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# Coming Out to Canada: The Immigration of Same-Sex Couples Under the Immigration and Refugee Protection Act

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While Canadian immigration policy has long favoured family reunification, until recently, Canadian immigration laws allowed only married heterosexual Canadians to sponsor their spouses as family class immigrants. The recently enacted *Immigration and Refugee Protection Act*, and the accompanying *Immigration and Refugee Protection Regulations*, have expanded the family class to allow gay men and lesbians to formally sponsor their partners. In this article, the author argues that despite the important progress made in recognizing gay and lesbian conjugal relationships under the new legislation, the issue of same-sex immigration remains problematic. The author examines the legislative scheme to reveal that the new family class categories still contain policy and drafting weaknesses that could hinder same-sex immigration. In addition, while the new legislation offers a better regime than existed previously, gay men and lesbians remain vulnerable to discriminatory applications of the law if visa officers, members of the Immigration Division, and Federal Court judges do not recognize the political, social, and cultural specificity of gay and lesbian couples who apply for permanent residency in Canada.

Alors que la politique canadienne sur l'immigration a longtemps favorisé la réunification familiale, jusqu'à tout récemment, le droit de l'immigration permettait exclusivement aux répondants hétérosexuels de parrainer la demande d'immigration de leur conjoint en vertu de la catégorie «regroupement familial». Nouvellement édictée, la *Loi sur l'immigration et la protection des réfugiés* et le *Règlement sur l'immigration et la protection des réfugiés* a finalement élargi la catégorie de la famille pour y inclure les couples gais et lesbiens, leur permettant ainsi de parrainer officiellement leur conjoint. L'auteure de cet article constate qu'en dépit du progrès important qu'entraîne la nouvelle loi vis-à-vis la reconnaissance des relations conjugales homosexuelles, la question de l'immigration des couples de même sexe demeure problématique. Dans son examen du nouveau régime législatif, l'auteure démontre que la catégorie «regroupement familial» préserve certaines faiblesses tant au niveau de la politique que de la rédaction, qui risquent forcément d'entraver l'immigration des couples de même sexe. Entre autre, la vulnérabilité des gais et les lesbiennes face à l'application discriminatoire de la loi persistera si les agents de visa, commissaires de la Section d'immigration et juges de la Cour fédérale ne reconnaissent pas la particularité politique, sociale et culturelle des couples homosexuels qui font demande pour l'obtention du statut de résident permanent au Canada.

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## Introduction

Canadian immigration policy has long favoured family reunification. The most recent legislation, the *Immigration and Refugee Protection Act*,<sup>1</sup> provides that one of the official objectives of the law is “to see that families are reunited in Canada.”<sup>2</sup> This goal has been a cornerstone of Canadian immigration policy, and successive laws have allowed citizens and permanent residents to sponsor members of their family as immigrants to Canada.<sup>3</sup> Individuals sponsored under the family reunification provisions of the immigration legislation are referred to as “family class immigrants”.

While family class immigrants have constituted an important part of the historical and current immigration to Canada,<sup>4</sup> until recently Canadian immigration laws allowed only married, heterosexual Canadians to sponsor their spouses as family class immigrants. Lesbians and gay men were able to sponsor parents, siblings, and most of the other family members listed in the family class on equal footing with heterosexual Canadians and permanent residents.<sup>5</sup> The definitions related to conjugal relationships, like “spouse”, “fiancé(e)”, or “marriage”, however, historically referred only to opposite-sex couples.<sup>6</sup> Thus, gay men and lesbians were prohibited from sponsoring their partners as immigrants to Canada.

On 28 June 2002, the *IRPA* and the *Immigration and Refugee Protection Regulations*<sup>7</sup> came into effect. The new law and regulations have expanded the family class to incorporate common law and conjugal partners, in addition to married spouses. Included in these new provisions are gay and lesbian couples. Indeed, the new legislative and regulatory scheme sets out the rules concerning the sponsorship of same-sex partners. For the first time in Canadian immigration history, gay men and lesbians will be able to formally sponsor their partners.<sup>8</sup> In changing its immigration policy to include same-sex couples, Canada joined several other countries in extending immigration rights to prospective gay and lesbian immigrants.<sup>9</sup>

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<sup>1</sup> S.C. 2001, c. 27, entered into force on 28 June 2002 [*IRPA*].

<sup>2</sup> *Ibid.*, s. 3(1)(d).

<sup>3</sup> See Freda Hawkins, *Critical Years in Immigration: Canada and Australia Compared* (Montreal and Kingston: McGill-Queen’s University Press, 1989) at 85-88.

<sup>4</sup> In fact, family class immigrants constitute the most significant part of immigration movements to Canada since 1976: Hawkins, *ibid.* at 86.

<sup>5</sup> See Donald G. Casswell, *Lesbians, Gay Men, and Canadian Law* (Toronto: Emond Montgomery, 1996) at 567.

<sup>6</sup> *Ibid.* at 567.

<sup>7</sup> S.O.R./2002-227 [*IRP Regulations*].

<sup>8</sup> Prior to the coming into force of the *IRPA*, common-law partners of Canadian citizens or permanent residents who wished to apply for permanent resident status to reunite with their partner were considered on humanitarian and compassionate grounds under subsection 114(2) of the former *Immigration Act*, R.S.C. 1985, c. I-2 [1985 Act].

<sup>9</sup> In addition to Canada, many other countries recognize same-sex couples for immigration purposes, including Australia, Belgium, Denmark, Finland, France, Iceland, the Netherlands, New

The principal categories of immigrants to Canada are independent immigrants,<sup>10</sup> business immigrants,<sup>11</sup> and family class immigrants. This article is concerned only with the latter, namely immigrants who qualify for permanent residency as family members. In addition, it is specifically the situation of gay and lesbian family members that will be the focus of the analysis, though it is acknowledged that common law, heterosexual couples were also included in recent changes to immigration laws. This paper will argue that despite the important progress made in recognizing gay and lesbian conjugal relationships under the *IRPA* and the *IRP Regulations*, the issue of same-sex immigration remains problematic. This is so for two reasons. First, the legislative scheme itself still contains policy and drafting weaknesses that may hinder same-sex immigration. Second, even if the new legislation offers a better regime than existed previously, gay men and lesbians remain vulnerable to discriminatory applications of the law if visa officers and judges do not recognize the political, social, and cultural specificity of gay and lesbian couples who apply for permanent residency in Canada.

The article is divided into two main sections. Part I reviews historical discrimination against gay men and lesbians in Canada's immigration laws. In addition, the first section will describe the legislative developments that led to the inclusion of same-sex family sponsorship in the *IRPA* and the *IRP Regulations*. The analysis will highlight the federal government's motivations for changing the permanent residency requirements to include same-sex partners, the interests that were at stake at the time, and the entitlements or obligations flowing from the new legislative scheme. Part II examines the ways in which same-sex family immigration remains problematic under the *IRPA* and the *IRP Regulations*. The analysis will first review the new immigration law and regulations to identify government policy and drafting choices that disadvantage prospective gay and lesbian immigrants. Second, the analysis will examine the application of the new law and regulations to same-sex partners. Here, the focus will be on determining what issues are specific to same-sex partner immigration, and how they could impact on an immigration officer's assessment of the merits of the application.

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Zealand, Norway, South Africa, Sweden, and the United Kingdom. See Brian McGloin, "Diverse Families with Parallel Needs: A Proposal for Same-Sex Immigration Benefits" (1999) 30 Cal. W. Int'l L.J. 159 at 172.

<sup>10</sup> Independent immigrants are selected for admission in Canada on the basis of specific selection standards that take into account certain factors including education, age, work experience, occupational demand, and knowledge of English and French. The elements of the selection criteria are assigned point values and an applicant must obtain a specific number of points to gain entry into Canada.

<sup>11</sup> Business immigrants are selected based on their ability to become economically established in Canada. Business immigrants are expected to invest or start businesses in Canada and to support the development of the Canadian economy.

## I. Gay and Lesbian Immigration—Past and Present

The following discussion will provide a brief historical review of Canada's discriminatory immigration policies, as well as examine the recent legislative changes that purport to put gay men and lesbians on an equal footing with their heterosexual counterparts.

### A. Historical Perspectives

#### 1. Prostitutes, Homosexuals, and Pimps: 1952-1977

Canadian immigration law has historically discriminated against gay men and lesbians.<sup>12</sup> Until 1977, homosexuals were listed in the categories of persons to be excluded from Canada along with “prostitutes, ... pimps, or persons coming to Canada for these or any other immoral purposes.”<sup>13</sup> In 1952, amendments to the *Immigration Act* were adopted that, according to Philip Girard, constituted a Canadian response to Cold War national security concerns.<sup>14</sup> The 1952 law identified for the first time “homosexuality” as a ground on which someone could be denied entry into Canada. Gay men and lesbians could not enter Canada as visitors; they could not come to Canada as immigrants seeking permanent residence; and gay men and lesbians who managed to enter into Canada were subject to deportation if they were found to have “practice[d], assiste[d] in the practice of or share[d] in the avails of ... homosexuality.”<sup>15</sup>

#### 2. (Heterosexual) Family Reunification: 1977-1991

The discriminatory provisions of the 1952 *Immigration Act* were repealed in 1977 and gay men and lesbians were no longer barred from entering the country.<sup>16</sup> Canadian immigration law continued, however, to allow only heterosexual Canadians to sponsor their spouses as family class immigrants.

The exclusion of gay men and lesbians from the family class of immigration laws was brought to the attention of the Canadian public in a highly publicized case in 1992.<sup>17</sup> Two gay men—Todd Layland, an American, and Pierre Beaulne, his Canadian

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<sup>12</sup> See Philip Girard, “From Subversion to Liberation: Homosexuals and the Immigration Act 1952-1977” (1987) 2 C.J.L.S. 1. See also Richard Green, “‘Give Me Your Tired, Your Poor, Your Huddled Masses’ (of Heterosexuals): An Analysis of American and Canadian Immigration Policy” (1987) 16 *Anglo-Am. L. Rev.* 139; Casswell, *supra* note 5 at 564-66.

<sup>13</sup> *Immigration Act*, R.S.C. 1952, c. 325, s. 5(e) [1952 Act].

<sup>14</sup> Girard, *supra* note 12 at 6-9.

<sup>15</sup> *Ibid.* at 11, citing the 1952 Act, *supra* note 13, s. 19.

<sup>16</sup> *Immigration Act, 1976*, S.C. 1977, c. 52, in force April 10, 1978 (SI/78-70).

<sup>17</sup> *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658, 104 D.L.R. (4th) 214 (Div. Ct.).

partner—wanted to stay together in Canada, but immigration law prohibited Beaulne from sponsoring Layland as his spouse. In an attempt to meet the definition of “spouse” for immigration purposes, they applied for a marriage licence at Ottawa City Hall, but were denied. They decided to challenge the prohibition against same-sex marriage before the Ontario courts. While their constitutional challenge on marriage failed, and the couple decided not to pursue an appeal before the Ontario Court of Appeal,<sup>18</sup> their case brought to light not only the issue of same-sex marriage, but also the restricted immigration choices facing binational gay and lesbian couples at that time.<sup>19</sup>

Given the existing prohibitions, binational same-sex partners were left with few options. As Donald Casswell points out, in order to stay with their Canadian partners, lesbians and gay men were forced to “spend years as reluctant students on student visas, endure marriages of convenience in order to obtain permanent residence in Canada, or even live underground ...”<sup>20</sup> For many, arranging a mutually beneficial “sham” marriage was the only option if same-sex partners wanted to make a life together in Canada.<sup>21</sup> Men and women interviewed as recently as 1993 stated that, although they were married to an opposite-sex spouse, they were in fact gay and lesbian.<sup>22</sup> They opted to enter into heterosexual marriages of convenience because, under Canadian immigration regulations, “spouse” was restricted to partners of the opposite-sex who were joined in marriage.

### 3. The Charter to the Rescue: 1991-1994

With the introduction of the *Canadian Charter of Rights and Freedoms*,<sup>23</sup> gay men and lesbians seriously considered constitutional challenges to the exclusion of same-sex couples in Canadian immigration law. In December 1991, several Canadians with foreign partners came together to form a national lobby group called the Lesbian and Gay Immigration Task Force (“LEGIT”).<sup>24</sup> Soon after, individual Canadians filed claims before the courts. In January 1992, Canadian Christine

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<sup>18</sup> Leave to appeal was granted by the Ontario Court of Appeal (7 June 1993) but the appeal was withdrawn in 1995: Kathleen A. Lahey, *Are We “Persons” Yet?: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) at 399, n. 65.

<sup>19</sup> Layland was not able to extend his work permit during the court case and was forced to return to Seattle before the issue was resolved. Beaulne moved to Vancouver to be closer to his partner. See Christopher Dueñas, “Coming to America: The Immigration Obstacle Facing Binational Same-Sex Couples”, Note (2000) 73 S. Cal. L. Rev. 811 at 830-31. Within a few years, the couple had separated under the strain of living in separate countries.

<sup>20</sup> Casswell, *supra* note 5 at 568.

<sup>21</sup> See Colin Leslie, “Unwelcome to Canada” *Xtra!* (April 1993) 11 [Leslie, “Unwelcome”]. For a discussion of sham marriages in the United States, see Dueñas, *supra* note 19 at 826-27.

<sup>22</sup> See Leslie, “Unwelcome”, *ibid.*

<sup>23</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>24</sup> The group is dedicated to ending discrimination against same-sex partners in Canadian immigration law. See online: LEGIT <<http://www.qrd.org/qrd/www/world/immigration/legit.html>>.

Morrissey, a founder of LEGIT, commenced proceedings in the Federal Court, arguing that Immigration Canada's refusal to process her application to sponsor her Irish-American partner Bridget Coll constituted discrimination on the basis of sexual orientation.<sup>25</sup> In another case, Canadian Andrea Underwood sought to sponsor her British partner Anna Carrott. When immigration officials refused to even consider Underwood's application, she launched an action in Federal Court in 1992. Underwood claimed that "she was being discriminated against on the basis of sexual orientation and family status," in violation of the Charter.<sup>26</sup> Finally, in 1993, several lesbian and gay Canadians asked the Canadian Human Rights Commission to investigate their claims of discrimination after Canadian immigration officials refused to recognize their conjugal relationships.<sup>27</sup>

The Department of Employment and Immigration ("Department" or "Immigration")<sup>28</sup> settled the constitutional litigation by granting permanent resident status to the partners of Canadians who had launched the constitutional appeals in order to avoid court rulings that could rewrite the family reunification provisions.<sup>29</sup> Thus Christine Morrissey's partner, Bridget Coll, was landed as an independent applicant in October 1992.<sup>30</sup> Anna Carrott was allowed to stay as a permanent resident in 1994, three years after her partner, Andrea Underwood, initially applied and at a time when the constitutional challenge was still to be heard.<sup>31</sup> Underwood's lawyer, Marcel LaFlamme, stated that immigration officials were "afraid to lose ... and this

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<sup>25</sup> See EGALE, *Outlaws & Inlaws: Your Guide to LGBT Rights, Same-Sex Relationships and Canadian Law* (Ottawa: EGALE, 2003) at 108. See also Casswell, *supra* note 5 at 569.

<sup>26</sup> Matthew Martin, "Yukon Couples Wins Immigration Permit" *Angles* (April 1992) 7.

<sup>27</sup> See *Outlaws & Inlaws*, *supra* note 25 at 108. See also Cindy Filipenko, "Immigration Permits Denied to Gay and Lesbian Couples" *Xtra! West* (December 1994); Casswell, *supra* note 5 at 570.

<sup>28</sup> The department was called the "Department of Employment and Immigration" until 1994, when it was changed to the "Department of Citizenship and Immigration". This paper will use the name in effect at the time of the events described.

<sup>29</sup> See Lahey, *supra* note 18 at 142.

<sup>30</sup> Soon after the lawsuit was filed, immigration officials asked Coll to fill out an application under the independent class, ostensibly for the purposes of the lawsuit. That form was then quickly processed, apparently by the Consul General in Seattle personally, to grant her residency status, not as a sponsored family class member, but as an independent immigrant. See *Outlaws & Inlaws*, *supra* note 25 at 108; Aaron A. Dhir, "Same-Sex Family Class Immigration: Is the Definition of 'Spouse' in Canada's *Immigration Regulations, 1978* Unconstitutional" (2000) 49 U.N.B.L.J. 183 at 209. In fact, Coll was not even asked to attend what is usually a required interview with an immigration officer: see Casswell, *supra* note 5 at 569. Morrissey and Coll's lawyer, Robert Hughes, stated that "this was the federal government's way of sidestepping the messy issue of gay and lesbian rights in the immigration context": John A. Yogis, Randall R. Duplak & J. Royden Trainor, *Sexual Orientation and Canadian Law: An Assessment of the Law Affecting Lesbian and Gay Persons* (Toronto: Emond Montgomery, 1996) at 98.

<sup>31</sup> In Carrott's case, the national headquarters of the Department of Citizenship and Immigration directed local immigration officials to deal favorably with the sponsorship application. See Michael Battista, "Immigration Battle Is Won" *Xtra!* (25 October 1994); "Same-sex Couple Win Immigration Fight" *The Citizen* (3 September 1994).

case is very strong.”<sup>32</sup> The federal government was thus able to avoid successive legal challenges to the immigration law and regulations that excluded gay and lesbian families.

#### 4. A Kindler, Gentler (and Discretionary) Policy: 1991- 2002

In 1991, the Department of Employment and Immigration also began a practice of granting same-sex partners entry into Canada under the discretion to take “compassionate and humanitarian considerations” into account.<sup>33</sup> These grounds enable a waiver of the usual selection criteria in specific cases. The first application of this approach came on 20 April 1991. Then Minister of Employment and Immigration, Barbara McDougall, granted permanent residency on “humanitarian and compassionate” grounds to a foreign national who was the same-sex partner of a Canadian living in Alberta.<sup>34</sup>

In April 1993, the Minister of Employment and Immigration delegated the authority to grant same-sex partner applications on the basis on humanitarian and compassionate grounds to program officers in visa offices abroad.<sup>35</sup> Then, in June 1994, the policy was further strengthened when the Department officially recognized that the separation or continued separation of same-sex couples and heterosexual common-law partners may cause “undue hardship” and therefore constituted grounds for exercising the broad and discretionary “humanitarian and compassionate” decision-making criterion under the *Immigration Act*. This new policy direction was contained in a telex, titled “Processing of Same Sex and Common Law Cases”, which was sent to program managers in Canadian embassies and consulates around the world.<sup>36</sup>

Immigration officers were directed to “assess whether the relationships were *bona fide*, whether they met undefined requirements of duration and stability, and check that they were not entered into primarily for the purposes of gaining admission into Canada.”<sup>37</sup> The new policy also directed immigration officers to process all lesbian and gay sponsorships as independent applications. If the same-sex partner did not

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<sup>32</sup> Battista, *ibid.*

<sup>33</sup> 1985 Act, *supra* note 8, s. 114(2).

<sup>34</sup> The author was responsible for this file while working as a legislative assistant in the House of Commons from 1987-1993. This 1991 case was never publicized but it constituted the first time that the “humanitarian and compassionate” grounds were used to recognize the hardship caused to a Canadian separated from his gay partner. It is interesting to note that Minister Barbara McDougall approved this application as one of her final acts as Minister of Employment and Immigration; she was shuffled to another ministerial position on 21 April 1990, one day after the approval was granted.

<sup>35</sup> See *Outlaws & Inlaws*, *supra* note 25 at 108-109.

<sup>36</sup> M. Davidson, Department of Citizenship and Immigration Canada, “Processing of Same Sex and Common Law Cases”, REF ORD0150 (3 June 1994) (telex, on file with author) [“Processing of Same Sex Cases”].

<sup>37</sup> *Outlaws & Inlaws*, *supra* note 25 at 109. See also “Processing of Same Sex Cases”, *ibid.* at para. 5.



meet the points requirement for landing as a member of the independent class, officials were to then determine whether separation or continued separation of bona fide same-sex couples created undue hardship and was grounds for exercising humanitarian and compassionate discretion.<sup>38</sup>

Moreover, the 1994 telex provided that the same humanitarian and compassionate considerations were to apply to the accompanying same-sex partner of a person granted a visitor or immigrant visa to Canada. Missions were instructed to use the humanitarian and compassionate grounds to “facilitate the admission of an otherwise unqualified applicant who is involved in a same-sex or common-law relationship with an individual who, in their own right, qualifies for immigration under any category.”<sup>39</sup> This ensured that a person to whom a visitor or immigrant visa was issued would be permitted to be accompanied by his or her same-sex partner.

While the implementation of the policy relied on the use of discretionary powers granted to individual visa officers, it was nevertheless an effective practice if viewed from the perspective of the binational couples who applied for compassionate and humanitarian consideration. It was reported that, within a year of the adoption of the policy, more than sixty couples had successfully used these grounds to obtain residency for a gay or lesbian partner.<sup>40</sup>

This new immigration practice was, however, criticized by lesbian and gay rights activists, immigration advocates, and lawyers for being too discretionary, arbitrary, and lacking in transparency. The discretionary character with which the humanitarian and compassionate policy was applied “raised questions of potential discrepancies among petition approvals.”<sup>41</sup> Donald Casswell pointed out that the homophobia of particular visa officers may have unfairly affected their assessment of an application, for instance, in their evaluation of the bona fides of a gay or lesbian relationship.<sup>42</sup> Deborah McIntosh argued in support of that same point when she stated that “[t]he fact that a ‘humanitarian and compassionate’ immigration official may well be neither of those, or overly ethnocentric, means that there is little chance of success, particularly for homosexuals ...”<sup>43</sup>

Rob Hughes, an immigration and refugee lawyer in Vancouver, described the policy as “a discretionary remedy that can be taken away with a stroke of the pen.”<sup>44</sup> LEGIT further claimed:

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<sup>38</sup> “Processing of Same Sex Cases”, *ibid.*

<sup>39</sup> *Ibid.* at para. 8.

<sup>40</sup> See Battista, *supra* note 31.

<sup>41</sup> McGloin, *supra* note 9 at 172.

<sup>42</sup> Casswell, *supra* note 5 at 560.

<sup>43</sup> Deborah McIntosh, “Defining ‘Family’—A Comment on the Family Reunification Provisions in the Immigration Act” (1988) 3 J.L. & Soc. Pol’y 104 at 110.

<sup>44</sup> Filipenko, *supra* note 27.

Canada now allows the immigration of same-sex partners, but under the worst possible set of procedures. There are no rules. There are no appeals. There are no rights. There is no assurance of consistency of decision making by the program managers and visa officers in the various embassies and consulates. There is no openness, no transparency, no publicity. If someone goes into an embassy or consulate in Paris or Atlanta are they likely to get accurate information about the possibilities of a Canadian sponsoring their lesbian or gay partner? Or will they get a standard form document which indicates that they do not qualify for family class sponsorship; a document which explains nothing about what can occur on "humanitarian" grounds.<sup>45</sup>

Lawyer Mary Joseph cautioned that "[W]e have won a battle, but not the war."<sup>46</sup> Joseph, along with many other commentators, believed that the "bigger battle" involved taking away the discretionary power given to immigration officers to make family reunification for gay men and lesbians part of the law "like it is for married heterosexual couples."<sup>47</sup>

Similar concerns were raised by the Immigration Legislative Review Advisory Group ("Advisory Group") in its 1997 report titled *Not Just Numbers: A Canadian Framework for Immigration*.<sup>48</sup> The Advisory Group expressed concern that gay and lesbian "applicants are reliant upon the less than uniform application of unpublicized administrative directives."<sup>49</sup> In recommending that the definition of "spouse" be amended to include same-sex couples, the Advisory Group stated that the goal of the family reunification provisions should be "transparency, fairness and equality of treatment, and [that] these must be enshrined in law."<sup>50</sup> This recommendation echoed one made in 1994 by participants to a national consultation on the immigration of family members who urged the government to grant gay men and lesbians immigration sponsorship rights equal to those of heterosexual married couples.<sup>51</sup> For many immigration advocates, it was time to expand the definition of "family" to reflect "both the evolving concept of family in Canadian domestic law, and the

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<sup>45</sup> Dhir, *supra* note 30 at 211, citing LEGIT, "Taking the Next Step: A Brief to the Honourable Sergio Marchi, Minister of Immigration" (12 November 1993) [unpublished] [LEGIT Brief]. See also *Outlaws & Inlaws*, *supra* note 25 at 109, quoting the LEGIT Brief.

<sup>46</sup> Ailsa Craig, "Relationship Sustained in Six-Month Spurts" *Xtra!* (21 July 1995).

<sup>47</sup> *Ibid.*

<sup>48</sup> Immigration Legislative Review, *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Minister of Public Works and Government Services Canada, 1997) [*Not Just Numbers*].

<sup>49</sup> *Ibid.* at 43.

<sup>50</sup> *Ibid.*

<sup>51</sup> Participants also felt that family sponsorship rights should be granted to de facto opposite-sex couples: Citizenship and Immigration Canada and Refugee Law Research Unit, *Report of the National Consultation on the Immigration of Family Members* (Toronto: Centre for Refugee Studies, York University, 1994) at 3.

concept of ‘extended family’ long recognized in other cultures and increasingly a part of Canadian life.”<sup>52</sup>

Finally, while legitimate gay and lesbian partners who applied abroad were almost always successful in obtaining residency on humanitarian and compassionate considerations, a problem soon arose with regard to the inland determination process under which some gay men and lesbians applied to sponsor their partners. Under the *Immigration Act* in effect at the time, a person seeking permanent resident status in Canada was required to apply from outside Canada.<sup>53</sup> This requirement could, however, be waived on humanitarian or compassionate grounds.<sup>54</sup> In 1994, Immigration officials confirmed that inland determination had become an issue of concern for the Department—and not just for gay and lesbian couples. A decision was made to move away from inland determination to eliminate backlogs and avoid an influx of applications.<sup>55</sup> Several lesbian and gay foreign nationals, already living in Canada with their partners, were denied landed status and told to leave the country.<sup>56</sup> They, in turn, considered filing legal challenges to the *Immigration Act* charging discrimination in violation of the Charter.<sup>57</sup>

It appeared that the dual strategy of the government was failing. The adoption of a discretionary mechanism to deal with gay and lesbian family sponsorship was viewed as a half measure lacking in transparency, consistency, and fairness by gay, lesbian, and immigration advocates. Furthermore, the policy of granting landing to individuals launching Charter challenges provided the government with temporary relief only from what seemed to be an inevitable constitutional lawsuit.

In response, then Immigration Minister Lucienne Robillard announced in January 1999 proposed changes to the immigration law and regulations to include lesbian and gay partners in the family class provisions.<sup>58</sup> Interestingly, her announcement came at

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<sup>52</sup> McIntosh, *supra* note 43 at 107 [footnotes omitted]. See also *Not Just Numbers*, *supra* note 48 at 42-43.

<sup>53</sup> 1985 Act, *supra* note 8, s. 9(1).

<sup>54</sup> See Casswell, *supra* note 5 at 573.

<sup>55</sup> See Filipenko, *supra* note 27. Padraic Brake, “Marchi Buckles Under: No More Ministerial Permits Issued, Lawyer Says” *Xtra!* (9 December 1994) 13.

<sup>56</sup> The immigration department refused Kristin Ruppert’s application for permanent resident status and she was ordered out of the country despite her long-term relationship with a Canadian national, E.B. Brownlie. See Colin Leslie, “No ‘Undue Hardship’, Letter Says” *Xtra!* (9 December 1994) 13 [Leslie, “Undue Hardship”]. In another case, Marco Tarelho, a Brazilian national, was also turned down despite his five-year relationship with Blair Boyle, a Canadian man. But their lawyer was able to overturn the refusal when she “went above the case officer’s head” (Craig, *supra* note 46).

<sup>57</sup> Kristin Ruppert and her partner filed a claim in the Federal Court of Canada charging that the *Immigration Act* was discriminatory. See Leslie, “Undue Hardship”, *ibid.*

<sup>58</sup> In January 1999, the minister released a departmental white paper on the immigration and refugee systems. The paper called for fair treatment of common-law and same-sex couples in the immigration law and regulations: “Refusing permanent residence does not simply deny a benefit to the ... same-sex partner, but may effectively deny Canadians the right to live with their life partners ...

the same time as a court challenge was launched against the federal government seeking changes to fifty-eight federal statutes, including the immigration law, that discriminated against gay men and lesbians.<sup>59</sup>

## **B. The 2002 IRPA and IRP Regulations**

### **1. The Basic Framework: Bill C-11**

The Minister of Citizenship and Immigration tabled Bill C-11, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*<sup>60</sup> in the House of Commons on 21 February 2001. As framework legislation, Bill C-11, which became the *IRPA*, set out the principles and the components of the immigration system, while the procedures, exceptions, and other administrative details were to be provided for in regulations.<sup>61</sup> The proposed bill maintained the immigration policy of family reunification. It provided that a “Canadian citizen or permanent resident may, subject to the regulations, sponsor a foreign national who is a member of the family class.”<sup>62</sup> Family class is defined as follows:

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.<sup>63</sup>

While the minister made it clear when the new legislation was introduced that same-sex couples were to be recognized as “common-law partners” under the new act, the actual definition of “common-law partner” was set out in proposed regulations presented on 15 December 2001.<sup>64</sup>

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The recognition of common-law and same-sex relationships through regulatory changes would eliminate the recourse to discretionary administrative guidelines”: Citizenship and Immigration Canada, *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) at 25.

<sup>59</sup> See Dhir, *supra* note 30 at 185. The lawsuit was filed by the Foundation for Equal Families, a gay and lesbian rights group. The federal government was also forced to act after the Supreme Court of Canada decided, in *M. v. H.*, [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577 that the Charter mandated governments to treat gay and lesbian couples on an equal footing with opposite-sex common-law partners.

<sup>60</sup> 1st Sess., 37th Parl., 2001 (as passed by the House of Commons 13 June 2001) [Bill C-11]. The Minister of Citizenship and Immigration at that time was the Hon. Elinor Caplan.

<sup>61</sup> *Immigration and Refugee Protection Regulations: Regulatory Impact Analysis Statement*, C. Gaz. 2001.I.4477 [2001 Impact Analysis].

<sup>62</sup> Bill C-11, *supra* note 60, cl. 13(1).

<sup>63</sup> *IRPA*, *supra* note 1.

<sup>64</sup> Proposed Regulatory Text: *Immigration and Refugee Protection Regulations*, C. Gaz. 2001.I.4577 at 4588 (cl. 1(1)) [Proposed Regulations].

## 2. A First Attempt: The 2001 Regulations

The *Regulatory Impact Analysis* that accompanied the 2001 proposed regulations identified three purposes for the new provisions on family reunification. The regulations were to ensure that:

- the process and criteria by which members of the family class are selected are clear and transparent—this includes the requirements and obligations of sponsors;
- current social realities are taken into account in the defining of family class membership; and
- legislation is consistent with other legislation or principles to which Canada is committed.<sup>65</sup>

In meeting these objectives, the regulations introduced provisions that allowed common-law partners to be sponsored as members of the family class. The proposed regulations defined “common-law partner” as “an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year.”<sup>66</sup> The only exception to the cohabitation requirement was for couples unable to cohabit “due to persecution or any form of penal control.”<sup>67</sup> In addition, the regulations created a new category of individuals, “intended common law partners”, that was to include heterosexual and same-sex couples in bona fide relationships who were unable to cohabit.<sup>68</sup> The intended common-law partners, along with “intended fiancé(e)s”, were excluded from the family class, but they could be considered for immigration on humanitarian and compassionate grounds.

The Minister of Immigration explained the inclusion of the cohabitation requirement in the definition of a “common-law partner” as necessary to make the regulations consistent with the terminology used in the *Modernization of Benefits and Obligations Act*.<sup>69</sup> As stated in the *Regulatory Impact Analysis*, the regulations were to be consistent with other legislation.<sup>70</sup> The *Modernization Act* extends rights and obligations to gay and lesbian couples, as long as they have cohabited in a conjugal relationship for one year.

It may also be that the Department of Citizenship and Immigration settled on the cohabitation requirement because the definition of gay and lesbian partnerships was

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<sup>65</sup> 2001 Impact Analysis, *supra* note 61 at 4536.

<sup>66</sup> Proposed Regulations, *supra* note 64 at 4588 (cl. 1(1)).

<sup>67</sup> *Ibid.* (cl. 1(2)).

<sup>68</sup> *Ibid.* at 4636.

<sup>69</sup> S.C. 2000, c. 12 [*Modernization Act*]. See Canada, House of Commons, Standing Committee on Citizenship and Immigration, *Committee Evidence*, 37th Parl., Meeting No. 45 (5 February 2002), at 56, online: Parliament of Canada <<http://www.parl.gc.ca/InfoCom/PubDocument.asp?DocumentID=518817&Language=E#Int-119521>> [*Committee Evidence*].

<sup>70</sup> 2001 Impact Analysis, *supra* note 61 at 4536.

“bedevilling federal immigration officials ...”<sup>71</sup> Indeed, in drafting the regulations, officials struggled between finding a foolproof way for gay men and lesbians to prove they were in a legitimate relationship and the reality that persecution in many countries “forces gays to live underground, making it impossible for them to collect the documentation required to demonstrate a legitimate partnership.”<sup>72</sup> The definition proposed in the 2001 regulations appeared to strike a balance between these two opposing realities by setting a general rule requiring a one-year cohabitation, while at the same time providing for exceptions in cases where cohabitation was not possible “due to persecution or any form of penal control.”

The proposed definition of “common-law partner” immediately attracted criticism. First, neither Bill C-11 nor the proposed regulations actually specified that same-sex partners were included in the definition of “common-law partners”. In its brief to the House of Commons Standing Committee on Citizenship and Immigration (“Standing Committee”), EGALE, a national gay and lesbian rights advocacy group, expressed concerns that the definition, as it then stood, was not accessible and transparent.<sup>73</sup> In many foreign jurisdictions, where individuals would be seeking information about Canada’s immigration laws, it would not be a natural assumption to define a “common-law partner” as including gay men and lesbians.<sup>74</sup>

A second, and more important, concern focused on the cohabitation requirement. It was seen as an unrealistic criterion in the immigration context, since couples of different nationalities in a bona fide relationship often cannot cohabit for a wide variety of reasons including not only persecution or penal control, but also for cultural, social, financial, religious, and other factors.<sup>75</sup> LEGIT and EGALE both appeared before the Standing Committee to argue that the cohabitation requirement, and the limited exceptions to it, were inappropriate in the immigration context.<sup>76</sup> Christine Morrissey stated that “the main obstacle to people reaching a cohabitation requirement ... is the immigration rules and regulations themselves.”<sup>77</sup> Interestingly, under the previous humanitarian and compassionate policy, same-sex partners were not subject to a mandatory cohabitation requirement. LEGIT estimated that seventy-five per cent of the same-sex partners who obtained entry in Canada under

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<sup>71</sup> Brian Laghi, “Ottawa Puzzles Over Gay Immigration” *The Globe and Mail* (22 May 1999) A7.

<sup>72</sup> *Ibid.*

<sup>73</sup> EGALE Canada, *EGALE Submissions to House of Commons Standing Committee on Citizenship and Immigration: Re Immigration Regulations* (February 2002) at 6 [EGALE Brief].

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.* at 7-10.

<sup>76</sup> *Committee Evidence*, *supra* note 69 at 39.

<sup>77</sup> *Ibid.*

humanitarian and compassionate considerations did not meet the one-year cohabitation requirement.<sup>78</sup>

In addition, EGALE was of the view that the drafting of the definition was vulnerable to constitutional challenges given that cohabitation was not a requirement for married spouses. Christine Morrissey of LEGIT made the same point in her testimony on behalf of LEGIT to the Standing Committee:

There's one significant difference between the majority of heterosexual common-law couples and all of same-sex couples, and that is that we do not have the benefit of marriage at this time. For an opposite-sex heterosexual couple, they can cut through all of this by marrying, for the majority. For us, none of us can do that. So we have the compounding of the very strict definition with very narrow exceptions, compounded by the fact that we have no other option.<sup>79</sup>

Heterosexual couples could avoid the one-year cohabitation requirement by simply getting married, but marriage was not yet an option for gay men and lesbians.<sup>80</sup>

The “intended common-law” category was not deemed a sufficient solution for couples who could not meet the cohabitation requirement for reasons other than persecution or penal control. Under the proposed regulations, immigration officials could use the humanitarian and compassionate grounds to grant residency to gay and lesbians couples who do not meet the criteria for other classes of applications.<sup>81</sup> A concern was raised, however, that humanitarian and compassionate grounds would remain the norm for the processing of same-sex applications, as a large number of partners are unable to meet the one-year cohabitation requirement. John Fisher, then of EGALE, testified before the House of Commons Committee on Citizenship and Immigration that “[t]he humanitarian and compassionate process is discretionary and arbitrary, there is no right of appeal from a refusal, and there is no exemption from the excessive medical demands provision, as there is under the family class.”<sup>82</sup> Thus, the proposed regulations continued the policy of subjecting the immigration of gay men and lesbians to a discretionary exercise of authority, with all the same disadvantages it had entailed when humanitarian and compassionate grounds previously governed same-sex sponsorships.

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<sup>78</sup> *Ibid.* at 40. In fact, MP Steve Mahoney, a member of the committee, observed that “most of the MPs in this room would not qualify under the cohabitation rules—when you live in Ottawa eight months of the year” (*ibid.* at 54).

<sup>79</sup> *Committee Evidence*, *supra* note 69 at 41.

<sup>80</sup> See EGALE Brief, *supra* note 73 at 8-9.

<sup>81</sup> Proposed Regulations, *supra* note 64 at 4636 (cl. 109).

<sup>82</sup> EGALE Brief, *supra* note 73 at 2.

### 3. Back to the Drawing Board: The 2002 Regulations

The feedback received from public consultations and the specific recommendations from the House of Commons Standing Committee on Citizenship and Immigration<sup>83</sup> led the minister to amend the regulations.<sup>84</sup> The new regulations were finalized and published in a special 14 June 2002 edition of the *Canada Gazette*.<sup>85</sup> The *Regulatory Impact Analysis* specifies explicitly that the proposed regulations “enable the sponsorship of a common-law partner or a conjugal partner, which may include sponsorship of a partner of the same-sex” as well as stating that “the Regulations are sensitive to the reality that in some countries same-sex couples are not able to live together.”<sup>86</sup>

To deal with the concerns raised about the mandatory cohabitation requirement for common law spouses, a further category—“conjugal partner”—was added to the regulations. A person in this new immigration class is defined, by section 2 of the *IRP Regulations*, 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.”<sup>87</sup> Thus, the discretionary “deemed common-law partner” category was withdrawn in favour of a new class of immigrants. The one-year cohabitation requirement was maintained for common-law partners, except in the case of “persecution or penal control”, as provided for in the 2001 proposed regulations, while the definition of a “conjugal partner” requires a relationship of at least a one-year duration. Conjugal partners are not relegated to discretionary humanitarian and compassionate grounds, but rather constitute a separate class of sponsored immigrants.

### 4. The Final Version: The *IRPA* and the *IRP Regulations*

The *IRPA* and the amended regulations finally came into effect on 28 June 2002. Taken together, the *IRPA* and the *IRP Regulations* have expanded the category of

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<sup>83</sup> Canada, House of Commons, Standing Committee on Citizenship and Immigration, *Building a Nation: The Regulations Under the Immigration and Refugee Protection Act* (March 2002) [*Building a Nation*]. For instance, in Recommendation 33, the Standing Committee believed the “the allowable reasons for excusing common-law partners from cohabiting should be expanded beyond ‘persecution’ and ‘penal control’” (at 21). In Recommendation 34, the Standing Committee suggested that “cohabitation should only be one factor in determining the genuineness of a common-law relationship and the definition of ‘common-law partner’ ... should be changed accordingly.” In Recommendation 35, the Standing Committee was of the view that “the definition of ‘common-law partner’ ... should state that a partnership may be of the opposite-sex or of the same sex.”

<sup>84</sup> See Minister of Citizenship and Immigration, “Government Response to the Report of the Standing Committee on Citizenship and Immigration” (June 2002), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/irpa/response.html#fa>>.

<sup>85</sup> *IRP Regulations*, *supra* note 7.

<sup>86</sup> *Regulatory Impact Analysis Statement*, C. Gaz. 2002.II.177 at 258.

<sup>87</sup> *Supra* note 7.



individuals who can immigrate or be sponsored for permanent residency to Canada. Whereas the previous legislation afforded the benefits of immigration to Canada only to married heterosexual partners, except for the discretionary use of humanitarian and compassionate considerations, the *IRPA* and the *IRP Regulations* have been expanded to include many more intimate relationships. Thus, Canadian immigration laws now recognize three kinds of conjugal relationships: spouses, common-law partners, and conjugal partners.

The term “spouse” is not defined in either the act or the regulations; however, in the context of immigration, it refers to persons who are married. The regulations require that a foreign marriage be “valid both under the laws of the jurisdictions where it took place and under Canadian law.”<sup>88</sup>

A “common-law partner” is defined in the regulations as “an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year.”<sup>89</sup> The regulations also provide that the definition of a common-law partner includes “an individual who has been in a conjugal relationship with a person for at least one year but who is unable to cohabit with the person, due to persecution or any form of penal control.”<sup>90</sup>

Both “spouse” and a “common-law partner” are included in the “family member” class,<sup>91</sup> which means that they may be considered as dependents of an individual applying to immigrate to Canada. Spouses and common-law partners are thus eligible for permanent residency by virtue of their relationship with the Canadian sponsor (qualifying them as members of the family class) or by virtue of their relationship with another person (qualifying them as a family member for the “member of the family” class), which means that they may be included as dependents of an individual applying to immigrate to Canada.

A conjugal partner will not be recognized in a relationship where there is no Canadian partner. In this way, contrary to spouses or common-law partners, conjugal partners are not members of any other class of persons who may become permanent residents. Conjugal partners are only eligible for permanent residency by virtue of their relationship with the sponsor (qualifying them for the member of the family class) and not with any other person.<sup>92</sup>

The *IRP Regulations* exclude any “bad faith relationships”—that is, relationships that are “not genuine or [were] entered into primarily for the purpose of acquiring any

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<sup>88</sup> *Ibid.*, s. 2.

<sup>89</sup> *Ibid.*, s. 1(1).

<sup>90</sup> *Ibid.*, s. 1(2).

<sup>91</sup> *Ibid.*, s. 1(3).

<sup>92</sup> See Anna Colaianni, “Members of the Family Class: Common-Law Partners and Conjugal Partners” Paper presented to the Citizenship and Immigration Law Conference, *IRPA: Theory vs. Practice*, Canadian Bar Association (2-3 May 2003) at 13 [unpublished].

status or privilege under the Act.”<sup>93</sup> All three categories of conjugal relationships are subject to this restriction. Of concern are relationships where the evidence establishes that the partners do not intend to continue their relationship once immigration status has been obtained.<sup>94</sup>

The new immigration law and regulations represent a significant shift in Canadian policies toward lesbian and gay family immigration. Gay men and lesbians are now officially permitted by the family reunification provisions of the immigration law to sponsor their partners. Indeed, all three categories of conjugal relationships listed in the *IRP Regulations* potentially include same-sex partners. A more transparent and equitable regime has been established to process the applications of women and men wishing to be united in Canada with their same-sex partners.

Yet, as the next section will argue, there are many ways in which same-sex partner immigration remains problematic. Certainly, applications from same-sex couples will have to be determined according to the same legal test as heterosexual cases. All levels involved in deciding on gay and lesbian immigration applications—namely, visa officers, the Immigration Appeals Division of the Immigration and Refugee Board (“IAD”), and ultimately, the Federal Court—will determine for the purposes of the *IRPA* the bona fides of the relationship, the conjugal nature of the relationship, and the duration of the relationship for all applicants. In many ways, however, lesbian and gay sponsorship applications continue to present unique issues and challenges.

## II. Problems and Challenges

### A. Policy and Drafting Problems with the *IRPA* and the *IRP Regulations*

In this section, the shortcomings of the *IRPA* and *IRP Regulations* will be examined. While both the act and the regulations were subjected to significant public and parliamentary scrutiny, the government did not respond to all these concerns when it amended the *IRP Regulations*.

#### 1. Some Relationships Are More Equal Than Others

While the minister redrafted the immigration regulations after receiving strong criticisms of the 2001 proposals, it must be underlined that the final version of the regulations did not address a fundamental critique. The regulations maintain “cohabitation” as a mandatory requirement for common-law couples.

The insistence that common-law couples be required to cohabit remains a problem for many reasons. First, it remains true that many binational couples will not

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<sup>93</sup> *IRP Regulations*, *supra* note 7, s. 4.

<sup>94</sup> See Colaianni, *supra* note 92 at 19-21.

be able to meet this requirement, in large part because of immigration barriers. While most heterosexual couples can opt to get married, and therefore get around the cohabitation requirement, this option is not easily available to gay men and lesbians, as will be discussed later in the article. Because of their inability to marry, they will have to apply under the new category of “conjugal partner”. But unlike spouses and common-law partners, conjugal partners can only immigrate if they are in a relationship with a Canadian citizen or a permanent resident. A conjugal partner cannot be included as a dependent of an individual applying to immigrate to Canada. A disadvantage is thus created, and in effect, a hierarchy of personal relationships is established in the regulations. Spouses do not need to live together for a year and they are members of the family class; common-law partners must cohabit but they are also members of the family class; finally, conjugal partners need not cohabit but they are not members of the family class.

In addition to being unnecessarily complicated and hierarchical, this categorization of personal relationships does not reflect the approach taken by the courts when assessing the conjugality of a relationship. In *M. v. H.*, the Supreme Court identified the characteristics of a conjugal relationship.<sup>95</sup> The Court did not single out cohabitation as more determinative than other factors. Rather, it identified “shelter, sexual and personal behavior, services, social activities, economic support and children, as well as the social perception of the couple” as the full range of factors to be examined when considering the conjugality of a personal relationship.<sup>96</sup>

Witnesses before the Standing Committee urged the government to maintain the comprehensive approach adopted by visa officers working under the 1994 humanitarian and compassionate policy where cohabitation was not favoured as a criterion over other evidence of conjugality. Michael Battista, lawyer for EGALE, argued the following:

[T]he way the system works right now is very much consistent with the Supreme Court’s decision. What an immigration officer does is look at all the evidence that’s been submitted on the relationship—testimonials from friends and family, any evidence of cohabitation, any joint property assets. They look at the total picture of what has been submitted to them and they base the decision on that. And it’s been working well for many years.<sup>97</sup>

Battista went as far as to suggest that maintaining cohabitation as a mandatory requirement made the regulations “highly subject to legal challenge.”<sup>98</sup>

LEGIT proposed that all conjugal relationships be assessed according to the same criterion: that individuals be involved in a genuine conjugal relationship of at least one-year duration. The Standing Committee agreed, recommending that “the primary

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<sup>95</sup> *Supra* note 59.

<sup>96</sup> *Ibid.* at paras. 59-60.

<sup>97</sup> *Committee Evidence, supra* note 69 at 46.

<sup>98</sup> *Ibid.* at 45.

test for a common-law partnership would be whether or not the conjugal relationship is *bona fide* and has continued for at least one year.”<sup>99</sup> Members of the committee further suggested that “cohabitation should be only one element among others that serve to prove the genuineness of the relationship.”<sup>100</sup>

The government’s insistence on retaining cohabitation as a mandatory requirement is difficult to understand. Officials stated that it was considered essential to maintain a definition of “common-law” that was consistent with all other federal statutes.<sup>101</sup> The *Modernization Act* defines common-law partners as living in a conjugal relationship and having cohabited for at least one year. The federal government has not shifted from its position, despite the repeated criticisms the mandatory cohabitation criterion received from witnesses before the Standing Committee on Citizenship and Immigration.

The position of the government is not, however, defensible. First, the proposed definition of a common-law partner is already inconsistent with the *Modernization Act*. It allows for exceptions to the cohabitation requirement in cases of persecution or penal control, exceptions not found in other federal statutes. In fact, the inclusion, from the very start, of exceptions to the cohabitation requirement appears to be an admission by the government that the immigration context cannot be assimilated to other domains of federal regulation. This, in fact, was the position put forth by several witnesses who testified before the Standing Committee. Given this implicit admission, it is hard to understand why federal officials did not take more seriously the calls for a different definition of common-law partner for immigration purposes. While immigration officials are of the view that the issue was resolved by the addition of “conjugal partners”, this remains an inadequate response, as the new class of conjugal partners was established as a more limited immigration class than spouses or common-law partners.

Not enough time has elapsed since the *IRPA* and the *IRP Regulations* were enacted to be able to assess their impact. It will, however, be important to monitor developments in the next few years to see if, as the Standing Committee on Citizenship and Immigration suggests, “a mandatory cohabitation requirement is bound to produce unfair results in some circumstances.”<sup>102</sup>

## 2. Give Us Your Truly Persecuted Few

As mentioned above, the immigration regulations provide that if one partner is unable to cohabit with the other due to persecution or any form of penal control, the partner may be considered a common-law partner for the purposes of the visa

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<sup>99</sup> *Building a Nation*, *supra* note 83 at 21.

<sup>100</sup> *Ibid.*

<sup>101</sup> See *Committee Evidence*, *supra* note 69 at 56.

<sup>102</sup> *Building a Nation*, *supra* note 83 at 21.

application. Neither “persecution” nor “penal control” is defined in the *IRPA* nor the *IRP Regulations*. But in the refugee context, persecution has been interpreted by the courts to mean “repeated or systemic infliction of serious harm or treatment which compromises or denies basic human rights.”<sup>103</sup> Penal control may refer to “punishment usually state sanctioned or tolerated which constricts the liberty of the person.”<sup>104</sup>

Despite progress made in several countries, the human rights situation for sexual minorities around the world continues to be bleak, and while some countries are safer than others, there are no truly safe havens for gay men and lesbians.<sup>105</sup> In many countries, homosexuality is diagnosed as a mental disease by the medical profession, penalized as a crime by the law, and condemned as a sin by religious institutions. Some states continue to execute individuals because they are homosexuals. In other countries, while executions are not the norm, criminalization of consensual same-sex relations is still relatively common. Even when not criminalized, gay men and lesbians are provided with little protection from harassment and persecution, or homosexuality is treated as a disease. Most countries do not extend protection against discrimination in the workforce to lesbians and gay men. Government restrictions have also been placed on the freedom of expression of lesbians and gay men, and community publications have regularly been shut down. Gay and lesbian groups have also been consistently denied the right to freedom of assembly.

Moreover, gay men and lesbians often face persecution or penal sanctions as a result of their conjugal relationships. In certain cultures, what constitutes unacceptable transgressions of gender and social norms can be very broad, including the choice of two men or two women to live together and the refusal to marry or have children. For instance, several refugee claimants, including gay men, speak of the pressure to marry, and in some cases, claimants were actually forced into arranged marriages.<sup>106</sup>

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<sup>103</sup> Colaianni, *supra* note 92 at 11-12.

<sup>104</sup> *Ibid.* at 17.

<sup>105</sup> For reports on human rights violations against sexual minorities, see Amnesty International, “Human Rights and Sexual Orientation and Gender Identity”, AI Index: ACT 79/001/2004 (March 2004), online: Amnesty International, <[http://web.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/ACT790012004ENGLISH/\\$File/ACT7900104.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ACT790012004ENGLISH/$File/ACT7900104.pdf)>; Amnesty International, *Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment Based on Sexual Identity* (London: Amnesty International, 2001); Amnesty International, *Breaking the Silence: Human Rights Violations Based on Sexual Orientation* (London: Amnesty International, 1997); Rachel Rosenbloom, ed., *Unspoken Rules: Sexual Orientation and Women’s Human Rights* (London: Cassell, 1996).

<sup>106</sup> See *Re F.I.N.*, [1995] C.R.D.D. No. 151 (I.R.B.) (QL); *Re L.U.M.*, [1996] C.R.D.D. No. 193 (I.R.B.) (QL); *Re O.P.K.*, [1996] C.R.D.D. No. 88 (I.R.B.) (QL) [*O.P.K.*]; *Re G.U.S.*, [1996] C.R.D.D. No. 239 (I.R.B.) (QL); *Re O.R.C.*, [1997] C.R.D.D. No. 66 (I.R.B.) (QL); *Re E.N.U.*, [1997] C.R.D.D. No. 67 (I.R.B.) (QL); *Re U.V.G.*, [1997] C.R.D.D. No. 250 (I.R.B.) (QL); *Re Q.N.W.*, [1998] C.R.D.D. No. 38 (I.R.B.) (QL); *Re U.O.D.*, [1999] C.R.D.D. No. 106 (I.R.B.) (QL); *Re V.P.F.*, [1999] C.R.D.D. No. 191 (I.R.B.) (QL). Ironically, in some cases, arranged marriages represent the only way to escape persecution. See e.g. *Re L.(M.D.)*, [1992] C.R.D.D. No. 328 (I.R.B.) (QL); *Re P. (E.U.)*,

One gay claimant describes the horrific torture and subsequent pressure to marry inflicted on him by his father and brothers upon their learning of his homosexuality.<sup>107</sup> Many lesbians and gay men who are discovered in same-sex relationships are victims of sexual assaults at the hands of their persecutors.<sup>108</sup> In addition, deviations from proper gender roles in appearance and dress from proper gender roles often make sexual minorities easily identifiable to their persecutors. Refugee claimants have also indicated that both socializing and living with a gay or a lesbian partner are factors that brought them to the attention of agents of persecution.<sup>109</sup>

While the regulations appear to acknowledge that some lesbians and gay men live in countries where they could be persecuted for cohabiting in a conjugal relationship with someone of the same-sex, the provisions made for these exceptional circumstances appear to set a higher standard than that required of refugee claimants. Under Canadian refugee law, persons seeking asylum must demonstrate a “well-founded fear of persecution.”<sup>110</sup> Because an individual need only fear a future risk of persecution,<sup>111</sup> evidence of individualized past persecution is not necessary.<sup>112</sup> In fact,

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[1992] C.R.D.D. No. 397 (I.R.B.) (QL); *Burgos-Rojas v. Canada (Minister of Citizenship and Immigration)* (1999), 162 F.T.R. 157 (F.C.T.D.); *Re O.R.R.*, [2000] C.R.D.D. No. 122 (I.R.B.) (QL).

<sup>107</sup> *Re A.M.A.*, [2000] C.R.D.D. No. 103 (I.R.B.) (QL).

<sup>108</sup> See *Re N. (L.X.)*, [1992] C.R.D.D. No. 47 (I.R.B.) (QL); *Re J. (F.H.)*, [1993] C.R.D.D. No. 98 (I.R.B.) (QL); *Re H. (Y.N.)*, [1994] C.R.D.D. No. 13 (I.R.B.) (QL); *Re X.M.U.*, [1995] C.R.D.D. No. 146 (I.R.B.) (QL); *S.Z.R.*, [1995] C.R.D.D. No. 150 (I.R.B.) (QL); *Re B. (W.B.)*, [1995] C.R.D.D. No. 108 (I.R.B.) (QL); *Re I. (X.W.)*, [1995] C.R.D.D. No. 100 (I.R.B.) (QL); *Re D. (C.J.)*, [1995] C.R.D.D. No. 86 (I.R.B.) (QL); *Re J.J.Y.*, [1996] D.S.S.R. No. 50 (I.R.B.) (QL); *Re C.D.T.*, [1996] D.S.S.R. No. 90 (I.R.B.) (QL); *Re V.Y.F.*, [1996] D.S.S.R. No. 91 (I.R.B.) (QL); *Re G.E.K.*, [1996] D.S.S.R. No. 264 (I.R.B.) (QL); *Re O.R.C.*, [1997] C.R.D.D. No. 66 (I.R.B.) (QL); *Re C.R.H.*, [1997] C.R.D.D. No. 178 (I.R.B.) (QL); *Re B.W.L.*, [1997] C.R.D.D. No. 316 (I.R.B.) (QL); *Re S.E.X.*, [1997] C.R.D.D. No. 77 (I.R.B.) (QL); *Re J.K.D.*, [1997] C.R.D.D. No. 307 (I.R.B.) (QL); *Re T.B.E.*, [1997] C.R.D.D. No. 304 (I.R.B.) (QL); *Re D.E.A.*, [1998] C.R.D.D. No. 2 (I.R.B.) (QL); *Re J.M.E.*, [1998] C.R.D.D. No. 19 (I.R.B.) (QL); *Re F.V.Y.*, [1998] C.R.D.D. No. 20 (I.R.B.) (QL); *Re U.O.D.*, [1999] C.R.D.D. No. 106 (I.R.B.) (QL); *Re Y.J.E.*, [1999] C.R.D.D. No. 288 (I.R.B.) (QL); *Re N.P.Q.*, [1999] C.R.D.D. No. 249 (I.R.B.) (QL); *Re P.J.X.*, [2000] C.R.D.D. No. 128 (I.R.B.) (QL).

<sup>109</sup> See *Re A. (E.C.)*, [1993] D.S.S.R. No. 238 (I.R.B.) (QL); *Re X. (J.K.)*, [1992] C.R.D.D. No. 348 (I.R.B.) (QL). See also *O.P.K.*, *supra* note 106 (“... I moved back with my family and X went back to his family. We knew that we could not live together any more because of the pressure and the fear of exposure.”); *Re R.M.W.*, [1998] C.R.D.D. No. 76 (I.R.B.) (QL); *Re R.Z.L.*, [1997] C.R.D.D. No. 311 (I.R.B.) (QL).

<sup>110</sup> *IRPA*, *supra* note 1, s. 96:

A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

- (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
- (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

<sup>111</sup> See James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 66.

the *IRPA* has extended asylum protection not only to individuals who fear persecution, but also to those who believe on substantial grounds that they might be subject to torture, a risk to their life, or a risk of cruel and unusual treatment or punishment.<sup>113</sup>

Under the rules governing applications for permanent residency, it is not clear whether a same-sex partner is required to prove actual past persecution, or simply a well-founded fear of persecution, in order to waive the cohabitation requirement. The wording of the regulations suggests that a criterion other than the one used in refugee law is meant to apply, since the legislator opted for different wording. If so, it is possible that the immigration regulations create “a more stringent criterion than the one applied for people applying as refugees where they’re required to demonstrate that they have a well-founded fear of persecution.”<sup>114</sup> If actual persecution is required, and the persecution must be related to the gay or lesbian conjugal relationship,<sup>115</sup> the law is in effect telling potential immigrants that they must place themselves at risk, and actually endure persecution or penal control, before they can apply to come to Canada as common-law partners. Surely, the government did not intend this result, but the unfortunate choice of wording leaves this interpretation open to visa officers, IAD members, and the Federal Court.

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<sup>112</sup> Though past persecution can certainly be an important indicator of the treatment awaiting the claimant should they return home (*ibid.* at 87).

<sup>113</sup> *IRPA*, *supra* note 1, s. 97(1):

A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

- (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
- (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
  - (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
  - (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
  - (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
  - (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

<sup>114</sup> *Committee Evidence*, *supra* note 69 at 39.

<sup>115</sup> The wording of subsection 1(2) of the *IRPA Regulations* (*supra* note 7) seems to suggest that the persecution or penal control must be related to the inability to cohabit:

For the purposes of the Act and these Regulations, an individual who has been in a conjugal relationship with a person for at least one year *but is unable to cohabit with the person, due to persecution or any form of penal control*, shall be considered a common-law partner of the person. [emphasis added]

### 3. Till Heterosexual Death Do Us Part

While the issue of same-sex marriage is currently before the Supreme Court of Canada in the form of a reference,<sup>116</sup> gay men and lesbians can already get legally married in Ontario,<sup>117</sup> British-Columbia,<sup>118</sup> and Quebec.<sup>119</sup> In addition, same-sex marriage is also available in the Netherlands,<sup>120</sup> Belgium,<sup>121</sup> and more recently, Massachusetts.<sup>122</sup> In light of these legal developments, and given the absence of a specific definition of “spouse” in the *IRPA* and the *IRP Regulations*, it is necessary to ask whether same-sex individuals may marry each other and therefore be considered spouses for the purposes of immigration laws.

As mentioned previously, the meaning of “spouse” is related to the definition of marriage. Section 2 of the *IRP Regulations* states 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.”<sup>123</sup> Hence, for gay men and lesbians to be considered spouses for the purposes of immigration to Canada, their marriage must be considered legal in the country where it took place and under Canadian law.

At the time the act and the regulations were drafted and enacted, it was not expected that marriage would so quickly open up to lesbians and gay men in Canada. But it now appears to be the case that gay men and lesbians can meet the established criteria. This could happen in two ways. First, if a same-sex couple marries in a Canadian provincial or territorial jurisdiction that has recognized gay and lesbian marriages, they would become spouses under the *IRPA* and the *IRP Regulations*.

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<sup>116</sup> See Department of Justice Canada, News Release, “Minister of Justice Announces Reference to the Supreme Court of Canada” (17 July 2003), online: Department of Justice <[http://canada.justice.gc.ca/en/news/nr/2003/doc\\_30944.html](http://canada.justice.gc.ca/en/news/nr/2003/doc_30944.html)>.

<sup>117</sup> *Halpern v. Canada (A.G.)* (2003), 65 O.R. (3d) 161, (2003) 225 D.L.R. (4th) 529 (C.A.).

<sup>118</sup> *EGALE Canada v. Canada (A.G.)* (2003), 225 D.L.R. (4th) 472, [2003] 7 W.W.R. 22 (B.C.C.A.).

<sup>119</sup> *Ligue catholique pour les droits de l'homme c. Hendricks*, [2004] J.Q. No. 2593, J.E. 2004-724 (C.A.).

<sup>120</sup> The Netherlands was the first country to open up marriage to same-sex couples on 1 April 2001. See Kees Waaldijk, “Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands” in Robert Wintemute & Mads Andenæs, eds., *Legal Recognition of Same-Sex Partnership: A Study of National, European and International Law* (Oxford: Hart Publishing, 2001) 437 at 437.

<sup>121</sup> *Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil (1)*, 13 February 2003, online: Service public federal justice <[http://www.ejustice.just.fgov.be/cgi/article\\_body.pl?language=fr&caller=summary&pub\\_date=2003-02-28&numac=2003009163](http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=2003-02-28&numac=2003009163)>.

<sup>122</sup> See Pam Belluck & Warren St. John, “With Festive Mood, Gay Weddings Begin in Massachusetts” *The New York Times* (17 May 2004).

<sup>123</sup> The validity of a marriage in the jurisdiction where it took place is established through conflicts of law rules, specifically by demonstrating that the formal and essential requirements of marriage have been respected. See J.-G. Castel & Janet Walker, *Canadian Conflict of Laws*, 5th ed. (Toronto: Butterworths, 2002) at 16.1-16.14.



Second, a same-sex couple can now contract a legally valid same-sex marriage in the Netherlands, Belgium, and Massachusetts; this couple also would be in a position to establish the validity of the marriage under both the foreign jurisdiction's and Canadian law as required by the *IRP Regulations*.

Nevertheless, it would appear that immigration officials have until very recently opposed processing applications from lesbians and gay men who identify themselves as spouses in their immigration applications. In a letter dated 27 April 2004, officials from Citizenship and Immigration Canada informed a gay applicant that:

all sponsorships applications received for foreign nationals submitted on the basis of a same-sex marriage to a Canadian Citizen or Permanent Resident are to be held pending advice from the Department of Justice regarding the implications for immigration and legislation required to change the definition of marriage.<sup>124</sup>

Christine Morrissey of LEGIT confirms that federal immigration officials have told legally wed same-sex couples “that they can apply to immigrate to Canada, but that their applications will be put on hold until guidelines are set”<sup>125</sup> and a new definition of marriage is established by the federal government. Indeed, the Department of Citizenship and Immigration Canada's public information for Canadian citizens who wish to sponsor their partners provides that only a person of the opposite-sex who is married to a citizen can be sponsored as a spouse.<sup>126</sup>

Such a policy cannot be legally justified. First, the gay and lesbian marriage reference case will not be argued before the Supreme Court of Canada until the fall of 2004.<sup>127</sup> A final decision will take at least several months. The federal government will then have to draft, present, debate, and adopt legislation in both the House of Commons and the Senate before it can become the law of the land. If immigration officials insist on waiting for this process to end, anybody applying right now as same-sex married couples will have their applications “just sitting in a pile somewhere,” as Christine Morrissey points out.<sup>128</sup>

It appears that the Department of Citizenship and Immigration has recently recognized the legal invalidity of its policy. On 18 May 2004, Department officials announced that, as an interim policy, they would begin recognizing the marriages of

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<sup>124</sup> Letter from the Case Processing Centre, Mississauga, Citizenship and Immigration Canada, to Michael James Blair (27 April 2004) on file with the author, cited with the permission of Michael Blair [Letter to Blair].

<sup>125</sup> Jennifer Pak, “Same-Sex Marriage and Immigration Don't Go Hand in Hand” *Capital News Online* (26 September 2003), online: [Capitalnews online <http://temagami.carleton.ca/jmc/cnews/26092003/n1.shtml>](http://temagami.carleton.ca/jmc/cnews/26092003/n1.shtml).

<sup>126</sup> See Shawna Gnutel, “Same-Sex Marriage Not Accepted Here: Federal Immigration Policy Trumps Provincial Marriage Licence” *Capital Xtra!* (6 May 2004) 16.

<sup>127</sup> EGALE, News Release, “Government Unnecessarily Delays Equality” (28 January 2004), online: EGALE <<http://www.egale.ca/index.asp?lang=E&menu=3&item=921>>.

<sup>128</sup> Pak, *supra* note 125.

same-sex couples.<sup>129</sup> However, the new policy remains arbitrary and discriminatory. Indeed, it is to apply only to couples where one spouse is a Canadian citizen or permanent resident, and only to marriages celebrated in Ontario, British Columbia, and Quebec.<sup>130</sup> It does not include married couples who wed in other jurisdictions that allow for same-sex marriage like the Netherlands, Belgium, or Massachusetts, or to couples consisting of two foreign nationals.

Under the law, same-sex partners cannot be arbitrarily excluded from the spousal category of immigration. If a same-sex couple meets the established legal requirement, which is to prove the validity of their marriage under Canadian law and the foreign law where the marriage took place, they should be processed as spouses. It is clear that some gay and lesbian couples can now meet the required legal test. Immigration officials therefore have no legal justification to continue delaying the proper application of the law to all legally married same-sex couples.

A spokesperson for Citizenship and Immigration Canada states that couples can avoid the delay by applying as common-law or conjugal partners.<sup>131</sup> But important differences remain among the three categories, which explain why some legally married same-sex couples favour applying as spouses. As John Hart points out, in the context of family reunification, “the institution of marriage is heaven sent” as two married individuals can generally be assumed to be a family unit.<sup>132</sup> Marriage retains another important legal advantage: unlike common-law partners, married couples do not have to show that they have lived together continuously for one year. In addition, contrary to conjugal partners, a spouse may be included as a dependent of an individual applying to immigrate to Canada. Conjugal partners can only immigrate if they are in a relationship with a Canadian citizen or a permanent resident in Canada.

### **B. The Application of the IRPA and the IRP Regulations**

While this article has exposed several defects in the legislative regime governing the immigration of same-sex partners, the *IRPA* and the *IRP Regulations* have nevertheless established a more open and effective process by which gay men and lesbians may immigrate to Canada based on their conjugal relationships. Keeping the shortcomings of the *IRPA* and *IRP Regulations* in mind, the discussion will now turn to the examination of how the new provisions will be applied to gay and lesbian applicants.

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<sup>129</sup> Canadians for Equal Marriage, News Release, “Immigration Department to Recognize Marriages of Same-Sex Couples” (18 May 2004).

<sup>130</sup> *Ibid.* See also “Family Class Immigration”, online: Citizenship and Immigration <<http://www.cic.gc.ca/english/sponsor>>.

<sup>131</sup> Pak, *supra* note 125. A Canadian applicant was also advised that his application to sponsor his foreign spouse could be quickly processed under the common law category, despite the fact that the couple was legally wed in Ontario and applied as spouses: Letter to Blair, *supra* note 124.

<sup>132</sup> John Hart, *Stories of Gay and Lesbian Immigration: Together Forever?* (New York: Harrington Park Press, 2002) at 8.

As the act and the regulations were enacted less than two years ago, it is not yet possible to review the actual practice of visa officers, IAD members, and the Federal Court. The discussion that follows will, however, highlight issues that may be of concern when applying the new law and regulations to same-sex partners. It is argued that visa officers and judges need to account for the specific conditions that surround lesbian and gay immigration applications. If officials fail to recognize the particular context in which same-sex partners present their visa requests, gay men and lesbians will continue to be denied a fair, just, and equitable process.

### 1. Homophobia 101

Homosexuality remains a very controversial topic for most Canadians. While the lives of Canadian lesbians and gay men have improved in the last twenty years, the level of discrimination, homophobia, and violence remains very high. It is important that visa officers and judges reflect on their own standpoints, biases, and presumptions about homosexuality in order to fairly assess appeals from lesbian and gay couples. It will be important to identify any prejudicial, stereotypical, or discriminatory views or behaviours that may underlie particular decisions.

Immigration officials and judges should also keep in mind that it may be very difficult for lesbians and gay men to speak about their sexual orientation and their lives, particularly to state officials. Many may feel shame, embarrassment, and fear about speaking of something that is so personal and private. For some applicants, in order to qualify for a visa, they will be declaring their homosexuality for the first time, and sometimes in countries where such behaviour is against the law. As one Australian claimant stated, he had not been “out” as gay for very long so “it was very difficult to give such personal details to a government department.”<sup>133</sup>

In many countries, government investigations of the personal and social lives of gay men and lesbians is not the relatively benign process it may be in Canada. Repression of lesbians and gay men is state sponsored or encouraged, so it is difficult for many to imagine that state officials could possibly be anything less than hostile to discussions of homosexuality. Some individuals believe that to speak frankly about their intimate life and sexual orientation would only prejudice their cases. Immigration officials should ensure that hearings provide a safe place for gay men and lesbians to speak about their relationships. Applicants and appellants should not be questioned regarding their actual sexual practices but rather on elements proving the conjugality of their relationship with their partner.

### 2. Bona Fide *Homosexualis*

While sponsorship applications from same-sex couples may present unique issues and challenges, the legal issues to be determined will be the same as with

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<sup>133</sup> *Ibid.* at 48.

heterosexual cases. Whether gay men and lesbians apply as spouses, common-law partners, or conjugal partners, they will have to prove that their relationships are bona fide. In addition, they will be required to establish the conjugal nature and duration of the relationship.

Experience shows that couples tend to demonstrate the bona fides of their relationships in several ways. Prospective immigrants are interviewed by immigration officers, who determine the credibility of the partners. In addition, couples submit supporting documentation: phone bills, letters, plane tickets, boarding passes, visa stamps, photos, and a history of the relationship. Now, it will also be possible for some gay men and lesbians to add as proof of the genuineness of their relationship marriage certificates, wedding photos, or proof of civil union or partnership registration. If they have cohabited, they can also present rent receipts, joint leases, joint bank accounts and credit card accounts. Finally, applications are often accompanied by statutory declarations from individuals with personal knowledge that the relationship is genuine and continuing.<sup>134</sup>

Certainly, more than any other area of government regulation, lesbian and gay immigrants will have to prove that their relationships are genuine and successful enough to meet government approval. Since the quality of relationships will be under scrutiny, visa officers, and eventually IAD members and Federal Court judges, in assessing the credibility of witnesses or in drawing legal conclusions from the facts, will have to be careful to avoid assimilating same-sex relationships into those of their heterosexual counterparts. As will be outlined below, many facets of the lives of gay men and lesbians are substantially and significantly different from heterosexual couples. While it is true that the objective behind Canada's family reunification policy is to facilitate the migration of a particular type of family unit,<sup>135</sup> the inclusion of gay and lesbian families now requires decision-makers to expand their conception of what constitutes the favoured family unit. In demanding proof of the bona fides of the relationship, flexibility will be required to ensure that inappropriate, discriminatory, or heterosexist values are not imposed on same-sex partners.

Couples experience and live their sexual orientation in many different ways, depending on their country of origin, gender, culture, social class, education, religion, family background, and socialization. There is no uniform way in which lesbians and gay men recognize and act on their sexual orientation. Answers to questions about a person's same-sex relationship may, therefore, vary widely from one couple to another. Lesbians, gay men, and bisexual people in Canada conduct their personal relationships in a wide variety of ways. While the experience of lesbians and gay men in this country is diverse, it is nothing compared to the tremendously divergent and different experiences of sexual minorities around the world. Moreover, individuals

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<sup>134</sup> See *Outlaws & Inlaws*, *supra* note 25 at 110-11.

<sup>135</sup> For instance, Canada's family reunification provisions do not allow for the sponsorship of polygamous or underage marriages.

who have a different sexual orientation or gender identification from the majority are invariably among the most marginalized and oppressed groups in any society.

Given the diversity of the global context, it is dangerous to make assumptions about the relationships of members of sexual minorities. It is true, however, that one aspect of the lives of lesbians and gay men that is universal is the pervasive societal rejection of their sexual orientation and their relationships. There is no country where a gay man or lesbian can grow up free of either discrimination, persecution, or repression. While many same-sex couples will be able to adduce the necessary evidence to demonstrate that they have been in a long-standing, bona fide conjugal relationship, they may present very different profiles and evidence in relation to their relationship than would a heterosexual couple.

As with other cases, couples may provide photographs, letters, testimonials, phone bills, proof of visit, and other documentation. In fact, Canadian immigration officials have confirmed that this approach worked well in practice when same-sex couples were covered by the “humanitarian and compassionate” policy. It is, however, important to bear in mind that discrimination and persecution often force gay men and lesbians to live underground, making it more difficult for them to collect the documentation required to demonstrate a legitimate partnership to officials. Some people may not have disclosed their sexual orientation to their family and friends. Such disclosures are often difficult and may lead to hostile and violent reactions by family members. Immigration officials need to contextualize same-sex relationships in order to properly determine the weight to place on the openness or secrecy of the relationship.

To give another example of the need to take the larger social context into account, consider the situation of gay men and lesbians who may have been married or involved in heterosexual relationships. As mentioned above, gay and lesbian refugee claimants have testified about the pressure to marry in their cultures. This pressure often originates with private actors, particularly family members. Moreover, family pressure and violence are not the only reasons gay men and lesbians have been involved in heterosexual relationships: repression of their sexual orientation, genuine attraction to a member of the opposite-sex, desire to socially conform, and need to hide one’s sexual orientation may all explain past heterosexual relationships. This reality must be considered when same-sex couples are making proof of their relationships.

It is interesting, at this point, to examine the experience in Australia where gay men and lesbians have been able to sponsor their partners since 1985.<sup>136</sup> In fact, Australia was one of the first countries to amend its immigration policies to allow for same-sex sponsorship. Yet, in developing its policy toward gay and lesbian partners, the Australian government was nervous about the type of homosexual relationships it

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<sup>136</sup> See Hart, *supra* note 132 at 2.

would validate for immigration purposes. For instance, in 1988, the Australian Immigration Minister defended the new policy on same-sex immigration by making it clear that only “monogamous” gay and lesbian relationships met the required criteria for immigration.<sup>137</sup> Commentators agreed that both heterosexual and homosexual relationships should be exclusive, in that they are, for prospective immigrant couples, of a different quality than any other relationships they may have. The government’s policy was criticized for this focus on monogamy, or sexual exclusiveness, as a specific requirement for gay men and lesbians.<sup>138</sup>

The Australian government was also nervous about significant age differences between gay partners, especially when the non-Australian partner was substantially younger.<sup>139</sup> Gay and lesbian activists counselled prospective immigrants to address the issue head-on in their applications. While they considered the policy discriminatory, as heterosexuals with significant age differences did not face the same scrutiny, activists suggested to gay men and lesbians that they submit psychiatric reports and family and community declarations of support of their relationship.<sup>140</sup> The Australian government’s nervousness about both sexual behaviour and age differences is certainly a reflection of larger discriminatory and homophobic views—views that Canadian officials must avoid in scrutinizing the quality of same-sex relationships.

In a study conducted of Australian binational couples many individuals expressed concern about the models they felt they were forced into by the immigration policy. Here are some of the comments made by gay men and lesbians who experienced the Australian immigration process:

The models that we were forced into by the department caused a lot of stress. Joint bank accounts, cohabitation, etc. There are other ways to have a relationship! It feeds off and enforces dependency.<sup>141</sup>

I feel I’ve been expected to be involved in a relationship likened to marriage whereas I’d like to break that mold for a better sort of relationship that has room for growth and individuality.<sup>142</sup>

I feel that the expectations of the Department of Immigration are basing the elements of a relationship on heterosexual standards and are trying to validate and contain lesbian and gay relationships in the same pattern, e.g., living together, lifelong commitment. Sharing bank accounts, loss of individuality. Does it have to be like this to be genuine?<sup>143</sup>

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<sup>137</sup> *Ibid.* at 29.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.* at 37.

<sup>140</sup> *Ibid.* at 38. For instance, research exists that demonstrates the success of age-asymmetrical male couples. See Hart, *ibid.*, citing David P. McWhirter & Andrew M. Mattison, *The Male Couple: How Relationships Develop* (Englewoods Cliffs, N.J.: Prentice-Hall, 1984).

<sup>141</sup> Hart, *ibid.* at 84-85.

<sup>142</sup> *Ibid.* at 86.

<sup>143</sup> *Ibid.*

Others spoke of the equality that exists between gay and lesbian partners, because of the absence of gender roles:

Lacking the difference in gender, there is equality between gay partners that is expressed in attitudes toward each other and is exemplified in their maintenance of financial separateness during the early years of the relationship.<sup>144</sup>

Thus, there are important differences in how same-sex couples meet, socialize, and present themselves to their families, communities, and the world. There may even be individuals in same-sex partner applications who do not identify as “gay” or “lesbian”.<sup>145</sup>

Research does support the claim of many gay men and lesbians that their relationships can be substantively different from those of traditional heterosexual couples.<sup>146</sup> For prospective gay and lesbian immigrants, the dilemma confronting them is how to form relationships that are personally satisfying while still conforming to government requirements.<sup>147</sup> For immigration officials and judges, the challenge is to assess the genuineness of gay and lesbian couples without using markers that may only apply in the context of heterosexual relationships. It will be important to consider the particular social and political context surrounding a same-sex relationship before concluding on the genuineness of the relationship.

### 3. Persecution: Making the Case

For gay men and lesbians claiming to be common-law partners who have not been able to cohabit due to persecution or penal control, assessing the credibility of their claims of persecution will require immigration officials to have some knowledge and information about both the gay and lesbian communities in the country of origin and the legal and social reality of sexual minorities. To the extent possible, visa officers should encourage parties to provide documentation and expert testimony on the situation of sexual minorities in the country of origin of the foreign national. At the same time, it is important for individual visa officers, and in the context of a sponsorship appeal, IAD members, to recognize that gay men and lesbians will encounter some difficulties in providing objective evidence of persecution. In many

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<sup>144</sup> *Ibid.* at 78 [footnotes omitted].

<sup>145</sup> *Ibid.* at 56.

<sup>146</sup> See Lawrence A. Kurdek, “Relationship Outcomes and Their Predictors: Longitudinal Evidence from Heterosexual Married, Gay Cohabiting, and Lesbian Cohabiting Couples” (1998) 60 *J. of Marriage and the Family* 553; Richard A. Mackey, Matthew A. Diemer & Bernard A. O’Brien, “Psychological Intimacy in the Lasting Relationships of Heterosexual and Same-Gender Couples” (2000) 43 *Sex Roles* 201; Christopher Carrington, *No Place Like Home: Relationships and Family Life Among Lesbians and Gay Men* (Chicago: University of Chicago Press, 1999); Stephen M. Haas & Laura Stafford, “An Initial Examination of Maintenance Behaviors in Gay and Lesbian Relationships” (1998) 15 *Journal of Social and Personal Relationships* 846.

<sup>147</sup> See Hart, *supra* note 131 at 35.

countries, very little information is available on human rights violations against sexual minorities. While an increasing number of international human rights groups are beginning to document abuses against lesbians and gay men, they remain a minority.<sup>148</sup> Many non-governmental organizations maintain that the rights of homosexuals are not human rights issues.<sup>149</sup> The lack of documentation is often the result of “the underlying climate of homophobia,”<sup>150</sup> which permeates most countries. One human rights activist in Ecuador notes that while human rights abuses are known to occur, “people are too frightened to come forward and denounce them.”<sup>151</sup> It may, therefore, be difficult for foreign gay men or lesbians to provide anything more than their own testimony about the persecution they may face living in a same-sex relationship in their country.

It is also important to note that other factors may intersect with sexual orientation. Gender is an important element to keep in mind; there is often a very important difference between the kind of discrimination and persecution faced by lesbians as compared to gay men.<sup>152</sup> Moreover, sexual orientation may be only one aspect of the persecution faced by transvestites, transsexuals, or people with HIV/AIDS. Immigration officers need to assess the extent to which factors other than sexual orientation contribute to the persecution faced by lesbian and gay couples.

Finally, personal interviews, and the handling of the file more generally, must be done confidentially. The risks involved for gay men and lesbians in publicly declaring their homosexuality can be very serious. In addition, a measure of confidentiality may be required in relation to other family members: since, as mentioned previously, they are often the agents of persecution.

Related to the issue of confidentiality is the use of interpreters in either the interview process conducted by immigration officials or, in the case of sponsorship appeals, in the IAD hearing room. In the refugee context, the use of interpreters has occasionally proved to be problematic in sexual orientation claims.<sup>153</sup> In some cases, interpreters and claimants come from the same ethnic or cultural community and a claimant may fear that speaking openly about his or her sexual orientation will result in it being known in their local community. In other cases, the interpreters have

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<sup>148</sup> See Nicole LaViolette, “Proving a Well-Founded Fear: The Evidentiary Burden in Refugee Claims Based on Sexual Orientation” in Sydney Levy, ed., *Asylum Based on Sexual Orientation: A Resource Guide* (San Francisco: International Gay & Lesbian Human Rights Commission, 1996), I.D/3 at 5-9.

<sup>149</sup> *Ibid.* at 5, n. 22.

<sup>150</sup> *Ibid.* at 6 [footnotes omitted].

<sup>151</sup> *Ibid.*

<sup>152</sup> See Nicole LaViolette, “Les revendications du statut de réfugié fondées sur le sexe : constats et orientations nouvelles” (2001) 13 C.J.W.L. 285 at 305-10.

<sup>153</sup> This concern has been raised by several members of the Convention Refugee Division of the Immigration and Refugee Board during training professional development sessions conducted by the author in 1995, 1999, and 2003.



reacted negatively to issues of homosexuality presented by claimants. It is therefore important to be aware that the use of interpreters may present particular challenges in cases dealing with gay men and lesbians.

#### 4. I Take Thee to Be My Civil Union Partner

Other jurisdictions have established official legally binding mechanisms for solemnizing same-sex relationships.<sup>154</sup> For example, gay couples can enter into civil unions in Quebec<sup>155</sup> and Vermont;<sup>156</sup> lesbian couples can register their partnerships in Denmark<sup>157</sup> and Iceland.<sup>158</sup>

The most widespread mechanisms available to same-sex couples are some form of registered partnership. While registered partnership schemes vary from one jurisdiction to another, the existing models possess some common features. Their purpose is usually to recognize, validate, and support committed, mutually supportive personal relationships between unmarried individuals. Most registered partnership policies define who may register, for instance, by setting cohabitation or age requirements. Furthermore, an essential element of this new civil status is the fact that individuals make an official record of their partnerships. This process allows individuals to register with various levels of government or private employers by completing a formal declaration or by obtaining an official licence. It is also true that the majority of registered partnerships confer a number of entitlements and obligations. In this fashion, registered partnerships regulate rights between partners, entitlements and obligations involving third parties, and in some cases, parenting rights. Finally, registered partnership programs define a process by which the partners may dissolve the formal relationship.

In the case of civil unions or registered partnerships, same-sex couples have publicly affirmed their relationship and commitment, voluntarily assume legal rights and obligations, and have documentation to evidence the relationship. It is therefore possible that gay and lesbian couples involved in an immigration sponsorship application will submit proof of a legally binding relationship.

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<sup>154</sup> See Nicole LaViolette, "Waiting in a New Line at City Hall: Registered Partnerships as an Option for Relationship Recognition Reform in Canada" (2002) *Can. J. Fam. L.* 115.

<sup>155</sup> "Civil Union", online: Justice Québec <<http://www.justice.gouv.qc.ca/english/publications/generale/union-civ-a.htm>>.

<sup>156</sup> *An Act Relating to Civil Unions*, 1999 Vt. Acts & Resolves No. 91, H.847, online: State of Vermont Legislature <<http://www.leg.state.vt.us/docs/2000/acts/act091.htm>>.

<sup>157</sup> *The Danish Registered Partnership Act*, D/339-H-ML, No. 373 (1 June 1989), online: Cybercity Denmark <<http://users.cybercity.dk/~dko12530/s2.htm>>.

<sup>158</sup> *Iceland Registered partnership law, 1996* (1 July 1996), online: la France Gaie et Lesbienne <<http://www.france.qrd.org/texts/partnership/is/iceland-bill.html>>. In Iceland, the institution is known as "confirmed cohabitation": Caroline Forder, "European Models of Domestic Partnership Laws: The Field of Choice" (2000) 17 *Can. J. Fam. L.* 371 at 390.

During the hearings of the Standing Committee on Citizenship and Immigration on the *IRP Regulations*, gay and lesbian groups suggested that solemnization of a gay or lesbian relationship in another jurisdiction should be sufficient to establish conjugality.<sup>159</sup> In those cases, they argued, the prohibition in section 4 of the *IRP Regulations* on bad faith relationships is a sufficient safeguard, and no additional evidentiary criteria should be met. Certainly, for individuals applying as common-law partners or conjugal partners, proof of a legally binding relationship in another jurisdiction may be sufficient to meet the conjugality criteria. This will depend on the nature of the registered partnership or civil union. Immigration officials should enquire into the nature of the obligations and entitlements that attach to a specific registered partnership in order to determine if it meets the Supreme Court's definition of conjugality as set out in *M. v. H.* Proof of the solemnization of the relationship in a foreign jurisdiction may be sufficient to establish the cohabitation requirement if the registered partnership also requires at least one year cohabitation.

## Conclusion

This article has reviewed the recent developments in Canadian immigration law as they pertain to same-sex couples. In canvassing the historical development of immigration policies, the discussion has shown that Canada has moved from a total ban on gay and lesbian immigration, to providing a discretionary remedy for same-sex couples wishing to be reunited, and finally, to a formal inclusion of gay and lesbian couples in the family sponsorship provisions of the 2002 *IRPA* and *IRP Regulations*.

The analysis has, however, revealed that previous discriminatory policies continue to impact same-sex couples. The *IRPA* and *IRP Regulations* fail to remove unnecessary distinctions between couples. Married spouses retain the easiest access to permanent residency, while common-law partners are generally required to meet a more stringent cohabitation requirement. To waive the cohabitation requirement, common-law partners may have to prove persecution on a more stringent standard than do refugees. Finally, while conjugal partners are spared the cohabitation criterion, they can only apply if they are in a conjugal relationship with a Canadian citizen or permanent resident. They cannot immigrate as dependents of foreign nationals who have gained admission to Canada. This hierarchy of relationships is unnecessary. *All* prospective couples should be required to demonstrate a conjugal relationship of at least one-year duration. Cohabitation should be examined as one of several factors demonstrating the genuineness and conjugal nature of the relationship.

In addition to highlighting the shortcomings of the actual legislation and laws, this analysis has also tried to identify issues that may arise in the actual application of the family reunification provisions of the immigration act and regulations. Several issues make applications from same-sex partners unique and different from their

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<sup>159</sup> *Committee Evidence*, *supra* note 69 at 44-45.

heterosexual counterparts. For instance, universal discrimination, persecution, and repression against sexual minorities impact significantly on how gay men and lesbians conduct their relationships. The result is that lesbians and gay men who enter into relationships often face unique struggles, and those struggles will often move them away from, or place them in opposition to, their families, friends, communities, and society in general. The ability to conform to traditional heterosexual models must therefore not be a requirement when immigration officials assess the genuineness of a same-sex relationship.

Given that legislative changes are not soon expected to correct the problems identified with the *IRPA* and *IRP Regulations*, it is even more important that the family reunification provisions be applied in a way that ensures true equality for gay and lesbian immigrants. If immigration officials ignore the larger context in which lesbian and gay relationships are formed, the new law and regulations will not deliver the open, transparent, and equitable process the government promised when it enacted the *IRPA* and *IRP Regulations*.

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