

# RECOGNIZING SAME-SEX PARTNERS AS FAMILY MEMBERS: THE CANADIAN ALTERNATIVE

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## INTRODUCTION

Family-based immigration has been a significant part of Canada's immigration program for well over three decades. Most Canadian immigration lawyers agree that the implementation of the Immigration and Refugee Protection Act (IRPA and "the Act" herein) in June of 2002 represented a restrictive step in Canada's immigration history, but the legislation and regulations did provide for some increased access to family-based immigration to Canada. Perhaps the most noteworthy change was the definition of "Members of the Family Class" to include common-law and conjugal partners. The inclusion of same-sex relationships in these newly introduced concepts in turn heralded Citizenship & Immigration Canada's modern-day approach to less traditional families. For the first time, Canada formally recognized in its immigration legislation common-law and conjugal relationships between both opposite and same-sex partners.

This article outlines Canada's approach to same-sex couples by describing the legislative origins of inclusion in the Family Class and setting out some of the associated benefits. It also is important to understand that the expanded definition of Members of the Family Class in Canada's immigration legislation has resulted in increased access for same-sex couples to all of Canada's immigration programs. Same-sex partners now have access to these pro-

grams as all common-law and conjugal partners receive the same consideration as married spouses under the law. For instance, the same-sex partner of a Work Permit applicant may be eligible for the spousal "Open" Work Permit that allows him or her to work without employer restriction while the applicant is temporarily assigned to the Canadian office of his or her employer. As well, same-sex partners are considered dependent family members for purposes of Canada's Foreign Skilled Worker and Business (including Self-Employed, Entrepreneur, and Investor) immigration programs.<sup>1</sup>

## A SNAPSHOT—OVERVIEW OF CANADA'S FAMILY CLASS IMMIGRATION PROGRAM

One of the stated objectives of the IRPA is "to see that families are reunited in Canada."<sup>2</sup> The IRPA provides that foreign nationals may be selected as Members of the Family Class on the basis of their relationship to a Canadian citizen or permanent resident.<sup>3</sup> As such, the list of Members of the Family Class determines the type of relationships that qualify as family relationships for immigration purposes.

The 2002 expansion of the Family Class included common-law partners and conjugal partners.<sup>4</sup> In making gender neutral the definition of common-law and conjugal relationships, Canada's immigration laws, regulations, and policies now provide for the equal treatment of common-law and conjugal couples of both the opposite and same sex. Note, additionally, that the definition of "marriage" is also gender neutral; where same-sex marriage is valid in the jurisdiction where it took place and under Canadian law, it too is therefore acceptable for immigration purposes.

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<sup>1</sup> Discussion of employment-based derivative benefits for same-sex couples is outside the scope of this article.

<sup>2</sup> IRPA §3.

<sup>3</sup> IRPA §12(1).

<sup>4</sup> The IRPA Regulations also broaden the definition of a dependent child and specifically exclude fiancé(e)s from the Family Class. These considerations fall beyond the scope of this article.

The IRPA Regulations do not set out processing quotas for Family Class applications. However, processing objectives for Family Class applications are found within Citizenship & Immigration Canada's Operation Manuals, which clearly advise immigration officers that spouses, common-law and conjugal partners, and their dependent children should have the highest priority in processing.

### THE PLAYERS—THE STATUTORY REQUIREMENTS AND RESTRICTIONS

To immigrate to Canada on the basis of a family relationship, the foreign national applicant must be sufficiently related to his or her sponsor and fall within the parameters of the relationships set out in the Family Class. Conversely, the sponsor must be eligible to sponsor a Member of the Family Class. All Members of the Family Class and their family members must be admissible to Canada under the sections of the IRPA relating to criminality and security.<sup>5</sup> Immigration officers determine admissibility on the basis of police certificates and background reports.

#### Members of the Family Class

Members of the Family Class include:<sup>6</sup>

- Spouses (formally married);
- Common-law and conjugal partners;
- Dependent children including children adopted overseas;
- Fathers or mothers;
- Grandparents;
- Orphans under 18 if sibling, niece or nephew, or grandchild of sponsor;
- Children under 18 adopted in Canada;
- One relative when the sponsor has no relatives in Canada (Canada citizen, Native Indian, or permanent resident) and no relative eligible as listed above.

Note that brothers and sisters are not Members of the Family Class; thus, Canadian law does not provide for the sponsoring of siblings.

Foreign nationals are specifically precluded from being considered a spouse (a partner in a formal marriage), common-law partner, a conjugal partner, or an adopted child of a 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.<sup>7</sup>

#### The Common-Law Partner

For immigration purposes, a common-law partner is *an individual* who is cohabiting with the person in a conjugal relationship, having so co-habited for at least one year.<sup>8</sup> As such, the traditional definition of common-law partner was expanded to include a same-sex partner. All common-law partners can be sponsored and are included in the Family Class.

A number of scenarios that might arise in the context of a common-law relationship are contemplated in Citizenship & Immigration Canada's Operation Manuals. For instance, persons who are separated but not divorced may be considered common-law partners with another person provided their prior marriage has broken down and they have cohabited with their common-law partner for the requisite one year. In such cases, however, the applicant should provide evidence of the prior marriage break down and separation.

#### The Conjugal Partner

For immigration purposes, a conjugal partner is 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.<sup>9</sup> Again, the gender neutral language of the provisions provides for inclusion of same-sex couples. Cohabitation is not a requirement for a conjugal relationship.<sup>10</sup> Conjugal partners are similar to common-law partners; however, they have not yet merged their households to the same extent, as they have not been able to cohabit continuously and permanently. The successful application must adequately explain why the couple has not been able to cohabit continuously for one year.

#### Sponsors

A sponsor is a Canadian citizen or permanent resident who is at least 18 years of age and who has filed an application to sponsor a Member of the

<sup>5</sup> IRPA §33-37.

<sup>6</sup> IRPA Regulations §117(1).

<sup>7</sup> IRPA Regulations §R4.

<sup>8</sup> IRPA Regulations §1(1).

<sup>9</sup> IRPA Regulations §1(1).

<sup>10</sup> IRPA Regulations §2.

Family Class or a member of the spouse or common-law partner "In-Canada" class.<sup>11</sup>

A sponsor who is a Canadian citizen and does not reside in Canada may sponsor a foreign national pursuant to the Family Class provided that the sponsor will reside in Canada when the foreign national becomes a permanent resident.<sup>12</sup> Sponsors must provide evidence that they will reside in Canada after the Member of the Family Class becomes a permanent resident. Acceptable evidence may include one or more of the following:

- Letter from employer indicating the relocating of the sponsor to Canada;
- Letter of acceptance from a Canadian educational institution;
- Proof of having purchased a home in Canada.

The sponsorship applications of Canadian citizens living abroad must be submitted to the Case Processing Centre in Mississauga, Ontario, not to a visa office.

### **Bars to Sponsorship**

Sponsors are not eligible to sponsor a Member of the Family Class if they are subject to any of the bars set out in the Regulations.<sup>13</sup> The regulations specifically prevent individuals from being sponsors if they have been convicted of a sexual offence or offence relating to family violence.<sup>14</sup> A prospective sponsor convicted of a sexual offence or offence involving family violence cannot sponsor unless five years have passed since completion of the sentence or a pardon has been granted. For convictions outside of Canada, prospective sponsors must show that at least five years have expired since completion of the sentence, that they have been rehabilitated, or that there has been an acquittal.<sup>15</sup> A prospective sponsor also is ineligible if detained in a penitentiary, jail, reformatory, or prison.

If the prospective sponsor is in receipt of social assistance other than for a disability, this also will bar him or her from being a sponsor. The sponsor may be eligible once social assistance is discontinued. Note, however, that this bar to sponsorship may be waived for humanitarian and compassionate reasons.

<sup>11</sup> IRPA Regulations §130(1).

<sup>12</sup> IRPA Regulations §130(2).

<sup>13</sup> IRPA Regulations §133.

<sup>14</sup> IRPA Regulations §133(1)(e).

<sup>15</sup> IRPA Regulations §133(3).

Where the prospective sponsor is in default of a previous undertaking submitted or support obligations ordered by a court, he or she is ineligible to sponsor. As well, if during the sponsorship process the sponsor becomes subject to an application for revocation of citizenship, has a report written against him or her pursuant to the IRPA, or is charged with the commission of an offence punishable by a maximum term of imprisonment of at least 10 years, the sponsorship application will be suspended pending a final determination of the charge.

### **THE PROCESS—THE SPONSORSHIP AND PERMANENT RESIDENCE APPLICATIONS**

The application process, including the initial application forms and the destination where applications are filed, differs depending on who is being sponsored and whether the sponsored family member is in Canada or abroad. In every instance, the applicant is required to undergo medical examinations and police clearance and security checks. In some cases, the applicant also is required to attend an interview. Typically where the *bono fides* of the relationship is in question, both the applicant and the sponsor may be required to attend separate interviews conducted by an immigration officer. All successful applicants must pay a CAD\$975 Right of Permanent Residence Fee prior to issuance of the immigrant visa.

### **Spouse and Common-Law Partners in Canada**

For spouses and common-law partners in Canada, there is an "In-Canada" landing class for their sponsored spouses, common-law partners, and dependent children. This process permits family members who fall within the class to be processed within Canada, thus, eliminating the necessity of filing an application for permanent residence by the sponsored family member at a Canadian visa office abroad. In theory, this provision eliminates the necessity of families being apart for long periods of time and promotes the IRPA objective of family reunification. Spouses and common-law partners of Canadian citizens or permanent residents who are living together in Canada are eligible to apply in this class. Until recently, the foreign national applicant was required to have legal temporary residence status as a visitor, worker, or student in Canada.

In-Canada processing requires the filing of joint applications. A "Joint Application" involves the simultaneous filing of both a Sponsorship Application (IMM 1344A) and a Permanent Resident Applica-

tion (IMM 0008). The Case Processing Centre in Vegreville, Alberta, is responsible for processing applications filed for spouses and common-law partners under the In-Canada Class.

The processing of the application will not commence until the Case Processing Centre has received both applications completed and signed with the appropriate processing fees. Applications also must include all information and documents required by the Act and Regulations,<sup>16</sup> the basic required supporting documentation is identified in the sponsorship and permanent resident application packages.

#### *Approval in Principle*

The Case Processing Centre is charged with assessing the sponsor's eligibility to sponsor and making a determination concerning the foreign national's Application for Permanent Residence. Applications requiring further investigation will be forwarded to a local Citizenship & Immigration Canada office for final decision. Once an individual is approved in principle as a member of the In-Canada Class, he or she may apply for a work permit or study permit while the Application for Permanent Residence continues to be processed.

#### **Spouses, Common-Law Partners, Conjugal Partners, and Dependent Children Outside of Canada**

Applications for conjugal partners cannot be processed in Canada and must be processed at a visa office outside of the country. The applications of spouses and common-law partners also can be processed at a Canadian visa office abroad. The "Joint Application" process still is applicable when a Canadian citizen or permanent resident is sponsoring a spouse, common-law partner, conjugal partner, and/or a dependent child residing outside of Canada. In such instances, however, the Sponsorship Application (IMM 1344A), the Permanent Resident Application (IMM 0008), all supporting documentation, and the requisite fee must be filed at the Case Processing Centre in Mississauga, Ontario. After rendering a decision with respect to the Sponsorship Application, CPC-Mississauga will forward the Application for Permanent Residence with the supporting documentation to the appropriate visa office for further review and processing.

## DIFFICULT CASES

### Outstanding Sponsorship Agreements

As part of the Sponsorship Application, sponsors are required to enter into a Sponsorship Agreement. Part and parcel of this agreement is the sponsor's undertaking. The undertaking is effective from the day the sponsored family member enters Canada until the end of the specified period of the undertaking. The duration of the undertaking varies depending on the person who is being sponsored. For all spouses, common-law partners, and conjugal partners, the term of the undertaking is three years from the date of the foreign national becomes a permanent resident. Sponsors must be cognisant of the length of any prior sponsorship agreement that they have entered into on behalf of a Member of the Family Class as sponsors of spouses, common-law partners, or conjugal partners. Individuals 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.<sup>17</sup> This rule applies to both Canadian citizens and permanent residents who wish to sponsor a family member. There are no specific exemptions from this exclusion.

### Excluded Relationships

Foreign nationals who are the sponsor's spouse, common-law partner, or conjugal partner but are under 16 years of age are not eligible to be sponsored.<sup>18</sup> There is no specific exemption from this exclusion.

## FINANCIAL REQUIREMENTS

A sponsor's income must meet the minimum necessary income requirements as identified by Statistics Canada in its Low Income Cut-Off Levels assessment. A sponsor must provide his or her latest Notice of Assessment from the Canada Customs and Revenue Agency. If such notice is not available, the sponsor is required to provide evidence that he or she meets the applicable minimum income for the 12-month period immediately preceding the date of the sponsorship application.

The ability of the sponsor to meet the minimum income requirement is mandatory unless the sponsor

<sup>16</sup> IRPA Regulations §10.

<sup>17</sup> IRPA Regulations §§117(9)(b), 125(b).

<sup>18</sup> IRPA Regulations §117(9)(a).

is sponsoring a spouse, common-law partner, conjugal partner, or dependent child where the child has no dependent children of their own.<sup>19</sup> By the inclusion of same-sex relationships in the common-law and conjugal definitions, same-sex couples can avail themselves of this exemption.

### Medical Inadmissibility

As Canada has a public health care system, Citizenship & Immigration Canada diligently tests and screens all immigrants as well as many visitors who wish to enter Canada for medical inadmissibility. Foreign nationals are inadmissible to Canada on health grounds if they are determined to have a health condition that:

- Is likely to be a danger to public health;
- Is likely to be a danger to public safety;
- Might reasonably be expected to cause excessive demand on health or social services.<sup>20</sup>

If, however, an individual is determined to be a Member of the Family Class and to be the spouse, common-law or conjugal partner, or child of a sponsor within the meaning of the Regulations, then he or she is exempt from meeting the health grounds due to excessive demand on Canada's health and social services.<sup>21</sup> This provision is consistent with IRPA's stated objective of family reunification and because same-sex couples are included in the common-law and conjugal definitions, they can avail themselves of this important exemption.

### Misrepresentation

If a sponsor who is a Canadian permanent resident misrepresents a material fact on his or her Sponsorship Application, the sponsor can be removed from Canada; Canadian citizen sponsors who misrepresent can, on conviction, be fined up to CAD\$100,000 or imprisoned for a term of not more than five years.<sup>22</sup> The foreign national who is being sponsored also may be found inadmissible. There are no specific exemptions to this provision of the Act.

## THE LEGAL PRACTITIONER'S ROLE

In assessing any family-based permanent residence application, an immigration officer must be satisfied that the relationship between the sponsor and the spouse, common-law partner, or conjugal partner is genuine and that it falls within the definitions provided in the IRPA Regulations. It is the legal practitioner's role to ensure that the sponsor and applicant fully appreciate the extensive information and documentation required to support the application and to assist them in thoroughly preparing, filing, and monitoring the progress of the application.

### Preparing the Submission

One practical consequence of modernizing the Family Class definition has been the increased scrutiny that Citizenship & Immigration Canada now places on the assessment of family-based applications in general. In the three years since the IRPA became law, it has become increasingly important to provide extensive documentation evidencing the *bone fides* of the family relationship whether marital, common-law, or conjugal. However, because common-law and conjugal relationships are by nature less documented, it is particularly important that the legal practitioner ensure that both the sponsor and the applicant have satisfactorily established the key elements of the relationship in their applications and submitted sufficient accompanying documentation.

Citizenship & Immigration Canada's Overseas Processing Manual advises visa officers of the following characteristics that should be present in all conjugal (including spousal and common-law) relationships:

- Mutual commitment to a shared life;
- Exclusivity—cannot be in more than one conjugal relationship at a time;
- Intimacy—commitment to sexual exclusivity;
- Interdependence—physically, emotionally, financially, socially;
- Permanence—long term, genuine, and continuing relationship;
- Present themselves as a couple (“here’s my other half”);
- Regarded by others as partners;
- Caring for children together (if there are children).

The legal submission therefore should contain a summary of the major dates and events of the relationship and particulars of friends and family members with knowledge of the relationship. It also might contain details of the communications between the

<sup>19</sup> IRPA Regulations §133(4).

<sup>20</sup> IRPA §§38(1) (a), (b), and (c).

<sup>21</sup> IRPA §38(2); IRPA Regulations §24.

<sup>22</sup> IRPA §40.

couple and an indication of the frequency of visits to each other when apart and/or an outline of time spent cohabiting either in Canada or abroad. Where applicable, the submission also should address whether the sponsor has sent financial support to the applicant and whether either partner ever has been in a common-law or conjugal relationship before.

### Evidencing the Relationship

Assessment of the relationship is fact-based, and as such, the onus is on the applicant and his or her lawyer to provide documentation in support of the relationship. The relationship (marital, common-law, and conjugal) must be clearly distinguished from one of convenience.<sup>23</sup> The following list of supporting documentation may assist the legal practitioner in demonstrating that the relationship between the sponsor and spouse, common-law, or conjugal partner is genuine:

- Copies of family memberships, medical plans, documentation from institutions that indicate recognition as a couple;
- Marriage certificate, wedding invitations, commitment ceremony certificate, domestic partnership certificate (where applicable);
- Joint ownership of possessions, joint utility bills, joint lease/rental agreement, joint mortgage/loan documents, property title, joint bank statements or credit cards;
- Correspondence addressed to either or both parties at the same address (where applicable);
- Documents showing travel together, long distance phone bills, letters;
- Insurance policies (documents naming the partner as a beneficiary), wills, powers of attorney;
- Significant photographs taken throughout the term of the relationship;

- Statements of support from family members, friends, employers, religious leaders, bank managers (often provided in Statutory Declaration form); and

▪ A Statutory Declaration of Common-law Union.  
Additional documentation illustrating the following also may be useful:

- Duration of the relationship and how the partners met;
- Long-term planning involved in the relationship;
- The knowledge each has of the other's background and family situation; and
- History of marital or other relationships.

### CLOSING REMARKS— RELIEF NORTH OF THE BORDER

The repatriation of Canada's Constitution in 1982, and the implementation of the *Charter of Rights and Freedoms* in 1985, are generally acknowledged as the impetus behind Canada's gradual recognition of less traditional family relationships.<sup>24</sup> The jurisprudence that followed addressed the rights of individuals in marriage-like relationships where the individuals in question were in opposite and same-sex relationships. The Supreme Court of Canada's adjudication of the *Charter's* §15 equality provisions meant that Canada's notion of marital status evolved in a new legal, political, and social direction. In 2002, this notion was formally incorporated into Canada's immigration legislation and regulations. In the intervening three years, this author has had an opportunity to see how this formal recognition of same-sex relationships indeed has facilitated the reunification of less traditional families in Canada. In its progressive approach to less traditional family relationships, Canada offers a true alternative for many same-sex couples in need of immigration relief.

<sup>23</sup> IRPA Regulations §4.

<sup>24</sup> *Constitution Act*, 1982.