Family Relationships and Immigration:

Traditional Concepts At The Crossroads

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Immigration To Canada and The Family Class Category

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1. Introduction

Family class immigration is the foundation of Canadian Citizenship and Immigration policy since the inception of the codified process. One of the objectives of the IRPA is "to see that families are reunited in Canada".[1]

Foreign nationals may be selected as permanent residents on the basis of their relationship to the spouse, child or grandchild.

Members of the family class include:

- spouse, common-law or conjugal partner;
- dependent children including children adopted overseas;
- father or mother;
- grandfather or grandmother;
- orphan under age 18, if sibling, niece or nephew, or grandchild of the sponsor;
- child under age 18 to be adopted in Canada;
- a relative, if there is no member of the family class who is a Canadian citizen, Indian or permanent resident or who could be sponsored.[2]

The family class category seeks to promote family reunification rather than national economic goals. Citizenship and Immigration Canada is of the opinion that the support of the sponsors assists new immigrants in achieving self-reliance and expediting their contribution to their Canadian community. The family class category has traditionally been the most important and prioritized immigration program in Canada. This tradition has been maintained by the new Act and

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[1] Immigration and Refugee Protection Act, S,C, 2001, c. 27 as amended, s. 3.
[2] Immigration and Refugee Protection Regulations, Can. Reg. 2002-227 as amended, s. 117(1).

Regulations. Notwithstanding prioritization under the new Act, parent and grandparent sponsorships are now subject to new immigration targets announced, which effectively will delay sponsored landings for 10 to 15 years, based on current numbers.

The family class category now includes common-law partners, conjugal partners and a broader definition of dependent children. Fiancees are no longer included under the family class category. Canadian citizens and permanent residents can no longer sponsor their fiancees from abroad. This category has been eliminated and replaced by the conjugal partner category. The current law provides for the equal treatment of common-law couples, including those in a same sex relationship.

Spouses, common-law partners and conjugal partners, and dependent children outside Canada now receive the highest processing priority. Other family class members will no longer receive a processing priority *vis-à-vis* the economic classes.

Foreign nationals seeking entry to Canada under the family class category are exempt from meeting the requirements of the economic classes specified above.

The current family class category retains many of the features of the "old" immigration law, whilst improving the clarity of the provisions regarding the responsibilities of sponsors and amending the definition of family class membership to account for the current social realities. The regulations include compliance provisions to discourage sponsors from defaulting on their sponsorship obligations and in the case of default would generally hold sponsors accountable for social assistance costs. Of particular significance is the establishment of a collection mechanism for defaulting sponsors which is intended to replace litigation and the inherent delays which would thereby result.

2. The Sponsor

A sponsor is a Canadian citizen or permanent resident who is:

- at least 18 years of age;
- resides in Canada; and
- has filed a sponsorship application.

There is an exemption to the residence in Canada requirement in the case of Canadian citizens who reside outside of Canada and seek to sponsor their spouse, common-law partner, conjugal partner or dependent child, provided that the sponsor and the sponsored individual will reside in Canada when the applicant becomes a permanent resident.

3. Sponsorship Obligations

All sponsors are required to sign an undertaking to provide the sponsored person with the basic requirements from the day they enter Canada until the term of the undertaking terminates. The undertaking is a contract between the sponsor(s) and CIC that the sponsor will repay the government for any social assistance payments made to the sponsored person. Sponsors remain obligated to the undertaking agreement for the entire period of the contract, even in a change of circumstances such as marital breakdown, separation, divorce, or a financial change in circumstances.

In the case of a spouse, common-law partner or conjugal partner, a sponsor is required to sign an undertaking to reimburse the federal or provincial governments from the date in which they become a permanent resident for the period of three years. If the spouse, common-law partner or

conjugal partner has entered Canada on a temporary resident permit, either prior to or after filing the application for permanent residence to Canada, from the date of entry to Canada, the three-year sponsorship obligation commences on the date of entry with the temporary resident permit. Sponsors of spouses, common-law partners or conjugal partners who have existing undertakings outstanding for a former spouse, common-law partner or conjugal partner are excluded from entering into a new sponsorship undertaking until the period of the previous undertaking has lapsed.[3]

Sponsors cannot include as members of the family class dependants who were previously excluded because they were listed as non-accompanying family members and were not examined on a previous application.[4]

In the case of a child under the age of 22 years, of either the sponsor or the spouse, common-law partner, or conjugal partner, the obligation commences on the day that the child becomes a permanent resident of Canada for the period of 10 years or until the child reaches the age of 25 years, whichever is earlier.

In the case of a dependent child over the age of 22 years, of either the sponsor or the spouse, common-law partner, or conjugal partner, the obligation commences on the day that the dependent child becomes a permanent resident, for a period of three years.

In the case of all other members of the family class, the sponsorship obligation extends for a period of 10 years from the date in which the member of the family class becomes a permanent resident.

In addition to the above noted obligations, the sponsor must meet the following requirements:

- intends to fulfill the obligations in the sponsorship undertaking;
- is not subject to a removal order;
- is not detained in any penitentiary, jail, reformatory or prison;
- has not been convicted of a sexual offence or an offence under the *Criminal Code*, or convicted outside Canada of an offence which, if committed in Canada, would be a sexual offence or an offence under the *Criminal Code*, against the conjugal partner, a relative of the sponsor, or of the sponsor's spouse or of the sponsor's common-law partner, including a dependent child or other family member of the sponsor, the sponsor's spouse, conjugal partner or of the sponsor's common-law partner;[5]
- is not in default of an undertaking or support obligations ordered by a court;
- is not in default of a debt owed under the IRPA;
- is not an un-discharged bankrupt under the *Bankruptcy and Insolvency Act*;
- is not in receipt of social assistance, other than for a reason of disability;
- is not in default of a previous sponsorship obligation or undertaking;
- has a total income equal to the minimum necessary income for the number being sponsored.

The bar on sponsorship is removed where the sponsor's conviction has been pardoned or has been revoked under the *Criminal Records Act* or where the final determination was an acquittal. In addition, if a period of five years or more has elapsed since the completion of the sentence

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[3] IRPR, ss. 117(9)(b) and 125(b).
[4] IRPR, s. 117(9)(d).
[5] IRPR, s. 133(1)(e) and (f).

imposed, the sponsor may sponsor a member of the family class. Likewise, for foreign offences, the bar is lifted in the case of a final acquittal, or if a period of five years or more have elapsed since the completion of the sentence imposed, and the sponsor has demonstrated that he has been rehabilitated.

Pursuant to IRPR, s. 133(4) a sponsor is not required to meet the minimum income required if the sponsored person is:

- the sponsor's spouse, common-law partner or conjugal partner and has no dependent children;
- the sponsor's spouse, common-law partner or conjugal partner and has a dependent child who has no dependent children; or
- a dependent child of the sponsor who has no dependent children or a person who meets the definition of a dependent child and in respect of whom the sponsor became the guardian while the person was under the age of 18, or a person under 18 years of age whom the sponsor intends to adopt and meets other specified requirements referred to in s. 117(1)(g).

The sponsor and the member of the family class, over the age of 22 years (or if less than 22 years is spouse, common-law partner or conjugal partner of the sponsor) must sign a sponsorship agreement which contains the following elements:

- a statement that the sponsor will provide for the basic requirements of the person and their accompanying dependants during the period of the undertaking;
- a declaration from the sponsor that the sponsorship obligations do not prevent the honouring of the agreement with the member of the family class and the undertaking to the Minister of Citizenship and Immigration; and
- a statement from the member of the family class that they will make every reasonable effort to provide for the basic requirements for themselves and their accompanying dependants.

The effect of immigration sponsorship agreements on spousal support claims is an issue which requires the consideration of immigration lawyers, when advising spouses under the family class immigration category. Although in the majority of cases, the person sponsoring the immigrant will be meet their obligations voluntarily, sometimes, due to a marriage breakdown, the sponsor refuses to provide financial support. In such cases, the immigrant is able to avail themselves of government assistance. However, once a government makes a payment to the immigrant, that the sponsor has in the undertaking promised to repay, or an obligation set out in the undertaking is breached, the sponsor will be considered in default pursuant to IRPR 135. Attached as schedule 1 please see the 'Memorandum of Understanding" between the Minister of Citizenship and Immigration Canada and the Canada Revenue Agency wherein enforcement of defaulted undertaking and the sponsors liabilities is delegated to the Canada Revenue Agency. The government has recently aggressively pursued reimbursement of payments made to immigrant spouses where the sponsor is in default. However, in addition to government assistance, the immigrant spouse may seek support from the sponsor under the Divorce Act, in the case of legally married spouses and the Family Law Act, in the case of common law spouses (ie. Spouses who have cohabited for three or more years). Although the case law allows for wide discretion in awarding support payments, there are now "Spousal Support Guidelines" that provide additional, albeit non-binding guidance to the court in exercising its discretion. It appears that some weight is given to sponsorship agreements in spousal support cases and that

the existence of an undertaking of assistance will result in an award of greater financial support and may interfere with the enforceability of a marriage contract[6].

The sponsor must meet the Lower Income Cut Off ("LICO") requirement for the given geographical area applicable to the family unit. The onus is on the applicant to demonstrate that his/her income meets the minimum income requirement specified in the LICO figures published from time to time by Statistics Canada. The sponsor's income is calculated based on the previous year's CRA Notice of Assessment. The sponsor can bolster the total income by including an income earning spouse or common-law partner as a co-signer on the undertaking of assistance.

Sponsorship undertakings may be co-signed by the sponsor's spouse or common-law partner. The sharing of sponsorship undertakings can potentially enhance the income level in order to meet the LICO requirements for sponsorship.

4. Defining the Members of Family Class

The IRPR sets out that no foreign national shall be considered a spouse, common-law partner, conjugal partner, or adopted child of the sponsor if the relationship is not genuine or was entered into primarily for the purpose of acquiring any status or privilege under the Act or Regulations.[7]

The following foreign nationals may be sponsored by a Canadian or permanent resident under the IRPR:

- the sponsor's spouse, common-law or conjugal partner;
- dependent children of the sponsor,
- the sponsor's father or mother;
- the mother or father of the sponsor's mother or father (grandparents);
- A person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is:
    - A child of the sponsor's mother or father,
    - A child of the child of the sponsor's mother or father, or
    - A child of the sponsor's child.
- Where the adoption is an international adoption and either the country in which the person resides or the person's province of intended destination is not a party to the Hague Convention on Adoption, the competent authority of the country and of the province have approved the adoption in writing as conforming to that Convention, and
    - The person has been placed for adoption in the country in which they reside or is otherwise legally available in that country for adoption and there is no evidence that

[6] James Herbert, The Effects of Immigration Sponsorship Agreements on Spousal Support Claims, Paper delivered to Ontario Bar Association on April 24, 2008. In this paper, the writer established five propositions from the case law: 1) Immigration sponsorship agreements are an important factor in spousal support claims, 2) the combination of a sponsorship agreement and a claimant on public assistance creates an overwhelming case for spousal support, 3) although highly relevant, a sponsorship agreement is not conclusive as to the question of entitlement, 4) although highly relevant, a sponsorship agreement is not conclusive as to the question of duration of support, and 5) a marriage contract is unlikely to alleviate liabilities under a sponsorship agreement.

[7] IRPR, s. 4.

the intended adoption is for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption, and
    - The competent authority of the person's province of intended destination has stated in writing that it does not object to the adoption; or

- a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child who is a child of the mother or father of that mother or father
    - Who is a Canadian citizen, Indian or permanent resident, or
    - Whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.[8]

The above noted relatives must meet the definition of family class member at the time the application was submitted as well as at the time of determination of the application. Accompanying family members of the family class member must be admissible in order for the sponsorship application to receive approval.

(i) Common-law or Conjugal Partner

The current law allows for the sponsorship of same sex spouses, common-law and conjugal partners in addition to those of the opposite sex. Spouses, common-law partners or conjugal partners under the age of 16 years cannot be sponsored into Canada.

"Common-Law Partner" Defined:

Common-law partners can now be sponsored and are included in the family class. A "common-law partner" means a person who is and has cohabited with a Canadian citizen or permanent resident in a conjugal relationship for the period of at least one year. Cohabiting common-law partners who are not yet divorced from their previous marriage partners can meet the definition of common law partners provided that they have cohabited with the common-law partner for at least one year.

Conjugal Partner Defined:

A "conjugal partner" is defined as a "foreign national residing outside of Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year".[9] Cohabitation is not a requirement for a conjugal relationship. The conjugal partner may be sponsored by the Canadian citizen or permanent resident provided the couple has maintained a conjugal relationship for at least one year. Conjugal partners are not required to merge their households due to the fact that it may be physically impossible, in light of visa restrictions or other personal limitations, to do so.

The following characteristics identify the existence of a family class conjugal relationship:

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[8] IRPR, s. 117(1).
[9] IRPR 2.

- mutual commitment to a shared life;
- exclusive commitment;
- exclusively intimate;
- physically, emotionally, financially and socially interdependent;
- permanent, long term, genuine and continuing relationship;
- presentation to the outside world as a couple (i.e. this is my partner/other half);
- considered to be a couple by friends and acquaintances;
- shared parental and/or financial responsibilities;
- frequent contact, visits and communication between the couple whenever possible.

(ii) Dependent Children

The regulations define a dependent child as a child who:

a) has one of the following relationships with the parent, namely;

   i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent; or

   ii) is the adopted child of the parent; and

b) is in one of the following situations of dependency, namely:

   i) is less than 22 years of age and not a spouse or common-law partner;

   ii) has depended substantially on the financial support of the parent since before the age of 22 years –or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner—and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student

      a. continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and

      b. actively pursuing a course of academic professional or vocational training on a full-time basis, or

iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition[10].

In order to be considered a dependent, over the age of 22 years, the "child" who is not in a spousal or in a common-law relationship or a full time student must meet the required criteria at the time of sponsorship and at the time the immigration visa is issued[11]. At the time that the visa application is

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[10] IRPR 2

[11] *Hamid v. Canada (Minister of Citizenship & Immigration)* (2006), 54 Imm. L.R. (3d) 163, 2006 CarswellNat 1592, 2006 FCA 217 (Fed. C.A). The Federal Court of Appeal held that a child of a federal skilled worker who has applied for a visa, who was 22 years of age or over and who was considered dependent on the skilled worker on the date of the of the application because of his financial dependence and full-time study, was no longer a dependant within the meaning of IRPR 2(b)(ii) because he was no longer in full-time studies at the time the visa application was determined and, consequently, could not be included as a dependant on his parent's application for permanent residence.

determined, children over the age of 22 years may also be considered dependants if they have been financially dependent on their parents since the age of 22 years. A child who became a spouse or common-partner before 22 years of age and who continues as a full-time student and financially dependent on their parents, will also fall within the regulatory definition of a dependent child. In order to qualify as a dependent child, children over the age of 22 must demonstrate that they have been enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and is actively pursuing a course of academic, professional or vocational training on a full-time basis.[12]

The applicant is required to submit documentation regarding the dependency of the children such as documentation evidencing that the child is a full-time student and is "substantially" supported by the parent. School enrolment confirmations, tuition receipts, course curriculums and transcripts provide evidence of continuous full-time enrolment in a post-secondary institution. Parents should also provide letters from the school or bank records indicating that they are supporting the dependent child, particularly if the child is not living at home.

(iii) Adoptions

The Hague Convention on Protection of Children and Cooperation in respect of Inter-Country Adoption governs all provincial and territorial international adoption programs in Canada where the child's country of residence is a signatory. In Canada, child welfare and adoption falls within provincial and territorial jurisdiction and each province and territory has specific international adoption programs. In cases where the child's country is not a signatory to the Hague Convention, the adoption must have been concluded in accordance with the intent and spirit of the Convention because Canada is a signatory. The thrust of the legislation is to protect the best interests of the child, which are deemed to be protected if the following conditions are met in respect of the adoption:[13]

1. a competent authority has conducted or approved a home study of the adoptive parents;
2. before the adoption, the child's parents gave their free and informed consent to the child's adoption;
3. the adoption created a genuine parent-child relationship;
4. the adoption was in accordance with the laws of the place where the adoption took place;
5. the adoption was in accordance with the law of the sponsor's place of residence and, if the sponsor resided in Canada at the time the adoption took place, the competent authority of the child's province of intended destination has stated in writing that it does not object to the adoption; and
6. if the Hague convention applies, that all relevant countries complied therewith.

In cases where the child is adopted after reaching the age of 18, a genuine parent-child relationship must have been established before the applicant turned 18 years and continues to exist.

Since it is an offence for an Ontario resident to leave the province to adopt internationally or finalize an international adoption without making an application to adopt with a licensed international adoption agency, it is essential to involve the provincial authority for adoption prior to initiating any type of adoption process.

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[12] IRPR 2.
[13] IRPR 117(3).

In addition to applying for permanent residence, a parent may also apply for citizenship of their adopted child, without first obtaining permanent residence. This is a new procedure which was announced on December 23, 2007 and allows persons who were adopted or who will be adopted by a Canadian citizen parent after February 14, 1977 to apply to become Canadian citizens without first having to become permanent residents of Canada.

The processing times for both the citizenship application process and the permanent residence application process are similar because most of the steps and documentation is similar, including the fact that they each have a review process. There is no prohibition to applying under each process simultaneously, however, if the citizenship application is approved and citizenship is granted, the permanent residence application will be administratively withdrawn. In the case of a negative citizenship determination, the applicant can apply for a judicial review within 30 to the Federal Court of Canada. Negative determinations of permanent residence applications are appealed to the Immigration and Refugee Board.

5. Bars to Sponsorship

A sponsorship application will not be approved if the:

1. spouse or common-law partner is under the age of 16 years;
2. where the sponsor's obligations under a previous sponsorship undertaking in relation to a spouse or common-law partner have not expired;
3. sponsor or spouse was married at the time of their marriage;
4. sponsor has lived separate and apart from the foreign national for at least one year and either the sponsor or the common-law partner or conjugal partner is now the common-law partner or conjugal partner of another person;
5. sponsor obtained permanent residence and at the time of their own application the spouse was a non-accompanying family member, or a former spouse or former common-law partner and was not examined.[14]

One of the most controversial sections of the IRPR are the bars to sponsorship, particularly s. 117(9)(d), which effectively bars from sponsorship persons who would otherwise be members of the family class by virtue of their relationship to the sponsor if they were not examined as part of the sponsor's application for permanent residence. Since there is no exception to the requirement that family members must be declared (and examined) to qualify for landing, this provision has resulted in some harsh decisions against the subsequent sponsorship of unexamined children. The courts have so far upheld the provision and have indicated that the applicant may request consideration based on humanitarian and compassionate circumstances and the best interests of the children to overcome the strict interpretation of IRPR 117(9)(d).[15]

To date IRPA, s. 25 has been underutilized by visa officers in their decision-making with respect to family sponsorship cases. Additional training and exposure to this provision may remedy

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[14] IRPR 117(9).

[15] *De Guzman v. Canada (Minister of Citizenship & Immigration)* (2004), 40 Imm. L.R. (3d) 256, 245 D.L.R. (4th) 341, 2004 CarswellNat 3261, 2004 FC 1276 (F.C.), affirmed (2005), 51 Imm. L.R. (3d) 17, 2005 CarswellNat 4381, 2005 CarswellNat 6009, 42 Admin. L.R. (4th) 234, 2005 FCA 436, 262 D.L.R. (4th) 13, 137 C.R.R. (2d) 20, [2006] 32005 CarswellNat 6009, 42 Admin. L.R. (4th) 234, 2005 FCA 436, 262 D.L.R. (4th) 13, 137 C.R.R. (2d) 20, [2006] 3 F.C.R. 655, 345 N.R. 73 (F.C.A.), leave to appeal refused (June 22, 2006), Doc. 31333 (S.C.C.), reported 2006 CarswellNat 1694, 2006 CarswellNat 1695, [2006] S.C.C.A. No. 70.

the current absolute prohibition and its draconian effect in certain family reunification circumstances (e.g., young children abroad being cared for by someone who is now deceased and who were never declared or examined in their parents' application for permanent residence).

6. Sponsors Living Outside Canada

Canadian citizens living outside of Canada may sponsor their spouse, common law partner, conjugal partner or dependent children without dependent children of their own, provided that they are able to demonstrate that they will reside in Canada after their sponsored landing(s). Permanent residents residing abroad may not sponsor their family from outside Canada. Furthermore, a spouse or common law partner in Canada may only sponsor their spouse or common law partner if they are cohabiting in Canada; otherwise, the application must be filed through a visa office.

7. Application Process

Sponsorship applications may be made inland or outside of Canada. The IRPR has created an inland landing class for sponsored spouses, common-law partners and their dependent children. Conjugal partners cannot be sponsored from within Canada.

In the case of applications for permanent residence filed outside of Canada, once the sponsorship undertaking is approved by the inland case processing centre, the approval is forwarded to the visa office specified by the sponsor and wherein the member of the family class resides or is a national. The visa office is responsible for determining that the family class member and all accompanying dependants are not inadmissible to Canada and will verify their family class relationship to the sponsor. The member of the family class will be required to meet all immigration medical and security requirements. In the case of spouses, common-law partners and conjugal partners, the visa office will make a determination regarding the bona fides of the relationship.

Where the application is filed within Canada, the sponsorship undertaking and permanent residence portions of the application can be filed together at the case processing centre. The case processing centre makes a determination of the sponsor's eligibility to sponsor as well as the foreign national's admissibility to Canada. Applications which require further investigation will be forwarded to a local Citizenship and Immigration Office for a final decision, and potentially include a request for an interview. Once an individual is approved in principle as a member of the In-Canada Family Class, they are eligible to apply for an open work permit or student permit while their application for permanent residence continues to be processed by the case processing centre in Canada.

The permanent residence application must include evidence of the family class relationship such as birth or marriage certificates authenticating blood or marriage relationships, court guardianship, custody or adoption orders and so forth. The sponsor and applicant should provide the best documentation and evidence of the family class relationship available to them. Where clear documentary evidence is not available or if the documentation provided is unconvincing, the visa officer may request genetic testing to prove a relationship.

8. Misrepresentation

Under the IRPA, a permanent resident sponsor who is found to have misrepresented a material fact on their application may be removed from Canada if they are permanent residents, or if they are Canadian citizens, may be convicted and fined up to $100,000 or imprisoned for a term

of not more than five years. Likewise, the foreign national being sponsored may be found inadmissible to Canada.[16]

9. Conclusion

Canada's most recent act and regulations, which became law in June 2002, have significantly broadened the scope of the family class immigration category in order to include same sex conjugal, common law and marriage spouses, and the adopted children of such unions. These changes were the direct result of legal challenges, the significant impact of our Charter of Rights and Freedoms on our society, and the evolution of family law in Canada. Canada's current immigration provisions regarding the broadening of the family class category to include non-traditional spousal and child relationships, resonate with Canada's current overall legislative framework.

[16] IRPA, s. 40.