

**ALL IN THE FAMILY?
THE NEW REALITIES OF FAMILY REUNIFICATION**

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By Nathan A. Po, McCuaig Desrochers LLP

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SECTION 1: INTRODUCTION

The landscape of Canada’s family reunification immigration programs has evolved significantly in the last two years. This paper aims to outline the most significant changes that have been made to family sponsorship programs, discuss how these changes have been dealt with in recent jurisprudence, consider how such changes might affect our clients on a practical level, and consider alternative strategies and application streams.

SECTION 2: STATUTORY PROVISIONS

The following sections, *inter alia*, govern family sponsorship applications in Canada generally:

Reunification as Objective. The reunification of families in Canada is an objective of our legislation. **IRPA s.3(1)(d)**

Family Reunification. 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. **IRPA s.12**

Sponsor: Eligibility. In order to be a sponsor, the sponsor must:

1. Be a citizen or permanent resident. **IRPA s.13(1)**
2. Be at least 18 years of age. **IRPR s.130(a)**
3. Reside in Canada (unless the sponsor is a Citizen and is seeking to sponsor a spouse or dependent child, in which case the sponsor must show that her or she will reside in Canada when the applicant becomes a permanent resident). **IRPR s.130(1)(b) and s.130(2)**
4. Have filed an undertaking. **IRPR s.130(c)**
5. If the sponsor became a permanent resident after being sponsored as a spouse/common-law partner and is seeking to sponsor a spouse/common-law partner, at least 5 years have passed since the sponsor became a permanent resident. **IRPR s.130(3)**

Sponsor: Other Requirements. Notionally separate from sponsorship *eligibility* are the following requirements:

1. The Sponsor must intend to fulfill the obligations of the sponsorship undertaking. **IRPR s.133(1)(b)**
2. The Sponsor must not be subject to a removal order. **IRPR s.133(1)(c)**
3. The Sponsor must not be detained in a penitentiary, jail, reformatory or prison. **IRPR s.133(1)(d)**
4. The Sponsor must not have been convicted of:
 - a. an offence of a sexual nature (including threats and attempts),
 - b. a violent indictable offence punishable by a maximum term of imprisonment of at least 10 years (or an attempt to commit such an offence), or
 - c. an offence that results in bodily harm (including threats and attempts) against a:
 - i. current or former family members of the sponsor;

- ii. current or former family members of a family member or conjugal partner of the sponsor;
- iii. current or former family members of a relative of the sponsor or the sponsor's family member;
- iv. current or former conjugal partner of the sponsor, as well as current and former family members of the conjugal partner's relatives;
- v. relative of the conjugal partner of the sponsor, or that relative's current or former family members
- vi. a child under the current or former care and control of the sponsor, their current or former family member, or conjugal partner;
- vii. a child under the current or former care and control of a relative of the sponsor or a current or former family member of that relative; and
- viii. someone with whom the sponsor dates or has dated, whether or not they live together, or a family member of that person.

IRPR s.133(1)(e)¹

- 5. The Sponsor must not have been convicted outside Canada of an offence which would constitute an offence under subsection (e). **IRPR s.133(1)(f)**
- 6. The Sponsor must not be in default of any undertaking or court-ordered support payment obligation. **IRPR s.133(1)(g)**
- 7. The Sponsor must not be in default of the repayment of any debt payable to Her Majesty in right of Canada. **IRPR s.133(1)(h)**
- 8. The Sponsor must not be an undischarged bankrupt. **IRPR s.133(1)(i)**
- 9. The Sponsor must have a total income that meets or exceeds the minimum necessary income (as calculated according to IRPR s.134) **IRPR s.133(1)(j)**. This minimum necessary income requirement does not apply if the sponsor is seeking to sponsor his spouse, common-law partner, conjugal partner or dependent children **IRPR s.133(4)**.
- 10. The Sponsor must not be in receipt of social assistance for a reason other than disability. **IRPR s.133(1)(k)**

Period that Sponsorship Eligibility and Requirements Must be Met. Even after the sponsorship application is approved, the sponsor and the sponsorship undertaking must continue to meet all R133 requirements at the time of visa issuance - **IRPR s.120**. Similarly, a visa cannot be issued if the sponsor no longer meets any sponsorship requirements of the Act - **IRPA s.11(2)**.

¹ As amended November 17, 2011 to expand the list of relatives in response to *CIC v. Brar*, 2008 FC 1285 where the Federal Court highlighted a gap in the previous regulation which allowed a man convicted of killing his brother's wife to sponsor his own wife.

Member of the Family Class: Qualifying Relationships. “Member of the family class” means the following relatives of the sponsor:

1. Spouse, common-law or conjugal partner. **IRPR 117(1)(a)**
2. Dependent child. **IRPR 117(1)(b)**
3. Parents. **IRPR 117(1)(c)**
4. Grandparents. **IRPR 117(1)(d)**
5. A person whose parents are deceased, who is under 18 years of age and not a spouse or common-law partner, and who is the sponsor’s sibling, niece/nephew, or grandchild. **IRPR 117(1)(f)**
6. A person, who is under 18 years of age, who the sponsor intends to adopt in Canada if certain requirements are met. **IRPR 117(1)(g)**
7. A residual relative. If the sponsor has no close relatives who are Canadian citizens or permanent residents, and also has no one else in the world who is otherwise a “member of the family class”, the sponsor can sponsor a relative (related by blood or adoption), regardless of age. **IRPR 117(1)(h)**

Conditional Permanent Residence for Sponsored Spouses/Partners: Any individual who obtains permanent residence as a result of a spousal or partner sponsorship will be obtaining status that is conditional on him or her cohabiting in a conjugal relationship with his or her sponsor for a period of two years from the day that they become a permanent resident (subject to certain exceptions discussed below). **IRPR 72.1 to 72.4**

SECTION 3: NEW AMENDMENTS TARGETING MARRIAGE FRAUD

3.1. THE FIVE YEAR SPONSORSHIP BAR

On March 2, 2012, an amendment to the Immigration and Refugee Protection Regulations introducing the so-called “5 year sponsorship bar” came into force. The amendment added the following subparagraph to section 30 of the regulations.

Five-year requirement

(3) A sponsor who became a permanent resident after being sponsored as a spouse, common-law partner or conjugal partner under subsection 13(1) of the Act may not sponsor a foreign national referred to in subsection (1) as a spouse, common-law partner or conjugal partner, unless the sponsor

(a) has been a permanent resident for a period of at

least five years immediately preceding the day on which a sponsorship application referred to in paragraph 130(1)(c) is filed by the sponsor in respect of the foreign national; or

(b) has become a Canadian citizen during the period of five years immediately preceding the day referred to in paragraph (a) and had been a permanent resident from at least the beginning of that period until the day on which the sponsor became a Canadian citizen.

The stated purpose of the amendment is to “create a disincentive for a sponsored spouse or partner to use a relationship of convenience as a means of circumventing Canada’s immigration laws, abandoning their sponsor soon after becoming a PR, then seeking to sponsor a new spouse or partner.”²

The amendment can also be seen as creating some degree of symmetry between the level of obligation undertaken by the Canadian sponsor and the sponsored spouse. Whereas the Canadian sponsor is subject to a three year financial undertaking and continues to bound by his or her undertaking even after relationship breakdown, prior to the amendment of R130, the sponsored spouse could leave their sponsor upon obtaining status and enjoy his or her status without any continuing restrictions or obligations.

The 5 year sponsorship bar was enacted without any exceptions that might provide relief in extenuating circumstances. As a result, a sponsored spouse or partner will not be able to sponsor another spouse or partner for five years even if faced with genuine relationship breakdown, or the death of the sponsor.

3.1.1. H&C consideration at the IAD to relieve from 5 year bar?

Does the Immigration Appeal Division have the jurisdiction to consider humanitarian and compassionate considerations in order to relieve against a refusal of a spousal sponsorship application based on R130(3)? While there are not yet any reported decisions on the issue, it must be recalled that the IAD cannot consider humanitarian and compassionate considerations unless the sponsor is “a sponsor within the meaning of the regulations”³. While a sponsor’s failure to meet one or more of the requirements

² Regulation Amending the IRPR, Canada Gazette, Part II, March 14, 2012, Vol. 146, No. 6. - Regulatory Impact Analysis Statement

³ IRPA s.65

set out in IRPR 133(b) to (k) (e.g. minimum necessary income, receipt of social assistance other than for disability etc.) can be overcome at the IAD via H&C consideration, the IAD cannot consider H&C factors if the sponsor is not “a sponsor” as described in IRPR 130.

As the 5 year sponsorship bar was drafted as an amendment to IRPR 130 (which conceptually governs whether someone is or isn't a sponsor) rather than as an amendment to IRPR 133 (which provides the remaining sponsor qualifications) it is unlikely that the IAD would have the jurisdiction to overcome the sponsorship bar on humanitarian and compassionate grounds.

3.1.2. Ability to request H&C (s.25) overseas despite 5 year bar?

The 5 year sponsorship bar does not contain any prescribed exceptions that might temper the harshness of its application in certain situations. If exigent circumstances exist as to why it would be a particular hardship for a potential sponsor to wait for the 5 year period to lapse, it would remain open for the sponsor (just as he or she would do in the case where a family member is excluded as a result of R117(9)(d)) to submit their application to CPC-Mississauga with the expectation that it be refused and indicating on the sponsorship application that, if they are found ineligible, that they wish that the application still be forwarded to the visa office for continued processing. The principal applicant could then request an exemption from the requirement to have an eligible sponsor pursuant to IRPA s.25 on a humanitarian and compassionate basis. As with R117(9)(d) cases, it should be noted that if the H&C application is refused by the visa officer, the only real recourse would be judicial review as the IAD would lack jurisdiction to consider the H&C factors present in the case and the individual is otherwise ineligible to be sponsored.

Despite calls from the CBA and others that the sponsorship bar be reduced from 5 years to 3 years, CIC maintained that a 5 year bar was “sufficiently long to discourage fraud without being overly onerous for those who have suffered a legitimate relationship break down” especially considering that “a sponsored spouse or partner becomes a permanent resident on the basis of their relationship with their sponsor”⁴. H&C submissions would have to anticipate the fact that legislators have considered and accepted that sponsored spouses will suffer some degree of hardship even if they experience a legitimate relationship breakdown.

⁴ Canada Gazette, Part II, March 14, 2012, *supra*.

3.2. TWO YEAR PERIOD OF CONDITIONAL PERMANENT RESIDENCE

After the implementation of the 5 year sponsorship bar the government moved quickly to publish proposed regulations that would next introduce a 2 year period of conditional permanent residence for sponsored spouses and sponsored common-law/conjugal partners.

The 2 year period of conditional permanent residence came into force on October 25, 2012 and affects all individuals who became permanent residents on or after that date through spousal/partner sponsorship.

Set out in Paragraphs 72.1 to 72.4 of IRPR, the condition requires that the sponsored spouse or partner cohabit with their sponsor in a conjugal relationship for a period of two years after the day that he or she becomes a permanent resident. If the sponsored spouse or partner fails to meet this condition they can be stripped of their permanent resident status and removed from Canada (subject to a couple of notable exceptions that are discussed below).

Other than being subject to the two year cohabitation requirement, the permanent resident status of such individuals is otherwise no different from any other permanent resident and they have all of the rights and obligations of other permanent residents.

3.2.1. Application of Conditional Permanent Residence Period

The two year period of conditional permanent residence does not apply to all sponsored spouses or common-law/conjugal partners. The permanent resident status of the sponsored spouse or common-law/conjugal partner will not be conditional in the following circumstances:

1. **Long term relationship.** The condition does not apply if the sponsored person has been the spouse, common-law or conjugal partner of the sponsor for more than two years at the time that the sponsorship application is filed. **IRPR 72.1(2)(b)**
2. **Children in common.** The condition does not apply if the sponsored person and the sponsor had a child together at the time that the sponsorship application is filed. **IRPR 72.1(2)(c)**

3.2.2. Investigations and Ending the Condition

The condition ends two years after the day on which the sponsored person becomes a permanent resident and CIC's Global Case Management System (GCMS) will automatically remove the tracking of the condition once the two year period ends so long as the case is not currently being investigated.⁵ Unlike other jurisdictions, the person will not make a formal application to have the condition removed by furnishing proof of cohabitation.

The absence of a formal application to have the condition lifted will be a boon for the majority of affected individuals (who by in large will not be required to show proof of compliance); however, for others, the wording of the regulations should create some cause for concern. While CIC has indicated that the tracking of the condition will be automatically removed from their computer system⁶, the regulations specifically allow for a finding of non-compliance to be made *after* the two year conditional period has come to an end. Notably, IRPR 72.1(4) requires that a permanent resident provide evidence of compliance if an officer has reason to believe that the individual is not complying *or has not complied* with the condition. Similarly, IRPR 72.4 states:

Clarification

72.4 For greater certainty, for the purposes of subsection 27(2) of the Act, a determination as to whether the permanent resident has failed to comply with the condition set out in subsection 72.1(1) *may be made during or after the two-year period* referred to in subsection 72.1(1).

Sections 72.1(4) and 72.4 will create a great deal of uncertainty and distress for individuals who have not met the condition, those who are uncertain as to whether the condition applies to them (e.g. perhaps they are unclear about whether they had a common-law relationship with the sponsor for a full two years prior to filing the sponsorship application), and those who are not confident of their ability to qualify for one of the exceptions to the condition (e.g. unsure whether they would be able to prove abuse and have therefore not requested on their own accord that they be considered for the exception); such individuals will continue to have the spectre of future investigation looming over them long after the two year period has expired.

Proof of compliance will only need to be provided if CIC officers commence an

⁵ Operational Bulletin 480 - October 26, 2012

⁶ *Ibid.*

investigation and request evidence of compliance because there is “reason to believe” that the sponsored spouse or partner “is not complying or has not complied” with the condition (e.g. as a result of a complaint, tip or other information)⁷. Alternatively, proof of compliance may be requested on a random basis in order to assess the overall level of compliance.⁸

If the sponsored spouse or partner does not meet (or has not met) the condition of cohabiting in a conjugal relationship with the sponsor during the applicable two year period, and is not otherwise eligible for an exception, the sponsored person’s permanent resident status can be revoked. An inadmissibility report could be written on the basis of non-compliance for failing to comply with an imposed condition (**IRPA s.41(b) and s.27(2)**). The inadmissibility report would be referred to the Immigration Division which would issue a removal order. Should a removal order be issued, the sponsored person would have recourse to appeal the removal order to the Immigration Appeal Division (IAD) and would be able to argue on humanitarian and compassionate grounds for why the removal should be quashed or stayed. Given the proposed IRPA amendments that will restrict the ability of “serious foreign criminals” to appeal their removals at the IAD, appeals of removal orders resulting from non-compliance with the two year condition may replace some portion of that IAD caseload.

If removal proceedings are commenced against a sponsored spouse or partner for failure to comply with the condition, removal proceedings could also be commenced against the sponsored person’s accompanying dependents⁹ and any members of the family class who the sponsored person may have sponsored during or after the conditional period.¹⁰

3.2.3. Exceptions to the two year condition period

There are two exceptions to the two-year condition period. Firstly, sponsored spouses and partners will no longer be subject to the two-year condition if the sponsor dies during the two-year condition period. Secondly, the condition ceases to apply if the sponsored spouse or partner ceased residing with his or her sponsor as a result of abuse or neglect.

To request an exemption, the individual who is or was subject to the condition would generally call the CIC Call Centre (1-888-242-2100), and the Call Centre agent will receive the request, obtain necessary information and refer the request for further

⁷ IRPR s.72.1(4)

⁸ *Ibid.*

⁹ IRPR s.72.2(1)

¹⁰ IRPR s.72.3(1)

investigation and processing.

3.2.3.1. Exception for death of the sponsor

In situations involving the death of the sponsor, the sponsored spouse will be advised to forward evidence of the sponsor's death (e.g. a death certificate or confirmation from the funeral home) to the nearest CIC office. Please note that the sponsored person may still be required to show that he or she cohabited in a conjugal relationship with the sponsor *until* the sponsor's death.¹¹

3.2.3.2. Exception in cases of abuse or neglect

In circumstances involving abuse or neglect, the Call Centre agent will obtain relevant information, including a narrative of the request as well as appropriate contact information so that CIC can contact the sponsored person in a secure, safe and confidential manner in order to schedule an interview.

Sections 72.1(6) of the regulations indicate that the condition will cease based on evidence that the permanent resident is unable to continue cohabiting with his or her sponsor as a result of abuse or neglect. The sponsored spouse or partner does not necessarily have to be the victim of the abuse or neglect. The condition will come to an end if the sponsored person was unable to continue cohabiting because of abuse or neglect suffered by the sponsored person, a child of the sponsored person or the sponsor, or any other person who is related¹² to the permanent resident or the sponsor and who is habitually residing in their household. Similarly, the sponsor must have either caused the abuse or neglect, or failed to protect the victim from the actions of someone related to the sponsor who is habitually living in the household.

Again, the sponsored spouse or common-law partner could be required to prove that they resided with their sponsor "in a conjugal relationship until the cohabitation ceased as a result of abuse or neglect" (IRPR s.72.1(6)).¹³

¹¹ IRPR 72.1(5)

¹² The definition of "related" for the purpose of this section includes relatives related by birth, adoption, marriage, common-law partnership or conjugal partnership (IRPR s.72.1(8)), a far more expansive definition than the general definition of "relative" found in IRPR s.2 which is restricted to relatives by blood or adoption.

¹³ The wording of this section is problematic as it suggests that an abused spouse/partner must maintain a relationship that is "conjugal" in nature and quality (e.g. bearing the hallmarks of financial, social, emotional, physical interdependence) up to the point when he or she ceases cohabiting with the abusive spouse, when in reality the conjugal nature of the relationship may have broken down much earlier.

3.2.4. Two-Year Condition Period: Practical Considerations

Practically speaking, evidence that a sponsored person has complied with the two-year condition will resemble the type of documentation that practitioners are accustomed to gathering in order to prove the genuineness of the relationship for spousal and common-law/conjugal partner permanent residence application, with a shift of the focus of such evidence to the two years following the day that the sponsored spouse becomes a permanent resident.

For example, evidence that the couple has resided together in a conjugal relationship for the requisite two year period may take the form of the following familiar types of documents:

1. Joint bank accounts or credit cards;
2. Joint ownership of residential property (e.g. certificate of title);
3. Joint residential leases;
4. Joint rental receipts;
5. Joint utilities accounts (electricity, gas, telephone);
6. Joint management of household expenditures (receipts or bank statements);
7. Evidence of joint purchases, especially for household items;
8. Correspondence addressed to either or both parties at the same address (postmarked envelopes may be helpful);
9. Important documents of both parties showing the same address, for example, identification documents, driver's licenses, insurance policies, etc.;
10. Letters of support or statutory declarations from friends and family indicating cohabitation and the nature of the relationship;
11. Evidence of children of one or both partners residing with the couple;
12. Proof of communication: telephone calls, text (SMS) messages, emails, or online chat logs.

Clients must be advised to gather and maintain evidence that they cohabited in a conjugal relationship throughout the entire two year conditional period, or until the death of the sponsor or until the sponsored person has received a formal decision that they qualify for an exemption by reason of abuse or neglect. As discussed earlier, the regulations do not place any limit on the time period during which CIC officers can commence an investigation. As it appears that CIC has the legal authority to go back and examine the two year condition period at any time in the future (and whether they will conduct retroactive investigations as a practical matter remains to be seen), for the time being we would suggest that such evidence of compliance be kept indefinitely or at least until Canadian citizenship is obtained.

SECTION 4: MINISTERIAL INSTRUCTIONS AFFECTING FAMILY CLASS APPLICATIONS

4.1. MI4 - NOVEMBER 5, 2011 INSTRUCTIONS

Pursuant to the authority granted to the Minister by section 118 of the Immigration and Regulation Protection Act as it was amended in 2008, the Minister announced his fourth set of Ministerial Instructions (MI4) on Friday, November 4, 2011 with them coming into force the next day on Saturday, November 5, 2011.

MI4 was the first set of ministerial instructions to affect Family Class sponsorships (previous ministerial instructions had dealt primarily with Federal Skilled Worker applications). MI4 made the following changes with respect to parent/grandparent sponsorships:

1. Effective November 5, 2011, no new applications for the sponsorship of parents or grandparents were to be accepted. This pause was billed as being temporary in nature and necessary to address the large backlog of parental sponsorship applications that built up. The temporary pause was specifically set to last 24 months and was put in place “while a more responsive, sustainable, and long-term approach for the program [was] being considered”.
2. No Humanitarian and Compassionate Requests to overcome the Ministerial Instructions would be permitted. As has been the norm with past Ministerial Instructions, H&C requests made from outside of Canada that accompany a parent or grandparent sponsorship would not be processed.

4.1.1. Legal Challenges to MI4

In *Essensoy v. MCI*¹⁴ an applicant learned of the incoming ministerial instructions on Friday, November 4, 2011 (the date that they were announced). As those ministerial instructions were to become effective the very next day, the applicant paid the application fee online on November 4, 2011, sent the application to CIC by fax that evening, and before the day was done paid for overnight delivery of the physical application. Despite the applicant's efforts, the physical copy of the application was received after November 5, 2011.

¹⁴ *Essensoy v. M.C.I.*, 2012 FC 1343.

The court found that the application was not received in time as the instructions clearly stated that applications must be physically received by November 5, 2011 and also explicitly stated that a postmark before that date would not be sufficient. The applicant argued that while subsection 87.3(1) of IRPA authorizes the Minister to control the number of applications considered, the Minister could not stop all parent/grandparent applications because section 13 of the Act confers a right to sponsor a family member and setting the number of parent/grandparent applications at zero effectively nullifies a right granted by Parliament. The court found that the right to sponsor a parent/grandparent pursuant to subsection 13(1) can be restricted or modified by regulation, and in the absence of regulation by ministerial instruction.

In order to restrict this line of argument, subsection 3.2 has now been added to section 87.3 of IRPA and reads as follows:

for greater certainty, an instruction given under paragraph 3(c) may provide that the number of applications or requests, by category or otherwise, to be processed in any year be set at zero.

The Federal Court considered a similar challenge to MI4 in *Lukaj v. Canada*.¹⁵ The court confirmed that MI4 was not ultra vires, and considered the applicant's additional argument that the issuance of the ministerial instruction was an abuse of the minister's authority. The court also rejected the abuse argument, recognizing that there was a "legitimate and bona fide rationale" for issuing MI4 (an application backlog of 165,000 parent/grandparent applications), and that MI4 was part of a broader plan which also included the establishment of the parent/grandparent's super visa and the eventual reopening and redesign of the parent/grandparent's sponsorship program after public consultation. Furthermore, the extremely short notice period was justified as CIC would otherwise have been flooded with applications. The applicant was owed no duty to be given notice of the change in policy as he had no "vested, accrued or accruing" right to sponsor his parents or to have his application processed.

4.2. SUPERVISA MINISTERIAL INSTRUCTION

MI4 was followed up quickly with another set of instructions which implemented a 10 year "super visa" for parents and grandparents. Effective December 1, 2011, these instructions created a process in which parents and grandparents could obtain a multiple entry temporary resident visas with a maximum validity period of 10 years.

¹⁵ *Lukaj v. M.C.I.*, 2013 FC 8

In order to qualify, the applicant is required to meet the following requirements:

1. Provide proof of parent or grandparent relationship with the Canadian citizen or permanent resident;
2. Undergo a medical examination and be admissible on health grounds;
3. Provide satisfactory evidence of private medical insurance policy from a Canadian insurance company. The insurance policy must be valid for a minimum of one year from the date of and must:
 - a. cover the applicant for healthcare, hospitalization and repatriation,
 - b. provide a minimum of \$100,000 coverage, and
 - c. be valid for each entry to Canada and available for review by the examining officer upon request; and,
4. Provide satisfactory evidence of financial support from the host child or grandchild for the duration of the requested stay in the form of a written and signed promise of financial support, such as a letter of invitation, including evidence of the number of persons in the host's household and proof of income at a level meeting or exceeding the low income cut-off for the total number of persons in the household, including the visiting parents or grandparents.¹⁶

Once a super visa is obtained, on the individual's entry into Canada the port of entry officer should normally fix the period of authorized stay as two years pursuant to the provisions of section 183 of the IRPR.

Grandparents or parents who come from visa exempt countries, have the ability to obtain a letter from a Canadian visa office abroad confirming that they have met the eligibility criteria for a super visa. Upon presenting this letter at the port of entry, the examining officer should normally fix the period of authorized stay as two years (pursuant to the provisions of section 183 of the IRPR).

In subsequent meetings with immigration practitioners¹⁷, CIC made the following clarifications:

- Individuals holding a super visa must leave Canada after two years (no extension is possible) and they will have to be outside of the country for a certain duration before returning (although no specified amount of time has yet to have been determined)

¹⁶ Operational Bulletin 357 - December 1, 2011

¹⁷ CICIP, November 18, 2011

- Abuse of the super visa program (e.g. a large number of super visa holders making humanitarian and compassionate applications for permanent residence once within Canada) will not be tolerated and may result in the cancellation of the program.

4.3. CRYSTAL BALL GAZING: THE FUTURE OF PARENT SPONSORSHIP?

When the Grandparent and Parent Sponsorship stream reopens, it is expected that the ability to sponsor parents or grandparents will be greatly restricted. While it is too early to know for certain what these new restrictions will look like, reports and transcripts from the Standing Committee on Citizenship and Immigration and the Government’s responses reveal some options that may be under consideration. One might speculate that the upcoming changes will involve one or more of the following:

1. Introduction of a hard cap on the number of grandparent and/or parent applications that will be accepted each year.
2. Introduction of a minimum age for sponsored grandparents and parents.
3. Introduction of a “balance of the family” test, which would only allow sponsorship to occur if the greater balance of the family of the parent or grandparent resides here in Canada (e.g. the parent has more children living in Canada than any other particular country, or at least half the parent’s children are living in Canada).

SECTION 5: AFTER MI4 - WHAT'S LEFT?

5.1. H&C APPLICATIONS FROM WITHIN CANADA

It remains available for parents/grandparents to make H&C Applications from within Canada if warranted in the circumstances. In fact, the temporary moratorium on parent/grandparent sponsorship applications and the lack of an alternative pathway to permanent residence may temporarily constitute additional hardship suffered by the applicant.

In *Mancheno v. M.C.I.*¹⁸, the Applicant made an H&C Application from within Canada.

¹⁸ *Mancheno v. M.C.I.*, 2013 FC 66

The Applicant was the primary caregiver for his Canadian grandchild and had adult, Canadian children who could not at the time afford to sponsor him. The application was refused one week prior to the implementation of MI4 and the moratorium on parent/grandparent applications. In light of MI4, the Applicant asked the officer to reconsider her decision. On reconsideration, the officer held that the moratorium on parent/grandparent application was temporary and did not preclude the Applicant from submitting an application in the future once lifted, and that the Applicant could apply for a Super Visa in the interim. The court agreed with the Applicant and found that the refusal of the H&C application imposed a much greater hardship since the implementation of the moratorium, and the officer did not assess the added undue hardship.

5.2. LAST REMAINING RELATIVE

Given the temporary moratorium on the sponsorship of parents and grandparents, the attention of practitioners has turned increasingly towards IRPR 117(1)(h): the “last remaining relative” or “lonely Canadian” sponsorship stream.

The “last remaining relative” stream allows a Canadian Citizen or permanent resident to sponsor one relative (by blood or adoption), regardless of age, so long as he doesn’t have anyone from the following list of relatives who is a Canadian permanent resident or citizen OR whose application to enter and remain in Canada could otherwise be sponsored:

- Spouse/common-law/conjugal partner
- Child
- Mother/father
- Grandmother/grandfather
- Sibling or half sibling
- Niece or nephew
- Aunt or uncle

Interestingly (though mostly from a theoretical perspective), although 117(1)(h) is perceived as a rule to allow a lonely Canadian without close relatives to sponsor one otherwise ineligible relative, the wording of the regulation does not limit it to one single usage. For example, in the 2002 IAD decision *Sarmiento v. M.C.I*¹⁹ the Appellant had met the criteria of the equivalent section of the former Immigration Act and used it to sponsor a niece. After she came to Canada, the niece eventually departed and was

¹⁹ *Sarmiento v. MCI*, 2002 CanLII 47160, TA1-28226 (IAD)

presumed to have lost her permanent resident status. As the Canadian sponsor continued to meet the requirements of the provision he was permitted by the IAD to sponsor a second niece. In the course of argument, Minister's Counsel noted that the interpretation ultimately taken by the IAD permitted an individual who qualified under 117(1)(h) to sponsor an unlimited number of cousins (cousins are not on the 117(1)(h) list of relatives, so the sponsor remains eligible even after the first cousin becomes a permanent resident), something that the existing wording of the regulation seemingly allows.

As one of the requirements is that the Sponsor must have no listed relatives that could otherwise be sponsored, individuals are unable to sponsor under 117(1)(h) if they have a living, sponsorable relative (e.g. an elderly parent). Even if the relative has no desire to come to Canada or is clearly medically inadmissible, they are still listed as sponsorable family members under 117(1)(a) to (d) and are therefore sponsorable for the purposes of 117(1)(h).²⁰

It remains to be seen as to how the moratorium on parent and grandparent sponsorships affects the sponsorability of parents and grandparents for the purposes of 117(1)(h). Are individuals previously ineligible to sponsor under 117(1)(h) by reason of having living parents now free to sponsor another relative as their parents cannot currently be sponsored because of the Ministerial Instructions? Or are parents and grandparents still considered sponsorable by virtue of their continued inclusion as sponsorable members of the family class under IRPR s.117(1)?

²⁰ Maxian v. M.C.I. (IAD TA4-18264) 2006 CanLII 52296 (I.R.B.); Tobas v. M.C.I. (IAD TA7-04802); 2008 CanLII 69796 (I.R.B.); Bhachu v. M.C.I. (IAD VA7-01729); 2007 CanLII 68206 (I.R.B.); Decorina v. M.C.I (TA7-04577), 2009 CanLII 49235 (IRB)

5.3. PROVINCIAL NOMINEE STREAMS ALLOWING FOR SUPPORT OF FAMILY MEMBERS

Provincial nominee streams that are based heavily on a family-connection between an applicant and a Canadian citizen or permanent resident are a bit of a dying breed: Alberta stopped accepting applications for its Family Stream as of August 23, 2010, Newfoundland canceled its Family Connection Stream as of May 1, 2012, and P.E.I. closed its Family Connection Stream effective December 31, 2012.

Of the remaining provincial programs containing some element of family support, only Saskatchewan's Family Referral Category includes parents/grandparents as one of the qualifying relationships.

The following table outlines some of the key differences between the various provincial programs that give credit for the support of a close family member. Please note that the websites and resources of each provincial program should be consulted for further details and additional program requirements that may not be listed herein.

Provincial Nominee Programs with Family Connection Component

Province	Program Name	Qualifying Relationships (Applicant must be:)	Applicant Age Restrictions	Experience Requirement	Education Requirement	Other
Saskatchewan	Family Referral Category	parent, daughter/son, sister/brother, aunt/uncle, niece/nephew, first cousin, grandchild, grandparent (including step family members and in-laws of the same)	18-49	1 year of work experience in the past 10 years in intended occupation	Completed post-secondary education, training, or apprenticeship and earned diploma, certificate or degree (min. 1 year program)	Job Offer required Language proficiency requirements
Manitoba	General Points System for Overseas Applicants (pass-mark: 60 points)	daughter/son, sister/brother, aunt/uncle, niece/nephew, first cousin, grandchild 20 points if application supported by a close relative (Canadian citizen/PR, living in Manitoba)	18 (4 points) 19 (6 points) 20 (8 points) 21-45 (10 points) 46 (8 points) 47 (6 points) 48 (4 points) 49 (2 points) 50 (0 points)	<1 year: 0 points 1 year: 8 points 2 years: 10 points 3 years: 12 points > 4 years: 15 points	Masters or Doctorate: 25 points 2 post-sec. programs of 2+ years: 23 points 1 post-sec. program of 2+ years: 20 points 1 one-year post-sec. program: 14 points Trade-certifications: 14 points	Language Proficiency: max 20 points for first language, 5 points for second language
New Brunswick	Skilled Worker with Family Support	non-dependent child, sister/brother, niece/nephew, grandchild	22-50	At least two years of continuous full-time work within the last five years in the intended occupation	Post-secondary degree (minimum of 3 years) or Diploma (minimum of 2 years)	Language proficiency requirements
Nova Scotia	Family Business Worker	Applicant must be related to the family business owner or spouse of the business owner as: daughter/son, sister/brother, aunt/uncle, niece/nephew, grandchild (or step or half relative of same degree)	21-55	Appropriate work experience required for the position	Highschool diploma	Job offer from established Nova Scotia business owned by a close family member or his/her spouse. Family member must own at least 33.3% which has been in operation under current management for a minimum of two years.

APPENDIX: SELECTED 2012 FEDERAL COURT DECISIONS RE: FAMILY SPONSORSHIP

Gill v. M.C.I., 2012 FC 1522 (Crampton C.J.)

Marriage genuine but primarily entered into to acquire status. Test for “bad faith” amended after visa officer decision, but before IAD hearing.

Application originally refused while IRPR s.4 still required that for a marriage to be in bad faith it must be (i) not genuine, *and* (ii) entered into primarily for the purpose of acquiring any status or privilege under the IRPA. By the time of the IAD hearing, s.4 had been changed to the disjunctive such that even if the relationship was genuine, it could be a “bad faith” relationship ineligible of supporting sponsorship if it had been entered into primarily for the purpose of acquiring status. The IAD determined that the visa officer had made an error and that the marriage was genuine, however, it also determined that the relationship had been entered into primarily for an immigration purpose. The IAD applied the disjunctive test that was by then in force and refused the appeal. The Federal Court found that although it was a troubling result, the IAD correctly applied the law as it existed at the time of the hearing, the IAD’s finding that the primary purpose of the marriage was for the purpose of acquiring status or privilege under IRPA was a reasonable one. Application for judicial review dismissed.

Kitomi v M.C.I., 2012 FC 1293 (Shore J.)

Voluntary support payments relevant to genuineness of marriage. Rebutting presumption that IAD considered all relevant evidence.

The IAD’s reasons were silent with respect to the evidence of financial support. At the same time it performed a detailed analysis of the inconsistencies and discrepancies of the couple’s knowledge of one another, this made it easier to infer that it did not give the evidence of financial support appropriate consideration.

Sidhu v. M.C.I., 2012 FC 515 (Russell J.)

Genuineness of Relationship. Unreasonable assessment of evidence by IAD.

IAD’s reasons relied on specific, material concerns that it had with the documentary evidence. The IAD had not put these concerns to the Applicant so that they could be addressed at the hearing. By failing to put the concerns to the Applicant and then relying on the concerns in its decision, the IAD breached natural justice and procedural fairness.

Nijjar v. M.C.I., 2012 FC 903 (Simpson J.)

Genuineness of Relationship. Conception of child by couple should have been given significant weight, despite subsequent miscarriage.

Decision failed to squarely address the fact that the couple conceived a child and, but for the miscarriage, would be sharing responsibility for a sixteen month toddler. The birth of a child should be accorded great weight in assessing the genuineness of a marriage (Gill v. M.C.I, 2010 FC 122), and the fact that the decision did not focus on this aspect of the evidence made it unreasonable.

Rojas v. M.C.I., 2012 FC 1303 (Zinn J.)

Children unavailable for examination. What kind of evidence is required to avoid refusal?

In his application for permanent residence made under the spouse or common-law partner in Canada class, the Applicant declared three children but asked that they be excluded for purpose of the application, stating that they all lived in Costa Rica with his ex-wife, that he had no contact with them and they were estranged from him. The On his own initiative, the Applicant acknowledged that the children would not be sponsorable in the future.

Application refused because there was no evidence of lack of custody or any efforts made to contact children for examination. Officer therefore had no evidence on which to base a finding that the children were in the sole custody of another individual, exempting them from examination, and also could not find that the applicant had exhausted all avenues such that he might benefit from CIC's "last resort" procedure that can be applied on a case by cases basis when family members are "genuinely unavailable" (e.g. statutory declarations confirming inability to sponsor children in the future).

Doraisamy v. M.C.I., 2012 FC 1053 (O'Keefe J.)

Officer was unduly focused on minor inconsistencies from interview.

"In summary, I find that in this case, the officer ignored significant evidence of a positive, genuine relationship by unduly focusing on minor inconsistencies in the interview at the expense of other relevant evidence. As such, the officer failed to consider significant evidence against her interview findings."

Dhillon v. M.C.I., 2012 FC 192 (Harrington J.)

Over-age dependent. Inability to be financially self-supporting.

Visa officer not satisfied that over-age dependent was unable to be financially self-supporting due to a physical or mental condition. Over-age dependent had physical disability as a result of polio and could not walk without crutches. Officer commissioned report by physician in India which indicated that individual could feed, drink, dress, bathe and relieve himself without assistance. As the individual could complete most tasks on his own and had 12 years of schooling, the Officer was not satisfied that he was unable to be financially self-supporting. There was evidence that the individual could not board a bus, was unable to find work, and that individuals with disabilities were discriminated against. The right question was whether he is able to support himself *where he lives*, not whether he would be able to financially support himself in Canada.