Submission on Bill C-63

Citizenship of Canada Act

[98-G]

NATIONAL CITIZENSHIP & IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 35,000 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 National Citizenship and Immigration Law Section of the Canadian Bar Association. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Citizenship and Immigration Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The National Citizenship and Immigration Law Section of the Canadian Bar Association (the Section) congratulates the Minister of Citizenship & Immigration on the overall initiative of Bill C-63. The Section welcomes the opportunity to comment on the Bill, and indeed supports most aspects of the Bill. This submission will address the limited number of areas which, in our view, warrant change.

This submission outlines concerns on policy issues relating to three policy issues:

- children adopted abroad by Canadians;
- residency requirements; and
- revocation of citizenship.

The submission then addresses specific drafting problems in the Bill.

II. CHILDREN ADOPTED ABROAD BY CANADIANS

The Section supports granting citizenship to adopted children as proposed by the Bill. There are, however, five principal areas of concern.

First, we believe that visa officers should be granted authority to process and approve such cases, as they are vested with the knowledge necessary to assess the validity of foreign adoptions.

Second, in view of the importance of family reunification, the Section believes that the right of appeal to the Immigration Appeal Division of the (IAD) Immigration and Refugee Board (IRB) should be preserved in such cases, rather than to have these cases judicially reviewed by the Federal Court of Canada. The sensibilities and considerations of the IAD are better suited to the determination of such cases. To give effect to this point, the Section proposes that section 77 of the *Immigration Act* be amended to permit failed applications for citizenship to be appealed to the IAD. Without such amendment, children adopted abroad would be forced to be sponsored as

members of the family class and to file Application for Citizenship in order to preserve their rights of appeal.

Third, the Bill limits granting of citizenship to children adopted after the coming into the force of the Bill. We see no reason why children adopted previously should not receive the benefit of this new basis for citizenship. We recommend removing this limitation from section 8(b) of the Bill.

Fourth, the Bill also limits the grant of citizenship to individuals whose adoptions were valid under the laws of the country of residence of the adopting citizen. We see no reason for this limitation. In our view, the only requirement should be that the adoption be valid in the country in which it took place. Thus, the latter portion of section 8(b)(i) should be deleted.

Finally, in cases in which a permanent resident successfully sponsors an adopted child for permanent residence, and the permanent resident and the adopted child later apply for citizenship, it should be clear that the legality and propriety of the adoption should not be revisited during the processing of the citizenship application. If the visa officer was satisfied in this regard, the citizenship decision- maker should not be able to negate this decision.

III. RESIDENCE

Physical presence requirement

The Section supports the Government's goal of ensuring that immigrants who become citizens comprehend the rights and obligations of Canadian citizenship. That said, we see some ambiguity in the public policy underlying the shift to a strict physical presence requirement. Does the Government still believe that the applicants' understanding of the rights and obligations of Canadian citizenship is the critical prerequisite to grant Canadian citizenship? Or has the Government arrived instead at a different rationale, namely that applicants must make a commitment to Canada by serving time in Canada?

The underlying public policy is critical to the appropriateness of a physical presence requirement. If the focus is on understanding the rights and obligations of Canadian citizenship, then applicants could acquire this knowledge in many ways, not merely by physical presence in Canada. Take, for example, the situation of a multinational executive employed by a Canadian company, whose only home and office is in Canada, whose family in Canada, who has no connection to their country of residence, and has to travel outside of Canada for more than 183 days of each year. These examples illustrate that people who are committed only to Canada and who benefit Canada by their activities on behalf of Canadian employers would not qualify under the physical presence requirement.

Canadian immigrants are often the best suited to represent Canadian companies abroad because of their language skills, experience and business contacts in their place of former residence. This is partly why they were selected as immigrants in the first place.

The same argument can be made with regard to business immigrants who spend significant periods abroad, attending to their global business interests, after coming to Canada. We would argue that it is in Canada's interest to foster the activities of such people to enhance trade and business abroad. So long as these individuals could establish sufficient connection to Canada to have acquired the necessary understanding of the rights and obligations of Canadian citizenship, they should be granted citizenship.

Finally, similar considerations should be extended to students or academics who are permanent residents of Canada and who, in order to attain their educational goals or to conduct research must leave Canada.

One may respond that business and employment immigrants are unaffected by the residency requirement under the *Citizenship Act* because their ability to return to Canada is protected by the issuance of a returning resident permit (RRP). The issuance of RRPs can be cumbersome and time-consuming, taking three to six months to obtain. The rules governing their issuance are restrictive and the application process fraught with delay and inconsistency. This greatly hinders the mobility of permanent residents. The RRP is thus not sufficient to protect the mobility rights of business and employment immigrants who are permanent residents in Canada.

The Section is not persuaded that a physical commitment to Canada should form the basis of the grant of citizenship to immigrants.

Residency requirement under the present Act

Section 5(1)(c) of the *Citizenship Act* outlines the requirements for residency in Canada that an applicant must fulfil to be granted citizenship. The residency requirement is by far the most contentious issue in Canadian citizenship law. Its inclusion is to prevent those who do not wish to make Canada their permanent home from being able to enjoy rights and privileges associated with citizenship. Application of this requirement, however, has posed problems to permanent residents who have chosen and intend to make Canada their permanent home, but who, for reasons beyond their control, are unable to fulfil the residency requirement. It has placed an unfair burden on them despite their positive contributions to Canada.

Section 5(1)(c) of the *Act* has three components. First, it requires applicants to have been admitted to Canada as a permanent resident. Second, it requires

that they have not ceased to be a permanent resident pursuant to section 24 of the *Immigration Act*. Third, applicants must have accumulated at least three years of residence in Canada within the four years immediately preceding the date of the application. Sections 5(1)(c)(i) and (ii) set out the way in which accumulation of three years of residence in Canada is to be calculated. Thus, while a person admitted to Canada for permanent residence under the *Immigration Act* is a *de facto* resident of Canada, the *Citizenship Act* imposes a higher residency test for a permanent resident to meet for the grant of citizenship.

In our view, the first two requirements should be maintained in the *Act.* Those admitted to Canada as permanent residents have satisfied immigration officials that they intend to reside permanently in Canada. Any person who has ceased to be a permanent resident, or is believed to have abandoned their permanent residence status, should continue to be barred from eligibility to become citizen until they regain their permanent resident status. The final requirement, that a person accumulate at least three years of residence within the relevant four year period should remain in the *Act*, with some modification.

Qualification for citizenship - a tiered approach

The Section believes that it is in Canada's interest to facilitate the international business activities of its immigrants, so long as they are legitimately in Canada's interests and not solely in the interest of the particular immigrant. We therefore strongly urge the Government to abandon the physical presence requirement contained in Bill C-63 as the sole basis for the grant of citizenship, and to adopt instead a three-tier system for the consideration of citizenship applications.

- ***Tier One - Those Physically Present***

Tier One would permit applicants who meet the physical presence requirement to apply for citizenship through the proposed system. This system already exists through the use of test centres. The vast majority of applications would proceed efficiently through this system.

- ***Tier Two - Those Ordinarily Resident***

Tier Two would permit those who fail to meet the three year physical presence requirement to qualify for Canadian citizenship if they were ordinarily resident in Canada for five years. This would accommodate persons who have renewed their permanent resident card after the five-year initial issuance, demonstrating that they have not abandoned Canada in that time.

Under the current Act, permanent residents in Canada must accumulate three years' residence in the four years preceding the citizenship application to satisfy section 5(1)(c). However, the term "residence" has never been clearly defined in the *Citizenship Act,* nor has subsequent case law adopted a uniform interpretation. As a result, there has been inconsistency in what citizenship judges determine to be residence.

Under the 1947 *Citizenship Act,* "resident" was held to mean actual physical presence in Canada. At that time, countries had not begun to experience the pressures of global economic interdependence, and therefore did not acknowledge the need for persons to travel across national borders extensively to facilitate business . The 1977 *Act* recognized this change in world economic relations and the residency definition was changed. For some time, however, under the current *Act,* the "physical presence" interpretation continued to have force. As a result, any temporary absences from Canada could be deducted from the calculation of the three year residency requirement.

The physical presence interpretation of the residency requirement was modified in the landmark case of *Re Papadogiorgakis.* Associate Chief Justice Thurlow (as he then was) radically expanded the interpretation and concept of the residency requirement by accepting the idea that one need not be physically present in Canada for the three year period in order to have accumulated at least three years of residence in Canada. He stated that:

> the words "residence" and "resident" in paragraph 5(1)(b) of the new *Citizenship Act* are not as strictly limited to physical presence in Canada throughout the period as they were in the former statute but can include, as well situations in which the person concerned has a place of abode to a sufficient extent to demonstrate the reality of his residing there during the material period even though he is away from it for part of the time.

In more recent decisions, there has been a tendency by some Federal Court judges to place a more restrictive interpretation of the term "resident" for the purpose of the *Citizenship Act.* For example, in *Re Koo*, the Federal Court looked at the quality of the applicant's residence in Canada beyond the period required under the *Act,* as the applicant had several absences during the four years prior to his application for citizenship. The quality of the applicant's residence in Canada in this case was held not to be more "substantial" than his residency in Hong Kong, and thus his appeal from the refusal of citizenship was dismissed.

The lack of consensus over the term resident must be resolved in any amendments to the *Citizenship Act.* One possible solution is the adoption of

an "ordinarily resident" test for the purpose of section 5(1)(c), a standard already contemplated in citizenship case law.

In *Re Papadogiorgakis,* Thurlow J. referred to the Supreme Court of Canada decision of *Thomson v. Minister of National Revenue* in concluding that, for the purpose of the *Citizenship Act*, the question of residence was "chiefly a matter of degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with his accessories in social relations, interests, and conveniences at or in the place in question."

Thus a strict computation of numbers should not be the sole determinant of a person's residence in Canada. A person's "stock" in Canada can be shown in a variety of ways. Canadian income tax legislation uses an "ordinarily resident" test to determine whether a person resides in Canada for the purposes of paying income tax where that person has not stayed in Canada for a prescribed number of days. Section 250 of the *Income Tax Act* defines a resident as a person who "sojourned in Canada in the year for a period of, or periods the aggregate of which is 183 days or more". The number of days required by tax legislation is a much lower standard than that imposed on persons seeking to become citizens. The term "ordinarily resident", while vague in the statute, has been interpreted by the Supreme Court to mean residence in the course of customary life. Other factors may be considered when determining whether a person ordinarily resides in Canada, including ownership of a home in Canada, maintenance of bank accounts, or membership in social, cultural or political groups.

Other federal and provincial laws have adopted an ordinarily resident test. For example, for the purpose of the *Family Allowances Act,* a person is resident in Canada or in a province if that person makes their home and is ordinarily present in Canada or a province.[1] The Ontario *Health Insurance Act* also adopts an ordinarily resident definition to determine eligibility for access to the health care system.[2] A person legally entitled to remain in Canada and who makes it his or her home and is ordinarily resident in Ontario is a resident for the purpose of that *Act.*

Australian residency requirements are similarly open-ended. While the *Australian Citizenship Act* provides that an applicant for citizenship must reside continuously in Australia during the year immediately preceding the application, section 14(1)(d) requires a person to accumulate at least two years' aggregate residence in the previous eight years. That section uses the word "resided", which differs from a requirement of continuous physical presence. It has been argued that this amounts to a more open interpretation of residency, similar to that in the Canadian case law.

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1 *Family Allowances Act*, S.C. 1973-74, c.44, s.1

2 R.S.O 1990, H.6, s.1

The *British Nationality Act* attempts to clarify any ambiguity over residency by adopting an ordinarily resident standard.[3] Under British case law, a person is deemed to be ordinarily resident who has resided habitually, normally and legally in the United Kingdom by choice and with a settled purpose. *Shah v. Barnet London Borough Council and other appeals* went even further than this standard. It held that it was irrelevant that the applicant's permanent residence or "real home" might be outside the United Kingdom or that his future intention or expectation might be to live outside the United Kingdom when an ordinarily resident standard such as that used in the *British Nationality Act* is applied.

The United States naturalization law precisely requires physical presence to satisfy the residency requirement. Section 316(a) of the *Immigration and Nationality Act* stipulates that a person must reside continuously for at least five years, and in the five years immediately preceding the date of filing the application has been physically present in the country for periods totalling at least half that time.

In our view, it appears to be manifestly unfair that persons admitted to Canada on the basis of their ability to become successfully established in Canada and their intention to reside in Canada, and who pay taxes to support the Canadian infrastructure, must face such a rigid residency requirement to attain citizenship. The ordinarily resident test involves some physical presence in Canada. In our view, a person who can show social, political, and economic integration is still a resident, despite temporary absences from Canada.

We recommend that the Government adopt the ordinarily resident test established in *Re Papadogiorgakis.* It is our view that a permanent resident in Canada with no significant periods of temporary absences from Canada within the four years immediately preceding the citizenship application should meet the residency requirement as it now exists.

Some may take the position that determining who is "ordinarily resident" would be too costly and cumbersome. We would argue that, since people who are "ordinarily resident" in Canada have an obligation to file tax returns in Canada, for example, those permanent residents who have done so in the five years preceding their applications for citizenship could be granted citizenship under Tier Two. This would be a simple matter to confirm.

- **Tier Three - Those Absent for Compelling Reasons**

Tier Three would permit applicants who can legitimately argue that their activities abroad are in Canada's interest to make a case to the Minister. The Governor-in-Council currently has the power to grant citizenship in recognition of a person's extraordinary contribution to Canada. Though sparingly used, this power is

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3 *British Nationality Act* 1981, s. 7(2)

maintained in the proposed legislation. The Section proposes that this section be expanded to allow the Minister or the Minister's's delegate to permit applicants whose activities abroad are in Canada's interest to qualify for Canadian citizenship notwithstanding their inability to meet the physical presence requirement. The advantage of this approach would be to encourage a limited number of individuals to continue their good work while not requiring a change to the proposed legislation. The Section is willing to assist the Government in the creation of policy guidelines for such cases, to avoid frivolous applications.

Should the Government consider Tier Three too costly to administer, the same public policy objectives could be achieved by allowing time spent abroad while holding a valid RRP to count toward the three year physical presence requirement. This would save having to assess the justifiability of the person's time abroad twice, once when considering the RRP application and again when assessing the citizenship application.

Additional arguments against a strict physical presence requirement

a) *Difficulty in Proving Actual Physical Presence*

If a physical presence requirement is adopted, the Section is of the view that it should not be applied until immigrants' entries to and exits from Canada can be reliably verified. The Minister's suggestion, in press release 98-62, that school records and affidavits of employers could be used to establish physical presence is not workable. These documents could establish residence, but not physical presence on a day to day basis. The Government may wish to consider a more reliable method, perhaps scanning of electronic permanent resident cards.

b) *Impact on Corporations*

The definition of residence contained in Bill C-63 could affect some corporations within Canada. For example, under section 118 (3) of the Ontario *Business Corporations Act:*

> A majority of the directors of every corporation other than a non-resident corporation shall be resident Canadians but where a corporation has only one or two directors, that director or one of the two directors, as the case may be, shall be a resident Canadian.

The Act further maintains that "resident Canadian" means an individual who is:

> (a) a Canadian citizen ordinarily resident in Canada;
> (b) a Canadian citizen not ordinarily resident in Canada who is a member of a prescribed class of persons; or
> (c) a permanent resident within the meaning of the Immigration Act (Canada) and ordinarily resident in Canada, except a permanent resident who has been ordinarily resident in Canada for more than one year after the time at which he or she first became eligible to apply for Canadian citizenship.

Thus, the proposed residency requirement could result in permanent residents having to remove themselves as directors of Canadian corporations.

Relevant time period for calculation of residency

Section 5(1)(c) of the *Citizenship Act* requires that applicants for citizenship show that they have accumulated at least three years' residence in Canada during the four years preceding the application for citizenship. Citizenship judges cannot consider any previous time spent in Canada to determine a person's eligibility for citizenship. In our view, this time limit should be removed from the *Citizenship of Canada Act*. The current system fails to recognize that individuals may have been "Canadianized" during long periods of time in Canada which do not fall within the preceding four years.

Other countries have recognized the need to remedy this problem. The United Kingdom takes a more open approach to the time during which the applicant for citizenship should have resided in the territory to qualify for citizenship. Section 7(2)(c) of the *British Nationality Act* requires that the person be ordinarily resident in the United Kingdom for the last five years or more.

The *Australian Citizenship Act* gives an applicant for citizenship even more leeway. Section 14(1)(d) requires that the person accumulate not less than two years residence in Australia in addition to one year of "continuous" residence immediately preceding the application. The two year aggregate period may be accumulated over eight years.

The United States requires that an applicant reside in the United States for a period of five years and must be physically present in the country for at least half of that time (*Immigration and Nationality Act* 1952, s.316).

We recommend that the stringent four year requirement be omitted from the *Act.* There should be no restriction on the amount of previous time that a permanent resident has accumulated in Canada in order to meet the residency requirement.

A possible alternative would be to increase the five year period proposed in Bill C-63 to six or seven years. Whether the underlying policy objective is time for the sake of

acquiring knowledge or time for the purpose of showing commitment to Canada, either objective could still be served by lengthening the period of qualification. This would mitigate some of the negative effects of the imposition of the physical presence requirement.

Preservation of Permanent Resident Status

Some permanent residents will be unable to qualify for Canadian citizenship by meeting the physical presence requirement or by establishing their extraordinary contribution to Canada but will, nonetheless, spend considerable periods of time abroad for legitimate purposes. Consider, for example, immigrants who must attend to litigation or seriously ill relatives, or as temporary intra-company transferees for multinational companies. Such people should not hesitate to attend to their important duties abroad because they fear loss of their Canadian permanent resident status.

Many of those who fail the physical presence requirement for Canadian citizenship under the proposed legislation would also spend enough time abroad to be deemed to have abandoned permanent resident status. We would therefore argue that RRPs be available to such people in a predictable and transparent fashion. Again, we do not argue that everyone who wants an RRP should be given one. The purpose should be rational and legitimate from a public policy perspective. The issuance of RRPs is currently inconsistent, unpredictable, and serves few of the stated public policy objectives.

We urge the Government to establish new policy guidelines for the issuance of RRPs, as well as reasonable service standards. The Section would be pleased to assist CIC officials to this end.

Residency Test Exemption for Certain Spouses: Subsection 6(2)

Subsection 6(2) of Bill C-63 exempts from the residency test those permanent resident spouses who reside abroad with their Canadian citizen spouses employed by Canadian governments. We applaud the recognition that the permanent resident spouse married to a Canadian government employee living abroad has a sufficient connection to, and knowledge of, Canada to be granted citizenship. In our view, similar consideration should be extended to spouses of Canadian citizens transferred abroad by other Canadian employers.

Elimination of Half Day Credits

The Government has not articulated any reason for eliminating the half day credit toward the residency requirement for each day spent in Canada within the required period of time preceding the application in a status other than as a permanent resident. We can see no rationale for this elimination. The Canadian experience of those who first come to Canada as foreign workers, for example, is not qualitatively

different to their experience after they immigrate. If the physical presence requirement is motivated by a notion of time served, then granting a half-day credit for each day in Canada prior to landing would not erode this principle. The Section opposes the elimination of these credits and recommends that text similar to section 5(c)(ii) of the present Act be added after section 6(2) of Bill C-63.

IV. LOSS OF CITIZENSHIP

Revocation Order under Section 16(1)

A Federal Court decision with respect to a section 16(1) revocation is final and not subject to appeal. We question what recourse the person affected will have. There will be no humanitarian and compassionate application under the *Immigration Act* for persons "out of status", inadmissible or under a deportation order. There is no access to the Appeal Division as the person will no longer be a permanent resident reportable under section 27. We are concerned that by making misrepresentation an enumerated ground of inadmissibility, the Government is seeking to foreclose Appeal Division reviews and humanitarian and compassionate applications by permanent residents whose admission involved any misrepresentation.

In our view, it is unacceptable that a person whose misrepresentation (innocent or otherwise) is found out after years of residence and acquisition of citizenship be in a less favourable position than one whose misrepresentation is discovered during their permanent resident status.

Other Persons Affected under Section 16(4)

We can envisage many cases, particularly when a person has been a Canadian citizen for a long period of time, when those who acquired citizenship as a result of an initial misrepresentation of a parent often should not be penalized by having their citizenship revoked along with that of the offending parent. The Section opposes this section, as it could punish individuals with no intent to commit a wrong against Canada. Although it could be argued that continued Canadian citizenship of a child is a reward for the parent who committed a wrong against Canada, this consideration, in our view, is outweighed by the wrong against children whose citizenship could be revoked through no fault of their own.

The Section takes a similar view to the annulment provisions of sections 18 and 28. If the Minister annuls for a section 28 violation, dependents would automatically lose their citizenship. This could include, for example, children of a person charged with a foreign offence that would be indictable in Canada, presumably whether the person knew of the charge or not. Dependents who may have nothing to do with the offending parent, no longer dependent on the parent, and with careers and families of their own, risk having their citizenship annulled with no recourse. Since the loss

would be automatic, the provisions are potentially harsher than the revocation provisions referred to above. We believe the possible effect of these provisions to be inconsistent with Canada's reputation as a fair, just and compassionate nation.

Revocation of Citizenship under Section 17

Sections 17(1)(a) and (2) refer to notices. In our view, the more appropriate trigger for a report should be the date of receipt of the notice rather than the date of sending it. Revocation of citizenship should not be possible unless actual notice occurs. Similarly, section 17(3) provides no right of appeal from the Federal Court. Given the seriousness of revocation, appeal with leave should be permitted.

Denial of Citizenship in the Public Interest

Given the seriousness of this matter, the Governor in Council should receive written representations of the person concerned in addition to the Minister's Report, so that both sides may be presented before a decision is made.

Again, the Section cannot support the absence of review of the Governor in Council's order under section 22(3) or section 27(3).

National Security

Section 23(3) provides that the person concerned shall be notified by the Minister. The method of notification should be specified and should contemplate actual receipt of the notice by the person concerned.

Section 23(6) provides that the Review Committee shall provide the conclusions to the person concerned "when it is convenient to do so". We recommend instead that the Review Committee should report "as soon as possible but in consideration of the national interest".

Ineligibility

Section 28 denies the granting of citizenship to individuals in certain circumstances, but excludes those who would be granted citizenship by section 8. In our view, those who would be granted citizenship under section 11 should also be excluded from the operation of section 28 .

Power to Reverse Decision

Under section 30, the Minister can reverse a denial of an application for grant of citizenship, or the issuance or denial of issuance of a citizenship certificate, in cases of material defect. In our view, the Minister should not have the power to reverse

a positive decision to issue a citizenship certificate for material defect, because of the lack of reviewability of a decision made under this Section.

We cannot contemplate circumstances in which the Minister should use a power to reverse issuance of a certificate of citizenship in the absence of a revocation or refusal of application for citizenship. Of even greater concern is the lack of time constraints on when can the issuance of a certificate be reversed.

Transitional Provisions

Section 55(1) provides that applications not concluded before the Bill comes into force must be considered under the new *Act*. In our view, retroactive application is inappropriate. We recommend that the new provisions apply only to applications made after the Bill comes into force.

The courts have held that retrospective construction has no application to enactments which affect substantive rights. Persons have a vested right in any substantive rights provided by a statute: see, for example *Minister of Citizenship and Immigration v. Bogoljub Karic*[4]. Transitional provisions must be read in light of the *Interpretation Act*, sections 43 and 44. Section 43 provides *inter alia* that the repeal does not affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder nor does it affect any obligation under the enactment so repealed. Section 44 states that all proceedings taken up under the former enactment shall be continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment. In our view, section 55(1) would not stand the judicial scrutiny and, if proclaimed as part of the Act, would be contrary to the law.

V. TECHNICAL AMENDMENTS

We recommend the following technical amendments to the English version of the Bill, to improve the clarity of the legislative text. Further explanation is provided when necessary.

Section 3
"A person is a citizen if the person was *a citizen* before the coming into force of this Act or acquires citizenship in accordance with this Act."

Section 4(1)(b)
"the person is born outside Canada *after the coming into force of this Act* of a Canadian who is a citizen at the time of the birth, unless the parent's citizenship was acquired because the parent was born, outside Canada, of a father or mother

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4 Federal Court, Trial Division, unreported T-565-98

(i) who was a citizen at the time of the parent's birth; and
(ii) whose citizenship was also acquired as a result of the father's or mother's birth outside Canada."

The first addition is required to avoid conflict with section 3, which provides that all people who were citizens before the Bill came into force will continue to be Canadian citizens. Section (4)(1)(b) conflicts with section 3 by eliminating the right of citizenship to those who do not meet the new generational requirement. As currently drafted, citizens by virtue of their birth abroad to a Canadian parent beyond the second generation would cease to be citizens under this section but would remain citizens under section 3.

Reference to the 1977 date is not required, there would have been no other way for the parent to have acquired citizenship by being born abroad.

Section 5
"Other than a person referred to in Section 4, a person acquires citizenship on being granted citizenship by the Minister and taking the oath of citizenship. The requirement of taking the oath of citizenship does not apply to a person referred to in section 8, 11 or 20 or a person who is less than 14 years of age."

Section 4 also provides for the acquisition of citizenship.

Section 6(1)(b)
"*was* lawfully admitted to Canada *as a* permanent *has* continued to be a permanent resident *since such admission*, and has *resided in Canada for at least 1,095 days*, during the five years immediately before applying for citizenship;"

Section 6(1)(c)
Delete.

Section 6(1)(c) is unnecessary, as section 6(1)(d) states the language ability requirement. A consequential amendment would also have to be made to section 43(e).

Section 6(3)(a)
"(a) in the case of any person, the *language and knowledge* requirements of paragraph 1(c);"

Consequential to the proposed amendment to section 6(1)(c).

Section 9
"In order to alleviate a situation of special and unusual hardship or to reward services of an exceptional value to Canada, the Governor in Council may, after being informed by the Minister of the situation or services, direct the Minister to grant

citizenship, without delay, to a person *who does not otherwise qualify for grant of citizenship*."

Section 10
"The Minister may, for the purposes of this Act, deem a person who is in Canada and who has resided in Canada for at least 10 years to have become a permanent resident as of the day the Minister specifies."

> Presumably, this section is to benefit an individual whose permanent resident status cannot be established but who has resided in Canada for at least ten years. However, a literal interpretation would permit the Minister to change the effective date of acquisition of permanent resident status of anyone who resided in Canada for more than 10 years. The text should be redrafted to specify its purpose and to limit the Minister's power to cases coming within its purpose.
>
> The word "resided" is a defined term. Thus, the requirement will be one of 10 years' physical presence. This will often be difficult to establish as people are unlikely to keep records of their physical presence in Canada for 10 year periods. It should be amended to require 10 years of residence as the term is commonly understood, rather than as defined.

Section 11
"*Despite paragraph 4(1)(b),* the Minister shall, on application, grant citizenship to a person who

> (a) is born outside Canada after the coming into force of this Act *of a parent who is a citizen at the time of the birth*;
> (b) is less than 28 years of age;
> (c) has never acquired, or *has* the right to acquire, citizenship of any country; and
> (d) has not been convicted of an offence against national security."
>
> Without the addition, section 11 would conflict with section 4(1)(b). The addition to section 11(a) and the deletion of section 11(b) mirrors the wording of section 4(1)(b). Section 11(c) is deleted, as it is not appropriate to require such individuals to satisfy a physical presence requirement. First, these people would not have status in Canada to permit them to meet the physical presence requirement. If they did, presumably it would be as a permanent resident, in which case, if they met the physical presence requirement, this provision would be moot. Thus no benefit would be conferred by this provision that could not be otherwise acquired.
>
> Under section 11(e), a person who ever had the possibility of acquiring citizenship of another country, could not have the benefit of section 11. In some cases, a person may lose the right to citizenship in another country before even being aware that it existed. Changing "had" to "has" would

benefit people who would be stateless but for the application of section 11. Present ability to avail oneself of citizenship of another country should disqualify a person from using section 11.

Section 12
"A citizen not born in Canada, is entitled to all rights, powers, and privileges and is subject to all the obligations, duties and liabilities to which a person who is a citizen in Canada at birth is entitled or subject and has the same status as that person."

The deleted text is not required, as the second part of the section deals with citizens born in Canada.

Section 14
"A person who acquires citizenship *pursuant to paragraph 4(1)(b)* loses citizenship, on attaining 28 years of age, unless the person applies to retain citizenship and has resided in Canada for at least 1,095 days during the five years before so applying."

Section 28(i)
"has ceased to be a permanent resident or is subject to, or is a party to, an inquiry under the Immigration Act*, or subsequent appeal or review thereof*, that may lead to their removal from Canada or the loss of their status as a permanent resident;

VI. CONCLUSION

The National Citizenship and Immigration Section of the Canadian Bar Association supports the introduction of renewed legislation to govern Canadian citizenship. That said, there are three policy issues in Bill C-63 that warrant reconsideration:

- children adopted abroad by Canadians;
- residency requirements; and
- revocation of citizenship.

Children Adopted Abroad by Canadians
The Section supports granting citizenship to adopted children, and recommends that the proposals in Bill C-63 be enhanced in five ways:

- visa officers should be granted authority to process and approve such cases;
- a right of appeal to the Immigration Appeal Division of the Immigration and Refugee Board should be maintained, rather that having cases subject to judicial review by the Federal Court;
- the adoption provisions of the Bill should have retroactive effect, applying to adoptions predating the new law;
- the requirement for the adoption to be valid in the adopting citizens' place of residence should be removed, and validity in the place of adoption should be the only consideration; and

- where a permanent resident has sponsored an adopted child, then the legality of the adoption should not be revisited in a subsequent citizenship application.

Residence

The Section questions the propriety of the requirement for five years' physical presence to be eligible for citizenship. "Serving time" should not be a substitute for making a commitment to Canada and understanding the rights and obligations of Canadian citizenship.

The Section strongly recommends that the "five year residency" rule be abandoned in favour of a three tiered residency requirement:

- Tier One — physical present for three years
- Tier Two — ordinarily resident for five years
- Tier Three — absent for compelling reasons, whose activities abroad are in Canada's interests.

An alternative to Tier Three would be to count time with a valid returning residency permit toward a three year residency requirement.

The current *Citizenship Act* requires that at least three years' residence be accumulated in the four years preceding the application for citizenship. The Section recommends that there be no limitation on the time period for calculating accumulated residence be removed.

Loss of Citizenship

Any proceeding with so great a penalty as loss of citizenship must follow scrupulously the rules of natural justice. Part 2 of the proposed Act fails in this regard in a number of instances.

Bill C-63 proposes that a Federal Court decision with respect to a section 16(1) revocation of citizenship not be subject to appeal. Under the *Immigration Act*, a permanent resident in similar circumstances would have recourse. In our view, it is unacceptable that a person whose misrepresentation (innocent or otherwise) is discovered after years of residence and acquisition of citizenship should be in a less favourable position than one whose misrepresentation is discovered during their permanent resident status. Governor in Council orders under sections 22(3) and 27(3) should also be subject to appeal.

In our view, the child of a person whose citizenship is revoked or annulled should not be penalized by having their citizenship revoked or annulled along with that of the offending parent.

Notice provisions under sections 17 and 23(3) should be specified, and should contemplate actual receipt of the notice by the person concerned.

The Minister's power to reverse decisions under section 30 should be removed from the Bill.

Finally, section 55(1) provides that applications not concluded before the Bill comes into force must be considered under the new law. We believe that the new law should apply only to applications made after it comes into force.

Appendix 1

Comparative Analysis of Residency Requirements of the Laws of United Kingdom, Australia and the United States

United Kingdom

The British Nationality Act 1981 is the statute under which non-citizens can apply for and acquire British citizenship. The 1981 *Act* marked a change in British citizenship law from the previous 1948 and 1965 Acts, in that the emphasis moved from entitlement to citizenship through registration to applications for naturalization.

Aside from birth or descent, there are two methods of obtaining citizenship: registration and naturalization. Registration is the process by which persons who have a connection to the United Kingdom become citizens. This connection is through relationship, previous citizenship, or being a Commonwealth citizen who has resided for a period of time within the United Kingdom. Naturalization is the process by which "aliens" become citizens of the United Kingdom, through legal residence and allegiance to the Crown.

Certain persons are entitled to citizenship by registration:

- persons born in the United Kingdom after 1981 with at least one parent who is or became a British citizen or became settled in the United Kingdom prior to the person's eighteenth birthday;

- persons born in the United Kingdom, who have reached the age of ten, and who have not been absent from the United Kingdom for a period exceeding 90 days, in each of the first ten years of that person's life; and

- persons born in the United Kingdom, who have at least one parent who is a British citizen (not by descent) and who meet the residency requirements.

The essential prerequisite for naturalization is obtaining settled status under the *Immigration Act* (similar to permanent residence status in Canada). The Secretary must be satisfied that applicants meets residency requirements, are of good character, have sufficient knowledge of English, Welsh or Scottish Gaelic, and either intend to make the United Kingdom their home or principal home, or intend to work in Crown service, service under an international organization or for a company or an association established in the United Kingdom.

Applicants must have been in the United Kingdom for five years without any absences over 450 days. They must not be in breach of immigration laws throughout

the five years. During the 12 month period immediately preceding the application, applicants must have been free from any restrictions on the period of time which they could remain in the United Kingdom and could not have been absent for more than 90 days.

While not defined in the *Act,* good character has been found to require that a person not possess a serious criminal record, or not be strongly suspected of being engaged in crime or known associates of serious criminals. In addition to criminal behaviour, financial irresponsibility, serious insolvency or bankruptcy may also be considered in determining whether a person is of good moral character.

With respect to the language proficiency requirement, an oral test is administered to establish that the applicant can communicate with other citizens. The language requirement might be waived if it is unreasonable to expect the applicant to meet the requirements due to age or physical or mental condition.

The applicant must also show that s/he has an intention to reside in the United Kingdom permanently. There must be some substantial connection and loyalty to the United Kingdom. The applicant must have her home or principal home in the United Kingdom.

Australia

Although the *Australian Citizenship Act* used to distinguish between Commonwealth citizens and non-Commonwealth citizens, this distinction ceased to have effect in 1975, two years after the commencement of the 1973 Act.

To obtain Australian citizenship, an applicant must be of full age (eighteen years old) and be capable of understanding the nature of the application. The applicant must have resided continuously in Australia or New Guinea, or partly in each, throughout the year immediately preceding the date of the grant of the certificate, and must have resided in Australia or New Guinea, or had service under an Australian government, or partly such residence and partly such service, for periods amounting in the aggregate to not less than two years during the eight years immediately preceding the date of the grant of citizenship. The *Act* also requires that the applicant be of good character, adequate knowledge of the English language, and adequate knowledge of the responsibilities and privileges of Australian citizenship. Applicants must intend to reside or continue to reside in Australia or New Guinea.

The Australian residency requirements have often been interpreted in a manner consistent with Canadian jurisprudence. Section (14)(1)(c) of the *Australian Citizenship Act* stipulates that the applicant "continuously reside" in Australia during the 12 month period prior to the granting of citizenship. Section 14(1)(d) stipulates a person merely "reside" for an aggregate of two years within the eight years prior to the application for citizenship. As a result, it appears that the failure to use the word "continuously" in section 14(1)(d) amounts to a liberal interpretation toward

residency, such as that found in the Canadian cases of *Papadogiorgakis and Stafford*, which looked at a number of indices beyond physical presence to determine whether a person resided in Canada.

United States

The *Immigration and Nationality Act* sets out the requirements for the grant of citizenship to non-citizens of the United States. A person becomes a citizen of the United States by being born on American soil or to a parent who is a citizen of the United States, or through naturalization.

To obtain American citizenship, an applicant must have resided continuously in the United States for at least five years after being lawfully admitted for permanent residence, and must have been physically present for periods totalling at least half of that time. Applicants must have resided within the State where the application is filed for three months prior to filing and must reside continuously in the United States from the date of application to the date of admission to citizenship. During all these periods, the applicant must have been and continue to be a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

Although the *Immigration and Nationality Act* does not specifically require that a person intend to reside permanently in the United States, this can be inferred from the provision of the *Act* for revocation of naturalization if the applicant evidences an intent to not reside permanently in the United States. Any absence of more than six months during the statutory period raises a rebuttable presumption of abandonment of continuous residency for naturalization purposes. The burden is on the applicant to show that the requirement has been met. The person's intent, shown by objective evidence, is also determinative.

Certain persons travelling abroad can preserve their residence, including employees or contractors of the American government, employees of American institutions of research recognized by the Attorney General, employees of American firms or corporations engaged in foreign trade and commerce or a foreign subsidiary, employees of public international organizations of which the U.S. is a member by treaty or statute, and persons engaged in religious functions. Such persons must apply to preserve their residence by completing a Form N-470, similar to the application form for returning resident permits in Canada. They must also be permanent residents with no absences from the United States in the year preceding the absence required.

Under the *Immigration and Nationality Act*, certain persons are prohibited from acquiring American citizenship. Persons without good moral character may be denied American citizenship and the corresponding rights and privileges. Good

moral character is not defined in the Act, but examples of what is not good moral character are listed. Persons who lack good moral character include those who:

- have been convicted of murder; aggravated felony; two or more crimes involving moral turpitude while permanent residents;
- have committed one or more crimes involving moral turpitude, or two or more offenses for which the applicant was convicted and the aggregate sentence imposed was five years or more;
- violated any law of the United States, state, or a foreign country relating to a controlled substance, provided the violation was not a single offense for simple possession of 30 grams or less marijuana;
- have admitted committing any criminal act described above for which there was never a formal charge;
- are or were confined to a penal institution for an aggregate of 180 days;
- have given false testimony to obtain any benefit under the *Immigration and Nationality Act*, where the testimony was given under oath;
- have been involved in prostitution or commercialized vice;
- have been involved in the smuggling of a person into the United States;
- have practiced or are practicing polygamy;
- have committed two or more gambling offenses;
- earn their income principally from illegal gambling activities;
- are or were habitual drunkards.

Other specifically mentioned activities will cause a finding of lack of good moral character, unless the applicant can provide extenuating circumstances. These include failure to support dependents, certain adulterous activities and commitment of unlawful acts that adversely reflect on the applicants moral character.

The American statute also includes a language requirement. All applicants must pass a literacy test at an elementary level, to satisfy the requirement that they are able to read, write and speak an adequate amount of English. This requirement is not applicable to physically disabled persons, persons 50 years old who have lived in the United States for 20 years as permanent residents, and persons 55 years old who have resided for 15 years as permanent residents. Also, applicants must also have a knowledge of American history and government, tested by an interviewer.

	U.S. IMMIGRATION AND NATIONALITY ACT	BRITISH NATIONALITY ACT	AUSTRALIAN CITIZENSHIP ACT
Citizen by Birth	born in U.S. [s. 301(a)(1)]	born in U.K. to British citizen/s or permanent resident/s [s. 1(1)]	born in Australia whose parent/s at the time of person's birth was citizen or ordinarily resident in Australia [section 10(2)]
Citizen by Descent	born outside U.S. to two U.S. citizens, or born to parents one of which is American citizen who lives in U.S. or resided in U.S. continuously in year preceding the birth [s. 301 (a)(3) and (4)]	born outside U.K. to a British citizen who did not acquire British citizenship by descent [s. 2(1)(a)]	born outside Australia to parents who are citizens or ordinarily resident in Australia [s. 11(1)]
Entitlement to Citizenship	Any person who meets requirements of Act [s. 316(a)]	No entitlement: citizenship accorded where Secretary of State "sees fit" [s. 6(2)]	No entitlement: citizenship granted on meeting requirements and when Minister of Immigration and Ethnic Affairs "sees fit" [s. 14(1)]
Age	18 years and over [s. 334(b)]	18 years and over [s. 6(1)]	18 years and over [s. 14 (1)(a)]
Residency Requirement	"Continuously resided" in U.S. for 5 years immediately preceding application and physically present for at least half of that time [s. 316(a) & (b)]	"ordinarily resident" in U.K. for at least five years and remained ordinarily resident prior to filing application and had right of abode there [s. 7(2)]	"continuously resided" in Australia in year immediately preceding application and two years' residence in preceding eight years [s. 14(1)(c) & (d)]
Adequate Knowledge of Language	able to speak, read and write words in ordinary usage in the English language [s. 312 (1)]	sufficient knowledge of English, Scottish or Gaelic language [Schedule 1]	adequate knowledge of English language [s. 14(1)(1)]
Adequate Knowledge of State	demonstrate knowledge and understanding of fundamentals of history and principles and form of government of the U.S. [s. 312 (2)]	adequate knowledge of rights and responsibilities of British citizenship [Schedule 1]	adequate knowledge of responsibilities and privileges of Australian citizenship [Schedule 14 (1)(g)]
Ministerial Discretion	may be naturalized as citizens in manner and under conditions prescribed, and not otherwise [s. 310(d)]	Secretary may waive residency, good moral character and language requirements if, in special circumstances of the case, Secretary sees fit [s. 6(6)]	Minister may waive the requirements of residency, language and citizenship knowledge in such cases as the Minister sees fit [s. 14(4), (7), and (8)]