regarding their client's citizenship matter. Given that a Citizenship judge may employ any one of the three legal tests to establish residency (which are all sufficiently different in substance) a seemingly predictable outcome is often out of the question. Nonetheless, clients should be encouraged to establish at least 1095 days of "physical presence" in Canada within four years, so as to conform to the *Pourghasemi* test. If this requirement is not possible due to a client's work or family circumstances, then a multitude of

[2] *Re Pourghasemi*, [1993] F.C.J. No. 232 *(QL) (T.D.)*
[3] *Re Papadogiorgakis*, [1978] 2 F.C. 208 *(T.D.).*
[4] *Re Koo*, [1993] 1 F.C. 286 *(T.D.)*
[5] *Tulupnikov v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1439, [2006] F.C.J. No. 1807 (QL)
[6] *Lam v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 410 (T.D.) (QL)

contextual factors establishing a strong connection to Canada must be established, and an implementation of one of the other two tests encouraged.

Judicial Interpretation of S. 22(1)(a) and S. 22(2):

As indicated earlier, citizenship applications can be denied on the basis that the applicant has been convicted of an indictable offence under any Act of Parliament in the three years preceding the application or in the time between the sending of the application and the granting of citizenship (s. 22(2) of the *Citizenship Act*). Furthermore, s. 22(1)(a) prohibits those who are on parole, probation or incarcerated from obtaining citizenship status.

The Federal Court has provided applicants a fair amount of leeway when applying the aforementioned prohibition provisions of the *Citizenship Act*. One of the more interesting cases where the Federal Court's flexibility on this issue was demonstrated is that of *Re Tohme*.[7] Mr. Tohme made a citizenship application in March 1992. In April 1992 as a result of an earlier charge of sexual assault, Mr. Tohme received a suspended sentence and was placed on probation for three years. He met all the other requirements for citizenship except that of s. 22(1)(a) of the *Act*. As a result, the Citizenship Judge refused his application, which he appealed to the Federal Court. By the time the Appeal was heard in November of 1995, he was no longer under the probation order. At the Federal Court, Justice MacKay allowed the appeal on the understanding that the appeal is a trial *de novo*. In his reasons, Justice MacKay stated the following

> "If this appeal is not now allowed, of course the applicant may file another application. If he were to do so the residency requirement of three years residence in the four years preceding application, and the prohibition of counting for purposes of residence any time served under probation, would effectively mean, assuming Mr. Tohme continues to reside in Canada, that he would not again be qualified by residency requirements until April 1998, some three years following the end of his probation sentence"[8]

This holding implies that if an individual is prohibited from obtaining citizenship as a result of falling under section 22(1)(a), then the applicant may be encouraged to apply anyway. That is, if the applicant's parole, probation or incarceration is for a year or two, the applicant can appeal the denial of the application because it is likely that the appeal will be heard once those enactment orders have expired.

Similarly, with respect to s. 22(2), in *Re Choudhury*[9], it was held that a Citizenship Judge had erred in finding that Choudhury was prohibited from obtaining citizenship because he was given a conditional discharge for using stolen credit card. The Federal Court stated that "a conditional discharge…is NOT a conviction under s. 22(2) of the

[7] *Re Thome*, **[**1995] F.C.J. No. 1606**; [**1995] A.C.F. no 1606
[8] *Ibid*, para. 12
[9] *Re Choudhury*, (1985), CCH DRS 1985 P27-518, F.C.C

CitizenshipAct."[10]

REVOCATION OF CITIZENSHIP

Applicable Legislation with respect to Revoking Citizenship:

Section 10(1) of the *Citizenship Act* allows the Minister to submit a report to the Governor in Council outlining the reasons for which an individual's citizenship should be revoked. The report must show that the individual "*obtained, retained, renounced or resumed citizenship under this Act by* ***false representation or fraud or by knowingly concealing material circumstances***".

Section 10(2) states that if an individual lawfully obtained Permanent Residence by false representation or fraud or by knowingly concealing material circumstances and because of that admission, the person subsequently obtained citizenship, then their citizenship status is revocable. In summary, if a person misrepresented themselves in attaining Permanent Resident status and then legally (without misrepresentation) obtains their citizenship, **that citizenship is revocable**.

Section 10 of the Act states,

> **10.** (1) Subject to section 18 but notwithstanding any other section of this Act, where the Governor in Council, on a report from the Minister, is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances,
>
> (*a*) the person ceases to be a citizen, or
>
> (*b*) the renunciation of citizenship by the person shall be deemed to have had no effect,
>
> as of such date as may be fixed by order of the Governor in Council with respect thereto.
>
> Presumption
>
> (2) A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship.

Overview of the Process Undertaken to Revoke Citizenship:

To initiate the revocation process, the Minister must have information that a naturalized citizen unlawfully obtained citizenship or permanent resident status. If there is sufficient evidence, the Minister prepares a notice to the affected person indicating that a report will be made to the Governor in Council (pursuant to s. 18(1) of the *Citizenship Act*). This notice sets out the basic allegations against the person.

Upon receipt of the notice, the affected person has 30 days in which to advise the Minister that he/she wishes the case to be referred to the Federal Court for a

[10] *Ibid*

determination whether their citizenship had been obtained by false representation, fraud or knowingly concealing material circumstances (s. 18(1) of the *Citizenship Act*). It is at the Federal Court where the government must file its evidence.

If the Federal Court finds that the citizenship was obtained on the basis of fraud, the Minister may recommend revocation to the Governor in Council. It is important to note that decisions made by the Federal Court with respect to original findings of facts concerning s. 18(1) of the Citizenship Act are **NOT APPELABLE** (s. 18(3) of the *Citizenship Act*). The Governor in Council makes its decision through an Order in Council (s. 10(1) of the *Citizenship Act*). A person affected by such an Order in Council may apply to the Federal Court for judicial review of that Order. Although no appeal is permitted on the original finding of facts by the Federal Court, any individual whose citizenship has been revoked has the right to a judicial review by the Federal Court of whether the **Governor in Council decision was lawful.**

Finally, if admission to Canada was granted on the basis of fraud, the person may lose her/his immigration status in this country, including Permanent Resident (PR) status (s. 10(2) of the *Citizenship Act*). However, if the misrepresentation occurred during the citizenship application process, the individual reverts to PR status.

Given the current procedural requirements for citizenship revocation, the biggest criticism of the process is that there is no statute of limitation on when a citizen's status can be revoked. That is, even if a resident of Canada has been a citizen for 40 years or more, they are still subject to applicable revocation provisions of the *Citizenship Act*. As such, it is prudent for legal counsel to identify exactly what is at stake in these revocation references. Simply stated, an individual is at risk of losing his or her citizenship which is of fundamental significance to the person concerned, as these individuals have consequently built lives and had families here. Their loss of status will undoubtedly have an enormously negative impact on their lives.

Jurisprudential Development of Revocation

Standard of Proof:

In order to adequately assess the citizenship revocation process, it is wise to first identify the relevant case law which has interpreted and formed its development. The first question to be addressed affects much of the subsequent development of the revocation process; that question asks *what is the nature of the Federal Court's determination of whether citizenship should be revoked pursuant to s. 10 of the Citizenship Act*? Is it a civil or criminal proceeding accordingly importing all of the rights and process of either?

In *Luitjens v. Canada* (1991), Justice Collier of the Federal Court held that,

> "I am satisfied the present proceeding is a civil proceeding. I had been tempted, alternatively, to use the phrase, a quasi-criminal proceeding. That, to my mind, would be too imprecise and create confusion".[11]

This characterization of the revocation reference in the Federal Court as a "civil proceeding" has allowed the courts to determine that the standard of proof on which the Minister must prove the constituent elements of s. 10 must be proven is on a **balance of probabilities**. It is interesting to note that in the *Luitjens* decision, the Court stated that the standard of proof to be met was a "high degree of probability".[12] However, that finding was rejected in the subsequent jurisprudence[13] in favour of the existing balance of probabilities standard.

"Material Circumstances":

Pursuant to s. 10 of the *Citizenship Act*, an individual's citizenship can be revoked on the basis that they concealed "material circumstances". What constitutes "material circumstances" has attempted to be clarified through judicial interpretation on a number of occasions.

In *Canada v. Minhas* (1993)[14] it was held that technical transgressions of the *Act* or innocent misrepresentations are NOT to result in the revocation of citizenship. Justice Jerome held that,

> "What is required, therefore, is some evidence that the respondent misrepresented **pertinent facts with the intention to deceive** and to obtain his citizenship on the basis of those false representations".[15] [emphasis added]

In that case, Mr. Minhas applied for citizenship, was subsequently charged with an offence under the *Criminal Code*, then appeared before a Citizenship Judge and did not disclose his charge. The Court reasoned that a charge does not equal a conviction and Mr. Minhas was to be presumed innocent until such conviction was rendered. Thus, the charge was not material and did not need to be disclosed.

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[11] *Canada* (*Secretary of State*) *v. Luitjens* (1991), 40 F.T.R. 267, [1991] F.C.J. No. 1041 (F.C.T.D.)
[12] *Ibid*
[13] *Canada* (*Minister of Citizenship and Immigration*) *v. Bogutin* [1998] F.C.J. No. 211 (QL) (F.C.T.D.) at para. 1110, *Canada* (*Minister of Citizenship and Immigration*) *v. Obodzinsky*, 2003 FC 1080, [2003] F.C.J. No. 1344 (QL) at para. 7; *Canada* (*Minister of Citizenship and Immigration*) *v. Baumgartner*, 2001 FCT 970, [2001] F.C.J. No. 1351 (QL) at para. 8; *Canada* (*Minister of Citizenship and Immigration*) *v. Odynsky*, 2001 FCT 138, [2001] F.C.J. No. 286 (QL) at para. 13; *Canada* (*Minister of Citizenship and Immigration*) *v. Oberlander*, [2000] F.C.J. No. 229 (QL) (F.C.T.D.) at para. 187; *Canada* (*Minister of Citizenship and Immigration*) *v. Kisluk* (1999), 169 F.T.R. 161, [1999] F.C.J. No. 824 (QL) (F.C.T.D.) at para. 5; and *Canada* (*Minister of Citizenship and Immigration*) *v. Katriuk* (1999), 156 F.T.R. 161, [1999] F.C.J. No. 90 (QL) (F.C.T.D.) at para. 38)
[14] *Canada (Minister of Multiculturalism & Citizenship) v. Minhas* (1993), 66 F.T.R. 155 (T.D.)
[15] *Ibid*, para. 8.

Since the determination in that case, the argument that a misrepresentation or omission was "innocent" or was "not pertinent" has been forwarded by various advocates attempting to defeat a Minister's request for revocation. This has often occurred with unsuccessful results. One of the most unequivocal rejections of the *Minhas* principle was put forth in *Canada v. Phan* (2003).[16] In that decision, Justice Gibson states that,

> "I am concerned that the principle drawn from that decision by Justice Dawson that "*innocent representations are not to result in the revocation of citizenship*" is **overly broad**. I am satisfied that misrepresentations put forward as "innocent" must be carefully examined. "Willfull blindness", when practised by an applicant for Canadian citizenship in the pursuit of his or her application, is not to be condoned. The applicant is seeking a significant privilege. In those circumstances, he or she, when faced with a situation of doubt, **should invariably err on the side of full disclosure to a citizenship judge or citizenship official**.[17] [emphasis added]

The final sentence of this holding provides a great deal of guidance to legal practitioners as to the manner in which clients should be counseled with respect to disclosure. Whether these clients are attempting to obtain Permanent Resident status or Canadian citizenship, honest and candid testimony is in their, and the country's, best interest. This principle is also reflected and upheld in the decision of *MCI v. Dinaburgsky*.[18]

In the *Dinaburgsky* case, the defendant had been convicted (as a 15 year old) of an indictable offence in Belarus before arriving in Canada. He had concealed this fact from the visa officer when immigrating to Canada because the conviction was wrongful since it was based on "fabricated evidence". His claim was corroborated by a Belarus newspaper article.[19] However, Justice Kelen held that the defendant's testimony and the newspaper were not more credible than the detailed verdict of the foreign court.[20] With respect to an applicant's duty for candour and disclosure, Justice Kelen writes that the appropriate time for the defendant and his wife to have explained that these convictions were wrongful convictions and that he was a minor when convicted "*was when the defendant and his wife were interviewed by the visa officer*".[21] As a result, the Federal Court held that he had lied and concealed material information when interviewed by visa officer who approved him for entry into Canada, and thus he was not lawfully admitted to Canada. The Court further held that pursuant to s. 10(2) of *Citizenship Act*, he was deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances.

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[16] *Canada (Minister of Citizenship and Immigration) v Phan* [2003] F.C.J. No. 1512
[17] *Ibid*, para. 33
[18] *Canada (Minister of Citizenship and Immigration) v. Dinaburgsky* [2006] F.C.J. No. 1460**;** [2006] A.C.F. no 1460
[19] *Ibid*, para. 42.
[20] *Ibid*, para. 59
[21] *Ibid*

One of the more factually and legally fascinating cases dealing with citizenship revocation is that of *Canada v. Schneeburger* (2003).[22] In this case, Mr. Schneeburger (a former South African doctor) had applied for his citizenship in May 1992. In October 1992, he committed two criminal offences: administering a stupefying drug with the intention of committing sexual assault and sexual assault. In November of 1992 he was called to meet with the RCMP. In anticipation of this meeting, he surgically inserted a tube of someone else's blood into his arm and subsequently offered a blood sample to the RCMP for the purposes of conducting a DNA test (to be compared with the semen sample provided by the victim). Naturally, the DNA test result was negative and the RCMP terminated their investigation of Mr. Scheeberger. In February 1993, a Citizenship Judge approved his application for citizenship and Mr. Schneeburger took the oath. In 1998, after becoming privy to Mr. Schneeburger's evasive tactics, several charges were laid against him for which he was eventually convicted.

Given the circumstances of the case, in January 2002, the Minister notified Schneeburger of his intention to make a report to the Governor in Council, pursuant to ss. 10 and 18 of the *Citizenship Act*. Upon his request that the matter be referred to the Federal Court, Justice Dawson held the following with regards to material circumstance,

> "As a matter of law, an untruth or a misleading answer which has the effect of foreclosing or averting further inquiries may be a misrepresentation within the meaning of the Act".[23]

Justice Dawson found that the defendant provided a false blood sample to the RCMP and this constituted a false representation under the *Citizenship Act*. Mr. Schneeburger had knowingly concealed the material circumstance that it was someone else's blood contained in a rubber tube inserted in his arm under his skin.

Justice Dawson further held that,

> "Through the making of this false representation and the knowing concealment of a material circumstance, the defendant circumvented any further police inquiry which would likely have led to criminal charges and would have rendered him ineligible for citizenship"[24]

This ruling has the effect of expanding the scope of material circumstance to include indirect misrepresentations. Technically speaking, Mr. Schneeburger did not misrepresent himself before the Citizenship Judge because in February of 1993, when he appeared before the Citizenship Judge, he did not have a criminal charge or conviction. However, it was only through his misrepresentation to the RCMP (providing a false blood sample) that he was able to evade the criminal charge. Therefore, but for the misrepresentation to the RCMP, he would have been ineligible for citizenship.

[22] Canada (Minister of Citizenship and Immigration) v. Schneeburger (2003) 238 F.T.R. 85.
[23] *Ibid*, para. 24
[24] *Ibid*, para. 48

Summary Judgments under S. 10 and 18 of the *Citizenship Act*:

The *Schneeburger* case was also the one of first cases dealing with revocation where the Federal Court found that a summary judgment was available. Justice Dawson found that there was no genuine issue to be tried with respect to the existence of the facts or the legal conclusions which flow from those facts.[25] In effect, this case was decided by way of written submissions. Mr. Schneeburger attempted to appeal the Governor in Council's Order to revoke citizenship to the Federal Court of Appeal. His counsel argued that the granting of a summary judgment was inconsistent with the FCA's holing in *Canada v. Obozinsky.*[26] However, in *Obozinsky*, the Federal Court of Appeal held that a determining factor was that the summary judgment left unresolved the ultimate question of fact that was the subject matter of the reference – whether citizenship was obtained by false pretences. Secondly, a different judge from the one already assigned to the trial heard the summary judgment motion. Neither of these circumstances were present in the *Schneeburger* case, so the Federal Court of Appeal quashed his counsel's appeal. Leave was sought from the Supreme Court of Canada to appeal that decision, but that was subsequently denied.

Application of the *Charter of Rights and Freedoms*:

Whether individuals subject to these Federal Court revocation proceedings are afforded *Charter* rights (specifically S. 7 *Charter* rights) has also been a contentious issue. In *Luitjens v. Canada* (1992)[27], Mr. Luitjens attempted to appeal the Federal Court decision that he had obtained Canadian citizenship by false representation or by knowingly concealing material facts. His counsel argued that S. 7 of the *Charter of Rights and Freedoms* renders s. 18(3) of the *Citizenship Act* (which bars an appeal of the Federal Court's decision) of no force and effect. In the appeal, the Federal Court of Appeal found that the decision made on a s. 18 reference constitutes a factual finding by the Court, which is not finally determinative of any legal rights. The Court held that,

> "All that has been decided was the fact that the appellant obtained his citizenship by false representation. This finding is merely one state of the proceeding which may result in the revocation of citizenship. There may be a right of review or appeal at a later stage"[28]

<u>CONCLUSION:</u>

[25] *Ibid*, para. 49
[26] Canada *(Minister of Citizenship and Immigration) v. Obodzinsky*, [2002] F.C.J. No. 1800, 2002 FCA 518.
[27] *Canada (Secretary State) v. Luitjens* (1992), 142 N.R. 173 (F.C.A.)
[28] *Ibid*

In summary, it is apparent that citizenship status in Canada bestows a plethora of rights onto naturalized citizens of this country. However, those rights are not absolute or inalienable. It is imperative that clients are made aware of the *Citizenship Act*'s nuanced provisions with respect to granting, refusing and revoking citizenship. The existing jurisprudence on the applicable sections of the *Citizenship Act* provides a great deal of guidance and offers practitioners the legal parameters to make persuasive arguments on behalf of (or against) claimants.