Date: 20140915

Docket: IMM-1332-13

Citation: 2014 FC 874

Ottawa, Ontario, September 15, 2014

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

RAJENDRA GOVIND DURVE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review addresses the residency requirements for permanent residents prescribed by section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and their application to permanent residents who spend periods of time out of Canada working for their own business. The applicant, Rajendra Govind Durve, seeks judicial review of the decision of the Appeal Division of the Immigration and Refugee Board of Canada (the

"Board") dated January 28, 2013 which found that he had failed to comply with the residency requirements and which upheld the decision to not renew his permanent resident status.

Overview

[2] Mr Durve, a citizen of India, landed in Canada in 2002 and was later granted permanent resident status. He incorporated a business best described as a "one-man operation" in Ontario in 2004. He frequently travelled to India and other countries for significant periods of time. In May 2009, Citizenship and Immigration Canada did not renew his permanent resident card because he failed to meet the residency requirement of 730 days in Canada in a five year period. The Board upheld that decision. In *Durve v Canada (Citizenship and Immigration Canada)*, 2011 FC 995, [2011] FCJ No 1226 [*Durve #1*], the Court allowed the judicial review and remitted the appeal back to the Board for a new hearing (*de novo*).

[3] The Board conducted a *de novo* hearing and again dismissed the appeal on the basis that Mr Durve did not meet the residency requirements of section 28 of the *Act*; he was not physically present in Canada for 730 days and he did not otherwise comply because he was not outside Canada employed on a full-time basis by a Canadian business. The Board found that his business was not an "ongoing operation in Canada". This decision is now the subject of judicial review.

[4] The applicant submits that the Board: denied him procedural fairness; erred in interpreting the provisions of the *Act* and formulating the test for an ongoing operation in Canada; erred in applying that test; and unreasonably refused to exercise its discretion based on humanitarian and compassionate ["H&C"] grounds.

[5] I have considered the Board's decision, the extensive record and the arguments of the parties and I find that there was no breach of procedural fairness and the decision is reasonable.

[6] The Board undertook a lengthy and careful examination of a vast amount of documentary evidence. In response to the guidance provided by Justice Gauthier in *Durve #1*, the Board considered several factors or indicia to determine whether Mr Durve's one-man business met the requirements of an ongoing operation in Canada. While a range of factors should be considered, no single factor is determinative as one-man and other small businesses will vary. In the present case, Mr Durve was self-employed and he was the business. He claimed to be working for his Canadian business from wherever he was located. The reality was that he was seldom in Canada for more than several days at a time (with four visits of approximately one month) in the five year period and there was little evidence to show any connection between the advice or consultant work he provided to his clients and Canada. The Board's determination is factual, based on all the evidence, and there is no basis to disturb its findings.

[7] The Board also reasonably concluded that there were no H&C considerations at play to warrant the exercise of its discretion to exempt Mr Durve from the residency requirements.

[8] Although the applicant submits that he would be an asset to Canada, and there is no reason to doubt this, he simply did not observe the residency requirements, of which he was well aware and which are not onerous, nor did he establish that his business has sufficient connection to Canada to be considered an ongoing operation in Canada.

[9] For the more detailed reasons that follow, the application is dismissed.

Background

[10] Mr Durve landed in Canada on May 25, 2002. In March 2008, he applied to renew his permanent resident [PR] status before its expiry, but he left the country for business before receiving a decision. In March 2009, he was advised that Citizenship and Immigration Canada [CIC] did not have enough information to establish that he had met his residency obligation of 730 days in the five year span between April 1, 2004 and March 31, 2009. Later in March 2009, he applied to the Canadian High Commission at New Delhi for a travel document to return to Canada. In June 2009 he was advised that his PR status was revoked along with his application for a travel document. His appeal of that decision was rejected. In *Durve #1*, at para 23 Justice Gauthier found that the Board had not considered all the evidence and that the very brief "decision does not meet the requirements of justification and transparency applicable under the standard of reasonableness."

[11] In a *de novo* hearing, the Board considered the same five year span – April 1, 2004 to March 31, 2009. The Board considered all the evidence; the appeal records from the first hearing, three exhibits entered at the first hearing, and new disclosure consisting of six volumes of over 1000 pages.

The Applicant's facts

[12] Mr Durve first applied to immigrate to Canada as a Foreign Skilled Worker. He describes himself as a financial advisor, with the specialty of promoting Indo-Canadian business relations. He was issued an immigrant visa and landed in Canada on May 25, 2002. In 2004, after two years of looking for employment, he registered a financial consultancy business as 1623709 Ontario Inc, with its corporate office listed at the residence of his settlement advisor, Mr Kapoor.

[13] During the five year period at issue, 2004-2009, Mr Durve made approximately 25 to 30 international business trips from Canada. He noted that his consulting contracts included:

- An October 16, 2004 agreement with Mississauga-based Skyport Financial Group Inc ("Skyport");
- An ongoing contract with the multi-national company Adept Consulting Services Inc ("Adept");
- An ongoing contractual relationship with Mumbai-based Time Media and Entertainment (PvT) Ltd ("Time Media"); and,
- An ongoing contract with Mumbai-based Lakeland Chemicals (India) Ltd, ("Lakeland"); and

[14] The applicant's own evidence before the Board was that:

- He travelled to India for several reasons: for recuperation following medical treatment; to assist his mother following his father's death and, more generally, to tend to his aging mother, whom he visits five to six times a year;

- He regularly travels to other countries, including the US, several European countries, Thailand, the UK, and the UAE, in order to meet clients and potential clients and to assist with and oversee the implementation of financial business systems. This includes some personal travel of short duration on his trips to Thailand;
- He frequently returns to Canada and has a residence here. He divested himself of his property and some of his parent's properties in India. He purchased a condominium in Canada, which was only completed in 2011, and remains unfurnished pending his permanent resident status. He stays at hotels or at his settlement advisor's home when he is in Canada; and,
- Canada is the base of his business operations. He wound down his consultancy business in India. His efforts to build his business in Canada have suffered due to his uncertain immigration status and the economic downturn. He does not operate business accounts in India, although he has personal accounts there. When in India, he uses his late father's office. He has income in both Canada and India and files taxes in both jurisdictions.

The Relevant Legislative Provisions

[15] The relevant provisions of the *Immigration and Refugee Protection Act* and the *Immigration and Refugee Protection Regulations* are set out below:

The Act

28. (1) A permanent resident must comply with a residency obligation with respect to every five-year period.	28. (1) L'obligation de résidence est applicable à chaque période quinquennale.

(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 federal public administration or the public service 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 federal public administration or the public service 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

(2) Les dispositions suivantes régissent l'obligation de résidence :

a) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :

(i) il est effectivement présent au Canada,

(ii) il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,

(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(iv) il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(v) il se conforme au mode d'exécution prévu par règlement;

b) il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période

(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;

quinquennale suivant l'acquisition de son statut, s'il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est conformé pour la période quinquennale précédant le contrôle;

(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.

c) le constat par l'agent que des circonstances d'ordre humanitaire relatives au résident permanent — compte tenu de l'intérêt supérieur de l'enfant directement touché — justifient le maintien du statut rend inopposable l'inobservation de l'obligation précédant le contrôle.

The Regulations

61. (1) Subject to subsection (2), for the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act and of this section, a Canadian business is

61. (1) Sous réserve du paragraphe (2), pour l'application des sous-alinéas 28(2)a)(iii) et (iv) de la Loi et du présent article, constitue une entreprise canadienne :

(a) a corporation that is incorporated under the laws of Canada or of a province and that has an ongoing operation in Canada;

a) toute société constituée sous le régime du droit fédéral ou provincial et exploitée de façon continue au Canada;

(b) an enterprise, other than a corporation described in paragraph (a), that has an

b) toute entreprise non visée à l'alinéa a) qui est exploitée de façon continue au Canada et

ongoing operation in Canada and

(i) that is capable of generating revenue and is carried on in anticipation of profit, and

(ii) in which a majority of voting or ownership interests is held by Canadian citizens, permanent residents, or Canadian businesses as defined in this subsection; or

(c) an organization or enterprise created under the laws of Canada or a province.

(2) For greater certainty, a Canadian business does not include a business that serves primarily to allow a permanent resident to comply with their residency obligation while residing outside Canada.

(3) For the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act, the expression "employed on a full-time basis by a Canadian business or in the public service of Canada or of a province" means, in relation to a permanent resident, that the permanent resident is an employee of, or under contract to provide services to, a Canadian business or the public service of Canada or of a province, and is assigned on a full-time basis as a term of the

qui satisfait aux exigences suivantes :

(i) elle est exploitée dans un but lucratif et elle est susceptible de produire des recettes,

(ii) la majorité de ses actions avec droit de vote ou titres de participation sont détenus par des citoyens canadiens, des résidents permanents ou des entreprises canadiennes au sens du présent paragraphe;

c) toute organisation ou entreprise créée sous le régime du droit fédéral ou provincial.

(2) Il est entendu que l'entreprise dont le but principal est de permettre à un résident permanent de se conformer à l'obligation de résidence tout en résidant à l'extérieur du Canada ne constitue pas une entreprise canadienne.

(3) Pour l'application des sous-alinéas 28(2)a)(iii) et (iv) de la Loi respectivement, les expressions « travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale » et « travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale », à l'égard d'un résident permanent, signifient qu'il est l'employé ou le fournisseur de services à contrat d'une entreprise canadienne ou de

employment or contract to	l'administration publique, fédérale ou provinciale, et est affecté à temps plein, au titre de son emploi ou du contrat de fourniture :
(a) a position outside Canada;	a) soit à un poste à l'extérieur du Canada;
(b) an affiliated enterprise outside Canada; or	b) soit à une entreprise affiliée se trouvant à l'extérieur du Canada;
(c) a client of the Canadian business or the public service outside Canada.	c) soit à un client de l'entreprise canadienne ou de l'administration publique se trouvant à l'extérieur du Canada.
[…]	[…]

The Decision under Review

[16] The Board's 49-page decision is comprehensive. A summary of the decision is set out below to provide the necessary context for the applicant's arguments regarding the Board's alleged errors.

[17] The Board thoroughly canvassed the submissions of the parties and the guidance provided by Justice Gauthier in *Durve #1* noting that Justice Gauthier had directed it to be more precise about the indicia to consider when applying the relevant provisions of the *Act* and the *Regulations* in the small business context. The Board also noted that Justice Gauthier had indicated that the question whether there is an ongoing operation in Canada is factual, to be determined by the nature and the degree of the business activities in each individual case and that no particular indicia is determinative.

[18] The Board then noted the applicant's position and submissions, including:

- While not physically present in Canada, he satisfies the residency obligation because he is outside Canada due to work for his Canadian business, pursuant to subparagraph 28(2)(a)(iii) of the *Act*.
- His business is incorporated under Ontario law and is ongoing. The purpose of incorporation was not to enable him to meet his residency obligations.
- There is no requirement that his Canadian business be "for profit" or that work be demonstrated through proper business contracts. Although he does not make a lot of money from his business, this does not mean that he did not work for his Canadian business.
- His ongoing business activity need not take place in Canada. He continues to work from wherever he travels and that this work is full-time. His situation is analogous to, for example, Canadian mining businesses with international assets.
- He does not have a residence outside Canada.
- He is a "one-man show" and knows his clients personally.
- His time is spent working for his Canadian business on contracts, developing contracts, and developing business projects to bring business to Canada. Some of this work is not remunerated.
- He has the financial means to support himself while cultivating clients.

[19] As a preliminary issue, the Board addressed Mr Durve's allegation that he had been denied the opportunity to clarify his financial statements in response to the submissions of the respondent about discrepancies in those documents. The Board noted that an appeal is a *de novo*

hearing and is adversarial in nature. The applicant bears the onus to establish his case on a balance of probabilities with clear and cogent evidence. The Board noted that it was familiar with financial and corporate records and capable of understanding the financial documents provided by the applicant without further clarification. The Board rejected the applicant's argument that the evidence should not be considered by the Board because it would be unfair and found that it was contrary to the appeal process to suggest that evidence on the record, which had been provided by the applicant himself, should not be considered. The Board noted that the decision of Justice Gauthier had directed it to re-determine the appeal on the basis of "all of the facts and the evidence before the decision-maker".

[20] The Board then focussed on the key issues: whether the appellant had satisfied the residency requirements of section 28 as informed by section 61 of the *Regulations*; and, if not, whether sufficient H&C grounds warranted special relief.

[21] The Board considered whether the appellant had satisfied his residency requirement because he had been "outside Canada employed on a full-time basis by a Canadian business" in accordance with subparagraph 28(2)(a)(ii). The Board noted that this requires consideration of definitions set out in the *Regulations* and raises four questions:

- Is the Canadian business a corporation incorporated under the laws of Canada (paragraph 61(1)(a) of the *Regulations*)?
- Is the Canadian business a corporation and does it have ongoing operations in Canada (paragraph 61(1)(a) of the *Regulations*)?

- Is Mr Durve a full-time employee of the Canadian business or under contract to provide services to the Canadian business (subsection 61(3))?
- Is Mr Durve an employee or under contract with the Canadian business and is he assigned on a full-time basis as a term of either his employment or contract to a position outside of Canada or a client of the Canadian business outside of Canada ? (paragraph 61(3)(c))?

Canadian business; ongoing operations in Canada

[22] The business was incorporated under the laws of Ontario; the issue for the Board was whether the business has or had ongoing operations in Canada.

[23] The Board first distinguished the applicant's business, being a personal services corporation, from a large company with multiple shareholders, directors and employees. It noted that operations in Canada may not be self-evident where a corporation has a single shareholder, director or employee, where no tangible product is produced and where the business is provided by that sole shareholder, director or employee.

[24] It noted, echoing Justice Gauthier's reference in *Durve #1* to *Faeli v Canada (Minister of Citizenship and Immigration)*, [2005] IADD No 267, that the term "ongoing" must have some meaning beyond the mere fact of incorporation. The Board acknowledged the importance, as identified by Justice Gauthier at para 15, "of examining the nature of an applicant's activities while outside of Canada in relation to the business of his or her Canadian company."

[25] The Board considered the ordinary and common sense meaning of the term "ongoing" and the dictionary definition, as "continuing activities". It also considered the requirement of "in Canada" and concluded that "ongoing operations in Canada" requires that the company's continuing activities be fully located in Canada.

[26] The Board found that Mr Durve's product is the services he provides and his brain is his primary tool. Therefore, he need not be in any particular place to provide his services.

[27] The Board examined the evidence and testimony including Mr Durve's description of his consultancy services, which included financial consultancy, domain and software advice and the business relationships with Skyport and Adept and found that, while it is clear what he does when he is outside Canada, it is not clear what he does in Canada or how his activities outside Canada relate to his business in Canada.

[28] It noted at para 34: "[y]et, when the panel considers the totality of the evidence, including the transcript from the first IAD hearing, the disclosure in both hearings and the submission of the appellant's counsel it remains largely unclear just what the appellant actually does".

[29] The Board extensively reviewed the documents regarding Mr Durve's work for Adept and Skyport.

[30] The Board found that the letters of understanding with Adept did not assist in ascertaining the business activities of 1623709 Ontario Inc. and how they constituted ongoing

operations in Canada. The Board reiterated that it was looking at the nature of his activities outside of Canada in relation to the business of his Canadian corporation. The Board concluded that:

> The activity of a "representative" or "agent" or "employee" of an Ontario corporation marketing the IT services and/or technology of an American corporation to third parties in the Middle East has no relationship to the Canadian company. There is no nexus between the ongoing business of the Canadian corporation and these marketing contracts. Here the corporate vehicle has not been chosen primarily for tax purposes, but rather for immigration purposes.

[31] The Board also noted that the 2008 invoices do not show that accounting services were provided to Adept and do not match Mr Durve's narrative that he provided nine months of business promotion services to Adept.

[32] With respect to Skyport, the Board found that the relationship ended in December 2007, two years before the end of the five year span, with no evidence that it was ever renewed. The Board found that the one aspect of the contract with Skyport that could have become an ongoing business operation in Canada never materialized. The Board considered the terms of the contract as well as Mr Durve's testimony and concluded that he had failed to generate a sufficient client-base for Skyport in India, UK, the US, and Dubai. Instead he merely undertook bookkeeping projects for Skyport on an hourly basis and relied on resources in India to do so.

[33] The Board also considered the role of the settlement advisor, Mr Kapoor. Mr Durve used Mr Kapoor's home address as his business address and he stayed with Mr Kapoor often while in Canada. The Board noted that Mr Kapoor answered the phone and took the mail for the business

office in Canada for a nominal fee of $200 per month. The Board found that this was not an indicator of any form of ongoing operation in Canada. The Board concluded, after considering other evidence, including cancelled checks and an undated service agreement, that Mr Kapoor was more of a service provider and was not an employee.

[34] The Board found that various letters from other businesses submitted by Mr Durve only generally described his business activities and did not demonstrate that he performed paid work for these individuals or businesses. With respect to Time Media and Lakeland, the Board noted that neither business indicated that it had a relationship with 1623709 Ontario Inc, but only mentioned a personal relationship with Mr Durve.

[35] The Board accepted that much of Mr Durve's work is done on an informal basis given his personal relationships with his clients and that some work related to business development is unpaid. However, the Board found that there was insufficient evidence of a business with an ongoing operation in Canada. The Board found that the business had no nexus to Canada, but was instead tied to Mr Durve's own physical location, which could be Canada, India, or elsewhere.

[36] The Board stated: "[…] for the purposes of proving that ones Canadian business is conducting business abroad for Indian based companies, the lack of formal contracts, letters of understanding etc. goes to the sufficiency of evidence . […] it is this very lack of documentary evidence of all the work conducted by 1623709 Ontario Inc. that calls into question the appellant's claim to having a business with an ongoing operation in Canada".

[37] After considering the nature of the business activities and finding the evidence lacking, the Board noted that the next most important indicia of an "ongoing operation in Canada" is revenue, as demonstrated by corporate and financial records. The Board noted that other documents, such as utility bills and credit card bills, are of lesser probative value, especially since the applicant did not provide much context to situate them in his business activities. The Board scrutinized the corporate and financial records of 1623709 Ontario Inc and found them to be unreliable because they were prepared by the applicant himself, were unaudited and had no explanatory notes. The Board also found some discrepancies in certain financial statements that could not be reconciled with the invoices.

[38] The Board considered Mr Durve's submission that there is no requirement to make a profit. The Board did not make any finding that profit was a requirement. The Board noted, however, that there was no indication of how Mr Durve's work to obtain future business was related to the ongoing operations in Canada of his incorporated business.

[39] The Board concluded that Mr Durve had failed to show any ongoing operation in Canada which had any form of nexus to the stated activity of the business. The Board further found that because the two requirements set out in paragraph 61(1)(a) of the *Regulations* for a "Canadian business" - that of an ongoing operation in Canada, had not been met on a balance of probabilities, there was no need for it to consider the application of sub-paragraph 28(2)(a)iii of the *Act*, as guided by subsection 61(3) of the *Regulations*, to assess whether the applicant had been outside of Canada employed on a full-time basis by a Canadian business .

[40] Despite this finding, the Board nevertheless considered whether subparagraph 28(2)(a)iii applied.

Employed on a full-time basis by a Canadian business

[41] Subsection 61(3) guides the application of subparagraph 28(2)(a)(iii), i.e., whether the permanent resident complies with the residency obligation because he or she is outside Canada employed on a full-time basis by a Canadian business or in the public service of Canada or of a province.

[42] The Board noted that the jurisprudence on the meaning of "employed on a full-time basis by a Canadian business", *Canada (Citizenship and Immigration) v Jiang*, 2011 FC 349, [2011] FCJ No 560 [*Jiang*] and *Bi v Canada (Citizenship and Immigration)*, 2012 FC 293, [2012] FCJ No 366 [*Bi*], was not helpful to the current facts. In *Jiang* and *Bi* the permanent residents were employed by larger enterprises that had businesses and employees both in Canada and abroad, and it was possible to view them as being on assignment when abroad. In contrast, Mr Durve occupies his position whether he is in Canada or abroad and his "assignment" is entirely dependent on where he chooses to live for the purposes of doing his work.

[43] Despite the inapplicability of the jurisprudence to Mr Durve's circumstances, the Board took a broad look at the notion of "employed on a full-time basis" and concluded that Mr Durve's work would not qualify because much of it was spent in business development for no specific client and it did not otherwise relate to the ongoing operations of 1623709 Ontario Inc in Canada. The Board rejected the argument that unpaid work is still work, noting that such logic

would enable Mr Durve to spend all his time doing research and business development abroad while fulfilling his residency obligation.

[44] The Board noted:

> Since the appellant defines his business in respect of the financial consultancy services he provides his clients to the extent that he is doing unpaid work for no specific client it cannot be said that he is employed on a full-time basis.
>
> […]
>
> If there was no or little work aboard (*sic*) for his Canadian business then logically the justification for the appellants remaining outside Canada was also absent.

[45] The Board also compared the applicant's claimed Canadian personal income and his claimed business activity and found that his personal income exceeded his business income, suggesting that he had income from sources other than his Canadian business (1623709 Ontario Inc) and supporting the view that he was not working full time for his Canadian business. The Board concluded that the full extent of the applicant's work abroad is unknown.

Other Considerations

[46] The Board found that despite Mr Durve's view that his home base is in Canada, this was not the case because he had only spent 279 days in the relevant five year span in Canada. He had no place of residence in Canada and had given the name and address of his settlement advisor on his application for a travel document. The Board found that although the applicant may have sold his own residence in India, he continued to have a residence in India shared with his mother. The Board acknowledged that he purchased two condos in the Toronto area in 2006, but only took possession of one in 2011. The other purchase was cancelled due to construction delays. Buying a condominium under development in Canada does not create establishment nor prove any abiding connection.

Humanitarian and Compassionate Considerations

[47] The Board noted that, initially, the applicant had made some effort to establish himself in Canada but that this did not develop and he was merely an occasional visitor. He spent the vast majority of his time abroad. The Board acknowledged his obligations to his parents who were elderly and in poor health, but noted that this would or should have been anticipated when he came to Canada and that his family had the means to hire help. The Board concluded that if his familial duties took precedence over his residency obligations to Canada, he should not expect much sympathy. The Board further noted that his family would suffer no hardship if he loses his permanent residence status. He is unmarried and has no family in Canada. His mother remains in India and his only sister is in the United States. The Board remarked that it is not readily apparent what hardship would follow from his loss of permanent resident status, as he has always

been able to work wherever he goes. The Board considered the stigma of being a single man in India, but found that his status was a personal decision. The Board also acknowledged his efforts in pursuing his appeal but did not find this to be unique or special and did not warrant an exercise of discretion pursuant to H&C factors.

[48] In conclusion, the Board reiterated that, beyond incorporating his company in Canada, it is not evident that Mr Durve's business ever had an ongoing operation in Canada. The Board rejected an analogy with Canadian mining companies with overseas operations, which involve many Canadian and foreign-based employees. However, the Board did not rule out that one-man operations could meet the requirements of section 61 of the *Regulations* and noted that the determination relies on the specific facts. The Board found that, in general, unless a one-man operation can establish with clear, cogent and convincing evidence that the Canadian business has ongoing operations in Canada, it cannot use a Canadian incorporation to satisfy the residency obligation. The Board provided two examples of the type of ongoing operation in Canada that could or might be sustained by one-man operations: an accountant's business with an established and ongoing operation in Canada which is contracted to provide services to a Canadian business's operations outside Canada on a temporary basis; and a one-man trading company that distributes goods in Canada but requires periodic absences from Canada for the purposes of buying and quality control.

[49] The Board concluded that Mr Durve's business is as described in subsection 61(2) a "business that serves primarily to allow a permanent resident to comply with their residency".

The Applicant's Overall position

[50] Mr Durve submits that the Board breached its duty of procedural fairness by not providing an opportunity for him to clarify the discrepancies in his financial statements and by not permitting him to address the Board's concerns about the Skyport contract which Mr Durve submits had a nexus to Canada.

[51] He further submits that the decision is not reasonable; the Board did not follow the guidance provided by Justice Gauthier in *Durve #1*, it imported additional requirements into the test for on-going operation in Canada, including that the business be fully located in Canada; erred in applying the test, including by ignoring some evidence; and, erred in determining that the applicant was not fully employed by his Canadian business while outside Canada. The applicant argues that it should be sufficient for the purposes of section 28 for the business to be a "functioning entity" in Canada.

[52] Finally, the Board erred in its analysis and in not exercising its discretion in favour of Mr Durve on H&C grounds.

The Respondent's Overall position

[53] The respondent submits that there was no breach of procedural fairness; the Board in its *de novo* hearing considered all the evidence which had been provided by the applicant and his testimony both at the earlier hearing and the *de novo* hearing, and the applicant had full opportunity to produce the evidence he relied on.

[54] The Board's decision was reasonable; it properly interpreted the provisions of section 28 guided by the definitions in the *Regulations*, it identified the indicia or factors it considered in determining whether the applicant had an ongoing operation in Canada and reasonably found, due to the insufficiency of the evidence, that he did not.

[55] The Board also reasonably found that there were no special circumstances to warrant the exercise of its discretion on H&C grounds.

Standard of Review

[56] Issues of procedural fairness are reviewable on a standard of correctness.

[57] Issues of mixed fact and law are reviewable on a standard of reasonableness. The jurisprudence emphasizes that where the standard of reasonableness applies, the role of the Court is to determine whether the decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir*, at para 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome." (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59). The Court does not re-weigh the evidence or remake the decision.

The Issues

[58] The applicant has raised three issues:

1) Did the Board deny the applicant procedural fairness?

2) Did the Board err in formulating and applying the residency requirements of section 28- in particular subparagraph 28(2)(a)(iii) and the meaning of a Canadian business as an "ongoing operation in Canada"?

3) Did the Board err in its analysis of the H&C factors and is its determination unreasonable?

Did the Board deny the applicant procedural fairness?

[59] Mr Durve submits that the Board erred in not providing him with an opportunity to respond to deficiencies and discrepancies in his financial records that were raised by the respondent. He argues that the Board did not make any clear credibility findings against him and should not have simply accepted the respondent's arguments which indirectly undermined his evidence.

[60] He further submits that he was not made aware of the Board's concerns regarding his contract with Skyport and not provided an opportunity to clarify this work, which had a nexus to Canada.

[61] The respondent submits that the onus was on the applicant to demonstrate that the decision to deny his PR status was not reasonable and that his appeal should be allowed. He had

the opportunity to reply to the differences and discrepancies that were identified in his financial records, but chose not to do so. Mr Durve and his counsel were aware of the concern raised in the respondent's submissions and could have dealt with this evidence in reply submissions but did not do so.

[62] The respondent adds that although there was no breach of procedural fairness regarding the financial statements, the concerns about the financial records do not affect the Board's key findings that the Canadian corporation had no ongoing operation and that there is no connection between its business activities and Canada.

There was no breach of procedural fairness

[63] The principles of procedural fairness do not require the Board to confront the applicant with the accounting differences and discrepancies identified in his own financial records. The applicant was alerted to these discrepancies by the respondent's submissions and had ample opportunity to disclose additional documentary evidence or to call other witnesses. He did not do so. Nor did his counsel question him at the hearing to elaborate. He was well represented and he produced a record to the Board of more than 1,000 pages, as well as the record from the first appeal. He cannot now claim a breach of procedural fairness.

[64] Moreover, Mr Durve describes himself as a financial consultant and, therefore, would have understood and could have further explained the accounting differences and discrepancies identified by the respondent. These records had been provided by Mr Durve and he was aware of their contents; they did not take him by surprise, nor did the respondent's submissions.

[65] The Board noted that while it could have benefitted from specialized accounting knowledge, its own experience and expertise was more than adequate to allow it to analyze the applicant's submissions and evidence. I agree that this was within the Board's experience.

[66] With respect to Mr Durve's submissions that the Board failed to put its concerns about his relationship with Skyport to him, I do not agree that there was any breach of procedural fairness. The onus is on him to establish that his business was an ongoing operation in Canada. The Board noted that he provided very little testimony about Skyport. The Board also looked at the transcripts from the 2010 hearing when he was questioned about what he does for Skyport noting the brief answer and that no further questions were put to him by his counsel. Despite the paucity of oral testimony, the contract with Skyport was analyzed in great detail by the Board. It cannot be said that there was a breach of procedural fairness or that the Board ignored his evidence regarding the business relationship with Skyport.

Did the Board err in formulating and applying the residency requirements of section 28 – in particular subparagraph 28(2)(a)(iii) and the meaning of a Canadian business as an "ongoing operation in Canada"?

[67] Mr Durve argues that the Board erred in interpreting the provisions of section 28 and section 61 of the *Regulations* with respect to the meanings of "Canadian business" as an "ongoing operation in Canada", and imported additional elements into the provision including that the business have continuing activities that are fully located in Canada. He submits that the Board did not follow the findings or the direction of Justice Gauthier in *Durve #1*.

[68] In addition, the Board erred in its assessment of whether he was employed full-time by his Canadian business while he was working abroad.

[69] Mr Durve notes that the test for "Canadian business" and "ongoing operation in Canada" is factual – there is no single determinative indicator. He submits that his situation must be evaluated in light of the nature and size of his business and the difficulties he has faced.

[70] Mr Durve raises many of the same arguments he made to the Board to support his position that his Canadian business was an ongoing operation in Canada, including that his business paid for the services of and rented an office from Mr Kapoor, his settlement advisor, that he started the business after failing to find work two years after landing in Canada, that proper business contracts and financial viability are not legal requirements to a finding of an ongoing operation, that business has been slow given the economic downturn and his uncertain immigration status but that he worked full-time and there was no indication that he received a salary from any other source, that he has an office in Canada at Mr Kapoor's address, that all consulting fees generated by the business were payable to 1623709 Ontario Inc, and that he had no other residence except for the condo he purchased in Canada but does not live in. He also argues that his travel pattern shows that his home base is in Canada as he leaves from and returns to Canada.

[71] Mr Durve now also argues that the Board ignored the evidence of his business relationship with Skyport, a Canadian client that retained him to do work in India because of his business in Canada. He notes that his evidence was that Skyport chose him because he could

both outsource labour in India and provide a business in Canada which would comply with Canadian standards and regulations.

[72] Mr Durve submits that the Board erred in narrowly interpreting "ongoing operation" as continuing activities in Canada because an ongoing operation should also include an ongoing "functioning entity". Mr Durve submits that his business was indeed a functioning entity in Canada with ongoing functions and that this should be sufficient to satisfy the test of ongoing operation in Canada. He submits that his business functions in Canada as reflected in its incorporation, office location and the role played by Mr Kapoor in Canada.

[73] In addition, Mr Durve argues that the Board erred by incorporating an additional requirement that the business be "fully" located in Canada; a business which conducts activities abroad could never comply with being fully located in Canada.

[74] He also submits that the Board erred in determining that he was not employed on a full-time basis while working abroad for his Canadian company and argues that "full-time basis" does not require paid employment. The Board found he did not work full time because he did not get paid for all his work and his income was low.

[75] In his written submissions, Mr Durve asserts that he was physically present in Canada for 730 days in the five year period. He adds that when he is not in Canada, he is working full time for his Canadian business.

[76] Mr Durve also submits that the Court should take the opportunity to craft a clear test for the determination of "ongoing operation in Canada" to avoid future litigation and to provide some guidance for permanent resident small business owners, like Mr Durve, who conduct business outside of Canada.

[77] The respondent submits that section 28 of the *Act* as guided by paragraph 61(1)(a) of the *Regulations* envisions two conjunctive criteria: an *ongoing operation* and one that is *in Canada*. The respondent submits that the use of the present tense in the provision signifies that an "ongoing operation" requires a continuing activity, as noted by Justice Gauthier's decision in *Durve #1* at paras 13-15. The term "in Canada" requires that the business activity be conducted in Canada or have a sufficient connection to business activity in Canada.

[78] The Board reasonably concluded that the applicant's business was not an "ongoing operation" and did not have any activities that are in or are sufficiently connected to Canada.

[79] With respect to the contracts or letters with Time Media and Lakeland, the respondent notes that the Board considered the evidence and found it did not mention a relationship with 1623709 Ontario Inc. With respect to Skyport, the respondent notes that the evidence demonstrated only the intention of the parties, but not how the business relationship ultimately played out.

[80] Furthermore, the respondent submits that the Board did not require the applicant's business to be profitable. The Board found that the business was not ongoing due to the lack of

real business activity. In any event, profitability is inherent in a for-profit business and the lack of an expectation of profit would reasonably heighten the risk of a business being viewed as established for the sole purpose of meeting the residency requirements. The respondent suggests that the Board's comments regarding profit are *obiter* – but are not unreasonable.

[81] The respondent also submits that the Board reasonably concluded that the applicant did not work full time for his business while abroad. The Board's conclusion was not based on his lack of revenue, but on the lack of evidence; for example, the applicant did not provide evidence about how much time was spent providing services to his clients and his tax returns report income that exceeds the profits of his business.

[82] The respondent points to the record regarding the lack of evidence produced by the applicant to support his business activities, noting that he could only produce invoices for work done for the one Canadian company, Skyport, from 2005-2007 in which he brokered to have accounting work done in India.

[83] Similarly, he could produce only a few invoices for services rendered for Adept, a US company, for a few months in 2004, 2005, and for one month in 2007.

[84] The applicant could not establish that he was employed on a full-time basis by his Canadian business. He worked 80-90 days per year from 2005-2007 providing services to Skyport, but he could provide no information for the time worked for Skyport in 2008 or 2009. Nor could he provide any documentation for the hours worked for Adept in the five year period.

[85] The respondent also notes that with respect to the work done for Skyport, there is no evidence that it had any connection to Canadian law, business practices or accounting rules. The Board noted that the applicant produced no evidence that he is a recognised accountant in Canada and the rate he charged to Skyport was far below what a professional would charge.

[86] The respondent submits that the Board reasonably found that there must be a sufficient connection between the work and Canada; this is supported by the clear wording of subsection 61(1) of the *Regulations*.

The Board did not err in interpreting or applying section 28

[87] The Board reasonably interpreted section 28 of the *Act* guided by section 61 of the *Regulations* and applied the provisions to the evidence before it. The Board directed itself to four questions as noted in its decision and answered each in turn. It considered a range of factors or indicia to determine whether the applicant's business was an ongoing operation in Canada and reasonably concluded it was not.

[88] Having determined that the business was not an ongoing operation in Canada and was, therefore, not a Canadian business, there was no need for the Board to consider whether the applicant could comply with his residency requirements by being "outside Canada employed full-time by a Canadian business".

[89] However, the Board did go on to consider whether the applicant was or would have been a full-time employee of his own business while working abroad, and reasonably found he was not.

[90] The Board's interpretation or "test" for "ongoing operation in Canada" was based on the language of paragraph 61(1)(a) of the *Regulations*. Relying on the plain meaning of the phrase, the Board concluded that "ongoing" must go beyond the mere fact of incorporation, and that it means "continuing activity". The additional qualifier of "in Canada" requires that the continuing activity be "fully" in Canada. The Board applied the test reasonably, as it examined how the applicant's activities while outside of Canada related to his business in Canada.

[91] I do not agree with the applicant that it would be impossible for the continuing activities to be "fully" located in Canada, where the business is like Mr Durve's, i.e., a self-employed person who works for his clients wherever he is located. The requirement to be fully located in Canada does not demand that all work and every business activity or service be carried out in Canada but that a sufficient connection exists between work done abroad and the ongoing operation of the business in Canada. However, in my view there must be some business done in Canada and the proportion of business done within Canada and outside of Canada for the Canadian business is a relevant consideration.

[92] Based on the evidence, the Board reasonably concluded that it is unclear just what Mr Durve does for his business in Canada while he is abroad. The Board underwent a thorough and detailed analysis of the business, including its clientele and contracts, Mr Durve's relationship

with his settlement advisor and his revenues, and reasonably found that the business was not anchored in Canada, but rather followed him wherever he went.

[93] The Board also reasonably concluded that Mr Durve's travel patterns do not support his position that Canada is his home base. In fact, the applicant had no place of residence in Canada. Although he purchased a condo in 2006, he would have been well aware that it would not be ready for several years. Ultimately, he only took possession in 2011, which falls two years outside the relevant period, and he continues to not live in it. The second condo purchase was cancelled due to delays. He used the name and address of his settlement advisor on his application for a travel document in 2008. The Board reasonably concluded that he still has a residence outside Canada, in India, which he shares with his mother.

[94] Mr Durve submits that the Board's interpretation of ongoing operation as "continuing activity" is too narrow and that by relying on dictionary definitions and common sense, as the Board did, an ongoing operation would equally be defined as a "functioning entity". He does not offer a clear explanation of what a "functioning entity" means, but it would appear to capture Mr Durve's situation; incorporation in Canada with a mailing address and phone service and an intention to eventually reside in Canada. (I note that the applicant expanded on this notion in post hearing submissions to support a proposed certified question.)

[95] In my view, Mr Durve's proposed interpretation of an ongoing operation as a "functioning entity" is not a good alternative for him. The dictionary definition of "entity" is something that exists by itself or is separate from other things. This would include a business.

"Function" or "functioning" has meanings depending on the context but more generally means "operate" or "operating". So a functioning entity is an operating entity or, in this case, an operating business.

[96] Even if "functioning entity" could constitute an ongoing operation, the Board reasonably found that Mr Durve had not established that he had a functioning entity, i.e. an operating business in Canada.

[97] I suspect that Mr Durve seeks a lower standard for "functioning entity" that would include simply some presence in Canada. Such an interpretation could not have been contemplated by the legislation as it is intended to permit permanent residents with businesses that have a real and hopefully beneficial connection to Canada to retain their permanent resident status while they pursue their business outside of Canada.

[98] Although the Board need not have considered the issue of full-time employment by a Canadian business, it reasonably found that Mr Durve was not a full-time employee of his business. The Board considered Mr Durve's submissions that there is no requirement that the Canadian business be viable or for profit and that, although he does not work fixed hours, he works full time. Contrary to Mr Durve's characterization, the Board did not reach its conclusion because he did not make a lot of money or was doing unpaid work, but because most of his time was spent in business development for no specific client that had no link to the ongoing operations of 1623709 Ontario Inc in Canada.

[99] The Board considered the not for profit business studies the applicant had produced regarding a potential wine packaging business in India, noting that this did not relate to the ongoing operations of his Canadian company. The Board also noted that the letters from Time and Lakeland did not refer at all to the Canadian corporation. The Board also compared Mr Durve's tax returns to the revenue generated by the business and concluded that Mr Durve earned from other sources than the corporation and that this discrepancy was not explained to the Board's satisfaction. The Board concluded, "Since the appellant defines his business in respect of the financial consultancy services he provides his clients to the extent that he is doing unpaid work for no specific client it cannot be said that he is employed on a full-time basis."

[100] The Board considered the available jurisprudence regarding subsection 61(3) of the *Regulations*, *Bi* and *Jiang*, and concluded that the concept of being assigned on a full-time basis did not apply to Mr Durve's circumstances.

[101] I agree that subsection 61(3) of the *Regulations* does not specifically address the situation of a self-employed person and the Board reasonably considered a more liberal interpretation of that provision in the context of the present facts and concluded, based on the evidence provided by Mr Durve, that he had not established that he worked full-time for his own business and his clients while outside Canada. I would also reiterate that the Board did not need to pursue this having already found that Mr Durve did not have a Canadian business.

[102] With respect to the contract with Skyport, the Board examined all the terms of the contract with Skyport and reasonably concluded that the proposed work which could have had a

nexus with Canada, and which presumably could have established that some of Mr Durve's work had a nexus to his business in Canada, did not come to fruition. Moreover the contract anticipated that if that work did not occur, bookkeeping services could be provided. The only evidence of work done for Skyport was in fact bookkeeping and this was done in India by persons in India. The Board reasonably concluded that this had no connection to Mr Durve's Canadian business. The contract with Skyport ended in 2007 and as the respondent notes, the work done for Skyport amounted to 80-90 days per year from 2005-2007.

[103] Although Mr Durve did not establish that he was employed full-time for his business, there will be situations where a self-employed person is able to establish that they worked full-time for their Canadian business abroad for a period of time. However, the starting point would be to establish that it was in fact a Canadian business, i.e., with continuing activities in Canada. The Board provided two such examples.

[104] With respect to the assertion in the applicant's written memorandum that he was physically present in Canada for 730 days, this is not at all supported by the evidence. I can only conclude that this statement is in error and was meant to suggest that once his work abroad was taken into account, he would meet the 730 day threshold. However, this is clearly not the case. Mr Durve has not established that his work abroad filled the gap between his 279 days in Canada and the 730 day requirement.

[105] Finally, I do not agree with the applicant that Justice Gauthier made findings in *Durve #1* that the Board failed to observe or apply, including that Mr Durve had a presence in Canada and that he was credible.

[106] I note that Justice Gauthier made it very clear that the reason to allow the judicial review was the lack of justification and transparency in the scant reasons provided by the Board. She also made it clear that on a *de novo* hearing all the evidence was to be considered. A *de novo* hearing is brand new and the decision maker is not bound by previous findings – but there were no such findings. Justice Gauthier noted that credibility was not challenged at that time. This is not the same thing as making a credibility finding.

[107] The Board on the *de novo* hearing did not focus on Mr Durve's credibility but on the insufficiency of evidence. In addition, a presence in Canada is not the test for residency.

[108] The Board referred to Justice Gauthier's decision throughout its decision, and noted in particular that she had identified the need for the Board to consider what indicia or criteria applied to the ongoing operation of a small business. The Board did just that.

[109] In *Durve#1*, Justice Gauthier made it clear that the determination in accordance with section 28 and the *Regulations* was for the Board to address:

> [25] Nothing in my decision should be construed as implicitly accepting that Mr. Durve's company falls within the parameters of subsection 61(1) of the *Regulations* and that it is not excluded under subsection 61(2) of the *Regulations* or even that the applicant would meet the requirement of subparagraph 28(2)(a)(iii) of *IRPA*. The Court simply finds that this matter has not been

> properly assessed on the basis of all the facts and the evidence before the decision maker and that the said decision maker has not sufficiently explained its reasoning to enable the Court to properly assess the validity of its conclusion. In that respect, I note that it would be helpful if the IAD could be more precise as to the indicia it will look at when considering the application of the above-mentioned provisions to businesses started by new permanent residents on a very small scale and which involve developing clientele abroad. For example, if a one-man operation is not acceptable, it should be clearly spelled out.

The relevant considerations

[110] Mr Durve suggests that a clear and consistent approach is needed to determine how to apply the residency requirements for permanent residents with small or even one person Canadian businesses.

[111] The Board identified several indicia or considerations and did not rule out that one-man operations could fit within section 28. It provided two examples of one-man operations that could satisfy the criteria as a Canadian business and permit the permanent resident to work outside of Canada for that business. Other analogous examples could be imagined, but as noted by the Board echoing Justice Gauthier in *Durve #1*, compliance with the residency requirements is a factual determination. It is not possible to anticipate all the potential fact scenarios and set out a list of criteria which if met, will lead to compliance with the residency requirement. Some criteria will weigh more heavily than others depending on the nature of the business, the time spent within and outside of Canada and, importantly, the nexus or connection between the work outside Canada and the business in Canada.

[112] Where the business is a one-man operation with no employees in Canada, more focus will be put on the nature of the business in Canada and how the work conducted by the one-man operation or self-employed person relates to the Canadian business.

[113] One of the examples cited by the Board is that of an accountant's business with an established and ongoing operation in Canada contracted to provide services to a Canadian business outside Canada on a temporary basis. This contemplates that the permanent resident conducts business and provides these same services in Canada and that the techniques, business practices, expertise, necessary accreditation or principles applied would be governed by or informed by Canadian practices and would guide the work for the other Canadian business outside Canada. In other words, there is a Canadian "product" being delivered in the form of the services provided by the self-employed or "one-man "operation.

[114] I have set out the indicia or considerations noted by the Board and have elaborated on some, but I note that this is not a checklist. The applicability of these considerations will vary depending on the facts, as will the weight attached to the various considerations.

[115] The basic principles remain that: the onus is on the permanent resident to provide clear and cogent evidence that his business is a Canadian business (an ongoing operation in Canada) and that work done outside Canada is full-time work for the Canadian business; the inquiry is a question of fact to be determined by the nature and the degree of the applicant's business activities in each individual case; and, the focus is on the nature of an applicant's business activities while outside of Canada in relation to the business of his Canadian company.

[116] An ongoing business is a business with continuing activities in Canada. This determination takes into account what the business actually does within Canada, and how this is demonstrated or documented.

[117] In assessing whether the business is an ongoing operation, the relevant considerations will vary with the nature and size of the business. Where the business is a self-employed person or a very small business, the goods or services, which would include advice, must be identifiable.

[118] The decision maker should consider whether there are any employees (even part-time), associates or contractors in Canada that ensure the business continues to operate in Canada and that services are or could be provided in Canada while the permanent resident is outside Canada conducting business or providing the services of the Canadian business.

[119] The corporation's physical office is a consideration, even in the day and age of the virtual office, and notwithstanding that the business may be able to provide services from elsewhere, including whether there are any employees working from that location (even part- time) and whether any work is done or services provided from that location. The requirement to be "in Canada" involves consideration of the business activities or services carried out in Canada and the link between the business carried on outside Canada with the business in Canada. It is not essential that all work and every business activity or service be carried out in Canada but that a sufficient connection or nexus exists between work done abroad and the ongoing operation of the business in Canada. However, as noted above, some business should be done in Canada and the proportion of business done within Canada and outside of Canada is a relevant consideration.

[120] The nature of business activities outside Canada and how they advance the overall goal of the business in Canada, and their connection or nexus to the Canadian business is a significant consideration. For example, whether the permanent resident has qualifications or accreditations in Canada that are relied on by those he provides services to outside of Canada and whether the permanent resident uses Canadian business principles and practices or rules of his or her profession guided by Canadian standards in his or her work abroad are all relevant to the issue of nexus.

[121] The permanent resident's pattern of travel, residence in Canada and residence outside of Canada (recognizing that the permanent resident may have both) are also relevant considerations.

[122] With respect to assessing whether the permanent resident was employed full-time for the Canadian business, again the nature of the business must provide the context because a self-employed person cannot "assign" him or herself as contemplated by the *Regulations*. Records of the time spent for specific services provided and clients' businesses will be informative, including time spent for work that is not remunerated and the reason for this.

[123] Unpaid work could qualify as business activities, but it should relate to the ongoing business in Canada. Considerations include whether there is a business plan that forecasts the unpaid or developmental work needed to advance the business with a view to future paid work and the proportion of paid work compared to unpaid work.

[124] The revenue of the business should be considered, including whether the financial statements of the business reflect the described business activities and can be reconciled with invoices. Business records that document how the time was spent by the permanent resident on business abroad would be useful for the decision maker. If the permanent resident's personal income exceeds the income from the claimed business activities, it will be more difficult to establish that it is full-time work for the Canadian business.

Did the Board err in its analysis of the H&C factors by failing to consider the jurisprudence?

[125] Mr Durve submits that the Board should have approached his appeal from the perspective of retaining his permanent resident status, i.e., positively, as established by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84 [*Chieu*].

[126] He suggests that the Board did not consider the principles from the jurisprudence in assessing his H&C grounds and, in particular, it ignored his unique and special circumstances, which, he submits would evoke the sympathy of the reasonable person (*Chirwa v Canada (Minister of Manpower & Immigration)*, [1970] IABD No 1 [*Chirwa*]). He is an unmarried man, growing older, whose only close family is abroad and who has been working for several years to build his Canadian business. His only residence is in Canada.

[127] He is financially well-established and will benefit Canada in the long-term. He submits that the loss of permanent resident status is too harsh a sanction given his intention to simply do well in Canada. He notes that the Board had previously identified the relevant factors to consider

in *Hussain v Canada (Minister of Citizenship and Immigration)*, [2010] IADD No 552 at para 42 [*Hussain*] which should have been applied.

[128] The respondent notes that there is no basis to find the assessment of the H&C grounds to be unreasonable. In addition, the *Chirwa* standard is not the governing test for H&C relief nor do the *Hussain* factors necessarily lead to H&C relief.

The H&C assessment is reasonable

[129] Paragraph 28(2)(c) permits the decision maker to exercise its discretion to relieve against the breach of the residency requirement where there are H&C considerations. There is no entitlement to an H&C exemption. The Board reasonably declined to exercise its discretion.

[130] Although the applicant suggests that the *Hussain* factors should have been considered, the Board considered similar factors although it did not specifically refer to the jurisprudence. The relevant factors were first articulated in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 [*Ribic*] and were endorsed by the Supreme Court of Canada in *Chieu* at para 40, albeit in the context of the removal from Canada of a permanent resident for misrepresentation. In *Tai v Canada (Minister of Citizenship and Immigration)*, 2011 FC 248, [2011] FCJ No 289, Justice Shore noted that these factors had been extensively relied on for H&C assessments and he applied these same factors in the context of section 28.

[131] The *Ribic* factors are:

a) The degree of establishment in Canada including employment and skills training;

b) The reasons for leaving Canada;

c) The reasons of continued or lengthy stay abroad;

d) Whether any attempts were made to return to Canada at the first opportunity;

e) The family support available in Canada;

f) The impact that the removal has on a person and his family;

g) The hardship which the appellant would suffer if he was removed from Canada.

[132] While the Board did not refer to or neatly organize the *Ribic* factors, the decision clearly indicates that it considered and balanced these same factors. The Board considered Mr Durve's initial establishment in Canada and his efforts since that time. It noted that while he may have a relationship with Canada, he has not resided here and he is only an occasional visitor. The Board acknowledged the 2006 purchase of a condo but given that he did not take possession of it until 2011, reasonably found that it was not much evidence of establishment.

[133] The Board examined his many departures from Canada and his evidence that the reason was for business, to attend to his father's estate and to attend to his mother. His lengthy stays abroad were for the same reasons. The Board noted that although he returned to Canada from his travels, it was not with the intention of remaining permanently.

[134] Given that Mr Durve has no family here and his only sister is in the US, the Board found no ties to Canada.

[135] The Board also found that he would not suffer any hardship, nor would his few family members abroad, due to his loss of permanent resident status because he is self-employed and he has always been able to work from wherever he is.

[136] The Board was entitled to conclude that, although Mr Durve demonstrated a desire to remain in Canada through the great effort he expended in pursuing his appeals, these efforts are not unique nor do they constitute special circumstances warranting the discretion in his favour.

[137] I agree with the respondent that *Chirwa* has not been adopted by the Courts for other H&C determinations. For example, see *Serrano Lemus v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1274, [2012] FCJ No 1374, where Justice Near (as he then was) considered a similar argument, albeit in the context of H&C applications under subsection 25(1) of the *Act*.

[138] Regardless, there was no need for the Board to explicitly refer to *Chirwa* when it clearly considered all the applicant's submissions and reasonably concluded that there were no unique or special circumstances. While the applicant's view may be that his situation evokes sympathy to the extent that the Board should exercise discretion in his favour, the Board's assessment did not lead it to this conclusion.

[139] I agree that the loss of permanent resident status is a harsh penalty for anyone who is attempting to transition to permanent residence in Canada. While the applicant hopes to one day be fully integrated into Canadian society and has experienced personal setbacks due to the

economic downturn and the health of his parents, the requirements of Canada's immigration laws are clear and the residency requirements, which demands physical presence for 730 days out of a five year period, or 40%, and provides alternative ways to establish residency, are not onerous. Mr Durve had ample time since 2002 and particularly since 2004 to establish himself in Canada and/or to establish a nexus between his work abroad and his Canadian business.

Proposed Certified Question

[140] Mr Durve proposed two questions for certification and has made submissions in support of the questions highlighting their general importance, which to some extent reiterate the arguments made on judicial review.

[141] He reiterates the circumstances of his business, asserting that his Canadian corporation has continued to operate in Canada through Mr Kapoor acting on his behalf.

[142] Mr Durve submits that the Board's finding that paragraph 61(1)(a) of the *Regulations* which defines Canadian business as an "ongoing operation in Canada" requires continuing activities fully located in Canada is incorrect in law and unreasonable and will thwart the development of many legitimate businesses.

[143] He again submits that the Board relied on dictionary definitions in reaching that interpretation which would also support the meaning of ongoing operation as a continuing "functional entity" (or "functioning entity" as referred to earlier). He submits that his business was and is a continuing functional entity in Canada and that such an interpretation is essential for

small and other businesses that do their work entirely outside Canada with only a functional business presence in Canada.

[144] He argues that it could not be the intent of the legislators to thwart the development of businesses where work is done out of Canada but the business is in Canada, markets itself as Canadian and brings income into Canada.

[145] He further argues that the Board found that he was not fully employed because his unpaid work was not taken into account. He notes that people may work long hours unpaid to build a business. The Board's conclusion may impact others seeking to maintain their permanent resident status while working abroad and the proposed question is one of general importance.

[146] The two questions proposed for certification are:

1. *Does the "ongoing operation of a Canadian business referred to in paragraph 61(1)(a) of the IRPA Regulations require that the business be engaged fully in its business activities in Canada, or is it sufficient that the business be a functional entity, whose activities are primarily conducted outside of Canada.*
2. *Does being "employed on a full time basis" within the meaning of subparagraph 28(2)(a)(iii) of the IRPA only include full time paid employment or can it also include work which is not paid.*

[147] Mr Durve submits that both questions would be determinative because if the Board had accepted his unpaid work in assessing whether he was outside Canada employed on a full-time

basis for his Canadian company and had accepted that the functioning presence of his company in Canada through Mr Kapoor constituted an ongoing operation, then the outcome may have been different.

[148] The respondent submits that the questions do not meet the criteria for a certified question as they do not raise a serious question of general importance that is dispositive of the appeal. The present facts raise only a narrow issue of the one-man business whose operations are conducted significantly outside of Canada. Moreover, the meaning of "ongoing operation in Canada" can be determined by principles of statutory interpretation and the term "in Canada" requires a significant connection to business conducted within Canada or linked to Canadian business activities. This is an issue of statutory interpretation and was reasonably interpreted by the Board.

[149] The respondent adds that the second proposed question regarding full-time employment, would not be dispositive. The Board determined that Mr Durve did not establish that he worked on a full-time basis performing work for the clients of his corporation nor did he provide evidence of how much work he did to seek new business for his corporation. Even if the questions were answered in the applicant's favour, it would not be dispositive because he could not establish the extent of his unpaid work for his corporation.

No question for certification

[150] The test for certifying a question was set out by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637, 176 NR 4 at

para 4. The question must be one which transcends the interest of the immediate parties to the litigation and contemplates issues of broad significance of general application and must be determinative of the appeal.

[151] Or, as more simply put in subsequent cases, in order to be a certified question the question must be a serious question of general importance which would be dispositive of the appeal.

[152] Neither of the questions proposed by the applicant meets the test.

[153] The first proposed question seeks to gain the Court's possible approval of an interpretation of a Canadian business and ongoing operation in Canada which is not supported by the language of the *Act* or the *Regulations*. It raises a policy issue which should be left to Parliament; whether a permanent resident can comply with their residency requirements through a business which is "primarily conducted abroad". In my view, this is not the intention of the legislation, which currently provides several ways for a permanent resident to meet their residency requirements, which as noted above are not particularly onerous, and which contemplates a connection to Canada, that would not be satisfied where the business is primarily conducted abroad.

[154] I agree with the respondent that a functioning entity whose primary business activities are conducted outside of Canada with no other connection to Canadian business activities cannot be said to have an ongoing operation in Canada.

[155] Mr Durve's approach would appear to contradict subsection 28(2) which makes it clear that the definition of Canadian business does not include a business that is primarily to allow a permanent resident to meet their residency requirements while continuing to reside outside of Canada.

[156] As noted above, 'functioning entity" or "functional entity" has no clear meaning and likely means "operating entity/business" and therefore does not differ from the notion of ongoing operation which the Board reasonably interpreted as continuing activities. The argument for a different or broader interpretation is circuitous. Moreover, the Board found that Mr Durve had not established what his business did in Canada – i.e. there was no evidence to establish it was either a functioning entity or an ongoing operation *in Canada*.

[157] The second question would only be dispositive if the applicant had established, first, that he had a Canadian business and, second, that he had evidence to support his full-time work. This is a factual determination and the Board found that he could not so establish. Whether the work was paid or unpaid was not the issue, he could not establish what work was done. As noted above, some unpaid work may be considered as full-time work for the Canadian business if there is evidence to establish that it is done in furtherance of future paid work or is part of the business plan, and the amount of unpaid work is not disproportionate to the paid work.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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