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Same-Sex Partners And Family Class Immigration: Still Not Equal With Opposite-Sex Partners

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The Immigration and Refugee Protection Act, which came into force in 2002, and the Regulations under it, expanded family class immigration to include common-law partners and conjugal partners in addition to spouses. A common-law partner or a conjugal partner may be either an opposite-sex or same-sex partner—as can a spouse, depending upon the currently evolving law with respect to same-sex marriage. Under the former Immigration Act, same-sex partners had been admitted pursuant to the discretion to admit immigrants on the basis of compassionate or humanitarian considerations. After examining the admission of same-sex partners under both the former and the current legislation, the author argues that same-sex partners were, and still are, treated unequally in comparison with opposite-sex partners. The only way to eliminate this sexual orientation discrimination is to extend marriage to same-sex partners. In the meantime, the government should facilitate the admission of same-sex partners unable to marry outside Canada.

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Introduction
The Immigration and Refugee Protection Act¹ (IRPA) and the Immigration and Refugee Protection Regulations² (IRPRegs) came into force on June 28, 2002 and replaced the Immigration Act³ ("the former Act") and the Immigration Regulations, 1978⁴ ("the former Regulations") respectively. IRPA and the IRPRegs made many significant changes to Canadian immigration and refugee law.⁵ One of those changes was that a Canadian citizen or permanent resident may now sponsor their "spouse", "common-law partner" or "conjugal partner" as a family class immigrant, whereas only a spouse could be sponsored under the former legislation. A common-law partner or a conjugal partner may be either an opposite-sex partner or a same-sex partner. The federal government stated that these changes to immigration law would "ensure consistency with the [Canadian] Charter

¹. S.C. 2001, c. 27 [IRPA].
². S.O.R./2002-227 [IRPRegs].
⁴. S.O.R./78-172 [former Regulations].
⁵. A very useful source in this regard is Frank N. Marrocco and Henry M. Goslett, The 2004 Annotated Immigration and Refugee Protection Act of Canada (Toronto: Carswell, 2003) at 1-5 (table of changes and amendments introduced by IRPA) and 99-104 (table of changes and amendments introduced by the IRPRegs).
of Rights and Freedoms and the intent of the Modernization of Benefits and Obligations Act."

I begin by considering how spousal sponsorship was regulated under the former Immigration Act and Regulations and how same-sex partners came to be admitted to Canada, not as members of the family class, but pursuant to the government’s discretion to admit immigrants on the basis of “compassionate or humanitarian considerations”. In particular, I consider the problems inherent in discretionary admission. I then examine same-sex partner sponsorship under IRPA and the IRPRegs. Using a close analysis of what precisely the government intended to accomplish by adding “common-law partner” and “conjugal partner” to the family class and what in fact IRPA and the IRPRegs have done and the manner in which they are applied by Citizenship and Immigration Canada (CIC), I argue that same-sex partners are not in a substantially better situation now than they were previously. Same-sex partners are still treated unequally in comparison to opposite-sex partners and, therefore, lesbians and gay men are still treated unequally with heterosexuals. I conclude by considering how equal treatment of opposite-sex and same-sex partnerships could be achieved, in order that immigration law, both in its content and application, could truly be “consist[en]t with the [Canadian] Charter of Rights and Freedoms and the intent of the Modernization of Benefits and Obligations Act.”

I. Same-Sex Partners and the Former Immigration Act

1. Sponsoring a “Spouse”
Under the former Immigration Act and Regulations, a Canadian citizen or permanent resident could sponsor their spouse as a family class immigrant. A person’s “spouse” was defined as “the party of the opposite sex to whom that person is joined in marriage” and “marriage” was defined as

7. Former Act, supra note 3, ss. 2(1) (“member of the family class”), 6(1), 6(2)(a); and former Regulations, supra note 4, ss. 2(1) (“member of the family class”), 4-6(1).
8. Former Regulations, ibid., s. 2(1). Interestingly, the former Regulations contained a second definition of “spouse” of more limited application, namely, a citizen or permanent resident could co-sponsor, with their “spouse,” a family class immigrant, “spouse” for this purpose being extended to include a cohabiting unmarried opposite-sex partner: former Regulations, s. 5(1). It would seem clear that, after M. v. H., [1999] 2 S.C.R. 3, 171 D.L.R.(4th) 577, the “opportunity” afforded under this provision for an unmarried opposite-sex partner to undertake an obligation to the federal government would have extended equally to a willing same-sex partner as well.
"the matrimony recognized as a marriage by the laws of the country in which it took place, but does not include any matrimony whereby one party to that matrimony became at any given time the spouse of more than one living person."”

2. Challenges to the Exclusionary Definition of "Spouse"
As has been argued elsewhere, the exclusion of same-sex partners from the definition of "spouse" in the former Regulations undoubtedly constituted sexual orientation discrimination which violated the guarantee of equality under section 15 of the Charter and, further, this violation would not have been justified under section 1 of the Charter. In 1991, same-sex couples, supported by the Lesbian and Gay Immigration Task Force (LEGIT), began to challenge the restrictive definition of "spouse". The federal government was reluctant to defend such challenges and litigate the issue of same-sex partner sponsorship, likely because of a concern that it might well lose, with the result that judicial precedent permitting same-sex partner sponsorship would then exist. As a result, no court ever had the opportunity of considering a constitutional challenge to the restrictive definition of "spouse" in the former Regulations. Instead, the government began issuing immigration visas to Canadian citizens' or permanent residents' same-sex partners pursuant to its discretionary power to do so for "compassionate or humanitarian considerations."

3. Admission of Same-Sex Partners for "Compassionate or Humanitarian Considerations"
Under the former Immigration Act and Regulations, the government could exempt any person from any provision of the Act or Regulations or "otherwise facilitate the admission" of the person to Canada on the basis of "the existence of compassionate or humanitarian considerations."
sionate or humanitarian considerations" — generally referred to as "H&C" — was interpreted as meaning "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another."^14

The federal government first issued an immigration visa to a Canadian citizen’s same-sex partner in 1992, a few months after she and her partner had commenced proceedings in the Federal Court challenging the constitutionality of the restrictive definition of “spouse” in the Regulations.^15 However, the foreign national partner was granted permanent resident status as an independent immigrant, not as a member of the family class. Then, in 1994, CIC sent a fax to Canadian embassies and consulates setting out guidelines for visa officers concerning visa applications involving same-sex partners or unmarried opposite-sex partners. The fax stated that in these cases visa applicants should be assessed under the provisions governing independent immigrants and, if the applicant qualified as an independent immigrant, then an independent immigrant visa, not a family class visa, should be issued. If the foreign national did not qualify as an independent immigrant, then he or she should be considered for possible admission under H&C. The fax stated in part:

2. ...[T]he treatment of same sex relationships under the immigration regulations is coming under increasing scrutiny by public, media, courts and interest groups. Likewise failure of immigration to recognize common law relationships is increasingly being questioned.

3. The immigration regulations define spouse as someone of the opposite sex to whom an individual is joined in marriage. Due to this definition, [family class] sponsorship of same sex or common law spouse...is conventionally precluded. These regulations remain law of the land unless they are changed by government or struck down by courts.

6. ...[M]issions should review same sex or common law applications for H&C grounds. Where H&C grounds are compelling it is appropriate for program managers to ... authorize the issuance of an immigration visa.

15. Casswell, supra note 10 at 569.
H&C grounds in such cases include the existence of a stable relationship with a Canadian citizen or permanent resident. Missions should recognize that undue hardship would often result from separating or continuing the separation of a bona fide same sex or common law couple.

7. When assessing whether H&C factors are present missions may, of course, look behind same sex or common law relationships (as is done with marriages of convenience). Missions should assess relationships to determine that they are bona fide (in terms of duration and stability of relationship) and not entered into primarily for the purpose of gaining admission to Canada of one of the parties. Where H&C factors are present and applicant is otherwise admissible missions should issue immigrant visa.\(^\text{16}\)

Same-sex partners admitted on the basis of H&C considerations were also issued independent immigrant visas rather than family class visas. CIC later formalized this policy position by stating that “[t]he separation of common-law or same sex partners who reside together in a genuine conjugal-like relationship is grounds for H&C consideration. As with all applications, cases involving common-law or same sex relationships must be reviewed on their individual merit.”\(^\text{17}\) With respect to determining whether a relationship was bona fide, CIC instructed immigration officers to consider in particular the level of interdependence between the partners. Relevant evidence in this regard included, “[d]ocumentary evidence pertaining to the relationship such as joint bank accounts, joint real estate holdings, other joint property ownership, wills, insurance policies, letters from friends and family.”\(^\text{18}\)

Pursuant to this government policy concerning admission of same-sex partners for H&C considerations, many lesbian and gay Canadians were able to bring their same-sex partners to Canada.\(^\text{19}\) However, since same-sex partners admitted on the basis of H&C considerations were admitted as independent immigrants rather than family class immigrants, it is impossible to know how many same-sex partners were admitted to Canada. They were effectively “buried” within statistics concerning independent immigrants generally. While H&C admission of same-sex partners was definitely a positive development, such admission was nevertheless

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extremely problematic because of its discretionary nature. While detailed consideration of the law concerning judicial review of the exercise of H&C discretion is beyond the scope of this article, it is sufficient to say that successfully challenging a negative decision on an application for discretionary admission was extremely difficult. The only two reported cases concerning H&C discretionary admission of a same-sex partner illustrate the difficulties involved in such admission.

In da Silva v. Canada (Minister of Citizenship and Immigration), a decision of the Federal Court, Trial Division, da Silva, a citizen of Brazil, had been in Canada illegally since 1993 and was ordered in 1995 to leave Canada when he abandoned his claim that he was a refugee. In November 1995, he met and began living with a Canadian citizen. They lived together until sometime late in 1997, when they separated, and then began living together again in November 1999. In March 1997, da Silva applied for an immigrant visa on two grounds, namely, as an independent applicant whose intended occupation was a cook and, second, on the basis of his relationship with his same-sex partner and H&C considerations. Da Silva was interviewed by a visa officer on August 6, 1998 and his application was refused in a letter dated August 18, 1998. In her letter, the immigration officer stated that in her assessment da Silva did not qualify as a cook. With respect to his H&C application, the entirety of her reasons for decision on this point were, “I have considered possible humanitarian and compassionate factors but have determined that there are insufficient grounds to warrant special consideration.” As a result, a deportation order was issued against da Silva. He then applied to the Federal Court, Trial Division, for a stay of the deportation order. An applicant seeking this discretionary remedy must establish first, that there exists a serious issue to be argued, secondly, that the applicant will suffer irreparable harm if the remedy is not granted and, finally, that the balance of convenience favours the granting of a stay. In order for a stay to be granted, the applicant must succeed on all three elements. With respect to the first element of the test — whether there was a serious issue to be tried — da Silva argued that the immigration officer’s refusal letter indicated that she had given no consid-
eration to his H&C application. In his submission, this failure constituted an infringement of his equality rights as guaranteed under section 15 of the Charter. In his affidavit in support of his application, da Silva said that the visa officer had showed little or no interest in the genuineness of his relationship with his Canadian partner, had made few inquiries about it and had cut him off when he tried to speak about it. The government argued that the immigration officer had considered da Silva’s H&C application and relied on her computer notes concerning her interview with da Silva. Her notes stated in part:

Subj [Da Silva] claims he met his current partner, a Cdn citizen at a gym in November 95. This appears to be at the same time subj was deemed deport. He claims he met partner and has been living with him for approx 1.5 yrs. Although he moved in with partner he continued to work illegally in Cda. Subj presented letters from friends attesting to character, honesty, integrity. Very little in letters that focus on subj’s relationship with partner and any emotional hardship that would exist if subj left Cda. Subj was asked about relationship with partner and application for landing. Subj stated he would like to return to [B]razil to be able to visit family. He would like to remain in Cda and go to school and work. Subj made no comment regarding emotional dependency on partner. Stated he worked illegally because partner is unable to support him and subj has own life and feels it is important to work. ...

Subj has shown a blatant disregard for the laws of Cda. When asked why he did not leave Cda when ordered to do so subj stated he was afraid he would not be able to return Cda if he left. No mention made of not wishing to leave partner. I am unable to conclude there are H&C grounds in this case. It appears subj entered into relationship and used it to aid in his remaining in Cda. ...Subj has not given me impression that hardship would exist for him or partner if he left Cda.  

Pelletier, J., as he then was, stated that he had “considerable misgivings about the treatment which the application received” and that even the immigration officer’s computer notes “d[id] not show an attentive inquiry into the issue” concerning the H&C application. However, he determined it was not necessary for him to decide this issue because, in his view, da Silva had not established that he would suffer irreparable harm if a stay of the deportation order was not granted and, therefore, his application

24. Da Silva, supra note 16 at para. 6.  
25. Ibid at paras. 6, 11.
failed on the second element of the applicable test. In particular, Pelletier, J. stated:

Documentary evidence was submitted that homophobic violence occurs in Brazil, to which the applicant is scheduled to be deported. On the other hand, the applicant's affidavit recounts one incident of an assault against him, following which he continued to live and work in Sao Paolo for another four and one half years. Homophobic violence continues to occur in Canada and the United States. If absolute safety were required, no illegal claimant could ever be returned to his place of origin.

The applicant also claims that in the context of his relationship with his partner, enforced separation would amount to undue hardship. This can only be as true for same sex relationships as it is for conventional relationships but ... the weight of authority in this court is that family separation is not, of itself, undue hardship. In this case, the parties lived apart for two years before resuming life together in November 1999. Their voluntary separation colours the hardship associated [with] an involuntary separation. 26

In the result, therefore, da Silva's application for a stay of the deportation order against him was dismissed.

The only other reported case in which an application for admission of a same-sex partner on the basis of H&C was considered is the decision of the Federal Court, Trial Division, in Rodriguez v. Canada (Minister of Citizenship and Immigration). 27 Rodriguez, a citizen of Cuba, had been in Canada for eight years. Shortly after he arrived in Canada, he claimed refugee status but that claim was rejected. Pre-removal risk assessments had also been determined against him. He then applied for landing in Canada under H&C on the basis that he was the same-sex partner of a Canadian citizen. The immigration officer who considered his application decided not to recommend discretionary admission on the basis of H&C. The immigration officer stated in her notes:

Involved in a same sex relationship and that he and his partner reside together. Subject stated that he and his partner have been together for approximately three years. Subject could not provide any evidence pertaining to this relationship such as joint bank accounts, joint real estate, joint ownership, wills, insurance policies, letters, bills or apartment [sic]

26. Ibid. at paras. 18-19.
27. Supra note 17.
lease. Subject however after our interview opened a joint account with his partner and sent us a copy of a statement. Subject did produce letters from friends stating that the subject was in a relationship with John Freitas a [C]anadian citizen ...

Overall, subject has not satisfied that there is a genuine relationship between himself and John Freitas or that there is [sic] sufficient humanitarian and compassionate grounds exist [sic] to warrant [discretionary admission]. ...

Subject stated that the hardship he would encounter if he were to return home is emotionally he loves his partner and that they depend on each other both emotionally and financially. Subject also stated that he will be harassed [sic] by the government and the police if he returns home due to his sexual orientation. He went on to say that he has no home or employment to return to and fears he will be arrested for his political opinion and desertion due to his employment with the [C]uban airlines prior to coming to Canada. Subject's partner wanted to add that the subject is a valuable asset to Canada as he is self sufficient, has not been involved in criminal activity, willing [sic] to help others and he loves him.

After careful consideration of the information provided by the subject and his counsel, I am not satisfied that the subject would face undue and disproportionate hardship if returned to Cuba. Subject has been in Canada for eight years. ... Subject has family residing in the U.S. and in Cuba. In Canada, he has his partner John Freitas.28

Rodriguez sought judicial review of the immigration officer's decision, arguing that she had violated her duty of fairness by not advising him adequately that she doubted the bona fides of his relationship with his partner and not giving him an adequate opportunity to respond to her concern, that she had disregarded the evidence of his establishment in Canada, and that her decision was not reasonable based on the evidence before her. McKeown, J. rejected all of these submissions and concluded that the immigration officer had committed no reviewable error. With respect to the submission that the immigration officer's decision was unreasonable, the following is the entirety of McKeown, J.'s reasons:

[T]he standard of review is reasonableness simpliciter. However, on the evidence before her, it was not unreasonable for the officer to conclude that the Applicant had not satisfied her that there was a genuine relationship

28 Ibid at paras. 10, 11, 15.
between himself and Mr. Freitas, and that there are insufficient humanitarian and compassionate grounds to warrant [discretionary admission].

In the result, Rodriguez's application for judicial review was dismissed.

I do not know whether da Silva's relationship with his partner or Rodriguez's relationship with his partner was genuine. Similarly, I do not know whether they would have suffered undue hardship by being separated from their partners. Conversely, however, I do not know whether either da Silva or Rodriguez had the misfortune of being a victim of the "subtle homophobia" which is possible in the immigration system in applying discretion. As one writer has put it, "[t]he fact that a 'humanitarian and compassionate' immigration official may well be neither of those" may present difficulties for lesbian and gay couples in seeking administrative largesse in a "highly discretionary and uncertain area of immigration policy." Homophobia in immigration proceedings certainly has existed.

In particular, one cannot know whether da Silva or Rodriguez had the misfortune to have their applications assessed by an immigration officer who harboured anti-homosexual prejudice. It is most unlikely that an immigration officer would overtly express such prejudice, as this would expose their decision to judicial review for bias. However, I do submit that some of the statements made by the immigration officers in these two cases suggest a blissful ignorance on their part of the reality of living openly and surviving as a same-sex couple in a frequently homophobic and potentially violent society. It is not surprising, therefore, that there was little, if any, documentary evidence by way of letters or otherwise, especially from family, concerning their homosexual relationships. In the context of another concern raised by the immigration officers in their cases, perhaps they and their partners were not economically well off, and therefore had not yet had the chance to accumulate real estate, bank accounts and other property together, even if that was a personal goal for them. Again, I do not know. My point is simply to highlight the unfairness inherent in the discretionary system da Silva and Rodriguez bumped head first into. The individual immigration officer in such a process has huge

29. Ibid. at para. 19. The leading case with respect to the standard of review of an immigration officer's decision on an H & C application is Baker, supra note 13.
31. McIntosh, supra note 10 at 110.
32. Casswell, supra note 10 at 590-602, referring specifically to concerns about the Immigration and Refugee Board.
discretion to make assumptions about the nature of a couple’s relationship which may in fact be utterly wrong. As the immigration officer’s notes in *da Silva* so tellingly stated, it was ultimately her “impression” concerning the men’s relationship which was decisive. At the very least, a discretionary administrative process, which is so heavily stacked against all visa applicants, can operate in an unrealistic and unfair manner when addressing claims by same-sex partners.

II. *Same-Sex Partners and the Immigration and Refugee Protection Act*

1. **Sponsoring a “Spouse”, “Common-Law Partner” or “Conjugal Partner”**

*IRPA* provides that “[a] foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner ... or other prescribed family member of a Canadian citizen or permanent resident.” The *IRPRegs* provide that “[a] foreign national is a member of the family class if, with respect to a sponsor, the foreign national is ... the sponsor’s spouse, common-law partner or conjugal partner.” Thus, in addition to a “spouse” or a “common-law partner,” a “conjugal partner” is similarly a member of the family class as an “other prescribed family member.” *IRPA* then provides that a “Canadian citizen or permanent resident may ... sponsor a foreign national who is a member of the family class.” Therefore, the net effect of these provisions is that a Canadian citizen or permanent resident may now sponsor their spouse, common-law partner or conjugal partner as a family class immigrant.

“Spouse” is not defined in *IRPA* or the *IRPRegs* and, therefore, has its common law meaning. “Marriage” is defined in the *IRPRegs* as, “in respect of a marriage that took place outside Canada, ... a marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law.” This definition of “marriage” was motivated by changes in Dutch law which permitted same-sex couples to marry there as of April 1, 2001. (Belgian law has subsequently also permitted same-sex marriage as of June 1, 2003, and Massachusetts law did so as of May 17, 2004.)

33. *IRPA*, supra note 1, s. 12(1).
34. *IRPRegs*, supra note 2, s. 117(1)(a).
35. *IRPA*, supra note 1, s. 13(1).
36. *IRPRegs*, supra note 2, s. 2.
The meaning of "marriage" under Canadian law and, therefore, the common law definition of "spouse," are currently in flux. Presently, "marriage" means, in British Columbia and Ontario, pursuant to very recent decisions of the British Columbia and Ontario Courts of Appeal, "the voluntary union for life of two persons to the exclusion of all others" whereas in all other common law provinces and territories, "marriage" means "the voluntary union for life of one man and one woman to the exclusion of all others." Similarly, the Quebec Court of Appeal held that "homosexuality [was] not ... a valid objection" to a lawful marriage, thereby permitting legal same-sex marriage. Finally, proposed federal legislation to extend marriage to same-sex partners throughout Canada has been referred to the Supreme Court of Canada to determine its constitutionality.

The IRPRegs do, however, define "common-law partner" and "conjugal partner." "Common-law partner" means, "in relation to a person, an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year." The IRPRegs further provide that, in interpreting the definition of "common-law partner," "an individual who has been in a conjugal relationship with a person for at least one year but is unable to cohabit with the person, due to persecution or any form of penal control, shall be considered a common-law partner of the person." "Conjugal partner" means, "in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal

41. Hyde v. Hyde (1866), L.R. 1 P. & D. 130 at 133.
44. IRPRegs, supra note 2, s. 1(2).
45. Ibid., s. 1(2).
relationship with the sponsor and has been in that relationship for a period of at least one year.\textsuperscript{46} To date, there have been no reported cases interpreting the definitions of "common-law partner” or “conjugal partner” set out in the IRPRegs. The critical expression, “conjugal relationship,” in the definitions of “common-law partner” and “conjugal partner,” is not defined in IRPA or the IRPRegs and, therefore, has its meaning at common law. There is clear, albeit very flexible, case law defining a "conjugal relationship." The leading case is a 1980 Ontario District Court decision, \textit{Molodowich v. Penttinen},\textsuperscript{47} in which Kurisko, D.C.J. listed a series of questions grouped under “seven descriptive components” which offered guidance as to whether a personal relationship was “conjugal.” He emphasized, however, that the extent to which the different elements should be taken into account had to vary with the circumstances of each case and emphasized the varying and complex nature of human relationships. His “seven descriptive components” and questions were as follows:

(1) Shelter:
   (a) Did the parties live under the same roof?
   (b) What were the sleeping arrangements?
   (c) Did anyone else occupy or share the available accommodation?

(2) Sexual and Personal Behaviour:
   (a) Did the parties have sexual relations? If not, why not?
   (b) Did they maintain an attitude of fidelity to each other?
   (c) What were their feelings toward each other?
   (d) Did they communicate on a personal level?
   (e) Did they eat their meals together?
   (f) What, if anything, did they do to assist each other with problems or during illness?
   (g) Did they buy gifts for each other on special occasions?

(3) Services:
   What was the conduct and habit of the parties in relation to:
   (a) Preparation of meals,
   (b) Washing and mending clothes,
   (c) Shopping,
   (d) Household maintenance,
   (e) Any other domestic services?

\textsuperscript{46} \textit{Ibid}, s. 2.
(4) Social:
   (a) Did they participate together or separately in neighbourhood and community activities?
   (b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

(5) Societal:
   What was the attitude and conduct of the community towards each of them and as a couple?

(6) Support (economic):
   (a) What were the financial arrangements between the parties regarding the provision of or contribution towards the necessaries of life (food, clothing, shelter, recreation, etc.)?
   (b) What were the arrangements concerning the acquisition and ownership of property?
   (c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

(7) Children:
   What was the attitude and conduct of the parties concerning children?

It is settled law that both same-sex and opposite-sex couples may live in a "conjugal relationship." As Cory, J. stated, for the majority, in M. v. H.:

*Molodowich v. Penttinen* ... sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many other "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal."

Certainly an opposite-sex couple may, after many years together, be

considered to be in a conjugal relationship although they have neither children nor sexual relations. Obviously the weight to be accorded the various elements or factors to be considered in determining whether an opposite-sex couple is in a conjugal relationship will vary widely and almost infinitely. The same must hold true of same-sex couples. Courts have wisely determined that the approach to determine whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely.\(^9\)

Nowhere in \textit{IRPA} or the \textit{IRPRegs} is there explicit reference to same-sex partners. However, the gender-neutral language used in defining "common-law partner" and "conjugal partner" clearly indicates that common-law partners and conjugal partners may be either opposite-sex partners or same-sex partners. This is made explicit in both the \textit{Regulatory Impact Analysis Statement} which accompanied the publication of the \textit{IRPRegs} and in CIC's \textit{Immigration Manual}, as considered below.

Finally, the \textit{IRPRegs} deal with bad faith in the context of family relationships and provide, in particular, that "no foreign national shall be considered a spouse, a common-law partner, [or] a conjugal partner ... of a person if the marriage, common-law partnership [or] conjugal partnership ... is not genuine or was entered into primarily for the purpose of acquiring any status or privilege under the Act."\(^{50}\)

2. Why Exactly Were "Common-Law Partner" and "Conjugal Partner" Added to the Family Class?

In the \textit{Regulatory Impact Analysis Statement} which accompanied the publication of the \textit{IRPRegs}, the federal government stated that the purpose of adding "common-law partner" and "conjugal partner" to "spouse" in the family class was to "ensure consistency with the [Canadian] Charter of Rights and Freedoms and the intent of the Modernization of Benefits and Obligations Act."\(^{51}\) The reference to meeting Charter muster was undoubtedly intended to take into account Supreme Court of Canada decisions concerning discrimination on the basis of sexual orientation. First, in 1995, in \textit{Egan v. Canada},\(^{52}\) the Court unanimously held that sexual orientation was an analogous ground under the equality guarantees of section 15 of the \textit{Charter} and that, therefore, discrimination on the basis of sexual

\(^{49}\) \textit{Supra} note 8 at paras. 59-60. For a recent example of a determination whether a same-sex couple were in a "conjugal relationship," see \textit{R R v. C.R.}, [2003] O.J. No. 2366 (Sup. Ct. J.).

\(^{50}\) \textit{IRPRegs}, supra note 2, s. 4. With respect to excluded relationships more generally, see also \textit{ibid.}, ss. 5, 117(9).

\(^{51}\) \textit{Supra} note 6 at 258.

orientation was unconstitutional. Secondly, in 1999, an eight-Justice majority of the Court held, in \textit{M. v. H.},\textsuperscript{53} that the definition of "spouse" applicable to partner support in Ontario's \textit{Family Law Act}\textsuperscript{44} was unconstitutional because it included unmarried opposite-sex partners but not same-sex partners. In response to \textit{M. v. H.}, the federal government in 2000 enacted the \textit{Modernization of Benefits and Obligations Act},\textsuperscript{55} which amended most, but not quite all, federal legislation to extend benefits and obligations to same-sex partners on the same basis as they were extended to unmarried opposite-sex partners and, additionally, going farther than was required by \textit{M. v. H.}, to extend to both same-sex partners and unmarried opposite-sex partners certain benefits and obligations which had previously applied only to married spouses.\textsuperscript{56} The \textit{Modernization of Benefits and Obligations Act} did not amend immigration legislation since the process of replacing the former \textit{Immigration Act} with new legislation was already well underway at the time.

The government's perfectly laudable, but very general, statement about consistency with the \textit{Charter} and the intent of the \textit{Modernization of Benefits and Obligations Act} becomes more complicated when one, first, takes a closer look at other passages in the \textit{Regulatory Impact Analysis Statement}, and secondly, compares the \textit{Regulatory Impact Analysis Statement} which accompanied the final version of the \textit{IRPRregs} with the \textit{Regulatory Impact Analysis Statement} which accompanied the proposed version of the \textit{IRPRregs} six months earlier,\textsuperscript{57} and, thirdly, critically compares the English and French versions of the two \textit{Statements}.

The following passages of the \textit{Regulatory Impact Analysis Statement} which accompanied the \textit{IRPRregs} in their final form — published on June 14, 2002, that is, two weeks before \textit{IRP4} and the \textit{IRPRregs} came into force — are relevant (the emphasis is mine):

\begin{itemize}
\item The government's perfectly laudable, but very general, statement about consistency with the \textit{Charter} and the intent of the \textit{Modernization of Benefits and Obligations Act} becomes more complicated when one, first, takes a closer look at other passages in the \textit{Regulatory Impact Analysis Statement}, and secondly, compares the \textit{Regulatory Impact Analysis Statement} which accompanied the final version of the \textit{IRPRregs} with the \textit{Regulatory Impact Analysis Statement} which accompanied the proposed version of the \textit{IRPRregs} six months earlier,\textsuperscript{57} and, thirdly, critically compares the English and French versions of the two \textit{Statements}.
\end{itemize}

\textsuperscript{53} \textit{Supra} note 8.
\textsuperscript{54} R.S.O. 1990, c. F.3, s. 29.
\textsuperscript{55} \textit{Supra} note 6.
What has changed
For common-law partners, the Regulations:

— add the words “and common-law partner” where the term “spouse” appears, to ensure equal treatment and consideration of common-law partners, including those in a same-sex relationship

Benefits
Amending definitions under the family class provides for equal treatment under the law for common-law couples of the same or opposite sex by expanding the family class to include the term “common-law partner” or “conjugal partners”.

These provisions enable the sponsorship of a common-law partner or a conjugal partner, which may include sponsorship of a partner of the same sex. The changes ensure consistency with the Charter of Rights and Freedoms and the intent of the Modernization of Benefits and Obligations Act.

Compliance and Enforcement
The principal applicant, and any dependants, must meet all applicable immigration requirements to be granted an immigrant visa. These requirements include, among others, that they satisfy the officer that they meet the definition as members of the family class and that a genuine relationship exists between them and the sponsor.

Nature des modifications
Dans le cas des conjoints de fait, les dispositions réglementaires:

— font suivre toutes les mentions du terme «époux» des mots «et le conjoint de fait», pour que les dispositions qui concernent les époux s’appliquent également aux conjoints de fait, y compris à ceux qui vivent une relation homosexuelle

Avantages
L’ajout du «conjoint de fait» ou du «partenaire conjugal» dans les nouvelles définitions de la catégorie du regroupement familial permet d’assurer un traitement égal sous le régime de la Loi aux couples de fait de même sexe ou de sexe opposé.

Respect et exécution
Le demandeur principal et les personnes à sa charge doivent satisfaire à toutes les exigences d’immigration applicables pour obtenir un visa d’immigrant. Ils doivent entre autres convaincre l’agent qu’ils satisfont aux exigences établies pour faire partie de la catégorie «regroupement familialé» et qu’il existe une relation véritable entre eux et le répondant.
The following passages of the *Regulatory Impact Analysis Statement* which accompanied the proposed version of the *IRPRegs* — published on December 15, 2001 — are also relevant (again, the emphasis is mine):

**What has changed**
For common-law partners, the Regulations:

... 
— add the words “and common-law partner” where the term “spouse” appears, so that all provisions applicable to spouses are applicable to common-law partners...

**Nature des modifications**
Dans le cas des conjoints de fait, les dispositions réglementaires:

... 
— font suivre toutes les mentions du terme « époux » des mots « et le conjoint de fait », pour que les dispositions qui concernent les époux s’appliquent également aux conjoints de fait...

The *Regulatory Impact Analysis Statement* which accompanied the final version of the *IRPRegs* leaves it unclear whether the addition of “common-law partner” and “conjugal partner” to “spouse” in the family class was intended to ensure equal treatment of unmarried opposite-sex partners and same-sex partners with spouses, or only to ensure that unmarried opposite-sex partners and same-sex partners were treated equally. Consider, in particular, the phrases, “to ensure equal treatment and consideration of common-law partners, including those in a same sex [sic] relationship” and “[a]mending definitions under the family class provides for equal treatment under the law for common-law couples of the same or opposite sex.” One of these phrases in its French version appears to suggest that only the more limited initiative was intended: “permet d’assurer un traitement égal sous le régime de la Loi aux couples de fait de même sexe ou de sexe opposé”. However, on the other hand, the French version of the other key passage indicates, at least to me, that the legislative intent was to treat all of spouses, common-law partners and conjugal partners equally: “[d]ans le cas des conjoints de fait, les dispositions réglementaires... font suivre toutes les mentions du terme « époux » des mots « et le conjoint de fait », pour que les dispositions qui concernent les époux s’appliquent également aux conjoints de fait, y compris à ceux qui vivent une relation homosexuelle” (emphasis mine). As an alternative to the government translator’s English version of this passage, I suggest that the emphasized words translate into English as, “in order that provisions concerning spouses apply equally to common-law partners.” This translation would certainly accord more closely with the English version of this phrase in the earlier
Statement which accompanied the proposed IRPRegs, which read, “so that all provisions applicable to spouses are applicable to common-law partners”.

The differences between the two Statements and between the English and French texts of each Statement suggest that the government had difficulty deciding exactly what it intended to achieve by adding “common-law partner” and “conjugal partner” to “spouse” in the family class. In particular, did it intend to treat spouses, common-law partners and conjugal partners equally, or only treat unmarried opposite-sex partners and same-sex partners, that is, all common-law partners, equally, leaving spouses in a privileged position? In other words, did it intend the changes to family class immigration law only to comply narrowly with M. v. H. or did it intend to go beyond M. v. H., as it had done in the Modernization of Benefits and Obligations Act with respect to almost all other federal legislation, and amend immigration legislation to treat all spouses, unmarried opposite-sex partners and same-sex partners equally?

Despite the ambiguous language in the two Regulatory Impact Analysis Statements and the resulting uncertainty concerning the government’s precise intent in adding “common-law partner” and “conjugal partner” to the family class, I prefer to take the generous and optimistic approach to the construction of IRPA and the IRPRegs as having been intended to treat all spouses, common-law partners and conjugal partners equally and, by implication, to treat heterosexuals, lesbians and gay men equally. This is the only interpretation consistent with “the intent of the Modernization of Benefits and Obligations Act”, given that that Act, as mentioned above, went beyond what was required to meet Charter muster as determined in M. v. H., and extended to same-sex partners and unmarried opposite-sex partners certain benefits and obligations which had previously applied only to spouses.

3. How the New Legislation is Applied
CIC publishes and makes available to the public an Immigration Manual.58 Unlike IRPA and the IRPRegs, the Immigration Manual is not law.59 However, the Immigration Manual sets out extremely important “operational provisions” — to use CIC’s language — which give visa applicants and their counsel guidance as to how CIC interprets and applies immigra-
tion law. Given the dearth of case decisions concerning same-sex partner sponsorship, the *Immigration Manual* is crucial. While the Manual’s operational guidelines ought not to fetter an individual officer’s exercise of their discretion, they ought, as one judge has put it:

... to be followed by an Immigration Officer in making a decision so that some consistency is achieved within the department. Further, the guidelines offer some perspective on the policy of the Immigration Department.

More recently, the Supreme Court of Canada has made it clear that delegates must comply with ministerial guidelines. Further, courts frequently refer extensively to the *Immigration Manual*’s provisions. In this section I outline the principal provisions of the *Immigration Manual* concerning sponsoring a spouse, common-law partner or conjugal partner. I then analyze these provisions and conclude that their effect is to treat same-sex partners unequally in comparison with opposite-sex partners.

The *Immigration Manual* groups spouses, common-law partners and conjugal partners under “conjugal relationships.” The Manual states:

The term “conjugal” was originally used to describe marriage. Over the years, the term has expanded to describe “marriage-like” relationships, i.e., common-law opposite-sex couples. More recently the term was expanded further to describe common-law same-sex couples in the *M. v. H.* Supreme Court decision in 1999.

The word “conjugal” does not mean “sexual relations” alone. It signifies that there is a significant degree of attachment between two partners. ...

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60. *Yhap,* supra note 13.
61. *Cheng,* supra note 59 at para. 7 per Cullen, J.
64. See principally *Immigration Manual,* supra note 58 at OP-2 (Overseas Processing) – Processing Members of the Family Class. I mention that processing of prospective Canadian sponsors is dealt with in *Immigration Manual,* IP-2 (Inland Processing) – Processing Applications to Sponsor Members of the Family Class.
65. *Supra* note 58 at OP-2, ss. 5.23 (characteristics of conjugal relationships that apply to married, common-law and conjugal partner relationships), 5.24 (assessment of conjugal relationships).
The following characteristics should be present in all conjugal relationships, married and unmarried:

- mutual commitment to a shared life;
- exclusive — cannot be in more than one conjugal relationship at a time;
- intimate — commitment to sexual exclusivity;
- interdependent — physically, emotionally, financially, socially;
- permanent — long-term, genuine and continuing relationship;
- present themselves as a couple ("here's my other half");
- regarded by others as partners;
- caring for children together (if there are children).

The *Immigration Manual* indicates that "these elements may be present in varying degrees and not all are necessary for a relationship to be bona fide," "[w]hether an element is present may depend on the culture or preferences of the couple," and "[o]fficers should also take into account to what extent the laws and/or traditions of the applicant's home country may discourage the parties from openly admitting the existence of the relationship."

The *Manual* instructs officers that "[p]ersons who entered into a marriage, common-law relationship [or] conjugal partnership ... in order [to] obtain permanent residence in Canada," that is, who entered into "relationships of convenience," must be refused visas. The *Manual* lists factors that may be considered by officers in identifying a relationship of convenience, stating that these factors "are common to marriage, common-law relationships and conjugal partner relationships." The *Manual* also deals with situations in which partners have been separated, stating that, "[f]or common-law relationships (and marriage), the longer the period of separation without any cohabitation, the more difficult it is to establish that the common-law relationship (or marriage) still exists."

In addition to its provisions dealing with spouses, common-law partners and conjugal partners collectively under "conjugal relationships," the *Immigration Manual* also contains a number of provisions which deal separately with each of spouses, common-law partners and conjugal partners.

The *Immigration Manual* states that a "spouse" is "a married person" and defines a "marriage in Canada" as follows:

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66. *Ibid.,* s. 5.22 [emphasis in original].
67. *Ibid.,* s. 5.23.
68. *Ibid.,* s. 5.14.
70. *Ibid.,* s. 5.34.
71. *Ibid.,* s. 6.
A marriage in Canadian law is "the union of one man and one woman to the exclusion of all others."

A marriage must be legal both in the country where the couple got married and under Canadian federal law, i.e., the *Marriage (Prohibited Degrees Act)* with respect to consanguinity and the *Criminal Code* with respect to polygamy and bigamy.\(^7\)

Under the title "Foreign common-law registrations and same-sex marriages," the *Manual* states:

Some countries allow civil registrations of common-law same-sex and/or common-law opposite-sex partners. The Netherlands is the only jurisdiction that allows marriage for same-sex couples.

Marriages between people of the same sex are legal in some jurisdictions; however, such marriages are recognized for purposes of that particular jurisdiction only. These partners are not recognized as spouses in Canadian law. They may, however, be recognized as common-law partners and be processed as members of the family class, provided they meet the definition of common-law partner. . . . If they have not been able to cohabit for one year, the foreign national partner may apply as a conjugal partner provided they have maintained a conjugal relationship for at least one year.\(^73\)

As mentioned above, Belgium and Massachusetts now also have legal same-sex marriage. The *Manual's* statements concerning marriage were dated "03-2003," that is, before the recent same-sex marriage court decisions in British Columbia and Ontario referred to above. The *Manual* further states that a marriage by proxy, a marriage by telephone, a tribal marriage or a customary marriage may be a legal marriage if the law of the country in which the marriage occurred permits such marriages.\(^74\) The *Manual* further sets out "[f]actors specific to a marriage of convenience" to assist officers in identifying a marriage of convenience.\(^75\)

The *Immigration Manual* defines a "common-law partner" as follows:

A common-law partner means a person who is cohabiting in a conjugal relationship with another person, having so cohabited for a period of at

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73. *Ibid.*, s. 5.38.
74. *Ibid.*, s. 6 ("proxy marriage," "telephone marriage" and "tribal marriage").
least one-year. "Common-law partner" refers to both opposite-sex and same-sex couples.76

Under the heading "How can someone in Canada sponsor a common-law partner from outside Canada when the definition says 'is cohabiting'?"77, the Manual states:

According to case law, the definition of common-law partner should be read as "an individual who is (ordinarily) cohabiting". After the one year period of cohabitation has been established, the partners may live apart for periods of time without legally breaking the cohabitation. For example, a couple may have been separated due to armed conflict, illness of a family member, or for employment or education-related reasons, and therefore do not cohabit at present. Despite the break in cohabitation, a common-law relationship exists if the couple has cohabited in a conjugal relationship in the past for at least one year and intend to do so again as soon as possible. There should be evidence demonstrating that both parties are continuing the relationship, such as visits, correspondence, and telephone calls.

This situation is similar to a marriage where the parties are temporarily separated or not cohabiting for a variety of reasons, but still [consider] themselves to be married and living in a conjugal relationship with their spouse with the intention of living together as soon as possible.77

The Manual then instructs officers as follows on how to recognize a common-law relationship:

A common-law relationship is fact-based and exists from the day in which two individuals demonstrate that the relationship exists on the basis of the facts. The onus is on the applicants to prove that they are in a conjugal relationship and that they are cohabiting.

A common-law relationship is legally a de facto relationship, meaning that it must be established in each individual case, on the facts. This is in contrast to a marriage, which is legally a de jure relationship, meaning that it has been established in law.78

If the partners have not been able to cohabit due to persecution or any form of penal control, the Manual identifies types of evidence which officers

76. Ibid., s. 6.
77. Ibid., s 5.34.
78 Ibid., s. 5.32.
may consider in determining whether a common-law partnership exists. Considerable emphasis is put on documentary evidence such as photographs, airline tickets, visas, visa denials, long distance telephone bills, testaments and life insurance policies. Finally, the Manual lists factors that may be considered by officers when assessing a common-law relationship to determine whether it is a "common-law partnership of convenience."

The Immigration Manual defines a "conjugal partner" as follows:

A conjugal partner means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year. A conjugal partner can be in an opposite-sex or same-sex relationship.

The Manual states that “[c]onjugal partners are similar to common-law partners; however, they have not yet merged their households to the same extent, as they have not been able to cohabit continuously and permanently” and, therefore, “conjugal partner relationships are more challenging to assess than common-law relationships.” Nevertheless, “they must have established a long-standing, interdependent attachment and have combined their affairs to the extent possible.” Again, the Manual puts considerable emphasis on documentary evidence such as airline tickets, receipts from vacations, visas, visa denials, passports, leave forms from work, letters, and records of long distance calls and other communication. Finally, the Manual indicates how officers should strive to identify a “conjugal partner relationship of convenience.” Officers are instructed that the factors set out with respect to identifying a “common-law partnership of convenience” are relevant except that conjugal partners have been unable to cohabit. The Manual addresses the inability of conjugal partners to cohabit as follows:

As conjugal partners have been unable to cohabit continuously for one year, officers should focus on the genuineness of the relationship and the evidence of interdependence, mutual commitment and exclusivity. ...

79. Ibid., s. 5.41.
80. Ibid., s. 12.2.
81. Ibid., s. 6 [emphasis in original].
82. Ibid., s. 5.43.
83. Ibid.
84. Ibid., s. 12.3.
Although cohabitation is not a requirement, visa officers should consider the amount of time the partners have spent together. Another factor to consider is whether the partners have attempted to obtain visas to visit one another or to immigrate to one another’s countries. A claim that a conjugal relationship exists without much evidence of time spent together may suggest a relationship of convenience."

I now turn to a critical analysis of the provisions of the Immigration Manual. Whether the foreign national partner and the prospective Canadian sponsor partner are spouses, common-law partners or conjugal partners, they must satisfy two requirements before a visa will be issued to the foreign national partner as a member of the family class. First, they must establish the existence of their relationship. That is, they must establish that they are spouses, common-law partners or conjugal partners. Secondly, they must establish that their relationship is genuine and was not entered into primarily for the purpose of obtaining a visa for the foreign national partner. In CIC’s terminology, their relationship must not be a “relationship of convenience.”

Opposite-sex partners generally have the option of marrying, whereas same-sex partners generally do not. As the Immigration Manual correctly states, whether the parties are married, that is, whether they are spouses, is a question of law. Their marriage must be valid under Canadian law and, if the marriage took place outside Canada, under the law of the country where the marriage took place as well. The legal determination whether the partners are married may involve complex questions including, in particular, difficult conflict of laws issues. However, establishing as a matter of law whether a valid marriage exists is relatively straightforward, in comparison to the hurdles non-spouse partners must clear in establishing the existence of either a common-law partnership or a conjugal partnership. As indicated above, opposite-sex partners can even marry by proxy or by telephone if such a procedure can lawfully create a marriage in the country where it takes place. I emphasize that I do not have any problem with recognizing such marriages, but rather refer to such options merely to show the flexibility available in recognizing the validity of marriages.

In contrast, establishing the existence of a common-law partnership or a conjugal partnership is, as correctly stated in the Immigration Manual, a question of fact. In particular, common-law partners and conjugal partners must establish as a prerequisite that their relationship is a “conjugal

85. Ibid.
relationship." The partners must be assessed against the list of detailed, and often very intrusive, factors identified in the Immigration Manual as characterizing a "conjugal relationship." In particular, despite the apparent flexibility in assessing whether a relationship is a conjugal relationship, the Immigration Manual places significant weight on documentary evidence. In some cases it will be difficult, if not impossible, for common-law partners or conjugal partners to muster much, if any, such documentary evidence. Establishing the existence of their relationship may be particularly difficult for conjugal partners. As considered above, the Immigration Manual recognizes that cohabitation is not a prerequisite to establishing the existence of a conjugal partnership, but visa officers are nevertheless instructed to "consider the amount of time the partners have spent together." In short, the burden on common-law partners or conjugal partners to establish, as a matter of fact, the existence of their relationship is inherently more complex and difficult than is the burden on spouses to establish, as a matter of law, the existence of their marriage.

Unfortunately, the Immigration Manual elides the distinction between establishing the existence of a marriage and establishing the existence of a common-law partnership or a conjugal partnership. In particular, the Immigration Manual states that the requirements of a "conjugal relationship" apply to all spouses, common-law partners and conjugal partners. This gives the appearance that all these relationships are established on the same basis, when in fact they are not. The Manual therefore effectively misleads. While a marriage is certainly a conjugal relationship, spouses need not satisfy any factual criteria, factors, or elements of a conjugal relationship to be parties to a valid marriage. Instead, they must simply establish that their marriage is valid under both Canadian law and, if the marriage was performed outside Canada, according to the law of the jurisdiction where they were married. In particular, as examples, spouses need not establish that they own property together, have joint loan agreements, pool their financial resources, offer evidence of airline tickets, long distance records, and other documentary evidence, or otherwise have their intimate and personal life examined in detail. The elision of the distinction between marriage and common-law partnership or conjugal partnership is unfortunate since it creates the illusion of equal treatment of spouses, common-law partners and conjugal partners with respect to establishing

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86. Ibid.
87. The sexual orientation discrimination considered here intersects with additional concerns about gender, race, ability and socioeconomic status. See van der Meide, supra note 20.
the existence of their relationship. One might reasonably conclude that the provisions of the *Manual* suggesting that spouses, common-law partners and conjugal partners must all satisfy the same conjugal relationship criteria in order to establish the existence of their relationship are a rather self-serving attempt on the part of CIC and, therefore, the federal government, to make it appear that spouses, common-law partners and conjugal partners are treated equally when in fact they are not. However, as already indicated, CIC explicitly recognizes this crucial distinction in the *Immigration Manual* itself when it states that a common-law relationship and a conjugal relationship are *de facto* relationships whereas a marriage is a *de jure* relationship.

In summary, the assertions in the *Immigration Manual* that all marriages, common-law partnerships and conjugal partnerships are "conjugal relationships," and that the same factors and criteria apply to determining the existence of these relationships, leave the impression that establishing the existence of a marriage is as difficult as establishing the existence of a common-law partnership or a conjugal partnership. Clearly this is not the case.

Similarly, the *Immigration Manual* suggests that for both common-law relationships and marriages, the longer the partners are separated without any cohabitation, the more difficult it will be for them to establish that the common-law relationship or marriage still exists. Again, this is clearly inaccurate. A marriage is terminated only by death, divorce or annulment. A marriage is not terminated by the partners living separate and apart, regardless of for how long. Again, the *Immigration Manual* elides the differences between a marriage on the one hand and a common-law partnership or a conjugal partnership on the other hand. The *Manual* creates the erroneous impression that the criteria considered to determine the existence of the relationship are applied equally to spouses, common-law partners and conjugal partners. By extension, the appearance is created that heterosexuals, lesbians and gay men are treated equally when in fact this is not the case.

Some aspects of the *Immigration Manual*’s criteria for establishing the existence of a marriage might be relevant with respect to the issue of whether the marriage is genuine. However, all of the foregoing provisions in the *Manual* appear in sections dealing with establishing the existence of the relationship. The misclassification of considerations that are relevant with respect to determining whether a marriage is genuine by putting them into

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88. *Immigration Manual*, supra note 57 at OP-2, s. 5.34.
sections dealing with the existence of the relationship, deepens the misleading effect of the *Manual*. I emphasize that there is nothing in the *Immigration Manual* to suggest that spouses do not face the same hurdles with respect to the second criterion, that is, whether their relationship is genuine, as do common-law partners or conjugal partners. In particular, I do not suggest that, in practice, spouses typically have an "easy time" obtaining the foreign national spouse’s permanent resident visa or that common-law partners and conjugal partners always have a "harder time." Indeed, a forebodingly large number of cases decided since *IRPA* and the *IRPRegs* came into force indicates the contrary: many married couples have found their marriages deemed not to be genuine and, therefore, their sponsorship applications denied.89

Thus, the problems associated with admission of same-sex partners for "compassionate and humanitarian considerations" under the former *Immigration Act* and *Regulations*, as illustrated by *da Silva* and *Rodriguez*, are just as possible under *IRPA* and the *IRPRegs*. The basis for admission of "common-law partners" and "conjugal partners" remains in practice essentially the same as it previously was under the discretionary "H&C" approach. Clearly, *da Silva* and *Rodriguez* could today encounter exactly the same potential unfairness under the present system as they could, and may well have, under the previous system. In particular, they could still be victims of "subtle homophobia" or an immigration officer who harboured an undisclosed prejudice against homosexuals.

In short, the *Immigration Manual*, the federal government’s operational guidelines concerning the application of *IRPA* and the *IRPRegs*, do not achieve the government’s ostensible purpose of making immigration law with respect to partnership sponsorship consistent with the *Charter* and the intent of the *Modernization of Benefits and Obligations Act*. On the contrary, the *Immigration Manual* clearly illustrates the lack of equal treatment of same-sex partners in comparison to opposite-sex partners and, therefore, the lack of equal treatment of lesbians and gay men as compared with heterosexuals. The difficulties in the *Immigration Manual*’s operational guidelines echo the government’s equivocation in the *Regulatory*

89. See e.g. *Dhaliwal v. Canada (Minister of Citizenship and Immigration)*, [2003] I.A.D.D. No. 630; *Vandana v. Canada (Minister of Citizenship and Immigration)*, [2003] I.A.D.D. No. 629; *Abdul v. Canada (Minister of Citizenship and Immigration)*, [2003] I.A.D.D. No. 605; and *Szeto v. Canada (Minister of Citizenship and Immigration)*, [2003] I.A.D.D. No. 551. All of these cases were determined under *IRPRegs*, s. 4. Indeed, there is truly a plethora of similar decisions. The seemingly dramatic increase in the number of marriages excluded from sponsorship eligibility since *IRPA* and the *IRPRegs* came into force is due to the significantly different terms of *IRPRegs*, s. 4 as compared with its predecessor provision in the former *Regulations*, s. 4(3).
Impact Analysis Statements with respect to what precisely was presumably intended to be accomplished by adding "common-law partner" and "conjugal partner" to "spouse" in family class immigration. The resulting inequality is inconsistent with both Charter jurisprudence concerning sexual orientation discrimination and the approach taken in the Modernization of Benefits and Obligations Act.

Conclusion: Achieving Equality

The difficulties in the "compassionate and humanitarian considerations" approach to same-sex partners under the former Act, illustrated by da Silva and Rodriguez, are still possible under the operational guidelines concerning sponsorship of a common-law partner or conjugal partner under IRPA. Common-law partners and conjugal partners are not treated equally with spouses. The result is continuing sexual orientation discrimination contrary to section 15 of the Charter.

There is only one way to achieve equality. All partners, whether same-sex or opposite-sex, must be permitted lawfully to marry and therefore be able to be assessed as spouses. This is certainly the direction in which Canadian law is going. However, even if same-sex marriage were recognized throughout Canada, there would still remain the problem of same-sex partners not generally being able to marry in other countries. To date, only the Netherlands, Belgium and Massachusetts have opened legal marriage to same-sex partners. It would be unreasonable to expect all, most, or even many countries to extend marriage to same-sex partners anytime soon. In other words, the ideal required to achieve equality may not presently be attainable.

In the meantime, therefore, an interim measure to do as much as possible toward achieving equality is required. If a same-sex couple is unable to marry before the Canadian partner sponsors their foreign national partner, the government should facilitate the admission of the foreign national partner as the intended spouse of the Canadian partner. Specifically, the foreign national partner could be admitted as a visitor on condition that the

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90. Presently, same-sex spouses' immigration visa applications are apparently being kept on hold by CIC because of the uncertainty in Canadian law concerning same-sex marriage and pending adoption of operational guidelines with respect to same-sex marriages. However, CIC will process their applications in the meantime if they apply as common-law partners or conjugal partners. See Jennifer Pak, "Same-Sex Marriage and Immigration Don't Go Hand in Hand" Capitalnewsonline 13:1 (26 September 2003), online: Capitalnewsonline <http://temagami.carleton.ca/jmc/cnews/26092003/n1.shtml>. 
couple marries in Canada within a specified time.\textsuperscript{91} If the foreign national partner is inadmissible or otherwise does not meet the requirements of \textit{IRPA} or the \textit{IRPRegs}, they may be admitted under a temporary resident permit — again, on condition that the couple marries in Canada within a specified time — if an immigration officer "is of the opinion that it is justified in the circumstances".\textsuperscript{92} Temporary resident permits may be issued overseas, at a Canadian port of entry or in Canada in order to "respond to exceptional circumstances" involving "compelling reasons".\textsuperscript{93} I submit that a stated intention to marry should be considered exceptional and compelling justification for issuing a temporary resident permit, and a permit should only be refused if there is clear evidence of immigration fraud. This is because the government's concern with false assertions of an intention to marry is automatically addressed, since, if the couple does not marry within the specified time imposed as a condition of admission, the foreign national would be removable. The legislative mechanism for such admission already exists and no amendments to \textit{IRPA} or the \textit{IRPRegs} would be required. Thus, \textit{IRPA} and the \textit{IRPRegs}, without amendment, can accommodate the changing situation of same-sex couples as the law concerning same-sex marriage continues to evolve.

In summary, if the Canadian sponsor and their same-sex partner have already legally married, whether in Canada or outside Canada, the sponsorship application should be assessed as a spouse application. If the partners want to marry, but cannot until the foreign national partner is in Canada, the admission of the foreign national partner should be facilitated in order to permit them to marry.

\textsuperscript{91} \textit{IRPRegs}, supra note 2, ss. 183, 185, 191-193. See also \textit{Immigration Manual}, supra note 57 at OP-11 (Overseas Processing) – Temporary Residents.

\textsuperscript{92} \textit{IRPA}, supra note 1, s. 24; and \textit{IRPRegs}, supra note 2, ss. 63, 183, 185.

\textsuperscript{93} \textit{Immigration Manual}, supra note 57 at OP-20 (Overseas Processing) – Temporary Resident Permits, ss. 1, 2, 5.1.