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## DEFINING "FAMILY" — A COMMENT ON THE FAMILY REUNIFICATION PROVISIONS IN THE IMMIGRATION ACT

Deborah McIntosh\*

### INTRODUCTION

Working as an immigration lawyer in the 1980s requires the application of restrictive and conceptually limited legislation to problems deserving of legislative creativity and open mindedness. Nowhere is this more evident than in the area of Family Reunification and the sections of the *Immigration Regulations*<sup>1</sup> allowing Permanent Residents in Canada to "sponsor" applications for landing made by their close relatives.

The *Immigration Act, 1976*<sup>2</sup> states in its opening policy paragraphs (s. 3 (c)) that a foremost goal of the *Act* is to "facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad". In a year where refugee policy in Canada will regress to pre-World War II restrictiveness<sup>3</sup>, and applications for landing by "independent" applicants who are non-sponsorable by close family members are almost universally refused, the principle of family reunification is echoed at every opportunity by government spokespersons seeking to reassure the public that Canada's economic and humanitarian commitment to immigration is not dead. Typical is the following statement from the Standing Committee Report on Family Reunification:

"Family reunification has been, and will continue to be, the cornerstone of Canada's immigration policy. The Committee believes that family reunification is the most important and sensitive aspect of our policy and should continue to be so. In recent years, the family class has become the largest single

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<sup>1</sup> Regulations pursuant to the *Immigration Act*, S.C. 1976-77, c. 52.

<sup>2</sup> *Immigration Act, 1976*, S.C. 1976-77, c. 52

<sup>3</sup> See Bill C-55, *An Act to amend the Immigration Act, 1976 and to amend other Acts in consequence thereof*, 2d Sess., 33d Parl., 1986-87.

component of Canada's immigration intake. Every second person who obtains landed immigrant status has qualified because of his or her relationship to a close family member in Canada."<sup>4</sup>

Given that family reunification constitutes the "cornerstone of Canada's immigration policy"<sup>5</sup>, and that the government has acknowledged the need for Canada to continue admitting a certain number of immigrants each year, what exactly is Canada's legislative commitment to the reunification of immigrant families? What kind of family does the *Immigration Act* and *Regulations* seek to reunite? Is the legislative definition of family a reasonable one given the reality of family structure in other countries of the world? The answer is a resounding "no", and the problem has not escaped the attention of public, legal and immigrant minds alike.

## PROBLEMS WITH CURRENT DEFINITION

The restrictive definition of family in the *Regulations* has been the focus of many community groups concerned with immigration policy, including the newly formed Coalition for a Just Refugee and Immigration Policy. The Coalition stated in a document prepared for its inaugural press conference:

"...Immigrants and Canadian citizens must be allowed to bring their families (for example siblings) to Canada promptly... [the Coalition suggests reform of the definition of "family" for sponsorship purposes to include siblings and children regardless of age].

"...[yet] instead of implementing these essential reforms, the government has not expanded the definition of family to facilitate family reunification".<sup>6</sup>

A Toronto committee, the Non-Status Residents Support Committee (NSRSC) points out in a brief prepared for Gerry Weiner, Minister of State for Immigration, that

"...the definition of "family" contained in the Immigration Regulations is out of step with the multicultural character of Canada — it fails to recognize many different and equally valid ideas of "family" held by Canadians.

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<sup>4</sup> *Ninth Report of the Standing Committee on Labour, Employment and Immigration - Family Reunification* (Ottawa: Queens Printer, 17 June 1986) at 2.

<sup>5</sup> *Ibid.*

<sup>6</sup> Statement prepared in advance of a press conference, Coalition for a Just Refugee and Immigration Policy (March 1987) at 1.

The definition is contrary to the spirit and intent of the *Immigration Act, 1976*.<sup>7</sup>

The *Immigration Regulations* do allow for sponsorship of applications for landing of legally married spouses, unmarried children less than twenty-one years of age, orphaned siblings under eighteen years of age, "fiancés", and children under thirteen years of age whom the Canadian citizen or permanent resident intends to adopt (see Appendix I, s. 4(1) of the *Immigration Regulations*). The *Regulations* as they presently exist do *not* allow for sponsorship of children over twenty-one, siblings, common-law spouses or "equivalents", or *de facto* family members, i.e. members of an extended family who are financially or psychologically dependent. These restrictions create problems which do not present themselves to the legal practitioner with a theoretical face. Rather, it is an almost daily occurrence that the immigration practitioner must inform a would-be "sponsor" that the family member she or he wishes to sponsor does not "fit" the relevant legislation. Inevitably the client is appalled to discover that someone she or he considers to be close family is not "family" at all for the purposes of Canadian immigration law.

Participation in immigrant discussion groups and protest demonstrations, as well as personal experience with immigrant clients, has brought to the author's attention the following examples of the inadequacy of the existing regulations governing family reunification:

A Salvadoran couple wish to sponsor their widowed mother, aged sixty four, widowed sister, aged thirty seven, and the sister's two children. Under the *Regulations* they can apply to sponsor their mother, but their widowed sister is not sponsorable. The mother and sister, and the two children raised by them collectively are, they explain, an inseparable family unit.

In many countries of the world, divorce is not a legal possibility. Argentina, for example, only recently enacted a legal provision for divorce. At present, an estimated two million Argentinians live with someone other than his or her spouse.<sup>8</sup> A person immigrating to Canada and subsequently wishing to sponsor his or her common-law spouse may do so only as a "fiancée" pursuant to s. 4(1) of the *Regulations*, and only where there is no legal impediment to a marriage within ninety days of the sponsored applicant's arrival in Canada.

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<sup>7</sup> *Sojourners With Us — Non Status Residents in Canada*, A Brief of Concerns and Recommendations submitted to the Honourable Gerry Weiner, Minister of State for Immigration, by the Non-status Residents Support Committee, Toronto, Ontario (24 March 1987) at 6.

<sup>8</sup> "Divorce Legalized in Argentina", *The Toronto Star* (23 June 1987) at A4.

Since a prior existing marriage clearly constitutes a "legal impediment", the common-law spouse, *regardless of the duration of the relationship or the number of children born of it*, is not sponsorable.

Legal convention in many countries, for example Trinidad, does not necessitate the formal adoption of children raised by persons other than their biological parents. These children may grow to an age older than thirteen without the issue of their legal adoption becoming relevant. Unfortunately, under Canadian immigration law the issue is crucially relevant, and a child in this position over the age of thirteen is not sponsorable, regardless of the number of years he or she has lived with the non-biological parents.

Gay and Lesbian couples are as invisible in Canadian immigration law as they are in our provincial family legislation. A homosexual "spousal equivalent" is not sponsorable, as the *Regulations* define "spouse" as a "party of the opposite sex..."<sup>9</sup>

These examples are illustrations of only a few of the many problems created by the narrow definition of "close relative" contained in s. 4(1) of the *Immigration Regulations*. They are, however, representative of the types of problems that have led groups as diverse as the Coalition for a Just Refugee and Immigration Policy (CJRIP), the Non-Status Residents Support Committee (NSRSC) and the Standing Committee on Labour, Employment and Immigration (hereinafter referred to as the "Standing Committee") to make certain recommendations to the government regarding the efficacy of current family reunification provisions. These recommendations focus almost universally on the need for immigration legislation to recognize and implement a more expansive definition of "family" which would be in keeping with both the "evolving concept of the family in Canadian domestic law",<sup>10</sup> and the concept of "extended family" long recognized in other cultures and increasingly a part of Canadian life. A brief survey of these recommendations, the reasoning behind them and the means by which they might be recognized in the form of legislative amendments follows.

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<sup>9</sup> Regulations pursuant to the *Immigration Act* S.C. 1976-77, c. 52.

<sup>10</sup> See *supra*, note 7 at 6.

## PROPOSALS FOR CHANGE

### 1. ALL UNMARRIED CHILDREN, NOT JUST THOSE UNDER THE AGE OF TWENTY-ONE, SHOULD BE SPONSORABLE

This recommendation is raised both by the Standing Committee, and by the NSRSC. Both committees express concern regarding the arbitrary nature of a "cut-off" age of twenty-one. The NSRSC states simply that

"[The rule excluding children over twenty-one] runs counter to Canada's commitment...to reunite Canadian citizens and permanent residents with close relatives from abroad. Although the Immigration Policy Manual allows some children over twenty-one to be admitted, this discretion is strictly defined and interpreted and therefore fails to deal with the vast majority of people in this situation."<sup>11</sup>

The Standing Committee suggests as a solution to the problem of the age "cut-off" for dependent children that a concept of "actual" dependency be introduced. The Committee's concern lies in its acknowledgement that a legislated age of dependency ought to be re-examined in light of the equality provisions in s.15 of the *Charter of Rights and Freedoms*,<sup>12</sup> which prohibit discrimination on the basis of age. An "actual dependency" test, the Standing Committee feels, would more reasonably cover the situation of a son or daughter financially dependent on parents past the age of twenty-one, as well as allowing for unusual cases of mental or physical dependency. "While the age of presumed dependency might have to be changed," the Standing Committee has stated "the concept of actual dependency should apply, regardless of age".<sup>13</sup>

Section 3 of the *Immigration Act, 1976* states that

"...Canadian immigration policy and the rules and regulations made under this Act shall be...administered in such a manner as to...recognize the need...

(f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate on grounds of race, national or ethnic origin, colour, religion or sex."<sup>14</sup>

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<sup>11</sup> See *supra*, note 7 at 6.

<sup>12</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.) 1982*, c.11.

<sup>13</sup> See *supra*, note 4 at 10.

<sup>14</sup> *Supra*, note 2.

Section 15 of the *Charter* introduces additional grounds of discrimination, both explicit and implicit, as limitations on governmental action. The Parliamentary Committee on Equality Rights affirms a position that these newly recognized limitations should be reflected in the stated objectives of Canadian immigration policy, and recommends that section 3(f) of the *Immigration Act* be amended to state that the *Act* and *Regulations* ought not to discriminate in a manner prohibited by the *Charter*.<sup>15</sup>

While the age provision existing in s.4(1)(b)(i) of the *Regulations* may be challenged under s.15 of the *Charter*, such a challenge will not necessarily be sufficient to eliminate any reference to "dependency" at all. Groups like the NSRSC and the CJRIP, which requested in its statement that the "government expand the definition of family to include *all* children"<sup>16</sup> (emphasis added), may find "dependency" will ultimately replace age as a means of preventing older children from reuniting with their parents in Canada.

## 2. THE DEFINITION OF SPOUSE SHOULD INCLUDE ALL COMMON-LAW SPOUSES AND SPOUSAL "EQUIVALENTS"

Section 4(1)(a) of the *Immigration Regulations* states that Canadian citizens and permanent residents may sponsor an application for landing made by his or her spouse. This provision becomes problematic for many individuals only in light of the *Act* definitions of "spouse" and "marriage", which act to exclude from the provision common-law spouses and spousal "equivalents" such as partners in a homosexual relationship. The *Act* defines "spouse" "with respect to any person, [as] the party of the opposite sex to whom that person is joined in marriage". "Marriage", the *Act* elaborates, is "...a marriage by the laws of the country in which it took place, but does not include any matrimony whereby one party to that matrimony became at any given time the spouse of more than one living person".<sup>17</sup> Moreover, a Canadian citizen or permanent resident may, pursuant to s. 4(1)(f) of the *Regulations* sponsor an application for landing made by his or her "fiancé". A "fiancé" may not be sponsored under s. 6(1)(d) of the *Regulations* where there is a "legal impediment" to the proposed marriage.<sup>18</sup> The Sponsorship may only take place under an agreement to marry within ninety days of the applicant's admission to Canada.

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<sup>15</sup> *Equality for All: Report of the Parliamentary Committee on Equality Rights*, Issue 29 (October 1985) at 60.

<sup>16</sup> *Supra*, note 6.

<sup>17</sup> *Supra*, note 2.

<sup>18</sup> *Supra*, note 9.

The NSRSC states the problem inherent in this provision most succinctly in its brief:

"Immigration regulations should recognize that many family units are established and endure without any formal sanction. At present, a common-law spouse cannot sponsor his or her partner, but can sponsor their child. Partial recognition of non-marital family units is unrealistic and unfair. This impediment to family reunification cannot always be overcome by the partners simply marrying."<sup>19</sup>

Families and relationships exist, both in Canada and elsewhere in the world, which are not legally recognized. Barred from reunification by restrictive legislation, an applicant's only legal alternative may lie in what are known as "humanitarian and compassionate" considerations. Both at the administrative level and at the statutory level this is a highly discretionary and uncertain area of immigration policy. The fact that a "humanitarian and compassionate" immigration official may well be neither of those, or overly ethnocentric, means that there is little chance of success, particularly for homosexuals, an absolute ban on whom was only removed for the *Immigration Act* when it was revised in 1976.<sup>20</sup>

The possibility of a *Charter* challenge to this section of the Regulations is less straightforward than in the case of the regulation stipulating age as a condition for admission. A challenge to s. 4(1)(a) of the *Regulations* would require that s.15 of the *Charter* be interpreted as a protection against discrimination on the basis of marital status, and possibly on the basis of sexual orientation.

Section 15(1) of the *Charter* states that

"Every individual is equal before and under the law and has the right to equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."<sup>21</sup>

Section 27 of the *Charter* directs that

"This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."<sup>22</sup>

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<sup>19</sup> See *supra*, note 7 at 14.

<sup>20</sup> The Law Union of Ontario, *The Immigrant's Handbook* (Montreal: Black Rose Books, 1981) at 42.

<sup>21</sup> *Supra*, note 12.

<sup>22</sup> *Ibid.*

Section 27 may be only a rule of construction but in the context of immigration policy it takes on a particular significance. As Professor Julius Grey has pointed out in his book *Immigration Law in Canada*:

"It [s. 27] is an indication that Canada has not repudiated its beginnings as a nation of immigrants and that, whatever the temporary pressures of unemployment, social conditions, or security may be, a generally liberal attitude towards...immigration is an integral part of our tradition and should continue."<sup>23</sup>

Since Canadian courts have yet to rule extensively on the issue of whether s.15 provides protection on the basis of marital status and/or sexual orientation, the Parliamentary Committee on Equality Rights has made recommendations regarding proposed changes or developments in future legislation. The Committee has stated that in applying the *Charter* to distinctions on the basis of marital status, there are likely to be many situations where such distinctions can be "demonstrably justified" pursuant to s. 1 of the *Charter*. The Committee points out that

"Many statutes...treat those in a marriage or a family differently from others on the basis that the family represents an economic unit. That may be a fair and relevant assumption to make in fashioning the terms of a taxation scheme or an income security programme. It might not be relevant in another context."<sup>24</sup>

The Parliamentary Committee on Equality Rights speaks strongly in favour of extending recognition of common-law relationships in federal legislation so as to equate their effect with that given legal marriages. It recommends that when benefits are conferred or obligations imposed upon partners in a legal marriage, these benefits and obligations ought to apply equally to common-law spouses.

The Committee goes on, however, to require that a consistent definition of common-law relationships be incorporated in all federal laws and policies that recognize such relationships. For this purpose, it recommends that

"...the definition require that the parties be of the opposite sex, reside continuously with each other for at least one year, and represent themselves publicly as husband and wife."<sup>25</sup>

With regard specifically to the *Immigration Regulations*, the Parliamentary Committee on Equality Rights recommends that common-

<sup>23</sup> *Supra*, note 15 at 59 (excerpt).

<sup>24</sup> *Supra*, note 15 at 34.

<sup>25</sup> *Ibid.*

law relationships be recognized for immigration purposes, so that a party to such a relationship may be admitted to Canada as an accompanying dependent of his or her common-law spouse, or may be sponsored for admission to Canada by his or her common-law spouse. "Spouse" would, however, be defined as above.<sup>26</sup>

There is therefore ample support for the idea that the provisions for spousal sponsorship set out in s. 4(1) of the Immigration Regulations ought to apply equally to common-law spouses, provided they fit a certain definition. Given the definition imposed, however, homosexual couples may find their only challenge of the regulation in an interpretation of s. 15 of the *Charter* which would forbid discrimination on the basis of sexual orientation.

Although the Committee on Equality Rights reaches in its report the tentative conclusion that "sexual orientation" should be read into the general open-ended language of s. 15 of the *Charter* as a constitutionally prohibited ground of discrimination, how likely is it that a challenge to s. 4(1) of the *Regulations* would be successful on that basis? Since judicial reaction to questions involving homosexuality is frequently at a visceral level, the likelihood of s. 1 being successfully invoked to "demonstrably justify" this discrimination is greater than in the case of heterosexual common-law relationships.

### 3. DE FACTO FAMILY MEMBERS SHOULD BE INCLUDED IN THE FAMILY CLASS

A *de facto* member is described in immigration policy guidelines as a person who is considered to be a member of the family unit and who is dependent for physical, emotional, or psychological support on the family. The brief prepared by the NSRSC affirms that this definition is "fairly accurate", but points out that

"In practice...*de facto* relationships resulting from the tradition of extended families in many cultures are given little or no recognition by immigration officials. This denies the values and cultural heritage of many Canadians and ignores the goal of family reunification stated in the Act. The guidelines should be made more specific to recognize the permanent aspects of such relationships."<sup>27</sup>

*De facto* relationships would in appropriate circumstances include siblings of all ages. Thus a provision for sponsorship of *de facto* family

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<sup>26</sup> *Supra*, note 15 at 64.

<sup>27</sup> *Supra*, note 7 at 14.

members would allow for consistent consideration of applications like those of the Salvadoran couple mentioned earlier in this piece. Indeed, the non-eligibility of brothers and sisters for sponsorship has been of great concern to many community groups, as well as to the Standing Committee, which recommended that further recognition of the importance of close family be given by elevating the legislative position of siblings.<sup>28</sup> The Standing Committee failed, however, to support a position that siblings ought to be automatically "sponsorable", instead continuing to relegate them to the class of individuals that must amass a certain number of "points" before being eligible to immigrate, assigning siblings a status only slightly above that of independent applicants.

Such a position would likely not be satisfactory for groups like the Non-Status Residents Support Committee or the Coalition for a Just Refugee and Immigration Policy. These groups have stated far more emphatically that the *Immigration Regulations'* failure to recognize siblings as close relatives flies in the face of the *Immigration Act's* stated commitment to family reunification.

## CONCLUSION

The definition of "family" in the *Immigration Regulations* must be reformed to incorporate a more realistic, timely and global definition of the family that would allow for the sponsorship of "spouses" of all descriptions, children of all ages and other relatives who are *de facto* psychological or economic dependents of a Canadian citizen or permanent resident. A Constitutional obligation to doing so lies in ss. 15 and 27 of the *Charter of Rights and Freedoms*. Canada has made a constitutional commitment in s. 27 to interpret the *Charter* in a spirit of "preserving and enhancing the multicultural heritage of Canada". More importantly, certain provisions of the *Immigration Regulations* as they now exist contravene certain protected guarantees under s.15 of the *Charter*, and therefore run the risk of being read down as unconstitutional. These provisions ought to be amended, bearing in mind s.15 and its guarantee of freedom from discrimination based on age, nationality, and, possibly, marital status and sexual orientation.

Any perceived public call to "tighten up" Canadian immigration policy should only encourage governmental action to re-examine the restrictiveness of existing family reunification provisions in the *Immigration Regulations*. The inevitable result of unrealistically restrictive legislation which acts to keep families apart is abuse of other processes by families or couples desperate to remain together. While this "abuse" does not take place with the frequency critics of Canadian immigration policy often claim that it does, the fact remains that an individual continually

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<sup>28</sup> *Supra*, note 4 at 9.

frustrated in his or her attempts to regularize status in Canada will ultimately abandon legal means of doing so in favor of other avenues.

Finally, and most obviously, Canada needs immigrants. Since s. 3 of the *Immigration Act* makes it clear that one of the primary goals of our immigration scheme is to encourage the reunification of families, what better way to ensure that our population does not decrease to economically dangerous levels in the coming decades than to take this goal seriously? A global and humane definition of the family, in keeping with the models of "family" that exist in the cultures from which Canada draws immigrants would satisfy Canada's constitutional, sociological and economic needs. More importantly, it would do an effective and honest job of reuniting families.

## APPENDIX

### SECTION 4(1) OF THE IMMIGRATION REGULATIONS

(Pursuant to *Immigration Act, 1976, S.C. 1976-77, c. 52*)

4(1) Subject to subsections (2) and (3), every Canadian citizen and every permanent resident may, if he is residing in Canada and is at least eighteen years of age, sponsor an application for landing made

(a) by his spouse;

(b) by his unmarried son or daughter who is less than

(i) 21 years of age at the time the son or daughter applies for an immigrant visa and at the time the sponsor gives the undertaking referred to in subparagraph 6(1)(b)(i) and

(ii) 23 years of age at the time an immigrant visa is issued to the son or daughter or at the time the application for landing is refused under subsection 79(1) of the Act;

(c) by his father, mother, grandfather or grandmother under sixty years of age if the father, mother, grandfather or grandmother and his or her spouse are incapable of gainful employment or if the father, mother, grandfather or grandmother is widowed.

(e) by any brother, sister, nephew, niece, grandson or granddaughter of his who is an orphan, under eighteen years of age and unmarried;

(f) by his fiancée,

(g) by any child under thirteen years of age whom he intends to adopt and who is

(i) an orphan,

(ii) an abandoned child whose parents cannot be identified,

(iii) a child born outside marriage who has been placed with a child welfare authority for adoption;

(iv) a child whose parents are separated and who has been placed with a child welfare authority for adoption; or

(v) a child one of whose parents is deceased and who has been placed with a child welfare authority for adoption, and

(h) where he does not have a spouse, son, daughter, father, mother, grandfather, grandmother, brother, sister, uncle, aunt, nephew, or niece

(i) who is a Canadian citizen

(ii) who is a permanent resident, or

(iii) whose application for landing he may otherwise sponsor