

Consequences of Breach: Sponsorship Undertaking Enforcement in 2004

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Introduction

In its oldest legal form, an “undertaking” has been held to be a pledge or a guarantee. Within the context of family-class sponsorships in immigration proceedings, over the last 25 years such undertakings have formed the basis of this class of immigration.

The issue of breaches of sponsorship undertakings – while ever-present -- has not been a particularly hot topic in immigration law circles until this past year, when the Province of British Columbia sent out no less than 2,400 demand letters to defaulting sponsors in the Lower Mainland. This, in turn, yielded considerable interest in the issue from the Bar surrounding sponsorship undertakings and their enforcement.

When I originally conceived of this paper, I thought to dedicate much of it to equitable defences available to sponsors who are in breach. As the provincial government’s enforcement regime has not quite evolved to that stage, I have only touched on possible remedies at the end of the paper, so as to define more fully the procedure by which the government intends to collect against defaulting sponsors.

I. The Sponsorship Undertakings under the *Immigration Act*, R.S.B.C. 1975.

Under the current *Immigration and Refugee Protection Act*, in order to qualify for the scheme of family class sponsorship, a sponsor provides an undertaking that they will be responsible for the support of the family members they are sponsoring.

Under the previous *Immigration Acts*, the sponsorship scheme provided that a person was qualified to sponsor a family class member if they met the definition of sponsor within the meaning of Regulation 2(1)(a) or (b). That is, they had to give an “undertaking,” as well as meeting a number of other criteria that were listed in Regulation 5 of the old Regulations.

An undertaking was a defined term under the *Immigration Regulations* and was defined as:

“an undertaking in writing given to the Minister by a person to provide for the essential needs of the member of the family class and the member’s dependents for a period of ten years and to ensure that the member and the members dependence are not dependent on any payment of a prescribed nature referred to in Schedule VI.”

Schedule VI included under item 2 a list of applicable income-assistance provisions for B.C., including benefits under the then *Guaranteed Available Income for Need Act* (R.S.B.C. 1979, s.158), *B.C. Benefits (Income Assistance) Act*, and a number of other Acts.

Regulation 56 provided that, for the purpose s.118(2) of the *Act*, payments resulting from a breach of an undertaking, and that are made directly or indirectly under an item described in column one of Schedule VI, are payments that may be recovered from the person or organization that gave the undertaking as a debt due her to Her Majesty in right of any province to which the undertaking is assigned.

The *Act* was also not silent on this point, as s.118 provided explicitly that where any person or organization gave an undertaking to the minister to assist any immigrant in becoming successfully established in Canada, that undertaking may, by notice in writing, be assigned by the minister to Her Majesty in the right of any province.

Recovery for a breach of undertaking was provided for in paragraph 2, which outlined that any payment of a prescribed nature (either directly or indirectly) to an immigrant that resulted from a breach of an undertaking referred to in subsection 1 could be recovered in any court of competent jurisdiction as a similar debt.

II. Sponsorship Undertakings - IRPA

Under the *Immigration and Refugee Protection Act* that took effect in June 2002, s.13 confers the right to sponsor the family member on citizens or permanent residents, subject to the regulations. It also provides, at paragraph 3, that an undertaking relating to sponsorship is binding on the person who gives it.

Division 3 of Part 7 of the *Immigration and Refugee Protection Regulations* defines sponsor as including someone who has made a sponsorship undertaking, and outlines the sponsorship undertaking that shall be given to the minister. Further, it obliges the sponsor to reimburse Her Majesty, in right of Canada or province, for any benefit provided as a social assistance to, or on behalf of, the sponsored foreign national and their family members during the described period. Default is also defined under Regulation 135, and clearly makes reference to certain penalties in the event that the government makes a payment that the sponsor has, in the undertaking, promised to repay, or that an obligation set out in the undertaking is breached.

Regulation 351 of IRPA provides that undertakings referred to in s.118 of the former *Act* that were given prior to June 28, 2002 are governed by IRPA and makes clear in Regulation 351(2) that social assistance payments may be recovered from the person or organization that gave the undertaking as a debt due to Her Majesty, in right of Canada, or in the right of a province.

III. November 2003 - Sponsorship Default Enforcement in British Columbia

Legally, there's nothing new with assignment of undertakings of assistance. As far back as 1986, undertakings have been assigned to the province, and various enforcement efforts have followed, although in a fairly limited way.

In April 1999, perceiving an alarmingly high number of defaults on sponsorship undertakings, the provincial government started a Sponsorship Default Recovery Project, prompting the creation of a project team aimed at recovering those debts.

Initially, the project worked on the basis of "moral suasion" in order to obtain voluntary repayment. During the course of the project, any time a sponsored individual received income assistance, the ministry gave notice to the individual that the government could seek repayment of the defaulted amount.

In November 2003, the Collection & Loan Management Branch of the Ministry of Provincial Revenue started a vigorous collection program, complete with dedicated officers whose role was to actively seek repayment of sponsorship default debt. A typical letter outlined the nature of the debt and encouraged voluntary repayment.

The government identified that somewhere around nine or 10 per cent of all immigrants to B.C. under family-class sponsorship from 1998-2003 were receiving income assistance (in some years, as high as 12 per cent). In addition, as of September 2003, more than two per cent of the total income assistance cases in province involved a sponsorship default situation.

Having recognized this, and having calculated the total amount of defaults to be well in excess of \$80 million, the government decided to get tough.

IV. Ministry of Human Resources Policy Guidelines Relating to Enforcement

It is important for counsel to be aware of the ministry's policy on hardship assistance in these situations in the first place.

In fact, there are situations the Ministry of Human Resources will not seek to recover a sponsorship default. For example, where:

1. the sponsor and/or co-sponsor themselves are in receipt of income assistance;
2. there are concerns about the safety of the income assistance client, due to possible violence or abuse; or
3. if the sponsor has gone bankrupt. However, recovery may be pursued when the sponsor's financial situation improves (although that may be limited to ongoing obligations only).

The ministry made a number of changes to their hardship-assistance policy under the *Employment and Assistance Act and Regulation*. Updated legal authority for that policy outlines that hardship assistance will be provided to meet the essential needs of applicants who are awaiting verification of default of a sponsorship undertaking, but meet all other eligibility criteria. The Ministry's coding system for this category of hardship assistance is called "sponsorship undertaking default," or code L.

Hardship assistance is to be provided on a one-month temporary basis. Eligibility for hardship assistance must then be re-established each month for payments to continue.

Ministry staff are encouraged to contact the sponsor in order to verify that the sponsor is unable or unwilling to support the applicant. If the sponsor confirms that he or she is either unable or unwilling to provide for the essential needs listed in sponsorship undertaking (defined as food, lodging and clothing), the family unit may be eligible for income assistance, provided all other eligibility requirements are met.

Where an applicant agrees to continue residing with the sponsor, policy provides that the shelter allowance must not be issued unless the sponsor is also receiving assistance.

Officers are advised to tell a sponsor that debt collection will likely ensue despite the fact that a specific "repayment agreement" was not taken, because the debt resides with the sponsor, and not with the client recipient. Debt collection will occur regardless of whether the debt relates to income assistance or hardship assistance.

The hardship-assistance policy also provided that where abuse concerns have been raised, no contact is to be made with the sponsor, including by letter. Income assistance may then be issued, provided all other eligibility criteria are met. Once a hardship reason is addressed, each case then must be reassessed to determine if the family unit meets the eligibility criteria for income or disability assistance.

Under the policy guidelines, all applicants are to be advised that:

1. for the period of sponsorship undertaking, the sponsor is obligated to provide essential support, including food, lodging, and clothing, to sponsored family members, as well as an alternative to relying upon assistance;
2. once any assistance is paid out, the minister of human resources would advise Citizenship and Immigration Canada of any sponsorship breakdown;
3. any assistance issued will become a debt payable to the Crown that the sponsor, and not the sponsored relative, will be obligated to settle;
4. the provincial government, by assignment of the undertaking, may very well seek recovery of the debt; and
5. finally, if there are no concerns about possible abuse, the sponsors will then be contacted so the consequences of the default can be explained in full.

V. Enforcement: Collection & Loan Management Branch Procedure

In the course of researching this paper, I had the opportunity to have a number of discussions with staff at the Ministry of Revenue Collection and Loan Management Branch (the Branch). For those of you who are unfamiliar with this government department, the Branch has become the central debt collector/collection agency for the provincial government and acts on their behalf to collect debts.

This is an important role to understand, as the Branch's staff look at undertaking default as a proven debt to the Crown by the time it arrives to them for enforcement.

In terms of legal issues, the Branch acknowledged that they cannot collect on debts incurred between November 1996 and July 1999, because Schedule VI of the *Immigration Regulations* in effect at the time cross-referenced the wrong social assistance legislation; therefore, according to legal opinions the Branch has received, no debts incurred prior to that date can be collected. In consequence, the Branch has chosen to focus their efforts on debts incurred post-July 1999. Staff are familiar with the wording of the various sponsorship undertakings, and take the position that there are no legal arguments applicable against payment of the debt. The Branch echoes the provincial government's position generally that until a court rules otherwise, a debt owing to the Crown is collectable.

The enforcement strategy that the Branch has followed thus far is as follows:

1. issuance of a bill or demand letter quantifying the amount owing, and that the province considers the amount a Crown debt;
2. Follow up with an overdue notice 30 days later; and
3. finally, an enforcement letter threatening collection and/or other specific action.

At that point, the Branch dips into its considerable well of enforcement tools in an effort to collect the debt.

A. Crown Remedies Under the *Financial Administration Act* and other Provincial Statutes

It is important for counsel advising clients to explain that the government has far greater powers than a private creditor to collect a Crown debt. It has remedies under a number of statutes. I will address each of these in turn below.

i. Liens or Notices to Secure Debt under s.204 of the *Land Title Act*.

Putting notice against real property held by the debtor is a tactic commonly used by the Crown. Although these notices are not properly liens, they often have the same effect: the prevention of disposal of the property in question. In turn, these notices will provide a significant obstacle to mortgage renewal or refinancing. Thus far, this has been the most successful method of compelling repayment.

ii. GST Rebates and Tax Returns.

The *Financial Administration Act* empowers the provincial government to effectively garnish both income tax refunds and GST rebates in the name of a sponsor debtor. The Branch advises it has invoked these powers in several recent cases.

iii. Transferring the File to a Collection Agency.

In the case of smaller debts, where the sponsor either has chosen not to respond at all to demands or won't comply with the request, the government also has the option to transfer the file to a collection agency.

iv. Licensing Renewals

The provincial government also has the ability to deny such things as driver's licence renewals unless debts are paid.

v. Legal Action

I am told that no cases have yet been taken to court, but should this eventually occur, there are a number of lawyers at the Ministry of the Attorney General who have been assigned the task of preparing such action. To date, the Branch has not had a file proceed to this level.

The Branch may take more vigorous action to initiate lawsuits after the current small claims jurisdiction is increased upwards from \$10,000 to the anticipated \$25,000-\$30,000 currently in draft legislation expected to be considered by the Assembly in the spring.

In the meantime, another remedy used against sponsors who are former spouses is applications for maintenance orders under the *Family Relations Act*. I am currently aware of a couple of such cases before the Provincial Court. This presents an interesting avenue for testing the availability of such remedies as demanding full disclosure of caseworker's file notes from the welfare files, and various other equitable remedies, such as the doctrine of estoppel and/or acquiescence.

vi. Compromise Settlements

The Branch does have the authority to enter into repayment plans and compromise settlements based on ability to pay, but I have been advised by the senior staff at the Branch these are only temporary measures. I was also advised that the official policy is to only enter into settlement arrangements where there is not only current inability to pay, but also an inability to pay in the foreseeable future.

VI. Effectiveness of a Strategy

To date, the Branch has been successful in collecting almost \$10 million from sponsors in default of undertakings, and by all indications and the government is pleased with the result, and will not bring

an end to its enforcement focus in the foreseeable future. The Branch also feels that it has made significant progress in preventing future breaches through its current enforcement mandate.

There is still a lot of work for them to do, as between 800 to 1000 sponsors in default still remain to be located and contacted. However, it's likely that, for the Branch, 2005 will prove to be just as busy a year for them as 2004.

VII. Remedies:

Notwithstanding the bleak picture painted above, there are a number of equitable remedies that the defendants could raise – in some cases have raised – to actions initiated by the Branch.

For example, the equitable doctrines of estoppel, as well as acquiescence, have both been raised as shields against the Province as a creditor. One could certainly envision a situation where the creditor (in this case the Ministry of Human Resources) has put into place an arrangement whereby shelter has still been provided by the sponsor, but assistance payments are provided by the Ministry, and this situation has been allowed to continue for a number of years.

It could certainly be argued that the sponsor debtor has relied upon such an arrangement and has altered their position accordingly. It would then be easy to prove that prejudice would accrue to the sponsor debtor out of any future enforcement proceeding.

Those defences were raised by a number of counsel in Vancouver, including Ryan Rosenberg of Larlee & Associates, a Vancouver immigration firm. In one of Mr. Rosenberg's cases, the Province ended up entering into a settlement arrangement, in part, because of the legal arguments that he advanced.

In another currently unreported case, *Painter v. Painter*, a decision of the Provincial Court of British Columbia, Sam Hyman, of Hyman & Associates, argued successfully against an attempt to recover provincial disability allowances paid to an ex-spouse by the province from her sponsor. She and the sponsor had been divorced for some time and the ministry attempted to collect in reliance of the default.

In that case, Mr. Hyman argued successfully that the provincial government had to prove that the recipient spouse was truly unemployable before they could attempt to collect the default from the sponsor. Mr. Hyman relied on the case of *Samy v. Samy*, a decision of Justice Wally Oppal of the British Columbia Supreme Court [(2000), B.C.S.C. 1211, docket No. F991726]. In *Samy*, Justice Oppal ruled that, notwithstanding that a sponsorship undertaking is something to which regard should always be given and which requires the court's consideration, the simple fact of the sponsorship agreement cannot impose obligations greater than those imposed by the family law generally.

In the writer's view, for many defendants, good legal arguments may only have small comfort. If the government is not required to prove its debt in court in order to start collection proceedings, but only when all else has failed, its agents do not really need to be overly concerned about legal argument until all of their options are exhausted. Indeed, the Branch has made it clear in an interview with the writer that it is not part of their mandate to negotiate or discount a percentage of a claim based on what the debt could properly be proven in court or not. Their position is a Crown debt is, by definition, proven once the file reaches their offices.

Finally, a novel attempt worthy of comment is an application filed on Aug. 20, 2004 by two litigants in B.C. to attempt a class action against the province for damages resulting from the collection strategy started in November 2003. The case was filed in the name of two litigants, and is registered under the

name of *Daniela Gabric v. Her Majesty the Queen in the Right of the Province of British Columbia* (British Columbia Supreme Court, New Westminster Registry File No. S-S-87820).

In that case, the two litigants, Daniela Gavric (her name is typed incorrectly in the Writ) and Malkiel Dosanjh, have attempted to have a class certified under the British Columbia's *Class Proceedings Act*. They have not, thus far, had much success, possibly because of their choice of counsel, John Dempsey, who has been under investigation by the Law Society for some years for the unauthorized practice of law. Their case was filed by Dempsey. Because he is not authorized to practice law, and had no actual standing to file the suit, this has resulted in a Notice of Motion by the provincial government to have the matter dismissed. The government's motion has been adjourned generally, and it is uncertain how the case will proceed from here.

It is hard to see from the filed Writ of Summons and Statement of Claim how this matter would have been certified in any case. Gavric, who is a Bosnian refugee, sponsored her parents, who then went on welfare approximately 18 months after their arrival in Canada. She and her husband fell on hard times and were unable to meet their obligations under the undertaking. In January 2004, they received a bill for some \$52,678 from the province. She still owes that money as of the date of the filing of the action.

Meanwhile, the other litigant, Dosanjh, has already paid back some \$18,000 to the Province of British Columbia as a result of her defaulting in her sponsorship of her ex-husband.

It is hard not to feel for both these litigants. In Gavric's case, her husband lost his job and she was unable to financially support her parents, one of whom died after a long battle against cancer in 2003. In other case, Dosanjh split up with her husband of some seven months after several episodes of reported domestic violence. She wrote on a number of occasions and urged welfare authorities not to pay her ex-husband any money as he was working illegally, but according to her, they granted him welfare anyway. She was forced to pay the Branch after she was threatened with a lien on her property.

At the same time, both cases are significantly different. Gavric is claiming a set-off, while Dosanjh is looking for damages. One was a spousal case and the other involved parents. These matters are significant, particularly given that one of the requirements of the class proceeding in British Columbia is that a commonality of issues. S. 4(2) specifically obligates the court in such an application to look at whether questions or fact of law common to the members of the class predominated over any questions affecting only individual members (See *Class Proceedings Act* R.S.B.C. 1996, C.50, S.4(2)).

The Statement of Claim filed in these two cases dose not seem to meet this test. It is accordingly hard to see how all this action will ultimately amount to anything.