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Citizenship and the First-Generation Limitation in Canada

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This article considers the current Canadian regime for citizenship by descent and what is known as the "first-generation limitation." In 2009, Parliament legislated to limit the transmission of citizenship by descent. Known as the "first-generation limitation," the new rules mean that a Canadian parent is only entitled to pass on their citizenship to their children born abroad if the parent themselves became a citizen by birth inside Canada or by naturalization. In other words, if an individual acquired Canadian citizenship by descent, they are not entitled to pass on their citizenship to their children unless those children are born in Canada. The imposition of the first-generation limitation was controversial, as it is much more restrictive than the previous Canadian rules or those in many comparable jurisdictions. This article outlines the operation of the current Canadian rules around citizenship, analyzes the first-generation limitation, and sets out relevant international comparisons. In evaluating the current legal regime in light of debates about the principles of jus soli, jus sanguinis, and jus nexi, we conclude that the current legal regime is overly restrictive. There are potential alternatives that would better meet the underlying values of Canadian citizenship law. Building on the foundations of jus soli, jus sanguinis, and jus nexi, we have identified three main policy options that respond to the tensions raised by the indefinite transmission of citizenship by descent in Canada: (1) a parental residency exception; (2) an adapted naturalization application, and (3) a birth registration exception. In our assessment, any of these three options would be preferable to the status quo or the pre-2009 rules.

Dans le présent article, nous examinons le régime canadien actuel en matière de citoyenneté par filiation et ce que l'on appelle la « limitation à la première génération ». En 2009, le Parlement a légiféré pour limiter la transmission de la citoyenneté par filiation. Connues sous le nom de « limitation de la première génération », les nouvelles règles signifient qu'un parent canadien n'a le droit de transmettre sa citoyenneté à ses enfants nés à l'étranger que si le parent est lui-même devenu citoyen par naissance au Canada ou par naturalisation. En d'autres termes, si une personne a acquis la citoyenneté canadienne par filiation, elle n'a pas le droit de transmettre sa citoyenneté à ses enfants, sauf si ces derniers sont nés au Canada. L'imposition de cette limite de la première génération a suscité la controverse, car elle est beaucoup plus restrictive que les règles canadiennes précédentes ou que celles de nombreuses juridictions comparables. Dans le présent article, nous décrivons le fonctionnement des règles canadiennes actuelles en matière de citoyenneté, analysons la limite de la première génération et établissons des comparaisons internationales pertinentes. En évaluant le régime juridique actuel à la lumière des débats sur les principes du jus soli (droit du sol), du jus sanguinis (droit du sang) et du jus nexi (droit par filiation), nous concluons que le régime juridique actuel est trop restrictif. Il existe d'autres possibilités qui répondraient mieux aux valeurs sous-jacentes du droit de la citoyenneté canadienne. En nous appuyant sur les fondements du jus soli, du jus sanguinis et du jus nexi, nous avons identifié trois grandes options politiques qui répondent aux tensions soulevées par la transmission indéfinie de la citoyenneté par filiation au Canada : (1) une exception de résidence parentale ; (2) une demande de naturalisation adaptée, et (3) une exception d'enregistrement des naissances. Selon nous, chacune de ces trois options serait préférable au statu quo ou aux règles antérieures à 2009.

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Introduction

National citizenship is a multi-faceted concept involving the "linking of an individual to a nation-state."[1] It denotes a specific legal status, political membership in a community, and is an important aspect of individual and

1. Patrick Weil, "From Conditional to Secured and Sovereign: The New Strategic Link Between the Citizen and the Nation-State in a Globalized World" (2011) 9:3-4 Intl J Constitutional L 615. In this paper, the term citizenship is used to denote national citizenship. Some scholars challenge whether citizenship attaches only at the level of nation-state or may be asserted to exist at various other levels of community organization. See e.g. Linda Bosniak, "Critical Reflections on 'Citizenship' as a Progressive Aspiration" in Joanne Conaghan, Richard Michael Fischl, and Karl Klare, eds, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press 2004) [Bosniak, "Critical Reflections"].

collective identity.[2] It has even been called the "right to have rights,"[3] given the legal entitlements that flow to an individual from its acquisition.[4] Citizenship also serves as a significant determinant of life opportunities. Because the socio-economic characteristics of states vary so dramatically, the rules around acquisition of citizenship serve to "define access to certain resources, benefits, protections, decision-making processes, and opportunity-enhancing institutions reserved primarily to those defined as right-holders."[5] As a result, citizenship can be understood to have a dual nature: inclusive and emancipatory for some and exclusionary for others.[6]

Globally, citizenship and its benefits are still largely transmitted at birth according to two distinct sets of rules with different historical lineages and contemporary impacts. The principle of *jus soli* assigns citizenship at birth to anyone born within the territory of a state. The citizenship of the parent(s) is irrelevant to the operation of *jus soli. Jus sanguinis*, by contrast, explicitly transmits citizenship to children based on the citizenship of their parent(s). Entitlement to citizenship under *jus sanguinis* turns on descent. Both *jus soli* and *jus sanguinis* rely on facts about an individual at birth as the basis for distributing citizenship. Canada does not exclusively adopt any one approach. Canadian citizenship can be acquired by: 1) birth in Canada consistent with the principle of *jus soli*; 2) birth outside Canada to a Canadian citizen in accordance with *jus sanguinis*; or 3) naturalization.

This article considers the current Canadian regime for citizenship by descent and what is known as the "first-generation limitation." In 2009, Parliament legislated to limit the transmission of citizenship by descent. Known as the "first-generation limitation," the new rules meant that a Canadian parent was only entitled to pass on their citizenship to their children born abroad if the parent themselves became a citizen by

2. Will Kymlicka & Wayne Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory" (1994) 104:2 Ethics 352.

3. Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich, 1948). See also *Trop v Dulles*, 356 US 86 (1958).

4. Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Oxford: Oxford University Press, 2006) at 34-35. See also Sarah Song, "Rethinking Citizenship Through Alienage and Birthright Privilege: Bosniak and Shachar's Critiques of Liberal Citizenship" (2011) 9:1 Issues in Legal Scholarship 1 [Song, "Rethinking Citizenship"].

5. Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA: Harvard University Press, 2009) at 7. See also Joseph H Carens, *Immigrants and the Right to Stay* (Boston: MIT Press Cambridge, 2010).

6. Christian Joppke, "Citizenship in Immigration States" in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad & Maarten Vink, eds, *The Oxford Handbook of Citizenship* (Oxford: Oxford University Press, 2018) at 385-388. See also Bosniak, "Critical Reflections," *supra* note 1. These approaches are contrary to that of TH Marshall, who famously set out citizenship as embodying a process of progressive development: TH Marshall, *Citizenship and Social Class and Other Essays* (Cambridge, UK: Cambridge University Press, 1950).

birth inside Canada or by naturalization. In other words, if an individual acquired Canadian citizenship by descent, they are not entitled to pass on their citizenship to their children unless those children are born in Canada. The imposition of the first-generation limitation was controversial, as it is much more restrictive than the previous Canadian rules or those in many comparable jurisdictions. It introduced a differential set of rights among classes of citizens.[7] Amendments in 2017 reduced the risk that the first-generation limitation could result in statelessness.[8] While the harshest edges of the policy have been shaved off, the fundamental soundness of the limitation must still be interrogated.

The dilemma that the first-generation limitation sought to address can be framed relatively succinctly. Indefinite transmission of citizenship by descent to the children of multiple generations born abroad risks including members who may have little meaningful connection to the political community. Restricting the transmission of citizenship, however, may arbitrarily exclude individuals and, in doing so, harm their life chances. The excluded individuals may in fact have a genuine connection to Canada and/or be those whom Canada would otherwise be seeking to attract. Underlying this dilemma is a tension between the view of citizenship as a category distributing largely equal, formal rights to members that ought to be accessible and the "gate-keeping function"[9] of citizenship reflecting the political community's "right to exclude"[10] and to define itself.[11]

Prominent scholars have questioned birth location and parental citizenship as being, at times, arbitrary measures of whether a person has a connection to a country and ought to be afforded citizenship. Many have called for other approaches to citizenship transmission and acquisition, such as the argument in favour of a third option beyond *jus soli* and *jus sanguinis* called "*jus nexi.*" Under *jus nexi,* the acquisition of citizenship requires establishing some kind of real and substantial connection to the

7. Citizens unable to transmit their citizenship in the same way as their fellow citizens could be said to be in a state of "semi-citizenship": Elizabeth Cohen, "Dilemmas of Representation, Citizenship, and Semi-Citizenship" (2014) 58 St Louis ULJ 1047; Elizabeth Cohen, *Semi-Citizenship in Democratic Politics* (Cambridge, UK: Cambridge University Press, 2009).

8. Marietta Brennan & Miriam Cohen, "Citizenship by Descent: How Canada's One-Generation Rule Fails to Comply with International Legal Norms" (2018) 22:10 Intl JHR 1302.

9. Ayelet Shachar & Ran Hirschl, "Citizenship as Inherited Property" (2007) 35:3 Political Theory 253 at 265.

10. The idea that a state ought to be able to exclude members from its polity and associated benefits flowing from citizenship is frequently challenged. See e.g. Sarah Song, "Why Does the State Have the Right to Control Immigration?" (2017) 57 J Immigration, Emigration & Migration 3.

11. Shachar & Hirschl, *supra* note 9 at 267.

state,[12] with advocates framing it as a more just alternative[13] in determining citizenship than the sometimes arbitrary measure of circumstances of birth.[14] A robust debate has erupted about whether *jus nexi* would exclude many who would otherwise be automatically entitled to citizenship by descent or birth location.[15]

The choice between *jus soli, jus sanguinis,* and now *jus nexi* is a consequential one. The rules around citizenship acquisition and transmission establish whether an individual obtains the opportunities and status that come with citizenship. Globalization has further heightened the stakes. The processes of globalization undermine the common assumption that there is or even should be an overlap between residence or descent with citizenship. The international migration that has accompanied globalization creates, in the words of Rainer Baübock, "a mismatch between citizenship and the territorial scope of legitimate authority" including "citizens living outside the country whose government is supposed to be accountable to them and inside a country whose government is not accountable to them."[16] Canada is far from immune from having to reckon with the implications of globalization on citizenship, given the twin migrations into Canada by non-citizens and out of Canada by citizens moving abroad.[17] The implications of a "mismatch" between citizenship and territory manifest themselves in Canada in the debate about the first-generation limitation.[18]

This article sets out the various considerations involved in setting law and policy around the first-generation limitation. Related and important topics in the literature on citizenship and migration, such as the rights and legal status of long-term, non-citizen residents,[19] or whether citizenship itself is an exclusionary concept,[20] are beyond the scope of

12. Shachar, *supra* note 5.
13. Shachar & Hirschl, *supra* note 9.
14. Rainer Bauböck, "Stakeholder Citizenship: An Idea Whose Time Has Come?" in *Delivering Citizenship* (Gutersloh: The Transatlantic Council on Migration, 2008).
15. Song, "Rethinking Citizenship," *supra* note 4 at 9-19; Noah Novogrodsky, "The Use and Abuse of *Jus Nexi"* (2012) 7:2 The Ethics Forum 50.
16. Bauböck, *supra* note 14 at 31.
17. Audrey Macklin argues that there is even a "kind of immigration exceptionalism [which] dilutes the rule of law in relation to non-citizens." Audrey Macklin, "Citizenship, Non-Citizenship, and the Rule of Law" (2018) 69:1 UNBLJ 19. Available on SSRN.com: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3666111. Last accessed July 16, 2021.
18. Jamie Chai Yun Liew & Donald Galloway, *Immigration Law*, 2nd ed (Toronto: Irwin Law, 2015) at 45.
19. See e.g. Hiroshi Motomura, "The Rights of Others: Legal Claims and Immigration Outside the Law" (2010) 59:8 Duke LJ 1723. See also Linda Bosniak, "Territorial Presence as a Grounds for Claims: Some Reflections" (2020) 14:2 Nordic J Applied Ethics 53.
20. See e.g. Bosniak, "Critical Reflections," *supra* note 1. See also Joseph H Carens, "Aliens and Citizens: The Case for Open Borders" (1987) 49:2 Rev Politics 251.

this article. There are potential constitutional implications of state drawing distinctions among citizens, including a potential violation of the right to equality in s 15(1) of the *Canadian Charter of Rights and Freedoms*.[21] We also leave for another day the detailed argument necessary to establish the constitutionality or unconstitutionality of the first-generation limitation, given the rapidly shifting case law.[22]

In the sections that follow, this article outlines the operation of the current Canadian rules around citizenship, analyzes the first-generation limitation, sets out relevant international comparisons, and then addresses a variety of reform-minded policies that could be pursued. In evaluating the current legal regime in light of debates about the principles of *jus soli, jus sanguinis,* and *jus nexi,* we conclude that the current legal regime is overly restrictive. There are potential alternatives that would better meet the underlying values of Canadian citizenship law. Building on the foundations of *jus soli, jus sanguinis,* and *jus nexi,* we have identified three main policy options that respond to the tensions raised by the indefinite transmission of citizenship by descent in Canada: (1) a parental residency exception; (2) an adapted naturalization application; and (3) a birth registration exception. In our assessment, any of these three options would be preferable to the status quo or the pre-2009 rules.

I. *Citizenship and the* Citizenship Act

1. *The operation of the* Citizenship Act

This section outlines the legal rules surrounding the transmission and acquisition of citizenship. Federal legislation provides for citizenship by birth in Canada, by birth outside to a Canadian citizen, and by naturalization. Sub-section II (ii) then uses that discussion to analyze how "citizenship" is used as a concept in Canadian law.

a. *Citizenship by birth in Canada* (jus soli)

The *Citizenship Act*[23] (the "Act") governs citizenship law in Canada. Section 3(1)(a) of the Act guarantees citizenship to everyone born in Canada. This is limited only by s 3(2), which excludes foreign diplomats, consular officers, anyone in the service of the former two categories, and employees of a United Nations agency or similar organization. The scope of this provision was recently addressed by the Supreme Court of Canada

21. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
22. See *Fraser v Canada (Attorney General),* 2020 SCC 28.
23. *Citizenship Act*, RSC 1985, c C-29.

in *Vavilov v Minister of Citizenship*.[24] The majority of the Court recognized that: "…Canada affords citizenship in accordance both with the principle of *jus soli,* the acquisition of citizenship through birth regardless of the parents' nationality, and with that of *jus sanguinis,* the acquisition of citizenship by descent, that is through a parent."[25]

The facts of *Vavilov* are dramatic, and it is a rare instance of the Supreme Court taking up core aspects of citizenship. Mr. Vavilov was born in Canada to parents eventually revealed to be Russian citizens employed by their government as spies. Vavilov received Canadian citizenship on the basis of *jus soli,* but it was eventually revoked under s 3(2)(a) of the *Citizenship Act* by the registrar of citizenship. Mr. Vavilov challenged that administrative decision. The Supreme Court concluded that the revocation by the registrar was unreasonable as a matter of administrative law and statutory interpretation. The Court upheld the decision by the Federal Court of Appeal quashing the decision of the registrar.

While notable for its restatement of the principles of judicial review in administrative law, *Vavilov* reiterates the foundational importance of citizenship. The majority of the Court interpreted the relevant statute so as to enhance access to citizenship. The majority cited the opinion of Justice Iacobucci in *Benner v Canada (Secretary of State)*,[26] stating, "I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian Citizenship."[27] Given the interests at stake, the exclusion in s 3(2) was construed narrowly by the Court in Mr. Vavilov's favour. The exclusion was interpreted to only apply to the children of individuals who receive diplomatic immunities (or the people in their service). Offspring of individuals not identified by Canada as diplomats or in the service of a diplomat therefore benefit from the principle of *jus soli*, even though there were national security considerations and deception by the parents.

b. *Citizenship by birth outside Canada to a Canadian parent* (jus sanguinis)

Individuals born outside Canada are also entitled to citizenship by descent if one or more of their parents is a Canadian citizen, by virtue of s 3(1)(b) of the Act. The provision states that, "a person is a citizen if…the person was born outside Canada after 14 February 1977, and at the time

24. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].
25. *Ibid* at para 178 per the majority opinion.
26. *Benner v Canada (Secretary of State),* [1997] 1 SCR 358 at paras 68, 143.
27. *Vavilov*, *supra* note 24 at para 191.

of his birth one of his parents, other than a parent who adopted him, was a citizen." This provision gives life to the principle of *jus sanguinis*.

This guarantee is qualified by s 3(3), which limits citizenship by descent *to the first generation born abroad*. The limitation is the result of the passage by Parliament of Bill C-37*, An Act to Amend the Citizenship Act*, which came into force on 17 April 2009. This "first-generation limitation" as it has come to be known means that a person born outside Canada on or after 17 April 2009, will *not* become a citizen unless one of their parents is a Canadian citizen *otherwise than by descent*. Put differently, a Canadian citizen is only entitled to pass on their citizenship to their children born outside of Canada if the parent became a citizen by birth inside Canada or by naturalization.

Take the following example. Person A is born in the United States but becomes a citizen of Canada at birth due to the citizenship of their parents. They live most of their lives in Canada before moving back to the United States for school. Person A then has a child in the United States with an American spouse. In this scenario, Person A's child would *not* be granted citizenship by descent, despite their parent's links to the country. In contrast, if Person A or their partner became a citizen by birth in Canada or through naturalization, their child would become a Canadian citizen at birth despite being born abroad. The rule does not consider the amount of time the parent has spent in Canada or how they retain a connection to the country. It only considers *the method* by which the parent received citizenship.

The legislation builds in safeguards for specific Canadians. The first-generation limitation does not apply to children of individuals working abroad in the Canadian public service at the child's birth.[28] The public services enumerated in the Act are the Canadian Armed Forces, the federal public administration, and the public service of a province. A child born to parents working in the public service is also enabled to pass on their citizenship to their children born abroad.[29] That is to say, a child born abroad whose Canadian parent is employed in the public service is treated as born inside Canada or naturalized for the purposes of the first-generation rule, and as such, the limitation does not apply to their eventual children.

These provisions echo past exceptions in the *Canada Elections Act* related to voting in federal elections by Canadian citizens living outside the country for long periods of time. The legislation banned voting by those abroad for more than five years but created categories of exceptions

28. *Citizenship Act*, *supra* note 23, s 3(5)(a).
29. *Ibid,* s 3(5)(b).

for Canadians working for the Canadian state abroad or select international organizations that Canada is a member of, such as the United Nations. These exceptions were rendered moot by the passage of Bill C-76, which eliminated the five-year rule.[30] The Supreme Court of Canada eventually held in *Frank v Canada*[31] in 2019 that the five-year rule violated the right to vote granted to all citizens in s 3 of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

The rules prior to 2009 addressed what constitutes a "substantial connection." Under the pre-2009 rules, the second or subsequent generation born abroad was considered a Canadian citizen. Still, it would lose that status if they did not apply for retention by age 28 or failed to meet the application requirements. If an applicant had resided in Canada for the year preceding the application, they were entitled to retain their citizenship. If they had not, they had to demonstrate a substantial connection to Canada in order for the application to be accepted.

The definition of "substantial connection" was found in the Citizenship Regulations. A substantial connection could be demonstrated in two ways. First, one was considered to have a substantial connection to Canada if they worked abroad for the Canadian Forces, the RCMP, or the United Nations as a Canadian representative. Secondly, one could demonstrate a substantial connection by having an adequate knowledge of Canada, one of its official languages, and the privileges and responsibilities of citizenship, as well as having lived in Canada for one year since the age of 14 either with a family member or at a Canadian secondary or post-secondary institution.[32] There was some administrative confusion surrounding this law and its application, including that it was poorly advertised to individuals who needed to apply. It also provides significant discretion to the bureaucracy, which has not always been advantageous to rights claimants under the citizenship regime or immigration law.[33]

30. On the link between voting rights and citizenship acquisition in Canada, see Andrew Griffiths and Robert Vineberg's brief to the Standing Committee on Procedure and House Affairs: Andrew Griffith & Robert Vineberg, "C-76 Non-Resident Voting Rights" (last visited 15 June 2022), online (pdf): *House of Commons Canada* <www.ourcommons.ca/Content/Committee/421/PROC/Brief/BR9886548/br-external/GriffithAndrew-e.pdf> [perma.cc/6LK7-M3EA]. See also Michael Pal, "Evaluating Bill C-76: The *Elections Modernization Act*" (2019) 13:1 JPPL 171 at 176-177.

31. *Frank v Canada (Attorney General)*, 2019 SCC 1 [*Frank*].

32. *Citizenship Regulations*, SOR/93-246, s 16.

33. *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, 174 DLR (4th) 193.

c. *Citizenship by grant (naturalization)*

In addition to birth in Canada or outside Canada to a Canadian parent in some circumstances, an individual over the age of 18 can be apply for a grant of citizenship under s 5 of the Act, known as naturalization. An applicant must fulfill certain requirements to have their naturalization application accepted. The applicant must be a permanent resident, have been physically present in Canada for at least 1,095 days in the five years directly preceding the application,[34] and have filed taxes in three of those five years. Individuals between ages 18-55 must have an "adequate knowledge" of English or French and understand the "responsibilities and privileges of citizenship."[35] The Act temporarily or permanently excludes applicants from a grant of citizenship on the basis of criminality or national security considerations.[36]

One of the concerns raised about the first-generation limitation was the possibility that an individual could be rendered "stateless," if unable to gain access to the citizenship of their Canadian parents and denied citizenship in the country where they currently live. A grant of citizenship is therefore available for individuals who have Canadian parents but who are excluded from citizenship by the first-generation limitation and would be stateless, but for the grant of citizenship.[37] Between 2010 and 2017, 384 people had received a discretionary grant.[38] The vast majority of the recipients were "Lost Canadians," a group who lost their citizenship due to historical citizenship legislation deemed inconsistent with modern legal and ethical norms.[39]

2. *Defining citizenship in Canada*

The starting point for considering the first-generation limitation is how citizenship is set out in Canadian law. Citizenship does not have a comprehensive statutory definition in Canada.[40] It is also not defined in the

34. See *Citizenship Act, supra* note 23, s 5(1)(c). Days towards the 1,095 day requirement are calculated as a full day while the person is a permanent resident, while days during which the person was a temporary resident or protected person count as a half-day (*ibid*, s 5(1.001)(c)).

35. *Ibid*, s 5(1)(c)-(d).

36. See *ibid*, ss 22 (criminality), s 19 (national security).

37. *Ibid*, s 5(5).

38. See Memorandum from Deputy Minister Marta Morgan to the Minister of Immigration, Refugees and Citizenship Canada Ahmed Hussen (15 February 2017) at 2, retrieved by access to information request pursuant to the *Access to Information Act*. The precise period was from 2010 to 15 February 2017.

39. See Ajay Parasram, "Us and Them: The Plumbing and Poetry of Citizenship Policy and the Canadians Abroad" (2010) Asia Pacific Project Paper Series No 10-03, online (pdf): *Asia Pacific Foundation of Canada* <www.asiapacific.ca/sites/default/files/filefield/UsandThem.pdf> [https://perma.cc/YB5J-YXQN].

40. See Liew & Galloway, *supra* note 18 at 45.

Canadian Constitution, despite the fact that various rights in the *Canadian Charter of Rights and Freedoms* are granted on the basis of citizenship. The *Citizenship Act* governs who has the right to citizenship and what conditions must be fulfilled to become a citizen. The terms "citizen" and "national" are combined in Canadian law, rather than distinct.[41]

The courts have often pointed toward some significant connection to Canada as the justification or basis for assigning citizenship.[42] Requirements for acquiring citizenship—such as residency, birth in Canada or being born to Canadian parents—can be understood as proxies for a connection to Canada. The potential issue for any proxy is whether it accurately captures the intended facts about an individual. Arbitrariness would exist if some individuals without a meaningful connection are granted citizenship automatically while others with such a connection are denied it.

Citizens are specifically afforded constitutional rights unavailable to non-citizens. Under the *Canadian Charter of Rights and Freedoms*, the rights to vote and to stand as a candidate for federal or provincial office in s 3[43] and mobility rights in s 6[44] are granted exclusively to citizens. The right to vote includes the right to "meaningful participation"[45] and "effective representation."[46] Mobility rights are perhaps as important as ever, given restrictions on international, interprovincial, and even intra-provincial movement during the COVID-19 pandemic. Section 6(1) protects the right of citizens to enter, leave, and remain in Canada.[47] Sub-sections 6(2)-(3) guarantee inter-provincial movement, including taking up residence or moving for work, to citizens and also permanent residents.[48] Minority language rights in s 23 are also the preserve of citizens. The fact that the constitutional text guarantees these rights but that they are dependant on specification in the Act makes them vulnerable to restriction by Parliament in ways that those rights and freedoms possessed by "everyone" are not.

41. *Taylor v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1053 at para 61 [*Taylor*].
42. See *Canada (Attorney General) v Mckenna (CA)* (1998), [1999] 1 FC 401 at para 61, 167 DLR (4th) 488.
43. See *supra* note 21 ("Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein"); *Frank, supra* note 31
44. See *supra* note 21, s 6(1) ("Every citizen of Canada has the right to enter, remain in and leave Canada"), s 6(2) ("Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (*a*) to move to and take up residence in any province; and (*b*) to pursue the gaining of a livelihood in any province"); *Black v Law Society of Alberta*, [1989] 1 SCR 591, 58 DLR (4th) 317; *United States of America v Cotroni,* [1989] 1 SCR 1469, 48 CCC (3d) 193.
45. See *Figueroa v Canada (Attorney General),* 2003 SCC 37.
46. *Reference re Provincial Electoral Boundaries (Sask),* [1991] 2 SCR 158, 81 DLR (4th) 16.
47. *Divito v Canada (Public Safety and Emergency Preparedness),* 2013 SCC 47 at para 18.
48. See *Canadian Egg Marketing Agency v Richardson* (1997), [1998] 3 SCR 157, 166 DLR (4th) 1.

This vulnerability is a relevant consideration when assessing the merits of citizenship acquisition rules. Citizenship law directly affects capacity of individuals to claim rights under the *Charter.* Citizenship also entails some forms of preferential treatment from the state.[49]

The Act guarantees the same rights to all citizens flowing from their status.[50] Generally, one does not lose their rights against the Canadian state due to changes in residence. In striking down the provisions of the *Canada Elections Act* that barred Canadians living abroad for more than five years from voting in *Frank v Canada*,[51] Chief Justice Wagner wrote for the majority that:

> …the world has changed. Canadians are both able and encouraged to live abroad, but they maintain close connections with Canada in doing so. The right to vote is no longer tied to the ownership of property and bestowed only on select members of society. And citizenship, not residence, defines our political community and underpins the right to vote.[52]

This passage highlights the degree to which citizenship, as a legal category, is intended to ensure formal equality among members of the community.

II. *The first-generation limitation: citizenship by descent and Canadians abroad*

1. *Canadians abroad*

Limitations to citizenship by descent can potentially have a significant impact given the quantity of Canadians living abroad. Determining exactly how large the Canadian population is globally can be difficult, as the Government of Canada does not keep exact statistics on this point. The Asia Pacific Foundation released a report in 2009 that estimated approximately 2.8 million Canadians living abroad as of 2006.[53] This report represented, at the time, nine per cent of Canadians.[54] According to this estimate, the country with the most Canadian expats is the United States, with a population of one million.[55] A travel guide for Canadians

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49. See *Lavoie v Canada*, 2002 SCC 23 (favouring citizens in federal public service hiring practices is a justifiable breach of s 15 equality rights).
50. See *Citizenship Act, supra* note 23, s 6.
51. See *supra* note 31.
52. *Ibid* at para 35.
53. See Don DeVoretz & Kenny Zhang, "Canadians Abroad: Canada's Global Asset" (2011) at 3, online (pdf): *Asia Pacific Foundation of Canada* <www.asiapacific.ca/sites/default/files/canadians_abroad_final.pdf> [perma.cc/YZ5G-SGFA].
54. *Ibid*.
55. *Ibid* at 4.

released by Global Affairs Canada in 2013 references "about three million Canadians" living abroad.[56]

Estimating precisely how many Canadians born abroad are deprived of citizenship by the limitation is also difficult. In a brief submitted to the Standing Committee on Citizenship and Immigration during debates on Bill C-6, the Canadian Expat Association estimated that roughly 50,000 potential Canadians are born abroad each year, and that somewhere between 4109 and 57,190 children of Canadians had been deprived of citizenship between 2009 and April 2016.[57] These numbers are approximate, but it would appear safe to assume that the 2009 amendments restricting the transmission of Canadian citizenship to second and subsequent generations affected thousands.

2. *Bill C-37*

Jus sanguinis is now more restrictive than it has been since citizenship's creation in Canada, largely due to Bill C-37, *An Act to amend the Citizenship Act*. The Bill repealed the requirement that Canadians born abroad apply for citizenship retention by age 28. Bill C-37 did not affect those who already had citizenship when that the law came into force in 2009. Individuals who were the second or subsequent generation born abroad and were citizens at the time the provision came into force, but had not yet applied for citizenship retention, remained Canadian citizens.[58]

The first-generation limitation was intended to address the unlimited transmission of citizenship to successive generations born abroad who lack a substantive connection to Canada. It appeared to have been motivated by a view that the indefinite transmission of citizenship by descent pursuant to *jus sanguinis* would arbitrarily include as citizens individuals with only a tenuous or superficial link to Canada.[59] There were clearly very practical and, indeed, political concerns at play as well. For example, the

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56. See *Living Abroad: A Canadian's Guide to Working, Studying, Volunteering or Retiring in a Foreign Country*, (2013) at 2, online (pdf): *Global Affairs Canada* <travel.gc.ca/docs/publications/living_abroad-en.pdf> perma.cc/3DZV-VJGF].

57. See Randall Emery & Allan Nichols, "Welcoming Canadians Home, Embracing Global Opportunities" (2016) at 11-12, online (pdf): *House of Commons* <www.ourcommons.ca/Content/Committee/421/CIMM/Brief/BR8221904/br-external/CanadianExpatAssociation-e.pdf > [perma.cc/ULJ9-YRH6].

58. Penny Becklumb, "Bill C-37: An Act to Amend the Citizenship Act (Legislative Summary)" (9 January 2008, revised 26 February 2008) at 10, online (pdf): *Library of Parliament* <publications.gc.ca/collections/collection_2008/lop-bdp/ls/392-591-1E.pdf> [perma.cc/VW89-JZT5].

59. The acquisition of citizenship by descent without a substantial connection to the country has often been criticized: see the discussion of the nuances by Joseph H Carens, "In Defense of Birthright Citizenship" in Sarah Fine & Lea Ypi, *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford: Oxford University Press, 2016) at 215-221 [Carens, "In Defense of Birthright Citizenship"].

Canadian Government intervened in 2006 to aid Canadian citizens fleeing war in Lebanon, through an operation that cost an estimated $85 million.[60] The media at times characterized these individuals in a negative light as "citizens of convenience," implying they were benefitting from their status as citizens without paying taxes[61] or maintaining a "significant attachment" to Canada.[62] The first-generation limitation was also introduced within a years-long period of harsher citizenship rules overall, including around citizenship revocation.[63]

3. *The 2014 and 2017 amendments*

Bill C-37 was followed by two significant amendments to the Act in 2014 and 2017. Bill C-24, *An Act to Amend the Citizenship Act and To Make Consequential Amendments to Other Acts*, came into force in 2014.[64] The legislation was controversial[65] and was repealed almost entirely by amendments in 2017 by a new government. Bill C-24 expanded the exception to the first-generation limitation to the grandchildren of individuals working in the Canadian public service abroad.[66] In 2017, Parliament passed Bill C-6, *An Act to Amend the Citizenship Act and to Make Consequential Amendments to Another Act*, under the Trudeau government elected in 2015.[67] It repealed most, though not all, of the changes to the *Citizenship Act* resulting from Bill C-24.[68] Bill C-6 added statelessness as grounds for special case grants of citizenship partly in response to fears around the application of the strict first-generation limitation.

60. See "Lebanon evacuation cost $85-million: report," *The Globe and Mail* (19 September 2006), online: <www.theglobeandmail.com/news/national/lebanon-evacuation-cost-85-million-report/article1103709/> [perma.cc/SK28-GC5K].

61. *Ibid*.

62. *Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology*, 39-2, Committee Meeting 15, Issue 5 (10 April 2008) (The then-Minister of Citizenship and Immigration Canada emphasized citizenship as requiring "significant attachment").

63. See Audrey Macklin, "Citizenship Revocation, the Privilege to Have Rights, and the Production of the Alien" (2014) 40:1 Queen's LJ 1.

64. SC 2014, c 22 [*Strengthening Canadian Citizenship Act*].

65. Liew & Galloway, *supra* note 18 at 439.

66. *Strengthening Canadian Citizenship Act, supra* note 64, s. 2(12).

67. *An Act to Amend the Citizenship Act and to Make Consequential Amendments to Another Act*, SC 2017, c 14.

68. For a detailed analysis on this point, see Julie Bechard & Sandra Elgersma, "Legislative Summary: Bill C-6: An Act to amend the Citizenship Act and to make consequential amendments to another Act" (8 March 2016, revised 8 February 2018), online (pdf): *Library of Parliament* <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/C6-e.pdf> [perma.cc/H7DN-N3YB].

III. *Assessing the first-generation limitation*

With the development and context provided by the previous sections in mind, this section analyzes how the first-generation limitation fits within theories of citizenship acquisition. In our view, while there is a solid argument against expansive *jus sanguinis* including indefinite transmission through one's parents, the first-generation limitation as currently formulated is overly restrictive.

1. *Indefinite transmission?*

While a complete canvassing of citizenship theory is beyond the scope of this article, we summarize two different theoretical viewpoints here that are each skeptical to varying degrees of indefinite transmission. The first by Joseph Carens relies upon *jus soli* and *jus sanguinis* to reject indefinite transmission but to support the acquisition of citizenship at birth to children born abroad to Canadian nationals where a connection to the country can reasonably be assumed. The second by Ayelet Shachar set *jus sanguinis* and *jus soli* aside in favour of the principle of *jus nexi.* This approach also rejects indefinite transmission by descent, but would allow connection to be established in individual cases so as to justify acquisition. While there are nuances across the varying citizenship theories available, these two approaches are particularly useful to highlight for showing how the first-generation limitation as currently constructed fits or fails to fit with the demands of justice.

2. Jus sanguinis *and* jus doli *and the first-generation limitation*

First, Joseph Carens has expressed doubts about indefinite transmission from parent to child.[69] Carens simultaneously argues in favour of automatic acquisition of citizenship at birth for children of long-term residents.[70] For him, *jus sanguinis* and *jus soli* are not mutually exclusive and are both relevant considerations. Carens claims that citizenship acquisition at birth is just as i) there is good reason to entitle someone to citizenship in the polity in which they have significant social and political ties and ii) one's birth location *or* parental nationality are legitimate proxies for a baby's likely and eventual socio-political connections.

Carens claims that where a parent was born abroad and spent little or no time in the country of which they are a national, an assumption that

69. Carens, "In Defense of Birthright Citizenship," *supra* note 59 at 215-222.

70. Contrary to Carens, some scholars of course challenge the legitimacy of any acquisition of citizenship at birth. See Bosniak, "Critical Reflections," *supra* note 1. Bosniak acknowledges that such a view puts theorists in the uncomfortable position of arguing against policies, such as *jus soli* citizenship rules in the Americas, that generally work to the advantage of otherwise vulnerable residents.

their child does or will have a connection to that country is unconvincing.[71] The child's acquisition of citizenship at birth is therefore unjustified, on this view. However, he also claims that if the parent has spent a reasonable amount of time in the country, then there is a strong claim that parental nationality is a solid proxy for a baby's likely social and political ties. Descent is not the only basis for citizenship acquisition in his theory, but it is an important factor for a just citizenship regime. For Carens, both unlimited transmissions by descent or a rigid bar against transmission to the children of parents living abroad are unpersuasive.

Applying Carens' approach, the first-generation limitation as it exists is unduly restrictive. It prevents unlimited transmission by descent, which Carens accepts as legitimate, absent a real connection or a reasonable and reliable proxy. By preventing acquisition at birth even where a real connection exists or is likely to develop, however, the current rules violate his approach to the just transmission of citizenship. Parental nationality is a useful proxy for Carens of the likely or actual connections of the child. In our view, Carens' account encourages us to see the first-generation limitation as overly rigid and lacking a contextual assessment of an individual's actual or likely connection to Canada. The rule does not provide for any exceptions, even to those that could demonstrate a genuine connection or, on Carens' account, be presumed to have one.

Parliament's incorporation of an exception for members of the public service working abroad is a key point to consider. It indicates a legislative understanding that some offspring excluded by the limitation ought not to be because their parents maintain a close connection to Canada. The exception eliminates any harm caused by the rigid rule for public servants. It would be incongruous if they lost access to certain rights of citizenship, including transmission to their children, because of the service they undertake for their country. While relevant, the fact that one's parents worked for the Canadian public service abroad does not necessarily indicate a greater connection to Canada than other factors might. At its root, the exception shows the arbitrariness in using the parent's method of acquiring citizenship at birth as a relevant criterion for the child's claim.

3. Jus nexi *and the first-generation limitation*

Second, the theoretical basis for a first-generation limitation of some kind can also be found in the writings of scholars who advocate for *jus nexi* as a more principled and coherent alternative to *jus soli* or *jus sanguinis*. These scholars claim that citizenship acquisition should be calibrated not

71. Carens, "In Defense of Birthright Citizenship," *supra* note 59 at 215-222.

to "formal criteria," but "functional and pragmatic" ones.[72] Ayelet Shachar argues, for example, that *jus soli* and *jus sanguinis* are arbitrary in the sense that they both determine citizenship on the basis of specific factors related to an individual's birth.[73] Linda Bosniak critiques *jus soli* and *jus sanguinis* on a similar basis.[74] Circumstances of birth do not necessarily, on their own, correspond to any predictable or coherent facts about the individual that should be relevant for citizenship acquisition.

Jus soli and *jus sanguinis* on Shachar's view are poor proxies. They are under-inclusive for excluding some individuals with a genuine connection to Canada, such as a "resident stakeholder" "who participates in the life of the polity but lacks citizenship."[75] They are over-inclusive for counting the "nominal heir" born abroad as eligible for "birthright membership" through descent.[76] While the claim by advocates of *jus nexi* is against both *jus soli* and *jus sanguinis,* the particular critique of *jus sanguinis* is relevant for our purposes. Shachar would exclude on the basis of *jus nexi* the second generation born abroad[77] or, more broadly, a child born abroad to parents who have long lost their ties with their country of origin.[78] Shachar and others endorsing the principle of *jus nexi* would favour the resident stakeholder over the nominal heir.[79] Their approach would expand the opportunities to acquire citizenship for non-citizen residents of Canada, but decrease the automatic transmission of citizenship for the children born abroad of non-resident citizens.

The preferred approach of *jus nexi* advocates is to end indefinite transmission by descent and instead calibrate citizenship acquisition to "actual, real, and genuine connection."[80] Here Shachar's approach is much more detailed than Carens and searches for actual connections rather than proxy measures such as parental nationality. According to Shachar, indicators of such a connection include travel, residency, financial links such as remittances, which languages are spoken or "intercultural and political exchange."[81] These criteria are elements that gesture toward the elusive determination of whether a sufficient connection exists between the

72. Song, "Rethinking Citizenship," *supra* note 4 at 15.
73. Shachar, *supra* note 5 at 165.
74. There is a resonance here with Linda Bosniak's argument in Bosniak, "Critical Reflections," *supra* note 1 at 343.
75. Shachar, *supra* note 5 at 165.
76. *Ibid.*
77. *Ibid.*
78. *Ibid* at 116, 122.
79. Song, "Rethinking Citizenship," *supra* note 4 at 15-16.
80. Shachar, *supra* note 5 at 165, 183.
81. *Ibid* at 173.

individual and the country. In some circumstances, they will undoubtedly be *less* arbitrary and more principled indicia of connection than facts of birth and descent.

Critics of *jus nexi* have argued that it might actually end up being less attractive than the alternatives if applied exclusively and ousting *jus sanguinis* and *jus soli* entirely. Noah Novogrodsky emphasizes that a genuine connection would have to be established by some bureaucratic process.[82] The introduction of discretion within the bureaucracy around citizenship acquisition, rather than the clear rule of *jus sanguinis,* would inevitably be intrusive. It might even open up the process to manipulation for exclusionary or ethno-national concerns around who is perceived as a desirable would-be citizen.[83] While this is certainly not the intent of *jus nexi* scholars, it may be a real-world consequence during a period of democratic decline and a resurgence of exclusionary ethno-nationalism globally.[84]

Sarah Song argues that whatever its flaws, the venerable tradition of *jus soli* is likely to be less intrusive or prone to abuse than *jus nexi* in some contexts. She particularly points to the possible acquisition of citizenship by children born to irregular migrants as a poignant example.[85] Patrick Weil claims that *jus nexi* would destabilize the status of many individuals who at present more easily qualify for citizenship under *jus soli* or *jus sanguinis* around the globe. Presentation of a birth certificate would no longer suffice pursuant to *jus soli.*[86]

Weil also argues that the limitation of *jus sanguinis* by excluding the "descendants of expatriates"[87] misunderstands how citizenship functions. Citizenship is not just intended to *reflect* connection, but it also *generates* it. He argues that "exclusion of the descendants of expatriates from citizenship contradicts a new trend: an alliance between the emigrant, his or her descendants and their state of origin, reflective of new links between the individual and the nation-state in a globalized world. New technologies make greater, for the individual, movement within and

82. Novogrodsky, *supra* note 15.
83. Linda Bosniak, "Status Non Citizens" in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad & Maarten Vink, eds, *The Oxford Handbook of Citizenship* (Oxford: Oxford University Press, 2017) at 322-323; Bosniak, "Critical Reflections" at 343, 349. See generally Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2006).
84. See e.g. the case of Hungary: "A Coup Against Constitutional Democracy: The Case of Hungary" in Mark Graber, Mark Tushnet & Sanford Levinson, eds, *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018).
85. Song, "Rethinking Citizenship," *supra* note 4 at 16.
86. Weil, "Secured and Sovereign," *supra* note 1 at 628.
87. *Ibid* at 628.

across borders and, for the state, the expansion of its network."[88] Weil is arguing that in searching for a single, just principle by which to shape citizenship acquisition, *jus nexi* advocates end up with too narrow a vision for citizenship under globalization.

Our goal is not to attempt to resolve the debate about the relative merits of *jus sanguinis, jus soli,* or *jus nexi* as the preeminent principle by which to guide citizenship acquisition. We do not wish to elevate one principle to the exclusion of others. In our view, the harm caused by the first-generation limitation in its current form to individuals likely to have or develop real connections to Canada is excessive and needs reform. Carens, Shachar, and others have highlighted the lack of justice in the indefinite transmission of citizenship by parents to their children born abroad. Assuming that there are likely limits on citizenship by descent, the main issue in our assessment is the mechanisms by which connection can be assumed or proven so that citizenship is acquired on just terms by children born abroad to Canadian citizens. Both Carens and Shachar's work, in our view, implies that the first-generation limitation as formulated needs reform.

IV. *International comparisons*

The restrictiveness of the first-generation limitation is brought to light by comparison with the equivalent rules in comparable jurisdictions. Accordingly, this section considers how the United Kingdom, Australia, New Zealand, the United States, Germany, France, and Switzerland address the same issue. The countries have been selected due to either a similarity with Canada's regime or due to their notable *jus sanguinis* rules.

Most of the countries considered in this section have limitations on citizenship by descent, though there is a range between more and less restrictive access. Many have variants of a first-generation limitation. The legislative schemes also tend to contain a degree of flexibility. New Zealand is the only surveyed jurisdiction which limits citizenship by descent to the first generation born abroad without a procedure for second or subsequent generations to acquire citizenship.[89] France, on the other

88. *Ibid*.
89. *Citizenship Act 1977* (NZ) 1977/61, s 7; Kate McMillan & Anna Hood, "Report on Citizenship Law: New Zealand" (2016) at 9, online (pdf): *EUDO Citizenship Observatory* <cadmus.eui.eu/bitstream/handle/1814/42648/EUDO_CIT_CR_2016_09.pdf?sequence=1&isAllowed=y> [perma.cc/TDE6-RQXK].

hand, does not place any limits on *jus sanguinis*.[90] The United Kingdom,[91] Australia,[92] the United States,[93] and Germany[94] have a means for children born abroad to acquire citizenship at birth or by application if their parents are able to demonstrate a connectedness to the country of origin. Germany and the United States grant citizenship automatically if parental residency requirements are met at the time of the child's birth. The United Kingdom and Australia provide an application process based on parental residency. The periods of residency stipulated in these regime's requirements tend to be modest. Other countries in the sample allow for citizenship by descent with what can be described as time-limited procedural requirements. Switzerland[95] and Germany[96] allow parents to transmit citizenship to children born abroad so long as the birth is registered, or a retention application is made by the time the offspring reaches a certain age.[97]

Canada's rules on the transmission of citizenship abroad are generally more restrictive than in the other countries under comparison. Canada stands out in this sample as lacking a legislative scheme that enables people born abroad in the second or subsequent generation to demonstrate their connectedness to Canada and become citizens at birth or by a grant.

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90. Christopher Bertossi & Abdellali Hajjat, "Country Report: France" (2013), online (pdf): *EUDO Citizenship Observatory* <cadmus.eui.eu/bitstream/handle/1814/19613/RSCAS_EUDO_CIT_CR_2013_04.pdf?sequence=3&isAllowed=y> [perma.cc/XN5Z-4ZKS].

91. See generally Gina Clayton, *Oxford Textbook on Immigration and Asylum Law*, 4th ed (Oxford: Oxford University Press, 2016) at 73-75, 80.

92. Rayner Thwaites, "Report on Citizenship Law: Australia" (2017) at 19, online (pdf): *GlobalCit* <cadmus.eui.eu/bitstream/handle/1814/46449/RSCAS_GLOBALCIT_CR_2017_11.pdf?sequence=1> [perma.cc/7589-F6CB]; Sangeetha Pillai, "The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis" (2014) 37:3 Melbourne UL Rev 736 at 746; *Australian Citizenship Act 2007,* s 16.

93. Peter J. Spiro, "Interrogating Birthright Citizenship" (2013) in Austin Sarat, ed, *Special Issue: Who Belongs? Immigration, Citizenship, and the Constitution of Legality*, Studies in Law, Politics, and Society: vol 60 (Bingley, UK: Emerald Group, 2013); David A Isaacson, "Correcting Anomalies in the United States Law of Citizenship by Descent" (2005) 47:2 Arizona L Rev 313.

94. Martin Weinmann, "Cutting the Ties? Generational Limitations in Canada's and Germany's Citizenship Laws" (2017) 11:1 Rev European & Russian Affairs 1 at 5.

95. Alberto Achermann et al, "Country Report: Switzerland" (2013) at 4, online (pdf): *EUDO Citizenship Observatory* <cadmus.eui.eu/bitstream/handle/1814/19639/RSCAS_EUDO_CIT_2013_23.pdf?sequence=3&isAllowed=y>[perma.cc/Q3HX-VHCN]; *Federal Act on the Acquisition and the Loss of Swiss Citizenship,* September 1952, Art 9

96. Kay Hailbronner, "Country Report: Germany" (2010) at 8, online (pdf): *EUDO Citizenship Observatory* <cadmus.eui.eu/bitstream/handle/1814/19614/Germany.pdf?sequence=1&isAllowed=y> [perma.cc/VTR6-RE2W].

97. The process is similar in Belgium: Marie-Claire Foblets et al, "Country Report: Belgium" (2013) at 4-6, online (pdf): *EUDO Citizenship Observatory* <cadmus.eui.eu/bitstream/handle/1814/19603/RSCAS_EUDO_CIT_2013_27.pdf> [perma.cc/ZG67-Y3L7]; *Code de la Nationalite Belge*, (Belgium), art 8(2)(c).

Country	**First Generation Limitation**	**Exceptions for Children**	**Test to Meet Exception 2nd Generation**	**Test to Meet Exception for 3rd Generation**
Canada	Yes	No	Regular naturalization	Regular naturalization
USA	Residency requirement based on citizenship of parents and marriage status	Parental residency and spousal status	Parental residency on sliding scale based on citizenship of parents and marriage status	N/A
UK	Yes	Acquisition by registration;	3 consecutive years of parental residency without 270 outside	Residence in UK by parents for 3 consecutive years immediately prior to application
Australia	Yes; no automatic citizenship by descent	No application requirements	2 years of parental residency	Same as second generation
NZ	Yes	Application	Exceptional or special circumstances	Same as second generation
France	No; indefinite *jus sanguinis*	N/A	N/A	N/A
Germany	No	N/A	Parental residency or birth registration	Parental residency or birth registration
Switzerland	No	Birth registration and submission of declaration	Birth registration and submission of declaration	Birth registration and submission of declaration

V. *Options for reform*

This section considers the most plausible options for reforming the citizenship by descent regime in light of the preceding sections on the history, comparison, principles of citizenship acquisition, and scholarship. This article has identified several features of the first-generation limitation that need to be addressed by any successful reform. The rule is overly rigid

in restricting *jus sanguinis* while providing no safety valve for instances where the limits on transmission by descent result in under-inclusion. The first-generation limitation assumes descent is an insufficient indicator of connection to Canada, but does not provide a process for demonstrating a genuine link to the country. It imposes a cost on Canadians seeking to work or study abroad. Finally, the differences within the category of "citizen" that it introduced lead to legitimate claims of tiered or semi-citizenship. This section specifically considers a parental residency exception, an adapted naturalization application, and a birth registration exception as reforms that would address these deficiencies in the current law.

1. *Parental residency exception*

One of the available options to amend the citizenship by descent regime is to legislate an exception if a parent who is a citizen by descent has lived in Canada for a certain period of time. Such a proposal would be broadly consistent with Carens' framework. This reform would further the goal of ensuring citizens born abroad have a substantial link while also not excluding offspring of parents who have demonstrable connections to Canada. One way of viewing such an exception is that it combines *jus sanguinis* and *jus nexi.* It limits *jus sanguinis,* presumably on the basis that descent is an imperfect proxy for connection, but allows evidence of a specific type of connection to satisfy the need for a genuine relationship between the individual and the country required by *jus nexi.* Rather than relying on a proxy, such an approach defines specifically what a real connection is and how it is to be proven.

Beyond the specific context of the first-generation limitation, residency or physical presence requirements are frequently used as a legitimate way to determine connection to Canada for various purposes. Residency is viewed as an effective means of ascertaining connectedness in the naturalization regime, for example.[98] Some taxation obligations also depend on residence and calculations of the time of physical presence.

A parental residency-based exception to the first-generation limitation is a viable option in Canada. Ensuring a connection to Canada is an emphasized benefit of the limitation which would not be lost under this proposed legislation. A test of time in the country is also much less intrusive than other potential measures to establish a genuine connection that would seem necessary, according to advocates of *jus nexi.* If *jus sanguinis* is

98. UK, HC Deb (10 March 2016), vol 147, 42-1, no 30 at 1330 (Tony Clement). M.P. Tony Clement stated in 2016 debates on Bill C-6 in the context of naturalization requirements that "[o]n this side of the House, we believe that stronger residency requirements do promote integration, a greater attachment to Canada, and ultimately success in our great country."

based on the assumption that descent is a proxy for connection, then actual time in the country would seem to be at least as functional a substitute.

The rules in comparable countries suggest that the period of physical presence required ought to be modest. A one to six-year residency requirement appears appropriate. The requirements could increase based on how many generations removed the child is from an ancestor born in Canada, similar to the increased stringency of requirements in the United Kingdom. For example, the required parental residency could be longer for a third-generation offspring born abroad than a second. Requiring that a portion of these years occur after adolescence—as is done in the United States in some circumstances—is also viable. Maintaining modest presence requirements in some form would avoid excluding the children of parents who remain connected to the country.

The drawbacks to this regime are similar to the first-generation limitation in place. Both places of birth and residency are not necessarily perfect measures for connection to Canada. As pointed out by advocates of *jus nexi,* any formal test rather than a holistic assessment of genuine connection is likely to be arbitrary to some extent and to be both over-and under-inclusive in specific instances. Some individuals may be involved in Canadian organizations abroad and have an identity associated with the country without the required domestic physical presence period. As a result, adopting this rule may exclude some individuals who have not lived in Canada, but retain a significant connection to it. There would also still be disincentives for some to pursue international careers or studies.

2. *Adapted naturalization application*

Another feasible option is to provide a means for second or subsequent generation individuals to apply for a grant of citizenship with less onerous requirements than under the general procedure. This option recognizes the pre-existing relationship to Canada that the applicant has through their parentage. As well, it acknowledges the long-standing role of *jus sanguinis* in Canada and the relevance of descent in proving a connection.

Member of Parliament Jenny Kwan proposed a version of this in a private member's bill.[99] Bill C-333 proposed allowing for citizenship by descent where an applicant demonstrates their parent has a "substantial connection" to Canada, and the applicant has spent 1,095 days in Canada or demonstrates a substantial connection to the country. What is notable about this proposal is that it places the burden of physical presence or

99. Bill C-333, *An Act to Amend the Citizenship Act and the Immigration and Refugee Protection Act (Granting and Revoking of Citizenship)*, 1st Sess, 42nd Parl, 2016.

substantial connection on the applicant's offspring rather than exclusively on the citizen parent, as is the case in the United Kingdom and Australia. The three-year residency requirement in C-333 for the grant process (1095 days) is not overly arduous. As it partially replicates the existing grant requirements, it appears to be an accepted period of time for one to establish a connection to Canada, although C-333 would waive the requirement of pre-existing permanent residency. It would also waive the requirement that the days of physical presence be in the three years *directly prior* to the application.

Placing residency burdens on the applicant is comparable to the modified *jus soli* systems in Australia and France, which entitle someone born in the country to citizenship after certain residency periods. The length requirements in C-333 would have been longer than those in Australia, but are identical to those in the United Kingdom. While Bill C-333's approach has merit, it is arguably too strict. Requiring both the parent and the child to demonstrate a substantial connection (or, physical presence, in the child's case) is too stringent. A reasonable solution would be to require *either* the parent or the offspring to demonstrate a physical presence or substantial connection in lieu. This brings the amendment more in line with the international examples.

Such an approach would need to define the meaning of a parent's "substantial connection." In defining a "substantial connection," the challenge would be to avoid being overly intrusive or, worse, permitting abusive procedures of the kind warned about by critics of the tests for a genuine connection flowing from the *jus nexi* principle. Moreover, if poorly implemented, it could potentially introduce criteria that are unfair or biased, as Novogrodsky, Song, and Weil warn against.

The pre-2009 rules require a "substantial connection" and set out criteria, but they may be too limited to re-introduce today. Some of the manners of demonstrating connectedness would benefit from expansion to acknowledge the various ways in which a Canadian can retain a substantial connection to the country. For example, the former regulations identified someone who has worked for the Canadian Government in some capacity as maintaining a substantial connection. This could be expanded to include working for a Canadian NGO, company, or organization. As this proposal does not exclude applicants over 28, it would be fruitful to add criteria that are less targeted towards youth than the pre-2009 rules.

One potential criticism of the adapted naturalization application is that it enables people to apply for citizenship at any point in their lives. Some people may take advantage of this system by acquiring citizenship while never spending more than a few months in Canada consecutively.

As is the case in the general grant procedure, adding a consecutive period requirement, or a maximum age for applicants would solve these issues. Excluding an age requirement is likely prudent, however, in light of the noted difficulty the government has in communicating deadlines to those at risk of not meeting them.

3. *Birth registration exception*

A further option would be to add in a birth registration exception. Some countries, such as Germany and Belgium, allow for citizenship by descent so long as the child's birth is registered with the appropriate authority of the country within a certain time frame, or similarly that the parent submits a declaration of intent for the offspring to gain citizenship. This option accommodates those wishing for their children to become citizens. As a result, a benefit of this regime is the parents who retain a connection to the country are likely to be able to pass on Canadian citizenship to their children. Connection is partially demonstrated by the parent turning their mind to the necessary procedure. Further, it would solve the issue of statelessness flowing from the limitation.

A significant issue in this possible reform is that it may not adequately address the issues of over- and under-inclusion. For example, knowledge of a country's citizenship laws is an indirect measure for connectedness. It may serve to ensure that politically and legally aware people are able to pass on their citizenship to offspring born abroad if they so please, but unintentionally discriminate against people who lack knowledge and resources. Similar measures have also been criticized in Canada due to generally low awareness of the rules. The limited timeframe, then, risks excluding interested applicants. Despite these drawbacks, it would be an improvement over the existing rigidity of the first-generation limitation.

Conclusion

This article has evaluated the first-generation limitation in Canadian citizenship law. The indefinite transmission of citizenship by descent raises challenges for a legal regime underpinned by an emphasis on connection to Canada. The restrictions on *jus sanguinis* were controversial at their introduction in 2009 and despite softening at the edges as a result of 2017 amendments, remain so today. It seems likely that under the current rules, individuals with Canadian parents and substantial connections to the country are being arbitrarily excluded. There are a variety of potential reforms which, in our view, would improve Canadian citizenship laws, including a parental residency exception, an adapted naturalization process, and/or a birth registration exception. None of these options can fully square the circle of how to balance a need for a connection with a

just and legitimate form of *jus sanguinis* under Canadian immigration law. They each have flaws, but ultimately would be preferable to the current law.