CANADIAN IMMIGRATION LAW & SAME-SEX PARTNERS

ABSTRACT

Social equity is at the very heart of policy makers' preoccupations, including those at Citizenship and Immigration Canada. This is reflected in the evolution of the definition of family members in the family class. Today, it includes common law or same-sex partners. This article traces the evolution of public policies in this area since 1990.

One of the primary goals of Canadian immigration is, and has historically been, to see that families are reunited in Canada. Over the years, though Canadian immigration law and policy has undergone considerable transformation, this commitment has remained firm. Both previous and current legislation allows Canadian citizens and permanent residents the ability to sponsor members of their family as immigrants to Canada. Exactly who is considered "family," and by that same virtue who could be sponsored as part of the family class, has however been subject to change in an attempt to keep pace with social realities.

Canadian society is one renowned for its diversity – it is a country filled with people who possess a multiplicity of identities, attachments and cultural investments. But to make effective policy in this environment is to do more than recognize the Canadian population as diverse, it is to appreciate and account for the intersecting and plural identities present. It is to understand that both Canadian and immigrant families do not always conform to a particular model. Immigration policy makers, as a necessity, must be progressive in their approach and reflect these societal changes in their decision making. Such has been the approach to modernizing the Canadian immigration policy as it relates to the family class, to the inclusion of considerations relating to sexual orientation and the social reality that family relationships necessarily include same-sex couples.

IMMIGRATION POLICY EVOLUTION

Before 1976 homosexuals were among the list of inadmissible classes to Canada, a comment on the prevalent public attitudes of the time. With the passing of a new *Immigration Act* in 1977, this provision was repealed, permitting lesbians and gays legal access to the country. Though they could now enter Canada, this was only possible if they applied to immigrate as independent immigrants. It remained that only heterosexual Canadians could sponsor their partners in the family class. This group retained a strict membership, one which confined a sponsor's "spouse" to being "the party of the opposite sex to whom that person is joined in marriage." Notably absent were provisions for same-sex partners, in both the definition of sponsor and of marriage.

The coming into force in 1985 of section 15 of the *Canadian Charter of Rights and Freedoms* (the equality rights provision) considerably influenced legislative reform in this area. Section 15 has also been critical in the measured development, since the early 1990s, of provincial and federal legislation to expand statutory entitlements of opposite sex conjugal couples to same-sex couples.[1]

Aware that same-sex couples were an increasing Canadian social reality, but also mindful of active Charter challenges and with concern over the susceptibility of their own legislation to be similarly challenged, the then-named Department of Employment and Immigration began processing immigration applications from common-law and same-sex partners. Initially this practice was facilitated using Regulation 2.1, which allowed exemptions from any regulation to facilitate admission to Canada where the Minister felt there were humanitarian or compassionate reasons to do so. Later, in June 1994, the processing of same-sex partner applications was further operationalized with instructions sent to missions overseas requesting visa officers facilitate the processing of these cases by way of a new public policy. At the time, while involvement in a same-sex or common-law relationship in itself was not a barrier to immigration status, under the Act there was no provision for including same sex or common-law partners as part of the family class. Officers were therefore instructed to process these cases as "independent" (economic) applications and to rely on general legislative and regulatory provisions which allowed them to use discretion in approving applications where points awarded under the selection grid did not necessarily reflect the potential for successful establishment. Additionally, if the applicant did not qualify as a skilled worker, officers were advised

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that they could waive certain selection criteria for "humanitarian and compassionate" (H & C) reasons, provided the applicant was a partner in a bona fide relationship and was not otherwise inadmissible.

While it was made to work operationally and many couples took advantage of the policy, realistically it was not a sustainable processing option. Not only was the H & C evaluation process lengthy and complex, the policy equally drew criticism from the public, media and advocacy groups who charged it as being too subjective, inconsistent and wanting of transparency.

In 1997 CIC received a report from the Immigration Legislative Review Advisory Group (LRAG) entitled *Not Just Numbers: A Canadian Framework for Future Immigration*. Among other issues they identified, the LRAG expressly noted that the membership of the family class was in desperate need of modification. They proposed a re-definition of the term "spouse," which would now refer to "a partner through a marriage legal in the jurisdiction in which it occurred, or a partner in an intimate relationship, including cohabitation of at least one year in duration."[2] This definition, they felt, acknowledged certain existing realities that legislation neglected – notably, an increasing predominance of common-law partnerships, both opposite and same-sex, that had similar elements to a marriage, save for the presence of a legally recognized union. Also, poignantly, the report noted that "what is also new is the emerging conviction of more and more Canadians that to deny these realities is inconsistent with…values of fair play, consistency and equality of treatment."[3]

Taking into account these recommendations and more importantly, the social environment of the late 1990s, in 1998 the Department published its own report in response to that penned by the LRAG. *Building on a Strong Foundation of the 21st Century* addressed the need to provide fair treatment to common-law and same-sex couples, cognizant of the fact that "[r]efusing permanent residence does not simply deny a benefit to the common-law spouse or same-sex partner, but may effectively deny Canadians the right to live with their life partners and withhold from them an important factor in their social and economic self-sufficiency and integration."[4] In 1999, then Minister Lucienne Robillard took the departmental commitment a step further, announcing publicly that changes to the immigration law were under consideration and would include lesbian and gay partners.

In 1999 the Supreme Court tried the case of *M v. H*, the first high court ruling to allow a section 15 Charter challenge to the opposite-sex definition of "spouse." This case and other successful court challenges, both federally and provincially, prompted the Government of Canada to negotiate and pass the *Modernization of Benefits and Obligations Act* in 2000. The purpose of this omnibus piece of legislation was to ensure that common-law couples (both of the same and opposite-sex) were treated equally under federal law. Though not especially verbose (the 68 affected statutes aside, the Act itself was only a paragraph in length) the *Modernization Act* made one thing clear: the government cannot limit benefits or obligations by discrimination on the basis of common-law relationships.

A conjugal partner is described in section 2 of the IRP *Regulations* (2002) as "in relation to a sponsor, a foreign national residing outside of Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year." Evaluation guidelines for these relationships draw on the generally accepted characteristics of a conjugal relationship as set out in the *M v. H* decision.

But the *Modernization of Benefits and Obligations Act* did something else as well – it provided updated definitions for "spouse" and "common-law" that Citizenship and Immigration Canada would itself ultimately adopt. "Spouse" was defined to refer to married couples only and the newly introduced term "common law-partner" was defined to include people in common-law relationships, both of the same and opposite sex. The legislation, however, was conscious to make a clear distinction between married and unmarried relationships. The definition of marriage – "the lawful union of one man and one woman to the exclusion of all others" – was left untouched.

Conspicuously absent from the list of affected legislation was the *Immigration Act*. For the fact that immigration law in Canada for the past 25 years had been left essentially unchanged, a serious overhaul of its legislation was already being planned by the Department, with the spirit of equality enshrined in the *Modernization Act* in mind. Having dealt with common-law and same-sex partners as a matter of public policy since 1994, CIC knew that their revised act would necessarily incorporate provisions for making the admission process for same-sex and common-law partners more formal.

In a discussion document generated by the Department, a series of amendments that would ultimately be reflected in a new, modernized immigration act were proposed.[5] This document was in turn shared publicly in order to solicit feedback from key stakeholders. Among the list of propositions (the majority of which were later adopted) was the recommendation to modernize the family class to ensure consistency with the recently passed *Modernization of Benefits and Obligations Act*. What this meant was amending the definitions of family class and dependent to include what was now the standard federal definition of common-law partner – a person who has been cohabitating in a conjugal relationship with another person for the period of at least one year. This included both same and opposite-sex couples. Of all written submissions received from the public on this proposition, there were very few objections to the proposed

recognition of common-law and same-sex relationships in the immigration legislation.

THE IMMIGRATION AND REFUGEE PROTECTION ACT (2001)

Bill C-11, An *Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced or in danger*, was introduced in the House of Commons in February 2001. Though the proposed Bill suggested a number of changes, it retained a commitment to the principle of family reunification. The Regulatory Impact Analysis Statement (RIAS) that accompanied the proposed Regulations stated that the purpose of new family class provisions was to ensure that:

- the process and criteria by which members of the family class are selected are clear and transparent; this in-cludes the requirements and obligations of sponsors;
- current social realities are taken into account in the definition of family class membership; and
- legislation is consistent with other legislation or principles to which Canada is committed.

To achieve the goals for the family class identified in the RIAS, among other changes, the new legislation at once expanded and redefined membership in the family class to include common-law partners:

> 12.(1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.

To ensure consistency with other legislation, the Department chose to adopt the definition for "common-law partner" as set out in the *Modernization of Benefits and Obligations Act*. This is to say that a common-law partner is "an individual who is cohabitating with the person in a conjugal relationship, having so cohabited for a period of at least one year." But this definition, specifically the cohabitation requirement, was problematic for many groups – among them the Canadian Bar Association, the Lesbians and Gays Immigrant Taskforce (LEGIT) and Equality for Gays and Lesbians Everywhere (EGALE). These organizations and others making representations contended that for many, in particular same-sex couples, cohabitation was not possible for numerous reasons. First, the "one-year rule" between a sponsor in Canada and his/her partner who lives abroad may be difficult to achieve given admission restrictions. Or additionally, cohabitation might not be feasible for fear of persecution due to cultural or religious factors. These considerations aside, the definition was also vulnerable to legal challenge because cohabitation was not a requirement for couples who married – an option that at the time was not yet available to same-sex partners.

As a result of public consultations and the input received from the Standing Committee on Citizenship and Immigration, the Department made the decision to amend the proposed Regulations and add a further member to the family class – the "conjugal partner."

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With the addition of the conjugal partner category, Canadian immigration legislation now recognized three types of relationships: spousal, common-law and conjugal. The reaction of the media and the public to the new act and regulations was almost wholly positive – an important shift in Canadian immigration policy had occurred.

The Immigration and Refugee Protection Act (IRPA) and accompanying *Regulations* officially came into effect in June 2002. Common-law partners were formally removed from the category of persons who can obtain permanent resident status under public policy considerations and were regularized as members of the family class. With the addition of the conjugal partner category, Canadian immigration legislation now recognized three types of relationships: spousal, common-law and conjugal. The reaction of the media and the public to the new act and regulations was almost wholly positive – an important shift in Canadian immigration policy had occurred.

BILL C-38: THE *CIVIL MARRIAGE ACT*

Since "current social realities" are by nature transient, an Act that is a mere three years young can for some already feel dated. One very current social reality that *IRPA* does not explicitly address is same-sex marriage.

In December 2004, the Supreme Court of Canada rendered an opinion on the same-sex marriage reference, ruling that the federal government can change the definition of marriage to include same-sex couples (the ruling does not answer the question of whether such a change is required by the *Charter*). Subsequently, in February 2005, Minister of Justice and Attorney General of Canada Irwin Cotler introduced the *Civil Marriage Act* (Bill C-38). Bill C-38 (which was at the Second Reading stage in the House of Commons when this article went to print) seeks to extend

the legal capacity for civil marriage to same-sex couples so that marriage would now be preserved in federal law as "the lawful union of two *persons* to the exclusion of all others."

At the time *IRPA* and the *Regulations* were drafted it was not anticipated that marriage would so quickly become an option for gays and lesbians. Today, legislators in Ontario, British Columbia, Québec, Yukon, Manitoba, Nova Scotia and Saskatchewan have enacted a number of legislative measures that allow same-sex partners to enter into civil unions. To account for these rapid changes, CIC has introduced an interim policy on same-sex marriage. In mid-2004 the Department provided immigration officers with instructions to recognize same-sex marriages performed in Canada, allowing those civil marriages between a foreign national and their Canadian citizen or permanent resident same-sex partner to be considered valid for immigration purposes in the context of the family class.[6]

There are, however, certain cases where this policy does not apply; for this reason, many advocacy groups, though they concede the policy is a "step in the right direction," feel it does not go far enough. Section 2 of the *Regulations* state that "in respect of a marriage that took place outside of Canada, means a marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law." Therefore, until a decision as been rendered by the federal government on the validity of civil marriages between same-sex partners that took place in a foreign jurisdiction or between two foreign nationals in Canada, these couples cannot be considered under this policy. The debate around Bill C-38 is very active, both in the House of Commons and across Canada, and the Department follows these discussions closely. When a federal decision is rendered on Bill C-38, the Department will revisit its interim same-sex marriage policy. That said, a resolution by the government on the issue will not be a conclusion in itself with respect to how the issue will play out in an immigration context.

CONCLUSION

This latest interim policy follows a series of events that mark the historical evolution of Canadian immigration law as it relates to same-sex couples. The past two decades have been very active: from the removal of gays and lesbians from the list of inadmissible classes, to a forward-thinking public policy on the admission of same-sex and common-law partners, to the expansion of the family class codified in the *Immigration and Refugee Protection Act* and *Regulations*.

Though the shape and progression of future Canadian immigration policy remains to be seen, it will undoubtedly bear witness to the existing Canadian social realities of the time. Persons who gain admission, permanent residency and, ultimately, Canadian citizenship will continue to be a reflection on those who are Canadians already – a heterogeneous and diverse group by international reputation. In the spirit of our nation's commitments to inclusiveness, pluralism and diversity, Citizenship and Immigration Canada's policies will follow suit. Though our legislation cannot conceivably be fully "ahead of the curve," Citizenship and Immigration Canada has proved to be increasingly responsive and in tune to the real and evolving shape of Canada's families and in future hopes to only better this reputation.

Notes

1 Of note is the case *Miron* v. *Trudel* (1995), which ruled that discrimination on marital basis violates section 15 of the Charter. This is to say, that married persons and unmarried persons who are in a relationship akin to marriage should be treated equally under the law.

2 Immigration Legislative Review, *Not Just Numbers: A Canadian Framework for Future Immigration.* Ottawa: Minister of Public Works and Government Services Canada, 1997.

3 *Ibid.*

4 Department of Citizenship and Immigration, *Building on a Strong Foundation for the 21st Century: New Directions for immigration and Refugee Policy and Legislation.* Ottawa: Minister of Public Works and Government Services Canada, 1998.

5 Selection Branch, Department of Citizenship and Immigration, *Family Issues: Proposed Directives for Regulations Supporting Bill C-31, The Immigration and Refugee Protection Act,* 2000.

6 Marriage certificates issued by provincial authorities in Ontario (on or after 10 June 2003), British Columbia (on or after 8 July 2003), Québec (on or after 19 March 2004), Yukon (on or after 14 July 2004), Manitoba (on or after 16 September 2004) and Saskatchewan (on or after 5 November 2004) are all considered to be legally valid documents in support of a permanent residence application. Online: Citizenship and Immigration Canada http://www.cic.gc.ca.