Submission to:
Standing Committee on Citizenship and Immigration
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6
Canada

Study of *Bill S-245*

Brief

Introduction

Thank you for the opportunity to comment on *Bill S-245*. I write as the Executive Director of the Canadian Citizens Rights Council, which represents Canadians who have been disadvantaged by limitations on democratic rights, equality rights, multicultural rights, and mobility rights. I also present the perspective of a practitioner who has assisted clients with citizenship cases.

Bill S-245 addresses one gap in citizenship by descent that has resulted in “lost Canadians” – our descendants who have lost or never been granted citizenship despite deep ties to Canada.

We support *Bill S-245* but believe that it does not go far enough to address ongoing and historical concerns.

In this brief, we discuss:

- What concerns surround citizenship by descent
- How well current law addresses these concerns
- How other countries address the same concerns
- How we got here
- What Canadians have to say
- Recommendations based on this analysis

What Are the Concerns Around Citizenship by Descent?

On the one hand, the concern around the transmission of citizenship by descent could be best described as a concern for people who are “just passing through”.

For example, this concern applies in cases where individuals immigrate to Canada and become naturalized citizens with the express intent of immigrating to a third country. This can and does come into play because Canadians have an easier time than some other nationalities when they immigrate to certain countries.

A second scenario includes individuals who immigrate to Canada and become Canadian citizens with the desire of returning to their home country. In my practice, I have encountered this motivation when spousal immigration applications in other English-speaking countries are denied, and families are looking for a safe and culturally similar alternative.

A third scenario, one well documented in the press, includes individuals who come to Canada as tourists with the express intent of giving birth in Canada and then returning to their home country.

A fourth scenario is a situation where people with Canadian ancestors have been born abroad and lived abroad for generations without any active connection to Canada.

On the other hand, the concern we represent is for those who are born abroad, are actively connected to Canada, and want equal rights and the option to be mobile during childbearing years.

As citizens, under the *Charter of Rights and Freedoms*, section 6, we are guaranteed the right to leave and return to Canada. There is no time frame for this right. We can leave for as long as we wish, and unlike many other rights and freedoms, this section is not subject to the notwithstanding clause.

We also have a moral and legal duty to care for our dependent children.

To force Canadians to either give up our mobility rights or ignore our duties to our dependent children is unfair and unjust.

Finally, most people, regardless of their feelings on the concerns above, would prefer simple, understandable rules on citizenship.

How Well Do We Meet Those Concerns Now?

In response to concerns about people passing through, the *Citizenship Act* does not address the first three scenarios: 1) when a person immigrates to Canada and immediately emigrates to a third country; 2) when a person immigrates to Canada and returns to their home country as soon as possible; and 3) when a person visits Canada with the express interest of having a child and then returns immediately after the birth.

The *Citizenship Act* does address the fourth scenario, limiting citizenship by descent in cases where descendants have been born abroad with no active connection to Canada for generations, but it does so at the expense of mobility rights and family unity.

Some point to the discretionary grant in section 5(4) of the *Citizenship Act* as a remedy for family unity. Yet, this section of the law spells out three scenarios where the Minister can grant citizenship: in cases of statelessness, special or unusual hardship, or to reward services of exceptional value to Canada. It contains no option to grant citizenship to a dependent child of a Canadian citizen. It is not a constitutional substitute.

Others may point to the *Immigration and Refugee Protection Act (IRPA)* and its regulations *(IRPR)* as a guaranteed solution. As a practitioner, it would be unethical for me to express such a claim to clients for two reasons:

- First, if a Canadian comes to a port of entry with a dependent foreign national child who has a temporary resident visa, CBSA officers should deny the child entry if the parent expresses an intent to return permanently (see ss. 20(1)(b) and 22(2) *IRPA*).

- Second, IRCC is required to disallow Canadians from sponsoring their children for permanent residence from abroad, if they are living together as any good parent would and they cannot prove that they will reside in Canada when their child becomes a permanent resident (per s.

130(2) *IRPR*). The old maxim that “you can’t prove a negative” can and does predict IRCC permanent residency decisions in many of these cases.

The consequences of these directives in law are demonstrated dramatically in the Factum of the Applicants, *Bjorkquist et al v. Attorney General of Canada*, Court File No. CV-21-00 673419-0000. This *Charter* challenge identifies several additional constitutional issues associated with the “generations abroad” construct in limiting citizenship by descent.

One of the applicants, Ms. Maruyama, was born abroad but lived in Canada for 21 years. In 2017, she returned with her two dependent children to settle in Canada. IRCC allowed her children to enter temporarily on visitor visas. After arriving, she applied for discretionary grants of citizenship, discussed above, for her children. While these applications were in process, she had to leave Canada with her children because IRCC did not process the applications before the end of her children’s authorized stay.

She returned, this time with a new, temporary authorization for her children. Finally, in 2019, the Minister denied the Maruyama children a discretionary grant of citizenship, either because he simply did not want to approve them and had no obligation to do so, or more likely, because normal minor children don’t meet the criteria defined in section 5(4) of the *Citizenship Act*.

At IRCC’s urging, Ms. Maruyama then applied for applications for permanent residence for her children that same year. Again due to processing time frames, those applications were not evaluated before the Maruyama children were required to leave Canada.

Then in 2020, and in line with discretion accorded officers in *IRPA* and *IRPR*, IRCC did not approve the applications for permanent residence because the family could not prove that they would not leave Canada.

Each of these requirements for her children to leave, and the denials of their applications, first for a grant of citizenship and then for permanent residence, is understandable in the context of the provisions of law noted above. However, IRCC encouraged Ms. Maruyama to pursue these steps. As a result, between 2017 and the present day, Ms. Maryuma has been forced to leave Canada on multiple occasions to fulfill her legal and moral duties as a parent of dependent children. She is not free to return and settle in Canada. The *Citizenship Act* and *IRPA* have caused deep, inter-generational trauma in this case, and per the factum, one of her children “has experienced suicidal ideation.”

Please remember this story if anyone advises you that the current law is adequate. Please also remember that *IRPA* and *IRPR* have many more reasons for IRCC to say “no.” Poverty, ill health, or inadmissibility of another family member exemplify a few other reasons that lead to family separation. Without guaranteed status for your children, you can lose the right to enter Canada at any time. For example, for the first half of 2020, under emergency orders in council, all foreign national children were banned from coming to Canada with their Canadian citizen parents. While the government corrected this problem in October of the same year – and we appreciate every opposition party for speaking up on the issue and the government for meeting with us to discuss potential solutions – the emotional scars remain for everyone.

When children of Canadian citizens are born with the status of “foreign national” and all the limitations that come with that status, the following consequences are inevitable: generational harm to Canadians and their children, unnecessary overhead to process multiple discretionary applications for the same individuals, and finally, more Charter challenges.

Regarding simplicity, the *Citizenship Act* creates more than five tiers of citizenship, measured by which descendants are or are not citizens. Even experts often learn about this inequity only through personal experience, and after a remedy is out of reach.

The decision is whether to continue on this path or look to other models.

How Do Other Countries Manage the Same Concerns?

Every country must weigh similar concerns, and every country does. We surveyed constitutional and citizenship law for three groups of countries: 1) our major democratic trading partners – the G7, CUSMA partners, and CETA partners; 2) the additional Commonwealth countries of Australia and New Zealand, and 3) countries within continental Central and South America, which share many regional and post-colonial commonalities with us.

You may find the comparison surprising. First, many countries take a much more succinct approach directly in their constitutions. Second, on the measure of protecting mobility rights and family unity, Canada ranks dead last. Third, Canada is especially an outlier among countries in the continental Americas. Finally, English-speaking countries as a whole restrict citizenship by descent more than others because of a very old shared precedent in common law.

Models of Citizenship by Descent

Of the countries we surveyed, 49% protect the right of every citizen to return with their children via citizenship by descent for all descendants. The next largest group, 25%, requires only that a child be registered, a method that is nonetheless effective in limiting generations born abroad to those who actively take steps to maintain it. 11% of these countries restrict citizenship by descent when the person born abroad, their parent, or their grandparent meets some kind of residency requirement. A small minority, 9%, employ connection tests based on specific successive generations born abroad.

None of these countries are more restrictive than Canada, and none other than Canada disadvantages their citizens who live or have lived in the country when compared to government employees posted abroad.

We summarize the general approaches of these countries below.

Which Descendants Born Abroad Are Citizens	**Total**	**Countries**
All descendants born abroad without any limitation.	27	Austria, Belize, Bolivia, Brazil, Bulgaria, Cyprus, Czechia, El Salvador, Estonia, France, French Guiana, Germany, Greece, Guatemala, Hungary, Italy, Japan, Lithuania, Luxembourg, Mexico, Netherlands, Poland, Portugal, Romania, Slovakia, Suriname, Sweden
All descendants born abroad who are registered in a civil registry.	14	Belgium, Colombia, Costa Rica, Croatia, Honduras, Ireland, Latvia, Malta, Nicaragua, Peru, Slovenia, Spain, Uruguay, Venezuela
All descendants who establish a residence in the country.	3	Denmark, Panama, Paraguay

Which Descendants Born Abroad Are Citizens	Total	Countries
All descendants who are born abroad, but have either a citizen parent or grandparent who meets a residency requirement.	1	United States
All descendants, as long as each generation of citizen by descent meets a residency requirement before having children abroad.	2	Australia, New Zealand
All descendants who are not in excluded groups: descendants of naturalized citizens, descendants of an unmarried father, or holders of citizenship with specific countries, respectively.	3	Argentina, Finland, Latvia
Varies based on successive births abroad. No descendants after generational limit.	5	Canada, Chile, Ecuador, Guyana, United Kingdom

In a supplemental addendum for the record, we include additional tables summarizing each country's laws and legal language. We aim to demonstrate how other countries address the same concerns succinctly. We hope that some of these countries may serve as a model in the future.

Continental Europe and Japan

In the countries that we surveyed, most continental European countries as well as Japan fell into the pattern of allowing unlimited citizenship by descent, but often imposing some limitations on birth on national soil and/or multiple citizenship (usually with exceptions for citizenship acquired at birth).

Continental Americas

Most countries in the post-colonial continental Americas have taken a more inclusive approach, embracing three concepts simultaneously: 1) citizenship by birth in the country, 2) citizenship by descent, and 3) acknowledgement of multiple citizenship.

Countries that do not fully embrace these principles have been generally moving in that direction. For example, in the past 3 years, the United States and Mexico have taken concrete steps.

First, the United States, led by President Donald Trump, passed H.R.4803 in 2020, creating exceptions to the residency requirement that some U.S. citizens, depending on the nationality of their spouse, must meet to transmit citizenship by descent.

Second, Mexico, led by President Andrés Manuel López Obrador, amended its constitution in 2021 to ensure that any child of a Mexican citizen would be a Mexican citizen.

Both countries already recognized multiple citizenship and had constitutional protections for citizenship by birth on national soil.

The United Kingdom

The UK and countries that are most connected to the UK, including Canada, dominate the lowest end of the spectrum on mobility and the right to family unity.

This model started in the 1600s. In 1608, fifty-two years before the end of feudalism in England, and 400 years before the end of feudalism in all Crown holdings (the Isle of Sark being the last holdout), *Calvin's Case, 7 Coke Report 1a, 77 ER 377* set a precedent in English common law that has influenced the English speaking world to this day. That decision established that Scottish subjects had the rights of English subjects, after James VI, King of Scotland from 1567, also became James I, King of England in 1603.

At the time, slavery was common, serfs were one step up from being enslaved, and individuals were subjects, not citizens. The general principle of the time was that kings and lords owned not just the land but the people who lived on it. If you left the king's domain, and you lost your rights as a subject.

Today, the UK is one of the most restrictive countries we surveyed.

The United States

In addition to the changes noted in 2020, U.S. Representatives from both major parties introduced a bill, H.R. 2920, the following year. This bill contained a provision to address marriage-based discrimination in U.S. law and was co-sponsored by 18% of U.S. Members of Congress. It was among the 90% of bills introduced in that same Congress which did not come to a vote, but there is ongoing advocacy and support for change.

Among overseas branches of major U.S. political parties, Democrats Abroad noted marriage-based discrimination in citizenship by descent as the highest priority issue in their most recent platform, and Republicans Overseas focused more on reforming complex tax issues.

The two largest advocacy organizations representing U.S. citizens abroad, American Citizens Abroad and the Association of Americans Resident Overseas, continue to advocate to ameliorate this discriminatory provision. Other civil organizations also support the change.

If Canada were to adopt residency-based requirements like the United States without marriage-based discrimination, it would comprise two principles:

- Any citizen must establish residency before the birth of a child abroad for that child to be a citizen at birth.
- Upon application and at any point before a child's 18th birthday, a child may be naturalized without first becoming a permanent resident if either of the following becomes true:
  - a parent meets a physical presence test similar to that required of a permanent resident to naturalize; or,
  - a grandparent meets a physical presence test similar to that of a permanent resident to naturalize.

Having assisted what one might call "lost Americans" in attempting to identify their physical presence in Canada vs. the United States, I caution Parliamentarians to consider the fact that proving physical

presence immediately before applying for citizenship as a permanent resident is very different from proving physical presence 20 or more years later. Canada does not reliably retain such records, and typically neither do individuals. Any change to a similar effect should allow for alternative evidence to meet a similar intent.

Belize

Belize became independent in 1981, making it the most recent former British colony in the continental Americas to gain independence. At the time, Belize not only provided for children born on Belizean soil to be citizens but also provided for both children and grandchildren of people born in Belize to be "grandfathered" citizens by descent. From independence forward, the child of any citizen was a citizen by descent without limitation.

This is another example of the trend in continental American countries. It's also a working example for other English-speaking countries to follow.

Australia and New Zealand

Australia and New Zealand are grouped together because they take a similar approach. Both countries have no generational limits on citizenship as long as parents meet a residency requirement.

How Did We Get Here?

As the British Empire grew, people in the English-speaking world were able to travel freely as British subjects as a result of *Calvin's Case*.

Over time, however, as countries gained independence through either revolution or negotiation, citizens of former British colonies lost the rights that they had formerly been accorded subjects.

Now people from the English-speaking world are among the most restricted. Families that move from Canada to another English speaking and have children and return, face even more restrictions. This matters because when Canadians move abroad, they generally move to English-speaking countries.

Some key legislation related to citizenship and citizenship by descent follow:

- The *British North America Act* of July 1st, 1867 contains the first reference to "citizen" in section 31, to cause a Senator's seat to be vacated if a Senator becomes a "Subject or Citizen" of a foreign power.

- In the *Immigration Act of 1910*, "Canadian citizen" was defined as one of four "non-immigrant" classes. A child of a Canadian citizen would become a Canadian citizen upon landing in Canada. A Canadian would lose their citizenship if they became a citizen of a country where they were not also a British subject.

- The *Naturalization Act of 1914* made the naturalization process available to immigrants who lived in "his Majesty's dominions" for 5 years, specifically in Canada for 1 year, in the eight years before application. Women who married a British subject would become a British subject. Women who married an alien would become an alien, and their children would also.

- In the *Chinese Immigration Act of 1923*, anyone of ethnic Chinese descent, including children of what would have been Canadian citizens born abroad, was banned from entering Canada, with some exceptions for adults based on occupation.

- The *Canadian Citizenship Act of 1947* codified citizenship and defined Canadians at birth as those born in Canada, and those born abroad as citizens if their father was a citizen or if their mother was an unmarried citizen, and if their birth was registered. Apart from this gender discrimination, this Act also excluded former "Canadian citizen" non-immigrants who died before its enactment, including every Canadian soldier who died in the Boer War, World War I, and World War II. At some point before 1977, a provision for the loss of citizenship, an "age 21" rule, was added, requiring some Canadians born abroad to also apply to retain their citizenship.

- In 1977, Parliament repealed the *Canadian Citizenship Act of 1947* and replaced it with the *Citizenship Act*. Multiple citizenship was recognized for all Canadian citizens, expanding the existing exception for Canadians who married foreign nationals. Citizenship by descent was granted to all children of Canadian citizens, provided they registered the birth and/or applied to retain their citizenship by age 28. Historical gender-based inequities were not addressed.

- In 2009, Parliament ended the "age 28" rule and replaced it with the "after first generation" rule for children born abroad. In 2014, Parliament further amended the bill to create an exception for children and grandchildren born abroad to government employees born abroad. At the same time, it created an "after first generation" rule for adopted children of adopted children.

In the evolution from subjects to citizens, the government of the day has often used the definition of a Canadian citizen as a tool to retroactively remove rights that existed before. As a result, many groups of Canadian descendants have been denied the ability to resettle in Canada for reasons of an ancestor's race, gender, or marriage.

Finally, similar limits on resettling exist under current law as a by-product of human rights abuses in our past, and as a result of ongoing criminal acts:

- Some indigenous youth were apprehended during the period known as "the 60s scoop" and sent abroad, sometimes bypassing immigration law in other countries. I have spoken personally with a descendant of one of these survivors who would like to reclaim her heritage.

- Per Public Safety Canada, "Canada has been identified as a source, destination and transit country for victims of human trafficking for the purposes of sexual exploitation and forced labour. As of 2020, Statistics Canada reported that 3,541 incidents of human trafficking have been reported to police services in Canada between 2011-2021."

In balancing concerns about "people passing through" we need to acknowledge that absence from Canada has often occurred, and continues to occur, in situations where people have been forced to leave Canada against their will. We should not hold victims and their children to account for the crimes committed against them.

What Do Canadians Say They Want?

In 2011, the Asia Pacific Foundation of Canada published a report titled, "Canadians Abroad: Canada's Global Asset." In it, they shared the results of a poll commissioned with Angus Reid. One question

asked Canadians residing in Canada if they agreed with the following question: “Children of Canadians born in another country should have the same citizenship rights as children of Canadians born in Canada.” 66% agreed.

More recently, the Environics Institute published “Canada’s World Survey.” They asked, “Q.33 There are an estimated 3 million Canadians currently living abroad in other countries. Do you believe having this number of citizens living in other countries is generally a good thing or a bad thing for Canada?” 70% of respondents replied “Generally a good thing for Canada” and 12% replied, “Generally a bad thing for Canada”. The remaining responses were undecided or said it depends. The report, published in 2018, notes that the positive outlook on Canadians abroad is increasing.

In balancing the competing concerns around citizenship by descent, it seems clear that most Canadians would favour recommendations that embrace equality and mobility.

Recommendations

We recommend that the committee amend *Bill S-245* as follows:

1. **To address ongoing family separation and loss of mobility rights in the *Citizenship Act*.** We need guarantees in law that every Canadian can return and settle in Canada with their dependent children.

   On this topic, we would like to note our preference first, and our specific recommendations second. Our preference, like many who have weighed in on this bill, would be to simply repeal the “after first generation” exceptions in the *Citizenship Act,* with the effect of making all of our descendants Canadian. This is not to discount other concerns but is simply a judgment that the potential harm done by separating Canadians from their descendants is terrible and outweighs other potential harm.

   That said, in considering other concerns, taking into account *Charter* rights, examining our history, and looking at other countries, one model stands out as the most balanced for Canada: to replace the “after-first generation” exceptions in the *Citizenship Act* with a new requirement to register a birth abroad at any point in a person’s life (allowing either their parent or the person to do so) and to make this requirement apply equally to *all* citizens. We, therefore, recommend this approach and ask the committee to consider the following supporting facts:

   - Of the countries we surveyed, this is a middle-of-the-road approach; it is more restrictive than about half of the countries reviewed and less restrictive than a quarter.
   - The concern for people passing through includes many citizens born or naturalized in Canada; for the first time, they would not automatically pass on citizenship by descent under this approach.
   - This approach would guarantee that citizens could return to Canada with their children when their children’s registration, citizenship, and passport processes are complete.
   - It would restore lost Canadian mobility in the English-speaking world.

   As a practitioner, I note that putting together a proof of Canadian citizenship application is a complicated process that typically takes two years from the start to receipt of the certificate. The recommendation above would add another step to make things even more complex. People put up with such processes only when they intend to return.

If the committee does not support the recommendation above, we recommend an alternative: a connection test in line with the existing connection test for government employees stationed abroad. Such a test:

- could be met by either a Canadian parent or grandparent;
- would confer citizenship to the child or grandchild at birth; and,
- would be available to any generation born abroad.

To address practical record-keeping difficulties, especially 20 more years after the fact, any test should allow for multiple ways to prove the intent of the connection test.

In making this alternative recommendation, we note a serious deficiency: this approach would continue to generate more "lost Canadian" children whose parents could not return with them.

2. **To address the failure to recognize those who have died in the *Citizenship Act*.** Though mainly symbolic, it is offensive to many Canadians that our ancestors who fought and died for Canada before the *Canadian Citizenship Act of 1947* are not considered to be citizens.

3. **To better address historic gender and marriage discrimination in the *Citizenship Act*.** The *Citizenship Act* today references the prior act in section 3(1)(e). We should finally address discriminatory provisions in the prior act.

4. **To better address statelessness in section 5(5) of the *Citizenship Act*.** We understand that as of May 2022, no individual had been granted citizenship under this section, ever. The provisions are overly restrictive and should be loosened.

5. **To better address family separation in the *Immigration and Refugee Protection Act*.** We urge the committee to create a new provision to confer permanent residence by right to descendants of Canadian citizens, not subject to admissibility or retention requirements. This would address family separation issues that have not yet come to light. It would allow all descendants to earn a way back.

Sincerely,

J. Randall Emery, RCIC
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