2009

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Heather Neufeld

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INADEQUACIES OF THE HUMANITARIAN AND COMPASSIONATE PROCEDURE FOR ABUSED IMMIGRANT SPOUSES

HEATHER NEUFELD*

RÉSUMÉ
Cet article traite des difficultés rencontrées par les femmes immigrantes dont le parrainage conjugal est rompu pour cause de violence familiale. L'auteur se livre plus particulièrement à une critique des faiblesses du processus de demandes pour des circonstances d'ordre humanitaire (CH) qui, d'habitude, est le seul recours qui reste à ces femmes pour obtenir le statut de résident au Canada. Parmi les critères qu'une personne demandant le statut de résident permanent sur la base de raisons d'ordre humanitaire doit satisfaire, il y a le fait qu'elle subirait un préjudice indu ou disproportionné si elle était renvoyée dans son pays d'origine, et, d'autre part, qu'elle est bien établie au Canada et est financièrement autonome. La discussion débute par un examen du régime de parrainage canadien et son fonctionnement prévu, comparé à ce qui se passe fréquemment dans les cas de rupture de parrainage pour cause de violence familiale. Sont ensuite passées en revue, la nature de la violence conjugale subie par les femmes immigrantes ainsi que les barrières sociétales et juridiques qui les confrontent souvent. Ces facteurs fournissent le contexte d'une analyse de l'efficacité de la procédure de la demande de résidence permanente pour des raisons d'ordre humanitaire. Après un examen de cette procédure CH et de ses faiblesses, l'auteur discute des problèmes que l'on rencontre lors de contestations, par le biais du contrôle judiciaire, de décisions négatives résultant d'une demande CH.

Étant donné qu'il est peu probable que des amendements soient apportés, dans le court terme, à la Loi sur l'immigration et la protection des réfugiés, l'article conclut avec une brève proposition de réforme de la politique sur l'immigration visant à résoudre les problèmes spécifiques confrontant les femmes immigrantes victimes de violences.

INTRODUCTION
For women who suffer domestic violence, the Canadian immigration experience can be extremely trying, at times brutal. Many of these women seek to attain permanent resident status through sponsorship by their spouses who are established in Canada. Although abusive relationships are by no means unique to women in this situation,
because of the severity of the problem, attention in this paper is confined to the hazards of the sponsorship process, both social and legal.

Indisputably, immigrant women who experience domestic violence during the sponsorship process are highly vulnerable because of their precarious legal status in a new and unfamiliar country, and because of deficiencies in the *Immigration and Refugee Protection Act* [IRPA][1] and policies of Citizenship and Immigration Canada. Currently, men are most likely to be principal applicants for immigration.[2] Although a woman who has been sponsored by her spouse and obtained her permanent resident status may separate from or divorce her husband without threat of deportation, the same is not true if her sponsorship is still in process. In abusive relationships, the intrinsic control extended to sponsors by provisions of immigration law frequently leads to manipulation. In this context, husbands may threaten to revoke or actually do withdraw the sponsorship before it is finalized. In fear of deportation, women often choose to remain in the relationship, no matter how hazardous or unhealthy.[3]

For women who forgo the possibility of sponsorship by leaving an abusive spouse or whose sponsorship is withdrawn by their partner, the only means to obtain permanent resident status is almost always to submit a Humanitarian and Compassionate [H&C] application,[4] the positive outcome of which is anything but certain. The lack of attention in Canadian law to the inequitable status of immigrant women is typified by that procedure. Success requires abuse survivors to satisfy criteria that account little for social isolation and financial dependence that are so often the result of oppressive relationships.[5]

In short, I will argue here that Canada’s immigration system is inadequate and unjust with respect to abuse survivors whose spousal sponsorship has broken down. Further, I echo scholars’ claims that challenges immigrant women face are largely ignored in immigration policy; that both in the home and in Canadian society, immigrant women are not treated equally when compared with their male counterparts; and that immigration law fails to consider such systemic inequity when crafting law and policy.[6] I begin with an examination of the Canadian sponsorship regime, how it is

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4. IRPA, supra note 1 at s. 25(1).
5. For examples of criteria that abused immigrant women must satisfy, see Citizenship and Immigration Canada, *Immigration Manual*, at c. IP-5, ss. 5.1, 11.2, 13.10 [Immigration Manual].
intended to function versus what frequently occurs in cases of sponsorship breakdown due to domestic violence. By way of background to my analysis of the effectiveness of the humanitarian and compassionate procedure, I consider the nature of abuse as it pertains to immigrant women, as well as societal and legal barriers they face. Following an examination of the H&C process and its shortcomings, I discuss problems encountered when challenging negative H&C decisions through judicial review. Finally, given the unlikelihood of amendment of the Immigration and Refugee Protection Act in the short term, I conclude by proposing reforms to immigration policy that address specific problems confronting abused immigrant women.

In the interest of style and to avoid needless repetition, I sometimes refer to abused immigrant women as simply women and to the spouses who abuse them as their husbands, spouses or partners. I emphasize at this point that reference in this paper to men or women pertain to two specific subgroups of Canadian society and not to adult males and females in general in this country.

OBTAINING PERMANENT RESIDENCE IN CANADA AS A SPONSORED SPOUSE

The Sponsorship Regime

While sponsorship rules apply equally to same-sex and opposite-sex couples, the focus here is scenarios in which the sponsoring partner is male and the sponsored partner female, chiefly because the majority of cases still follow this pattern. A woman may be sponsored while still residing in her home country, able to join her partner in Canada once she has obtained permanent residence. However, inland sponsorships are of greatest interest in this paper, those in which the process is undertaken while both partners are already present in this country. An immigrant woman may marry her sponsor in Canada while she resides in the country illegally or while she holds a temporary form of status such as that of student or visitor. Likewise, inland sponsorship may be pursued when a spouse, already residing in Canada, brings his or her partner to the country from abroad, and then initiates the process.

According to the Immigration and Refugee Protection Act and Immigration and Refugee Protection Regulations, sponsors must be Canadian citizens or permanent residents, at least eighteen years old and residing in Canada. In addition, individuals may not sponsor a spouse if subject to circumstances such as being under a removal order, having defaulted on a previous sponsorship or receiving social assistance for a reason

7. Although not addressed in this paper, same-sex spouses who are sponsored also suffer from domestic abuse.
8. *IRPA*, supra note 1 at s. 13(1); *Immigration and Refugee Protection Regulations*, SOR/2002-227 at ss. 70(1), 72(1), 117(1) [Regulations].
9. Ibid. at ss. 123, 124.
10. Ibid. at s. 130(1); *Immigration Manual*, supra note 5 at c. IP-8, s. 5.14.
other than disability. Individuals sponsoring a spouse need not satisfy the minimum necessary income criterion normally required for sponsoring a relative.

Immigrant women who are to be sponsored from within Canada by a spouse or common-law partner must cohabit with their sponsor, demonstrate that their marriage is genuine and satisfy admissibility requirements relating to issues such as criminality. Although medical examinations are obligatory, sponsored spouses and their dependent children are exempt from proving that they will not cause excessive demand on the Canadian health system.

In a successful sponsorship scenario, the application is first accepted in principle, meaning that Citizenship and Immigration Canada has found that the sponsor and sponsored spouse meet all eligibility requirements. The sponsored spouse subsequently receives permanent resident status, assuming that she is not found inadmissible for criminal or security reasons, because she is a risk to public health, or because she is unable to convince an immigration officer that she will be financially self-supporting, etc. The waiting period for receiving a final grant of permanent resident status is highly variable. Her sponsor must have agreed to be responsible for all his spouse's needs during the first three years. If the sponsored spouse resorts to social assistance during that time, the sponsor is usually obligated to reimburse the government.

Sponsorship Breakdown
The term “sponsorship breakdown” refers to situations such as those in which the sponsorship is withdrawn, was never submitted or the individuals separate prior to the sponsored partner's receipt of permanent residence. Even in sponsorships that do not break down, immigrant women are sometimes subject to abusive tactics of control and forced isolation, leading to a significant power imbalance between partners. In addition to his influence upon the outcome of his wife's quest for permanent status, a sponsor may threaten to have his spouse deported for displeasing him or not complying with his demands. Women sometimes feel that they owe their sponsor allegiance because he arranged for their entry into Canada or helped them to obtain temporary legal status. When a woman has obtained permanent residence, separa-

11. Regulations, supra note 8 at s. 133(1).
12. Ibid. at s. 133(4).
13. Ibid. at s. 124(a).
14. Ibid. at ss. 4, 125(1)(c); Immigration Manual, supra note 5 at c. IP-8, s. 5.26.
15. Immigration Manual, supra note 5 at c. IP-8, s. 5.33.
16. IRPA, supra note 1 at s. 38(2)(a); Regulations, supra note 8 at s. 24.
17. IRPA, supra note 1 at ss. 34-41.
18. Immigration Manual, supra note 5 at c. IP-8, ss. 13, 15.
19. Regulations, supra note 8 at ss. 132(1), 135.
tion or divorce from her sponsor does not affect her immigration status. However, lack of knowledge of her rights may induce her to believe that her husband can have her deported at any time. For women whose sponsorship actually breaks down, the situation is more precarious still. Not uncommon are assurances by husbands that they have already filed for sponsorship or that they will soon do so, even though the application is never submitted. Eventually, persistently misled, these women find themselves with no status and at risk of removal from the country. Even if husbands actually file sponsorship documents, there is no guarantee that permanent resident status will be granted. For example, Citizenship and Immigration Canada may suspend processing if the sponsor is deemed ineligible because of criminal activity. Women in this situation will be without approved sponsorship and subject to removal orders because of the actions of their spouse.

Or a husband may withdraw his application at any time prior to the sponsored spouse’s receipt of permanent residence. Acceptance in principle, therefore, offers no guarantee that a woman is safe from revocation of her sponsorship. Finally, if an abuse survivor does manage to extricate herself from repression by leaving her husband prior to receiving permanent resident status she is no longer sponsored and thus at risk of removal from Canada.

Hence, women often feel they have no option other than to endure abuse to gain permanent residence. In this context, immigrant women have little choice but to resort to an H&C application, a discretionary process, the positive results of which are far from guaranteed. Before looking closely at that procedure, it is important to define domestic violence and review some of the imposing barriers that immigrant women face. Without examining these barriers, it is difficult to appreciate the almost insurmountable obstacles in meeting current H&C requirements.

**OBSTACLES CONFRONTING DOMESTIC VIOLENCE SURVIVORS**

**Defining Domestic Violence**

Domestic violence is unfortunately a very widespread phenomenon, within immigrant and non-immigrant families alike. It is found across all socio-economic, religious and ethnic groups. Factors such as unemployment, altered gender roles

22. *Regulations, supra* note 8 at ss. 131(1) (d)-(f), 136(1); *Immigration Manual, supra* note 5 at c. IP-8, s. 5.8.
23. *Sheppard, supra* note 2 at para. 23; *Immigration Manual, supra* note 5 at c. IP-2 at ss. 5.9, 5.28, 5.36.
24. *Regulations, supra* note 8 at s. 126; *Immigration Manual, supra* note 5 at c. IP-2, s. 5.40.
25. *Regulations, supra* note 8 at s. 124(a).
and financial instability tend to increase the probability of abuse. Although recent Canadian statistics illustrating the prevalence of domestic violence among immigrant women are not available, data from the United States for the year 2000 indicate that 59.5 per cent of married immigrant women suffer domestic abuse. Unfortunately, this figure likely underestimates the severity of the problem since many women neither file complaints nor apply for health or social services. In this paper, I will use the terms “family violence”, “domestic abuse” and “domestic violence” interchangeably in the context of relationships between spouses or common-law partners.

According to Health Canada, domestic abuse is “an attempt to control the behavior of a wife, common-law partner or girlfriend. It is a misuse of power which uses the bond of intimacy, trust and dependency to make the woman unequal, powerless and unsafe”. Domestic violence is not merely physical; it also includes psychological, emotional, sexual, financial or verbal and spiritual abuse. This more comprehensive definition of domestic abuse underscores that humiliating women or withholding money for food or clothing are as much forms of abuse as are beating and slapping.

Women frequently leave and return to their partners numerous times before finally breaking free, a fact often unappreciated by government officials. According to one estimate, domestic abuse survivors usually try to leave their abuser as many as seven times before finally succeeding. Women often are unaware of their spouse’s abusive tendencies at first, acknowledging it only subsequent to marriage or pregnancy. They remain in the relationships with the belief that it is their responsibility to make the relationship work or with the hope that their husbands will change with time. The varied forms of domestic violence as well as the obstacles described below must be carefully considered by immigration officers and judges when reaching decisions concerning abuse survivors.

28. Ibid. at 557-59.
30. Côté, Kérisset & Côté, supra note 6 at 51-52, 60 and 79.
**Language**

One of the most significant barriers facing many abused immigrant women in Canada is the inability to speak either French or English. Sadly, many immigrant women who undergo the sponsorship process do not have access to English classes, both because the courses are not subsidized and because abusive husbands frequently forbid their wives from enrolling. Their husbands may be unwilling to spend the money or prefer that their wives not develop skills that might promote autonomy.\(^{33}\) Women are often unable to obtain information pertaining to their rights, concerning services for abuse survivors or regarding complaints to the police.\(^{34}\) When interacting with immigration authorities, women may remain silent, their only knowledge of the process consisting of what their spouse has chosen to tell them.\(^{35}\) If the police are called to a domestic incident, many women report that officers take a statement only from their husband.\(^{36}\) Many immigrant women are unwilling to implicate their children as interpreters in emotionally charged situations. As a result, immigrant abuse survivors often refrain from accessing social services such as women’s shelters.\(^{37}\) In short, communication with the outside world for many abused immigrant women is all but cut off.

**Financial Dependency**

Frequently, immigrant women arrive in Canada entirely without financial resources. Their husbands may refuse to give them money for basic necessities and repeatedly tell them that they are a burden. Sponsors may refuse to allow their wives to seek employment or permit them to work only in low-wage occupations. Alternatively, husbands may force their wives to work illegally, then threaten to report them to immigration authorities. Women who are sponsored in this country often lack marketable skills or their credentials from abroad are not recognized. Most of these women will have little choice but to remain at home to care for children, unable to take advantage of community and employment resources.\(^{38}\)

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35. Côté, Kérisset & Côté, supra note 6 at 45-46.

36. Stairs & Pope, supra note 32 at 159.

37. Ibid. at 159; Susan McDonald, "Not in the Numbers: Domestic Violence and Immigrant Women" (1999) 19 Canadian Woman Studies (3) at 163-67 online: [http://proxy.bib.uottawa.ca:2304/ips/information.do?contentSet=IAC/Documents&type=retrieve&tabID=T002&prodId=IPS&docId=A300763888&source=gale&srccprod=CP1&userGroupName=otta77973&version=1.0][McDonald].

38. Côté, Kérisset & Côté, supra note 6 at 26.
The employment issue is further complicated by the fact that the right to work or study is not attained without hurdles. A woman who undergoes the sponsorship process from within Canada must apply for a work permit and pay the required fee. This process is often very lengthy. 39 Moreover, women may apply only when their sponsorship has been accepted in principle. 40 To make matters worse, until a woman becomes a permanent resident, her social insurance number begins with the number nine, a signal to potential employers that her immigration status is still in question. Women who wish to study but who are not yet permanent residents are not entitled to federal or provincial government grants or loans. 41

Compounding these difficulties is a mother’s lack of access to the Canada Child Tax Benefit if she lacks legal status and ceases to reside with her sponsor. The Canada Child Tax Benefit is a non-taxable amount paid to eligible families by the government to help with the cost of raising children. The money is paid to the parent who is primarily responsible for the care of the child, usually the mother. If a woman with children resides with a Canadian citizen or permanent resident spouse or common-law partner, she is eligible for the benefits despite lacking permanent status herself. However, if an immigrant woman without status leaves her sponsor, even as a result of abuse, she loses her right to the Child Tax Benefit. Without this financial assistance, based on household income and the number of children in the family, economic resources are further diminished for a mother who no longer lives with her husband. 42 In one case, a woman with three children separated from her abusive spouse before the sponsorship process had been completed. She continued to receive the Child Tax Benefit while her permanent resident application on humanitarian and compassionate grounds was processed. When the government learned that she had separated from her husband, she was required to repay the sum of $12,000, an extremely severe penalty for leaving an abusive spouse prior to receiving permanent resident status. 43 In addition, if a woman without permanent status incorrectly receives Child Tax Benefits after separating from her sponsor, the Canada Revenue Agency may withhold benefits even after she receives permanent status until she repays the benefits she was previously overpaid. 44

With obstacles at every turn, many women, unable to work or study, do not leave their husbands for fear of being homeless. 45 To do so before a sponsorship applica-
tion has been submitted on their behalf would likely render them ineligible for social assistance.46

Isolation

For many women who find themselves in a new country where the language, customs and people are unfamiliar, spousal abuse can lead to a sense of total isolation. They may have no one with whom to share their despair as abuse escalates. Some spouses expressly ensure their wife’s solitude by forbidding her to leave the house, make new friends or contact family in her country of origin. Some women come to feel so desperate that they fall into depression or attempt suicide.47

Because of their cultural background, some women believe it is their duty to hold the family together, conditioned to view abuse as a very private matter. Their only link to the world outside may be fellow members of their ethnic or linguistic community. Reasonably, women with only limited ties may be disinclined to break faith with the traditions and mores of their peer group. Few will risk leaving their husband to be ostracized by the only people they know in their new country. Some immigrant women have been taught from childhood that they are to be submissive to their husband.48

The Police

Few women will complain to the police for fear of deportation of herself or her spouse if he is not a Canadian citizen. Regrettably, this concern is well founded if a woman lacks any form of legal status.49 A woman whose spouse has promised to sponsor her but who has not yet done so may find herself in the impossible situation of either calling the police for help and facing the intervention of immigration authorities or enduring abuse.50 A woman may also fear mistreatment by state authorities, es-

46. "Directive 25.0: Immigrants, Refugees and Deportees", online: Ontario Works, Ontario Ministry of Community and Social Services <http://www.cfcs.gov.on.ca/NR/MCFCS/OW/English/25_0.pdf>; Ontario Regulation 134/98 at s. 6(12)(iii).
47. Côté, Kérisit & Côté, supra note 6 at 60.
48. Justice Institute of British Colombia, Empowerment of Immigrant and Refugee Women Who Are Victims of Violence in Their Intimate Relationships (March 2007), online: Justice Institute of British Colombia <http://www.jibc.ca/cccs/Publications/Pages%20from%20Empowerment_for_ImmigrantWomen_ExecutiveSummary.pdf> [Empowerment].
pecially if she originates from a country in which the police are used as a tool of repression.51

Many jurisdictions have police policies intended to promote the arrest of abusers. Ontario, for example, has had a mandatory arrest policy since 1983. This means that if the police have reasonable grounds to believe that an offence has taken place, they must charge one or both of the individuals involved. Not only does the abused woman herself have no control over whether her partner is arrested, but she risks arrest herself if she fights back to protect herself from violence.52 At least in Toronto, the number of women charged in domestic violence incidents, many of whom had a long history as domestic violence survivors and responded with force to protect themselves, has increased over recent years.53 Significantly, if a domestic violence survivor is convicted of assaulting her abusive spouse, she risks being denied permanent residence on H&C grounds, should sponsorship breakdown cause her to file such an application. A woman may also be concerned that if a complaint on her part results in a charge against her partner, she may consequently be obliged to testify against him.54

In addition, an individual convicted of a violent offence against a family member is ineligible to act as a sponsor.55 This provision, which appears intended to protect a spouse from sponsorship by an abuser, may instead discourage a woman from reporting mistreatment. If her sponsorship is in process and her husband is convicted of abusing her, she may find herself in a precarious situation without a sponsor.

**Immigration Authorities**

Often women incorrectly assume that leaving their sponsor will result in deportation.56 Many women are unaware that they can apply for permanent residence in

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55. *Regulations, supra* note 8 at s. 133(1)(e).

56. Stairs & Pope, *supra* note 32 at 159-60.
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their own right. In some instances, women have been told by immigration personnel that sponsorship requires them to follow the admonitions of their husband, that they are under his charge. Immigration officers, who frequently do not meet with the parties at all during the sponsorship process, sometimes fail to explain a woman’s rights or make clear what recourse is available to her if sponsorship breaks down. Women often have little or no knowledge about what has been stated in their sponsorship application since it is their spouse who engages in all interaction with immigration authorities. Sometimes Citizenship and Immigration Canada conducts the entire process as though the woman is either not present or need not be involved. This exclusive attitude facilitates abusers who lie to their wives concerning the sponsorship process.57 This writer knows of no organization in Canada whose specific mandate is to counsel women on all matters pertaining to sponsorship.

Loss of Children

Women are often told by their abuser that if they leave he will receive sole custody of the children by arguing that their mother abandoned them. Women may also experience guilt if they remove children from their father’s care. They may also be apprehensive about involvement by the Children’s Aid Society, because of their lack of knowledge of typical circumstances that prompt the government to seek foster care.58 Women rarely have sufficient financial resources to take their children with them if they must leave Canada. Hence, women who face such dilemmas are often forced to continue to suffer abuse rather than flee with their children and risk abduction charges by their husbands.59

Women who have no further immigration option available to them cannot elude a removal order simply because their children are born in this country. In Langner v. Canada (Minister of Employment and Immigration),60 the Federal Court of Appeal adopted the position that neither a Canadian citizen child’s rights nor those of an immigrant mother or father are violated when the parent’s only alternative is to leave the child in Canada or to return with him or her to the home country. According to the Federal Court of Appeal, the decision to leave a child in Canada is strictly a private family matter.61 The Court expressed concern that an individual “need only

57. Côté, Kérisit & Côté, supra note 6 at 43-45; Miedema & Wachholz, supra note 29 at 22, 36-37.
59. Côté, Kérisit & Côté, supra note 6 at 58.
61. Ibid. at para. 6.
have a child on Canadian soil and argue that child's Canadian citizenship rights in order to avoid the effect of Canadian immigration laws.  

As a result of the Langner decision, immigration lawyers turned to the family court in an attempt to keep immigrant women and their Canadian children together. Their approach was to obtain judgments that grant sole custody to the mother and, incidentally, prohibit parents' removal of the children from the province. These lawyers hoped that the court orders would create de facto stays of removal for mothers. 

Section 50 of the Immigration and Refugee Protection Act states: "A removal order is stayed (a) if a decision that was made in a judicial proceeding—at which the Minister shall be given the opportunity to make submissions—would be directly contravened by the enforcement of the removal order." 

In the case of Alexander v. Canada (Solicitor General), Madam Justice Dawson found that a custody order that prevents an immigrant woman from removing her Canadian-born children from Ontario is not a judicial decision that would be “directly contravened” by her removal from Canada. According to the justice, custody does not require that the parent have physical care of the children at all times. She adopted the reasoning of Justice Perkins in Chou v. Chou that custody is a “bundle of rights” that allows the custodial parent to make decisions about the child's place of residence but does not necessarily require that the parent reside with the child. 

The result of the Alexander decision is that immigrant women cannot rely on custody orders to protect them from separation from their children. This case was recently upheld by the Federal Court of Appeal in Idahosa v. Canada (Minister of Public Safety and Emergency Preparedness). However, in Idahosa, Justice Evans did note that the custody order prohibiting the removal of the children from Ontario was sought to attempt to prevent the mother's removal from Canada, rather than because of an actual custody dispute between two parents. This means that the question of whether a custody order could ever stay a parent's removal is still not entirely decided by the Federal Court. 

In short, some immigrant women are forced to choose between leaving children in Canada with an abusive spouse, entrusting them to the care of a Children's Aid
Society or taking the children with them when removed from the country. Thus, immigrant women's fears about possible loss of their children are well founded, their uncertainty yet one more disincentive to break away from an abusive relationship.  

**Fear of Deportation**

Immigrant women face many risks and hardships if forced to leave Canada and apply for permanent residence status from abroad. Some of them would not meet language, education and work-experience requirements for selection as independent immigrants. Also, a woman removed to her country of origin loses the benefit of Canadian restraining orders and peace bonds meant to protect her from her abusive partner.

As well as being at continued risk from her abuser, a woman who returns to her country of origin without her spouse is often shunned for having left her husband. A woman's family may refuse to shelter her and may blame her for her marital problems. In many countries, divorce leads to social stigma. Gender and religious norms may make reintegration very difficult. Women often return to poverty and entrenched gender discrimination. They frequently lack access to health and counselling services to address the physical and psychological effects of past abuse. For these reasons, domestic violence survivors are frequently terrified of coming to the attention of Citizenship and Immigration Canada.

**The Humanitarian and Compassionate Process**

While not comprehensive, the barriers discussed above illustrate the demoralizing obstacles abused immigrant women face in their attempts to make Canada their new home. As I will now endeavour to show, not only does immigration law fail to take account of their particular challenges and vulnerabilities, but immigration officers fail to adequately consider the actual experiences of abuse survivors during the humanitarian and compassionate process.

**The Procedure**

Individuals who hope to remain in Canada permanently may submit an H&C application that details why their personal circumstances warrant exemption from the rules of the *Immigration and Refugee Protection Act*. Examples of individuals who might submit an H&C application are those who unsuccessfully sought refugee status.

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69. E-mail correspondence with Geraldine Sadoway, immigration lawyer, Parkdale Community Legal Services in Toronto (8 January 2007) (on file with author) [Sadoway, 8 January].

70. E-mail correspondence with Kristin Marshall, immigration lawyer, Refugee Law Office in Toronto (April 2007) (on file with author).

or who built a life in Canada after initially entering the country illegally. The authority for granting H&C decisions is found in section 25(1) of the IRPA, which states:

The minister shall, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this act and may on the minister's own initiative or on request of a foreign national outside Canada examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this act if the minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them taking into account the best interests of a child directly affected or by public policy considerations.72

Although this provision refers to the minister, H&C applications are evaluated by immigration officers who act on the minister's behalf.73 These officers have a significant level of discretion, for they are not required to reach specific or prescribed decisions. Since H&C considerations are nowhere defined in the Immigration and Refugee Protection Act, officers rely on a policy manual, called the Immigration Manual, which sets out guidelines for deciding such cases. According to the Manual, the decisions are meant to "approve deserving cases not anticipated in the legislation."74

An applicant bears the burden of proof.75 She must provide written submissions that detail her personal situation and any relevant legal arguments. Applicants must also submit supporting documents.76 Immigration officers generally make decisions on the basis of written material alone.77

The H&C procedure has two stages. First, the immigration officer determines whether there are sufficient H&C factors to permit the applicant to apply for permanent residence without having to leave Canada. The officer may reach a positive decision even if the applicant would ordinarily be prohibited from receiving permanent residence. At this stage, the officer decides only whether to permit the individual to seek permanent residence from inside Canada. This does not mean that the status will ultimately be granted. In some cases, such as those involving issues of security or possible human rights violations, the officer does not have the authority to allow the applicant to apply for permanent residence from inside Canada.78 Once a case is approved in principle, processing for permanent residence will begin and legal status

72. IRPA, supra note 1 at s. 25(1).
73. Immigration Manual, supra note 5 at c. IP-5 ss. 4.2, 5.24.
74. Ibid. at c. IP-5, s. 2.
75. Ibid. at c. IP-5, s. 5.26.
76. Regulations, supra note 8 at s. 66; Immigration Manual, supra note 5 at c. IP-5, s. 3.1.
77. Immigration Manual, supra note 5 at c. IP-5, s. 5.28.
78. Regulations, supra note 8 at s. 68; Immigration Manual, supra note 5 at c. IP-5, ss. 4.2, 5.6, 5.7. The requirements that applicants must fulfil in order to obtain permanent residence subsequent to a positive H&C decision are found in subsections 72 (1)(b) and (e) of the Regulations. However, these requirements may be overcome in certain circumstances. See Citizenship and Immigration Canada, "Operational Bulletin 021: Interim Instructions to CIC Officers Concerning the Examination of H&C Ap-
is eventually granted, assuming the applicant is not medically inadmissible, in receipt of social assistance or subject to another form of inadmissibility.\footnote{79}

\textbf{The Hardship Criterion}

\textit{Hardship Defined}

According to the Immigration Manual, an H&C applicant must prove that the hardship she would face if forced to apply for permanent residence from outside Canada would be unusual and undeserved or disproportionate.\footnote{80} As with H&C considerations, the concepts of undue, undeserved or disproportionate hardship are not defined in legislation. Likewise, the Manual provides little guidance on how officers should interpret the concept of hardship. It does state that for hardship to be unusual and undeserved it should be “a hardship not anticipated by the Act or Regulations” and that the hardship should normally result from circumstances beyond the individual’s control.\footnote{81} Disproportionate hardship exists where the obligation to leave Canada would have a more severe impact on an individual because of her personal circumstances.\footnote{82} These vague and rather cryptic definitions of hardship provide scant practical guidance for immigration officers and applicants on what situations will or will not meet the hardship criterion.

\textit{Difficulties in Proving Hardship}

Although family violence is briefly mentioned in the Immigration Manual,\footnote{83} the section on hardship makes no reference to the special circumstances of abused women. This fact, combined with officers’ broad discretion to decide cases on the basis of what they consider to be reasonable, makes it very difficult for an abused immigrant woman to know precisely what she must prove to satisfy the hardship criterion.\footnote{84} As Justice Strayer noted in \textit{Vidal v. Canada (Minister of Employment and Immigration)}: “[I]t is highly desirable that immigration officers have some sort of guidance as to what factors the Minister thinks important.”\footnote{85} However, since the Immigration Manual does not clearly define the hardship factor, knowledge of what will fulfil that...
criterion can be gained only by looking to Federal Court case law, to cases in which H&C decisions have been reviewed.

Trends in H&C decisions regarding abused immigrant women who resort to the process after sponsorship breakdown are nearly impossible to access, since immigration officers' decisions are not published. Only from the small number of decisions challenged on judicial review at the Federal Court can conclusions be drawn. H&C cases that do not involve domestic violence are not especially helpful when evaluating the challenges the process poses for abused women, unique as their circumstances often are. An example of two cases with very different outcomes illustrates that immigration officers sometimes assess hardship arbitrarily and inconsistently.

In the case of A.A., the immigration officer reached a favourable decision. The applicant married a Canadian citizen. Subsequent to her marriage, her husband became very violent and verbally abusive. He also harassed her at her workplace. When A.A. was at home, her husband frequently beat her and punched her in the face, only to beg her for forgiveness later. During fits of rage, he knocked many holes in their apartment walls. Although A.A.'s husband promised to sponsor her, he failed to do so. He also lied to her about his lengthy criminal record of violent offences. A.A. sustained numerous physical injuries at the hands of her spouse and, when she defended herself against him, she was charged with assault. In addition to detailing this history of violence, A.A.'s counsel provided written submissions to demonstrate that A.A. would suffer hardship if forced to leave Canada. She would lose her entire support system, including counselling services, educational and employment opportunities and medical attention. In this case, the immigration officer accepted that A.A.'s situation did indeed meet the hardship criterion.

In contrast, the H&C application of B.B. was denied. She came to Canada as a visitor to be with her common-law spouse whom she later married. As in the case of A.A., B.B.'s husband told her that he would submit a spousal sponsorship application on her behalf. Shortly after, he became physically violent. In one incident, he beat B.B. severely and pulled chunks of hair from her scalp. The police subsequently charged him with assault. As discussed above, it is not uncommon for a woman to be uninformed about the sponsorship process, hence unable to determine whether or not all necessary paperwork has been filed. In B.B.'s case, the application for sponsorship was never submitted. Her husband had lied about his transactions with immigration. Although B.B.'s spouse begged her to return to him, promising to sponsor her if she informed law enforcement personnel that she wished to reconcile. B.B.'s lawyer assured her the abuse she suffered would be taken into consideration in her H & C case. In her application, B.B. explained that she feared her husband would follow her to her country of origin and that she would not be protected from him there.

86. E-mail correspondence with Melinda Gayda, immigration lawyer, Refugee Law Office in Toronto (2007) (on file with author).
B.B.'s application was refused. In the immigration officer's written reasons, he stated that B.B. had been in a legitimate relationship and had relied on her husband to sponsor her. Even though the officer conceded that she had suffered domestic violence, he found that B.B. did not satisfy the hardship criterion. He failed to reference the family violence guidelines in the Immigration Manual, instead blaming B.B. for having married an abusive man. The officer went on to indicate that insufficient evidence had been provided to corroborate certain facts, even though the applicant had never been permitted an opportunity to submit this evidence prior to the final decision.  

These two decisions pertain to women in very similar circumstances, both having believed in vain that they would have sponsorship. The two women were physically abused and both feared a lack of support if returned to their country of origin. Nonetheless, as already pointed out, these cases had very different outcomes. In the seminal Supreme Court case of Baker v. Canada (Minister of Citizenship and Immigration), Madam Justice L'Heureux-Dubé noted that, in the case of H&C decisions: “immigration officers are expected to make the decision that a reasonable person would make”. Likewise, in the Immigration Appeal Board case of Chirwa v. Canada (Minister of Citizenship and Immigration), H&C considerations are defined as “those facts, established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another”. Unhappily, with respect to B.B., this logic did not prevail. Although judicial review was sought in her case, as frequently occurs, leave was not granted.

**The Establishment Criterion**

*Establishment Defined*

The second major criterion that applicants must satisfy, one even more problematic for abused women than the hardship criterion, is the establishment factor. Abuse survivors must prove that their level of establishment in Canada is such that they should not be required to leave the country. The Immigration Manual indicates that, when assessing the degree of an applicant’s establishment, an officer should examine whether the individual has a “history of stable employment”, whether the individual has engaged in “sound financial management”, whether the individual has participated in volunteer work or otherwise integrated into the community, whether the individual has undertaken any form of study and whether the individual is free of criminal charges. As with the hardship criterion, the discretion afforded immigra-

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87. E-mail correspondence with Geraldine Sadoway, immigration lawyer, Parkdale Community Legal Services in Toronto (30 January 2007) (on file with author) [Sadoway, 30 January].
90. Sadoway, 8 January, supra note 69.
91. Immigration Manual, supra note 5 at c. IP-5, s. 11.2.
tion officers gives them considerable latitude when deciding what constitutes sufficient establishment in Canada.\(^9\)

**Difficulties in Proving Establishment**

According to the Immigration Manual, establishment need be proven only in certain types of cases. Interestingly, family violence scenarios are one of the categories listed.\(^9\) The requirement that abuse survivors demonstrate establishment reveals a profound lack of awareness of the daunting barriers that many immigrant women face. Personal financial resources, steady employment, access to education and community involvement are the very opportunities women need but often do not have when attempting to extricate themselves from unhealthy relationships. To apply the same standards of societal integration to abuse survivors as relate to other categories of applicants who do not face similar obstacles is to exacerbate rather than ameliorate the disadvantaged position the former already hold in society. The establishment factors entail individual autonomy of a kind that is all but unattainable by abuse survivors who are still isolated and lacking in self-confidence.\(^9\)

Confundingly, a woman who wishes to secure employment to demonstrate establishment is ineligible for a work permit until her application is approved in principle.\(^9\) This is unless she already received a work permit under other circumstances, such as while a refugee claimant or once a spousal sponsorship had been accepted in principle.\(^9\) Ironically, when applying for permanent residence for H&C reasons, a woman will receive her work permit only after establishment is assessed, rather than granting her the permit to assist her in establishing herself financially.

The inability to work prior to acceptance in principle often makes it impossible for women to pay the required processing fees.\(^9\) A principal applicant who applies for permanent residence on H&C grounds must pay $550 for herself and $150 for each of her dependent children. Before permanent residence status is granted, she must pay $490 more for herself, the Right of Permanent Residence Fee. Dependent children are exempt from paying this extra fee.\(^9\) Parkdale Community Legal Services and other community groups began a petition campaign in 2003 to eliminate the H&C

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93. *Immigration Manual, supra* note 5 at c. IP-5, s. 11.2.
95. *Regulations, supra* note 8 at ss. 200(1), 207(d); *Immigration Manual, supra* note 5 at c. IP-5, ss. 15, 15.3.
96. *Regulations, supra* note 8 at ss. 206(a) & (b), 207(b).
application fee in domestic violence cases, but these efforts have been unsuccessful.\textsuperscript{99} Citizenship and Immigration Canada does not provide loans to assist women to pay the H&C processing costs. Loans do exist to help them defray the Right of Permanent Residence Fee, but a woman must prove that the loan is necessary and that she can repay it.\textsuperscript{100} Such evidence is frequently very difficult for abused women to provide. For this reason, some do not apply for H&C consideration at all.\textsuperscript{101} On the one hand, our government requires that H&C applicants be “established” while, on the other, current policy of this same government ensures that this will be very difficult, if possible at all.

As well, it is difficult for an abuse survivor to demonstrate on judicial review that an immigration officer reached the wrong conclusion regarding establishment. In the case of \textit{Ruiz}, a Chilean woman came to Canada in the company of her daughter and abusive husband. Although sponsorship breakdown was not involved, the woman did file an H&C application because of domestic abuse that persisted in this country. The Federal Court upheld the immigration officer's finding of insufficient establishment. Justice Teitelbaum acknowledged that the applicant had employment and savings. He considered this to be insufficient evidence of establishment, however, because the applicant regularly relied on public assistance to enable her to pay rent. He found that her establishment was no greater than that demonstrated by others who had lived in Canada for several years.\textsuperscript{102} According to the reasoning in \textit{Ruiz}, not only must abused immigrant women prove complete self-sufficiency, avoiding all forms of social assistance, but they must show establishment beyond that of others who have been in Canada for the same period.

In contrast, in \textit{I.G. v. Canada (Minister of Citizenship and Immigration)}, the Federal Court overturned a negative H&C decision in which the immigration officer had determined the applicant to be so self-sufficient that she could simply return to her home country without incurring hardship.\textsuperscript{103} Although the applicant was a survivor of severe physical and sexual abuse at the hands of her husband, for which he was convicted,\textsuperscript{104} the immigration officer chose to interpret the applicant's level of independence and financial success as negative factors. Instead of valuing the applicant's level of establishment as factors favouring positive H&C consideration, the officer used the woman's level of independence against her. He found that she would not have difficulty adjusting to life back in her home country because she was financially self-sufficient. This decision put the applicant in a no-win situation. Had she shown insufficient indicia of establishment, she could have been denied a positive

\textsuperscript{99} Sadoway, 27 May, supra note 43.
\textsuperscript{100} CIC, H&C Considerations, supra note 98.
\textsuperscript{101} Sadoway, 8 January, supra note 69.
\textsuperscript{102} Ruiz, supra note 92 at paras. 20, 34.
\textsuperscript{103} \textit{I.G. v. Canada (Minister of Citizenship and Immigration)}, [1999] F.C.J. No. 1704 (QL) at para. 22.
\textsuperscript{104} \textit{Ibid.} at paras. 15-17.
H&C decision. Ironically, possessing the exact financial resources that officers seek meant that she received a negative decision because the officer thought she could reintegrate into her home country. Fortunately, Justice Lemieux disagreed with the immigration officer’s decision. He sent the case back to be examined by a different officer.\textsuperscript{105}

\textit{Inadmissibility and the Citizenship and Immigration Canada Operational Bulletin}

Decisions to grant permanent residence on humanitarian and compassionate grounds are made at the discretion of immigration officers. Although section 25(1) of the \textit{Immigration and Refugee Protection Act} permits officers to grant permanent residence on H&C grounds to an individual who is “inadmissible or who does not meet the requirements of this act”, officers have often made a negative H&C decision where inadmissibility is involved. A positive H&C decision allows an individual to apply for permanent residence from within Canada but does not automatically mean that status will be conferred. In the past, even if an officer made a positive H&C decision, permanent residence was often still denied as the result of a form of inadmissibility, such as receipt of social assistance. In June 2006, Citizenship and Immigration Canada published an Operational Bulletin that instructs officers to weigh any H&C considerations against inadmissibility when applicants request exemptions from requirements that must ordinarily be fulfilled to receive permanent resident status. Among others, forms of inadmissibility may relate to an applicant’s misrepresentation of material facts or her inability to financially support herself. However, the weighing of factors for and against granting permanent residence on humanitarian and compassionate grounds pursuant to the Bulletin does not apply to all forms of inadmissibility. According to the Bulletin, immigration officers cannot exempt individuals who have committed human rights abuses or who are considered security risks from the requirement to be admissible. Such individuals would have to seek an exemption directly from the minister.\textsuperscript{106}

The Operational Bulletin appears at first glance to signal an important change in policy that would ensure that applicants who are inadmissible may yet receive status. However, it is far from clear how effective the policy will be in practice. Immigration officers remain the arbiters of what is most important—inadmissibility, or humanitarian and compassionate factors. This fact is worrisome. In cases that involve immigrant women who may also be abuse survivors, their unique circumstances render them more susceptible than other applicants to certain forms of inadmissibility, the most prevalent form of which will now be considered. However, since the Bulletin is policy only and not law, inadmissibility will very probably continue to pose significant obstacles.

\textsuperscript{105} \textit{Ibid.} at para. 43.

\textsuperscript{106} “Operational Bulletin,” \textit{supra} note 78.
Inadequacies of the Humanitarian and Compassionate Procedure

Financial Inadmissibility

Section 39 of the Immigration and Refugee Protection Act states:

A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themselves or any other person who is dependent on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.\(^\text{110}\)

Section 25(1) of the Immigration and Refugee Protection Act, which addresses H&C applications, in principle, permits “an exemption from any applicable criteria or obligation of this act”.\(^\text{108}\) In practice, however, H&C applicants have frequently been denied permanent residence because they were found inadmissible under section 39 for having relied on social assistance.\(^\text{109}\)

The Immigration Manual indicates that officers are free to make positive H&C decisions even if an applicant receives social assistance. Such decisions, according to the Manual, will enable persons to obtain a work permit and hopefully become self-supporting. If an individual continues to receive social assistance at the time permanent residence is to be conferred, the final decision may be deferred for a few more months to give the applicant more time to become financially independent. If circumstances have not changed after such time, however, the final grant of permanent residence status is to be denied.\(^\text{110}\)

Optimally, guidelines in the Operational Bulletin will reduce the number of situations in which receipt of social assistance prevents women from receiving permanent residence. The long-term impact of the Bulletin is still uncertain, however. As suggested above, much will depend upon immigration officers’ inclination to balance inadmissibility against H&C factors.

Indications are that the Operational Bulletin is not yet applied consistently concerning financial inadmissibility. In one case, an immigration officer informed an abuse survivor with three young children that she must be self-supporting to overcome financial inadmissibility. Despite provisos in the Operational Bulletin, the officer failed to exempt her from proof of economic independence. In contrast, another officer exempted a severely abused woman with seven children from the need to prove she would not receive social assistance.\(^\text{111}\)

As with other H&C parameters, inadmissibility based on receipt of social assistance ignores the plight of many abused women whose only way to feed and house themselves and their children is to rely on such financial aid. Moreover, the period

\(^{107}\) IRPA, supra note 1 at s. 39.

\(^{108}\) Ibid. at s. 25(1).

\(^{109}\) LEAF supra note 84 at s. 2.2.

\(^{110}\) Immigration Manual, supra note 5 at c. IP-5, ss. 16.1, 16.14, 16.15.

\(^{111}\) Sadoway, 27 May, supra note 43.
between initial receipt of a work permit and the final grant of permanent residence does not provide women adequate time to become financially self-sufficient. Those who determine immigration policy must be dissuaded from the simplistic view that work permits will suffice to end domestic violence survivors' reliance on social assistance.¹¹²

**Family Violence Guidelines**

The section of the Immigration Manual that addresses issues of family violence states:

Family members in Canada, particularly spouses, who are in abusive relationships and are not permanent residents or Canadian citizens, may feel compelled to stay in the relationship or abusive situation in order to remain in Canada; this could put them at risk. Officers should be sensitive to situations where the spouse (or other family member) of a Canadian citizen or permanent resident leaves an abusive situation and, as a result, does not have an approved sponsorship.¹¹³

The Manual goes on to list several additional factors that immigration officers should consider when assessing H&C applications from persons who have suffered domestic violence. These include how long the applicant has been in Canada, whether she is pregnant, whether there are potentially restrictive customs in her home country and proof of abuse such as reports from the police, a physician or a women's shelter. It is disquieting that the list of factors includes an assessment of whether a family violence survivor demonstrates a “significant degree of establishment in Canada”¹¹⁴ Rather than exempt abused women from proving establishment, the family violence guidelines specifically highlight this factor. Still worse, the Manual pointedly prohibits officers from assessing an abused woman’s potential for establishment, reminding them that the only level of establishment to be considered is what exists at the time the H&C decision is made.¹¹⁵ Penalizing abuse survivors for not rapidly becoming self-sufficient is patently unfair.

While the family violence guidelines represent a positive step toward sensitizing officers to issues of domestic violence, they lack any detail and do not explicitly define what constitutes abuse. Moreover, these guidelines do not educate officers about the need to make decisions that will assist women to rebuild their lives. Furthermore, the guidelines make no mention of women’s realities such as fear of approaching the police¹¹⁶ and the many instances in which women are turned away from shelters

¹¹². Côté, Kérisit & Côté, *supra* note 6 at 137.
¹¹³. *Immigration Manual, supra* note 5 at c. IP-5, s. 13.10.
¹¹⁵. *Ibid.* at c. IP-5, s. 11.2.
Inadequacies of the Humanitarian and Compassionate Procedure

In many situations, providing proof of abuse from police or medical personnel is simply not possible. The guidelines, in effect, are merely a list of factors an officer may consider that require no greater attention than any other criterion set forth in the Manual.

**Officers’ Discretion and the Nature of Policy Guidelines**

*Discretion and Guidelines Defined*

According to the Supreme Court of Canada, “[T]he concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries.”

However, given that unlimited discretion is impermissible, courts review discretionary decisions for abuses. Officers commit an abuse of discretion if, for example, they act with an improper intention in mind, rely on inadequate material, make an unreasonable decision, misconstrue the law or adopt a policy that fetters their ability to consider cases with an open mind.

As previously noted, the policy manual that immigration officers consult when making H&C decisions constitutes non-binding guidelines. Government ministries and departments often issue guidelines to guide or constrain bureaucratic decision making, without prescribing certain results. Since the guidelines are not the product of a legislative process, they must be applied flexibly in order to avoid impermissibly fettering officers’ discretion. Policy guidelines must not give rise to imperatives, but “rough rules of thumb” are acceptable, as long as each case is considered on its merits.

Immigration officers choose whether to accept or reject an application based on their assessment of the evidence. The Manual instructs them to weigh all relevant evidence and not ignore or place too much emphasis on one particular factor. As discussed above, *Baker* indicates that officers need only make a decision a reasonable

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121. *Jones & de Villars*, supra note 119 at 192-93.

122. *Immigration Manual*, supra note 5 at c. IP-5, s. 5.27.
person would make. The Immigration Manual states that officers are to reach decisions objectively and impartially. However, the Manual does not specify how much weight each piece of evidence is to receive; this determination to be the purview of the officer.

The Unpredictability of Discretion and the Shortcomings of Guidelines

Since interpretation of the guidelines is subjective, women who file H&C applications have no way to know for certain that domestic violence they may have suffered will be given significant weight in their case. In Jebnoun v. Canada (Minister of Employment and Immigration), the applicant suffered ongoing physical violence by her husband. As a result of the woman's move to a shelter, her spouse withdrew the sponsorship he had submitted on her behalf. Her subsequent H&C application was denied. On judicial review, Justice Noel found that the family violence guidelines in the Immigration Manual are “not binding on immigration officers, but serve as a guide to ensure some coherence and uniformity in decisions”. The justice emphasized that proof of domestic violence “is not in itself a sufficient ground for the granting of landing”. Thus, even if women have suffered grave mistreatment while in Canada, their experience is but one factor to be considered, to be given no more weight than their level of establishment.

In Swartz v. Canada (Minister of Citizenship and Immigration), the applicant sought judicial review of a negative H&C decision in which the immigration officer failed to apply the guidelines on family violence despite acknowledging that the applicant's marriage had been extremely abusive. The officer did not analyze how the applicant's history of abuse and sponsorship breakdown contributed to the humanitarian and compassionate nature of her case. MacKay J. found that, had failure to apply the family violence guidelines been the only flaw in the officer's decision, the case would not merit reassessment by another officer. Only because the justice found other unrelated problems with the original decision was the case re-examined. In regard to the nature of guidelines, MacKay J. stated: “[G]uidelines are guidelines—they are not law. It would be difficult to intervene simply because one appears to have been overlooked while others have been followed”. This poses a problem for all H&C applicants, uncertain which guidelines will be weighted most heavily in their case. In particular, however, immigrant women who have fled abusive situations have

124. Immigration Manual, supra note 5 at c. IP-5, ss. 5.27, 5.30.
125. Sadoway, 30 January, supra note 87.
127. Ibid. at para. 8.
129. Ibid. at para. 22.
Inadequacies of the Humanitarian and Compassionate Procedure

no assurance that the guidelines regarding family violence will be privileged above others.

Immigration lawyers who advocate on behalf of abuse survivors cannot tell their clients with confidence that domestic violence will be seriously considered in an H&C application. In a recent case, a woman with three young children sought refuge in a shelter to escape from her abusive spouse. She subsequently returned to him because she feared that he would no longer continue to sponsor her. Although the woman's lawyer would have preferred that she permanently separate from her husband and rely on the H&C process, the client was afraid to do so because she heard from others in the community that the outcome of the process was uncertain.\(^\text{130}\)

Also, inconsistent decision making in the A.A. and B.B. cases, related above, clearly reflects officers' personal attitudes toward the relevance of domestic violence. The Immigration Manual unquestionably favours applicants who are socially and economically most successful, this in conflict with the stated goal of H&C applications to "uphold Canada's humanitarian tradition."\(^\text{131}\)

**Effect of Negative H&C Decision**

**Judicial Review**

**The Process**

The only means by which a woman can challenge a negative H&C decision is to apply to the Federal Court for judicial review. Under the *Immigration and Refugee Protection Act*, judicial review is not automatic. The court must grant leave. If leave is granted, the Federal Court will examine the immigration officer's decision and the grounds on which it is challenged. The Court either upholds the decision or returns the case for reassessment by a different officer.\(^\text{132}\)

It is extremely difficult to obtain leave for judicial review if a woman lacks legal counsel to make written arguments regarding the officer's error in her H&C case. Leave is granted in roughly 23 per cent of cases that seek judicial review.\(^\text{133}\) If leave is granted, counsel also plays a crucial role in presenting oral arguments to the Federal Court. Unfortunately, legal aid is frequently unavailable, depending on whether a program

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130. Sadoway, 8 January, *supra* note 69.
131. *Immigration Manual*, *supra* note 5 at c. IP-5, s. 2.
133. Federal Court of Canada Statistics, online: Federal Court of Canada <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics>. The precise percentage of humanitarian and compassionate applications granted leave by the Federal Court is unavailable. However, on the basis of the court's quarterly statistics, the number of cases granted leave appears to be approximately 23%. However, this number includes all immigration-related applications for judicial review, excluding refugee cases. Thus it is still unclear whether the leave rate for H&C cases is higher or lower than other types of immigration-related cases.
exists in the province where a woman resides.\textsuperscript{134} In Ontario, for example, despite the existence of legal aid, funding for judicial review is not guaranteed.\textsuperscript{135}

\textit{Standard of Review}

The standard upon which the Federal Court reviews H&C decisions is reasonableness, previously called reasonableness \textit{simpliciter}.\textsuperscript{136} As the court commented in \textit{Legault v. Canada (Minister of Citizenship and Immigration)}: “[I]t is not the role of the Federal Court to re-examine the weight given by an Immigration Officer to the various factors considered by that officer”.\textsuperscript{137} In \textit{Canada (Director of Investigation and Research) v. Southam Inc.}, the Supreme Court of Canada described an unreasonable decision as one not “supported by reasons that can stand up to a somewhat probing examination”.\textsuperscript{138} As stated by the Supreme Court in \textit{Law Society of New Brunswick v. Ryan}: “A decision may satisfy the standard of review if supported by a tenable explanation, even if that explanation is not one that the reviewing court finds compelling”.\textsuperscript{139} In other words, immigration officers are free to make any decisions that are reasonably open to them based on the facts of a case. Therefore, it is difficult for a woman to prove that the H&C decision made in her case is unreasonable.

The 2008 Supreme Court case of \textit{Dunsmuir v. New Brunswick} collapsed the three previous standards of review of patent unreasonableness, reasonableness \textit{simpliciter} and correctness into two: reasonableness and correctness.\textsuperscript{140} Describing the standard that a discretionary decision must meet in order to be upheld, the Court in \textit{Dunsmuir} states:

\begin{quotation}
Tribunals have a margin of appreciation within the range of acceptable and rational solutions … [R]easonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.\textsuperscript{141}
\end{quotation}

However, it is still unclear what the terms “justification”, “transparency” and “intelligibility” mean in regard to the reasonableness of particular H&C decisions.

Under the standard of reasonableness conceptualized in \textit{Dunsmuir}, the Federal Court continues to show deference to immigration officers’ decisions. The \textit{Dunsmuir} deci-

\textsuperscript{135} Legal Aid Ontario, \textit{Area Office Policy Manual} (Toronto: Legal Aid Ontario, 2008) at c. 5-5.
\textsuperscript{138} \textit{Canada (Director of Investigation and Research) v. Southam Inc.}, [1997] 1 S.C.R. 748 at para. 56.
\textsuperscript{140} \textit{Dunsmuir}, supra note 136 at paras. 44-45.
\textsuperscript{141} \textit{Ibid.} at para. 47.
inadequacies of the humanitarian and compassionate procedure

...sion states: "[D]eference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences."\(^{142}\) It is too soon to pronounce on whether the reasonableness standard elaborated in Dunsmuir will have any impact, either positive or negative, on judicial review of H&C decisions. However, what is clear is that officers' wide discretion remains unchanged.

Even if a Federal Court judge believes that an applicant's circumstances merit compassion, he or she is often reticent to set aside a decision if the reasons for that decision are not clearly unreasonable. In Ruiz the judge commented: "I feel sadness and empathy for the applicants and the problems they had to endure at the hands of Mr. Espinosa, but the H&C Decision is reasonable and the law does not allow me to interfere".\(^{143}\) Needless to say, the inability of sympathetic judges to redress errors committed by insensitive immigration officers underscores the need to ensure that humane and sensitive decisions are made at the first instance.

**Stays of Removal**

Another significant barrier when challenging a negative H&C decision is that stays of removal are not automatically granted to individuals who undergo the H&C process. A woman may actually be removed from Canada before the initial determination is made on her H&C application, especially since decisions of this kind are not reached expeditiously.\(^{144}\) Also problematic is the possibility that a woman will be removed while she awaits the outcome of an application for judicial review before the Federal Court. In brief, no automatic stay operates to ensure that women may complete the entire H&C process, including the right to challenge a negative decision, while still present in Canada.\(^{145}\) Reliable predictions are difficult to make regarding whether women who have pending H&C decisions or who have applied for judicial review will receive a stay.\(^{146}\) To succeed in her application for a stay, a woman must satisfy the Federal Court that she has a serious issue to be tried, that she would suffer irreparable harm if removed from Canada and that the balance of convenience favours her.\(^{147}\)

**Recommendations for Reform**

Ideally, we could look forward to extensive reform in Canadian immigration law that would address the unique needs of abused immigrant women. Included in such

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143. *Ruiz*, supra note 92 at para. 35.
144. *Immigration Manual*, supra note 5 at c. IP-5, s. 5.10; LEAF, supra note 83 at s. 2.4.
145. Sadoway, 8 January, supra note 68.
146. LEAF, supra note 84 at s. 2.4; Sadoway, 8 January, *supra* note 69.
reform would be amendments to the *Immigration and Refugee Protection Act* that pertain to the H&C procedure as well as the development of new or revised statutes that speak to the special problems of women who are susceptible to sponsorship breakdown. Regrettably, sweeping changes are unlikely in the short term. More realizable and surely necessary are modifications of the kind discussed below.

Some commentators call for complete abolition of the spousal sponsorship regime. They emphasize the many ways that it contributes to the subordination and inequality of immigrant women. 148 Although I agree wholeheartedly with their criticisms, I submit that complete elimination of sponsorship would disadvantage women who have no other means to join their husbands in Canada. It is preferable to retain the concept of sponsorship while strengthening protections for women who find themselves in situations of sponsorship breakdown.

The H&C Procedure

Simpler and more likely than legislative amendment or regulatory change would be for the minister to amend the guidelines in the Immigration Manual or develop a Spousal Sponsorship and Family Violence Public policy. Section 25 of the *Immigration and Refugee Protection Act* specifically permits the creation of “public policy” exceptions, categories of individuals whose permanent residence applications may be granted on the basis of special circumstances. 149 Unlike the guidelines in the manual used by immigration officers, issues of discretion do not arise when the minister sets public policy under section 25. As noted by the Federal Court in both *Aqeel v. Canada (Minister of Citizenship and Immigration)* and *Dawkins v. Canada (Minister of Employment and Immigration)*, 150 public policy exceptions prescribed by the minister do not fetter immigration officers’ discretion because officers do not have the authority to modify or extend public policy. Therefore, creating a Spousal Sponsorship and Family Violence policy under the exception could allow for special consideration without the concern that officers’ discretion was impermissibly constrained.

However, were the minister unwilling to create a public policy regarding spousal sponsorship and family violence, the Immigration Manual could be amended to weight domestic violence more heavily than other factors favouring a positive H&C decision. Even were the Manual strengthened to presume a favourable exercise of discretion in most cases of domestic violence and sponsorship breakdown, such a guideline would not impermissibly fetter officers’ discretion. The Federal Court of Appeal case of *Thamotheram v. Canada (Minister of Citizenship and Immigration)* states: “[A]s *Maple Lodge Farms* makes clear, the fact that a guideline is intended to establish how discretion will normally be exercised is not enough to make it an unlaw-

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148. Côté, Kérisset & Côté, supra note 6 at 171.
149. *IRPA*, supra note 1 at s. 25(1); *Immigration Manual*, supra note 5 at c. IP-5, s. 5.22.
ful fetter, as long as it does not preclude the possibility that the decision-maker may
deviate from normal practice in the light of particular facts.” Therefore, officers
would ultimately retain the right to deviate from the domestic violence guideline.

In short, the form in which the recommendations discussed below are implemented,
and whether they must be carefully tailored to avoid fettering discretion, will de-
pend to some extent on whether they become part of a public policy or strengthened
guidelines in the Immigration Manual. Further discussion and exploration of this
issue is needed in order to determine which vehicle is preferable and most feasible
for implementing changes in the H&C procedure.

Undue Hardship
Citizenship and Immigration Canada should accept proof of domestic violence in
Canada as generally sufficient to justify the need for landing, rather than requiring
women to demonstrate undue or disproportionate hardship. Abuse endured in
Canada, rather than suffering that might occur if removed from the country, would
become the central criterion upon which permanent residence would be granted.
It is important that women know their permanent residence application has a high
probability of approval.

A Spousal Sponsorship and Family Violence Public Policy or amended Immigration
Manual must clearly define domestic violence with illustrative examples of physical,
psychological, emotional and economic mistreatment so that immigration officers
may correctly assess whether or not a woman has suffered domestic abuse. Any
threating and controlling behaviour that limits the autonomy and freedom of
women should be taken into account by officers. When deciding whether a woman
has submitted sufficient proof of abuse, officers should be required to accept all cred-
ible and relevant evidence. If corroborating data are not available, officers should be
explicitly authorized to base their findings solely on a woman's sworn statement, as is
the case in refugee decisions.

What Is Reasonable?
When assessing the H&C applications of women whose spousal sponsorship has
broken down, immigration officers sometimes blame women for having married
men they knew to be violent. In their written reasons for denying an application, of-
ficers sometimes claim that the woman's lack of legal status is of her own making. Thus,
Citizenship and Immigration Canada must ensure that any new policy requires
immigration officers to assess actions in terms of what is reasonable to expect of a
domestic violence survivor instead of reaching decisions predicated solely on their

151. Thamotheram v. Canada (Minister of Citizenship and Immigration), [2007] FCJ No. 734 at paras. 11,
152. Sheppard, supra note 2 at 40-41.
personal opinions about what constitutes plausibility. Abused women's applications should succeed in most cases, unless there is convincing evidence of a false story of abuse or fraudulent marriage.

In the context of refugee status determinations, Canadian law recognizes that special care is necessary when evaluating the reasonableness of an abused woman's actions. Women sometimes marry men they know to be abusive with the hope that their husbands will change. Also, women do not always leave an abusive situation at the first opportunity. This does not signify, of course, that they are not at risk of persecution and in need of protection.\textsuperscript{155} This level of appreciation of women's experiences must find its way into the public policy document or Immigration Manual. In the Supreme Court case of \textit{R. v. Lavallee}, in which a domestic abuse survivor shot her partner in self-defence, Wilson J. stated:

If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man."\textsuperscript{156}

This is not to say that all immigrant women without permanent status who experience domestic violence in Canada will automatically receive a positive H&C decision. In some cases, for example, infrequent incidents of relatively minor violence or control may appropriately receive little weight by an immigration officer. However, the officer's consideration of domestic violence must always be context-specific. For example, a case may present few indicia of physical abuse but significant psychological abuse may nevertheless exist. Therefore, issues around how to determine what experiences of domestic abuse merit a favourable H&C decision require far more discussion.

\textbf{Establishment}

Abuse survivors must be entirely exempt from the requirement to prove establishment. Given frequent lack of French or English language skills, limited financial resources, poor employment prospects, child-care responsibilities and, at times, complete isolation, the criterion is discriminatory and often impossible for many women to meet. To instruct immigration officers to place stress on social integration or to emphasize current and potential establishment in Canada is to grossly oversimplify the evaluation problem.

\textbf{Inadmissibility}

The Operational Bulletin on inadmissibility is insufficient to assure that women will not be penalized for relying on social assistance, for fighting back in self-defence


\textsuperscript{156} \textit{R. v. Lavallee}, [1990] 1 S.C.R. 852, at paras. 31-34, 38.
against abusers or for unintentionally conveying misinformation. The Bulletin notwithstanding, the decision to overlook an instance of inadmissibility occurs only at the discretion of the immigration officer. In cases that involve women who flee domestic abuse, reliance on social assistance must not adversely influence evaluation of an application for permanent residence.\textsuperscript{157}

**Other Reforms**

**H\&C Processing Fees**

In recognition of abused women’s frequently precarious economic status and the obstacles they face when seeking financial self-sufficiency, Citizenship and Immigration Canada should either eliminate H\&C processing fees for abused women applying on H\&C grounds or implement a loan program that reflects adverse circumstances of abuse survivors. In conjunction with these loans, workshops or other forms of assistance would be helpful to aid women in securing employment.

**Stays of Removal**

Indisputably, most immigrant women will be especially vulnerable after having just left an abusive relationship. For this reason, abuse survivors who have submitted an H\&C application should be granted an automatic stay of removal, the duration of which would be sufficient for processing the application and pursuing judicial review if necessary.\textsuperscript{158}

**Training of Personnel**

Both immigration officers and Federal Court judges should receive ongoing training in issues of domestic abuse.\textsuperscript{159} They should be obligated to treat such cases favourably unless convincing negative evidence precludes a positive decision. In addition, Citizenship and Immigration Canada personnel should be obligated to interact equally with both spouses to ensure that women are not ignored during the sponsorship process. In this vein, it would be helpful if staff could provide women with

\begin{itemize}
\item \textsuperscript{157} LEAF, supra note 84 at s. 2.2.
\item \textsuperscript{158} CCR, supra note 134.
\item \textsuperscript{159} For example, see L. McClenaghan (on behalf of the deputy attorney general of Canada), Respondent’s Memorandum of Argument in the Case of M.H. v. Canada (Minister of Citizenship and Immigration) (Toronto, 2006). This Memorandum of Argument, on behalf of the government, relates to a leave application for judicial review sought by an immigrant domestic violence survivor whose H\&C decision was turned down. The immigration officer did not even refer to the family violence guidelines in the Immigration Manual. In his Memorandum of Argument, counsel for the government states at paragraph 18: “While there is the submission that the Officer displayed a ‘startling lack of understanding of the situation of domestic abuse’ and was ‘clearly insensitive to [the Applicant’s] situation; these are emotional and not legal submissions supported by any objective facts and as such do not provide any basis for the Court’s intervention”. Comments like these, made by government officials, indicate the extent to which members of the judiciary and immigration personnel need to be sensitized to the circumstances of abuse survivors. It is unacceptable for immigration officers and government counsel alike to treat insensitivity to domestic violence as irrelevant.
\end{itemize}
information about their rights in their native language. Likewise, Citizenship and Immigration Canada should take pains to inform both parties to a sponsorship that domestic abuse can be a violation of the criminal law.

CONCLUSION

The focus in this paper has been the plight of immigrant women whose spousal sponsorship breaks down as a result of domestic violence. More specifically, I have critiqued the shortcomings in the H&C process, which remains their sole recourse for attaining permanent resident status. I have attempted to strike a balance between the need for radical change and the fact that incremental modifications of immigration policy have a greater chance for implementation. Hopefully, changes like those outlined above will lead to reformulation of immigration law that will be more sensitive to the difficulties abused immigrant women face in our country.

Finally, we must work to increase collaboration between Citizenship and Immigration Canada personnel and specialists in the field. Women must have access to competent legal representation, culturally sensitive shelter services, subsidized language training, child day care and financial assistance such as the Canada Child Tax Benefit. Social integration and financial independence for abuse survivors who find themselves alone deserve our help.