

## **Residency Obligations for Permanent Residents of Canada**

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### **Introduction**

In order to board commercial transportation when returning to Canada, permanent residents are now required to obtain a permanent residence card or a travel document. In order to obtain the permanent resident card or travel document, the applicant will be required to demonstrate that he or she has complied with the residency obligations of the Immigration and Refugee Protection Act (“the Act”).

Travelling to Canada by *private* transportation will not require the use of the permanent resident card nor travel document. Other evidence of permanent resident status will be sufficient (i.e. the Record of Landing or the Confirmation of Permanent Residence document). For example, if one were to enter Canada by travelling in a private car across the border from the United States, then neither a permanent resident card nor travel document will be required, although having a permanent resident card creates a presumption that the person has the status of a permanent resident (A31(2)(a) and R53(1)).

The residency obligations under the Act replace the previous system under which it was usually recommended that permanent residents remain in Canada at least half of the time (this was commonly known as the “183-day rule,” although strictly speaking there was actually no such rule).

Refer to A27-28, A31-32, A44-46 and A63 for the main sections of the Act that relate to residency obligations for permanent residents. Similarly refer to R61-62 of the regulations. Finally, look at the Overseas Processing Manual, OP 10, and Enforcement Manual, ENF 23.

### **Obtaining a Permanent Residence Card or Travel Document**

An application for a permanent resident card will normally be made at that time when a person becomes a permanent resident (i.e. when using his or her permanent resident visa). The card will be processed and sent to the Canadian address provided by the immigrant. It takes 3-4 weeks for this card to be issued. If no address is provided upon entry then the immigrant can only apply for a permanent residence card once he or she obtains a Canadian address. This application takes 8-10 weeks to be processed and the card will not be sent by mail – it must be picked up in person in Canada. Only the application made at the border can be mailed because at that time the applicant’s identity is confirmed. All other applications are sent by mail and identity is confirmed when the card is picked up at a local Canada Immigration office. The cards are typically valid for five years, thus providing a regular opportunity for Canada Immigration to review whether residency obligations are being fulfilled.

### **Residency Obligations**

To retain status, permanent residents of Canada are required to comply with the residency obligations over a five-year period. If a permanent resident does not comply with the residency obligations they will be at risk of losing their permanent resident status and removal from Canada (or denial of entry).

The following provisions are from section 28 of the Act:

- (1) A permanent resident must comply with a residency obligation with respect to every five-year period.*
- (2) The following provisions govern the residency obligation under subsection (1):*
- (a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are*
- (i) physically present in Canada,*
  - (ii) outside Canada accompanying a Canadian citizen who is their spouse or common law partner or, in the case of a child, their parent,*
  - (iii) outside Canada employed on a full-time basis by a Canadian business or in the public service of Canada or of a province,*
  - (iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the public service of Canada or of a province, or*
  - (v) referred to in regulations providing for other means of compliance;*
- (b) it is sufficient for a permanent resident to demonstrate at examination*
- (i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident;*
  - (ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination;*
- and*
- (c) a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of permanent resident status overcomes any breach of the residency obligation prior to the determination.*

In this paper I refer to the days outlined in A28(2)(a) as “qualifying days,” whether or not they are days of actual physical presence or not. To meet ones residency obligations one must accumulate 730 qualifying days. Failing that, the person will be in breach. Upon a determination that a person is in breach of their obligations, he or she will need to resort to humanitarian and compassionate considerations in order to overcome the breach.

The simplest way to comply with the residency obligations is to actually be physically present in Canada for 730 days (normally two years) within the previous five years. As indicated, above:

- A28(2)(a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are*
- (i) physically present in Canada,*

A28(2)(a) also outlines several alternative scenarios where the 730 qualifying days can be accumulated without physical presence in Canada. These will be outlined in greater detail in the paper to be presented by David Bruner of *Hoppe Bruner*. A28(2)(c) provides that humanitarian and compassionate considerations may repair a breach. The criteria for these will be outlined in the paper to be presented by Gregory Willoughby of *McKenzie Lake, LLP*.

When calculating days, if any part of one day is spent inside Canada, then that day is counted as a full qualifying day. The Enforcement Manual, chapter ENF 23, indicates the following at section 6.4:

- For the purpose of calculating the number of days to comply with the residency obligation in A28(2)(a), a day includes a full day or any part of a day that a permanent resident is physically present in Canada. Any part of a day spent in Canada, or otherwise in compliance with*

*A28(2)(a), is to be counted as one full day for the purpose of calculating the 730 days in a five-year period.*

Therefore an applicant should include departure dates and arrival dates when calculating the dates he or she is physically inside Canada. Arrival in Canada at 11:59 pm immediately counts as one full day in Canada.

### **Residency Obligations during the First Five Years**

As indicated, within the first five years of permanent residence a permanent resident will need to accumulate at least 730 qualifying days in order to comply with the residency obligations. During the first three years of permanent resident status, it is not possible to be found in violation of residency obligations as long as the permanent resident can demonstrate they will be able to meet the residency obligation within those five years. That is usually easy to demonstrate because at any time during those first three years the person has at least 730 days remaining in those five years and therefore can yet accumulate 730 qualifying days and meet residency obligations. For example, they could simply return to Canada and remain in Canada for the final two years (730 days), thus fulfilling the residency obligations:

*A28(2)(b) it is sufficient for a permanent resident to demonstrate at examination  
(i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident;*

Note: If a permanent resident waits until the final possible day before returning to Canada then he or she must ensure that the next two years are filled with qualifying days in order to comply with the requirement of having 730 qualifying days during those first five years.

Note: Furthermore, if a permanent resident waits until the final day before re-entering Canada, he or she runs the risk of flight delays or other problems that might cause him or her to arrive in Canada later than expected. It's possible that one minute late could result in a complete loss of status.

### **Residency Obligations after the First Five Years**

For those persons that have been permanent residents for more than five years, it is sufficient to show that they comply with the residency obligations for the previous five-year period. Time before that, whether inside or outside Canada, will not be considered.

*A28(2)(b) it is sufficient for a permanent resident to demonstrate at examination  
(ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination; and*

This is an important provision for two reasons.

First, it shows that entering Canada and remaining for 730 days can repair any past breaches of residency obligations. But it is also possible to repair the breach of residency obligations from outside Canada. For example, a person that became a permanent resident as a single person might have lived outside Canada for the past five years. As such he or she is in breach of his or her residency obligations, not having accumulated 730 qualifying days in that time (we will assume for the purposes of this example that none of the alternatives to physical presence are applicable). But if that person were to then get married to a Canadian citizen and live with that Canadian citizen outside Canada for the next 730 days, then those 730 days would be qualifying days (see R28(2)(a)(ii)) and at the end of those 730 days they would have repaired the breach of their residency obligations.

Second, the five-year period referred to for residency obligation purposes is always “the five-year period immediately before the examination” (A28(2)(b)(ii)). So the question, then, is when is the examination?

### **Examination of Compliance with Residency Obligations**

Under the former Act examinations could be compelled only at the port of entry. In the new Act the examination process is extended to all applications made under IRPA:

*A15(1) An officer is authorized to proceed with an examination where a person makes an application to the officer in accordance with this Act.*

Therefore, in addition to when a person is applying to enter Canada, an examination can be held when applying to extend temporary status, to sponsor relatives, to obtain a permanent resident card, or any other application.

During an examination the permanent resident is obligated to “answer truthfully all questions put to them for the purposes of the examination and must produce...all relevant evidence and documents...” (A16(1)). It is only *during* an examination that the person is obligated to answer the questions asked. During a port of entry application, R37(a) essentially states that upon application to enter Canada an examination ends only when the person actually leaves the port of entry. Until then they are obligated to answer questions.

However, only applications for a permanent resident card or a travel document can trigger an examination that can compel the permanent resident to disclose information concerning whether he or she meets his or her residency obligations. Only questions that are “for the purposes of the examination” need to be answered by the permanent resident. Note the Enforcement Manual, ENF 4, section 11.4, and in particular the following:

*Port of entry (POE) officers can refuse entry to a permanent resident only when the person has already lost the status or when the conditions set out in A46 are met (such as a final determination has been made that they have failed to comply with residency obligations or when a removal order comes into effect). In other words, once a Canadian permanent resident’s status is established, the person may enter Canada by right and cannot be the subject of further immigration examination.*

*For greater clarity, if an officer has concerns that a permanent resident has not complied with the residency obligation of A28, or is inadmissible on other grounds (such as, criminality), officers are expected to obtain as much information as is considered necessary to support the writing of an inadmissibility report. In such cases, however, when a person’s permanent resident status has been established, it is necessary that officers clearly advise the permanent resident when the examination is concluded and that they are authorized to enter Canada as a permanent resident. Once this has been communicated, the officer may then request the permanent resident to remain to answer questions relating to any other inadmissibility; however, there is no obligation on the part of a permanent resident to do so.*

A permanent resident, upon demonstrating his or her status as a permanent resident, has the right to enter Canada, and that the examination at the port of entry can only *compel* answers to questions that seek to determine whether the person is a permanent resident. Questions about how long they have been out of Canada during the past five years might be asked by the officer and answered by the permanent resident, *but they need not be answered*. It is the permanent resident’s choice. Although immigration officers may tell a person that they must answer such questions, and might insist that they answer such questions, nevertheless, at the end of the examination the officer *must* allow the permanent resident into Canada and these further questions need not be answered.

It should not be under-estimated the amount of pressure that an officer can exert on a permanent resident during such an examination, but without the co-operation of the permanent resident (willing or otherwise) there might be insufficient evidence for the officer to write a well-founded inadmissibility report. How will the officer form the opinion that the person has breached their residency requirements without learning where that person has been for the past five years? That information is certainly not relevant in an examination to determine the status of a person seeking to enter Canada as a permanent resident. The permanent resident can not lose that status, even if in breach of their residency obligations, without a final determination having been made. That final determination cannot be made at the port of entry.

An officer is specifically empowered to write an inadmissibility report where the officer holds the opinion that the person has breached his or her residency obligations (A44), and this may result in the Minister making a decision to issue a removal order. Note the following from the Enforcement Manual, ENF 4, section 11.4:

*In cases where:*

- *permanent resident status is established;*
- *the permanent resident refuses to provide any further information; and*
- *the officer has serious concerns regarding admissibility.*

*officers should report the person (pursuant to A44(1)) if there is sufficient evidence to support an inadmissibility allegation. In the absence of sufficient evidence to support the writing of an inadmissibility report, officers may enter any available information into FOSS (date of entry, last country of embarkation, current address in Canada, etc) and forward notification of same to a CIC office in Canada to determine whether an investigation is warranted. [emphasis added]*

There is a right to appeal this decision (A63(3)(4)). As such, a removal order can result at the port of entry if the officer finds “sufficient evidence to support an inadmissibility allegation.” This leads to the question of whether a lack of evidence (the permanent resident refuses to answer questions) can be sufficient evidence to support an inadmissibility allegation. But even where an inadmissibility report is written and a removal order is issued, the person remains a permanent resident and must at that time be allowed into Canada (although the removal order may one day be enforced and permanent residence status lost).

In summary, at any time a person enters Canada or otherwise makes an application under the Act, a compelled examination can take place and they must answer “all questions put to them for the purposes of the examination” (A16(1)). When entering Canada, permanent residents are not compelled to answer questions that go beyond the determination of their status. Nevertheless, the possibility exists that an inadmissibility report will be written and a removal order issued if the officer forms the opinion that there are reasons to believe that the applicant has breached his or her residency obligations. It is not apparent how any inadmissibility report that is based on the person’s refusal to answer questions could be considered well-founded, but it is also not apparent whether there is any effective means to challenge such decisions. The end result will likely be an appeal to the Appeal Division.

Being able to demonstrate compliance with residency obligations for the most recent five-year period is always the best way to solve any problems at the port of entry, but failing that, and in any event, the permanent resident is not obligated to answer questions about their residency obligations.

## **Summary**

The new residency obligations replace the previous “183-day rule” that effectively required permanent residents to spend most of their time in Canada. The simplest way to comply with the new residency obligations is to actually be physically present in Canada for an accumulative period of 730 days within each and every five-year period, although here are also a number of alternatives to being physically present in Canada.

If a permanent resident fails to comply with the residency obligations of the Act, then it is possible to repair the breach of obligation by entering Canada and remaining until 730 days have accumulated, or by complying with some of the alternatives that allow residency obligations to be met while outside Canada. Discretionary humanitarian and compassionate considerations are also a means to repair a breach.

Finally, permanent residents at a port of entry examination cannot be compelled to answer questions concerning their residency obligations.

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