

1-1-2012

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### Recommended Citation

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## **A Dangerous Step Backwards: The Implications of Conditional Permanent Resident Status for Sponsored Immigrant Women In Abusive Relationships**

Pam Hrick\*

“The gravity, indeed, the tragedy of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its prevalence and its horrific impact on women from all walks of life. Far from protecting women from it, the law historically sanctioned the abuse of women within marriage as an aspect of the husband’s ownership of his wife and his “right” to chastise her.”<sup>1</sup>

Madam Justice Bertha Wilson

### **Introduction**

Canadian jurists and policy makers have recognized that domestic violence is pervasive across economic, social, and cultural classes in Canada.<sup>2</sup> Through the development of jurisprudence, such as in *Lavallee*, and reform to the criminal law, such as the institution of a prohibition on spousal rape, they have also acknowledged the ways in which some of the laws of this country have failed to protect or offer legal recourse to women who are in relationships of violence.

This paper argues that the federal government’s recent proposal to create a conditional permanent resident status for certain sponsored immigrants has the potential to fall into a category of laws that fails

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<sup>1</sup> *R v Lavallee*, [1990] 1 SCR 852 at para 32, 55 CCC (3d) 97 [*Lavallee*]. For the purposes of this paper, domestic violence is considered to encompass physical, sexual, psychological, and economic abuse.

<sup>2</sup> *Ibid.* See also Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Violence – Achieving Equality (Final Report of the Canadian Panel on Violence Against Women)* (Ottawa: Minister of Supply and Services Canada, 1993) [Report of Panel on Violence Against Women].

to protect women in abusive relationships. The intention of the federal government to affect this change to the *Immigration and Refugee Protection Regulations*<sup>3</sup> was first announced in the Canada Gazette in March 2011,<sup>4</sup> with the proposed regulatory text being published in March 2012.<sup>5</sup> This measure is situated in the context of significant reforms that are changing the landscape of Canada's immigration policies. Initiatives such as the imposition of a five-year bar on sponsored individuals sponsoring family members to come to Canada<sup>6</sup> are affecting the rights and privileges formerly afforded to this group of individuals.

It is essential to examine the context of the abuse of immigrant women in intimate partner relationships in order to understand the effects that conditional permanent residence may have on sponsored immigrant women.<sup>7</sup> Part I of this paper explores some of the factors that contribute to the particular vulnerability of immigrant women to domestic abuse. Part II briefly examines how Canada's current immigration laws, far from protecting women from abuse, operate to discourage immigrant women sponsored as spouses or partners from leaving abusive relationships. It is in this context that the federal government has recently proposed to create a conditional permanent resident status, which is outlined in Part III, for certain sponsored spouses and partners in an attempt to deter marriage fraud within the immigration system. Part IV assesses the possible impact of this status in light of the rights guaranteed to immigrant women under sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*.<sup>8</sup> This analysis will demonstrate the potential for conditional status to further exacerbate the already heightened vulnerability immigrant women experience with respect to domestic

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<sup>3</sup> SOR/2002-227 [*Regulations*].

<sup>4</sup> Government Notice, Department of Citizenship and Immigration (*Immigration and Refugee Protection Act*), (2011) C Gaz I, 1077 [Gazette Notice].

<sup>5</sup> Regulations Amending the Immigration and Refugee Protection Regulations, (2012) C Gaz I, 430 [Amending Regulations].

<sup>6</sup> *Regulations Amending the Immigration and Refugee Protection Regulations*, PC 2012-213, (2012) C Gaz II, 625.

<sup>7</sup> While the author acknowledges that male immigrants may also experience violence in intimate relationships, the literature demonstrates that in such relationships, women are overwhelmingly the targets rather than the perpetrators of this violence: see Report of Panel on Violence Against Women, *supra* note 2.

<sup>8</sup> Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act (UK)*, 1982, c 11 [*Charter*].

violence. It will also highlight issues that the federal government will need to address if it chooses to move forward with its proposal.

Taking into consideration the context in which conditional permanent residence would be implemented, as well its possible effects, the federal government should abandon this proposal. Alternatively, if the government is determined to move forward with this measure, it should carefully consider the effects conditional status will likely have on immigrant women in abusive relationships as it develops policies and processes related to this status.

### **I. Vulnerability of immigrant women to domestic violence**

Domestic violence affects the lives of many women in Canadian society. While its prevalence is difficult to determine, studies indicate that a significant number of women have experienced spousal violence at some point in their lives.<sup>9</sup> These women represent a cross-section of economic, social, and cultural classes in Canada.

There are a number of factors that make immigrant women particularly vulnerable to domestic violence and that affect their decisions about whether to leave abusive relationships. An understanding of the lived realities of women in these situations should inform the evaluation of Canada's immigration laws and policies. This section explores how a lack of language skills, perceptions of law enforcement, and fear of deportation contribute to creating a sense of isolation or dependency that leaves immigrant

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<sup>9</sup> See Lori Haskell & Melanie Randall, *The Women's Safety Project: Summary of Key Statistical Findings* (Ottawa: Canadian Panel on Violence Against Women, 1993) (more than one in four women reported having experienced a physical assault in an intimate partnership at some point in their lives); Statistics Canada, *Measuring Violence Against Women: Statistical Trends 2006* (Ottawa: Minister of Industry, 2006) at 16-17 (in 2004, seven per cent of women living in a common law or marital relationship reported experiencing spousal violence in the previous five years); Angela Bressan, "Spousal Violence in Canada's Provinces and Territories" in Statistics Canada, *Family Violence in Canada: A Statistical Profile 2008* (Ottawa: Minister of Industry, 2008) 10 at 11-12 (over 38,000 accounts of spousal violence were reported to Canadian police in 2006; women were the targets of abuse in 83% of these cases).

women more vulnerable to abuse than many other groups in Canadian society.<sup>10</sup>

### A. Lack of language skills

Being unable to communicate in English or French tends to keep women isolated, powerless, and vulnerable to abuse. Among the female immigrant population in 2006, 70% reported that their mother tongue was neither English nor French.<sup>11</sup> Eleven percent of recent immigrant women had no knowledge at all of either language.<sup>12</sup> Knowledge of one of Canada's official languages has a large impact on employment prospects and has a direct link to equality and safety.<sup>13</sup> One study involving immigrant women who spoke neither of Canada's official languages found that "the fear, the isolation, the dependency, the helplessness and the hopelessness that is so much a part of life for all women who are abused, are multiplied many times over" due to this lack of language skills.<sup>14</sup>

The inability to effectively communicate in English or French can also be a barrier to accessing social, health, and justice services to address the abuse a woman is experiencing. In such situations, a woman may not know where to go or that assistance is actually available to her.<sup>15</sup> A study of immigrant women who were abused noted that even for women who are usually able to function in English, the stress of an abusive relationship could compromise their

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<sup>10</sup> For a broader discussion of factors that exacerbate the vulnerability of immigrant women to domestic violence, see Cecilia Menjivar & Olivia Salcido, "Immigrant Women and Domestic Violence: Common Experiences in Different Countries" (2002) 16:6 *Gender Soc* 898 at 901-911; Ariane Campbell, *Intersections of Violence: The Role of Immigration Status in Women's Experiences of and Responses to Domestic Violence in Canada* (MA Major Research Paper, Ryerson University Graduate Program of Immigration and Settlement Studies, 2009) [unpublished]. The author is particularly indebted to Campbell's paper for the identification of secondary sources used in this paper.

<sup>11</sup> Tina Chui, "Immigrant Women" in *Women in Canada – A Gender-Based Statistical Report*, 6<sup>th</sup> ed (Ottawa: Statistics Canada, 2011) at 19.

<sup>12</sup> *Ibid* at 20.

<sup>13</sup> Report of Panel on Violence Against Women, *supra* note 2 at 94.

<sup>14</sup> Linda MacLeod & Maria Shin, *Like a Wingless Bird...A Tribute to the Survival and Courage of Women Who are Abused and Who Speak Neither English Nor French* (Ottawa: Minister of Supply and Services, 1993) at 28.

<sup>15</sup> Report of Panel on Violence Against Women, *supra* note 2 at 95.

ability to communicate in that language.<sup>16</sup> It is true that interpreters may be used in such circumstances. However, they are sometimes found to be inadequate or lack knowledge about the issue of domestic violence.<sup>17</sup> In the absence of professional interpreters, partners or family members are sometimes relied upon to provide interpretation, which can create significant screening and disclosure problems, especially where the interpreter is her abuser.<sup>18</sup> This reality can prevent a woman from receiving the help she needs at a time when she is at her most vulnerable.

## **B. Perceptions of law enforcement officials**

Much like the lack of knowledge of Canada's official languages, perceptions of law enforcement among immigrant women can have the dual effect of heightening vulnerability to domestic violence and acting as a barrier to escaping situations of violence. Immigrants will often frame their experiences using their home countries as a point of reference, and will respond to current situations of abuse in the same way they would in their home country.<sup>19</sup> Immigrant women may arrive in Canada from countries where law enforcement officials view domestic violence as a private matter and where there is relatively little legal protection for abused women.<sup>20</sup> In such cases, this may affect their decision to report domestic abuse to law enforcement officials in Canada.

For example, a study of abused Indian immigrant women in Ontario noted that their views of Canadian police were informed by their general perception of Indian law enforcement officers.<sup>21</sup> As a result, Canadian police were not necessarily perceived as protectors upon whom women could call to intervene in situations of domestic abuse.

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<sup>16</sup> Justice Institute of British Columbia, *Empowerment of immigrant and refugee women who are victims of violence in their intimate relationships* (Vancouver: The Institute, 2007) at 34.

<sup>17</sup> *Ibid* at 44.

<sup>18</sup> Report of Panel on Violence Against Women, *supra* note 2 at 96; Campbell, *supra* note 10 at 12, citing Yasmin Jiwani, *Intersecting Inequalities: Immigrant Women of Colour, Violence and Health Care* (Vancouver: FREDA Centre for Research on Violence Against Women and Children, 2001) at 3.

<sup>19</sup> Menjivar & Salcido, *supra* note 10 at 910.

<sup>20</sup> *Ibid*.

<sup>21</sup> Swati Shirwadkar, "Canadian Domestic Violence Policy and Indian Immigrant Women" (2004) 10:8 *Violence Against Women* 860 at 869.

Instead, these women feared that if they reported their abuse they would be blamed or disbelieved.<sup>22</sup> Abusers of immigrant women can rely upon these perceptions of law enforcement officials to control the women they abuse.

The effects of a heightened distrust of law enforcement officials and government authorities among some immigrant women are particularly concerning given the low rate at which women report partner abuse to police in Canada. In 2009, only 22% of those who had experienced spousal abuse reported the incident to police.<sup>23</sup> Where the experiences of immigrant women in their home countries negatively inform their perceptions of law enforcement in Canada, this has the potential to further reduce the rate at which incidents of abuse are reported.

### C. Fear of deportation

The fear of deportation may be the most significant factor exacerbating the vulnerability of immigrant women to abuse and posing a barrier to leaving relationships of violence. Abusers often use the threat of deportation as a means to control and isolate the immigrant women they abuse, regardless of whether terminating the relationship could actually impact the women's status.<sup>24</sup> This coercive tactic ensures women do not leave or seek assistance when abused.<sup>25</sup> One immigrant woman in the United States recounted how she remained in an abusive marriage for five years, enduring constant threats from her husband that he would take away their young daughter and have her deported.<sup>26</sup> He had permanent resident status; she did not. His repeated threats to cancel the ongoing petition process for her legal status as a spouse contributed to her decision to

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<sup>22</sup> *Ibid.*

<sup>23</sup> Shannon Brennan, "Self-Reported Spousal Violence" in Statistics Canada, *Family Violence in Canada: A Statistical Profile* (Ottawa: Statistics Canada, 2011) 8 at 8.

<sup>24</sup> Sandra D. Pressman, "The Legal Issues Confronting Conditional Resident Aliens Who Are Victims of Domestic Violence: Past, Present, and Future Perspectives" (1994) 6 *Md J Contemp L Issues* 129 at 135.

<sup>25</sup> Uma Narayan, "Male-Order Brides: Immigrant Women, Domestic Violence and Immigration Law" (1995) 10:1 *Hypatia* 104 at 109.

<sup>26</sup> Menjivar and Salcido, *supra* note 10 at 909, citing Olivia Salcido, *The Wilson Community Project: Assessing domestic violence issues* (Tempe: Arizona State University (Building Greater Communities Project), 2000).

stay with him. An immigrant woman who arrives in Canada totally dependent on her spouse and unaware of immigration laws may be particularly vulnerable to this type of manipulation.

Even where an abuser does not use the real or perceived threat of deportation to control and intimidate an immigrant woman, she may still be hesitant to leave the relationship or contact police when she believes her status may be affected.<sup>27</sup> In a 2006 research project, non-status women in Toronto were interviewed about their experiences of abuse at the hands of intimate partners or men that they knew.<sup>28</sup> These women confirmed that they would not report their abuse to the police for fear that the police would involve immigration authorities:

So you're afraid...afraid when he abused me, I was afraid to call the police. I don't want to, they will send me home one day. (Person with less than full status)

I would not call them for anything. One day he almost kill me, choked me with construction boot ties, and I would not call them. One time when I was pregnant with my son, he took me and fling me on the ground, and I was scared of calling them. What will they do with my kids, what will they do with me, you know? (Person with less than full status)<sup>29</sup>

These experiences of non-status women could also be characteristic of those of abused immigrant women who have status, but who erroneously believe that this status is dependent on remaining in a relationship with their abusers. This belief can lead women to stay with an abusive partner for fear that their ability to remain in Canada would be affected if they were to leave the relationship.

A woman may also fear reporting the abuse to the police because she is concerned that if her abuser is charged, he may be subject to

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<sup>27</sup> Justice Institute of British Columbia, *supra* note 16 at 41-43.

<sup>28</sup> Carolina Berinstein et al, "Access Not Fear: Non-Status Immigrants and City Services" Report prepared for the "Don't Ask, Don't Tell" Campaign, Toronto, February 2006.

<sup>29</sup> *Ibid* at 22.



deportation if he is only a permanent resident.<sup>30</sup> She may believe that as a result, this would create a risk that she and her children could be deported as well.<sup>31</sup> In any of these circumstances, the perceived or real possibility of deportation discourages immigrant women from leaving abusive relationships.

## II. Women sponsored as spouses in the Canadian immigration system

Immigrant women sponsored as spouses have different legal rights and experience different vulnerabilities depending on the particular stage of the sponsorship process. This section will examine the procedures for obtaining permanent resident status under the spousal sponsorship provisions of the *Immigration and Refugee Protection Act (IRPA)*<sup>32</sup> and the *Immigration and Refugee Protection Regulations*.<sup>33</sup> It will also canvass the considerations that arise for abused women within this class while they are waiting for their application to be processed, and during the period of sponsorship after the application is approved.

### A. Applying for spousal sponsorship

A permanent resident or a Canadian citizen 18 years of age and over may apply to sponsor a foreign national<sup>34</sup> who is a member of the Family Class to receive permanent resident status in Canada.<sup>35</sup> Foreign nationals can be sponsored on the basis of their relationship as the spouse, common-law partner, conjugal partner, child, parent, or other prescribed family member of the Canadian citizen or permanent resident.<sup>36</sup> The sponsor must make an undertaking to support the Family Class member by providing basic requirements for that person for a specified period of time, the length of which depends on the nature of their relationship.<sup>37</sup> In the case of a spouse

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<sup>30</sup> Colleen Sheppard, "Women as Wives: Immigration Law and Domestic Violence" (2000) 26 Queen's LJ 1 at 6.

<sup>31</sup> *Ibid* at 6-7.

<sup>32</sup> SC 2001, c 27 [*IRPA*].

<sup>33</sup> *Regulations*, *supra* note 3.

<sup>34</sup> "Foreign national" is defined in s 2 of the *IRPA*, *supra* note 32, as a person who is not a Canadian or a permanent resident, and includes a stateless person.

<sup>35</sup> *Ibid*, s 13(1); *Regulations*, *supra* note 3, s 130(1).

<sup>36</sup> *IRPA*, *supra* note 32, s 12(1); *Regulations*, *supra* note 3, s 117.

<sup>37</sup> *Ibid*, s 132.

or partner, the sponsorship period lasts for three years following the date on which the sponsored individual becomes a permanent resident.<sup>38</sup> In 2010, approximately 60% of the total number of individuals sponsored as spouses or partners under this class were women.<sup>39</sup>

Spouses or partners can be sponsored for permanent residence from outside or within Canada. While the Family Class provisions allow for sponsorship from abroad, a spouse or common-law partner can be sponsored for permanent resident status from within Canada under the Spouse or Common Law Partner in Canada Class.<sup>40</sup> This application can be made regardless of whether the sponsored individual has status in Canada at the time of the application.<sup>41</sup> The sponsored individual must reside with the sponsor and must be the sponsor's spouse or common law partner for genuine reasons and not primarily to obtain permanent resident status.<sup>42</sup> This kind of sponsorship application is sometimes called an "inland sponsorship application" and is an exception to the general rule that one cannot apply for permanent resident status from within Canada.<sup>43</sup>

## **B. Vulnerability to abuse and available remedies while awaiting approval**

There are often lengthy delays in assessing inland sponsorship applications. As of April 2012, it takes approximately 19 months from the time a completed sponsorship application is submitted until

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<sup>38</sup> *Ibid.*, s 132 (1).

<sup>39</sup> Citizenship and Immigration Canada, "Facts and Figures 2010 – Immigration overview: Permanent and temporary residents" (30 August 2011), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/resources/statistics/facts2010/permanent/02.asp>> [CIC, Facts and Figures 2010].

<sup>40</sup> *Regulations*, *supra* note 3, s 123.

<sup>41</sup> While s 124(b) of the *Regulations*, *ibid.*, requires that the sponsored spouse or common-law partner have temporary resident status in Canada, this requirement can be waived by the spousal policy so long as the sponsored individual meets all other requirements of the class: *Spouse or Common Law Partner in Canada Class*, c IP 8 (Ottawa: Citizenship and Immigration Canada, 2006), s 5.27.

<sup>42</sup> *Regulations*, *supra* note 3, s 4.

<sup>43</sup> Emily Carasco et al, *Immigration and Refugee Law: Cases, Materials, and Commentary* (Toronto: Emond Montgomery Publications Limited, 2007) at 372.

it is approved and permanent residence is granted.<sup>44</sup> A sponsor can withdraw the sponsorship undertaking at any time before a final decision on the application is made.<sup>45</sup>

The dependent character of an immigrant woman's relationship with her sponsor during this period has very negative implications in situations of abuse. A woman may stay in a violent relationship because she fears her sponsor will withdraw the sponsorship undertaking, affecting her ability to remain in Canada.<sup>46</sup> This is particularly true for women who do not have any status in Canada during the time that the sponsorship application is being processed, as they are especially vulnerable to removal if the sponsorship undertaking is withdrawn.

If sponsorship is withdrawn, an abused immigrant woman may be able to pursue an application for permanent resident status based on humanitarian and compassionate grounds.<sup>47</sup> However, given the relatively high level of hardship that must be demonstrated, the factors considered in assessing an application, and the possibly low rate of acceptance,<sup>48</sup> it may be quite difficult for a woman in an abusive relationship to make a successful application.<sup>49</sup>

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<sup>44</sup> Citizenship and Immigration Canada, "Processing Times: Family Sponsorship" (8 April 2012), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/information/times/perm-fc.asp>>.

<sup>45</sup> *Regulations*, *supra* note 26, s 126; *Processing Applications to Sponsor Members of the Family Class*, c IP 2 (Ottawa: Citizenship and Immigration, 2011), s 5.40 [*Processing Family Class Applications*].

<sup>46</sup> Sheppard, *supra* note 30 at 12.

<sup>47</sup> *IRPA*, *supra* note 32, s 25(1).

<sup>48</sup> While statistics on the rate of acceptance of applications are unavailable, one group of researchers suggests, based on the estimates of immigration lawyers and advocates, that only 2-5% of humanitarian and compassionate claims actually succeed: Luin Goldring, Carolina Berinstein & Judith Bernhard, "Institutionalizing Precarious Immigration Status in Canada", online: (2007) Ryerson University Early Childhood Education Publications and Research, Paper 4 at 23 <<http://digitalcommons.ryerson.ca/ece/4/>>.

<sup>49</sup> For a more thorough discussion about the difficulties abused immigrant women face in succeeding on a humanitarian and compassionate application, see Sheppard, *supra* note 30 at 13-16. While the federal guidelines for processing humanitarian and compassionate applications have changed slightly since Sheppard's article was written, her critique remains applicable to the guidelines in their current form.

### C. Vulnerability to abuse during the sponsorship period

While a sponsored woman may experience great uncertainty during the processing of her sponsorship application, once a final decision has been made on the application, a sponsor cannot withdraw the sponsorship undertaking.<sup>50</sup> This means that the sponsor is bound by the undertaking and is responsible for the sponsored spouse. While the woman's status as a permanent resident is secure and she cannot be removed from Canada solely for leaving an abusive sponsor, several considerations may continue to discourage her from doing so.

A sponsored woman's lack of knowledge of her rights once her sponsorship application has been approved can be a barrier to leaving an abusive relationship.<sup>51</sup> As discussed above, abusive sponsors often take advantage of this and use threats related to the woman's immigration status, such as deportation or loss of custody of any children if she leaves, to control and manipulate her.<sup>52</sup> In addition, a woman may also feel a sense of indebtedness to her sponsor for helping her come to Canada, which increases the level of dependency and the power imbalance in the relationship.<sup>53</sup> These factors may cause a woman to stay with her abusive sponsor, even when her legal status in Canada will not be jeopardized solely because she leaves.

### III. Federal government proposal: Conditional permanent resident status

Many aspects of the current immigration regime exacerbate the vulnerability of immigrant women to abuse and effectively discourage immigrant women sponsored as spouses or partners from leaving their abuser. It is in this context that the federal government has proposed to create a conditional permanent resident status, which

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<sup>50</sup> *Processing Family Class Applications*, *supra* note 44, s 12.2.

<sup>51</sup> Justice Institute of British Columbia, *supra* note 16 at 42; Sheppard, *supra* note 30 at 17.

<sup>52</sup> *Ibid.*

<sup>53</sup> Andr e C t , Mich le K risit & Marie-Louise C t , *Sponsorship...for better or worse: The impact of sponsorship on the equality rights of immigrant women* (Ottawa: Table feministe francophone de concertation provinciale de l'Ontario, Status of Women Canada's Policy Research Fund, 2001) at 32, cited in Campbell, *supra* note 10 at 25.

has the potential to aggravate, rather than ameliorate, the situations of immigrant women in abusive relationships.

In the 2011 Annual Report to Parliament on Immigration, the Minister of Citizenship, Immigration and Multiculturalism emphasized that a key focus of the department over the previous year had been “to reduce fraud and protect the integrity of our immigration system.”<sup>54</sup> As part of this focus, the federal government has proposed amendments to the *Immigration and Refugee Protection Regulations* to create a conditional permanent resident status for spouses or partners sponsored under the Family Class or the Spouse or Common Law Partner in Canada Class.<sup>55</sup> The stated purpose of the status is to “serve as a deterrent to marriages of convenience, thereby strengthening the overall integrity of Canada’s immigration program, while maintaining the spirit of the family reunification program by continuing to facilitate the reunification of legitimate spouses and partners.”<sup>56</sup>

These amendments would introduce a conditional permanent resident period of two years for sponsored spouses or partners who have been in a relationship of two years or less with their sponsor at the time of the sponsorship application, and who do not have a child with their sponsor when the application is filed.<sup>57</sup> Instead of sponsored spouses and partners simply being granted permanent residence upon approval of the sponsorship application, as is currently the case, permanent residence would become “subject to the condition that they cohabit in a conjugal relationship with their sponsor” for two years following approval of their sponsorship application.<sup>58</sup> Failure to do so could result in the permanent resident status being revoked.

The federal government has acknowledged that conditional status may pose particular problems for a sponsored woman abused by her sponsor.<sup>59</sup> In light of this, it proposes to include provisions that would remove the condition in cases where there is evidence of

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<sup>54</sup> CIC Report to Parliament 2011 (Ottawa: Minister of Citizenship and Immigration, 2011) at 3.

<sup>55</sup> Amending Regulations, *supra* note 5.

<sup>56</sup> *Ibid* at 433

<sup>57</sup> *Ibid* at 441

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid* at 434.

abuse or neglect, or evidence of a failure of the sponsor to protect the sponsored spouse or partner from abuse or neglect.<sup>60</sup> Evidence must also demonstrate that this abuse or neglect is the reason why cohabitation ceased.<sup>61</sup> The federal government has committed to developing guidelines to assist immigration officers in dealing with cases where these claims are made.<sup>62</sup>

#### **IV. Assessing the proposal using the Charter as an analytical lens**

In this section, conditional permanent residence is evaluated using sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* as an analytical lens. While the analysis demonstrates that *Charter* challenges to conditional status may be an uphill battle, it also illustrates the potential for conditional status to have serious negative implications for immigrant women, and highlights issues that the federal government should address if it chooses to implement its proposal for conditional status.

##### **A. Section 7: The right to life, liberty and security of the person**

The guarantees of individual rights entrenched in the *Charter* are important guiding principles for government actors in the development of public policy. While case law suggests that it may ultimately be difficult to establish that conditional status violates the section 7 rights of immigrant women,<sup>63</sup> analyzing the proposal in light of these guarantees demonstrates the significant negative impact that this proposal will likely have on sponsored women in abusive relationships.

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<sup>60</sup> *Ibid* at 441-442.

<sup>61</sup> *Ibid*.

<sup>62</sup> *Ibid* at 434.

<sup>63</sup> In the immigration context, courts have tended to recognize section 7 violations only in the most extreme circumstances, such as where there is a risk of torture or other direct impacts on liberty: see *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*] (a section 7 violation was found in the context of deportation to torture); *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui*] (detention during the security certificate process violated section 7 right to liberty). See also *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 SCR 539 (the deportation of a non-citizen cannot in itself implicate the liberty and security interests protected by section 7).

Section 7 of the *Charter* states that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>64</sup> The Supreme Court has held that “everyone” means every person who is in Canada, including persons who do not have legal status in Canada, and participants in immigration proceedings.<sup>65</sup>

In order to succeed on a section 7 claim, the claimant must establish that there has been or could be a deprivation of the right to life, liberty and/or security of the person, and that this deprivation was not or would not be in accordance with the principles of fundamental justice.<sup>66</sup> If this is established, the government will then have to prove that the deprivation is justified under section 1<sup>67</sup> as a reasonable limit on *Charter* rights that is demonstrably justified in a free and democratic society.

In the context of abusive relationships during the period of conditional permanent residence, the right to security of the person is most directly implicated. This right has physical and psychological dimensions.<sup>68</sup> “Serious state-imposed psychological stress” will be held to constitute a violation of the right to security of the person.<sup>69</sup> The effects of the state’s interference are to be assessed objectively, in consideration of their impact on “the psychological integrity of a person of reasonable sensibility”, and must be greater than ordinary stress or anxiety, but need not rise to the level of nervous shock or psychiatric illness.<sup>70</sup> Some examples of where the Supreme Court has found this threshold to be met are in the context of access to therapeutic abortions, where the process of obtaining an abortion was marred in uncertainty and delay,<sup>71</sup> and in the context of the potential removal of a child from parental custody through a state-initiated administrative process.<sup>72</sup>

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<sup>64</sup> *Charter*, *supra* note 8.

<sup>65</sup> *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at para 35, [1985] SCJ No 11.

<sup>66</sup> *Charkaoui*, *supra* note 63 at para 12.

<sup>67</sup> *Charter*, *supra* note 8.

<sup>68</sup> *R v Morgentaler*, [1988] 1 SCR 30 at para 22, [1988] SCJ No 1 [*Morgentaler*].

<sup>69</sup> *Ibid.*

<sup>70</sup> *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 60, [1999] SCJ No 47 [*G(J)*].

<sup>71</sup> *Morgentaler*, *supra* note 68.

<sup>72</sup> *G(J)*, *supra* note 70 at para 61.

One may argue that the state would be depriving immigrant women of their security of the person to the extent that conditional status places abused women in a situation where they must remain in a violent relationship or risk deportation. This could have serious implications with regard to both the physical and psychological dimensions of the right to security of the person. Women are put at risk of being physically harmed by their abusive sponsor. They may suffer severe psychological stress caused by an abuser who may use her precarious status to manipulate her and threaten to declare her “fraudulent” to immigration authorities.<sup>73</sup> Sponsored women in abusive relationships may experience further serious state-imposed psychological stress in that the legal regime can effectively force women to choose between their physical safety and remaining in Canada.

It is possible that introducing a process to deal with domestic violence during the conditional period may alleviate the state-imposed psychological stress. However, based on the experiences of other countries, the remedies provided by such a process may prove difficult to access for an abused immigrant woman. In the United States, a woman may self-petition, rather than petition jointly with her sponsor, to have her conditional status removed because she is in an abusive relationship. However, to succeed on such a petition, she must rebut the negative presumption that she married her sponsor to gain immigration status, prove that the marriage was legal, and demonstrate that she was subjected to abuse or extreme cruelty.<sup>74</sup> This places a tremendous burden on the abused woman at a time when she is at her most vulnerable.

At first glance, the provisions proposed by the Canadian federal government appear to impose less stringent requirements than those in the United States. However, there remain several unanswered

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<sup>73</sup> Canadian Council for Refugees, “Statement on Proposed ‘Conditional Permanent Residence’ for sponsored spouses” (April 2011), online: <<http://ccrweb.ca/en/statement-proposed-conditional-permanent-residence-sponsored-spouses>>.

<sup>74</sup> Olga Grosh, “Foreign wives, Domestic Violence: U.S. Law Stigmatizes and Fails to Protect ‘Mail-Order Brides’”, (2011) 22 *Hastings Women’s LJ* 81 at 98, cited in Audrey Macklin, “Re: Notice requesting comments on a proposal to introduce a conditional permanent residence period of two years or more for sponsored spouses and partners in a relationship of two years or less with their sponsors” at 2, online: <<http://ccrweb.ca/files/macklinconditionalprstatus.pdf>>.



questions regarding the process in which a sponsored spouse will have to engage to remove the conditional status in cases of abuse or neglect. It is not clear whether or how an abused sponsored spouse will be required to commence a proceeding to lift the conditional status. Also, the federal government has given no indication as to what evidentiary standards will have to be met to satisfy the requirement that a sponsored spouse must prove that abuse or neglect occurred and that it was the reason for the termination of cohabitation with the sponsor. While the government has indicated it will consult with expert non-governmental organizations to develop guidelines for processing cases, groups such as the Ontario Council of Agencies Serving Immigrants have raised concerns about the difficulty recent immigrant women would have in simply compiling evidence and presenting it to an immigration officer during a time of great vulnerability.<sup>75</sup> Significant evidentiary burdens could discourage women who are in genuine need of protection from applying to have the conditional status lifted.

Further concerns have been raised that because many sponsored immigrant women have little knowledge of their rights, a sponsored woman in an abusive relationship may not be aware that a remedy could be available to her.<sup>76</sup> As such, introducing provisions to deal with situations of domestic violence may do little to reduce the impact of the conditional status on the physical or psychological security of the person for women sponsored as spouses.

Any deprivation of the right to security of the person must be in accordance with the principles of fundamental justice in order to avoid a violation of section 7 of the *Charter*. Two principles may be applicable in the context of the federal government's proposal: overbreadth and procedural fairness. The provisions and procedures the federal government enacts in relation to the conditional status proposal may affect the outcome of inquiries into both of these principles.

Where a legislative provision is overbroad, the principles of fundamental justice will have been violated because the individual's

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<sup>75</sup> Ontario Council of Agencies Serving Immigrants, "Comments on Proposed Conditional Residence (CPR)" (April 2012), online: <<http://www.ocasi.org/index.php?qid=1109>>.

<sup>76</sup> *Ibid*; Canadian Council for Refugees, *supra* note 73.

rights will have been infringed for no reason.<sup>77</sup> The overbreadth analysis requires asking whether the means chosen by the state are necessary to achieve the state's objective.<sup>78</sup> In undertaking this analysis, a measure of deference must be shown to the legislature with regard to the means it has chosen.<sup>79</sup>

The stated purpose of introducing a conditional permanent resident status is to deter marriages of convenience.<sup>80</sup> One could argue that this proposal is overbroad in that it would apply to relationships that do not give rise to concerns that they are fraudulent, apart from the fact that they have existed for two years or less at the time of the application.

A law can be overbroad in terms of the individuals to whom it applies. In *Heywood*, a law prohibiting all persons convicted of certain offences from loitering in or around several specified public places was deemed to be overly broad in respect to the people to whom it applied.<sup>81</sup> However, it should be noted that in *Heywood*, Parliament had made no attempt to tailor the *Criminal Code* provisions to capture a defined group of people who could reasonably pose a danger to children. Given that the federal government has tailored its proposal for conditional status to apply to a narrowly defined group of applicants, and that deference must be shown to Parliament in the overbreadth analysis, it may be difficult to argue that the proposal is overboard.

Another principle of fundamental justice that may be engaged is the right to procedural fairness. While the Supreme Court has held that "Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada,"<sup>82</sup> it has also recognized that non-citizens are entitled to procedural fairness in immigration proceedings where their section 7 rights are infringed.<sup>83</sup>

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<sup>77</sup> *R v Heywood*, [1994] 3 SCR 761 at para 49, [1994] SCJ No 101 [*Heywood*].

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid* at para 51.

<sup>80</sup> Amending Regulations, *supra* note 5 at 433.

<sup>81</sup> *Heywood*, *supra* note 77 at para 61.

<sup>82</sup> *Chiarelli v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 711 at para 27, [1992] SCJ No 27 [*Chiarelli*].

<sup>83</sup> *Charkaoui*, *supra* note 63 at para 28.

In the context of conditional permanent residence, a sponsored spouse would be entitled to procedural fairness in proceedings initiated against her alleging that the conditions of her permanent residence have not been met (namely, that she has not cohabitated in a conjugal relationship with her sponsor). She would also be entitled to procedural fairness in any process to address violence in the relationship with her sponsor during the conditional period. Since these processes have not yet been fully elucidated, it is not possible to conduct a meaningful evaluation as to whether procedural fairness will be accorded. As it determines what these processes will entail, the federal government should take note of the factors set out by the Supreme Court for evaluating procedural fairness in situations where an individual has been deprived of rights protected by section 7.<sup>84</sup> Whether or not procedural fairness has been accorded in potentially depriving sponsored spouses of their section 7 *Charter* rights will depend on the processes ultimately put in place by the federal government in its conditional status scheme.

### **B. Section 15(1): The equality rights of immigrant women**

Evaluating conditional status using section 15(1) of the *Charter* as an analytical lens demonstrates further concerns that should cause the federal government to think twice before it moves forward with this proposal. Although Canadian courts have taken a relatively restrictive approach to finding a violation of section 15(1) in the immigration context,<sup>85</sup> conditional permanent resident status is a distinct policy that has not been the subject of *Charter* scrutiny to date. Even if a court does not accept that conditional status would violate section 15, the *Charter* should still be seen as a code of best practices that informs policy choices.

Section 15(1) of the *Charter* guarantees that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”<sup>86</sup>

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<sup>84</sup> See *Suresh*, *supra* note 63 at para 115, cited with approval in *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 at para 57, [2008] 2 SCR 326.

<sup>85</sup> *Carasco et al*, *supra* note 43 at 153.

<sup>86</sup> *Charter*, *supra* note 8.

At the heart of this guarantee is substantive equality, which is grounded in the idea that “[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”<sup>87</sup>

There is a two-step test for establishing a section 15(1) claim.<sup>88</sup> First, the court must determine whether the law creates a distinction based on enumerated or analogous grounds. Second, the distinction must create a disadvantage by perpetuating prejudice or stereotyping. If these two elements are established, the government will have the opportunity to demonstrate that the section 15(1) infringement is saved under section 1.

Given the lived realities of sponsored immigrant spouses, the grounds of race, ethnicity,<sup>89</sup> and citizenship<sup>90</sup> are all relevant in the context of conditional permanent residence. However, the analysis in this section is focused on the potential for the status to discriminate based on sex.

The proposal for conditional status is facially neutral, in that it does not explicitly make distinctions between different groups. The Supreme Court has recognized, however, that identical treatment may have the effect of creating serious inequality and constitute a violation of section 15(1).<sup>91</sup>

While conditional status would apply equally to sponsored spouses regardless of gender, in practice it may have a significantly different effect depending on the gender of the sponsored spouse. It is important to consider the social and political realities within which an impugned law operates.<sup>92</sup> The reality is that more women than

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<sup>87</sup> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 34, [1989] SCJ No 6 [*Andrews*]. The Supreme Court’s most recent pronouncement on section 15 is in *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 35, [2011] 1 SCR 396 [*Withler*].

<sup>88</sup> *Ibid* at para 30; *R v Kapp*, 2008 SCC 41 at para 17, [2008] 2 SCR 283 [*Kapp*].

<sup>89</sup> The federal government’s declaration that some cases would be “targeted” for fraud raises fears about potential stereotyping and discrimination on the grounds of race, nationality, or ethnicity: Canadian Council for Refugees, *supra* note 73.

<sup>90</sup> Citizenship was recognized as an analogous ground in *Andrews*, *supra* note 87.

<sup>91</sup> *Ibid* at para 26.

<sup>92</sup> *Lavoie v Canada*, 2002 SCC 23 at paras 45-46, [2002] 1 SCR 769.

men are sponsored as spouses under the Family Class, meaning it is likely that more women than men will be subject to conditional status.<sup>93</sup> This raises concerns when considered alongside the facts that immigrant women already experience a heightened vulnerability to domestic violence, and that male partners commit the vast majority of incidents of spousal violence in Canada.<sup>94</sup> Furthermore, the power imbalance created by a conditional status will affect all sponsored spouses, regardless of whether their relationship is “genuine”, and will reinforce unequal gendered power dynamics.<sup>95</sup> Based on these facts, an argument can be made that conditional permanent residence will create a distinction based primarily on sex, as immigrant women are more likely than their male counterparts to experience an increased level of vulnerability to domestic violence arising from a period of conditional status.

Such a distinction can be considered discriminatory on the grounds that it perpetuates prejudice or disadvantage. This typically occurs “when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group.”<sup>96</sup> The two primary factors to consider in this contextual analysis are the pre-existing disadvantage of the claimant group and the nature of the interest affected.<sup>97</sup> Both the circumstances of the group members and the negative impact of the law on them must be taken into account.<sup>98</sup>

Immigrant women currently constitute a socially disadvantaged group that is particularly vulnerable to abuse within intimate relationships. Introducing a conditional status may exacerbate this vulnerability by creating a period of precarious status during which an abused spouse may feel she has no real option but to stay in the relationship or risk deportation. During this time, immigrant women are also vulnerable to having abusive partners use their conditional status to manipulate and control them, as discussed above.

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<sup>93</sup> In 2010, roughly 60% of the 40 764 spouses sponsored under the Family Class were women: CIC, Facts and Figures 2010, *supra* note 39.

<sup>94</sup> Lucie Ogrodnik, “Spousal violence and repeat police contact” in *Family Violence in Canada: A Statistical Profile 2006*, (Ottawa: Statistics Canada, 2006) at 13-14.

<sup>95</sup> Canadian Council for Refugees, *supra* note 73.

<sup>96</sup> *Withler supra* note 87 at para 35.

<sup>97</sup> *Kapp, supra* note 88 at paras 19, 23.

<sup>98</sup> *Withler, supra* note 87 at para 37.

In terms of the nature of the interest affected, the Supreme Court has held that “the more severe and localized the...consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory[.]”<sup>99</sup> Introducing a period of conditional permanent residence may have significant consequences for the physical and psychological well-being of sponsored immigrant women. These include the vulnerability to physical abuse and the psychological stress for abused women who may be forced to choose between remaining with their abusers and risking deportation if they leave.

Further, in analyzing the content and obligations imposed by Canadian law, courts have taken into consideration Canada’s commitments with regard to international conventions.<sup>100</sup> In *Baker*, the Supreme Court highlighted the “important role of international human rights law as an aid in interpreting domestic law.”<sup>101</sup> The *IRPA* also explicitly states that the Act “is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory.”<sup>102</sup> The Federal Court of Appeal has stated that the words of this provision “are mandatory and appear to direct courts to give the international human rights instruments in question more than persuasive or contextual significance in the interpretation of *IRPA*.”<sup>103</sup> As such, any analysis of conditional status in light of the section 15(1) rights of immigrant women may take into consideration Canada’s international human rights commitments regarding violence against women.

Canada is a signatory to and has ratified the *Convention on the Elimination of All Forms of Discrimination Against Women*,<sup>104</sup> which is aimed at the elimination of sex-based and gender-based discrimination against women. Discrimination is framed broadly to include direct and indirect discrimination, whether intentional or unintentional, with respect to law or practice, in all aspects of private

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<sup>99</sup> *Kapp*, *supra* note 88 at para 74.

<sup>100</sup> *Baker v Canada*, [1999] 2 SCR 817 at para 70, [1999] SCJ No 39 [*Baker*].

<sup>101</sup> *Ibid* at para 71.

<sup>102</sup> *IRPA*, *supra* note 32 at s 3(3)(f).

<sup>103</sup> *De Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at para 75, [2006] 3 FCR 655, leave to appeal to SCC refused, [2006] SCCA No 70.

<sup>104</sup> GA Res 34/180, UNGAOR, 1979, Supp No 46, UN Doc A/342-346 93.

and public life.<sup>105</sup> This captures discrimination that occurs when facially neutral legal standards lead to consequences that disproportionately affect the enjoyment of rights by women, solely because they are women.<sup>106</sup>

While the Convention does not explicitly address the issue of violence against women, it has been interpreted by the treaty body established by the Convention (the Committee on the Elimination of Discrimination Against Women) to require states to exercise due diligence to protect women from violence.<sup>107</sup> The definition of discrimination in the Convention is held to include gender-based violence, which is “violence that is directed against a woman because she is a woman or that affects women disproportionately.”<sup>108</sup> Failure of a state to act with due diligence to prevent violations of the rights of women may lead to the state being responsible for private acts of discrimination, including violence against women.<sup>109</sup> These obligations set out in the *Convention* may be looked to as having an influential effect on the interpretation of the *IRPA* and the consideration of the section 15(1) rights of immigrant women.

Viewing conditional permanent resident status through the analytical lens of section 15(1) demonstrates that the proposal may have a serious negative impact on the lives of immigrant women. Whether or not a particular court would find conditional status to be unconstitutional, these issues still raise significant concerns about the prudence of moving forward with this proposal.

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<sup>105</sup> Dubravka Šimonović, “Convention on the Elimination of All Forms of Discrimination Against Women” (United Nations Audiovisual Library of International Law: 2009) at 1, online: <[http://untreaty.un.org/cod/avl/pdf/ha/cedaw/cedaw\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/cedaw/cedaw_e.pdf)>.

<sup>106</sup> *Ibid.*

<sup>107</sup> Committee on the Elimination of Discrimination Against Women, “General Recommendation No 19 (Violence Against Women) in *Report on Eleventh Session*, 1992, A/47/38, online:

<<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>>.

<sup>108</sup> *Ibid* at para 6.

<sup>109</sup> *Ibid* at para 9.

### C. Section 1: Are any limits on *Charter* rights demonstrably justified?

If the creation of a conditional permanent resident status were found to violate section 7 or section 15(1) of the *Charter*, or both, the federal government could justify this infringement under section 1 by showing that the limit on *Charter* rights is “demonstrably justified in a free and democratic society.”<sup>110</sup> An analysis of conditional status under this section also demonstrates further policy problems with the federal government’s proposal.

To meet the standard of justification under section 1, the federal government must first establish that the objective of the conditional permanent resident status is “pressing and substantial.”<sup>111</sup> The stated objective of the conditional status is to deter marriage fraud in order to strengthen the integrity of the immigration system.<sup>112</sup> However, a closer analysis suggests that marriage fraud may not actually be a widespread problem in Canada, the deterrence of which would constitute a “pressing and substantial” objective.

In the fall of 2010, Citizenship and Immigration Canada conducted an online consultation and hosted a series of town-hall meetings on marriage fraud.<sup>113</sup> The federal government solicited input from stakeholders and members of the general public on the prevalence of marriage fraud and the means by which it could be addressed. Seventy-seven per cent of respondents felt fraudulent marriages were a “very serious” or “serious” threat to Canada’s immigration system.<sup>114</sup>

While this consultation suggests a *perceived* threat to the system, the federal government has failed to bring forth convincing evidence that marriage fraud is a widespread problem that poses an *actual* threat.

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<sup>110</sup> *Charter*, *supra* note 8.

<sup>111</sup> *R v Oakes*, [1986] 1 SCR 103 at para 69, [1986] SCJ No 7 [*Oakes*].

<sup>112</sup> Amending Regulations, *supra* note 5 at 433.

<sup>113</sup> Citizenship and Immigration Canada, “Summary Report: Consulting the Public on Marriages of Convenience” (25 March 2011), online: Citizenship and Immigration Canada

<<http://www.cic.gc.ca/english/department/consultations/marriagefraud/index.asp>> [CIC Summary Report].

<sup>114</sup> *Ibid.*



The government has admitted that “firm figures on the extent of marriage fraud are not available.”<sup>115</sup> It has also noted, however, that of the 46,300 immigration applications for spouses and partners processed in 2010, 16% were refused for a variety of reasons, including criminality, security, medical issues, and that the relationship was not bona fide.<sup>116</sup> While the federal government states “[i]t is estimated that most of these cases were refused on the basis of a fraudulent relationship,” no breakdown is provided to indicate the precise percentage of applications that were rejected for reasons related to marriage fraud.<sup>117</sup>

These statistics do not support a conclusion that fraudulent marriages are a widespread problem in Canada; rather, the rate of refusal may actually imply that the current up-front screening of applications is, in fact, quite effective at identifying marriage fraud.<sup>118</sup> This raises questions as to whether the actual level of marriage fraud calls for the introduction of a conditional permanent resident status. However, given that the Supreme Court has recognized a broad right for Parliament to enact policies and legislation with regard to immigration,<sup>119</sup> and that courts rarely find that a restriction on *Charter* rights fails at this stage of the section 1 inquiry, it is possible that the deterrence of marriage fraud would qualify as a pressing and substantial objective.

The impugned law must also satisfy a three-step proportionality inquiry under section 1. First, the measures adopted must be rationally connected to the objective they seek to achieve.<sup>120</sup> Since this connection can be made on the basis of reason or logic,<sup>121</sup> the federal government could argue that it is simply reasonable to conclude that there is a logical link between conditional status and the objective of deterring marriage fraud. However, to this point, the

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<sup>115</sup> Amending Regulations, *supra* note 5 at 432.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> Canadian Bar Association, “Re: Notice requesting Comments on Proposal – Conditional Permanent Residence” (18 May 2011) at 2, online: <<http://www.cba.org/cba/submissions/pdf/11-27-eng.pdf>> [CBA Submission].

<sup>119</sup> *Chiarelli*, *supra* note 82.

<sup>120</sup> *Oakes*, *supra* note 111 at para 70.

<sup>121</sup> *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 153, [1995] SCJ No 68 [*RJR-MacDonald*].

government has failed to adduce any evidence that it is, in fact, reasonable to conclude that such a link actually exists.

In Citizenship and Immigration Canada's Fall 2010 online and town hall consultations, the majority of respondents (68%) supported the idea of implementing some form of conditional status to combat marriage fraud.<sup>122</sup> Despite this strong show of support for the proposal, the federal government does not appear to have fully explored whether conditional permanent residence will be an effective means of deterring or reducing fraudulent marriages, if such a problem is actually significant in Canada.

As the federal government highlighted in its notice seeking comments on the conditional status proposal, similar statuses have long been in place in countries such as the United States and the United Kingdom.<sup>123</sup> However, immigration experts and legal organizations have raised questions about whether the measures have been effective in reducing marriage fraud in these countries.<sup>124</sup> Their experiences suggest that the effectiveness of conditional status in this respect is unclear.

In 1986, the United States Congress passed legislation to create a period of two-year conditional residence for sponsored spouses of United States residents or legal permanent residents where the marriage is less than two years old.<sup>125</sup> Permanent status is dependent upon remaining in a bona fide marriage with the sponsor for the two-year period.<sup>126</sup>

However, even with this measure in place, in addition to the availability of various criminal and civil sanctions, the United States Government Accountability Office (GAO) has questioned the general effectiveness of fraud control measures in the United States.<sup>127</sup> While identifying immigration fraud as an ongoing

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<sup>122</sup> CIC Summary Report, *supra* note 113.

<sup>123</sup> Amending Regulations, *supra* note 5 at 432.

<sup>124</sup> See CBA Submission, *supra* note 118 at 3; Macklin, *supra* note 74 at 2.

<sup>125</sup> *Immigration Marriage Fraud Amendments of 1986*, Pub L No 99-639, 100 Stat 3537 (codified in various sections of 8 USC).

<sup>126</sup> *Ibid.*

<sup>127</sup> US, United States Government Accountability Office, *Report to Congressional Requesters – Immigration Benefit Fraud: Focused Approach is Needed to Address*

problem, the GAO has called upon the US Citizenship and Immigration Service to augment its ability to identify fraud, and also criticized the Department of Homeland Security for its failure to administer a credible sanctions program.<sup>128</sup>

A similar period of conditional status exists in the United Kingdom. Sponsored spouses are subject to a two-year probationary period of residency, at the end of which, so long as the relationship is ongoing, they may apply for indefinite leave to remain in the country.<sup>129</sup> Where the relationship has been ongoing for at least four years prior to the date of application, spouses may apply prior to the expiration of the two-year period.<sup>130</sup>

However, despite these provisions, “sham marriages” are still considered to be a major threat to immigration control.<sup>131</sup> Reports of suspected “sham marriages” have been increasing and recent targeted operations have resulted in over 150 arrests by United Kingdom Border Agency officers.<sup>132</sup> The problem is so prevalent that the Select Committee on Home Affairs has called for the Bogus Marriage Task

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*Problems* (GAO-02-66) (Washington, DC: USGAO, 2002), online: <[www.gao.gov/new.items/d0266.pdf](http://www.gao.gov/new.items/d0266.pdf)>, cited in CBA Submission, *supra* note 118 at 3.

<sup>128</sup> US, United States Government Accountability Office, *Report to Congressional Requesters – Immigration Benefits: Additional Controls and a Sanctions Strategy Could Enhance DHS’s Ability to Control Benefit Fraud* (GAO-06-259) (Washington, DC: USGAO, 2006) at 6, online: <[www.gao.gov/new.items/d06259.pdf](http://www.gao.gov/new.items/d06259.pdf)>, cited in CBA Submission, *supra* note 118 at 3.

<sup>129</sup> *Immigration Rules* (UK), HC 395 of 1993-94 as amended, s 287.

<sup>130</sup> *Ibid* s 281.

<sup>131</sup> UK, HC, “Home Affairs Committee: Immigration Control, Fifth Report of Session 2005-06”, HC 775-I at para 316, online: <<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/775/775i.pdf>> [Home Affairs Committee Report]. See also CBA Submission, *supra* note 118 at 4.

<sup>132</sup> UK Home Office, “Damian Green: we do not tolerate sham marriages” (24 March 2011), online: <<http://www.homeoffice.gov.uk/media-centre/news/sham-marriage-crackdown?version=1>>. However, the government has recently undertaken consultations on further proposals to address marriage fraud, which include extending the current probationary period for spouses from two to five years: see UK Border Agency, “Government launches consultation on family migration” (13 July 2011), online: <<http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2011/july/20-family-migration>>.

Force to be reconvened to develop proposals to more effectively combat this problem.<sup>133</sup>

The experiences of the United States and the United Kingdom suggest that the effectiveness of a conditional status in terms of deterring or reducing marriage fraud is, at best, unclear. This supports a conclusion that there does not appear to be a rational connection between conditional status and the objective of reducing marriage fraud.

At the second stage of the section 1 proportionality inquiry, the courts will inquire into whether the means used impair the rights or freedoms in question “as little as reasonably possible in order to achieve the legislative objective.”<sup>134</sup> In conducting this inquiry, a court will look to whether the measure has been tailored to the exigencies of the identified problem in a reasonable way.<sup>135</sup> There is evidence that the federal government has taken steps to tailor the conditional status to address the issue of marriage fraud in that it has limited its application to partners who have been in a relationship of two years or less and have no children together at the time of the sponsorship application. It is also proposing provisions to facilitate lifting the conditional status in cases of abuse or neglect. However, in addition to the tailoring of the measure, a court will also look to “whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner.”<sup>136</sup>

Even if marriage fraud is a widespread problem, the regulations and screening procedures currently in place appear sufficient to address it. The federal government acknowledges that Canadian visa officers perform intensive, up-front reviews of spousal sponsorship applications and often conduct interviews with sponsored individuals to ensure that the relationship is genuine.<sup>137</sup> In countries where the

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<sup>133</sup> Home Affairs Committee Report, *supra* note 131 at para 326.

<sup>134</sup> *RJR-MacDonald*, *supra* note 121 at para 160.

<sup>135</sup> *Montreal (City) v 2952-1366 Quebec Inc.*, 2005 SCC 62 at para 94, [2005] 3 SCR 141.

<sup>136</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 55, [2009] 2 SCR 567 [*Hutterian Brethren*].

<sup>137</sup> Citizenship and Immigration Canada, “Backgrounders – Marriage Fraud – Have Your Say” (27 September 2010), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/departement/media/backgrounders/2010/2010-09-27.asp>> [CIC Backgrounder].

Government of Canada has identified a high rate of marriage fraud, the use of interviews has “[proven] effective to identify and deter fraudulent relationships” before applications for spousal sponsorship are approved.<sup>138</sup>

Further, in the fall of 2010, the *Immigration and Refugee Protection Regulations* were amended to establish that “a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership was entered into primarily for the purpose of acquiring...status...or is not genuine.”<sup>139</sup> These amendments were introduced as a way to “clarify and strengthen the legislation against marriages of convenience,”<sup>140</sup> giving immigration authorities a more effective means by which to guard against fraud in the immigration system.

If a fraudulent relationship is not detected at the stage of processing an application, there are several provisions in the immigration legislation that give immigration officials the authority to revoke permanent resident status. The *IRPA* provides that permanent residence may not be obtained by misrepresentation, and that contravention of this provision can result in the withdrawal of that status and a two-year bar from Canada.<sup>141</sup> A substantial fine can also be levied against a person who engages in misrepresentation or who induces someone else to misrepresent or withhold material facts that would lead to an error in the administration of the *IRPA*.<sup>142</sup>

These practices and legislative provisions give the federal government several means by which to deter fraudulent marriages and to sanction those who have gained status in Canada through a fraudulent relationship. Given that the amendments to section 4 of the *Immigration and Refugee Protection Regulations* were introduced very recently, it may be possible or even preferable to attempt to use the tools currently at the federal government’s disposal to address marriage fraud before seeking to introduce new measures. If the federal government could achieve its objective of

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

<sup>139</sup> *Regulations, supra* note 3, s 4.

<sup>140</sup> CIC Backgrounder, *supra* note 137.

<sup>141</sup> *IRPA, supra* note 32, s 40.

<sup>142</sup> *Ibid* ss 126-128.

detering marriage fraud in a “real and substantial” manner by making fuller use of the current law, the conditional status would not be minimally impairing.

In the third branch of the section 1 proportionality inquiry, the court will consider whether there is proportionality between the deleterious effects of the measure and the objective, and proportionality between the deleterious and the salutary effects of the measures.<sup>143</sup> The proposal for a conditional status poses significant problems at this stage of the section 1 inquiry. While a government enacting social legislation is not required to demonstrate that a measure will in fact produce the anticipated benefits,<sup>144</sup> the analysis conducted in this paper suggests that the potential deleterious effects of a conditional status on immigrant women outweigh the likely minimal benefits of implementing the measure. Conditional permanent residence would have the effect of extending the period of time during which immigrant women sponsored as spouses would be particularly vulnerable to abuse due to the uncertain nature of their status. These women may effectively be forced to choose between remaining in an abusive relationship during the conditional period in order to obtain their permanent residence, and putting in jeopardy their ability to remain in Canada by leaving their abusers. The minimal benefits that conditional status would achieve are likely not proportionate to the potential impact on the physical and psychological well-being of immigrant women in abusive relationships. As such, a court might reach the conclusion that conditional status does not satisfy the third stage of the section 1 proportionality inquiry.

The above analysis demonstrates the negative effects that conditional status may have on immigrant women in abusive relationships, as viewed through the analytical lens of sections 7 and 15(1) of the *Charter*. In light of these concerns, as well as the monetary costs associated with the proposal,<sup>145</sup> the federal government may be well advised to abandon its proposal to implement this status and to first

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<sup>143</sup> *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at para 95, [1994] SCJ No 104.

<sup>144</sup> *Hutterian Brethren*, *supra* note 136 at para 85.

<sup>145</sup> The federal government estimates that the total cost to implement conditional status over ten years will be \$11 million, while the corresponding estimated benefit would be \$5.5 million (although non-monetized benefits are also identified): Amending Regulations, *supra* note 5 at 435-436.

attempt to make better use of the procedures and legislative provisions it currently has at its disposal to combat marriage fraud. These procedures and provisions have far fewer implications for the *Charter* protected rights of immigrant women. However, should it choose to move forward, this analysis also raises issues with regard to compliance with *Charter* rights that the federal government should take into consideration as it elaborates upon the details of this proposal.

## V. Conclusion

While domestic violence is prevalent throughout Canadian society, immigrant women are particularly vulnerable to this kind of abuse. As has been demonstrated, the current rules and procedures surrounding spousal sponsorship exacerbate this vulnerability and discourage immigrant women from leaving abusive relationships, particularly during the time when a sponsorship application is being processed.

The federal government's proposal to create a conditional permanent resident status will lengthen this period of vulnerability for sponsored women, and there is little evidence that it will actually be effective in deterring marriage fraud. Overall, it is likely that this measure will do more harm than good. Implementing a conditional status may effectively carve out a domain where abusers are far less likely to be held accountable for their actions and where immigrant women sponsored as spouses would be far less likely or able to leave a relationship of violence. This could lead to the kind of state-sanctioned abuse that jurists and policy-makers have recognized as a historical problem in Canada's legal system.

If the federal government intends to move forward with this proposal, it should give these potential implications very careful consideration. The principles enshrined in the *Charter* ought to guide the development of enforcement procedures, as well as processes to address situations of abuse within the sponsorship relationship.