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Troubling Trends in Canada's Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers

JAMIE LIEW, PRASANNA BALASUNDARAM & JENNIFER STONE*

Lorsque le droit est censé combattre un problème, plusieurs d'entre nous prennent pour acquis que le droit le fait de manière efficace, et donc sans porter préjudice à qui que ce soit. Cet article examine un règlement qui, bien qu'il vise à protéger l'intégrité du système d'immigration, affaiblit en réalité l'objectif humanitaire de regrouper les familles. L'alinéa 117(9)d) du *Règlement sur l'immigration et la protection des réfugiés* impose dans certains cas, une interdiction à vie de parrainer un ou une membre de la famille. Il s'agit des cas où le répondant ou la répondante, en immigrant au Canada, n'a pas divulgué l'existence de ce ou cette membre de la famille. Ce dernier ou cette dernière n'a donc pas pu faire l'objet d'un contrôle par les autorités de l'immigration. Cet article présente quatre conclusions principales tirées de deux sources : un examen de la jurisprudence et un sondage auprès d'avocates et avocats. Premièrement, lorsque nous examinons les raisons qui mènent à la non-divulgation et à l'absence de contrôle, 90% des cas ne semblent pas impliquer de fraude, mais présentent plutôt des circonstances tragiques et déchirantes. Deuxièmement, dans les cas impliquant des enfants, l'intérêt supérieur de ces enfants ne mène pas à un taux de succès plus élevé de regroupement familial. Troisièmement, bien que les tribunaux aient suggéré des recours alternatifs tels que les études de cas pour des motifs d'ordre humanitaire, ces recours n'aident au mieux que dans la moitié des cas. Finalement, ce règlement impose non seulement la séparation des membres de la famille, mais punit également les répondantes et les répondants qui se retrouvent à avoir fait une « fausse déclaration » en n'ayant pas déclaré l'existence de certains membres de leur famille. Ils sont donc découragés de tenter de trouver des recours alternatifs pour réunir leur famille au Canada. L'article conclut que le problème de la fraude dans le contexte du regroupement familial est exagéré. L'alinéa 117(9)d) du règlement fait plus de tort que de bien et devrait être abrogé.

When a law purports to combat a problem, many of us take for granted that it is effective in doing so, and that it is not harming people. This article looks at one regulation that, while aiming to protect the integrity of the immigration system, in fact erodes the humanitarian and compassionate objective of reunifying families. Regulation 117(9)(d)

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of the *Immigration and Refugee Protection Regulations* imposes a life-time ban on sponsoring a family member if the sponsor, when immigrating to Canada, did not disclose the existence of the family member and therefore have them examined by immigration officials. This article presents four main findings of two surveys: a survey of case law and of lawyers. First, in looking at the reasons for non-disclosure and non-examination, 90% of cases appear to have nothing to do with fraud, but involved tragic and heartbreaking circumstances. Second, in cases where children were involved, the best interests of those children did not lead to greater rates of family reunification. Third, while the courts have pointed to alternative remedies such as humanitarian and compassionate assessments, at best, these only provide relief in half of the cases. Finally, this regulation not only imposes family separation, but it also punishes sponsors who engaged in “misrepresentation” via non-disclosure of a family member, placing a chill on persons seeking alternative remedies to bring their families to Canada. The article concludes that the problem of fraud in family reunification is overblown, and that regulation 117(9)(d) does more harm than good and should be repealed.

BISRAT, AT TWENTY-TWO YEARS OLD, FLED from war and death threats, leaving behind a girlfriend, and a five-year-old daughter. Elated after being recognized as a Convention refugee in Canada, he sought to reunite with his family. However, he discovered that he was barred from sponsoring them because, out of fear for their safety, he had not disclosed his family’s existence on immigration documents. This omission triggered section 117(9)(d) of the *Immigration and Refugee Protection Regulations*¹ (*Regulations*) and deprived him of the opportunity to reunite with his family. Despite submitting DNA test results, his application to sponsor them was refused. Meanwhile, his girlfriend and daughter were living with an abusive man while Bisrat struggled to support them financially. Over the course of sixteen years, Bisrat made multiple applications and appeals to try to get them to Canada, but they remain separated with no end in sight.² This is a true story of one refugee living in Canada struggling with family separation created by the operation of *Regulation* 117(9)(d).

I. LEGISLATIVE CONTEXT & OPERATION

One of the objectives of the *Immigration and Refugee Protection Act (IRPA)* is “to see that families are reunited in Canada.”³ Under the subheading “family reunification,” section 12(1) of the *IRPA* provides that a foreign national may be selected to become a permanent resident as a member of the family class on the basis of their relationship to a Canadian citizen or permanent resident.⁴ Subsection 117 (1) of the *Regulations* defines membership in the family class and delineates who can be a sponsored family member to Canada.⁵ Subsection 117(9) of the *Regulations* excludes certain relationships for consideration in the family class despite ostensibly meeting the definition of membership set out in subsection 117(1). Set against this context, *Regulation* 117(9)(d) defines a specific kind of excluded relationship for the purposes of 117(9).

¹ *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 117(9)(d) [*Regulations*].

² This is a true story articulated in one of the 56 case surveys collected through interviews of 17 lawyers.

³ *Immigration and Refugee Protection Act*, SC 2001, c 27, s 3(1)(d) [*IRPA*].

⁴ *Ibid* at s 12(1).

⁵ *Regulations*, *supra* note 1, s 117.

It provides that a foreign national is not a member of the family class if they were not “examined” as a family member at the time of the sponsor’s own application to immigrate to Canada.⁶ It is thus an exclusion clause which applies to all immigrants, refugees, and non-refugees alike.

Because it is drafted so strictly, the *Regulation* does not provide any discretionary power to mediate its application; an officer must apply the *Regulation* strictly no matter the reason why the family member was not examined. Thus, *Regulation* 117(9)(d) prevents a sponsorship of a family member if, at the time the sponsor immigrated to Canada, the sponsor did not have the family member examined by immigration officials (usually, but not always, because the family member was not disclosed). No explanation, no matter how reasonable, can relieve the application of *Regulation* 117(9)(d).⁷

The stated aim of *Regulation* 117(9)(d) is to combat “fraudulent abuse,” but this term is not defined in the legislation.⁸ It is worth delving into the undefined “fraud” seeking to be captured here. Presumably, the real mischief *Regulation* 117(9)(d) seeks to address is misrepresentation,⁹ for example, an older child (who must be unmarried in order to be considered a dependent) who hides the fact she has a spouse, and benefits from that lie by obtaining permanent resident status, and later sponsors her spouse has engaged in misrepresentation. Another hypothetical scenario is the immigrant who hides the fact of a medically or criminally inadmissible dependent; this is important because section 42 of the *IRPA* provides that (except for protected persons) an inadmissible family member renders everyone in the family unit inadmissible, whether accompanying to Canada or not.¹⁰ In both of these scenarios of mischief, the applicants withheld information that was material to their own ability to immigrate to Canada.¹¹

While “fraud” is not defined in the *IRPA*, *Regulation* 117(9)(d) duplicates measures elsewhere in the *IRPA* designed to combat misrepresentation. Section 40 of the *IRPA* operates to strip permanent residence and exclude an individual from Canada for five years if they are found to have misrepresented or withheld material facts that could have induced an error in the administration of the *IRPA*.¹² Those persons still enjoy a right of appeal to the Immigration

⁶ *Ibid*, s 117(9)(d).

⁷ See Jamie Chai Yun Liew, “The Ultrahazardous Activity of Excluding Family Members in Canada’s Immigration System” (2016) 93:4 Canadian Bar Review 281 for an overview of how s 117(9)(d) operates as an absolute liability regime.

⁸ “Regulatory Impact Analysis Statement” (2004) C Gaz II, Vol 138, No 16 at 1100: “Under *IRPA* all family members of an applicant must be examined, whether they are accompanying or not. Paragraph 117(9)(d) is a necessary component of this requirement in order to prevent fraudulent abuse.”

⁹ See discussion of the policy rationale in the following: “Regulatory Impact Analysis Statement” (2002) C Gaz II, Vol 138, No 16 at 1100; House of Commons Debates, 37th Parl, 1st Sess, No 21 (26 February 2001) at 1525 (Hon Elinor Caplan); Canada, Immigration, Refugees and Citizenship Canada, “OP2 - Processing Members of the Family Class Overseas Processing (OP) Operational Manual” (11 November 2014), online:

<cic.gc.ca/english/resources/manuals/op/op02-eng.pdf> at 14 [perma.cc/H4ST-FQ6J].

¹⁰ *IRPA*, *supra* note 3, s 42.

¹¹ The Federal Court has repeatedly held that the purpose of section 40(1)(a) of the *IRPA* is to ensure that applicants provide complete, honest, and truthful information in every manner when applying for entry into Canada. See for example: *Jiang v Canada (Citizenship and Immigration)* 2011 FC 942 at para 36.

¹² See *IRPA*, *supra* note 4 at s 40 which deems a person inadmissible for misrepresentation if the person misrepresents or withholds material facts. Subsection 40(2)(a) of the *IRPA* states that a permanent resident or foreign national continues to be inadmissible for misrepresentation for a period of five years. An exclusion order is a removal order; this means that under s 40 an excluded person must leave Canada and cannot re-apply for any immigration status for 5 years.

Appeal Division (IAD) of the Immigration and Refugee Board, where all humanitarian and compassionate (H&C) factors can be considered. In contrast, *Regulation* 117(9)(d) imposes a lifetime ban on non-examined family members, no matter the reason for the non-examination, without a right of appeal.¹³

As discussed below, *Regulation* 117(9)(d) is overbroad and presumes that all non-examined family members are inadmissible. In the great majority of cases reviewed for this article, family members were not disclosed, and therefore not examined, for reasons unrelated to “fraud”; no benefit was gained from the non-disclosure, and yet family reunification is barred. The only possible legal remedy contemplated by the *IRPA* to overcome this *Regulation* is to make a request pursuant to section 25 for an exemption from the operation of 117(9)(d).¹⁴ As we discuss below, this alternative is difficult to access, relies on an immigration officer’s discretion, and prolongs family separation. It is also troubling that an exceptional discretionary waiver must be sought for a provision that is punitively overbroad.

The application of 117(9)(d) is significant. Data received by the authors pursuant to a request under the *Access to Information Act* made in April 2015 revealed that between 2010 and 2014 a total of 1,154 family class sponsorships were refused because of *Regulation* 117(9)(d).¹⁵ More than 50% of these refusals were applications to sponsor children.¹⁶

This paper represents the advocacy efforts of an *ad hoc* team of lawyers, refugee advocates, students, and academics. We developed our research after sharing our collective knowledge from experience representing clients caught by this *Regulation*. We could not locate what we are witnessing in the literature and thus, this paper hopes to fill in this gap.

A. CITIZENSHIP AND IMMIGRATION CANADA REPORT

Citizenship and Immigration Canada (CIC), now Immigration, Refugees and Citizenship Canada (IRCC), did conduct an unpublished empirical study of *Regulation* 117(9)(d) in 2010 after calls for review on the harsh consequences to the application of the regulation.¹⁷ The report concluded that, “the use of H&C consideration to overcome *Regulation* 117(9)(d) is common and

¹³ *Ibid* at s 63. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate (H&C) considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the *Regulations*.

¹⁴ Either within a fresh family class sponsorship application or in a permanent residence application of the family member.

¹⁵ *Access to Information* data received by Jennifer Stone, Neighbourhood Legal Services, June 2015: The top Canadian visa offices refusing sponsorships because of *Regulation* 117(9)(d) during this period were Accra, Manila, Nairobi, Port-au-Prince, New Delhi, Port of Spain, and Hong Kong. A request for the same data was also posed by Member of Parliament Paul Dewar to Minister Chris Alexander, and the response received echoed the ATIP data: Question No 832, House of Commons Debates, Vol 147, No 162, 2nd Sess, 41st Parl (1 December 2014).

¹⁶ Email to Jennifer Stone, Neighbourhood Legal Services, April 15, 2015: Specifically, CIC wrote: “Until a system modernization program that began in 2010, Citizenship and Immigration Canada (CIC) used a different application processing system from the one it currently uses, one that did not allow for detailed reporting of refusal grounds. Due to this, and relating to your request, CIC can report on the number of applications that were refused due to section 117(9) of the *Immigration and Refugee Protection Regulations* only if they were processed in 2010 or later and only if they were processed through CIC’s current Global Case Management System (GCMS). Unfortunately many of the details you’re asking us to report on are not available in GCMS.”

¹⁷ Amy Colbourne and Rachel Brule for CIC, *Regulation 117(9)(d) Excluded Relationships Report*, February 25, 2010 [CIC Report].

consistent.”¹⁸ This conclusion is at odds with the study's own findings. In coming to this conclusion, CIC studied 185 cases processed over a six-month period commencing May 2008.¹⁹ It is notable that the report cites two main categories for *Regulation* 117(9)(d) cases:

- (a) The failure of the applicant to declare a family member. Common reasons for neglecting to identify an otherwise-eligible family member were custody issues and birth of children between the time of visa issuance and landing.
- (b) The inability of the visa office to examine a declared family member. Common reasons were a change of custody of an eligible dependent, their inaccessibility for examination due to force majeure such as civil strife, war, natural disasters, etc.²⁰

Among reviewed cases, the report stated that the average time it takes for a person to sponsor a family member was 5.48 years.²¹ This figure can be further divided, to an average 3.01 years for cases involving spouses and 7.28 years for cases involving children.²² Notably, twenty-four cases (13%) had intervals exceeding ten years.²³ The report also revealed that 56% of refusals involved applications to sponsor children (compared to 43% of spouses).²⁴ Only sixty-three of the 185 cases (34%) were allowed on H&C grounds.²⁵ A similar proportion of the cases (32%) were refused without any H&C consideration at all.²⁶ The remainder (34%) were refused after H&C consideration.²⁷ It is also notable that the report found that sponsors who came to Canada as Convention refugees accounted for 18% of all sponsors.²⁸ The majority of these sponsors requested H&C consideration but the acceptance rate among that group was only 47%, notwithstanding the exemption under section 42 of the *IRPA*, which excludes protected persons from vicarious inadmissibility due to an inadmissible family member.²⁹

The Canadian Council for Refugees (CCR) noted in response to this CIC report that it “fails to address the major concerns repeatedly raised by CCR.”³⁰ Among those concerns were that, “The CCR considers the regulation to be fundamentally mis-matched with its objective” and therefore is overbroad.³¹ As well, the CCR was concerned with lack of access to H&C assessments, “due to the lack of information about this recourse, misinformation given to affected persons...and difficulties in presenting a strong H&C submission for those not represented by experienced counsel.”³² The CCR also questioned the quality of decision-making

¹⁸ *Ibid* at 2.

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ *Ibid*.

²² *Ibid*.

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ *Ibid*.

²⁶ *Ibid*.

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ *Ibid*.

³⁰ Canadian Council for Refugees, “CCR’s comments on CIC’s R117(9)(d) Excluded Relationships Report” (14 April 2010) at 1.

³¹ *Ibid* at 1.

³² *Ibid* at 1.

in H&C assessments, “including serious problems of inconsistency and, in some cases, failure to give proper (or any) consideration of best interests of the child.”³³

This paper aims to pick up where the CIC report left off and the CCR’s concerns begin, by providing a quantitative and qualitative analysis of how *Regulation* 117(9)(d) operates, and the impact on those subject to it. It does so by conducting two surveys: (a) one on 123 reported cases of the Federal Court and Federal Court of Appeal, and (b) one with seventeen lawyers discussing fifty-six cases.

Part II of the paper provides an overview of the methods we employed to conduct these two surveys. Part III details the results of the surveys. It provides a snapshot of who is caught under the *Regulation* and why, as well as important information concerning how conflict with *Regulation* 117(9)(d) is currently being resolved. Part IV ties the surveys together and discusses their common threads, illuminating the harsh ruin for the lives of many families in Canada. Our conclusion is that there are many plausible non-fraudulent reasons why a person may be caught within the ambit of *Regulation* 117(9)(d), and that the *Regulation* should be eliminated as it causes undue and unnecessary family separation, and heartache.

II. METHODS

A. SURVEY OF JURISPRUDENCE

During the summer of 2015, a student and supervising lawyer, Jennifer Stone at Neighbourhood Legal Services, conducted a survey of reported cases at the Federal Court and Federal Court of Appeal that dealt with *Regulation* 117(9)(d) since its inception in 2002. This work was continued and updated during the summer of 2016, by a University of Ottawa Faculty of Law student, and supervising lawyer, Jamie Liew. While there was a bountiful sample of cases that discuss *Regulation* 117(9)(d) at the IAD, these cases were excluded from this study because of the finding by the Federal Court that the IAD has no jurisdiction to deal with *Regulation* 117(9)(d) cases.³⁴ A search in the legal search engine Quicklaw was done with the key word “*117(9)(d)*”. Where there were cases pulled from the Federal Court of Appeal, the corresponding reported case from the Federal Court that was being appealed was not counted separately, but considered as part of one proceeding manifesting in the case at the Federal Court of Appeal. In total, 123 cases through 16 August 2016 were identified as dealing with the regulation and were therefore canvassed. Each case was coded to identify certain traits and trends. The following information was gathered from each case where the information was available:

- (1) gender of the sponsor
- (2) the sponsor’s country of origin
- (3) whether the sponsor was a refugee
- (4) which legal venue (i.e. court or decision maker) the decision was from

³³ *Ibid* at 1.

³⁴ See the companion cases *Habtenkiel v Canada (Citizenship and Immigration)*, 2014 FCA 180 [*Habtenkiel*] and *Seshaw v Canada (Citizenship and Immigration)*, 2014 FCA 181 [*Seshaw*, FCA]. The Federal Court of Appeal confirmed in these cases that the limitation on the IAD’s H&C jurisdiction in *Regulation* 117(9)(d) cases means that there is no effective right of appeal to the IAD and, as such, applications for judicial review of s117(9)(d) H&C decisions may be brought directly to the Federal Court.

- (5) the reasons for the non-disclosure of the family member
- (6) whether the non-disclosure of the family member was a material misrepresentation
- (7) the processes under which family reunification was sought
- (8) the outcome of the decision.

It is important to understand that, from the perspective of the would-be sponsor, *Regulation* 117(9)(d) is triggered when someone tells the sponsor that he or she cannot sponsor a family member. In the legal process however, *Regulation* 117(9)(d) is usually triggered while an officer is reviewing a sponsorship application. If subsection 117(9)(d) applies, the sponsorship application is denied. In some cases, the story ends there. In looking only at reported cases of Federal Court and Federal Court of Appeal, we recognize that such cases inherently limit our broader conclusions because these applicants obtained legal representation, a reality out of reach for many affected by *Regulation* 117(9)(d).

The jurisprudence survey captures a variety of *Regulation* 117(9)(d) cases at the Federal Court, including reviews of visa officer decisions and IAD decisions. When a sponsor seeks to challenge a sponsorship refusal, generally one of two things happens. One scenario involves an applicant who may try to appeal the decision to the IAD, which has the jurisdiction to deal with appeals of sponsorship applications.³⁵ The Federal Court however, has decided that since the IAD has no jurisdiction to apply H&C factors to persons not in the family class and thus persons caught by 117(9)(d), an IAD appeal for these cases is an illusory remedy and need not be exhausted before proceeding to the Federal Court.³⁶ The IAD can still hear sponsorship appeals of *Regulation* 117(9)(d) cases where a question of law is at issue—for example, whether the visa officer considered humanitarian & compassionate (H&C) factors at all. IAD decisions can be judicially reviewed at the Federal Court,³⁷ and if questions are certified there, appealed at the Federal Court of Appeal.³⁸ The second scenario involves sponsors going directly to the Federal Court for judicial review and then the Federal Court of Appeal if questions are certified.³⁹

In reality, once *Regulation* 117(9)(d) is triggered, the sponsorship application alone is no longer a viable method to family reunification and immigrants turn to other avenues.⁴⁰ Sponsors can request that their sponsorship application be considered on H&C grounds, if they are aware of this option.⁴¹ In other cases, sponsors will have received a negative sponsorship decision and then make a separate application for permanent residence on H&C grounds. It is in both of these applications where we get a sense of what went wrong—i.e. why the family member was not disclosed. The denied H&C assessments are judicially reviewed to the Federal Court and sometimes to the Federal Court of Appeal make up much of the jurisprudence survey.

B. SURVEY OF LAWYERS

During a period of eight months, from January to August 2015, seventeen lawyers/advocates in Ontario and Quebec were surveyed on fifty-six cases in which they represented clients whose

³⁵ *IRPA*, *supra* note 3, s 63(1).

³⁶ *Seshaw v Canada (Citizenship and Immigration)*, 2013 FC 396 [*Seshaw*, FC]; *Habtenkiel*, *supra* note 34

³⁷ *IRPA*, *supra* note 3, s 72(1).

³⁸ *Ibid*, s 74(d) and 79.

³⁹ *Ibid*, s 72(1).

⁴⁰ See Liew, *supra* note 7 which discusses how s 117(9)(d) renders a sponsorship application a dead-end.

⁴¹ *IRPA*, *supra* note 3, s 25(1).

family members were found to be excluded from the family class per *Regulation* 117(9)(d). The cases analyzed in this survey covered the same time period used for the survey of jurisprudence. The aim of the lawyer surveys was to capture cases that were not captured by the jurisprudence survey.⁴² As well, the jurisprudence survey alone was unable to capture certain data, for example, the number of attempts a person may have tried to bring a family member to Canada.

The surveys were first conducted by students at Osgoode Hall Law School supervised by lawyer Jennifer Stone at Neighbourhood Legal Services, and then by students at Downtown Legal Services (DLS) in Toronto supervised by lawyer Prasanna Balasundaram. The raw data collected was then analysed by DLS and also lawyer Jamie Liew with a University of Ottawa Faculty of Law student to compile general findings from the surveys.

A total of seventeen lawyers/advocates responded to a call-out for participants that was sent to the listservs of the following organizations: Refugee Lawyers Association, Canadian Council for Refugees, Canadian Bar Association's Immigration Section, and Inter-Clinic Immigration Working Group. The survey was mostly administered over the telephone, but a few were done in person. Except for one person who worked with an NGO that supports and advocates for refugees, the sixteen remaining respondents were lawyers working in legal clinics or private practice. Each lawyer/advocate was first asked to identify cases in which *Regulation* 117(9)(d) was an issue and then, for each case, was asked a series of questions related to details of that case. The survey questionnaire for each case identified by the lawyer asked the following questions:

- (1) lawyer/organization
- (2) sponsor's initials and gender
- (3) describe how the sponsor came to Canada and obtained immigration status
- (4) describe how the sponsor's family member was rendered excluded due to *Regulation* 117(9)(d)
- (5) describe the legal proceedings to attempt to find relief from *Regulation* 117(9)(d)
- (6) describe whether there was a resolution
- (7) was there any medical evidence or other issues that arose during legal proceedings
- (8) identify dates and period of time in which the sponsor arrived and submitted a sponsorship application
- (9) identify dates and period of time in which the sponsor submitted the sponsorship application and the final result
- (10) identify the total length of separation of the affected family members
- (11) identify any other trends, observations on the part of the lawyer/organization.

As seventeen lawyers were surveyed, this means that some lawyers provided information on more than one case they were retained on. Though the total number of cases investigated in the survey was fifty-six, not every survey contained complete information for a variety of reasons. For example, some surveys did not mention the country the applicant was from, or whether the case was resolved, because some lawyers lost contact with applicants who had moved or whose connection was discontinued. In the findings section below, it is clearly

⁴² Types of cases not captured by the jurisprudence survey include those where no legal remedy was sought for a refusal as a result of s 117(9)(d); a fresh application was submitted and thus no issue was litigated; the litigation settled before going to a Federal Court hearing; or the decision was not reported.

indicated how many cases did not indicate the pertinent information and thus not every set of findings totals to fifty-six cases. Despite this, we feel that the information still provides important observations with regards to how *Regulation 117(9)(d)* has affected family reunification in Canada.

III. FINDINGS

A. FINDINGS OF THE JURISPRUDENCE SURVEY

1. DEMOGRAPHIC STATISTICS OF CASES SURVEYED

One hundred and twenty-three reported Federal Court and Federal Court of Appeal cases were identified as dealing with *Regulation 117(9)(d)* directly. Of the 123 cases surveyed, approximately 64% involved sponsors who were men, while 34% involved sponsors who were female.

In coding the cases, not all cases clearly identified if the sponsor was given refugee status. However, we classified cases as “refugee-like” where the facts explained that the sponsor came to Canada under circumstances where it was likely they would have made a claim for refugee protection, their story would be one that would grant them refugee protection under sections 96 and 97 of the *IRPA*, or they would have been resettled as refugees. We were conservative in coding cases this way; only cases that could be described as obviously refugee-like were included, and any cases that had any doubt as to whether they should be included were not coded as refugees. Using this guideline, we determined that approximately 20% of the cases provided refugee-like facts. We recognize that this approach may mean that the real number of cases involving refugee-like facts could be higher. Considering the fact that, for example, in 2014, refugees made up only 9% of all immigrants coming to Canada, the figure of 20% of *Regulation 117(9)(d)* cases that dealt with refugees is alarming.⁴³ This number is also close to the government’s own finding in its 2010 report. In their snapshot of 185 cases over a six-month period, 18% of sponsors caught by *Regulation 117(9)(d)* were Convention refugees.

Countries from which the sponsor came were also identified. Approximately 54% of cases involved sponsors from Asia, 17% from Africa, 5% from the Middle East, 15% from South and Central America, and 5% from Eastern Europe.

TABLE 1 - SURVEY OF CASE LAW: SPONSOR’S COUNTRY OF ORIGIN

Country	Number of cases
Afghanistan	2
Bangladesh	1
Belarus	1
Cambodia	1
China	19

⁴³ Citizenship and Immigration Canada, *Facts and figures 2014 – Immigration overview: Permanent residents by category*, online: <open.canada.ca/data/en/dataset/2fbb56bd-eae7-4582-af7d-a197d185fc93> [perma.cc.M3TF-ZW4Z].

Colombia	1
Congo	2
Dominican Republic	3
Eritrea	2
Ethiopia	1
Gabon	1
Ghana	4
Guyana	1
Haiti	9
India	9
Kenya	2
Lebanon	2
Liberia	1
Morocco	2
Nigeria	3
Pakistan	6
Philippines	19
Poland	1
Romania	1
Sierra Leone	1
Somalia	1
Sri Lanka	2
St Vincent and the Grenadines	3
Syria	2
Ukraine	1
Venezuela	2
Vietnam	9
Yugoslavia	1
Zimbabwe	1
Information not available	6
Total	123

2. FINDINGS RELATED TO THE RESOLUTION OF THE CASE

Of the 123 Federal Court and Federal Court of Appeal cases, a total of sixty-nine involved a judicial review of an application for permanent residence on H&C grounds.⁴⁴ Some of these cases were reviews of decisions of sponsorship applications by visa officers who also considered

⁴⁴ *Trinidad v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1246; *Desalegn v Canada (Minister of Citizenship and Immigration)*, 2011 FC 268; *Leobrera v Canada (Minister of Citizenship and Immigration)*, 2010 FC 587.

requests to consider H&C grounds, and some of these cases were reviews of IAD decisions that did not properly review whether an officer considered H&C grounds.⁴⁵ Of the sixty-nine cases, thirty-eight resulted in granting the judicial review and thirty-one were dismissed. Of the sixty-nine H&C judicial reviews, forty-nine dealt with the best interests of the child as a factor. Within these forty-nine cases, twenty-nine judicial reviews were granted, while twenty were dismissed.

Forty-four percent of the cases in the jurisprudence survey did not deal with H&C consideration. The majority of cases were judicial reviews of decisions from the IAD,⁴⁶ although some of these cases may have also resorted to an H&C assessment concurrently or at a later

⁴⁵ *Tse v Canada (Minister of Citizenship and Immigration)*, 2007 FC 393; *Glushanytsya v Canada (Minister of Citizenship and Immigration)*, 2008 FC 725; *Ngalangala v Canada (Minister of Citizenship and Immigration)*, 2014 FC 798; *Marimuthu v Canada (Minister of Citizenship and Immigration)*, 2016 FC 238; *Chéry v Canada (Minister of Citizenship and Immigration)*, 2012 FC 922; *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2012 FC 331; *Zingano v Canada (Minister of Citizenship and Immigration)*, 2011 FC 331; *Amponsah v Canada (Minister of Citizenship and Immigration)*, 2010 FC 974; *Dan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 103; *Bistayan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 139; *Grewal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 55; *Abdo v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 64; *Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1109; *Pascual v Canada (Minister of Citizenship and Immigration)*, 2008 FC 993 [*Pascual*]; *Fremah v Canada (Minister of Citizenship and Immigration)*, 2016 FC 840 [*Fremah*]; *Valenzuela v Canada (Minister of Citizenship and Immigration)*, 2016 FC 603; *Xin v Canada (Minister of Citizenship and Immigration)*, 2016 FC 194; *Lu v Canada (Minister of Citizenship and Immigration)*, 2016 FC 175.

⁴⁶ For example *Du v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1094; *Liu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1076; *Talbot v Canada (Minister of Citizenship and Immigration)*, 2012 FC 972; *Moudoodi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 761; *Savescu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 353; *Thirunavukarasu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 339; *Aranguren v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1315; *Munganza v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1250; *Tse v Canada (Minister of Citizenship and Immigration)*, 2007 FC 393; *Linares v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1241; *Niedziela v Canada (Minister of Citizenship and Immigration)*, 2008 FC 725; *Glushanytsya v Canada (Minister of Citizenship and Immigration)*, 2008 FC 725; *Woldeselassie v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1540; *Hamedi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1166; *Tauseef v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 303; *Karimian v Canada (Minister of Citizenship and Immigration)*, 2006 FC 867; *Svay v Canada (Minister of Citizenship and Immigration)*, 2006 FC 820; *Dela Fuente v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 186; *Akhter v Canada (Minister of Citizenship and Immigration)*, 2006 FC 481; *Dumornay v Canada (Minister of Citizenship and Immigration)*, 2006 FC 541; *Azizi v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 406; *Xu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1575; *Beauvais v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1408; *Yen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1236; *Huang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1302; *Canada (Minister of Citizenship and Immigration) v de Guzman*, 2005 FC 1255; *Preclaro v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1063; *Sandhu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1046; *Tallon v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1039; *Asuncion v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1002; *Gearlen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 874; *Benjelloun v Canada (Minister of Citizenship and Immigration)*, 2005 FC 844; *Flores v Canada (Minister of Citizenship and Immigration)*, 2005 FC 854; *Quindiagan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 769; *Chen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 678 [*Chen*]; *Dave v Canada (Minister of Citizenship and Immigration)*, 2005 FC 510; *Dung v Canada (Minister of Citizenship and Immigration)*, 2005 FC 600; *Jean-Jacques v Canada (Minister of Citizenship and Immigration)*, 2005 FC 104; *Canada (Minister of Citizenship and Immigration) v Saeed*, 2004 FC 1514; *Collier v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1514; *Natt v Canada (Minister of Citizenship and Immigration)*, 2004 FC 810; *Marimuthu v Canada (Minister of Citizenship and Immigration)*, 2016 FC 238; *Adjani v Canada (Minister of Citizenship and Immigration)*, 2008 FC 993.

date.⁴⁷ Some were judicial reviews of sponsorship decisions from visa officers.⁴⁸ Fifty-four cases were not judicial reviews of H&C cases but mainly judicial reviews of IAD cases, and also of findings of inadmissibility. Of the IAD cases, sometimes there would be mention of a request that the IAD consider an application on H&C grounds but this was met with a jurisdictional barrier further to section 65 of the *IRPA* which, as discussed above, precludes consideration of H&C grounds for persons not in the family class.⁴⁹ One case of note dealt with a procedural error on the part of the visa office.⁵⁰

3. FINDINGS IDENTIFYING REASON FOR NON-DISCLOSURE

The jurisprudence reveals that the reasons for non-disclosure of a family member can be understood within the following five categories or themes.⁵¹

(1) Misunderstanding⁵²

- a. The applicant did not know about the requirement to list all family members and the serious consequences associated with this.⁵³
- b. The applicant misunderstood the meaning of the word “dependent.”⁵⁴
- c. The applicant listed the family member but not as a dependent.⁵⁵
- d. The applicant did not speak English fluently and was unable to communicate with the visa officer.⁵⁶
- e. The applicant misunderstood due to mental illness/capability.⁵⁷
- f. The applicant’s ex-husband/spouse forbade contact with the child.⁵⁸

⁴⁷ See for example *Lilla v Canada (Minister of Citizenship and Immigration)*, 2015 FC 568 [*Lilla*].

⁴⁸ *Landaeta v Canada (Minister of Citizenship and Immigration)*, 2012 FC 219; *Jankovic v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1482; *Lilla*, *supra* note 47; *Seshaw*, FCA, *supra* note 34; *Liu v Canada (Minister of Citizenship and Immigration)*, 2013 FC 914.

⁴⁹ See for example, *Huang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1302.

⁵⁰ *Canada (Minister of Citizenship and Immigration) v Yanknga*, 2008 FC 1008.

⁵¹ In most cases, the reasons for non-disclosure were presented as part of the circumstances warranting humanitarian and compassionate relief pursuant to section 25 of the *IRPA*. On judicial review of a refusal for H&C relief, the Federal Court does not generally reassess the underlying facts unless there is a credibility issue raised. Rather, the focus of the judicial review is on whether the decision was reasonably made given the evidence regarding the entire application.

⁵² In *Canada (Minister of Citizenship and Immigration) v Saeed*, 2004 FC 1514, there was a discrepancy between the story of the sponsor who claimed to have told a visa officer he was getting married, and the record, which was acknowledged as not being perfect.

⁵³ *Krauchanka v Canada (Minister of Citizenship and Immigration)*, 2010 FC 209; *Desalegn v Canada (Minister of Citizenship and Immigration)*, 2011 FC 268; *Fremah*, *supra* note 45.

⁵⁴ *Tauseef v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 303.

⁵⁵ *Liu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1076.

⁵⁶ *Phyang v Canada (Minister of Citizenship and Immigration)*, 2014 FCJ No 75; *Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2012 FCJ No 504; *Fang v Canada (Minister of Citizenship and Immigration)*, 2014 FCJ No 767; *Ruiz v Canada (Minister of Citizenship and Immigration)*, 2011 FC 803; *Linares v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1241; *Svay v Canada (Minister of Citizenship and Immigration)*, 2006 FC 820; *Desalegn v Canada (Minister of Citizenship and Immigration)*, 2011 FC 268.

⁵⁷ *Trinidad v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1246.

⁵⁸ *Rarama v Canada (Minister of Citizenship and Immigration)*, 2014 FC 60; *Liu v Canada (Minister of Citizenship and Immigration)*, 2013 FC 914 (in this case the wife prohibited the children from getting examined).

- g. The applicant did not believe his religious marriage was legal and therefore qualified.⁵⁹
- h. The applicant did not list the child or have the child examined because the child was not in his custody.⁶⁰
- i. The applicant did not list children not accompanying her and thought she could sponsor them later.⁶¹
- j. The applicant's marriage was on the verge of divorce that did not happen.⁶²
- k. The applicant made an inadvertent mistake.⁶³

(2) Failure to update application⁶⁴

- a. The applicant got married while the application was pending and failed to update the application.⁶⁵
- b. The applicant's child was born while an immigration application was pending and the applicant failed to inform immigration officials of the child's birth.⁶⁶
- c. The applicant made inquiries with immigration officials to no avail.⁶⁷

(3) Fear of exposure

- a. The couple had children outside of marriage.⁶⁸
- b. The applicant had an extra-marital affair that resulted children but was afraid to disclose the existence of them.⁶⁹
- c. The applicant fled her abusive husband and children, married a man she met while in a refugee camp and had children with her second husband. She did not disclose her children from her first marriage because she was afraid to tell her second husband.⁷⁰

⁵⁹ *Mai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 101 [*Mai*].

⁶⁰ *Aranguren v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1315; *Glushanytsya v Canada (Minister of Citizenship and Immigration)*, 2008 FC 725; *Chen*, *supra* note 46; *Jankovic v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1482; *Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1109.

⁶¹ *Tesheira v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1418; and *Tesheira v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1417.

⁶² *Akhter v Canada (Minister of Citizenship and Immigration)*, 2006 FC 481.

⁶³ *Pascual*, *supra* note 45.

⁶⁴ In general, see *Moudoodi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 761.

⁶⁵ *Hamedi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1166; *Benjelloun v Canada (Minister of Citizenship and Immigration)*, 2005 FCJ No 1069; *Canada (Minister of Citizenship and Immigration) v Mohamed*, 2010 FC 70 [*Mohamed*]; *Karimian v Canada (Minister of Citizenship and Immigration)*, 2006 FC 867; *Dela Fuente v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 186; *Beauvais v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1408; *Tallon v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1039; *Benjelloun v Canada (Minister of Citizenship and Immigration)*, 2005 FC 844; *Dave v Canada (Minister of Citizenship and Immigration)*, 2005 FC 510; *Marimuthu v Canada (Minister of Citizenship and Immigration)*, 2016 FC 238; *Seshaw*, FCA, *supra* note 34 (although in this case the sponsor claims to have advised the visa post); *Mirza v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 725 [*Mirza*].

⁶⁶ *Gill v Canada (Minister of Citizenship and Immigration)*, 2008 FC 613.

⁶⁷ *Abdo v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 64.

⁶⁸ *Mei v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1044; *Lin v Canada (Minister of Citizenship and Immigration)*, 2007 FC 314; *David v Canada (Minister of Citizenship and Immigration)*, 2007 FC 546.

⁶⁹ *Tse v Canada (Minister of Citizenship and Immigration)*, 2007 FC 393; *Niedziela v Canada (Minister of Citizenship and Immigration)*, 2008 FC 402.

⁷⁰ *Yen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1236.

- d. The applicant feared the cultural stigma that would arise if a common-law partner was declared.⁷¹
 - e. The applicant feared he/she would be ineligible.⁷²
 - f. The applicant was pregnant at the time of the application and feared talking about her rape by a rebel in a war.⁷³
 - g. The applicant was afraid her parents would discover her child out of wedlock.⁷⁴
 - h. The applicant was afraid the birth of the child would be discovered by the Chinese government as she/he was in violation of China's one child policy.⁷⁵
 - i. The applicant was a refugee and feared missing an opportunity for asylum.⁷⁶
- (4) Lack of knowledge⁷⁷/ bad advice⁷⁸
- a. The applicant did not disclose on the advice of an immigration consultant or lawyer.⁷⁹
 - b. The applicant simply did not fill out the application properly.⁸⁰
 - c. The applicant was separated from his spouse and children and did not think he needed to include them because of a breakdown in marriage which subsequently did not happen.⁸¹
 - d. The applicant did not know he/she had to declare a common-law partner.⁸²
 - e. The applicant did not have custody of her children and did not think they would accompany her.⁸³

⁷¹ *Savescu v Canada (Minister of Citizenship and Immigration)*, 2010 FCJ No 432.

⁷² *Azizi v Canada (Minister of Citizenship and Immigration)*, 2005 FCJ No 2041; *David v Canada (Minister of Citizenship and Immigration)*, 2007 FC 546; *Raymond v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1350; *Canada (Minister of Citizenship and Immigration) v de Guzman*, 2005 FC 1255; *Sandhu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1046; *Quindiagan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 769.

⁷³ *IO v Canada (Minister of Citizenship and Immigration)*, 2013 FC 833.

⁷⁴ *Amponsah v Canada (Minister of Citizenship and Immigration)*, 2010 FC 974.

⁷⁵ *Weng v Canada (Minister of Citizenship and Immigration)*, 2014 FC 778; *Gan v Canada (Minister of Citizenship and Immigration)*, 2014 FCJ No 875; *Lu v Canada (Minister of Citizenship and Immigration)*, 2016 FC 175.

⁷⁶ *Valenzuela v Canada (Minister of Citizenship and Immigration)*, 2016 FC 603.

⁷⁷ In general, see *Du v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1094.

⁷⁸ In general, see *Talbot v Canada (Minister of Citizenship and Immigration)*, 2012 FC 972; *Canada (Minister of Citizenship and Immigration) v Kimbatsa*, 2010 FC 346 [Kimbatsa]; *Quindiagan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 769.

⁷⁹ *Preclaro v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1063; *Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533; *Chen*, *supra* note 46; *Mirza*, *supra* note 65; *Leobrero v Canada (Minister of Citizenship and Immigration)*, 2010 FC 587; *Cortez v Canada (Minister of Citizenship and Immigration)*, 2016 FC 800 [Cortez].

⁸⁰ *Dung v Canada (Minister of Citizenship and Immigration)*, 2005 FC 600; *Arangurem v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1315; *Dumornay v Canada (Minister of Citizenship and Immigration)*, 2006 FC 541.

⁸¹ *Akhter v Canada (Minister of Citizenship and Immigration)*, 2006 FC 481.

⁸² *Seshaw*, FCA, *supra* note 34; *Savescu v Canada (Minister of Citizenship and Immigration)*, 2010 FC353; *Dan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 103.

⁸³ *Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292; *Iharounene v Canada (Minister of Citizenship and Immigration)*, [2011] IADD No 811.

- f. The applicant, at the time of the application, did not believe he was the father of two children with a woman he had a relationship with outside of marriage but later verified he was their father.⁸⁴
- (5) Unaware child existed at time of application.
- a. The applicant believed her children were dead or did not know their whereabouts.⁸⁵
- b. The applicant simply was unaware he had a child at the time of his application.⁸⁶

It is important to note that some cases were marked with an intersectionality of categories and themes. For example, in one case, one woman did not have custody of her son after he was born out of wedlock. The sponsor was fearful of exposing her child born out of wedlock and did not understand that he was a dependent. She also received bad advice about whether to list him as a dependent.⁸⁷

The two tables below (Tables 2 and 3), illustrate that the majority of cases in the survey did not involve an intention to shirk Canada's immigration law. In fact, only 9.76% of the cases surveyed posed potential material misrepresentation as reasons for non-disclosure and non-examination of a family member. The cases identified as possible material misrepresentations were those where the person knew they were deliberately withholding information and that such withholding corresponded with a reason by which a person could be found inadmissible or ineligible for immigration to Canada.⁸⁸

TABLE 2 – SURVEY OF CASE LAW: IDENTIFIED REASONS FOR NON-DISCLOSURE OF FAMILY MEMBER

Reason	Number of Cases
Lack of Knowledge/Bad Advice	36
Fear of Exposure	26
Misunderstanding	25
Failure to update application	14
Unaware child existed at time of application	9
Disclosed but did not list as dependant	1
Potential fraudulent reason	12
Total	123

⁸⁴ *Ikede v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1354 [*Ikede*].

⁸⁵ *Thirunavukarasu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 339; *Muganza v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1250; *Xin v Canada (Minister of Citizenship and Immigration)*, 2016 FC 194.

⁸⁶ *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2010 FC 133; *Adjani v Canada (Minister of Citizenship and Immigration)*, 2008 FC 32; *Woldeselassie v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1540; *Jean-Jaques v Canada (Minister of Citizenship and Immigration)*, 2005 FC 104; *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2012 FC 331; *Adjani v Canada (Minister of Citizenship and Immigration)*, 2008 FC 32.

⁸⁷ *Chen*, *supra* note 46.

⁸⁸ The reasons for non-disclosure were presented as part of the circumstances warranting humanitarian and compassionate relief pursuant to section 25 of the *IRPA*. The focus of Federal Court on judicial review is whether the decision was reasonably made given the evidence regarding the entire application. See note 57.

TABLE 3 – SURVEY OF CASE LAW: POTENTIAL MATERIAL MISREPRESENTATION UNDERLYING THE NON-DISCLOSURE

Potential Fraud - Reason	Number of cases
Yes; parents knowingly withheld existence of child for fear of delay of processing or finding of inadmissibility	8
Maybe; sponsor was granted visa as spouse's dependent	1
Maybe; child medically inadmissible	1
Yes; refugee resettlement program require him to be single	1
Maybe; refugee resettlement program (requirements not specified)	1
Total	12

B. FINDINGS OF THE SURVEY OF LAWYERS

1. DEMOGRAPHIC STATISTICS OF CASES SURVEYED

Within fifty-six cases, twenty-two (Table 4) of the sponsors were male, and thirty-four were female. For fifty-five of the cases, the countries the applicants were from were identified. Only one case did not identify the applicant's country of origin, while 52% of the applicants were from Africa, 26% from Asia, and 22% from the Middle East. In forty-seven of the cases, thirty-four (72%) involved a sponsor who obtained refugee protection in Canada, while thirteen (28%) involved someone who obtained immigration status via a different class.

TABLE 4 – SURVEY OF LAWYERS: APPLICANT'S COUNTRY OF ORIGIN

Country	Number of Applicants
Somalia	7
Tibet	6
Eritrea	5
Afghanistan	3
Iran	3
Kenya	3
Sri Lanka	3
China	2
Democratic Republic of Congo	2
India	2
Pakistan	2
Philippines	2
Sierra Leone	2

Sudan	2
Zimbabwe	2
Algeria	1
Angola	1
Burundi	1
Ethiopia	1
Iraq	1
Rwanda	1
Saudi Arabia	1
Uganda	1
Yemen	1
Unknown	1
Total	56

2. FINDINGS RELATED TO CASE PROCESSING

Of the fifty-six cases, thirty-six came to a resolution. In twenty-seven of the thirty-six cases, the applicants were eventually able to obtain sponsorship approval. Nine of the thirty-six cases ended with the family member still being excluded.

3. FINDINGS RELATED TO SUCCESSFUL SPONSORSHIP CASES

In reviewing the successful cases, the number of times an applicant tried to obtain sponsorship approval was tracked. Appeals, requests for reconsideration, requests for reopening cases and judicial reviews were not considered as an additional attempt, however, new applications were. The reason for this was that each appeal, request for reconsideration, request for reopening or judicial review dealt with an underlying application that was not resolved.

Of the twenty-seven successful cases, twenty of them (74%) made one attempt, six cases (22%) made two attempts, and one case 4%() made three attempts in the legal processes to obtain sponsorship approval.

It is important to note that one of the cases that made “one attempt” involved one application for permanent residence on H&C grounds that received two negative decisions which were both judicially reviewed at the Federal Court. It was only after the third re-determination following judicial review proceedings that the application was approved. This one attempt involved one original application, two judicial reviews, and three re-determinations of the application over five years. The number of attempts may not reflect the true length of separation, but indicates the persistent efforts people will make to reunite with their family in Canada.

Alarming, the total length of time of separation for the approved sponsorship applications ranged from four months to thirteen years (see Table 5 below). About one quarter, or six of the twenty-seven cases, resulted in a separation period of nine or more years. Twelve of the twenty-seven cases resulted in a separation of five or more years. The road to reunification is often preceded by a significant and lengthy wait.

Seven cases did not identify a total period of separation. Still, unresolved cases with multiple attempts to reunite, as discussed below, necessarily lead to much lengthier periods of separation.

TABLE 5 – SURVEY OF LAWYERS: LENGTH OF FAMILY SEPARATION FOR SUCCESSFUL CASES

Number of Years	Number of Applications
<1 year	1
1-2	5
3-4	2
5-6	3
7-8	3
9-10	3
11-12	2
13-14	1
Not known	7
Total	27

4. FINDINGS RELATED TO FAILED SPONSORSHIP APPLICATIONS

Of the nine resolved cases where reunification did not occur, three cases made no further attempt to sponsor the family member, indicating that once these persons were advised that they were caught under *Regulation* 117(9)(d), they decided not to engage in efforts for family reunification.

Two of the nine failed cases (22%) made one attempt, and four (44%) made two attempts before the sponsor gave up efforts to reunite with family in Canada.

5. UNRESOLVED CASES

Of the fifty-six cases, twenty remained unresolved at the conclusion of the research. Two families without successful outcomes have been separated for seventeen years. One family, whose case is not yet resolved began the legal process in 1999, and another, as noted above, chose not to pursue an application after getting summary advice on *Regulation* 117(9)(d). Other cases have no resolution because the lawyer surveyed either lost touch with the client, or the applicant is still awaiting a decision.

6. FEDERAL COURT INTERACTION

Of the fifty-six cases, thirty-one cases (55%) had no interaction with the Federal Court. Twenty-five cases (45%) did interact with the Federal Court. Among those twenty-five cases, ten obtained a positive decision, seven received a negative decision, three were denied leave, and in five cases, the outcome was unknown.

7. REASONS FOR NON-DISCLOSURE

Forty-four cases identified the reasons why the sponsor did not disclose the family member as indicated in Table 6 below, as told by their lawyers.

TABLE 6 – SURVEY OF LAWYERS: REASONS FOR NON-DISCLOSURE

Reason	Number of cases
Child born outside of marriage	13
Bad advice	10
Unaware of requirement to disclose family member	6
Sponsored by someone else who was unaware of the sponsoree's family members	4
Bad relationship with spouse	3
Sexual violence	3
Language barrier	3
Unaware that female partner was pregnant	1
Child's location unknown	1
Total	44

IV. COMMON THEMES FROM BOTH SURVEYS

While the surveying process and the obtaining of consistent data may not have been perfect, enough information from a critical number of cases provides some insight into how *Regulation* 117(9)(d) operates. There are four main themes or conclusions that can be garnered from looking at the results of both surveys. First, material misrepresentation, or shirking the rules to gain a benefit, does not appear to be a significant reason for the failure to disclose a family member. Second, the *best interests of the child* appear to be arbitrarily applied in H&C considerations around an excluded child. Third, contrary to pronouncements in the Federal Court and Federal Court of Appeal, sponsoring a family member who is caught under *Regulation* 117(9)(d) is a difficult and lengthy process. Finally, *Regulation* 117(9)(d) also appears to have a chilling effect and prevents many would-be sponsors from even attempting to reunite with their families for fear of punishment.

A. MATERIAL MISREPRESENTATION MAY NOT BE THE MAIN REASON FOR THE FAILURE TO DISCLOSE A FAMILY MEMBER

The jurisprudence and lawyer surveys both gather information about how a family member is not disclosed, and ultimately excluded from family sponsorship. A common theme from both surveys is that there are many non-fraudulent reasons why a person might be caught under *Regulation* 117(9)(d).

In the case law survey, a mere twelve cases of 123 cases dealt with reasons that could be construed as misrepresentation. In the lawyer survey, while only forty-four cases identified the reasons for non-disclosure, the identified reasons would likely not amount to material misrepresentation. Indeed, the Federal Court in *Ali v Canada* held that the mere existence of

false information does not automatically lead to a finding of inadmissibility; there must be some reasoning to explain how it was material to the application.⁸⁹

Many of the reasons identified deal with innocent mistakes, heartbreaking tragedies, and misunderstanding. The high rate of cases that do not amount to material misrepresentation calls into question the need for *Regulation* 117(9)(d). It appears there is not a persistent or overwhelming problem of misrepresentation in the family reunification system. This is exacerbated by the fact that section 40 of the *IRPA* provides measures to deal with the issue of misrepresentation in the immigration system already.⁹⁰ Section 40 of the *IRPA* provides that any person who misrepresents or withholds material facts can be found inadmissible.⁹¹

Finally, it is unclear why such a strict legal regime is imposed when it comes to sponsoring family members. Discretion and flexibility applied with common sense would allow for information gathering or clarification that would allow *bona fide* family members to reunite in Canada, while preserving the integrity of our immigration system.

B. BEST INTERESTS OF THE CHILD DOES NOT TIP THE BALANCE

The CIC Report finds that, between 2010 and 2014, applications to sponsor children were refused more than those involving spouses.⁹² The CIC Report mirrors other research findings that the best interests of the child “is but one factor among many, however, and very often fails to convince the authorities to stop the parent’s removal.”⁹³

Disturbingly, the findings from the surveys confirm the CIC report and other research, and reveal that where there are children involved in family separation, this does not seem to tip the balance towards a successful sponsorship application or reunification effort. The case law survey reveals that sixty-nine of the 123 cases at the Federal Court and Federal Court of Appeal dealt with H&C applications, and of these cases, forty-nine of the sixty-nine had to turn their minds to the best interests of the child. Of the forty-nine cases, only twenty-nine received a positive outcome at judicial review. This means that approximately 40% of cases did not receive a positive outcome and that some sponsors faced permanent separation from children as a result. The lawyer survey reveals that the refusals often lead to multiple applications and attempts, which underscores the difficulty of parents being separated from children for lengthy periods of time. The failure to address best interests of the child during the initial H&C assessments mean that there are frequently long delays before children are reunited with their parents.

While the findings in our survey confirm what we already know—namely that the best interests of the child does not lead to certain family reunification—the approach taken by the Federal Court and Court of Appeal flies in the face of Canada’s international obligations under the *Convention of the Rights of the Child* (CRC)⁹⁴ and the *International Covenant on Civil and*

⁸⁹ *Ali v Canada (Minister of Citizenship and Immigration)*, 2008 FCJ No 212 at paras 3-4.

⁹⁰ *IRPA*, *supra* note 3, s 40.

⁹¹ *Ibid.*

⁹² *CIC Report*, *supra* note 17.

⁹³ Cameron & Stark, “Under the IRPA and after Irving: The Right to Standing before the Federal Court for Canadian Children Seeking to Challenge their Parents’ Deportations” (2013) 46 UBC L Rev 205 at 206.

⁹⁴ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [CRC].

Political Rights (ICCPR).⁹⁵ In particular, Article 10 of the CRC states that applications by a child or parent to enter or leave a country for the purpose of family reunification shall be dealt with by the state in a positive, humane, and expeditious manner.⁹⁶ Moreover, Article 9 of the CRC holds that states shall ensure that a child will not be separated from his or her parents unless such separation is in the best interests of the child.⁹⁷ Article 17 of the ICCPR, places importance of non-interference of the family and article 21 of the ICCPR provides protection for the family unit by the State.⁹⁸ Further, the Supreme Court of Canada in *New Brunswick v G(J)* has found that a state's role in the separation of child from parent, "constitutes a serious interference with the psychological integrity of the parent" such that it violates section 7 of the *Charter of Rights and Freedoms*.⁹⁹ The Court elaborated:

The parental interest in raising and caring for a child is, as La Forest J. held in *B.(R.)*, *supra*, at para. 83, "an individual interest of fundamental importance in our society". Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.¹⁰⁰

C. THERE ARE NO TRUE REMEDIES FOR THE APPLICATION OF REGULATION 117(9)(D)

1. HUMANITARIAN AND COMPASSIONATE (H&C) GROUNDS APPLICATIONS IS NOT A VIABLE ALTERNATIVE

The two surveys reveal that an H&C application, while an option, may not always be a viable one. This is disquieting given that the Federal Court and Federal Court of Appeal have placed great importance on the fact that H&C assessments are available for those caught under *Regulation* 117(9)(d) as an alternative remedy and thus a reason to deny relief at the Federal Court.¹⁰¹ For example in *Nguyen*, the Federal Court stated,

[i]t is true that the operation of paragraph 117(9)(d) of the ... *Regulations* in a particular case may appear Kafkaesque; however one must keep in mind that there are other parts of the immigration system which exist for that very reason, to lessen the consequences of strict applications of the law in exceptional cases, when deemed appropriate. Foremost

⁹⁵ *International Convention on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

⁹⁶ CRC, *supra* note 94, at 10.

⁹⁷ *Ibid*, at 9.

⁹⁸ ICCPR, *supra* note 95, arts 17 and 21.

⁹⁹ *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 61.

¹⁰⁰ *Ibid* at para 61.

¹⁰¹ See *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 189; *Preclaro v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1063; *Azizi v Canada (Citizenship and Immigration)* 2005 FCA 406; *De Guzman v Canada (Citizenship and Immigration)*, 2005 FCA 436.

among these is section 25 of the [IRPA], which gives the Minister the authority to grant an exemption to any legal requirement on the basis of humanitarian and compassionate grounds.¹⁰²

The lawyer survey revealed that in some cases, the H&C application did provide the answer to bringing a family member to Canada. Of fifty-six cases, twenty-seven did lead to a positive resolution. However, nine cases resulted in a negative decision or a decision not to pursue reunification, and the remaining twenty cases either are still awaiting a decision or have lost contact with their lawyer. Less than half of the cases in the lawyer survey led to reunification (48%).

Over half of the judicial reviews in the case law survey dealt with H&C assessments (sixty-nine of 123 cases or 56% of cases). Slightly more than half were granted judicial review, while the other half were not. The statistics reveal that where H&C assessments are made, even where there is no material misrepresentation, they are not always granted. Further, in approximately half the cases, the Federal Court does not interfere with negative H&C decisions.

The lawyer survey also revealed that among the fifty-six cases, thirty-one did not seek judicial review or have any interaction with the Federal Court. They either chose not to go forward, or had positive resolutions. However, twenty-five of the fifty-six cases did interact with the Federal Court and of those twenty-five cases, ten received positive decisions from the Federal Court and seven did not. Three were not granted leave and five are ongoing or were unresolved at the time the survey was taken. Even taking the step of asking a court to review the reasonableness of an application did not mean that chances of receiving a positive review were high. Only about 40% received positive news from the Federal Court and because of the jurisdiction of the Court, the news did not mean family reunification but that the application would be sent back to the visa office for review by a different immigration officer, leading to further delays without a guaranteed result.

Both surveys reveal that in a significant number of cases, the H&C route does not lead to family reunification. This raises the disturbing possibility that this process is failing people who need it. The statistics give us a reason to question the view of the Federal Court and Federal Court of Appeal that the H&C application is a viable alternative solution to *Regulation* 117(9)(d).¹⁰³ We acknowledge that further research is needed to investigate whether the H&C process is malfunctioning in this context, and if so, how and why it is.

2. SUCCESSFUL REUNIFICATION OFTEN REQUIRES MULTIPLE ATTEMPTS

As discussed above, the data from both the jurisprudence survey and the lawyer survey establish that H&C applications do not always provide a safety valve for sponsors who did not make a material misrepresentation. However, where a sponsor is successful, he or she has had to be both patient and persistent.

Both the case law survey and the lawyer survey indicate that once 117(9)(d) is triggered, many individuals made attempts to reunite with their family through various legal channels. As discussed above, one attempt can sometimes include an initial H&C application. If that attempt fails, some have been able to have the decision judicially reviewed, and if granted, the

¹⁰² *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2010 FC 133 at para 2.

¹⁰³ *Ibid.*

application goes back to a different officer to review. In some cases, another negative decision is made, and another judicial review made. In one case, three reconsiderations and two judicial reviews led to a five-year legal process that finally ended in family reunification. In other cases, some have given up, or received too many negative decisions, or are still awaiting news. In one case, it has been sixteen years and counting.

It was difficult to discern from the reported case law how many attempts sponsors made before reaching the Federal Court or Federal Court of appeal since reported cases did not reveal such information. However, some cases did provide a glimpse of what we see in the lawyer survey. For example, in *Pascual*, the Federal Court stated, “On May 30, 2007 Mrs. Pascual initiated a third sponsorship application, this time emphasizing the H&C factors. It was refused on July 13, 2007, but the Applicant’s parallel application continued to be processed in Manila.”¹⁰⁴

Even in successful cases, 26% of cases had to make two or more attempts. It is important to remember that one attempt can consist of an initial application, a judicial review, and a reconsideration. Further iterations of this process may follow. A single attempt can take years.

Another corollary of the surveys is that the system of relying on alternative remedies is not working well. The cases where there are multiple reconsiderations and multiple applications show that some applications, previously rejected, were eventually accepted. This begs the question of why it must take multiple attempts for the right decision to be rendered.

3. REMEDIES LEAD TO EXTREMELY LENGTHY SEPARATIONS AND WAIT TIMES

One of the most concerning findings is how *Regulation* 117(9)(d) could lead to lengthy separation and wait times. No matter the outcome, families are forced to wait.

There was no comprehensive way of obtaining the length of time some applicants had taken to reach the Federal Court or Federal Court of Appeal in the case law survey. However, some cases did note lengthy periods of times comprising of various attempts to reunify family. For example, in the case of *Lilla*, the applicant was a spouse of a permanent resident who, when immigrating to Canada, did not disclose he had a spouse.¹⁰⁵ The Federal Court in *Lilla* stated: “The Applicant has a long immigration history, including approximately nine years in Canada between 2001 and 2009 wherein numerous immigration proceedings were engaged, which ultimately resulted in her deportation from Canada.”¹⁰⁶ In another case, *Fremah*, eleven years of separation had passed as the reported decision was dated 2016, but the sponsor had arrived in Canada in 2005, and made an application to sponsor her two children in 2010.¹⁰⁷ Given that the length of separation was not always revealed in the reported case law, the survey of jurisprudence could not provide a complete picture of separation times. The lawyer survey, on the other hand, provides some insight. Amongst successful cases (twenty-seven of fifty-six), approximately 45% had to wait five years or more to be reunited with their family, with the upper limit reaching thirteen years. It is important to note that of the successful cases, the total length of separation is unknown for seven cases. Thus, even if one eventually gets reunited, the alternative remedies force families to wait a long time before their case gets resolved.

¹⁰⁴ *Pascual*, *supra* note 45 at para 7.

¹⁰⁵ *Lilla*, *supra* note 47.

¹⁰⁶ *Ibid* at para 2.

¹⁰⁷ *Fremah*, *supra* note 45.

The same lawyer survey revealed that at least one ongoing case has been waiting for sixteen years. Of course, the unresolved or negative decisions can mean indefinite or permanent separation.

4. PUNISHMENT FURTHER TO *REGULATION* 117(9)(D) AND THE CHILLING EFFECT

Within the case law survey, there were judicial reviews of decisions of immigration officers to deny an immigration application due to inadmissibility¹⁰⁸ or judicial reviews of findings of misrepresentation (and therefore inadmissibility).¹⁰⁹ As well, there were some decisions where the Minister appealed a decision of the IAD.¹¹⁰ Thus, there were a number of cases in which the sponsors had their immigration application and status in jeopardy due to the application of *Regulation* 117(9)(d).

The lawyer survey noted that in at least nine of fifty-six cases, family reunification was not actively pursued. An important reason is that *Regulation* 117(9)(d), for some persons, not only means permanent separation from family members, but also threatens the loss of immigration status in Canada. The *Regulation* itself imposes a chill on taking any steps to reunite with family, including an H&C assessment, on persons who fear losing status in the end or getting punished.

Regulation 117(9)(d) does not just exclude family members, but may also punish persons for the “crime” of misrepresentation despite the fact that the misrepresentation was likely not material (as was the case in 92% of the reported Federal Court cases). An admission that a family member was not examined by immigration officials, no matter the reason, can trigger an investigation of inadmissibility. Given that the surveys indicate that a large proportion of cases deal with reasons for non-disclosure and non-examination that are not material and no benefit was gained, persons are unduly being punished.

V. CONCLUSION: REPEAL *REGULATION* 117(9)(D)

The two surveys were an attempt to gain a better understanding of how *Regulation* 117(9)(d) operates. While the surveys provided data on the different questions, and some information was missing from individual cases surveyed, the information gathered does provide a foundation that can serve as a starting point in discussing whether *Regulation* 117(9)(d) is useful, serving its objective, or harming persons unnecessarily. The information gathered is alarming. The regulation’s primary concern was that the family reunification regime in our immigration system may be a site of abuse. The evidence, however, shows that the problem of “fraud” (material misrepresentation) appears to exist in a minority of the cases. Both the survey of case law and the survey of lawyers reveal that the overwhelming majority of cases where *Regulation* 117(9)(d) is applied display no material benefit from the non-disclosure. Rather, misinformation, misunderstanding, and other tragic reasons lead to non-disclosure of perfectly admissible family members.

¹⁰⁸ For example *Ikede*, *supra* note 84.

¹⁰⁹ For example *Mai*, *supra* note 59; *Mirza*, *supra* note 65; *Cortez*, *supra* note 79.

¹¹⁰ *Kimbatsa*, *supra* note 78; *Mohamed*, *supra* note 65; *Canada (Minister of Citizenship and Immigration) v Chen*, 2014 FC 262.

Accepting that mistakes may happen, the *Regulation* however does not provide any discretion or flexibility to exclude cases where “fraud” is clearly not an issue. Instead, it forces sponsors to seek alternative legal remedies such as H&C assessments or prevents them from seeking any alternative whatsoever. The disturbing result is that H&C relief is arbitrarily granted. This is alarming given that more cases than not deal with children.

If Canada is truly committed to a robust family reunification system, *Regulation* 117(9)(d) should be eliminated. Concerns of misrepresentation and “fraud” are overblown and such concerns can be dealt with by the enforcement regime already in place in the *IRPA*. Further, Canada gains nothing by making those who have sought refuge, work and a life in Canada to needlessly endure expensive applications and lengthy waits to be with their loved ones. It raises a series of questions about not only Canada's commitment to family reunification, but also whether the human rights of persons affected are being violated.¹¹¹

¹¹¹ See Liew, *supra* note 7 for an analysis on how *Regulation* 117(9)(d) violates the *Charter of Rights and Freedoms*.