



FROM PERMANENT RESIDENT TO CANADIAN CITIZEN:

A STATE OF PERPLEXITY

CANADIAN BAR ASSOCIATION IMMIGRATION LAW CONFERENCE

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Speaker:

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WELCOME: Introduction



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SUMMARY OF PRESENTATION

SECTIONS:

A. THE PROBLEM: THE LACK OF AN APPELLATE VOICE

B. A CASE FOR PERPLEXITY: THE INCONSISTENCY OF THE CASE LAW

C. THE COMMON APPLICATION: THE CENTRALIZED EXISTENCE TEST

D. PRACTICAL NOTES



A. THE PROBLEM: THE LACK OF AN APPELLATE VOICE

Under subsection 5(1) of the *Citizenship Act, R.S.C. 1985, c. C-29* (the "Act"), an individual is granted citizenship if they fulfill the following requirements:

- (a) makes application for citizenship;
- (b) is eighteen years of age or over;
- (c) has been lawfully admitted to Canada for permanent residence, has not ceased since such admission to be a permanent resident pursuant to section 24 of the Immigration Act, and has, within the four years immediately preceding the date of his 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;
- (b) has an adequate knowledge of one of the official languages of Canada;
- (c) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and
- (d) is not under a deportation order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.



Establishing 3 Years of Residency in Canada

1. Physical Presence in Canada - Definitive Way

OR

2. Substituted Presence – The Discretionary Way



Problems:

1. Interpretation of ss. 5(1)(c) by the Federal Court has given authority to citizenship judges to apply one of several tests
 - Federal Court has determined different criteria on how to accumulate 3 years of residency - Citizenship Judges can choose from three main tests.
 - Flexibility causes uncertainty in this area of law.

2. The *Act* precludes any appeal from the decision of the Federal Court and as a result, the Appellant Courts has not been called upon to resolve the conflicting case law surrounding section 5(1)(c).
 - No unifying voice on the matter.



B. A CASE FOR PERPLEXITY: THE INCONSISTENCY OF THE CASE LAW

Federal Court confirmed 3 main tests that can be used by citizenship judges:

1. “Physical Presence” (*Pourghasemi*)
 2. “Central Existence” (*Papadogiorgakis*)
 3. “Centralized Existence” (*Koo*)
- Widely differing outcomes that can result from applying on the one hand the conservative standard requiring “physical presence” as set out in *Pourghasemi*, and on the other hand the liberal standard of “central existence” as set out in *Papadogiorgakis* or “centralized existence” in *Koo*, citizenship applicants and immigration practitioners are left with two choices.



VARIETY IN APPROACHES...

- If the physical presence test is applied, a candidate can only satisfy the residency requirement by meeting the exact number of days stipulated in the *Act*.
- If the central existence or centralized existence test is applied, an applicant can provide evidence to support that they have centralized their existence in Canada and as a result, met the residency requirement stipulated in the *Act*.



C. THE COMMON APPLICATION: THE CENTRALIZED EXISTENCE TEST

SOME STATISTICS...

- **Case law and experience has demonstrated that the most common test applied by citizenship judges is the centralized existence test.**
- **Statistics show that the majority of cases adjudicated by citizenship judges have applied the central existence or centralized existence test more than any other.**
 - 18 out of the 26 cases heard by the Federal Court since the start of 2007 have been based on a citizenship judge applying the centralized existence test.
 - the trend is pushing further in this direction with 6 out of the 7 cases heard as appeals by the Federal Court in 2008 (as of April 10th 2008) involved the centralized existence test.



SOME CASES TO NOTE...

- In *Re Stafford* (1980, 97 D.L.R. (3d) 499), the Federal Court Trial Division established the principle that the test for residency must naturally receive a liberal interpretation.



SOME CASES TO NOTE: APPLYING CENTRALIZED EXISTENCE

- *Sharma v. Canada (Minister of Citizenship and Immigration)*
 - At the time of his citizenship application Sharma had 8 absences totalling 1134 days outside of Canada and only 137 days present in Canada during the prior 4 years.
 - All the time in absence was spent in Syria working as a diplomat for UNICEF.
 - Sharma had created a strong connection with Canada by obtaining a Canadian Social Insurance Number, an Ontario Health card and drivers license, a bank account with 2 RESP's, a condominium, and had even started a sole-proprietorship. Moreover, all his family members, wife and children included, remained in Canada.
 - However, regardless of a strong connection to Canada by way of documentation, the holding of assets and having close family members in Canada, it was upheld that an applicant will not be found to meet the residency requirements if their absences constitute an overwhelmingly extensive period of time.



SOME CASES TO NOTE: APPLYING CENTRALIZED EXISTENCE

- *Sleiman v. Canada (Minister of Citizenship and Immigration)*
 - Sleiman was absent from Canada for 1,032 days out of the 1,258 days considered by the citizenship judge due to 8 separate prolonged trips after an initial period of only 33 days spent in Canada.
 - While the Court was impressed with the applicant's accomplishments within his first 33 days in Canada such as purchasing a residence, purchasing automobiles, establishing bank accounts and depositing all his immediate family in Canada, the applicant had not centralized his existence in Canada before leaving Canada.
 - Court was looking for factors that illustrated some form of involvement in the social life of Canada.
 - illustrates the point that an applicant who has a considerable amount of lengthy absences from the country must show a substantial form of "Canadianization" to exempt them from having to be physically present in Canada.



SOME CASES TO NOTE: APPLYING CENTRALIZED EXISTENCE

- *Chan v. Canada (Minister of Citizenship and Immigration)*
 - Applicant had studied abroad and as result had only accumulated 162 days in Canada.
 - Court did put emphasis on looking at whether she attempted to return to Canada when the opportunity was available (e.g. during summer breaks).
 - Court also looked at social factors that would integrate her into Canadian society such as joining social clubs, athletic clubs and church groups.
 - Although student highly integrated into Canadian society based on involved in church, Canadian politics and charitable activities, the Court ruled she had not centralized her mode of living in Canada; application was premature given the minimal amount of days in Canada.
 - illustrates that despite the liberal approach of the centralized existence test, having a reasonable amount of physical days in Canada is still an important factor.



SOME CASES TO NOTE: APPLYING CENTRALIZED EXISTENCE

- In *Shanechi v. Canada (Minister of Citizenship and Immigration)*, the Court applied the centralized existence test to an applicant who had been physically in Canada for 526 days. The reason for the applicant's extensive absence was due to work obligations outside of Canada. The Court accepted that the applicant was away from Canada due to his acceptance of several temporary positions. Furthermore, the Court emphasized that the temporary positions were in the United States, rather than the applicant's country of origin, which demonstrates a greater connection to Canada because it shows that the absences were not intended to be long-term. Temporary absences from Canada to a country other than an applicant's country of origin is always an important factor to be highlighted if applicable.
- Similarly, in *Re Kelly*, the Federal Court Trial Division ruled that where the applicant's absences from Canada have been dictated not by personal choice or preferences, but instead by the exigencies of his employment and his need to work overseas to support all his family members, then the period of time spent outside Canada can count towards the calculation of residency and entitlement for citizenship.



D. PRACTICAL NOTES

(i) Before Submitting An Citizenship Application

- The most important tip is to advise a client to stay in Canada after landing as a permanent resident as long as possible prior to leaving the country.
- Although cases have recognized that documentary evidence and the holding of domestic assets are not determinative and are “passive indicia”, they are nonetheless an important factor for the foundation of claiming centralized existence. Therefore, indicators such as close family members in Canada, provincial driving licences and health cards, Canadian bank accounts, residential real estate holdings, and other investments in Canada are essential to show that the applicant has taken the foundational steps to become centralized in Canada.
- In addition to “passive indicia” it is important to advise clients to develop social ties with Canadian society (beyond their family) i.e. memberships in community, religious, recreational, political groups. Ideally have clients develop ties outside of their ethnic group, but if that is the only option available it is still desirable.



(ii) Before A Hearing With A Citizenship Judge

- Despite the flexibility in the case law, practitioners should pre-empt the authority of citizenship judges to choose a test. This is accomplished by making a statement in an applicant's submission to the Case Processing Centre that the Federal Court Trial Division has established the principle that the test for residency must naturally receive a liberal interpretation and that the centralized existence test is the standard that is followed almost without exception.
- Emphasize a lack of "index country" where none exists. If the time spent by the client outside of Canada is divided between a number of different countries (especially if the list does not include their country of nationality or their former habitual residence), submit that they have spent more time in Canada than any one of those countries individually and as a result the applicant is centralized and has greater ties to Canada. (*Collier v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1511).



(iii) Before the Federal Court

- Challenge the reasonableness of decisions of pure fact in addition to decisions of fact and law and pure law. Since *Dunsmuir v. New Brunswick* and *Pourzand v. Canada (Minister of Citizenship and Immigration)* the standard of judicial review for facts has been lowered from patently unreasonable to reasonable.



END

THANK YOU