Sponsorship Bars and Conditional Permanent Residency: Coming Soon to the Spousal Sponsorship Program?

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INTRODUCTION

Recently, a debate has emerged in the Canadian immigration community regarding how to combat marriage fraud. News stories about individuals who have sponsored spouses, only to watch those spouses abandon them shortly after they arrive in Canada, have brought public attention to the issue. In October 2010, Jason Kenney, the Minister of Citizenship and Immigration (the "Minister"), held a series of town hall meetings on the matter across the country. The Minister's statements during the meeting made it clear that change is coming, and that this change will likely involve the imposition of conditional visas and sponsorship bars on individuals who obtain permanent residency through the spousal-sponsorship program. Before embarking on this path, however, it is important to consider how other nations address the issue, as well as whether there are existing tools in Canada's immigration legislation to combat marriage fraud. While a sponsorship bar for principal applicants under the spousal-sponsorship program would be a positive and practical change, conditional permanent residency would not be an appropriate method to combat marriage fraud.

THE CURRENT IMMIGRATION SYSTEM

The *Immigration and Refugee Protection Act* (the "Act")[1] and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations")[2]govern the admittance of permanent residents to Canada. They provide for the creation of different

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1 RSC 2001, c 27.

2 SOR 2002-227.

immigration classes. Section 12(1) of the Act creates the family class. Pursuant to this section, a foreign national may immigrate on the basis of his or her relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.[3]

The Regulations create numerous safeguards that attempt to ensure the spousal sponsorship program is limited to legitimate marriages. The most important of these is s. 4, which states:

> For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.[4]

The amount of information required to prove that a marriage is both genuine and not primarily entered into for the purpose of immigration is immense. Applicants are required to fill out detailed questionnaires regarding how they met their sponsors, the nature of the relationship, how a proposal was made, what the wedding was like, and whether their respective families know about the marriage. Applicants frequently provide binders of documents including copies of photos, e-mails and even wedding videos. Even then, the current acceptance rate for applications for a permanent residence visa under the spousal sponsorship program is only 83%. In 2009, 39,077 people were admitted to Canada as spouse, common law partner or conjugal partner of a Canadian under the sponsorship program. This means the applications of around 8,000 principal applicants (the legal term for the applying spouse) were rejected, a majority of which were because of a failure to meet the requirements of s. 4.

Another mechanism to ensure Canadian citizens and permanent residents only sponsor genuine spouses is through the requirement that sponsors sign undertakings. A sponsorship undertaking is an agreement between the government of Canada and a sponsor of a foreign national whereby the sponsor agrees to repay the government for any social assistance that the sponsor's immigrating spouse receives. These undertakings last three years.[5] A major reason for the undertaking in the spousal sponsorship context is to ensure that Canadian spouses think twice before sponsoring a spouse to immigrate, and that they will only sponsor someone if they honestly believe that the person they are sponsoring loves them.

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[3] *Immigration and Refugee Protection Act*, 2001, c 27, s 12(1).

[4] *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 4.

[5] *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 132(b).

Finally, should it be discovered that either the principal applicant or the sponsor lied or withheld relevant information from immigration officers during the application process, the principal applicant can be removed from Canada for misrepresentation. A permanent resident or a foreign national is inadmissible for misrepresentation, for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of the Act.[6] An Immigration Officer can declare that an individual is inadmissible to Canada for misrepresentation even after that individual obtains a permanent resident visa, and even if the individual has permanent resident status. The consequence of misrepresentation is a two-year ban on entering Canada, and often results in the revocation of status.

Together, these three safeguards generally prevent marriage fraud at all stages of the application process. Only applicants who can demonstrate they are in a genuine, *bona fide* relationship with a Canadian citizen or permanent resident will be approved for a permanent resident visa. The sponsorship undertaking deters sponsors from sponsoring people they do not trust. Finally, if at any point immigration authorities are made aware of deception, including after the foreign spouse has become a permanent resident, they can take steps to remove the individual.

THE PROBLEM

Despite these safeguards, there has been an increase in the number of stories about sham marriages, or marriages of convenience, in Canada. What has been particularly noteworthy and attention-grabbing about these stories is that the lack of sincerity in these relationships is not always mutual. These include instances of Canadians waiting for hours at an airport for a spouse who never appears, foreign spouses demanding divorces days after arriving in Canada, and other stories of abandonment. In some cases, the Canadian sponsors were allegedly even threatened by their ex-spouses' families in an attempt to silence them.[7] These stories have prompted much public outcry.

The Canadian government has heard the calls for change, and in the fall of 2010 the Minister travelled across the country hosting a series of town halls on the matter of marriage fraud. With the words "combating marriage fraud" displayed on a banner behind him, the Minister listened to story after story from people who had been abandoned by the people they sponsored. At the Vancouver town hall, one lady even held up her arm, displaying bullet scars from where she said her ex-husband shot her after she confronted him about his deceit. The Minster repeatedly voiced his

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[6] *Immigration and Refugee Protection Act*, RSC 2001, c 27, s 40(a).

[7] Kathy Tomlinson, "B.C. woman wants fake husband deported", CBC News (June 14 2010) online: <http://www.cbc.ca/canada/british-columbia/story/2010/06/14/bc-marriagefraud.html>.

disgust when he heard these stories, said that the current system was not working and promised reform.

Concurrently, the government launched an online questionnaire on the matter which expired on November 5, 2010.[8] Participants were asked for their opinions on whether there was a marriage fraud problem in Canada, and if there was, how to fix it. Interestingly, there were two questions that referenced the legal systems of other countries. These questions asked participants if they would support the imposition of sponsorship bars and/or conditional visas. Given the prominence of these two questions in the survey, and the fact that these two concepts have been frequently suggested by commentators in the media, it is foreseeable that the government will implement sponsorship bars and/or conditional visas in the future.

SPONSORSHIP BARS

A sponsorship bar prohibits a Canadian foreign national or permanent resident from sponsoring a member of the family class to immigrate. Currently, Canada's immigration system indirectly prohibits people from sponsoring more than one person every three years by providing that a sponsor cannot sponsor a spouse if they have an existing spousal-sponsorship undertaking. Subsection 117(9)(b) of the Regulations states:[9]

> A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if
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> (*b*) the foreign national is the sponsor's spouse, common-law partner or conjugal partner, the sponsor has an existing sponsorship undertaking in respect of a spouse, common-law partner or conjugal partner and the period referred to in subsection 132(1) in respect of that undertaking has not ended;

As spousal sponsorship undertakings typically last three years, there is effectively a three-year sponsorship bar on the sponsor once they have sponsored someone. There is no corresponding sponsorship bar on the person who has been sponsored. This means a foreign spouse can arrive in Canada, become a permanent resident, divorce their sponsor shortly thereafter, travel abroad, get married, and then immediately sponsor that person to immigrate.

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[8] The results of this survey have not been publicized.

[9] *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 117(9)(b).

That Canada prohibits only the sponsor from sponsoring another person is unique. In Australia, the Migration Regulations provide that both the sponsor and the sponsored foreign spouse are prohibited from sponsoring anyone else for five years after making the application for permanent residence.[10] New Zealand's immigration system contains a similar principle. There, to be eligible to sponsor someone, a New Zealand partner must not have sponsored another spouse in the five years preceding the date of the application.[11] As well, successful principal applicants under the spousal sponsorship program (which in New Zealand is known as the Partnership Category), cannot sponsor someone until at least five years have elapsed since the date the individual was granted permanent residence. [12]

The United States, meanwhile, has an indirect sponsorship bar as a result of the distinction between sponsors who are American citizens and sponsors who are permanent residents in possession of a green card. A foreign national being sponsored by an American citizen is classified as an Immediate Relative. Someone who is sponsored by a green card holder is classified as a Preference Relative. Immediate Relatives have immigrant visas immediately available to them, subject to processing times.

In contrast, Preference Relatives must wait for a visa number to become available, which can be several years. The effect is that people who immigrate as a spouse cannot immediately turn around and sponsor someone else with the expectation of being promptly reunited in the United States. As it takes five years for a permanent resident in the United States to become a citizen (or three years if the permanent resident became a permanent resident through the sponsorship program), there is effectively a three or five year bar on sponsorship in the United States.

So should Canada extend its sponsorship bar currently limited to sponsors under sponsorship undertakings to include the principal applicants as well? The advantages of following the Australian and New Zealand methods are numerous. First, the risks of sponsorship would become more evenly shared between sponsors and foreign nationals. A sponsor currently risks being unable to re-marry and sponsor a second person for three years should the sponsor's relationship to the first person fail. The principal applicant does not have this risk. Second, it would effectively prevent the most egregious scenarios of abandonment that are currently generating much publicity, in which the foreign national gets a divorce and tries to sponsor their true lover from back home. The main disadvantage would be that it would limit the ability of foreign nationals, whose relationships end legitimately, from sponsoring someone they meet in the future and deeply care for. However, this disadvantage

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[10] *Migration Regulations 1994*, Reg 1.20J.

[11] *Immigration New Zealand (INZ) Operational Manual*, (NZ), 29/11/2010, F2.10.10.

[12] *Ibid.*

must be evaluated in light of the fact that the foreign national was only admitted as a permanent resident because of his or her relationship to the Canadian spouse. The disadvantages of such inconveniences are outweighed by the benefit of preserving the integrity of the family class program.

With regards to differentiating between sponsors who are Canadian and sponsors who are permanent residents, as the Americans do, such an approach is not in tune with the realities of the modern immigration environment. In an increasingly globalized environment, more and more individuals are choosing to live in Canada as permanent residents who can travel, study and work freely. However, for various reasons, they do not intend to become citizens. A decision not to become a Canadian citizen should not restrict a person's ability to have a spouse live, work and study with him or her. As well, the distinction between citizens and permanent residents, for the purpose of sponsorship, does not preserve the integrity of the sponsorship program, or prevent marriage fraud.

CONDITIONAL VISAS

Canada currently does not have conditional permanent resident visas. The Regulations provide that an immigration officer shall issue a permanent resident visa to a foreign national if it is established that the individual is a member of the family class.[13] Once an individual is a permanent resident, he is entitled to remain in Canada unless he becomes otherwise inadmissible. Accordingly, the collapse of a marriage would not affect the immigration status of someone who immigrated to Canada under the family class, unless that person was shown to have misrepresented him or herself or the relationship.

Many other Western countries do not grant permanent residence to spouses of their citizens or permanent residents. In the United States, for example, 8 U.S.C. Section 1186, also known as Act 216 of the US *Immigration and Nationality Act,*[14] provides that a sponsored spouse shall be admitted as a permanent resident on a conditional basis. One condition is if the marriage is judicially annulled or terminated, within two years of the foreign spouse obtaining permanent residence, other than through the death of a spouse, the permanent residency shall be terminated. The permanent residency shall also be revoked if there is a discovery of marriage fraud during the same two years. There are exceptions for cases where removal would result in extreme hardship, or where the spouse was subjected to cruelty or abuse by the sponsor.

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[13] *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 70.

[14] 8 USC § 1186 (2006).

Australia has a similar two-year provisional period during which the principal applicant must remain married to the spouse. Exceptions exist when the principal applicant has been in a relationship with the sponsor for three years or more at the time of the application, or if the principal applicant has been in a relationship for two years prior to the application and the couple have children together.[15] As well, even when no exception applies, the dissolution of the marriage will not result in the termination of the permanent resident visa if the sponsor died, the couple had children or if the principal applicant or one of his or her dependents was subjected to domestic violence during the two years.

The United Kingdom's restriction is similar to that of Australia, except that an exception to the requirement for a conditional visa will only be given when the parties have been in a relationship for more than four years. [16]

Canada should not adopt a conditional permanent residency approach, despite its prevalence in other common law nations. The costs of adopting such approach outweigh the benefits of implementing the policy. First, conditional permanent residency would result in serious uncertainty for those living in Canada subject to conditions, and would prevent permanent residents from fully establishing themselves in the community. Second, the potential exists for people to be trapped in unhealthy relationships due to fear of being deported.

Third, imposing a single or multi-year probationary period does little to actually enhance the integrity of the family class system. The purpose of the spousal-sponsorship program is to allow Canadian citizens or permanent residents to live in Canada with their spouses. Just as Canadian law does not presume that all marriages will last forever, it should not presume that a marriage involving immigration will endure.

Finally, the misrepresentation provisions of the Act already provide for the removal of permanent residents who lie in order to be admitted to Canada. As it is, the deception and intention to defraud Canada's immigration system, which is at the root of the marriage fraud issue, the misrepresentation provisions, properly applied, would result in the removal of actual marriage fraudsters.

CONCLUSION

While there is definitely a growing problem of sham marriages, or at least growing awareness of the problem, the Immigration and Refugee Protection Act and

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[15] *Migration Regulations 1994*, Reg 1.21-1.26, Schedule 2.

[16] *Immigration Rules*, Rule 281(b)(i).

Regulations already contain provisions that, with proper application and sufficient resources, should catch most instances of fraud when they occur. While a sponsorship bar for permanent residents admitted under the spousal sponsorship program would be a useful tool that would balance the risks of sponsorship and prevent the most egregious cases while still allowing principal applicants to establish themselves in Canada, the same cannot be said for conditional permanent residency. The solution to marriage fraud should not be to impose hardship on all in order to catch a few, nor should it be to force people to stay married.