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Citizenship Reform Proposal #5: Citizenship for Persons Born Before January 1, 1947

ISSUE

This paper proposes options to address cases of those born prior to January 1, 1947 who did not acquire citizenship when the first *Canadian Citizenship Act* came into force.

BACKGROUND

Your office has requested legislative changes to address cases of those born prior to 1947 who did not become Canadian citizens on January 1, 1947, while keeping within the spring 2012 timeline for comprehensive reform. On a recent memo, you requested consideration of an amendment "clarifying that Canadian citizenship applies to British subjects born or domiciled in Canada pre-1947; or born in a British realm to a Canadian parent during wartime".

On January 1, 1947, the first *Canadian Citizenship Act* came into force, marking the beginning of Canadian citizenship as a legal status. Before this date, people born or naturalized in Canada were considered to be British subjects. However, prior to January 1, 1947, for the purposes of the 1910 *Immigration Act*, the status of Canadian national existed.

Changes implemented in April 2009 restored or gave citizenship to persons who lost or never had it due to outdated legislation. The changes preserved January 1, 1947 as the date when citizenship was first created as a legal status. Upholding the date of January 1, 1947 meant that persons born prior to 1947 were not addressed by the 2009 changes.

Although the changes in April 2009 addressed most cases of "lost Canadians" there continue to be persons who self-identify as lost Canadians who are not Canadian citizens today. For example, this includes those born outside Canada prior to 1947 out of wedlock to a British subject mother and a "Canadian" father or in wedlock to a British subject father and "Canadian" mother who did not acquire citizenship under the 1947 Act or who did not naturalize after January 1, 1947; some first generation persons born abroad to war brides and service men; some first generation born abroad in the Mennonite community who were born before their parents were legally married under Mexican law; those born or naturalized in Canada prior to 1947, who lost British subject status prior to 1947 and therefore did not become Canadian citizens on January 1, 1947; and those British subjects who came to Canada and were domiciled less than five years and did not become citizens on January 1, 1947.

If 5(4) applications from those born before 1947 are any indication, the estimated number of those who could benefit from amendments to extend citizenship could be modest. Of the 50 such cases considered for an exceptional 5(4) grant from 2005-2010, most (41) were accepted.

CONSIDERATIONS

Fixing cases of those who were born prior to 1947 who did not become citizens on January 1, 1947, can be done in several ways.

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Changing the date upon which citizenship as a legal status was created is legislatively possible, however pursuing such a change is not recommended as the policy and legal implications would be significant, the change may not achieve the desired goal, and the work required to make such a significant change to citizenship legislation could jeopardize the timelines of tabling a bill within desired timelines.

For these reasons, other options for targeted amendments are presented that will provide citizenship to this group. In addition, further to a request by your office, the story of Canadian citizenship could be told through the inclusion of a preamble in the *Citizenship Act*. Considerations around the inclusion of a preamble are explored in a separate policy paper (#6).

OPTIONS

The following options are proposed to extend citizenship to those born before January 1, 1947 and some of their descendants:

Option 1 : Grant of citizenship (going forward)

Amend the *Citizenship Act* to allow for a grant of citizenship (day forward) to persons born or naturalized in Canada, who subsequently lost status and didn't become citizens on January 1, 1947; to a British subject not with "Canadian Domicile" (as that term was defined under the relevant immigration legislation in force at the time) but ordinarily resident in Canada prior to January 1, 1947 and didn't become a citizen on January 1, 1947; and to persons born outside of Canada whose parent was born or naturalized in Canada or was a British subject not with "Canadian domicile" but ordinarily resident in Canada prior to January 1, 1947.

As you requested, this option would cover British subjects born or domiciled (ordinarily resident) in Canada prior to January 1, 1947 and those born abroad to a Canadian parent for the same period.

This option would require persons to come forward to apply for the grant. Those applying would not need to meet the regular grant requirements, e.g. residence, language/knowledge, prohibitions or oath requirement¹. In upholding the first generation limit, persons who were born outside of Canada and who receive such a grant would not be able to pass citizenship on to any children they may have had abroad.

Pros:

- Fixing those born outside Canada to a **parent** who was born or naturalized in Canada would uphold the first generation limit and would be consistent with the changes made in 2009.
- Option is similar to what was done from 1977-2004 which allowed for a grant for children born between January 1, 1947-February 14, 1977 in wedlock to a Canadian mother and later for those born out of wedlock to a Canadian father.

¹ Consistent with FCA decision In the case of *Benner v. Canada (Secretary of State)* 1997 CanLII 376 (S.C.C.) whereby the SC found the differential treatment of children born abroad before February 15, 1977, of Canadian mothers under the *Citizenship Act*, violated s. 15 of the *Charter* and could not be justified under s. 1. As a result, the Court declared the oaths, security and criminal record checks inapplicable to s. 5(2)(b) applicants.

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Cons:

- Not consistent with retroactive changes of 2009.
- Operational impacts as more clients would need to come forward to receive a grant.
- Will require changes to program (training, systems changes) for potentially a very small number of clients that will diminish over time.
- May have resource implications for CIC, DOJ and Federal Court.
- May raise criticism from persons whose children/grandchildren would have been citizens had this provision existed prior to April 2009. Medium to high risk of a successful *Charter* challenge if claim was commenced by a person whose parents were historically denied citizenship and due to the application of the first generation limit.

Option 2 : Retroactive Amendment

Amend the *Act* to restore or give citizenship retroactively back to Jan 1, 1947 to groups in option 1. Restoring or giving citizenship to these persons could be done retroactively by "operation of law" (as was done in 2009). Fixing such cases retroactively by "operation of law" would result in persons becoming citizens automatically and would not require them to come forward.

As you requested, this option would cover British subjects born or domiciled (ordinarily resident) in Canada prior to January 1, 1947 and those born abroad to a Canadian parent during the same period.

Pros:

- Consistent with the retroactive amendments of 2009.
- Fixing those born outside Canada to a **parent** who was born or naturalized in Canada would uphold the first generation limit and would be consistent with the changes made in 2009.
- Would have less operational impacts than option 1 as persons would not need to come forward and apply for a grant.

Cons:

- Option may have resource implications for CIC, DOJ and Federal Court.
- Will require changes to program (training, system changes) for potentially a very small number of clients that will diminish over time.
- Retroactivity may have unintended and undesirable consequences that are difficult to predict before legislation is enacted.
- Retroactively fixing cases by "operation of law" could result in instances where a person acquires citizenship under the new law but may not want it. May also pose a problem where the person automatically given citizenship has already received a grant in the past. A deeming provision may be needed to ensure that persons are treated the same in their ability to pass on citizenship.

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LEGAL ASSESSMENT

Should a legislative fix be chosen for this issue, it is recommended that a retroactive fix be pursued. The Federal Court of Appeal case law (the *Taylor* case) has affirmed that the *Charter* does not apply to distinctions made in citizenship law prior to 1947. As soon as the Department begins to legislate pre-1947 cases, in the current law, the Court is likely to scrutinize the adequacy of the legislative fix having regard to section 15 standards of equality. By giving citizenship retroactively to those born prior to 1947, in the first generation, the Department opens up the possibility for the Court to scrutinize a new group of people, who, under the current law cannot argue that a *Charter* breach has occurred. There is a medium to high risk of a successful *Charter* claim for this proposal if the claim is commenced by individuals born in the second generation and beyond whose parents had historically been denied citizenship in 1947. However, legislatively fixing those born prior to 1947 would also reduce the risk associated with the 1947 limit in the 2009 legislation (C-37), as it would allow individuals born before 1947 who had previously lost citizenship or never obtained citizenship to acquire citizenship retroactively.

CONSULTATIONS (EXTERNAL)

Consultations have taken place with Department of Justice.

STAKEHOLDER IMPLICATIONS

It is not anticipated that the proposed change will raise criticism amongst stakeholders. Stakeholders pursuing the interests of "Lost Canadians" were supportive of the changes made to the *Act* in 2009, however, some have expressed concerns that the amendments did not go far enough to fix these cases. Therefore, stakeholders will likely welcome such an amendment.

RESOURCE IMPLICATIONS

It is not expected that this amendment will require additional resources. However, if there is an increase in litigation cases as a result of such changes, this could result in resource implications for CIC and DOJ.

COMMUNICATIONS IMPLICATIONS

A change of this nature is not expected to raise controversy; however, questions may arise as to why the Department has not considered similar "fixes" for other groups of "Lost Canadians" such as failed retention cases and stateless persons who are born abroad in the second generation or beyond. Q&A's and media lines will be prepared to respond to such concerns.

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RECOMMENDATION

It is recommended that option 2 be pursued.

Neil Yeates

I concur

- OPTION 1: GRANT (GOING FORWARD)
- OPTION 2 (RECOMMENDED):** RETROACTIVE AMENDMENT
- I DO NOT CONCUR

The Hon. Jason Kenney, PC, MP