

## Potential Changes to the Residency Requirement in Canadian Citizenship Applications

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Under Section 5 of the current *Citizenship Act* (the "Act"), in order to apply for Canadian citizenship, the applicant must (among other things) have accumulated three years of residence in Canada within the preceding four years. The Act does not define "residence" and it has been left to the Citizenship judges to decide whether or not physical presence is strictly required to establish residence.

The case law sets out three legal tests which are available to determine whether an applicant has established residence within the requirements of the Act. The Citizenship judge may: (a) use a strict count of days, (b) consider the quality of residence (whether there are strong ties to Canada), or (c) conduct an analysis of the centralization of the applicant's mode of existence in Canada. The existence of three tests has created uncertainty in the system and has led at least one judge to comment in their decision that the system is akin to a lottery.

As it currently stands, on a strict count of days an applicant must have been physically present in Canada for 1,095 days in the preceding four years. If an applicant does not meet this mark, they can argue that they fall under the strong attachment to Canada or the centralized mode of existence categories. These arguments are sometimes called the "functional approach" to residence.

Section 5.9 of Chapter 5 of the Citizenship Policy Manual ("CP 5"), published by Citizenship and Immigration Canada ("CIC"), sets out the current citizenship policy dealing with residence and specifically acknowledges that there are "exceptional circumstances" where citizenship should be granted even where the 1,095 days of physical presence has not been established. CP5 outlines six questions (taken from the Federal Court case of *Koo (Re)*, [1993] 1 F.C. 286), which should be considered when making a determination under the functional approach:

- 1) Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?
- 2) Where are the applicant's immediate family and dependants (and extended family) resident?
- 3) Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?
- 4) What is the extent of the physical absences? If an applicant is only a few days short of the 1,095-day total, it is easier to find deemed residence than if those absences are extensive.
- 5) Is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a course of study abroad, accepting temporary employment abroad, accompanying a spouse who has accepted temporary employment abroad? and

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- 6) What is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

Unfortunately, the possibility of arguing that the functional approach should apply to an applicant's case may soon come to an end. On June 10, 2010, Bill C-37 (referred to as *An Act to Amend the Citizenship Act*) received first reading in the House of Commons. The CIC Backgrounder (entitled "Strengthening the Value of Canadian Citizenship: Amending the Citizenship Act to Protect the Integrity of Canadian Citizenship") states that one of the goals of the proposed legislation is to "strengthen the rules around citizenship residence requirements so that people applying for citizenship would have to be physically present in Canada for three of the previous four years." Under the transitional provisions, if an application is referred to a citizenship judge before the new Section 5 of the Act comes into force, the old Section 5 will apply.

Should Bill C-37 become law, it will certainly clarify the residence requirement for citizenship, but it will also narrow the definition so that the citizenship applications of many talented business people will be excluded by virtue of their international commitments. Given the growing globalization of the Canadian economy, there are circumstances where senior and valued members of the business community must spend considerable periods of time abroad to promote their business interests. These are the very people that Canada hopes to attract as immigrants.

As a policy, it seems short-sighted for Canada to send the message to business people who are contemplating moving to Canada that their international business ties may be held against them. This problem may be exacerbated by the fact that many of these people will have spouses and children living in Canada who will qualify for citizenship.

Those permanent residents who intend to apply for Canadian citizenship, but who will not satisfy the 1,095-day threshold, should consider applying as soon as they satisfy the other requirements. If Bill C-37 is enacted in its current form before their citizenship case is heard by a citizenship judge, they may have to choose between their business commitments and their desire for Canadian citizenship.

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